REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A.C. Mrima, J.)

CONSTITUTIONAL PETITION NO. E327 OF 2020

LAW SOCIETY OF KENYA.....PETITIONER

AND

1. THE ATTORNEY GENERAL

2. INSPECTOR GENERAL OF NATIONAL POLICE SERVICE.....RESPONDENTS

JUDGMENT

Introduction:

1. The Petition herein challenges the constitutionality of *Section 5* of the *Public Order Act*, Cap. 56 of the Laws of Kenya (hereinafter referred to as "***the Order Act***") and further challenges the legality and constitutionality of various directives issued by *National Security Advisory Committee* (hereinafter referred to as "***The NSAC***") on 7th October, 2020 and adopted by the Cabinet on 8th October, 2020.

2. The Petitioner herein, *The Law Society of Kenya,* being a statutory society whose objectives include; assisting the Government and the Courts in matters relating to legislation, the administration of justice, the practice of law, upholding the Constitution and advancing the rule of law contends that the directives made by the NSAC which seek to allegedly remedy "*unchecked utterances and political weaponization of public gatherings"* as well the impugned provision cannot stand the test of the Constitution.

3. The Petition is opposed.

The Petition:

4. The Petition is dated 12th October, 2020. It is supported by the Affidavit sworn by Collins Odhiambo on 12th October, 2020. In further support to the Petition, the Petitioner filed written submissions dated 20th October, 2020.

5. The Petitioner has summarized its case in its written submissions as under: -

> 2. In the Petition and Supporting Affidavit thereto sworn on 12th October, 2020 by Collins Odhiambo, several challenges are raised on the propriety of the directives made by the National Security Advisory Committee and Section 5 of the Public Order Act. First, the legal existence of the National Security Advisory Committee and its power to direct the 2nd Respondent in the enforcement of the Public Health (Covid-19 Restrictions of Movement of Persons and Related Measures) Rules, 2020, the Public Order Act and the National Cohesion and Integration Act No 12 of 2008 is questioned.
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> 3. Second, the directives by the National Security Advisory Committee are assailed as a culmination of decisions enumerated between 15th March, 2020 and 8th October, 2020 discriminatorily and selectively enforced and implemented by the 2nd Respondent ostensibly, to combat the spread of Covid -19 but the effect of which is to limit rights and freedoms of Kenyans under the Bill of Rights contrary to The Constitution of Kenya.
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> 4. Third, the 1st and 2nd Respondents are accused of resorting to the misuse of Section 5 of the Public Order Act to limit the People of Kenya's rights and fundamental freedoms under the Bill of Rights and in particular, to suppress divergent opinions, curtail freedom of expression, limit and restrict freedom of association in what is clearly a political clampdown on freedoms and liberties of the People of Kenya.

5. Fourth, it is the Petitioner's lamentation that Section 5 of the Public Order Act abrogates and limits the rights and freedoms of and/or to an opinion, expression, freedom of the media, association, assemble, demonstrate and campaign for a political cause by preconditioning the exercise of those rights and freedoms to the issuance of notice of exercise of the rights and freedoms to a police officer who is empowered by the Section to refuse permission for the exercise of any of such right or freedom simply on the ground that "it is not possible to hold a meeting or procession" without ascribing any or good reasons for the refusal or affording one fair administrative action on the matter as required by Article 47 of The Constitution of Kenya.

6. Fifth, the Petitioner pleads that Section 5 of the Public Order Act abrogates and limits the rights and freedoms of and/or to an opinion, expression, freedom of the media, association, assemble, demonstrate and campaign for a political cause by empowering a police officer to disperse a peaceful meeting or procession in the exercise of those rights and freedoms.

7. Sixth, it is contended by the Petitioner that the duty of the Police in general and the 1st and 2nd Respondents in particular, in so far as the exercise of the rights and freedoms of and/or to an opinion, expression, freedom of the media, association, assemble, demonstrate and campaign for a political cause is concerned should be limited to maintaining law and order whilst complying with constitutional standards of human rights and fundamental freedoms as demanded of the National Police Service by Article 244 (c) of The Constitution of Kenya.

8. Seventh, the Petitioner posits that the National Police Service Act No IIA of 2011 enacted subsequent to the promulgation of The Constitution of Kenya contains general functions set out in PART VIl thereof which are sufficient to enable the National Police Service maintain law and order in the People's exercise of the rights and freedoms of and/or to an opinion, expression, freedom of the media, association, assemble, demonstrate and campaign for a political cause without resort to the evidently unconstitutional and retrogressive colonial relics in the provisions of Section 5 of the Public Order Act.

9. Eighth, the Petitioner asserts that the entire Section 5 of the Public Order Act is inconsistent with The Constitution of Kenya, is void to the extent of the inconsistency in so far as it seeks to limit the rights and freedoms of and/or to opinion, expression, association, assemble, demonstrate and campaign for a political cause contrary to Articles 19, 20, 21, 24 (2) & (5), 27(1) & (8), 29, 32(1) & (2), 33, 34, 36, 37, 28, 39 (1) of The Constitution of Kenya.

10. Ninth, the Petitioner states that any acts or omissions on the part of the 1st and 2nd Respondents in the enforcement and implementation of the directives made by the National Security Advisory Committee for the use of Section 5 of the Public Order Act to contain, restrict and prohibit public gatherings, meetings and processions in name of combating Covid-19 and containing the weaponization of public gatherings as enumerated hereinabove including the refusal of permission to exercise the rights and freedoms of and/ or to opinion, expression, association, assemble, demonstrate and campaign for a political cause or disruption of meetings and processions in the exercise of such rights and freedoms is invalid and amounts to a contravention of The Constitution of Kenya.

11. Tenth, the Petitioner underscores that there is established under Section 15 of the National Cohesion and Integration Act No 12 of 2008, the National Cohesion and Integration Commission which is mandated with the roles of investigations for purposes of prosecution of offences enumerated in the said Act, including hate speech. The National Security Advisory Committee cannot arrogate to itself the powers of the National Cohesion and Integration Commission as it has, as doing so contravenes Article 10 of The Constitution of Kenya on the rule of law, good governance, integrity, transparency and accountability.

12. Eleventh, the Petitioner notes that The Cabinet failed to act in accordance with Article 153 (1) and (4) of The Constitution of Kenya in endorsing and ratifying unlawful and unconstitutional directives made by the National Security Advisory Committee for the use of Section 5 of the Public Order Act to contain, restrict and prohibit public gatherings, meetings and processions in name of combating Covid-19 and containing the weaponization of public gatherings and thereby violated the provisions of Articles 1(3), 2, 10, 19, 20, 21, 24 (2) & (5), 27(1) & (8), 29, 32(1) & (2), 33, 34, 36, 37, 28, 39 (1), 47(1) and (2), 153(4) (a), 244 (c) & (c) and 258 of The Constitution of Kenya.

13. Twelfth, the Petitioner claims that national security cannot be a ground for limiting rights and freedoms under the Bill of Rights as intended by the directives made by the National Security Advisory Committee for the use of Section 5 of the Public Order Act to contain, restrict and prohibit public gatherings, meetings and processions in name of combating Covid-19 and containing the weaponization of public gatherings.

6. In the main, the Petitioner prayed for the following orders: -

a. A declaration be and is hereby issued that the directives made by the National Security Advisory Committee on 7th October 202 and Ratified by the Cabinet on 8th October 2020 for the use of section 5 of the Public Order Act Cap 56 of the Laws of Kenya to contain, restrict and prohibit public gatherings, meetings and processions in the name of combating Covid-19 and containing the weaponization of public gatherings are unlawful, unconstitutional and in violation of Articles 1(3), 2, 10,19,20,21,24(2) & (5), 27(1) & (8), 29, 32(1) & (2), 33, 34, 36,37,28, 39(1), 47(1) & (2), 153(4)(a), 244(c) and 258 of the Constitution of Kenya.

b. A declaration be and is hereby issued that the directives made by the National Security Advisory Committee on 7th October 202 and Ratified by the Cabinet on 8th October 2020 for the use of section 5 of the Public Order Act Cap 56 of the Laws of Kenya to contain, restrict and prohibit public gatherings, meetings and processions in the name of combating Covid-19 and containing the weaponization of public gatherings have been used discriminatorily and selectively to supress divergent opinions and have been abused by 2nd Respondent.

c. A declaration be and is hereby issued that section 5 of Public Order Act Cap 56 of the Laws of Kenya is inconsistent with Article 19, 20, 21, 24(2) & 5), 27(1) & (8), 29, 32(1) & (2), 33, 34, 36,37,28, 39(1) of the Constitution of Kenya so far as it seeks to limit the

rights and freedoms of and/or to opinion, expression, association, demonstrate and campaign for political causes and is therefore unconstitutional.

d. A declaration be and is hereby issued that the directives made by the National Security Advisory Committee on 7th October 2020 and Ratified by the Cabinet on 8th October 2020 for the use of section 5 of the Public Order Act Cap 56 of the Laws of Kenya to contain, restrict and prohibit public gatherings, meetings and processions in the name of combating Covid-19 and containing the weaponization of public gatherings are unlawful, unconstitutional and in violation of Articles 1(3), 2, 10,19,20,21,24(2) & (5), 27(1) & (8), 29, 32(1) & (2), 33, 34, 36,37,28, 39(1), of the Constitution of Kenya in so far as it seeks to limit the rights and freedoms of and/or to opinion, expression, association, demonstrate and campaign for political causes and are therefore unlawful, unconstitutional and invalid.

e. An order of Certiorari be and is hereby issued calling into this Court and quashing the entire directives made by the National Security Committee on 7th October 2020 and ratified by the Cabinet on 8th October 2020, for the use of section 5 of the Public Order act Cap 56 of the laws of Kenya to contain, restrict and prohibit public gatherings, meetings and processions in the name of combating Covid-19 and containing the weaponization of public gatherings.

f. An order of prohibition be and is hereby issued restraining the 2nd Respondent acting by himself or any police officer under his command from seeking to license or authorize the holding of public gathering, meetings and processions, banning, disrupting or in any manner whatsoever interfering with peaceful public gatherings, meetings and processions on the strength of the directives made by the National Security Committee on 7th October 2020 and ratified by the Cabinet on 8th October 2020, for the use of section 5 of the Public Order act Cap 56 of the laws of Kenya to contain, restrict and prohibit public gatherings, meetings and processions in the name of combating Covid-19 and containing the weaponization of public gatherings.

g. An order of prohibition be and is hereby issued restraining the 2nd Respondent acting by himself or any police officer under his command from seeking to license or authorize the holding of public gathering, meetings and processions, banning, disrupting or in any manner whatsoever interfering with peaceful public gatherings, meetings and processions on the strength of the directives made by the National Security Committee on 7th October 2020 and ratified by the Cabinet on 8th October 2020, for the use of section 5 of the Public Order act Cap 56 of the laws of Kenya to contain, restrict and prohibit public gatherings, meetings and processions in the name of combating Covid-19 and containing the weaponization of public gatherings

h. A conservatory Order be and is hereby issued suspending the directives made by the National Security Committee on 7th October 2020 and ratified by the Cabinet on 8th October 2020, for the use of section 5 of the Public Order act Cap 56 of the laws of Kenya to contain, restrict and prohibit public gatherings, meetings and processions in the name of combating Covid-19 and containing the weaponization of public gatherings, pending the hearing an determination of this Petition.

i. A conservatory Order be and is hereby issued restraining the 2nd Respondent acting by himself any police officer under his command from seeking licence or authorise the holding of public gatherings, meetings and processions, banning, disrupting or in any manner whatsoever interfering with peaceful gatherings, meetings and processions on the strength of the directives made by the National Security Committee on 7th October 2020 and ratified by the Cabinet on 8th October 2020, for the use of section 5 of the Public Order act Cap 56 of the laws of Kenya to contain, restrict and prohibit public gatherings, meetings and processions in the name of combating Covid-19 and containing the weaponization of public gatherings.

j. A conservatory Order be and is hereby issued restraining the 2nd Respondent acting by himself any police officer under his command from seeking licence or authorise the holding of public gatherings, meetings and processions, banning, disrupting or in any manner whatsoever interfering with peaceful gatherings, meetings and processions of The Law Society of Kenya its branches and Chambers as well as Members, on the strength of the directives made by National Security Committee on 7th October 2020 and ratified by the Cabinet on 8th October 2020, for the use of section 5 of the Public Order act Cap 56 of the laws of Kenya to contain, restrict and prohibit public gatherings, meetings and processions in the name of combating Covid-19 and containing the weaponization of public gatherings.

k. Any other relief the Honourable Court deems appropriate, just and fit to grant.

l. The Costs of this Petition be provided for.

7. The Petitioner has delineated two issues in its written submissions. They are the existence and powers of the NSAC and the constitutionality of Section 5 of the Order Act.

8. On the existence and powers of the NSAC, the Petitioner submits that the Respondents did not demonstrate in their Affidavits where the NSAC derives power of existence and to direct the 2nd Respondent in the enforcement of The Public Health (Covid-19 Restrictions of Movement of Persons and Related Measures) Rules, 2020, the Public Order Act and the National Cohesion and Integration Act No 12 of 2008. It is submitted that Article 240 of the Constitution establishes the National Security Council with supervisory control over national security organs and performance of any other functions prescribed by national legislation. That, the National Security Council reports to Parliament annually on the state of the security of Kenya.

9. The Petitioner avers that a perusal Constitution and Statutes does not disclose the establishment and existence of an entity called NSAC. It is non-existent. A non-existent body cannot exercise any administrative power in the manner sought through the directives made by the NSAC on 7th October, 2020 and ratified by the Cabinet on 8th October, 2020 for the use of Section 5 of the Order Act to contain, restrict and prohibit public gatherings, meetings and processions in the name of combating Covid-19 and containing the weaponization of public

gatherings.

10. The position in law on the issue, the Petitioner submitted, is stated in Administrative Law, Sir William Wade, 10th Edn as follows:

> *The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong...must be able to justify its action as authorised by law-and in nearly every case this will mean authorised directly or indirectly by Act of Parliament. Every act of governmental power? i.e. every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. [Emphasis added]*

11. The Petitioner posits that even if the existence of the NSAC were to be justified for whatever reason, it does not have power to make the directives of a penal nature or to direct enforcement of those directives for several reasons. First, Section 5(11) of the Order Act prescribes the offense of an unlawful assembly which is punishable under Chapter IX of the Penal Code Cap 63 of the Laws of Kenya. The other penal measures sought to be imposed under the directives are therefore, unlawful as such power can only be exercised by Parliament. Second, Section 15 of the National Cohesion and Integration Act No 12 of 2008 establishes the National Cohesion and Integration Commission which is mandated with the roles of investigations for purposes of prosecution of offences enumerated in the said Act, including hate speech. The NSAC cannot arrogate to itself the powers of the National Cohesion and Integration Commission as it has, as doing so contravenes Article 10 Constitution on the rule of law, good governance, integrity, transparency and accountability.

12. The third reason is that the National Police Service is established under Article 244 of the Constitution with the mandate, *inter alia*, to prevent corruption and promote transparency and accountability. The National Police Service is under the command of the Inspector-General of Police who is appointed by the President of the Republic of Kenya with the approval of Parliament. Article 244 (b) and (c) of the Constitution designates the functions of the National Police Service as including compliance with constitutional standards of human rights and fundamental freedoms as well as fostering and promoting relationships with the broader society. It is argued that the Inspector-General of Police exercises independent command under Article 245 (2) (b) of the Constitution and may act on lawful directions from the Cabinet Secretary responsible for police services on any matter of policy. The Inspector-General of Police does not however, take any directions from any person in the Executive on: investigation of any particular offense or offenses; and enforcement of the law against any particular person or persons in view of Article 245 (4) (a) and (b) of the Constitution.

13. The Petitioner further argues that the only office empowered to direct the 2nd Respondent under Article 157(4)(b) of the Constitution is the Director of Public Prosecutions. It follows therefore, that the NSAC and the Cabinet cannot direct the 2nd Respondent in the enforcement of the Public Health (Covid-19 Restrictions of Movement of Persons and Related Measures) Rules, 2020, the Public Order Act and the National Cohesion and Integration Act No 12 of 2008.

14. The Petitioner made quite elaborate submissions on the constitutionality of Section 5 of the Order Act. It contends that the provision limits the rights and freedoms of and/or to an opinion, expression, freedom of the media, association, assemble, demonstrate and campaign for a political cause in two ways. One, it preconditions the exercise of those rights and freedoms to the issuance of notice of exercise of the rights and freedoms to a police officer. The police officer is empowered to refuse permission for the exercise of any of such right or freedom simply on the ground that "it is not possible to hold a meeting or procession". In doing so, the police officer need not ascribe any or good reasonsfor the refusal or affording one fair administrative action on the matter as required by Article 47 of the Constitution. The second reason is that the impugned provision abrogates and limits the rights and freedoms of and/or to an opinion, expression, freedom of the media, association, assemble, demonstrate and campaign for a political cause by empowering a police officer to disperse a peaceful meeting or procession in the exercise of those rights and freedoms.

15. The Petitioner argues that the National Police Service Act No 11A of 2011 enacted subsequent to the promulgation of the Constitution contains general functions set out in PART Vll. Those functions are sufficient to enable the National Police Service maintain law and order in the people's exercise of the rights and freedoms of and/or to an opinion, expression, freedom of the media, association, assemble, demonstrate and campaign for a political cause without resort to the evidently unconstitutional and retrogressive colonial relics in the provisions of Section 5 of the Order Act.

16. Article 24 (1) of the Constitution, it is submitted, guarantees that a right or fundamental freedom in the Bill of Rights shall not be limited except by law. Any such limitation must be reasonable and justifiable in an open and democratic society and based on human dignity, equality and freedom. All limitations in Section 5 of the Order Act in the people's exercise of the rights and freedoms of and/or to an opinion, expression, freedom of the media, association, assemble, demonstrate and campaign for a political cause are unconstitutional if the Constitution is interpreted holistically as it should.

17. In support of the above arguments, the Petitioner referred to two decisions. The first one is the Ugandan case in *Tinyefuza v Attorney General of Uganda*, Constitutional Petition No 1 of 1997 (1997 UGCC 3) where the Court stated that:

> *The second principle is that the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution. The third principle is that the words of the written Constitution prevail over all unwritten conventions, precedents and practices. I think it is now widely accepted that a Court should not be swayed by considerations of policy and propriety while interpreting provisions of a Constitution.*

18. The second case is *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya others [2015] eKLR* where on the claim by the Respondents that the Court should not interfere on the doctrine of separation of powers, the Court held as follows: -

> *128. To our mind, the doctrine of separation of powers does not stop this court from examining the acts of the Legislature or the Executive. Under Article 165(3)(d) of the Constitution, the Judiciary is charged with the mandate of interpreting the Constitution;*

and has the further mandate to determine the constitutionality of acts done under the authority of the Constitution...

We are duly guided by the principles enunciated in the above authorities, and it is clear that the doctrine of separation of powers does not prevent this court from exercising its jurisdiction under Article 165(3)(d).

129. We hasten to add that contrary to submissions of Counsel for Jubilee that in hearing and determining this petition we shall be limiting Parliament's legislative authority, it is apparent from the foregoing brief analysis and the doctrine of constitutional supremacy that it is not the Courts which limit Parliament but the Constitution itself. It also sets constitutional limits on the acts of the three arms of government while giving the Court the jurisdiction to interpret the constitutionality of any act said to be done under the authority of the Constitution. [Emphasis added]

19. On the question as to whether limitations arising out of the enforcement of Section 5 of the Order Act through the directives of the NSAC are reasonable and justifiable and the explanations given by the Respondents, the Petitioner relies on the *Coalition for Reform and Democracy (CORD) & 2 others* case (supra) for the position that: -

209. In the case of S vs Zuma & Others (1995)2 SA the Court held that a party alleging violation of a constitutional right or freedom must demonstrate that the exercise of a fundamental right has been impaired, infringed or limited. Once a limitation has been demonstrated, then the party which would benefit from the limitation must demonstrate a justification for the limitation. As in this case, the State, in demonstrating that the limitation is justifiable, must demonstrate that the societal need for the limitation of the right outweighs the individual's right to enjoy the right or freedom in question.

20. The Petitioner also referred to *Geoffrey Andare v Attorney General & 2 others [20161 eKLR* where the constitutionality of Section 29 of the Kenya Information and Communication Act Cap 411A was successfully challenged. In that case the Court expressed itself in the following words:

90. I have set out above the nature of the right to freedom of expression, and its importance in a free and democratic society. The respondents have asserted that the limitations in section 29 are justified in a free and democratic society. The questions that beg, bearing in mind the express provisions of Article 24 and the criteria in R vs Oakes are: what is the purpose of the limitation, and how important is it" What is the relationship between the limitation and its purpose" Are there less restrictive means to achieve the purpose intended" ...

95. Be that as it may, section 29 imposes penal consequences in terms which I have found to be vague and broad, and in my view, unconstitutional for that reason. Even if they were not, could the provision be permissible under Article 24"

96. The respondents were under a duty to demonstrate that the provisions of section 29 were permissible in a free and democratic society. They were also under a duty to demonstrate the relationship between the limitation and its purpose, and to show that there were no less restrictive means to achieve the purpose intended. They have not done this.

21. In its further submissions, the Petitioner argues that the Order Act was enacted on 13th June, 1950. As such, Section 5 of the Order Act and the directives must give way to the supremacy of the Constitution as they are inconsistent, void and invalid under Article 2(4) of the Constitution.

22. The Petitioner further cited the Report dated 17th September, 2008 on the General Elections held in Kenya on 27th December, 2007 where it was noted that Section 5 of the Order Act was prone to abuse to suppress divergent political opinions. An extract of the Report states that:

The amendment to the Public Order Act removed the need for licenses and permits with respect to the holding of public meetings The Act also provides that no person shall be restricted from holding public meetings on account of political beliefs or opinions. This is one of the IPPG wins that sought to curb the misuse of public offices and resources to crash any opposition to incumbency.

23. It is also argued that Section 5 of the Order Act has not been amended or repealed for alignment with the rights and fundamental freedoms given under the Bill of Rights.

24. The Petitioner took issue with the measures taken by NSAC to control the spread of Covid-19 through the use of the Order Act as being discriminatory and selective. The Petitioner submits that subsequent to the making of the impugned directives, there has also been discriminatory and selective application of the Covid-19 rules, the Order Act and the said directives. Several examples of these are referred to in the Affidavit of the Petitioner.

25. Submitting further on the purpose and effect principle in determining the constitutionality of a statute, the Petitioner cited *Robert Alai v The Hon Attorney General & Another [20171 eKLR* at where the Court held that: -

34. In applying the purpose and effect principle, the court has to look at the history and circumstances under which the impugned provision or legislation was enacted. The marginal notes to section 132 show that the section was introduced in 1958, at the height of the state of emergency, a turbulent period in the history of this country. The purpose was to suppress dissent among the natives with the object of protecting and sustaining the colonial government in power then. However, the resultant effect was to instill fear and submission among the people. This cannot be the object of section 132 in the current constitutional dispensation when people enjoy a robust Bill of Rights that has opened the democratic space in the country, and in particular when Article 20(2) stresses that every person shall be entitled to the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. People have the right to exercise the right to freedom of expression to the greatest extent? subject only to the limitation of that right under Article 33 (2) or any other provision in the constitution. [Emphasis added]

26. On the need to align legislation with the Constitution, the Petitioner cited *Jacqueline Okuta & another v Attorney General & 2 others [20171 eKLR* where the Court stated that: -

> *Above all, I am clear in my mind that there is an appropriate and satisfactory alternative civil remedy that is available to combat the mischief of defamation. Put differently, the offence of criminal defamation constitutes a disproportionate instrument for achieving the intended objective of protecting the reputations, rights and freedoms of other persons. Thus, it is absolutely unnecessary to criminalize defamatory statements. Consequently, I am satisfied that criminal defamation is not reasonably justifiable in a democratic society within the contemplation of article 24 of the Constitution. I my view, it is inconsistent with the freedom of expression guaranteed by 33 of that Constitution.*
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> *Upon promulgation of the constitution of Kenya 2010, it was expected that certain provisions in our laws were to be amended to align them to the letter and spirit of the constitution, but almost seven years later we still have such provisions in our statutes! [Emphasis added]*

27. The Petitioner also submitted on the aspect of public interest. It argued that the primordial question posed from the responses by the Respondents is whether individual rights and fundamental freedoms should yield to alleged concerns of public interest and national security. The Petitioner avers that Courts have held time without number in Kenya and elsewhere that this contest must always be determined in favour of individual rights and fundamental freedoms. The Petitioner relied on a number decisions on the question.

28. Citing *Sudi Oscar Kipchumba v Republic (through National Cohesion & Integration Commission) [2020] eKLR* the Petitioner submitted that the Court determined the question posed above in the following words: -

> *15. The Applicant insists that the Court fundamentally misapprehended both the law and the facts in its analysis and findings. In particular, in both the documents he has filed before this Court as well as in the oral arguments of his advocates before me, the Applicant makes the following four points:*
>
> > *First, that the finding by the Honourable Court that it was in the public interest to detain the Applicant was an erroneous interpretation of the public interest matrix and inconsistent with the settled principles and thereby negates the fundamental rights, freedoms and liberties as set forth under Article 29 of the Constitution. The Applicant argues that the Court's decision was not proportionate in balancing the rights and liberties of the Applicant against alleged public interest. The Applicant argues that our jurisprudence has now established that when individual liberties come into conflict with national security, it is the latter which must give way and not the other way round...*
> >
> > *Second, the argument that the interests of public order, peace and security necessitate the pre-charge detention of the Applicant because his speech has led to "demonstrations against him" does not meet the high threshold of "compelling test" required by our Constitution. The reason given appears illogical when set against the granted remedy: hold the Applicant without charging him for seven days then release him. There is no indication how holding the Applicant for precisely seven days will dissipate the public order, peace and security risk his alleged utterance caused. I have noted that there is no allegation that the Applicant has threatened to make like utterances if they are, indeed, capable of inciting the public. In any event, the Applicant has demonstrated a willingness to abide by the condition not to make any comments akin to the ones the State finds insalubrious and capable of inciting the public. What, then, is the logic of his continued detention" In short, the radical remedy prayed for and granted to the State (to hold the Applicant without charge for 7 more days) is not rationally related to the alleged risk. [Emphasis added]*

29. Transcending beyond the Kenyan borders, the Petitioner referred to *Malawi Law Society and Others v President and Others (2002) AHRLR 110 (MwHC 2002)* where the Court had occasion to adjudicate over measures taken by the State to maintain law and order, the implementation of which amounted to a violation of rights and fundamental freedoms of the people of Malawi. The Court had the following to say on the issue requiring permission to be sought from the police for the exercise of rights and freedoms: -

> *[22.1This section cannot and does not limit the rights in issue; it only regulates how such rights, among other things, can be enjoyed. The position of the law therefore is as was espoused in the case of Mulundika and Others v The People, (1996) IBHRC 199 (Supreme Court of Zambia). The citizen therefore need only give the police notice of the assembly, et cetera. There is no legal requirement that the police should grant them permission. Further there is no legal requirement to give notice about who will be addressing or what will be said at the assembly, meeting or procession. According to section 25 of the Police Act, assemblies, meeting or processions at private places do not require police notice.*
>
> *[23.1 Lastly, this Court bears in mind that the Constitution, under section 45, permits derogation from the rights only in accordance with the Constitution, when there has been a declaration of a state of emergency. It cannot be said and it was not argued that we have reached that stage.*
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> *[24.1 After considering the arguments and submissions before me, I find that there is no law prescribed to limit or restrict the right to assembly and demonstration. I find that the directive of the President at a political rally to limit such rights does not amount to law. The argument by and for the respondents in view of the finding in the case of R v Oakes (supra) are therefore not tenable. In view of this, I find that there is no need to examine the rest of the tests set out in section 44(2) of the Constitution. [Emphasis added]*

30. The Petitioner still on the above decision, referred to the Court's finding on the obligation to ensure that police power is not abused in a democratic state to skew belief, opinion or political causes. The Court further held that: -

> *[30.1 After hearing the parties and considering the evidence and the submission made by counsel and reading the authorities that counsel ably researched, it is my judgment that the two directives made by the President were unconstitutional, and furthermore that the banning all form of demonstrations' was unreasonable as such a ban is too wide and not capable of enforcement as events have*

shown even at the President's own rallies. It should be noted that the police have powers to regulate assemblies, meeting and processions under section 25 of the Police Act; the state has numerous other laws that regulate assemblies and prevent rioting, and also laws on defamation that regulate freedom of speech and expression. The police service would be advised to use these powers properly. Again, as Malawians, the organizers of demonstrations on this issue, or indeed any other issue, for or against, must bear in mind public tranquility. Democracy will always have enemies both within and without the government. Granted that the police have, at times, acted in a biased manner, as numerous cases before this Court will show, but we must take heed that confrontation will only result in chaos and disorder which are, in themselves, enemies of democracy. The rule of law must be preserved by challenging those we think have wronged us before the court. The wrongdoers too must be heard. I wish us to direct our minds to the words of Tambala J, as he was then, in the case of the National Consultative Council v The Attorney General Civil Cause 958 of 1994. He held that:

> *There is need to strike a balance between the needs of society as a whole and those of individuals. If the needs of society in terms of peace, law and order, and national security are stressed at the expense of the rights and freedoms of the individual, then the Bill of Rights contained in our Constitution will be meaningless and the people of this country will have struggled for freedom and democracy in vain. In a democratic society, the Police must sharpen their skills and competence. They must be able to perform their main function of preserving peace, law and order without violating the rights and freedoms of the individuals. That is the only way they can contribute to the development of a free state. Matters of national security should not be used as an excuse for frustrating the will of the people expressed in their Constitution. [Emphasis added]*

31. The Petitioner referred to another case from Malawi. It is *The State (on the application of Lin Xiaoxiao & Others) v Attorney General, Judicial Review Cause No 19 of 2020* where the Court held that: -

> *12.15 By way of concluding (for good now), the Court will be the first in joining the State in the fight against the corona virus epidemic. The Court will help in ensuring that all necessary measures put in place, be it by the legislature or the executive branches, are enforced. However, it has to be made clear that the Court will not be part of a fight against the epidemic that is being waged outside the dictates of the law. Equally true, the Court will not endorse measures that are unconstitutional and ultra vires. This country is founded on the rule of law: see sections 9, 12, 45(6) and 103 of the Constitution.*

32. Taking cue from the foregoing Malawian political scene, the Petitioner submitted that the decisions exemplifies how police power is susceptible to abuse for political or other reasons and the definitive manner in which the Court ought to come out to prevent its abuse. It is further submitted that the National Police Service should not emulate the example of the Malawian Police then. On the other hand, the Court ought to take guidance from the Malawian Court on this matter which is in all fours, similar to the one before the Malawian Court.

33. On the need for tolerance for criticism by those in power, the Petitioner cited a Ugandan case in *Andrew Mujuni Mwenda v Attorney General, No 12 of 2005 and No 3 of 2006* where the Court held as follows: -

> *That explains counsel Kakuru's observation that during elections voters make very annoying and character assassinating remarks and yet in most cases false, and yet no prosecutions are preferred against them. The reason is because they have a right to criticize their leaders rightly or wrongly. That is why he suggested, rightly so that leaders should grow hard skins to bear. We find that, the way impugned sections were worded have an endless catchment area, to the extent that it infringes one's right enshrined in Article 29(1) (a). We answer issue one in affirmative and in favour of the petitioners.*

34. With the above submissions, the Petitioner urged the Court to allow the Petition as prayed.

The Responses:

35. Both Respondents opposed the Petition.

36. The 1st Respondent relied on a Replying Affidavit sworn by *Kennedy W. Kihara*, the Principal Administrative Secretary to the Cabinet in the Office of the President, and a member of the NSAC. The Affidavit was sworn on 16th October, 2020. The Affidavit was filed in opposition to the Petitioner's Notice of Motion dated 12th October, 2020 but is taken also as a response to the main Petition.

37. The 1st Respondent deponed in justification of the directives by the NSAC that it was noted by the Cabinet that as the National government eased the containment measures put in place to stem the spread of the novel coronavirus disease, the country had experienced growing political tension that have exacerbated partisan divides, threatening peace, security and harmony within the country, and more importantly, exacerbated the risk of further spread and negative impact of the coronavirus pandemic, and that it was necessary to deal with the case urgently.

38. The 1st Respondent further deponed that the directives were issued to ensure "safety, peace, and order the attainment of national security". It was also deponed that the Petition is essentially seeking to usurp policy preferences of the National Executive contrary to the principle of separation of powers and for the Court to make value judgements on executive policy preferences.

39. On the use of Section 5 of the Order Act, the 1st Respondent deponed that the limitations therein are reasonable and justifiable.

40. The 2nd Respondent relied on a Replying Affidavit sworn by *Dominic Kisavi*, a Senior Superintendent of Police, a Staff Officer of Operations, Kenya Police Service. The Affidavit was sworn on 16th October, 2020 in opposition to the Petition and the Notice of Motion dated 12th October, 2020.

41. It is the 2nd Respondent's case that the directives by the NSAC are lawful government measures to contain the spread of Covid-19 and are enforced in the public interest. The 2nd Respondent contends that the directives have not been selectively enforced, citing "credible information" of potential violence in meetings halted and lack of "elevated risk" for breach of peace and compliance of Covid-19 guidelines for meetings that were not halted. It is concluded by the 2nd Respondent that the directives do not "derogate from the provisions of the Constitution or any written law."

42. The Respondents filed joint submissions.

43. They submitted that the provisions of section 5 of the Order Act are lawful and constitutional. They urged the Court to note that the provisions of section 5 of the Order Act have been subject of judicial determination in previous Court proceedings wherein the said section's constitutionality was upheld by the Court of Appeal and that the findings which are binding to this Court.

44. The case is Court of Appeal in Nairobi Civil Appeal 261 of 2018 ***Haki Na Sheria Initiative v Inspector General of Police & 3 others*** [2020] eKLR where the Court held as follows: -

> *32. As we embark on determining whether the impugned sections of the Act pass constitutional muster, we take cognisance of the fact that there is a general, although rebuttable presumption, that a provision of law is constitutional, and that it falls on the party alleging otherwise to prove its claim. This was the precedent set in* **Ndyanabo vs Attorney General [2001] 2 EA 495** *where the Court of Appeal of Tanzania held as follows:*
>
> > *In interpreting the Constitution, the court would be guided by the general principles that … there was a rebuttable presumption that legislation was constitutional, and…the onus of rebutting the presumption rested on those who challenged the legislation's status save that, where those who supported a restriction on a fundamental right relied on claw back or exclusion clause, the onus was on them to justify the restriction.*
>
> *34. This Court in* ***Attorney General v Law Society of Kenya & Another [2017] eKLR (Civil Appeal No. 133 Of 2011)*** *held that when determining the constitutionality of a statute or a provision of the law, it is important to consider the object, purpose and effect of implementation of that legislation. If the effect of the impugned law is to violate constitutional rights, then it must be declared so and struck down. In the words of the Court:*
>
> > *The cardinal rule in construing a statute or a provision of a statute is to interrogate the intention expressed in the statute itself by the drafters. That intention must be determined by reference to the precise words used in the statute, their factual context, and, their aim and purpose, bearing in mind that each case must be resolved by reference to its particular factors. In other words, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect…*
>
> *35. These are the principles that will guide us as we seek to determine whether the impugned provisions pass constitutional muster. Our starting point are the principles laid out in* ***Article 259*** *of the Constitution which enjoin us to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law and human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.*
>
> *38. The objective of the Act should be discernible from the words used by the Legislature and the context of its enactment. The Supreme Court of India in* ***Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others [1987] 1 SCC 424*** Observed that-
>
> > *Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual.*
>
> *39. Applying the above principle to this case, the purpose of the* **Act** *is evident from the preamble therein which reads:*
>
> > ***An Act of Parliament to make provision for the maintenance of public order and for purposes connected therewith.*** *[Emphasis supplied]*
>
> *40. Public order by its very definition presupposes a state of security, peace and stability that is free from criminal activities and violence. It is an integral component in national security which is defined in the following terms under* ***Article 238 (1)*** *of the* ***Constitution***:
>
> ***National security is the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.***
>
> *41. It is clear from the above provisions, which we have set out* in extenso, *that the aim of the said provisions is the furtherance of the Act's main objective namely, maintenance of public order. Notwithstanding the fact that* **Sections 8 & 9** *empower different authorities (Cabinet Secretary and Police Officer in charge of a County or police division respectively) to issue different orders (curfew orders and curfew restriction orders respectively), it is undeniable that the basis of issuance of any of those orders is in the interest of the attainment of peace, security and public order for good of the residents of the Four Counties and the country at large.*

45. On the limitation of rights and freedoms, the Court of Appeal went further to state that: -

..The limitation of fundamental rights and freedoms under ***Article 24*** *of the Constitution was a question of inquiry by this Court in* ***Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others [2017 eKLR (Civil Appeal 172 of 2014)*** *and the Court held that:*

> *While Article 19(3)(c) recognizes that the rights and fundamental freedoms in the Bill of Rights are only subject to the limitations contemplated in the Constitution**,** Article 25 identifies only four rights and fundamental freedoms that cannot be limited. It follows that by Article 24 the rest of the rights and fundamental freedoms under the Bill of Rights are enjoyed and guaranteed subject to strict terms of limitations.*
>
> *First, it must be demonstrated that the limitation is imposed by legislation, and even then only when it is shown that the limitation is reasonable and justifiable in an open democratic society. Further it must be based on dignity, equality and freedom, taking into consideration the nature of the right or fundamental freedom sought to be limited, the importance of the purpose of the limitation, its nature and extent, the enjoyment by others of their own rights as well as a consideration whether there are less restrictive means to achieve the purpose.*

[Emphasis supplied].

51. In that appeal, the court further reiterated that the first inquiry the court should delve into is whether there is a law that restricts the enjoyment of a fundamental right and whether the limitation was justifiable or reasonable in an open and democratic society. In considering this latter point, the Court held that:

> *The limiting law must be clear enough and devoid of ambiguity, for if a guaranteed constitutional right is to be limited, the limitation must be specific enough for the citizen to know the nature and extent of the limitation, his or her rights and obligations under the right as limited and the law supplying the limitation must be easily accessible to the citizen.*

52. This position was buttressed in **Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR (Civil Appeal No 56 of 2014)** *wherein the court set out similar prescriptions for a law that would limit fundamental rights to ensure legal certainty. Applying the principles therein to the appeal at hand, the law in question is the* ***Public Order Act.*** *It is clear to us that the impugned provisions do constitute a limitation on certain fundamental rights. '…65. We find that the impugned provisions are an acceptable limitation to the rights of the residents of the Four Counties and were not discriminatory as they applied to all the residents in the Four Counties. The objective of the* **Act** *is to attain the legitimate purpose of ensuring safety, peace and order and the attainment of national security in any given area of the country. Likewise, we find that* **Sections 8 & 9** *of the* **Act** *furthers and is connected to the attainment of the objective of the Act.*

66. Considering the essence of **Sections 8 & 9** *of the* **Act**, *we are satisfied that not only are curfew orders and curfew restriction orders imposed thereunder proportionate means of achieving* ***the Act's*** *objective of maintenance of public order but are also in line with the principles of national security stipulated under* **Article 238(2)** –

> *2) The national security of Kenya shall be promoted and guaranteed in accordance with the following principles—*
>
> *a) National security is subject to the authority of this Constitution and Parliament;*
>
> *b) National security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms;*
>
> *c) In performing their functions and exercising their powers, national security organs shall respect the diverse culture of the communities within Kenya; …*

67. In totality, we are satisfied that in circumstances where public order or safety has been or is at risk of being violated due to factors which include terror attacks or criminal insecurity, the limitation of the affected persons' rights and freedoms within the context of **Sections 8 & 9** *of* ***the*** **Act** *is justifiable, reasonable and necessary under* **Article 24** *of the* **Constitution** *to ensure the delicate balance of the rights of citizens.*

68. Accordingly, we find that the appeal lacks merit and is hereby dismissed. We uphold the High Court's finding that **Sections 8 & 9** *of* **the Act** *are constitutional. Taking into account that the appeal herein involves a public interest matter, the order that commends itself to us, is that each party shall bear their own costs. Orders accordingly.*

46. The Respondents cited another case by the Court of Appeal where the section 5 of the Order Act was discussed. It is Nairobi Civil Appeal No. 1 of 2015 ***Hussein Khalid & 16 others v Attorney General & 2 others*** [2017] eKLR where the Court held as follows: -

> *That then is the summary of the background and the respective positions of the parties. To begin with, it is necessary to point out the close correlation between freedom of expression, freedom of association, and freedom of assembly, demonstration, picketing and petition. More often than not, freedom of association and freedom of assembly, demonstration, picketing and petition are illusory if they are straightjacket and treated in isolation and without regard to each other and to freedom of expression. The freedom of assembly, demonstration, picketing and petition guaranteed by Article 37 cannot have full meaning without freedom of association guaranteed by Article 36 and freedom of expression guaranteed by Article 33. While it is true that freedom to demonstrate, picket and petition may be exercised by a lone individual without vocal expression as in the case of a lone demonstrator with a placard, it is normally actualized and meaningful when exercised in association with others and through expression which may be by pure speech or symbolic speech such as placards, handbills, leaflets, T-shirts, and possibly, without deciding, even messages on the bodies of pigs. Thus freedom of assembly, demonstration, picketing and petition will be emasculated if it is not underpinned by*

freedom of association and freedom of expression.

It must be emphasized that the freedom of expression, of association and of assembly, demonstration, picketing and petition are not among the fundamental rights and freedoms that cannot be limited under Article 25. Specifically, freedom of assembly, demonstration, picketing and petition that is guaranteed by Article 37 has an important internal qualifier, namely, to enjoy it, a person must be peaceful and unarmed. It is plainly obvious to us that in terms of Article 37, persons who are not peaceful or who are armed cannot claim to be entitled to freedom of assembly, demonstration, picketing and petition.

The Public Order Act, Cap 56 was enacted to provide for, among others, public order. It has provisions for regulation of public gatherings, meetings and processions. ***"Public gathering"*** *is defined in* **section 2** *to mean a public meeting, a public procession and any other meeting, gathering or concourse of ten or more persons in any public place. On the other hand, the Act defines* **"public place"** *to mean any place to which the public or any section thereof are entitled or permitted to have access whether on payment or otherwise. Consistent with the Constitution,* **section 6(1***) of the Public Order Act makes it an offence for a person to attend a public meeting or procession while armed with an offensive weapon. A person desiring to hold a public meeting or procession is required to notify the regulating officer at least 3 days before the meeting of the venue, date and time of the meeting. In the case of a procession the person has also to notify route to be used.* **Section 5(7)** *of the Act specifically requires the organizer of the meeting or procession or his agent to be present throughout and to assist the police in the maintenance of peace and order.*

Section 5(8) *sets out the circumstances under which a public meeting or procession may be stopped, thus limiting the freedom of assembly, demonstration, picketing and petition guaranteed by Article 37. The provision empowers the regulating officer or a police officer of or above the rank of inspector to stop or prevent the holding of a public meeting or procession in which there is clear, present or imminent danger of breach of peace or public order. Such officer is further empowered to give or issue orders, among others, for the dispersal of the meeting or procession, having regard to among others, freedoms of others. Failure to comply with such an order is an offence and any person who continues to take part in such meeting or procession is guilty of the offence of taking part in an unlawful assembly under* **Chapter IX** *of the Penal Code and is liable for imprisonment for one year.*

The offences with which the appellants were charged under the Penal Code, namely offensive conduct conducive to breaches of peace contrary to 94(1) of the Penal Code and taking part in a riot contrary to section 78 (1) and (2) as read with section 80 of the Penal Code are all in Chapter IX of the Penal Code. Those provisions must be read together with the Public Order Act in determining their constitutionality. Section 94 (1) of the Penal Code Provides Thus:

94.(1) Any person who in a public place or at a public gathering uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is to be occasioned is guilty of an offence and is liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months or both.

(2) In this section "public gathering" means-

> *(a) Any meeting, gathering or concourse of ten or more persons in any public place; or*
>
> *(b) Any meeting or gathering which the public or any section of the public or more than fifty persons are permitted to attend or do attend, whether on payment or otherwise; or*
>
> *(c) Any procession in, to or from a public place."*

On the other hand, section 78 of the Penal Code provides:

78. (1) When three or more persons assemble with intent to commit an offence, or, being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause persons in the neighborhood reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such assembly needlessly and without any reasonable occasion provoke other persons to commit a breach of the peace, they are an unlawful assembly.

> *(2) It is immaterial that the original assembling was lawful if, being assembled; they conduct themselves with a common purpose in such a manner as aforesaid.*
>
> *(3) When an unlawful assembly has begun to execute the purpose for which it assembled by a breach of the peace and to the terror of the public, the assembly is called a riot, and the persons assembled are said to be riotously assembled.*

In this appeal the appellants duly complied with the notification requirement of the Public Order Act and it is common ground that the meeting or procession started peacefully with police escort but was stopped and the appellants arrested after it became rowdy following the deployment of pigs and occupation of the streets by the appellants. It is not for us to determine whether appellants' conduct constituted offensive conduct conducive to breaches of peace or taking part in a riot. The issue before us is whether the arrest of the appellants was a violation of their freedom of assembly, demonstration, picketing, petition and by extension association and expression, and whether the provisions of the Public Order Act and the Penal Code that allow the police to stop a public meeting or procession and to prosecute them are unconstitutional.

While it is true that the High Court did not undertake the sequential analyzing required by Article 24 before determining whether the impugned provisions of the Public Order Act and the Penal Code are unconstitutional, ***a plain reading of that Act and the Code against Articles 24 and 37 does not persuade us that impugned provisions are unconstitutional****. As we have noted, the freedom of assembly, demonstration, picketing and petition guaranteed by Article 37 is circumscribed by the express requirement of the Constitution that it must be enjoyed peacefully and by persons who are unarmed. The issue before the trial court will be whether the*

appellants conducted themselves in a public place in a manner that was not peaceful.

The Public Order Act allows citizens to freely assemble, demonstrate, picket and petition authorities subject to the notification requirement. ***In our estimation the notification requirement is a reasonable measure for the police to ensure that the meeting or procession is conducted peacefully and that those involved in it are able to exercise their constitutional rights while at the same time not infringing on the rights of other persons, who have an equal right to access public spaces but are otherwise not involved or interested in the meeting or demonstration.*** *The Act and the Code do not allow stoppage of meetings and processions unless there is clear, present or imminent danger of breach of peace or public order. The meeting or procession can be stopped only when it ceases being peaceful as required by the Constitution.*

Turning to the criteria under Article 24 of the Constitution, there can be no dispute that the limitation is supplied by legislation, the Public Order Act and the Penal Code, which are laws within the meaning of that Article. By its nature freedom to assemble, demonstrate, picket and petition, is critical to a free society because it makes it possible for citizens to gather and express their views, stir public debate, search for truth, and participate in public affairs. Hence the basis of its limitation must be carefully scrutinized. Having regard to the following considerations namely; that by constitutional edict freedom of assembly, demonstration, picketing and petition must be enjoyed peacefully; the public order interest that informs the limitation of the right, namely the need to avoid disorder, violence to citizens, damage to property; the fact that under the Public Order Act and the Penal Code the right is limited only when there is clear, present or imminent danger of breach of peace; the need to ensure that the enjoyment of the appellants' right does not prejudice the rights and fundamental freedoms of other users of public spaces and thoroughfares who are not involved in the meeting or procession; ***we hold that the impugned provisions of the Public Order Act and Penal Code are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.*** *We need only point out that many democratic polities have similar public order legislation, such as the Public Order Act, 1986 of the United Kingdom and the Regulation of Gatherings Act, 1993 of South Africa.*

Having concluded that the stoppage of the appellants' meeting or procession was not a violation of their rights under Article 37 and that the provisions of the Public Order Act and the Penal Code under which the procession was stop are not unconstitutional, we must also conclude that the appellant's freedom of association and expression, which in this instance depended heavily on and were intertwined with their right to assembly, demonstrate, picket and petition were also not violated.

47. Submitting on the directives issued by the NSAC and the position that the Constitution makes it abundantly clear that the national executive is constitutionally mandated to give policy directions to the National Police Service contrary to the assertions by the Petitioner, the Respondents contend that the Constitution provides in no uncertain terms that the National Security Organs shall be subordinate to civilian authority under Article 239(5) of the Constitution. In Article 240, the Constitution establishes the National Security Council composed of the President, Deputy President, Cabinet Secretary for Defence, Cabinet secretary for foreign affairs Cabinet secretary for internal security, the Attorney-General, the Chief of Kenya Defence Forces, the Director-General of the National Intelligence Service, the Inspector General of the National Police. Under Article 240(3), the Council exercises supervisory control over national security organs and perform any other functions prescribed by national legislation.

48. The Respondents further argue that Article 130(1) of the Constitution provides that the national executive of the Republic comprises the President, the Deputy President and the rest of the Cabinet and that Article 131(1) (b) of the Constitution provides that the President exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries and further that Article 245(4) of the Constitution provides that the Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service.

49. The Respondents further submitted that executive authority vests upon the President as Head of the Executive and also Head of State. The President is assisted in undertaking his constitutional mandate by Cabinet which includes Cabinet Secretaries and the Attorney-General. The Cabinet Secretary for Interior who is currently in-charge of police matters in the Cabinet does so on behalf of the President and Cabinet and whatever policy directions he gives to the Police are informed by decisions of the President and also by Cabinet resolutions and that it would be a pedantic interpretation of law to treat the Cabinet Secretary of Interior as an isolated office, detached from the rest of Cabinet and isolated from the Presidency as alluded to by the Petitioner.

50. The Respondents further submit that the status of the NSAC is immaterial in the proceedings since the directives were ratified by Cabinet and became the directives of Cabinet. The Respondents rely on the legal principles of ratification in making the said submissions. They refer to the Court of Appeal in Nairobi Civil Appeal No. 20 of 2016 **Middle East Bank Kenya Limited v Thalia Katia Maria Castanha [2016] eKLR** where it was held that: -

..In any event an act though done by an unauthorized agent which act is later adopted by the principal as true is binding upon the principal by virtue of his adoption (ratification). Ratification can apply retrospectively provided the act done though unauthorized, was lawful. (see ***East African Safari Air Limited v Anthony Ambaka Kegode & another [2011] eKLR).***

51. The Respondents submit that the ratification by Cabinet put paid any legal objections on the status and capacity of the NSAC and that the same is a non-issue in the present circumstances. The Respondents submits that the Cabinet Secretary for interior is an agent of the National Executive including the Cabinet and that directives by the National Executive in respect to police matters cannot be impeached just because they were not specifically made by the Cabinet Secretary for Interior but by Cabinet wherein, the Cabinet Secretary is a member.

52. The Respondents also submits that the pedantic approach adopted by the Petitioner that seeks to have the Cabinet Secretary Interior treated as being distinct from the rest of Cabinet and functioning independent of Cabinet constitutes the legalism that the Constitution sought to depart from by providing for a purposive interpretation thereof. Citing Mativo J in ***Abdi Hussein Abdi & 3 others v The Independent Electoral and Boundaries Commission*** [2017] eKLR, the Learned Judge held as follows: -

…….The Constitution must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism'

and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government[3]and its organs.

18. This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purposes. All relevant provisions are to be considered as a whole and, where rights and freedoms are conferred on persons, derogations there from, as far as the language permits, should be narrowly or strictly construed.[4]

As was appreciated by the majority ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate****:-[8]*

> *Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different constitutions is highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.*

53. The Respondents further submit that the National Police Service in carrying out its important role under the Constitution is not precluded from coordinating, collaborating and cooperating with other institutions and organs of government. Citing the Supreme Court in ***In the Matter of Interim Independent Electoral Commission*** [2011] eKLR, the Court held that: -

> *[60] While bearing in mind that the various Commissions and independent offices are required to function free of subjection to "direction or control by any person or authority", we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the "independence clause" does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law. For due operation in the matrix, "independence" does not mean "detachment", "isolation" or "disengagement" from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question. The moral of this recognition is that Commissions and independent offices are not to plead "independence" as an end in itself; for public-governance tasks are apt to be severely strained by possible "clashes of independences"*

54. The Respondents also submit that the Petitioner has not adduced evidence of any discriminate treatment as alleged or at all and that the claim on that score ought to be dismissed. The Respondent respectfully submits that the Petitioner who had both the legal and evidentiary burden of proof has failed to discharge either in the present case and consequently the same should fail. They cited a decision by yours truly in *Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR* where the Court dealt with the legal and evidential burden of proof.

55. It was recalled that the 2nd Respondent specifically responded to the Petitioner's general allegation in its replying affidavit wherein it was deposed *inter alia* that;

- *That under the Public Order Act. Cap 56, Part III (Public Gathering) Section 5 titled Regulation of Public Meeting and Processions clearly indicated that the Act prescribes the manner of holding public meetings and processions.*

- *That Section 5(2) of the Act requires any person who desires to hold a public meeting or procession to give notice to the Officer in Charge of Station (OCS) within whose jurisdiction the said meeting or procession is to be held.*

- *That the police presence during such meetings is for the purpose of ensuring that those attending a meeting or take part in a procession are not harmed, removal of those bent on disrupting the orderly conduct of the meeting and management of crime generally.*

- *That the Notice helps the Police to make security arrangement to facilitate orderly conduct of such meetings and route clearance in the case of processions.*

- *That the Notice to the OCS offers a forum for the conveners and police to discuss the manner in which the meeting will be conducted, to make plans on how to deal with any breach of peace, the handling of suspects of crime including giving those who are not taking part a notice of the likelihood of being inconvenienced as a result of the intended gathering or procession and to allow those who wish to make adjustments to do so.*

- *That in the case of processions, to the determination the route, diversion of traffic, warning of other road users, maintenance of general safety and traffic management.*

- *That every public meeting or procession is unique and security arrangements are therefore assessed and made on a case-by-case basis having regard to the peculiar circumstances of each case.*

- *That the OCS may depending on the prevailing of projected scenarios advise the conveners not to hold a public meeting on a specific date and/or venue based on intelligence reports and/or credible information.*

- *That based on the relevant OCS' evaluation, which usually includes factors like sufficiency of personnel or logistical support available, projected threat and magnitude of insecurity incidences, the OCS may therefore advise the conveners to hold a meeting at a different location to avert confrontation or at a later date when the risk of a breach of peace would have dissipated or when sufficient numbers of police officers and other logistical support is made available to meet the level of the threat.*

- *That the Law Society Kenya has had a most cordial engagement with the National Police Service in respect to its public meetings or processions evidenced as recent as on 12th October 2020 when the President of the Law Society of Kenya led a group of twenty or so of its members to the precincts of Parliament, following a notice to occupy Parliament.*

- *That the group of lawyers was received by the Sub-County Police Commander (SCPC) Central, Mr. Mark Wanjala, SSP and the OCS Parliament CI. Hellen Nthambi (Ms) who promptly sought directions from the Clerk of the National Assembly Mr. Michael Sialai and thereafter the group was ushered into Parliament precincts without incidence.*

- *That the procession organized by the Law Society of Kenya was without incidence because there was ample Notice of the same in accordance with allowed for facilitative security arrangements to be made.*

- *That the police were aware that the intended fundraiser meeting at St. Leo Catholic Church Shianda, Mumias East Constituency scheduled for 11th October 2020 was halted and its conveners advised to reschedule the same fundraiser following credible information that there were some hired individuals who intended to disrupt the fundraiser and blame it on the police for political premium.*

- *That further, the SCPC Mumias East, Mr. David Ndirangu, SSP from whom the OCS Mumias CI Christopher Wesonga sought assistance had instructed the OCS to advise the conveners to defer the fundraiser to a later date as arrangements are put in place to identify the disruptors and allow mobilization of reinforcements.*

- *That underpinning the necessity for regulation of public gatherings and processions, the incidence that led to loss of lives and great destruction of property at Got Kweru in Suna West, Migori County may be called to mind; the incidence involved a confrontation between two factions of the Legio Maria Sect on 13th September 2020 where even the police response team was not spared as some of our officers sustained physical injuries and several police motor vehicles damaged.*

- *That contrary to the petitioner's assertion, there was strict adherence to government guidelines to combat covid-19 during the National Prayer Day.*

- *That the meeting alluded to by the Petitioner at former Prime Minister Hon. Raila Odinga's Bondo home, there was no prior report of an elevated risk of/likely breach of peace and the convenor was also found to have the facilities that would comply with the Covid-19 guidelines.*

- *That the text of the National Security Advisory Committee (NSAC) directives does not derogate from the provisions of the constitution or any written law.*

- *That the National Police Service enforces the law without bias and strives for a collaborative approach with conveners of public gatherings and processions.*

- *That there are incidences where persons with ulterior motive deliberately accused the police of bias for selfish reasons including for political capital.*

- *That the National Police Service discharges its mandate in compliance with the constitutional requirements of human rights and fundamental freedoms observance.*

- *That under the National Police Service Act, the police have a statutory duty to maintain law and order; preserve peace; protect life and property; investigate crimes; collect criminal intelligence; prevent and detect crime and enforce laws and regulations with which it is charged with.*

- *That police functions are to be discharged without any external influence and must comply with the highest standards of*

professionalism and discipline among officers charged with the mandate.

- *That there is no basis for the Petitioners allegations of bias by the police and that in any event the Petitioners case is premised on inadmissible hearsay evidence.*

56. The 2nd Respondent submitted that it provided the operational justification of the legal requirements and explained how they are facilitative of police work and by extension the exercise of fundamental rights. The 2nd Respondent also submitted that it offered a detailed explanation on the incidences alluded to by the Petitioner which explanation was not rebutted and remains unchallenged.

57. In the end, the Respondents submitted that the content of the directives is not prejudicial to anyone's rights as the same are mere restatement of applicable law that the police are bound to enforce in any event. The Respondents prayed that the Petition be dismissed.

58. On the issue of costs, the Respondents argue that it is generally the practice of the Court not to award costs on public interest litigation and that there is no compelling case for departure from the same in the present proceedings.

Issues for Determination:

59. I have carefully considered the Petition, the responses thereto, the parties' submissions and the decisions referred to. I find the following two issues are for determination: -

(i) Whether the directives issued by NSAC and adopted by the Cabinet are constitutional;

(ii) Whether Section 5 of the Order Act is constitutional.

60. I will deal with the issues in *seriatim*.

Analysis and Determinations:

(i) Whether the directives issued by NSAC and adopted by the Cabinet are constitutional:

61. This Court has been called upon to interrogate the constitutionality of the impugned directives as well as Section 5 of the Order Act. As such, it is in order to briefly deal with the manner in which the Constitution and statutes ought to be interpreted.

62. This Court dealt with this subject recently in ***Nairobi High Court Constitutional Petitions No. 33 and 42 of 2018 (Consolidated) Okiya Omtatah Okoiti vs. Public Service Commission & 73 Others*** (unreported). The Court rendered itself as follows: -

54. As regards the interpretation of the Constitution, suffice to say that the Constitution itself gives guidelines on how it ought to be interpreted. That is in Articles 20(4) and 259(1).

55. *Article 20(4) requires Courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) command Courts to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.*

56. *Courts have also rendered how the Constitution ought to be interpreted. The Supreme Court in a ruling rendered on 21st December, 2011in* ***In the Matter of Interim Independent Electoral Commission [2011] eKLR*** *discussed the need for Courts, while interpreting the Constitution, to favour a purposive approach as opposed to formalism. The Court stated as under: -*

> *[86] …. The rules of constitutional interpretation do not favour formalistic or positivistic approaches* ***(Articles 20(4)*** *and* ***259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction****. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the* ***Preamble,*** *in* ***Article 10,*** *in* ***Chapter 6****, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya.* ***Article 159(1)*** *states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.*
>
> *[87] In* ***Article 259(1)*** *the Constitution lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance."* ***Article 20*** *requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.*
>
> *[88] …..…* ***Article 10*** *states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.*

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

57. *On the principle of holistic interpretation of the Constitution, the Supreme Court in* ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] eKLR*** *affirmed the holistic interpretation principle by stating that:*

This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.

58. *The meaning of holistic interpretation of the Constitution was addressed by the Supreme Court in In the* ***Matter of the Kenya National Human Rights Commission,*** *Sup. Ct. Advisory Opinion Reference No. 1 of 2012; [2014] eKLR. The Court at paragraph 26 stated as follows: -*

…But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.

59. *In a Ugandan case in* ***Tinyefuza v Attorney General, [1997] UGCC 3 (25 April 1997)*** *the Court was of the firm position that the Constitution should be read as an integrated whole. The Court observed as follows: -*

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

60. *In* ***Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR,*** *the Court of Appeal summarized the various principles of constitutional interpretation as follows:*

[21] …. Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus: -

· that as provided by Article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.

· that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.

· that the Constitution must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism.

· that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.

63. In ***Advisory Opinion Application No. 2 of 2012, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR,*** the Supreme Court spoke to purposive interpretation of the Constitution. It had the following to say: -

…*The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution.*

64. The Court went ahead and gave further meaning of the term *purposive* by making reference to the decision in the Supreme Court of Canada in ***R -vs- Drug Mart*** (1985) when it made the following remarks: -

The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.

65. The Supreme Court, while referring to the South African Constitutional decision in ***Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319 (PC)***, went further and stated that a purposive approach is 'a *generous interpretation... suitable to give individuals the full measure of the fundamental rights and freedoms referred to.'*

66. The Learned Judges of the Supreme Court further agreed with the South African Constitutional Court in ***S -vs- Zuma (CCT5/94) 1995*** when it stated that in taking a purposive approach in interpretation, regard must be paid to the legal history, traditions and usages of the country concerned.

67. The Supreme Court embellished the need to pay attention to legal history while interpreting not only the Constitution but also statutes. It observed as follows: -

8.11 This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting the Constitution, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself.

68. The Court of Appeal while dealing with holistic interpretation of the Constitution in ***Civil Appeal 74 & 82 of 2012, Centre for Rights Education and Awareness & Another v John Harun Mwau & 6 others [2012] eKLR*** stated that the entire Constitution must be read as an integrated whole and no one particular provision destroying the other so as to effectuate harmonization principle.

69. Having looked at the manner in which the Constitution and statutes ought to be interpreted, I now turn to the issue as to whether the directives issued by the NSAC and adopted by the Cabinet are constitutional.

70. I will begin this discussion by unbundling the legality of NSAC. Whereas the Petitioner contends that NSAC is a non-entity, the Respondents posit that NSAC acted on behalf of the Cabinet and given that the directives issued by NSAD were eventually ratified by the Cabinet then the legal standing of NSAC is immaterial.

71. The impugned directives were issued on 7th 0ctober, 2020. The directives were issued by Dr. Joseph K. Kinyua, EGH, on behalf of NSAC. Dr. Joseph K. Kinyua, EGH, described himself as the Head of the Public Service and Chairperson of the NSAC. Whereas the Respondents politely avoided to disclose what NSAC is, there is no doubt that it is somewhere within the administrative structure of the National Executive. I say so because according to the Replying Affidavit sworn by Kennedy W. Kihara on behalf of the 1st Respondent, NSAC has a membership and its decisions are ratified by the Cabinet.

72. Be that as it may, *Article 260* of the Constitution defines a '*person'* and a 'state organ' as follows: -

"person" *includes a company, association or other body of persons whether incorporated or unincorporated;*

"State organ" *means a commission, office, agency or other body established under this Constitution;*

73. The Constitution does not provide for the NSAC. Therefore, NSAC is not a state organ. Further, none of the parties alluded that NSAC is created under any law. In essence, therefore, NSAC, is not a creation of any statute. However, going by the description of who a ***'person'*** is under Article 260 of the Constitution, NSAC qualifies to be described as a 'person' for the reason that it is a ' *body of persons whether incorporated or unincorporated'*.

74. As stated above, this body of persons known as NSAC is within the administrative structure of the National Executive.

75. The impugned directives by NSAC were contained in a 'Government Statement'. The Statement dealt with what it termed as *'the unchecked utterances and political weaponization of public gatherings continue to undermine law and order within the country'*. The statement partly stated as follows: -

Being fully seized of the foregoing, and conscious of the freedoms and liberties enshrined in our Constitution and other laws of the Republic of Keya, now therefore, NSAC, at its sitting today, resolved to remind Kenyans of the existing legal obligations and sanctions and ***issued the following directives****.*

76. The directives issued by NSAC were as under: -

1. That All Public Meetings and Public Processions Shall Be Held in Strict Compliance with Section 5 of the Public Order Act, Cap. 56 Laws of Kenya. The convenor or any person intending to hold a Public Meeting or a Public Procession shall*:*

a) Notify the Officer Commanding Station (OCS) of such intent at least three days but not more than fourteen days before the proposed date of the public meeting or procession.

b) Be present throughout the meeting or procession and shall assist the police in the maintenance of peace and order at the

meeting or procession.

c) Obey all Orders given to him or her by the OCS or any police officer of or above the rank of inspector.

d) At all times bind themselves to be peaceful and non-violent and shall keep to the designated places of public meetings or public processions.

2. That Any Person Who So Elects to Attend or Participate in a Public Meeting and or Procession Shall, Pursuant to the Law and in Particular, Section 5 of the Public Order Act:

a) Exercise a high sense of civic duty and responsibility and not to be in possession of any weapon.

b) At all times bind themselves to be peaceful and non-violent and shall keep to the designated places of public meetings or public processions.

c) Report to the relevant authority incidents of hate speech, incitement to violence, ethnic contempt or any other offence;

d) Respect the freedom of expression of other people;

e) Not abuse, exclude, demean, stereotype or profile other people;

f) Not propagate insurgency and socio-economic hostility among and between Kenyans;

g) Maintain strict observance of the law for the safety and well-being of everyone present.

3. That All Persons Who Elect to Address Any Public Meeting and Procession Shall Be Bound By the Legal Penalties and Obligations Set Out In Sections 13 and 62 of the National Cohesion and Integration Act, Which Provisions Bar Speeches, Utterances and Messages that Contain:

a) Offensive, abusive, insulting, misleading, confusing, obscene or profane language.

b) Inciting, threatening or discriminatory language that may or is intended to expose an individual or group of individuals to violence, hatred, hostility, discrimination or ridicule on the basis of ethnicity, tribe, race, color, religion, gender, disability or otherwise.

c) Attacks on personal rights that trigger discrimination on the basis of their ethnic background, economic status, race, religion or associations.

4. That All Media Outlets Shall Be Held Responsible for All the Content that they Publish and or Broadcast Pursuant to Section 62 of the National Cohesion and Integration Act as read together with the Guidelines for Monitoring Hate Speech in the Electronic Media issued by the National Cohesion and Integration Commission. Accordingly, the media shall*:*

a) Not publish words intended to incite feelings of contempt, hatred, hostility, violence or discrimination against any person, group or community on the basis of ethnicity or race.

b) Desist from providing platform to hate mongers, inciters and tribalists.

c) Practice responsible and conflict sensitive reporting.

d) Endeavor to air programs that promote respect, national unity and cohesion.

5. That All Social Media Users Shall be Held Individually Liable for All Content on their Social Media Profile Pursuant to the National Cohesion and Integration Act as read together with the Guidelines on Prevention of Dissemination of Undesirable, Bulk and Premium Rate Political Messages and Political Social Media Content via Electronic Communication Network. In That Regard, Every Social Media User Shall Ensure that:

a) All their content is written in a language that avoids a tone and words that constitute hate speech, ethnic contempt, and incitement to violence, harassment, abuse, defamation or intimidation.

b) Before forwarding and or sharing any messages, authenticate and validate the source and truthfulness of their content so as to limit information that might spread rumors, mislead or is not supported by facts.

c) Administrators of social media platforms are duty bound to moderate and control undesirable content and discussions that have been brought to their attention on their platforms.

77. In the end, the statement stated thus: -

*In this regard, **NSAC hereby directs the relevant security organs to enforce these directives** without fear or favour to the offenders, regardless of their economic standing, ethnicity, religion and political association and status.*

78. It is without any doubt, that the security organ which was directed to enforce the directives by NSAC is the National Police Service. I say so because the actions complained of and which NSAC wanted checked related to maintaince of law and order within the Kenyan borders. As such, Sections 24, 27 and 35 of the *National Police Service Act*, No. 11A of 2011 (hereinafter referred to as '***the Police Act'***) come to play.

79. The said provisions state as follows: -

24. The Functions of the Kenya Police Service

The functions of the Kenya Police Service shall be the—

(a) provision of assistance to the public when in need;

(b) maintenance of law and order;

(c) preservation of peace;

(d) protection of life and property;

(e) investigation of crimes;

(f) collection of criminal intelligence;

(g) prevention and detection of crime;

(h) apprehension of offenders;

(i) enforcement of all laws and regulations with which it is charged; and

(j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

27. The Functions of the Administration Police Service

The functions of the Administration Police Service shall be the—

(a) provision of assistance to the public when in need;

(b) maintenance of law and order;

(c) preservation of peace;

(d) protection of life and property;

(e) provision of border patrol and border security;

(f) provision of specialized stock theft prevention services;

(g) protection of Government property, vital installations and strategic points as may be directed by the Inspector-General;

(h) rendering of support to Government agencies in the enforcement of administrative functions and the exercise of lawful duties;

(i) co-ordinating with complementing Government agencies in conflict management and peace building;

(j) apprehension of offenders;

(k) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

35. Functions of the Directorate

The Directorate shall —

(a) collect and provide criminal intelligence;

(b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;

(c) maintain law and order;

(d) detect and prevent crime;

(e) apprehend offenders;

(f) maintain criminal records;

(g) conduct forensic analysis;

(h) execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution;

(i) co-ordinate country Interpol Affairs;

(j) investigate any matter that may be referred to it by the Independent

(k) Police Oversight Authority; and perform any other function conferred on it by any other written law.

80. *Article 244* of the Constitution provides the objects and functions of the National Police Service as follows: -

(a) strive for the highest standards of professionalism and discipline among its members;

(b) prevent corruption and promote and practice transparency and accountability;

(c) comply with constitutional standards of human rights and fundamental freedoms;

(d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and

(e) foster and promote relationships with the broader society.

81. The National Police Service is under the command of the 2nd Respondent. The manner in which the 2nd Respondent is to carry out its mandate is provided for under Article 245(2)(b) and (4) of the Constitution as follows: -

1. The Inspector General –

(a) ……..

(b) ***shall exercise independent command over the National Police Service,*** *and perform any other functions prescribed by national legislation.*

4. ***The Cabinet Secretary*** *responsible for police services may lawfully give a direction to the Inspector-General with respect to any* ***matter of policy*** *for the National Police Service,* ***but no person*** *may give a direction to the Inspector General with respect to—*

(a) the investigation of any particular offence or offences;

(b) the enforcement of the law against any particular person or persons; or

(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.

5. Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.

82. *Article 157(4)* of the Constitution provides that: -

The Director of Public Prosecutions shall have power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

83. The independence of the 2nd Respondent is constitutionally-insulated from any form of interference or directional command. Apart from the Director of Public Prosecutions and only to the extent so provided, no other person, body or entity has the power to give any form of directives to the 2nd Respondent on how to discharge its functions.

84. The above is further ring-fenced in that even the power donated to the Cabinet Secretary under Article 254(4) of the Constitution to issue any directives to the 2nd Respondent is only limited to policy issues.

85. The Supreme Court ***In the Matter of Interim Independent Electoral Commission*** [2011] eKLR, discussed the meaning and extent of the independence in relation to constitutional Commissions and independent offices. The Court emphasized the need for such entities to co-ordinate for effective service delivery, but delineated the discharge of their respective mandates as follows: -

> ***[60] While bearing in mind that the various Commissions and independent offices are required to function free of subjection to "direction or control by any person or authority", we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit.***

86. Applying the foregoing to this case, it therefore, follows that the Inspector General as the one in command of the National Police Service while discharging the duties of the office should not be under the direction or control of any person or authority and should not take any orders or instructions from organs or persons outside his/her ambit. As said, the only exception is what is provided for in Article 157(4) of the Constitution relating to the powers of the Director of Public Prosecutions over the Inspector General.

87. The Respondents, however, argue that the National Police Service is part of the executive arm of Government under the President. For that reason, they further argue that, in the spirit of coordinating government business the whole executive arm of Government, including the organs and offices therein, is under the general control and direction of the President and by extension the Cabinet.

88. This Court does not find the Respondents' argument persuasive. The Constitution provides the manner in which the sovereign power of the people may be exercised. Such power may be exercised by Parliament and the legislative assemblies in the county governments, the national executive and the executive structures in the county governments, the Judiciary and independent tribunals, the Constitutional Commissions and the Independent offices. The design of our Constitution is that it deliberately ring-fences the independence of each of those organs.

89. On the part of the National Police Service, Article 245(2)(b) and (4) of the Constitution speaks clearly of the independence of the Inspector General. And, as stated by the Supreme Court ***In the Matter of Interim Independent Electoral Commission*** case (supra), the Inspector General is *'…not to take orders or instructions from organs or persons outside their [his/her] ambit….'*

90. This discussion has defined NSAC as a person under Article 260 of the Constitution. From the definition of a 'state organ' under the same provision, the Cabinet is an organ for it is an office or body established in Article 152 of the Constitution. The Cabinet is distinct from its constituents who are the President, the Deputy President, the Attorney General and the Cabinet Secretaries.

91. Article 245(4) of the Constitution is categorical that no person, save the Director of Public Prosecutions, can give any orders or directions to the Inspector General relating to the investigation of any particular offence or offences; the enforcement of the law against any particular person or persons; or the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service. Therefore, not even the NSAC, the Cabinet or the constituents of the Cabinet can give directions on how the Inspector General is to discharge his duties.

92. Two questions now arise which beg for answers. They are whether NSAC and the Cabinet are part of the National Police Service and whether NSAC and the Cabinet, by ratification, issued any directives or orders to the Inspector General of Police or the National Police Service. The answer to the first question is in the negative. The Cabinet is an independent office or organ under the Constitution just like the Inspector General. None of the two is part of the other. NSAC is also not part of the National Police Service.

93. In answering the second question, I have carefully scrutinized the statement issued by NSAC and ratified by the Cabinet. The statement is conspicuous that it directed the law enforcement officers (who is the National Police Service in this case) to investigate particular offence or offences and also to enforce the law against particular person or persons. NSAC and the Cabinet, hence, issued directives and orders to the National Police Service on how to conduct its duties.

94. The directives and orders are in contravention with the Constitution. In particular, they contravene Article 10(2)(a) on the rule of law and Article 245(2)(b) and (4) of the Constitution.

95. In sum, the directives issued by NSAC on 7th October, 2020 and ratified by the Cabinet on 8th October, 2020 are unconstitutional, ineffective and void *ab initio* for directing the law enforcement officers on how to discharge their duties.

(ii) Whether Section 5 of the Order Act is <u>constitutional:</u>

96. As correctly submitted by the Respondents, the constitutionality of Section 5 of the Order Act was settled by the Court of Appeal in Nairobi Civil Appeal No. 261 of 2018 ***Haki Na Sheria Initiative v Inspector General of Police & 3 others*** case (supra). The Court held that the impugned provision is constitutional.

97. This Court is bound by the above finding of the Court of Appeal unless the decision is distinguishable. In this matter I will not attempt any differentiation. However, I hold a contrary position to the one rendered by the Court of Appeal. I am also aware that the Court of Appeal

has previously rendered different verdicts on similar issues. For instance, on 18th October, 2013 in ***Joseph Njuguna Mwaura & 2 Others v. Republic*** (2013) eKLR the Court of Appeal held that death sentence is constitutional whereas on 30th July, 2010 in ***Godfrey Ngotho Mutiso v. Republic*** (2010) eKLR the Court held that death sentence is unconstitutional. In another scenario, in ***Evanson Muiruri Gichane v. Republic*** (2010) eKLR and ***David Mwangi Mugo v. Republic*** the Court of Appeal held that the mandatory nature of death sentence is unconstitutional while in Criminal Appeal Nos. 87, 88 and 89 of 2007 ***Joseph Baariu Imiemba & 2 Others v. Republic*** the Court held that the mandatory nature of death sentence is constitutional. However, the conflicting decisions were settled by the Supreme Court in Petition Nos. 15 and 16 of 2015 ***Francis Karioko Muruatetu & another v Republic*** [2017] eKLR.

98. Given the possibility of this issue being handled by either a different bench of the Court of Appeal or by the Supreme Court in future, and for general jurisprudence, and for the record, with much humility and respect, may I be pardoned to briefly tender my position in respect to the impugned provision.

99. In doing so, I must make it clear that in the end, the finding of the Court of Appeal prevails.

100. I will begin by reiterating what the Court of Appeal stated in ***Haki Na Sheria Initiative v Inspector General of Police & 3 others*** case (supra) on the constitutional and statutory basis of public order. The Court remarked that the aspect of public order is variously provided for in the Constitution and statutes. It made precise reference to the various Articles of the Constitution and the sections of the law on public order.

101. The Court of Appeal, correctly so, found that the various rights and fundamental freedoms that come to play under public order are not absolute. Such, can be limited under Article 24 of the Constitution. The Court also dealt with the limitation of the rights and fundamental freedoms in arriving at the finding that the impugned provision is constitutional.

102. Having carefully read the said decision, I wish not to rehash how the Court arrived at its decision. However, I will look at the limitations on the various rights and fundamental freedoms posed by the said Section 5 of the Order Act against Article 24 of the Constitution and the criteria in the Canadian case in ***R. vs. Oakes***, 1986 CanLII 46 (SCC), [1986] 1 SCR 103.

103. Due to the centrality of **Article 24** of the Constitution in this discussion, I will reproduce the same as under: -

> *(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: -*
>
> > *(a) the nature of the right or fundamental freedom;*
> >
> > *(b) the importance of the purpose of the limitation;*
> >
> > *(c) the nature and extent of the limitation;*
> >
> > *(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*
> >
> > *(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*
>
> *(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom: -*
>
> > *(a) in the case of a provision enacted or amended on or after the Limitation of rights and fundamental freedoms, effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;*
> >
> > *(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and*
> >
> > *(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.*
>
> *(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.*
>
> *(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.*
>
> *(5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service: -*
>
> > *(a) Article 31—Privacy;*

(b) Article 36—Freedom of association;

(c) Article 37—Assembly, demonstration, picketing and petition;

(d) Article 41—Labour relations;

(e) Article 43—Economic and social rights; and

(f) Article 49—Rights of arrested persons.

104. I will also look at the decision in ***R. vs. Oakes***. The brief facts are that the Respondent, *David Edwin Oakes*, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the *Narcotic Control Act*, but was convicted only of unlawful possession. After the trial judge made a finding that it was beyond a reasonable doubt that the Respondent was in possession of a narcotic, the Respondent brought a motion challenging the constitutional validity of s. 8 of the *Narcotic Control Act*. That section provides that if the Court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he or she must be convicted of trafficking. The Ontario Court of Appeal, on an appeal brought by the Crown, found that this provision constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence now entrenched in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*. The Crown appealed and a constitutional question was stated as to whether s. 8 of the *Narcotic Control Act* violated s. 11(*d*) of the *Charter* and was therefore of no force and effect. Inherent in this question, given a finding that s. 11(*d*) of the *Charter* had been violated, was the issue of whether or not s. 8 of the *Narcotic Control Act* was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of s. 1 of the *Charter*.

105. The appeal was dismissed and the constitutional question answered in the affirmative. In so holding, the Supreme Court of Canada, then presided by the Chief Justice in a Seven-Judge bench discussed the criteria in ascertaining the manner in which a limitation to a right or fundamental freedom may be justified. The Court came up with a three-pronged criteria. **First**, the objective which the limitation is designed to serve. **Second**, the means chosen to attain the objective must be reasonable and demonstrably justified. This is the *proportionality test.* **Third**, the effect of the limitation.

106. On the ***objective test***, the Supreme Court stated as follows: -

> *69. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, …..… the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M Drug Mart Ltd., supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection.* ***It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important***.

107. On the ***proportionality test***, the Supreme Court stated that: -

> *70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R. v. Big M Drug Mart Ltd., supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances,* ***in each case courts will be required to balance the interests of society with those of individuals and groups***. *There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".*

108. On the third test, that is the ***effect*** of the limitation, the Supreme Court stated that: -

> *71. With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary.* ***The inquiry into effects must, however, go further.*** *A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society.* ***Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve.*** *The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.*

109. I will now juxtapose the provisions of Article 24 of the Constitution and the criteria in *R v. Oakes* with the provisions in Section 5 of the Order Act. To enable me do so with ease, I will reproduce Section 5 of the Order Act as under: -

> **"PART III – PUBLIC GATHERINGS**
>
> ***5. Regulation of Public meeting and Processions***

(1) No person shall hold a public meeting or a public procession except in accordance with the provisions of this section.

(2) Any person intending to convene a public meeting or a public procession shall notify the regulating officer of such intent at least three days but not more than fourteen days before the proposed date of the public meeting or procession.

(3) A notice under subsection (2) shall be in the prescribed form and shall specify—

(a) the full names and physical address of the organiser of the proposed public meeting or public procession;

(b) the proposed date of the meeting or procession and the time thereof which shall be between six o'clock in the morning and six o'clock in the afternoon;

(c) the proposed site of the public meeting or the proposed route in the case of a public procession.

(4) Where, upon receipt of a notice under subsection (2), it is not possible to hold the proposed public meeting or public procession for the reason that notice of another public meeting or procession on the date, at the time and at the venue proposed has already been received by the regulating officer, the regulating officer shall forthwith notify the organiser.

(5) The notification by the regulating officer under subsection (4) shall be in writing and shall be delivered to the organiser at the physical address specified pursuant to the provision of subsection (3).

(6) Where the regulating officer notifies the organiser of a public meeting or public procession in accordance with subsection (3) that it is not possible to hold the proposed meeting or procession, such public meeting or procession shall not be held on the date, at the time and venue proposed, but may, subject to this section, be held on such future date as the organiser may subsequently notify.

(7) The organiser of every public meeting or public procession or his authorised agent shall be present throughout the meeting or procession and shall assist the police in the maintenance of peace and order at the meeting or procession.

(8) The regulating officer or any police officer of or above the rank of inspector may stop or prevent the holding of— (a) any public meeting or public procession held contrary to the provisions of subsections (2) or (6); (b) any public gathering or other meeting or procession which, having regard to the rights and interests of the persons participating in such gathering, meeting or procession, there is clear, present or imminent danger of a breach of the peace or public order, and may, for any of the purposes aforesaid, give or issue such orders, including orders for the dispersal of the meeting, procession or gathering as are reasonable in the circumstances, having regard to the rights and freedoms of the persons in respect of whom such orders are issued and the rights and freedoms of others.

(9) Any person who neglects or refuses to obey any order given or issued under subsection (7) shall be guilty of an offence.

(10) Any public meeting or public procession held contrary to the provisions of subsections (1) and (5) shall be deemed to be an unlawful assembly.

(11) Any person who takes part in any public meeting or public procession deemed to be an unlawful assembly under subsection (10), or holds, convenes or organises or is concerned in the holding, convening or organising of any such meeting or procession shall be guilty of the offence of taking part in an unlawful assembly under Chapter IX of the Penal Code and liable to imprisonment for one year.

(12) The organiser of any excluded meeting may request the regulating officer that the police be present at such meeting to ensure the maintenance of peace and order.

(13) A request under subsection (12) shall be in writing and shall be delivered to the regulating officer at least three days before the proposed date of the meeting.

110. Sub-section 1 of the impugned provision mandatorily provides that no one can hold a public meeting or a public procession except in accordance with the provisions of the impugned section. I take offence with this provision for two reasons. First, the provision negates the supremacy of the Constitution as envisaged in Article 2 of the Constitution in that even though the Constitution variously provides for the manner in which some rights and fundamental freedoms touching on holding of public meetings and processions, may be exercised, the impugned sub-section 1 tends to, mandatorily so, contend that it is only that provision that applies to public meetings and processions. Two, the provision also negates any other law from applying to public meetings and processions.

111. Unlike the Order Act, the Police Act is very deliberate in the manner in which the said Act either captures various constitutional provisions verbatim or the spirit of the Constitution. For instance, Section 3 of the Police Act provides the objective of the Act as to give effect to *inter alia* the provisions of Articles 238, 239, 243, 247 and 244 of the Constitution. Sub-section 1, therefore, tramples upon the Constitution and the law.

112. Sub-section 3(b) of the impugned provision restricts the holding of meetings and processions to between six o'clock in the morning and six o'clock in the afternoon. In effect, the provision excludes the holding of peaceful public meetings between six in the afternoon and five in the morning.

113. Section 2 of the Order Act defines a "**public meeting"** to mean any meeting held or to be held in a public place, and any meeting which the public or any section of the public or more than fifty persons are or are to be permitted to attend whether on payment or otherwise. A **"public place"** is defined to mean any place to which for the time being the public or any section of the public are entitled or permitted to have access whether on payment or otherwise, and, in relation to any meeting to be held in the future, includes any place which will, on the occasion and for the purposes of such meeting, be a public place.

114. The Order Act applies to all public meetings. It does not make any exceptions at all. Given the wording of sub-section 3(b), it follows that the Order Act criminalizes public meetings held at night. Therefore, meetings such as overnight prayer meetings in Churches and prayers in mosques at night and early mornings stand outlawed since Churches and mosques are public places. In fact, sub-section 10 qualifies such meetings as unlawful assemblies.

115. The sub-section is, therefore, a serious affront to various rights and fundamental freedoms including the rights under Article 32 (freedom of conscience, religion, belief and opinion), Article 36 (Freedom of Association), Article 37 (Right to assembly), Article 39 (Freedom of movement) among others.

116. Further, the definition of a '*public meeting'* discriminates between meetings of less than 50 members from those of more than 50 members. According to the definition, a meeting of less than 50 persons cannot be deemed as a public meeting. However, a meeting of 51 members or more is deemed as a public meeting. The differentiation is not justifiable in an open and democratic society based on human dignity, equality and freedom. The provision infringes Article 27 of the Constitution.

117. Sub-section 4 of the impugned provision provides for only one reason where a regulating officer may decline to allow a public meeting or a procession. The only reason is that *'… it is not possible to hold the proposed public meeting or public procession for the reason that notice of another public meeting or procession on the date, at the time and at the venue proposed has already been received by the regulating officer…'.*

118. The position is impermissible. A regulating officer must exercise discretion on the basis of a wide range of considerations and in line with the powers and duties as provided for in the Constitution, the Police Act and any other law. Restricting a regulating officer to such an extent is unimaginable.

119. Sub-section 7 calls upon the organizer of a meeting or a procession to *mandatorily* assist the police in the maintenance of peace and order at the meeting or procession. The manner in which the organizer is to assist the police is not defined. Further, police work is a technical one where police officers undergo training prior to serving. Placing such a duty to a citizen amounts, to an extent, to an abdication of duty on the part of the police. It also places the organizer in such a vulnerable position in the hands of police officers and may be susceptible to abuse.

120. Sub-section 8 empowers the police to issue orders and directions stopping or preventing the holding of a public meeting or a procession. It also demands that such orders and directions by the police must be obeyed. What comes out of the sub-section is a grant of blanket powers to the police. The powers which the police ought to issue must be qualified to only those which are lawful. The Police Act is very deliberate on this. It states, times without number, that any orders to be issued by the police must be lawful orders. For instance, Section 49(2) and (4) of the Police Act is to the effect that any orders and directions given to a surbodinate police officer by a superior one must be lawful. The provisions state as follows: -

> *(2) Where any duty, power or discretion is imposed or conferred by this Act or any other law on a police officer of any specified rank or holding any specified office, the police officer, shall, in the performance of such duty or the exercise of such power or discretion, and subject to the* ***lawful orders and directions*** *of any police officer to whom the police officer is directly subordinate, and any senior police officer, if the occasion arises where it is expedient to do so, perform any such duty or exercise any such power or discretion.*
>
> *(4) A police officer who performs an official duty or exercises police powers shall perform such duty or exercise such power in a manner that is* ***lawful****.*

121. Section 51(1)(a) and (b) of the Police Act further provides that: -

> *(1) A police officer shall –*
>
> > *(a) obey and execute all* ***lawful orders*** *in respect of the execution of the duties of office which he may from time to time receive from his superiors in the Service;*
> >
> > *(b) obey and execute all orders and warrants l****awfully*** *issued;*

122. Section 51(2) of the Police Act cushions a police officer who fails to comply with an unlawful order in the following manner: -

> *A police officer who fails to comply with an* ***unlawful order*** *shall not be subjected to disciplinary proceedings.*

123. This Court further takes judicial notice of the fact that even the Director of Public Prosecutions has of late been warning police officers from issuing and executing unlawful orders.

124. Sub-section 8 is, hence, a provision which can be freely used to issue unlawful orders and directions. The omission of the words '*lawful orders and directions'* was deliberate with a view to create room for possible issuance of unlawful orders and directions. The provision is,

therefore, a threat not only to the Constitution, but also to the law. Since the provision is in contrast with the Constitution and the Police Act, then that provision must give way.

125. Sub-section 2 deals with notifying the police of the public meeting and procession. The requirement is totally in order. The police must be notified so that they may integrate such meetings and processions in their planning. Even without that provision in the Order Act still the requirement to notify the police of any meeting or procession stands. I say so because the Constitution and the Police Act gives powers to the Inspector General to oversee and co-ordinate all police operations in Kenya. Under Section 125 of the Police Act, the Inspector General has powers to make regulations on *inter alia* the use of police powers under the Act and generally for the good order and management of the police service towards attaining the objectives of the Service. One of the objectives is the maintenance of law and order. The Inspector General can, therefore, readily incorporate such a requirement on public meetings and processions in the regulations if not yet. (See the High Court in ***Ngunjiri Wambugu v. Inspector General of Police & 3 Others (2019) eKLR***).

126. Further, under Part IX, the Police Act provides for Community Policing Forums and Committees. The Forums and the Committees are geared towards attaining a cordial and close working relationship between the police and the public. That is in line with Article 244(e) of the Constitution. The committees include police officers in their membership and are charged with the duty, *inter alia*, to monitor the activities on the ground and to readily liaise with the police. The Committees and Forums also emphasize upon the members of public to involve the police whenever one intends to undertake a public engagement which may involve a public security element.

127. There is also the establishment of the County Policing Authority in each County under the Chair of the Governor. The said entities also come up with security measures including how law and order shall be maintained. Such orders must definitely deal with public meetings and processions. The police are also incorporated in their membership.

128. There is also the Police Reserve Unit. It also aids the police on matters of law and order.

129. With such provisions in the Constitution and the law, it is clear that the police are vested with ample power to require a convenor of a public meeting or a procession to notify them well in advance. Suffice to say, the requirement of notice in the Order Act is, therefore, subsumed in the Police Act.

130. Lastly, the offence of '*unlawful assembly*' created under sub-section 10 and the offence of '*taking part in an unlawful assembly'* created under Chapter IX of the Penal Code, and referred to in sub-section 11, although deemed to be the same under the impugned provision, are in reality not the same. Each of the offences has different ingredients. Sub-section 10, therefore, breeds confusion, uncertainty and unsettles the law in the Penal Code.

131. It is also the duty of this Court to consider the objective of the Order Act. The preamble states that it is an Act of Parliament to make provision for the maintenance of public order, and for purposes connected therewith. The Order Act was enacted on 13th June, 1950. By then Kenya was still under the colonial rule. Infact, that was the period when Kenyans began resisting the colonial rule through personalities and movements like *Mekatitlili wa Menza,* the *Mau Mau* and many others. The Order Act was, hence, specifically designed to deal with and suppress such initiatives by the locals in the name of maintaining law and order. Section 5 of the Order Act cannot, hence, stand in the advent of the Constitution of Kenya, 2010 which Constitution provides a robust and well-guarded Bill of Rights.

132. The above rationale was well captured in the Report dated 17th September, 2008 on the General Elections held in Kenya on 27th December, 2007 where it was noted that Section 5 of the Order Act was prone to abuse to suppress divergent political opinions. An extract of the Report states that:

> *The amendment to the Public Order Act removed the need for licenses and permits with respect to the holding of public meetings The Act also provides that no person shall be restricted from holding public meetings on account of political beliefs or opinions. This is one of the IPPG wins that sought to curb the misuse of public offices and resources to crash any opposition to incumbency.*

133. From the foregoing, it is apparent that Section 5 of the Order Act does not attain the threshold of limiting rights and fundamental freedoms as envisaged in Article 24 of the Constitution.

134. It is of essence to state that the Police Act which was enacted on 30th August, 2011 comprehensively covers all aspects of public order. As said, the Police Act has incorporated the relevant provisions of the Constitution in its 132 sections and the Schedules thereto. It is high time, therefore, that the Police Act be accorded the opportunity to, as intended in its preamble, *'…. give effect to Articles 243, 244 and 245 of the Constitution; to provide for the operations of the National Police Service; and for connected purposes'*.

135. In the end, I must state that I would have found Section 5 of the Order Act to be unconstitutional, hence, void and of no legal effect. However, as I stated when I was initiating this discussion and in keeping with the doctrine of *stare decisis*, the decision by my Lordships in Nairobi Civil Appeal No. 261 of 2018 ***Haki Na Sheria Initiative v. Inspector General of Police & 3 others*** case (supra) must prevail.

136. This Court now returns the verdict that Section 5 of the Order Act is constitutional.

Conclusion and Disposition:

137. The Petition has, therefore, partly succeeded. Whereas the Petitioner has succeeded in proving that the directives issued by NSAC on 7th October, 2020 and ratified by the Cabinet on 8th October, 2020 are unconstitutional, it has failed to prove that Section 5 of the Order Act is unconstitutional.

138. In the end, the following final orders hereby issue: -

(a) A declaration be and is hereby issued that all the directives made by the National Security Advisory Committee on 7th October 2020 and ratified by the Cabinet on 8th October 2020 for the use of section 5 of the Public Order Act Cap 56 of the Laws of Kenya to contain, restrict and prohibit public gatherings, meetings and processions in the name of combating Covid-19 and containing the weaponization of public gatherings are unlawful, unconstitutional and in violation of Articles 10(2)(a) and 245(2) (b) and (4) of the Constitution for directing the law enforcement officers on how to discharge their duties.

(b) An order of Certiorari be and is hereby issued calling into this Court and quashing the entire directives made by the National Security Committee on 7th October 2020 and ratified by the Cabinet on 8th October 2020, for the use of section 5 of the Public Order Act Cap 56 of the laws of Kenya to contain, restrict and prohibit public gatherings, meetings and processions in the name of combating Covid-19 and containing the weaponization of public gatherings.

(c) An order of prohibition be and is hereby issued restraining the Inspector General of Police whether by himself or any police officer under its command from taking directives from the National Security Advisory Committee and/or any other person, organ, body or entity in the manner in which the Inspector General of Police or its officers should carry out their constitutional and statutory duties save for the provisions of Articles 157(4) and 245(4) of the Constitution.

(d) There shall be no order as to costs as the matter is a public interest litigation.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **18th** day of **August, 2021.**

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Kurgat and **Mr. Havi,** Learned Counsel for the Petitioner.

Mr. Bitta, Learned Counsel instructed by the Honourable Attorney General for the Respondents.

Elizabeth Wambui – Court Assistant.