REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 163 OF 2019

(FORMERLY MACHAKOS HIGH COURT PETITION NO. 7 OF 2019)

BETWEEN

OKIYA OMTATAH OKOITI.....1ST PETITIONER

NYAKINA CHARLES GISEBE.....2ND PETITIONER

CHARLES OMBOKO.....3RD PETITIONER
DAVID MUNYAO MWANZA.....4TH PETITIONER

VINCENT MUILI MUINDI.....5TH PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

KENYA LAW REFORM COMMISSION.....2ND RESPONDENT

NATIONAL ASSEMBLY.....3RD RESPONDENT

JUSTIN BEDAN NJOKA MUTURI.....4TH RESPONDENT

KENNETH MAKELO LUSAKA.....5TH RESPONDENT

CABINET SECRETARY MINISTRY OF INFORMATION

COMMUNICATION & TECHNOLOGY.....6TH RESPONDENT

AND

COUNCIL OF GOVERNORS.....1ST INTERESTED PARTY

KATIBA INSTITUTE.....2ND INTERESTED PARTY

LAW SOCIETY OF KENYA.....3RD INTERESTED PARTY

CHILD WELFARE SOCIETY.....4TH INTERESTED PARTY

COMMUNICATIONS AUTHORITY OF KENYA....5TH INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioners in this matter have lodged the present Petition to challenge the constitutionality of amendments made to various statutes vide the **Statute Law (Miscellaneous Amendments) Act, 2018** (hereinafter referred to as **"**the Amendment Act" or "the impugned Act"). They argue that the amendments are unconstitutional and therefore invalid, null and void. The reasons they advance are that the manner in which the said amendments were effected violated various constitutional provisions. In particular, they argue that the Amendment Act introduced substantive amendments which ought to have been done through stand-alone Bills and was an abuse of the proper purpose of miscellaneous amendment Bills. It was also, in their view, in contempt of court for disregarding precedents that prohibit use of miscellaneous amendments to effect substantive amendments in the law.

2. The Petitioners further argue that the enactment of the Amendment Act was in violation of the constitutional principle that requires participation of the public in the enactment of legislation. It is their case that the period of seven (7) days given to the public to participate in the process of amendment was so short that no meaningful participation would have taken place in view of the fact that there were 69 pieces of statutes contained in the Bill. They therefore ask the court to declare the entire Amendment Act unconstitutional, null and void.

The Parties

3. Okiya Omtatah Okoiti and Nyakina Wycliffe Gisebe, the 1st and 2nd Petitioners, are residents of Nairobi City County and members of the Kenyans for Justice and Development Trust, a legal trust incorporated in Kenya. Charles Omboko, David Munyao Mwanzia and Vincent Muili Muindi, the 3rd 4th and 5th Petitioners are described as residents of Machakos County. In their Petition dated 7th March 2019 and supported by an affidavit sworn by the 1st Petitioner, the Petitioners describe themselves as public spirited individuals and human rights defenders

4. The Petitioners have brought their Petition against several Respondents based on the various roles they played in relation to the enactment of the Amendment Act. The Attorney General has been sued as the 1st Respondent in his capacity as the legal adviser and representative of the Government of Kenya within the meaning of Article 156 of the Constitution and the Office of the Attorney General Act, No. 49 of 2012. The 2nd Respondent is the Kenya Law Reform Commission which is established by the Kenya Law Reform Commission Act, No. 19 of 2013 with the mandate to review the laws of Kenya and to prepare new legislation to give effect to the Constitution. The Commission has been sued for failing to protect the public from the continued use by Parliament of Statute Law (Miscellaneous Amendments) Bills to 'sneak' in substantive and controversial amendments into statutes, even after the High Court had condemned the practice.

5. The 3rd Respondent is the **National Assembly** which the Petitioners allege has been acting without transparency and *ultra vires* the Constitution when it effected substantive changes to numerous statutes using the Statute Law (Miscellaneous Amendments) Bill, 2018. The 4th Respondent, Hon. *Justin* Bedan Njoka *Muturi,* is the seventh Speaker of the National Assembly of Kenya and an *ex-officio* member of the National Assembly and presides over sittings of the National Assembly by dint of Article 97(1) (d) and Article 107 of the Constitution. The 4th Respondent has been sued for having disregarded decisions of the High Court prohibiting the use of Statute Law (Miscellaneous Amendments) Bills to effect substantive amendments to statutes, and which were brought to his attention through a point of order during debate on the Amendment Act.

6. Hon. Kenneth Makelo Lusaka**,** the Speaker of the **Senate** is joined to the proceedings as the 5th Respondent. The claim against him is that he was in dereliction of his duties under the Constitution for failing to determine that the Statute Law (Miscellaneous Amendments) Bill, 2018 was a Bill concerning county governments within the meaning of Article 110 of the Constitution.

7. The Petitioners also joined several Interested Parties to the Petition on the basis that they have an identifiable stake or legal interest or duty in the proceedings. The 1st Interested Party is the Council of Governors, the 2nd Interested Party is Katiba Institute, while the 3rd Interested Party is the Law Society of Kenya. The Child Welfare Society was joined as the 4th Interested Party upon application to the Court.

8. In the course of the proceedings, this Court joined the Communications Authority of Kenya as the 5th Interested Party and the Cabinet Secretary for Information Communication and Technology as the 6th Respondent. The joinder was necessitated by an application by the Petitioners seeking conservatory orders to suspend the implementation of the amendments made by the Amendment Act to the Kenya Information and Communications Act, 1998 (No. 2 of 1998) with regard to appointment of the Board of Directors of the 5th Interested Party.

9. The parties' respective cases are detailed in the following sections. We note that the 1st and 3rd Interested Parties did not enter any appearance nor participate in the hearing of this Petition. The 2nd Interested Party supported the Petition and for this reason, its arguments will be presented after the Petitioners' case. The 4th and 5th Interested Parties opposed the Petition, and their respective cases will be presented in the section on the responses to the Petition.

The Petitioners' Case

10. The Petition is supported by an affidavit sworn on 7th March 2019 by the 1st Petitioner and supplementary affidavits sworn on 14th March 2019 by the 4th Petitioner, and on 18th March 2019 and 7th June 2019 by the 1st Petitioner. The Petitioners also filed submissions dated 26th June 2019. The 2nd Interested Party, which was supporting the Petitioners' case, indicated that it would rely on the Petitioners' pleadings and would only file submissions on the legal arguments.

11. The Petitioners have raised various grievances against the impugned Act. Firstly, that Statute Law (Miscellaneous Amendments) Bills,

otherwise known as *omnibus Bills,* ordinarily contain minor amendments to various Acts of Parliament and are used to correct typographical errors, mistakes in cross-referencing, out-dated terminology or errors which are minor, non-controversial amendments to a number of statutes at once in one Bill, instead of making such amendments incrementally, or when a particular statute is being amended in the context of a separate legislative initiative. On the other hand, that where the Legislature wishes to make substantive amendments, it must do so via a stand-alone Bill that allows for full scrutiny, including by being subjected to effective public participation.

12. The Petitioners contended that the High Court has held this to be the position in various decisions. They cited in this regard the decisions in **Law Society of Kenya vs Attorney General & Another, (2016) eKLR; Okiya Omtatah Okoiti vs Communications Authority of Kenya & 21 Others, (2017) eKLR; Josephat Musila Mutua & 9 Others vs Attorney General & 3 Others (2018) eKLR;** and ***Mercy Munee Kingoo & Another vs Safaricom Limited & Another, (2016) eKLR***. The Petitioners pointed out that the reference in the Memorandum of Objects and Reasons of the Bill to the Statute Law (Amendment Bill), 2018 instead of the Statute Law (Miscellaneous Amendments) Bill, 2018, is deliberate and substantive.

13. The Petitioners also referred the Court to the proceedings in the Hansard where a member of the National Assembly voiced his concerns before the second reading of the Bill and cautioned the Speaker that the Bill could be unconstitutional as it sought to make various wide-ranging amendments. However, that in response, the Speaker stated that there was nothing unconstitutional about the Bill, and deliberately and contemptuously ignored the decisions of the superior courts that prohibited the use of miscellaneous amendments to effect substantive changes to statutes.

14. The Petitioners further argued that contrary to the claim by the National Assembly in the newspaper advertisement relating to the intended amendments that the Bill was for *"amendments which do not merit the publication of separate Bills",* various changes proposed in the Bill were not only wide-ranging but substantive and controversial. Examples provided by the Petitioners were the amendments proposed to the Industrial Property Act, 2001 (No. 3 of 2001), the Children Act, 2001 (No. 8 of 2001), the Labour Relations Act, 2007, (No. 14 of 2007), the Anti-Counterfeit Act, 2008, (No. 13 of 2008), and the Wildlife Conservation and Management Act (No. 47 of 2013). The Petitioners also provided a detailed table of amendments made to various statutes which they contended were substantial and did not warrant the manner in which they were passed.

15. The Petitioners argued, secondly, that the impugned Amendment Bill 2018 was published on 10th April 2018 and read for the first time on 18th April, 2018. Further, that on 7th May 2018, the National Assembly placed advertisements in the press calling on members of the public to submit memoranda containing any representations they may have on the Bill, and that the deadline for making the presentations was Monday, 14th May 2018, at 5.00 pm. They contended therefore that the public was given only seven days within which to make comments on the 69 pieces of statutes contained in the Bill. It was their case that the amendments were critical and affected the rights and fundamental freedoms in the Constitution, yet the public, whom the amendments were directed at, were not consulted as required under Article 109(1) of the Constitution.

16. The Petitioners' third grievance related to the errors on the statutes sought to be amended by the impugned Amendment Bill. They contended that the newspaper advertisement incorrectly indicated that the Bill contained proposals to amend 68 pieces of legislation yet the correct number was 69, and that the Memorandum of Objects and Reasons to the Bill only contained 60 statutes. In addition, that amendments to the Public Finance Management Act, 2012, contained in the Amendment Act were not in the Bill, while the Bill's Explanatory Memorandum omitted nine (9) statutes which were in the Bill. They alleged further that some statutes were referred to in the Memorandum of Objects but were omitted from the advertisement, namely, the Kenya Revenue Authority Act, 1995 (No. 2 of 1995), the National Hospital Insurance Fund Act 1998 (No. 4 of 1998), and the Public Private Partnership Act, 2013 (No. 15 of 2013).

17. Lastly, the Petitioners contended that amendments to a number of statutes concerned county governments but were not subjected to the Senate for consideration as required under Article 110 of the Constitution as read with the Fourth Schedule to the Constitution. A lengthy list of the said statutes was outlined in the Petition and in the prayers sought by the Petitioners.

18. In their reply to the responses from the Respondents, the Petitioners deponed and reiterated that they have established a *prima facie* case that the Amendment Act is unconstitutional and that the legislative powers of Parliament must be exercised strictly in accordance with the Constitution as provided under Articles 1(1), 2, 3(1), 10, 24, 93(2), 94(4) and 259(1) of the Constitution. They argued further that courts of competent jurisdiction in Kenya and around the world have decreed that omnibus Bills are strictly for effecting editorial and not substantive changes to legislation. It was their contention that this court is vested with jurisdiction and is enjoined to interfere where policy decisions contravene the Constitution.

19. It was the Petitioners' deposition that the privileges accorded to the 4th and 5th Respondents pursuant to Article 117 of the Constitution and section 12 of the Parliamentary Powers and Privileges Act No. 29 of 2017 are just privileges and immunities to be enjoyed only where they discharge their mandate in good faith and strictly in accordance with the law. Further, that the failure to determine that the impugned Bill concerned county governments amounted to dereliction of duty and as such they cannot claim to have acted in good faith and with due diligence expected of them. In the premises, the Petitioners argued that the Preliminary Objection by the 4th and 5th Respondent that they were wrongly joined to the Petition is incompetent as it does not raise any point of law upon which the Petition may be disposed of.

20. The Petitioners also reiterated that there was no reasonable and meaningful public participation and stakeholder consultation on the impugned amendments and the claim by the National Assembly in its press adverts calling for public participation was false and misled the public and resulted in a situation in which it was not possible to hold effective public participation. In any event, the seven-day period allowed for members of the public to submit memoranda containing their representations on the Bill, which contained some 69 pieces of regulation, was grossly inadequate.

21. On the amendments to the Registration of Persons Act, establishing the National Integrated Identity Management System (NIIMS) it was the Petitioners' averment that NIIMS is totally unnecessary for purposes of identifying Kenyans since the Integrated Population Registration System (IPRS) already collects data from a dozen databases held by various government agencies. It was also their case that the State is yet

to adopt data protection legislation to govern the collection, centralisation and sharing of this type of data. In their view, the capacity the State is building through NIIMS to be able to geographically locate every individual in Kenya with precision is not required for purposes of identification of persons but for the murky and sinister purpose of mass surveillance, monitoring, and tracking of the general population contrary to Article 31 of the Constitution.

22. The Petitioners argued, further, that the claim that Kenya lacks the capacity to collect DNA is an admission that the National Assembly was out of touch with reality when it enacted the impugned amendments which in this context are superfluous and violate the law. The Petitioners averred that whereas the right to privacy is not absolute and can be limited, the obligation is upon the State to demonstrate that the limitation is justifiable under the Constitution as provided for under Article 24.

23. With regard to the amendments to the Kenya information and Communication Act (KICA), the Petitioners averred that there is no justification for eliminating the selection panel under section 6B of KICA as that provision of law ensured that Article 34(2)(a) and (5)(2)(a) would be adhered to through an objective process. The Petitioners contended that contrary to its averments, the 5th Interested Party had not demonstrated how the impugned amendments place the appointment of the Board of Directors of the Communications Authority of Kenya (CAK) in line with the appointment of members of other Boards of State agencies. Further, unlike the Boards with no express constitutional underpinnings, the said Board is expressly required under Article 34(2)(a) and (5)(a) of the Constitution to be free of government control.

24. With regard to the amendments to the Children Act, it was the Petitioners' averment that since the process of developing the Children Bill, 2018 was an on-going government process, there was no tangible reason why the impugned amendments to the Children Act could not be considered through a legitimate process. They noted that the proposed amendments to the Children Act were necessitated by, among others, the emerging issues on children such as adoption and establishment of the Central Adoption Authority and administrative issues like separation of the National Council for Children's Services from the Department of Children's Services in compliance with the Constitution of Kenya, 2010.

25. The Petitioners therefore seek a raft of remedies as follows:

I. The following Declarations:

1. THAT ***the National Assembly violated Articles 1(1), (2) & 3(a); 2(1) & (2); 3(1); 4(2); 10; 93(2); 95(3); 94(4); 109(1); 118; and 259(1) of the Constitution.***

2. THAT **the National Assembly's continued use of the Statute Law (Miscellaneous Amendments) Acts to effect substantive changes to various pieces of legislation is a violation of the Constitution and, therefore, fatal to the said amendments.**

3. THAT the National Assembly's decision to use the Statute Law (Miscellaneous Amendments) Act, 2018 to effect substantive and controversial changes to various statutes contrary to the findings and holdings of Kenyan Courts that such Acts could only be used for minor and non-controversial amendments was fatal to and voided the entire Act.

4. THAT the National Assembly's continued use of Statute Law (Miscellaneous Amendments) Acts to effect substantive changes to various pieces of legislation constitutes contempt of Court in view of the following decisions:

a. Law Society of Kenya v Attorney General & another [2016] eKLR;

b. Okiya Omtatah Okoiti v Communications Authority of Kenya & 21 others [2017] eKLR;

c. Josephat Musila Mutual & 9 others v Attorney General & 3 others [2018] eKLR;

d. Mercy Munee Kingoo & Another v Safaricom Limited & Another [2016] eKLR;

5. THAT because they were substantive and not minor or insignificant, the amendments made by the Statute Law (Miscellaneous Amendments) Act, 2018 to sections enumerated in paragraph 8 herein of statutes are invalid, null and void.

6. THAT because they affected statutes ***concerning county governments within the meaning of Article 110 of the Constitution but they were not committed to the Senate,*** **the amendments made by the Statute Law (Miscellaneous Amendments) Act, 2018 to the following statutes are invalid, null and void:**

a. The Public Archives and Documentation Service Act (Cap. 19);

b. The Registration of Persons Act (Cap 107);

c. The Housing Act (Cap 117);

e. The Kenya Ports Authority Act (Cap.391);

e. The Traffic Act (Cap. 403);

f. The Export Processing Zones Act, 1990, (Cap 517);

g. The National Environment Management and Co-ordination Act 1999 (No. 8 of 1999);

h. The Kenya Roads Board Act, 1999 (No. 7 of 1999);

i. The Children Act, 2001 (No. 8 of 2001);

j. The Labour Relations Act, 2007, (No. 14 of 2007) ;

k. The Alcoholic Drinks Control Act (No. 4 of 2010);

l. The Tourism Act, 2011 (No. 28 of 2011);

m. The National Construction Authority Act, 2011 (No.41 of 2011);

n. The Land Act, *2012 (No. 6 of 2012);*

o. The Kenya Institute of Curriculum Development Act, 2013 (No. 4 of 2013);

p. The Kenya Agricultural and Livestock Research Act, 2013(No. l7 of 2013);

q. **The Wildlife Conservation and Management Act (No. 47 of 2013);**

r. The National Drought Management Authority Act, 2016 (No. 4 of 2016) ;

s. The Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016 (No. 33 of 2016);

t. The Forest Conservation and Management Act, 2016 (No. 34 of 2016).

7. THAT because they had been considered and passed by both the Senate and the National Assembly, yet amendments to them were not subjected to consideration by the Senate, the amendments made by the Statute Law (Miscellaneous Amendments) Act, 2018 to the following statutes are invalid, null and void:

a. The Alcoholic Drinks Control Act;

b. The Public Finance Management Act;

c. The National Youth Service Act (Cap. 208);

d. The Universities Act, 2012;

e. The National Drought Management Authority Act, 2016;

f. The National Environment Management and Co-ordination Act 1999;

g. The Registration of Persons Act;

h. The Forest Conservation and Management Act, 2016;

i. The Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016.

8. THAT no reasonable and meaningful public participation and stakeholder consultation was held on the Statute Law (Miscellaneous Amendments) Bill, 2018.

9. THAT any proposed amendments to a statute which was considered and passed by both Houses of Parliament must be approved with the concurrence of both the Senate and the National Assembly, otherwise the amendment in issue is unconstitutional and, therefore, invalid, null and void.

10. THAT *to* qualify for inclusion in a miscellaneous amendments bill, a proposed amendment must meet the following criteria:

- **not be controversial;**
- **not involve the spending of public funds;**
- **not affect the application of the Constitution and must not limit the enjoyment of the rights and fundamental freedoms in the Bill of Rights; or**

- **not create new offences or subject a new class of persons to an existing offence.**

11. THAT ***on Tuesday 28th August 2018, during debate on Statute Law (Miscellaneous Amendments) Bill, 2018 the Hon. Justin Bedan Njoka Muturi, the seventh Speaker of the National Assembly of Kenya, acted in contempt of Court when he deliberately and contemptuously disregarded the caution by Hon. (Dr.) Otiende Amollo MP that the High Court had prohibited the use of Statute Law (Miscellaneous Amendments) Bills to effect substantive amendments to statute.***

12. THAT the Hon. Kenneth Makelo Lusaka, the Speaker of the Senate, failed in his duties under Article 110(3) of the Constitution **for failing to determine that the Statute Law (Miscellaneous Amendments) Bill, 2018 was a Bill concerning county governments within the meaning of Article 110 of the Constitution.**

13. THAT due to the inclusion of amendments to the Public Finance Management Act, in the Statute Law (Miscellaneous Amendments) Act, 2018, the National Assembly debated a different Bill from the one that was subjected to public participation and, therefore, the entire Statute Law (Miscellaneous Amendments) Act, 2018 is void.

14. THAT ***the Statute Law (Miscellaneous Amendments) Bill, 2018, did not have a*** **Memorandum of Objects and Reasons.**

15. THAT the Statute Law (Miscellaneous Amendments) Bill, 2018 was incompetent as a Bill of Parliament.

16. THAT the amendments made to the Registration of Persons Act Cap 107 Laws of Kenya vide the Statute Law Miscellaneous (Amendment) Act No. 18 of 2018, establishing ***the National Integrated Identity Management System (NIIMS)*** **are unconstitutional, and therefore, invalid, null and void.**

17. THAT the Statute Law (Miscellaneous Amendments) (No.2) Bill, 2018 poses a threat to the rule of law and to the Constitution.

18. THAT the Kenya Law Reform Commission has failed to protect the public from the continued use by Parliament of Statute Law (Miscellaneous Amendments) Bills to sneak substantive and controversial amendments into statutes, even after the High Court had condemned the practice.

II. The following Orders:

1. Quashing of both ***the Statute Law (Miscellaneous Amendments) Act, 2018 (National Assembly Bill No. 12 of 2018) and the*** **Statute Law (Miscellaneous Amendments) (No.2) Bill, 2018 (*National Assembly Bill No. 13 of 2018).***

2. Quashing of the amendments made by the Statute Law (Miscellaneous Amendments) Act, 2018 to the following sections referred to in paragraph 8 of the Petition.

3. Quashing of ***the amendments made by the Statute Law (Miscellaneous Amendments) Act, 2018 to the following statutes:***

a. The Public Archives and Documentation Service Act (Cap. 19);

b. The Registration of Persons Act (Cap 107);

c. The Housing Act (Cap 117);

d. The Kenya Ports Authority Act (Cap.391);

e. The Traffic Act (Cap. 403);

f. The Export Processing Zones Act, 1990, (Cap 517);

g. The National Environment Management and Co-ordination Act 1999 (No. 8 of 1999);

h. The Kenya Roads Board Act, 1999 (No. 7 of 1999);

i. The Children Act, 2001 (No. 8 of 2001);

j. The Labour Relations Act, 2007, (No. 14 of 2007) ;

k. The Alcoholic Drinks Control Act (No. 4 of 2010);

l. The Tourism Act, 2011 (No. 28 of 2011);

m. The National Construction Authority Act, 2011 (No.41 of 2011);

n. The Land Act, *2012 (No. 6 of 2012);*

o. The Kenya Institute of Curriculum Development Act, 2013 (No. 4 of 2013);

p. The Kenya Agricultural and Livestock Research Act, 2013(No. l7 of 2013);

d. The Wildlife Conservation and Management Act (No. 47 of 2013);

r. The National Drought Management Authority Act, 2016 (No. 4 of 2016) ;

s. The Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016 (No. 33 of 2016);

t. The Forest Conservation and Management Act, 2016 (No. 34 of 2016)*;*

u. The Public Finance Management Act;

v. The Universities Act, 2012;

w. The National Drought Management Authority Act, 2016;

x. The Forest Conservation and Management Act, 2016;

y. The Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016.

4. Quashing of *the Statute Law (Miscellaneous Amendments) Act, 2018, in its entirety*

5. Prohibiting of Parliament from using miscellaneous amendment bills or omnibus bills to effect substantive changes *to statute unless the proposed amendments meet the following criteria:*

a. are not be controversial;

b. do not involve the spending of public funds;

c. do not affect the application of the Constitution and do not limit the enjoyment of the rights and fundamental freedoms in the Bill of Rights; and

d. do not create new offences or subject a new class of persons to an existing offence

6. Prohibiting implementation of the National Integrated Identity Management System (NIIMS) *pursuant to the amendments made to the Registration of Persons Act Cap 107 Laws of Kenya vide the Statute Law Miscellaneous (Amendment) Act No. 18 of 2018.*

7. An Order compelling the Hon. Justin Bedan Njoka Muturi to pay from his salary an amount of money determined by the Court as punishment for the contempt of Court.

8. That the Respondents to pay to the Petitioners' the costs of this suit.

9. Any other appropriate relief the court may deem just to grant.

The Respondents' Cases

The 1st Respondent's Case

26. The Attorney General filed a reply in opposition to the Petition dated 26th April 2019. He also relied on a replying affidavit sworn on 13th March 2019 by Dr. (Eng.) Karanja Kibicho, the Principal Secretary in the Ministry of Interior & Co-ordination of National Government. It was the 1st Respondent's case that the existing Parliamentary Standing Orders made under Article 124 of the Constitution provide for public participation, and that the Petitioners had conceded in their Petition that the Bill leading to the Amendment Act was published. It is his case that the public was made aware that it was intended to make various amendments to statute law and was afforded the opportunity to present memoranda on the same.

27. In rejecting the Petitioners' contention that the Bill was not subjected to public participation, the 1st Respondent stated that the Bill was in the legislative process from 14th April to 20th November 2018, a period of seven months. That during this period, it was open for members of the public to make their input, including through writing of memoranda to the President before his assent to the Bill. The 1st Respondent further contended that the Petition was anchored on views of two members of Parliament as opposed to the majority of members which should be taken into account in a majoritarian democratic process. Furthermore, that the Petitioners are relying on select excerpts of the

Parliamentary Hansard reports which are subject to misinterpretation outside the context of the entire proceedings.

28. It was further the 1st Respondent's case that it would amount to judicial overreach if this Court were to assume the constitutional powers vested in Parliament to decide what is to be provided in a Parliamentary Bill in the absence of clear and specific prescriptions of the Constitution. The 1st Respondent averred that no provision in the Constitution requires miscellaneous amendments to be for limited purposes as alleged by the Petitioners. Additionally, that the only body vested with legislative mandate under the Constitution is the National Assembly and as such it has the sovereign mandate to decide whether an amendment merits a separate Bill or not. In his view, the invitation to this Court to decide otherwise would be usurpation of the constitutional prerogative of the legislative arm of Government.

29. The 1st Respondent contended that the Petition does not disclose any breach of the Petitioners' or any other person's rights under the Bill of Rights. Further, that the prayers sought in the Petition will occasion great and disproportionate harm to the public by impairing already functioning governance processes in numerous public institutions.

30. On the Petitioners' reference to and reliance on various court decisions regarding use of omnibus Bills, the 1st Respondent contended that the decisions were non-binding determinations by courts of concurrent jurisdiction and were distinguishable, and that the National Assembly was not a party thereto. Further, that the traditions and legislative practices in comparative jurisdictions cannot be relied on to declare Kenyan Acts of Parliament unconstitutional.

31. With regard to the prayer to cite the Speakers of both Houses for contempt of court, the 1st Respondent averred that this Court lacks jurisdiction to exercise disciplinary control over them in the manner sought, and that any contempt of court has to be determined by the court which issued the orders alleged to have been violated. It was also contended that the parts of the Petition that are in respect of NIIMS are *sub judice* as the matter is the subject of active judicial proceedings in Nairobi High Court Consolidated Petitions Number 56,58 and 59 of 2019.

32. In his replying affidavit, Dr. (Eng) Karanja Kibicho focused specifically on NIIMS. He averred that under section 9A(3) of the Registration of Persons Act, he has the responsibility of administering NIIMS, and he gave a detailed background to its conceptualization and development, arising from the need for reliable data for the government to adequately plan for and deliver critical services to its citizens, and the existence of multiple registration systems which resulted in duplication of efforts, wastage of resources and risks as to the accuracy and reliability of the data collected.

33. Dr. Kibicho stated that the purposes of NIIMS are to harmonize and facilitate sharing of population data from all existing databases; to create and manage a central master population database which will be the single source of truth on a person's identity data for citizens and foreign nationals residing in Kenya; and to undertake national biometric registration of all citizens and foreign nationals residing in Kenya. He also listed the expected benefits of NIIMS, and stated that by implementing NIIMS, the government of Kenya is adopting technology to aid it in service delivery in line with current global trends.

34. Dr. Kibicho detailed the steps taken in the implementation of NIIMS. He stated that the government has spent a lot of money, time and other resources in actualizing NIIMS, including development of software, training of personnel and the conduct of a pilot phase between 18th February 2018 and 22nd February 2018. He denied that the government will require Deoxyribonucleic Acid (DNA) and Global Positioning System (GPS) information in the NIIMS registration, stating that on the contrary, it has no capacity to collect the said information from all Kenyans.

35. Lastly, Dr. Kibicho averred that he has personally sensitized members of the public through various public fora and media on NIIMS to complement similar efforts of the government. In his view, members of the public and requisite stakeholders were given sufficient notice and adequate opportunity to participate in the consideration of the issues in the Bill. Further, that members of the National Assembly, being the duly elected representatives of the people of Kenya, effectively represented the citizenry in the consideration and passage of the amendments. He expressed the opinion that the amendments effected on the Registration of Persons Act are not substantive since the personal information required for the registration of individuals under NIIMS is essentially similar to the personal information required for registration under the registration systems which were already in existence before the impugned amendments.

The 2nd Respondent's Case

36. The 2nd Respondent, Kenya Law Reform Commission**,** opposed the Petition through its Grounds of Opposition dated 14th May 2019. It was its case that the Petition did not disclose with precision the manner in which the Amendment Act violated the Constitution, and that there is no constitutional restriction in the manner in which Parliament could exercise its constitutional mandate under Article 94. It was also its contention that it is the prerogative of Parliament to decide the nature in which legislation is to be enacted.

37. The 2nd Respondent further averred that the Petition was an abuse of Court process and the doctrine of separation of powers since the Petitioners are asking the Court to substitute its views with those of Parliament in violation of Article 94(1) of the Constitution. It was its case that the Petitioners had failed to demonstrate the manner in which Parliament's exercise of its constitutional mandate violated Article 118 of the Constitution.

38. With regard to the Petitioners' arguments that the impugned Bill did not conform to precedents set by courts, the 2nd Respondent contended that such non-conformity did not impugn the constitutionality of the Act. In its view therefore, the Petitioner's challenge had no constitutional basis.

39. The 2nd Respondent averred that the Petition was challenging the constitutionality of a substantive number of statutory provisions, which impacts on the legislative mandate of Parliament. In its view, the orders sought are contrary to public interest and the doctrine of separation of powers. It therefore urged the Court to dismiss the Petition with costs,

The 3rd Respondent's Case

40. The 3rd Respondent, the National Assembly, filed Grounds of Opposition dated 15th March 2019 and a replying affidavit sworn on 2nd May 2019 by its Clerk, Michael Sialai. It is the 3rd Respondent's case that the Petition threatens the legislative role of the National Assembly under Articles 1(1), 94 and 95 of the Constitution, and seeks to restrict the National Assembly from carrying out its constitutional mandate derived from Article 95 (3) of the Constitution by enacting the Amendment Act. Further, that the Petition contravenes Article 109 of the Constitution which mandates Parliament to enact, amend or repeal any law through Bills passed and assented to by the President.

41. According to the 3rd Respondent, the statutes enacted by Parliament pursuant to its mandate under Article 94 of the Constitution are presumed constitutional and fair. What is required is that the legislature facilitates public participation on the Bill under consideration by the House. Further, that the burden falls on the person who alleges otherwise to rebut this presumption, and if the purpose and/or the effect of the statute do not infringe on a right guaranteed by the Constitution, the statute is not unconstitutional.

42. To demonstrate that the legislative process was carried out constitutionally and that public participation was facilitated by the National Assembly, Mr. Sialai gave a detailed account of the process of the enactment of the impugned Act, from the time of the introduction, first reading and committal of the Statute Law (Miscellaneous Amendments) Bill (National Assembly Bill No. 12 of 2018) to Departmental Committees on 18th April 2018, to the time of assent to the Bill by the President on 31st December 2018 in exercise of powers conferred on him under Article 115 of the Constitution.

43. In particular, Mr Sialai pointed out that on 7th May 2018, the National Assembly facilitated public participation through print media by placing an advertisement in the *Standard* and *Daily Nation* newspapers asking for memoranda from stakeholders. He states that the various National Assembly Departmental Committees held stakeholder meetings from 7th May 2018 and 20th June 2018. He further avers that the said National Assembly Departmental Committees compiled their reports having taken into account the nature of the concerns of the different stakeholders, and the reports were laid before the National Assembly on 3rd July, 2018. Lastly, that between 7th August 2018 and 15th November 2018**,** the National Assembly, taking into account the concerns of the different sectors, considered and passed the Impugned Bill before it was forwarded to the President for assent.

44. The 3rd Respondent annexed copies of the Bill, the National Assembly Hansard proceedings of 18th April, 2018 and of the debates on the Bill, the advertisement in the *Nation* and *Standard* newspapers of 7th May, 2018, the Kenya National Commission on Human Rights review of the Bill dated 25th May, 2018 and the various Reports on the Bill from the National Assembly Departmental Committees as laid in the House.

45. To buttress the propriety of the procedure adopted in the impugned Bill, the 3rd Respondent averred that Article 124 of the Constitution allows each House of Parliament to establish its own procedures for conduct of proceedings in the House. It was its contention that it has set out the procedure in Standing Orders 113 to 165 of the National Assembly Standing Orders relating to the enactment of legislative proposals in Parliament.

46. In response to the particular concerns raised by the Petitioners on the procedure employed in the enactment of the impugned Act, Mr. Sialai averred that in the practice of the National Assembly, a Miscellaneous Amendment Bill means a Bill that amends various legislations; and that the long title of the Bill usually states the intention and purpose of a Bill. He pointed out that the impugned Bill's long title was *"A Bill for an Act of Parliament to make various amendments to statute law"*, and that there was no usage of the word "minor". In addition, that the intention of a Memorandum of Objects and Reasons is to give the intent and purpose of a Bill, and that the intent of the Bill was stated in the Memoranda of Objects and Reasons as being *'to make various wide-ranging amendments on various statutes"*.

47. It was Mr Sialai's averment further that neither the Constitution nor the rules of the House have disallowed the use of Miscellaneous Amendment Bills. In addition, no constitutional provision or rule of the House prevents the National Assembly from undertaking its legislative business using a Miscellaneous Amendment Bill as long as the principles of public participation are adhered to. Its position is that Article 109 of the Constitution gives absolute power to Parliament to exercise legislative powers through Bills, which are then assented to by the President. According to Mr. Sialai, as a matter of Parliamentary practice, Parliament consolidates amendments due to either backlog of unlegislated areas or to save on Parliamentary time, and courts should leave Parliament to decide on its own nomenclature of Bills.

48. With regard to the remarks made by some of its members on the procedure used, the 3rd Respondent averred that the provisions of Article 117 of the Constitution allow every member in the House freedom of speech and debate, and there is no limitation as long as it is relevant to the subject matter being debated by the House.

49. Regarding the many statutes sought to be amended by the impugned Bill, the 3rd Respondent averred that during the process of the passage of the Bill, each National Assembly Departmental Committee was tasked to examine each amendment as if they were distinct legislations. In addition, each thematic area was distinctively before a relevant Departmental Committee in accordance with the Second Schedule of the National Assembly Standing Orders. Mr. Sialai further averred that in the newspaper advertisements relating to the impugned Bill, the committee that was to deal with each subject matter was indicated in order to aid the public in presenting its view. Further, that during the debates on the Bill, Chairpersons of respective committees were given time to indicate views of the Committees and the public.

50. As for the comments made by the Petitioners with respect to the amendments effected on various statutes by the impugned Act, it was the 3rd Respondent's position that the Petitioners had a chance to submit their concerns to the various National Assembly Department Committees when they called for submissions and memoranda.

51. Regarding the comments made specifically on the Registration of Persons Act, the 3rd Respondent averred that as a matter of

parliamentary practice and procedure, amendments to a statute can be introduced in either House of Parliament. Thus, the amendments to the Registration of Persons Act through the impugned Bill could not be withdrawn in order to await the ongoing efforts to anchor its provisions in the National Registration Identification Bill 2012 and the Registration and Identification of Persons Bill, 2014 (Senate Bill. No. 39), because *the* amendments introduced to the Registration of Persons Act fell exclusively within the mandate of the National Assembly. In any event, according to the 3rd Respondent, the Senate Bill has never been enacted to date.

52. It was the 3rd Respondent's position further that matters of national registration and identification of persons is a policy decision solely within the mandate of the Executive; that legislation with respect thereto is enacted by Parliament, and this Court ought to decline to make policy decisions which are solely within the realm of the other arms of government. In its view, the capture of biometric data and geographical data as enacted in the impugned Act are reasonable and justifiable in an open and democratic society to address matters of national security and development. Further, that matters of national registration and identification of persons are sanctioned by the Constitution and enactment of a law for their regulation cannot deprive the Petitioners of the right to privacy provided under Article 31 of the Constitution.

53. The 3rd Respondent further averred that the right to privacy cited by the Petitioners is not absolute. Rather, it is subject to reasonable restrictions in the public interest on grounds of national security, to preserve public order, protect public health, maintain moral standards, secure due recognition and respect for the rights and freedoms of others or to meet the just requirements of the general welfare of a democratic society.

54. The 3rd Respondent also addressed the concerns raised that there were statutes mentioned in the Memorandum of Objects and Reasons but are missing from both the Bill and the Amendment Act. Mr. Sialai explained that it is not always automatic that all the legislative proposals in a Bill translate into legislation or an amendment in a statute. Further, that the fact that an amendment is missing in a statute implies that no amendment was passed by the National Assembly in respect of that statute. It was his averment that there were therefore no amendments to the National Hospital Insurance Fund Act and the Public Private Partnership Ac, 2013.

55. The 3rd Respondent further pointed out that the impugned Bill was a government Bill and the contents therein were from the Ministries and state departments and were drafted by the Office of the Attorney General, thus ownership by the ministries was paramount.

56. Mr Sialai averred that where the debates in the House indicated that an amendment was dropped by the mover, this implied that there were no amendments carried or enacted in the relevant statute. The 3rd Respondent stated that this was the case in respect to amendments to some 16 statutes, which he enumerated in his affidavit. We need not set them out as they are not material to the determination of this Petition.

57. On the allegations by the Petitioners that there were two Bills in circulation namely National Assembly Bill No. 12 and 13 of 2018, and that the only Bill that was published and subjected to public participation was Bill No. 12 of 2018, the 3rd Respondent explained that the Statute Law (Miscellaneous Amendment) (No. 12) Bill, 2018 is the one that was subjected to public participation, and is also the Bill that was passed by the House and gave birth to the Amendment Act. On the other hand, the Statute Law (Miscellaneous Amendment) (No. 13) Bill, 2018 is still under consideration by the National Assembly because it contains amendments to statutes that qualify it as a Bill concerning counties. It is therefore to be committed to the Senate in due course after passage by the National Assembly and is available for the general public at the Kenya Law Reports website and at the Government Printers.

58. Lastly, in response to the Petitioners' averment that the impugned Bill concerned county governments and therefore ought to have been subjected to the Senate, the 3rd Respondent referred to the provisions of Article 110(1)(a) and Part 2 of the Fourth Schedule to the Constitution on when a Bill concerns county governments. It also noted that the mandate of the Senate under Article 96(2) of the Constitution is to participate in law-making function of Parliament by considering debate on and approving Bills concerning counties as provided for under Article 217 of the Constitution.

59. It was his argument further, that it is upon both Speakers of the Houses, as required by the Constitution, to make a resolution on whether a Bill concerns counties under Article 110(3) of the Constitution. The 3rd Respondent in this respect contended that what is contained in the Senate's Bill Tracker relied on by the Petitioners are proposals and do not connote legislation that has been passed, nor are the amendments proposed exactly the same as those contained in the impugned Bill.

60. The 3rd Respondent explained the procedure it employed in the enactment of the impugned legislation. It stated that it first received the Statute Law (Amendment) Bill 2018, and invoked its procedural powers where it categorized the statutes sought to be amended into The Tax Laws (Amendment) Bill, 2018; The Health Laws (Amendment) Bill, 2018; the Statute Law (Miscellaneous Amendment) (No. 12) Bill, 2018; and The Statute Law (Miscellaneous Amendment) (No. 13) Bill, 2018.

61. It was its case that each of the above Bills was considered by the House separately and that after the Statute Law (Miscellaneous Amendment) (No 13) Bill, 2018 was subjected to the criteria set out under Article 110(3) of the Constitution, it was determined to be a Bill concerning counties and thus was not enacted together with the impugned Bill. In any event, according to the 3rd Respondent, there is no contention in any House of Parliament on whether impugned Bill was a Bill concerning counties. The 3rd Respondent reiterated that the Bill proposed to amend various legislations affecting the functions and powers of the national government and not the county government.

62. The 3rd Respondent averred that the procedure for enactment of the impugned Bill was in line with the Constitution, and that this Court lacks grounds to invoke its jurisdiction under Article 165 of the Constitution to invalidate the legislation. Its position was that the Petitioners have not adduced any or any cogent evidence to demonstrate that their rights have been infringed by the impugned Act. The 3rd Respondent therefore prayed that the Petition be dismissed.

The 4th and 5th Respondents' Case

63. The Hon. Justin Bedan Njoka Muturi and The Hon. Kenneth Makelo Lusaka, the Speakers of the National Assembly and Senate respectively, are the 4th and 5th Respondents. They filed a consolidated Preliminary Objection dated 13th March 2019. This Court directed that the said Preliminary Objection would be heard and determined together with the Petition, and would be considered as their response to the Petition. Their main ground for objecting to the Petition is that their actions are non-justiciable on the basis of parliamentary privilege as provided for under Article 117 of the Constitution and section 12 of the Parliamentary Powers and Privileges Act No. 29 of 2017. They argued that the Petition is a violation of the said provisions to the extent that it sought to enjoin them in their personal rather than in their official capacities.

The 6th Respondent's Case

64. The 6th Respondent is the Cabinet Secretary, Ministry of Information, Communication and Technology who was joined to these proceedings by the Court. The 6th Respondent relied on an affidavit sworn by Mrs. Juliana Yiapan, the Administrative Secretary in the Ministry. The averments in the affidavit were confined to the challenge in the Petition to the amendments by the impugned Act to section 6 (1) (a) and (e) and section 6B of KICA. It was her deposition that there was an error in the description in the Memorandum of Objects and Reasons where it stated that the amendment was to provide for the appointment of the Chairperson of the CAK when it should have stated that it was to provide for the appointment of the members of the Board.

65. It was the 6th Respondent's case that the amendment to KICA must be read within the strictures of the Constitution. Ms. Yiapan averred was that by empowering the Minister to appoint members of the Board of Directors of the CAK, the statute still binds the Minister to observe the national values and principles of governance under Article 10 as well as Article 34 (5) (a) of the Constitution. Further, that the amendment is in line with appointment of members of the Boards of Directors of other state agencies. Accordingly, the mere fact that the Cabinet Secretary appoints members of the Board does not mean that the government is in control of the institution.

66. Mrs. Yiapan averred therefore, that the Petitioners have not demonstrated how or the manner in which the impugned amendments impair, infringe or limit the exercise of any fundamental right of any individual. She expressed the view that the suspension of the operation of a statute should only take place in exceptional and extraordinary circumstances where it has been shown that there is imminent danger to the life and limb of citizens.

The Case of the Interested Parties Opposing the Petition

67. The 4th and 5th Interested Parties, the Child Welfare Society of Kenya, and the Communications Authority of Kenya joined the Respondents in opposing the Petition.

68. The 4th Interested Party's Chief Executive Officer, Ms. Irene Mureithi, swore an affidavit dated 15th May 2019 in response to the Petition. She stated that the 4th Interested Party is a semi-autonomous government agency for the care, protection and adoption of children. In its response, 4th Interested Party focused on NIIMS and its effects on children. It was its case that pursuant to NIIMS, it would know the identity of a child and will be in a position to protect children from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishments and hazardous exploitative labour.

69. Ms. Mureithi averred that through NIIMS, the 4th Interested Party would be able to identify lost and abandoned children as well as their families and unite them in the shortest time possible. Its view, was that the amendment thus aligns both the Registration of Persons Act and the Children Act to Article 53 of the Constitution which entitles every child to a name and nationality, parental care and protection, protection from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishments and hazardous and exploitative labour.

70. It was her averment that NIIMS shall curb the illicit adoption practices and forgery of documents that have precipitated trafficking, and that the government will assign children a *Huduma Number*, thus curbing incidents where children are labelled as orphaned and abandoned when in fact their biological parents are alive.

71. The 4th Interested Party further contended that the inclusion of DNA in NIIMS would assist in effectively tracing a child's family without imposing unnecessary trauma to the involved parties. In addition, that NIIMS would mitigate various crimes against children, facilitate easy tracking where they drop out of school, and ensure due diligence is conducted easily and thoroughly before allowing inter-country adoption.

72. According to the 4th Interested Party, the rights which the Petitioners allege had been violated by the impugned Act were not among the rights that cannot be limited. Its view was that the limitation of the rights in the implementation of the impugned Act is reasonable and justifiable in an open and democratic society.

73. The 4th Interested Party averred that the National Assembly had facilitated public participation through print media by placing advertisement in both the *Standard* and the *Daily Nation* newspapers inviting memoranda from stakeholders. Finally, its contention was that as the Members of the National Assembly were duly elected representatives of the people of Kenya, the people were effectively represented in the passage of the impugned Act. The 4th Interested Party therefore asked the Court to decline to give the orders sought in the Petition for the sake of children who stand to benefit from the amendment made in the Children Act, 2001 (No. 8 of 2001).

74. In opposing the Petition, the 5th Interested Party relied on an affidavit sworn on 3rd June 2019 by Mr. Matano Ndaro, the Director, Competition, Tariffs and Market Analysis (CTMA) at the Communications Authority of Kenya. It was his deposition that the CAK is the regulatory body for the information, communications and technology (ICT) sector in Kenya as established under section 3 of KICA. He

averred that the 5th Respondent is responsible for facilitating the development of the information and communications sectors in Kenya. Its leadership, according to Mr. Ndaro, is vested in the Board of Directors which is constituted under section 6 of KICA While the day to day running and management is on the Director-General who is an appointee and an ex-officio member of the Board.

75. The 5th Interested Party stated that **t**he function of law-making is a mandate donated by the Constitution to the National Assembly and Senate, and the said function cannot be undertaken at the direction of any other arm of government. Further, that the members of the National Assembly enjoy immunity from prosecution for utterances during debates in the house in order to ensure that such debates are candid and fruitful.

76. It was his averment that in deciding whether a provision of law is unconstitutional, this Court must start from the premise that the statutes are presumed to be constitutional. Further, that it is incumbent upon the Petitioners to demonstrate, with reasonable precision, that which they complain of in order to enable the parties respond sufficiently.

Analysis and Determination

77. We have considered the pleadings of the parties and their respective submissions and authorities and have identified the following as the substantive issues that arise for determination:

a. Whether there is a misjoinder of Justin Muturi and Kenneth Lusaka, the 4th and 5th Respondents herein, in their personal capacity

b. Whether the Respondents have disobeyed Court orders on the use of Omnibus Bills

c. Whether the legislative process leading up to the enactment of Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 was constitutional. In this regard, three sub-issues arise:

i. Whether the applicable constitutional and legal procedures in the publication and debate on the *Statute Law (Miscellaneous Amendment) Bill No. 12 of 2018 were followed*

ii. Whether the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 was subjected to public participation in accordance with Articles 10(2)(a) and 118(1)(b) of the Constitution;

iii. Whether the Statute Law (Miscellaneous Amendment) Bill No. 12 of 2018 was a Bill concerning counties and should therefore have been subjected to approval of the Senate.

d. Whetherthe impugned amendments violate or threaten violation of rights guaranteed under the Constitution. In this regard, three sub-issues arise:

i. Whether the establishment of NIIMS under section 9A of the Registration of Persons Act violate or threaten violation of the right to privacy contrary to Article 31 of the Constitution.

ii. Whether the procedures for appointment of the Chairperson or members of the Board of the Communications Authority of Kenya under section 6 of the Kenya Information and Communications Act, 1998 (No.2 of 1998 violate *Article 34(2)(a) of the Constitution.*

iii. Whether the amendments to the Children Act were constitutional

78. Before we enter into a consideration of these issues, however we shall begin by addressing the jurisdiction of this Court to determine this Petition. Thereafter, we shall set out the applicable constitutional principles that should guide the Court in the exercise of its jurisdiction.

The Court's Jurisdiction

79. The Respondents and the Interested Parties who support them have made pleas to the Court not to infringe on Parliament's role of passing legislation in light of the doctrine of separation of powers. On their part, the Petitioners and the 2nd Interested Party ask the Court to exercise its jurisdiction under the Constitution to issue the orders sought in the Petition. They have identified three grounds upon which they hinge their prayer for invalidation of the impugned amendments for failure to comply with the law governing enactment of legislation: lack of or inadequate public participation, the use of an omnibus Bill to effect the amendments; and the failure to involve the Senate in the legislation process.

80. We observe at the outset that, contrary to the position advanced by the Respondents and the Interested Parties who support them, failure to comply with the laid down mechanism for the passing of legislation can lead to invalidation of statutes by courts. This position was succinctly captured in the case of **Doctors for Life International v Speaker of the National Assembly and others (CCT 12/05) [2006] ZACC 11, 2006(12) BCLR 1399(CC), 2006 (6) SA 416 (CC))** (the **Doctors for life case)** in which the court stated that:

"It is trite that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid. And courts have the power to declare such legislation invalid … this Court not only has a right but also has a duty to ensure that

the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid."

81. The Respondents have also contended that the court cannot make an inquiry into the issues raised by the Petitioners since it is bound to respect the doctrine of separation of powers and the principle of parliamentary privilege. They argue that the Court should not issue the orders sought by the Petitioners with respect to the impugned Act as that would amount to interference with the National Assembly's constitutional mandate to legislate.

82. However, a consideration of the jurisprudence from our courts and other jurisdictions whose decisions are persuasive in nature shows that there is a plethora of authorities which confirm that Parliament can only successfully raise the defence of separation of powers or parliamentary privilege by proving compliance with the Constitution and the law. Anything done by Parliament outside the confines of the Constitution and the law attracts the attention and action of this court. Article 165(3)(d) gives the Court the constitutional authority to conduct an inquiry into the constitutionality of the decisions and actions of the legislature. In **Council of Governors & 6 others v Senate [2015] eKLR; Petition No. 413 of 2014**, the court expressed the ambit of this mandate as follows:

"We are duly guided and this Court vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation….To our mind, this Court has the power to enquire into the constitutionality of the actions of the Senate notwithstanding the privilege of inter alia, debate accorded to members of the Senate. That finding is fortified under the principle that the Constitution is the Supreme Law of this country and the Senate must function within the limits prescribed by the Constitution. In cases where it has stepped beyond what the law and the Constitution permit it to do, it cannot seek refuge in illegality and hide under the doctrine of parliamentary privilege….In that regard, we have already found that the Constitution is the supreme law of the land and all state organs have an obligation to uphold it and the Senate must always act in accordance with the Constitution. Its procedures and resolutions must be made within the purview of the same constitution and it cannot purport to violate the Constitution and seek refuge in the doctrine of separation of powers. This Court, under Article 165(3) (d) (ii) of the Constitution is constitutionally mandated to examine whether anything done under the authority of the Constitution is well within the four corners of the Constitution. The Senate cannot therefore act in disregard of the Constitution and at the same time claim to exercise powers under the same Constitution. This Court will continue to exercise its jurisdiction and judicial authority as conferred by the people of Kenya to assert the authority and supremacy of the Constitution and when the Senate has violated the Constitution, it must be told so."

83. The Supreme Court of Kenya confirmed this principle in its decision in **In the Matter of the Speaker of the Senate & another [2013] eKLR; Advisory Opinion Reference No. 2 of 2013** in which it held that:

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

84.The Petitioners primarily challenge the process of enactment of the impugned Act, contending that it was done in violation of the Constitution. It is therefore our sacrosanct duty to determine whether that allegation is true, and if so, provide an appropriate remedy. Our fidelity to the Constitution and by extension to the people of Kenya, from whom our mandate emanates, cannot be shaken by isolated reference to the doctrine of separation of powers. The Constitution must be read as a whole, and while the Constitution recognizes the doctrine of separation of powers, it also mandates this court to determine whether any action undertaken by Parliament violates the Constitution or the law. In its decision in **Tinyefuza v Attorney-General, Const. Pet. No. 1 of 1996 (1997 UGCC3)**, the Ugandan Court of Appeal held that:

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

85. While the Court does respect the roles of the other arms of government, it must faithfully exercise its constitutional mandate of enforcement and protection of the Constitution.

Applicable Constitutional Principles

86. Having disposed of the question of the Court's jurisdiction, we find it useful also, before embarking on an analysis of the issues, to consider the principles applicable in a matter challenging the constitutionality of legislation as is presently before us. The starting point is Article 259(1) which obliges this Court to interpret the Constitution in a manner that promotes its purposes, values and principles, advances

the rule of law and the human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.

87. In determining whether an impugned legislation or action is unconstitutional, the provisions of the Constitution must be interpreted purposively in line with Article 259(1) and other principles of constitutional interpretation. In the case of **Institute of Social Accountability & Another v National Assembly & 4 Others High Court, [2015] eKLR**, the court summed up these principles as follows:

> **[57] "[T]his Court is enjoined under Article 259 of the Constitution 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 and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution. In determining whether a statute is constitutional, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nair*obi Petition No. 3 of 2011 [2011]eKLR, Samuel G. Momanyi v Attorney General and Another (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect…***
>
> **[59] Fourth, the Constitution should be given a purposive, liberal interpretation...Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3)). We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution."**

88. Similarly, the Canadian Supreme Court stated in **R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295** that:

> **'Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.'**

89. The Constitution should also be interpreted in a holistic manner that entails reading one provision alongside other provisions, and considering the historical perspective, purpose, and intent of the provisions in question. In **Re the Matter of Kenya National Commission on Human Rights [2014] eKLR**, the Supreme Court considered the meaning of "a holistic interpretation of the Constitution," and stated:

> **"[26] 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."**

90. Courts have consistently affirmed that a holistic interpretation of the Constitution calls for the investigation of the historical, economic, social, cultural and political background of the provision in question. This view was expressed by the Supreme Court in **Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others, [2015] eKLR**, that:

> **"the Constitution should be interpreted in a holistic manner, within its context, and in its spirit." The Supreme Court in interpreting the Constitution took into consideration the historical, economic, social and political background of the Articles it had been called upon to consider."**

91. See also the Supreme Court **Advisory Opinion No. 2 of 2013 - The Speaker of The Senate & Another vs. Honourable Attorney General & Others, [2013] eKLR** in which reliance was placed on the holding in **Tinyefuza v Attorney General** (Supra)**.**

92. Article 24 sets out the principles that a court should consider in an analysis of the question whether legislation which is challenged on the basis that it limits fundamental rights in the Bill of Rights, meets the requirements of the Constitution. We note that the Petitioners allege violation of constitutional rights, specifically the right to privacy under Article 31 and the rights guaranteed under Article 34 of the Constitution. A burden is therefore placed upon them to demonstrate, with a reasonable degree of precision, the manner in which these rights have been or are threatened with violation. They are required to set out precisely the articles of the Constitution alleged to have been infringed and the manner of such infringement-see **Anarita Karimi Njeru vs Republic [1979] 1 KLR 154**.

93. In **Trusted Society of Human Rights Alliance vs Attorney General and 2 Others [2012] eKLR**, the Court re-affirmed the holding in the **Anarita Karimi Njeru** case and stated that:

> **"We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing**

itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case."

We shall be guided by the above principles as we consider the issues that arise in this Petition

Whether there is a Misjoinder of the 4th and 5th Respondents in their Personal Capacity

94. The Petitioners defend their joinder of the 4th and 5th Respondents in their personal capacity on the basis that personal culpability for public officials is anchored on Article 226(5) of the Constitution. They cited the case of **Kenya Country Bus Owners Association & Ors vs. Cabinet Secretary for Transport & Infrastructure & Ors JR No. 2 0f 2014** in which the court held that where dishonourable conduct is traced to a State Officer, the court would particularly be less sympathetic to persons who swear to protect and defend the Constitution and thereafter violate the same with impunity.

95. They further submit that a similar position was taken by Musinga, J. (as he then was) in **Robert Kisiara Dikir & 3 Others vs. The Officer Commanding Keiyan General Service Unit (GSU) Post & 3 Others Kisii HCCP No. 119 of 2009**. It is their submission that the 4th and 5th Respondents are therefore not above the law and must be held accountable for their deeds in their personal capacity. According to the Petitioners, the privileges accorded pursuant to Article 117 of the Constitution and Section 12 of Parliamentary Powers and Privileges Act No. 29 of 2017, are just privileges and immunities to be enjoyed only where the officer discharges his mandate in good faith and strictly in accordance with the law.

96. We have already alluded to the Preliminary objection filed by the 4th and 5th Respondents. They argue that the petition should be struck out on the basis that their actions are non-justiciable as they are entitled to the protection of parliamentary privilege under Article 117 of the Constitution and section 12 of the Parliamentary Powers and Privileges Act, 2017. The Petition also, in their view, violates the above constitutional and statutory provisions because it enjoins them in their personal capacity and not in their official capacity as Speakers of the two Houses of Parliament.

97. The 4th and 5th Respondents submitted extensively on this issue. It was their contention that Article 117 of the Constitution confers parliamentary powers, privileges and immunities to Parliament, its committees, the Leader of the Majority Party, the Leader of the Minority Party, the Chairpersons of Committees and Members of Parliament. Further that this position is also stated in section 12 of the Parliamentary Powers and Privileges Act No. 29 of 2017 which was enacted pursuant to Article 117.

98. The 4th and 5th Respondents also relied on the decision of the Supreme Court of Kenya in **Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another, (2017) eKLR** in which it was held that members of the legislature and Speakers are protected from judicial proceedings for acts done in the performance of their legislative functions under the said provisions. They further refer the court to similar decision by the Court of Appeal in **John Harun Mwau vs Dr. Andrew Mullei & Others, Civil Appeal No. 157 of 2009** and the High Court in **Shadrack Muyesu Sharu & 2 others v Justin Muturi & 2 others [2018] eKLR.** for the proposition that the proceedings of each House of Parliament should be entirely free and should not be liable to examination elsewhere.

99. The 4th and 5th Respondent also referred to comparative jurisprudence in the case by the Supreme Court of Malaysia in **Teng Chang Khim V. Badrul Hisham Bin Abdullah & Another, Malaysia Civil Appeal No. 01(F)-26-08/2016 (B)** where the Supreme Court of Malaysia held that the business of Parliament and state legislative assemblies are immune from judicial interference and courts have no power to interfere with the internal management of Parliament or any state legislative assembly. Also cited was an excerpt from **Erskine May, Treatise on the Law, Privileges Proceedings and Usage of Parliament, 24th Edition, page 203** which states that parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament and by members of each house individually without which they could not discharge their functions and which exceed those possessed by other bodies or individuals.

100. Accordingly, it was submitted that the actions of the 4th and 5th Respondents were done while undertaking their duties as Speakers of Parliament and in presiding over the proceedings of the National Assembly and Senate, and within the parameters set out in Article 107 of the Constitution as well as Standing Order 18 of the National Assembly Standing Orders, 2013. They are therefore entitled to the protection of Parliamentary Privilege under Article 117 of the Constitution and Section 12 of the Parliamentary Powers and Privileges Act No. 29 of 2017. According to the 4th and 5th Respondents, these provisions operate as a safeguard of separation of powers and extends to those acts of Parliament that are necessary for its survival as well as for the performance of its functions.

101. It was further submitted that suing the Speakers in their own individual capacities rather than in their official capacities is unlawful, malicious and in bad taste and meant to ridicule the 4th and 5th Respondents' persons.

102. We have considered the submissions of the parties on this issue. The Petitioners' case is that the personal culpability of the 4th and 5th Respondents is hinged on Article 226(5) of the Constitution. The 4th and 5th Respondent hold the view that Section 12 of the Parliamentary Powers and Privileges Act, 2017 which is rooted in Article 117 of the Constitution protects them from court proceedings for acts done in the performance of their legislative functions. However, the Petitioners contend that the privileges and immunities can only be enjoyed where the officer discharges mandate in good faith and in accordance with the law.

103. We have already expressed ourselves on the place of the doctrines of separation of powers and parliamentary privilege in relation to the authority of this court. In **Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another [2017] eKLR**, the Supreme Court outlined the principles that should govern relationships between State organs as follows:

> **" (a) each arm of Government has an obligation to recognize the independence of other arms of Government;**
>
> **(b) each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;**
>
> **(c) the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;**
>
> **(d) for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;**
>
> **(e) in the performance of the respective functions, every arm of Government is subject to the law."**

104. We take the view, guided by Article 165(3)(d) and the above decision, that we can inquire whether there was non-compliance by any party with the Constitution. However, the party alleging non-compliance must demonstrate such non-compliance with the Constitution.

105. In this case, the Petitioners rely on Article 226(5) of the Constitution in support of their decision to sue the 4th and 5th Respondents in their names. This Article states that:

> **"If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not."**

106. We find nothing in the said provision to suggest that an office holder should be sued in his personal capacity for executing official duties. The Petitioners have not even explained why they think the cited provision is applicable to this matter.

107. In our view, the 4th and 5th Respondents are correct when they fault the Petitioners for suing them in their personal capacities. It is clear from the Petition that the 4th and 5th Respondents have been sued in connection with the performance of their duties. There was therefore no basis for suing them in their personal capacities. The protection accorded to parliamentary business by Article 117 of the Constitution can only be understood to mean that the actions of the Speakers of the two Houses of Parliament are immunized from court action.

108. We equate the protection extended to the 4th and 5th Respondents to that given judges in the execution of their judicial duties. In **Bellevue Development Company Ltd v Francis Gikonyo & 7 others [2018] eKLR,** the Court of Appeal discussing the immunity of judges and held that:-

> **"I have no difficulty whatsoever in holding that judicial officers are under Article 160(5) immunized from any action or suit on account of their performance of a judicial function. I do not apprehend that the words "good faith" and "lawful" in the sub-article are a qualification or limitation of the immunity for the rather obvious reason that so long as a judge is acting in a judicial capacity and exercising his usual jurisdiction, there is a commonsensical presumption that he is acting lawfully and in good faith. There exists an implicit covenant of good faith binding judges. That has to be the *a priori* position for to hold otherwise would lead to the absurd position of the good faith bases of judges' actions being debatable points and open to an intolerable deluge of litigation, each unhappy litigant suing judges left right and centre as wounded pride dictates.**
>
> **I think that even though judges are fallible human beings like everybody else, a mechanism does exist in our laws for correcting whatever errors they may commit in the discharge of their juridical functions. Aggrieved parties are at liberty to appeal as a matter of course and that appellate system suffices to deal with ordinary errors of law and fact so that in the end justice is served. I also harbor no doubts that where a judge's conduct consists in egregious illegalities, violation of the judicial oath or outright illegalities and criminality, a mechanism for removal does exist and can be triggered in appropriate cases."**

109. The Petitioners submitted that it is only that which is done in good faith and lawfully that attracts immunity. Even if this argument is correct, and we do not say it is correct, the Petitioners did not tender any evidence to show that the 4th and 5th Respondents acted in bad faith. The naming of the 4th and 5th Respondents in the Petition was therefore not warranted.

Whether the Use of an Omnibus Bill was in Contempt of Court

110. The Petitioners challenge the use of omnibus Bills by the National Assembly, and they make two distinct sets of arguments which we shall consider separately before we make our determination thereon. The first relates to what they see as the prohibition by courts of use of omnibus Bill, and the second the alleged disobedience of the orders of the court prohibiting such use, and therefore a prayer that the court finds the 1st, 2nd 4th and 5th respondents in contempt of court and censures them accordingly.

111. It is the Petitioners' submission that the use of the impugned Bill to effect substantive changes to 39 statutes was contrary to court decisions forbidding the use of such Bills. Their case is that the National Assembly violated the principles of the rule of law and democracy

under Article 10(2)(a) of the Constitution in the legislative process. They contended that they have demonstrated in their pleadings that courts of competent jurisdiction in Kenya and around the world have decreed that omnibus Bills are strictly for effecting minor editorial, not substantive changes to legislation. To buttress that argument, the Petitioners cited the cases of **Law Society of Kenya v Attorney General & Another, [2016] eKLR; Okiya Omtatah Okoiti v Communications Authority of Kenya & 21 Others [2017] eKLR; Josephat Musila Mutual & 9 others v Attorney General & 3 Others [2018] eKLR;** and **Mercy Munee Kingoo & another v Safaricom Limited & Another, [2016] eKLR.**

112. The Petitioners further argued that the enactment of the impugned Act was a legislative process and for that reason the National Assembly was bound by the rule of law as well as the other national values and principles of governance, including democracy, public participation, transparency and accountability. Their position was that Article 93(2) of the Constitution is clear that Parliament should conduct its business in accordance with the Constitution, Article 94(4) expressly requires Parliament to protect the Constitution and promote the democratic governance of the Republic, while Article 259(1) requires Parliament to promote the purposes, values and principles of the Constitution, advance the rule of law, permit the development of the law and contribute to good governance.

113. It was therefore the Petitioners' contention that by using the omnibus Bill contrary to decisions of this and other courts, the constitutional imperative of the rule of law was violated in the legislative process leading to the enactment of the impugned Act. Further, they argued that the 3rd Respondent had not denied that allegation, but instead had sought to justify both the anomaly and its defiance of the court decisions on the grounds that the impugned law making process followed was akin to that used annually to enact the Finance Act through the omnibus Finance Bill. The Petitioners further submitted that because court decisions are law, then any actions or omissions done in contravention, disobedience or defiance of court orders are nullities in law pursuant to Article 2(4) of the Constitution.

114. The Petitioners cited the case of **Judicial Service Commission v Speaker of the National Assembly & Another, [2013] eKLR** in which it was held that court decisions must of necessity be respected and the dignity of the court upheld at all times. They also relied on the case of **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006** where the Court of Appeal held that judicial power in Kenya vests in the courts and other tribunals established under the Constitution, and that it is a fundamental tenet of the rule of law that court orders must be obeyed.

115. In response, the 1st Respondent submitted that there is no constitutionally prescribed procedure for the amendment of any statute. That under Articles 118 and 124 of the Constitution, the Legislature formulates the procedure it employs in enacting legislation provided the procedure facilitates public participation and public access. The legislative mandate is therefore within the ambit of Legislature and it is not the place of any court or other arm of government to question the wisdom of Parliament. It was submitted further that in any case, the fact that amendments are effected on legislation through omnibus Bills cannot, *ipso facto*, render them unconstitutional.

116. Similar submissions were made by the 2nd Respondent. It argued that Article 109 of the Constitution gives Parliament the discretion to determine the manner in which it exercises its legislative powers and does not impose limitations on this power nor provide for the type of Bills to be used by Parliament. Further, that the Houses of Parliament have the power to establish and regulate their internal procedures, and any undue interference by the Court would amount to a contravention of the doctrine of separation of powers. Reliance was placed on the decision in **Hugh Glenister v President of the Republic of South Africa, CCT 41/08** for this position.

117. The 3rd Respondent submitted that Article 124 of the Constitution allows each House of Parliament to establish its own procedures for conduct of proceedings in the House, and that the National Assembly has set out the procedure in Standing Orders 113 to 165 of the National Assembly Standing Orders relating to the enactment of legislative proposals in Parliament. The 3rd Respondent cited the case of **Nathanael Nganga Reuben v Speaker, Machakos County Assembly & Another, [2016] eKLR**, where the Court cited with approval the Supreme Court of Canada in the case of **Canada (House of Commons) v. Vaid [2005] 1 SCR 667** which provided a "doctrine of necessity" in explaining the areas where courts should exercise restraint with regard to Parliamentary and County Assembly proceedings.

118. The 4th Interested Party submitted that the Petitioners have not stated a single provision of the Constitution or the law that specifically prohibits the use of the omnibus structure of Bills.

119. In the second limb of their argument against use of omnibus Bills, the Petitioners have alleged that the continued use by the National Assembly of omnibus Bills to effect substantive changes to various pieces of legislation at once constitutes contempt of court. They have relied on the definition of contempt of court in the case of **Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County Ex Parte Stanley Muturi [2017] eKLR** where the court interpreted the meaning of civil contempt of court as the wilful disobedience of a judgment, decree or order. Also relied upon was a similar definition by the Supreme Court of India in **All India Anna Dravida Munnetra Kazhagam v L. K. Tripathi and Others S.l.P. (C) No. 18879 of 2007**. According to the Petitioners, it was not disputed that the 3rd and 4th Respondents had full knowledge of the court decisions on the use of omnibus Bills, and hence, by using the impugned Bill to effect substantive changes to 69 statutes contrary to the said decisions, the National Assembly acted in contempt of Court.

120. The Petitioners further, argued that the 4th Respondent also acted in contempt of court by allowing debate on the impugned law when, on Tuesday 28th August 2018, before the second reading of the Bill, he deliberately and contemptuously disregarded the caution by Hon. (Dr.) Otiende Amollo MP that the High Court has prohibited the use of omnibus Bills to effect substantive amendments to statute.

121. The Petitioners submitted that the factors to be taken into consideration when determining a contempt of court application were set out in the case of **Ringera & 2 others v Muite and 10 others ,HCC Nairobi, Civil Suit No. 1330** and **Sarah Wanjiru v Jacinter Wanjiru Nguti [2014] eKLR** where it was stated that the salient features of disobeying court orders are that the contemnor must be aware of the existence of the court order; there must be an existing court order capable of being disobeyed and breach thereof must be proved. Further, that the Court of Appeal in **Justus Kariuki Mate & Another v. Martin Nyaga Wambora & Another, [2014] eKLR** also observed that the law of contempt of court has since changed and as it stands today, knowledge of an order is sufficient for purposes of contempt proceedings.

122. The Petitioners further submitted that in **Basil Criticos v Attorney General [2015] eKLR**, it was held that knowledge of an order supersedes service. It was also their submission that a similar position was advanced in **Kenya Tea Growers Association v Francis Atwoli [2015] eKLR** where the contemnor had notice of the court orders.

123. They further cited the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR**, where the Court of Appeal held that the notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made or was notified of its terms by telephone, email or otherwise. They further relied on the case of **Fredrick Okolla Ojwang v Orange Democratic Movement & Another [2017] eKLR**, where it was held that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. Their submission was that it is not disputed that the 4th Respondent had full knowledge of the court orders in issue prohibiting the use of omnibus Bills to effect substantive amendments to statutes.

124. Regarding the standard of proof in contempt proceedings, the Petitioners submitted that it must be proved beyond reasonable doubt, as was held in **Re Bramblevale Limited, (1970) 1 Ch 128,; Kasembeli Sanane vs. Manhu Muli alias Fredrick Saname & 4 Others [2013] eKLR**; **Jean Claude Adzalla v Jackline Wanjiru Muiruri & another [2017] eKLR** and **Gatharia K. Mutikika vs. Baharini Farm Ltd Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR**. In the premises, they submitted that the Petitioners have established the standard of proof of contempt against the 4th Respondent and he should be punished according to the law.

125. To the question whether the 2nd Respondent failed to protect the public from the continued use by Parliament of the Statute Law (Miscellaneous Amendments) Bills, it was submitted that the said Respondent did not demonstrate in any way that it tried and failed to get the National Assembly to abandon the use of miscellaneous amendment Bills to effect substantive changes to several statutes at the same time.

126. Lastly, the Petitioners submitted that the 1st, 2nd and 4th Respondents' disobedience of the court orders impeded the administration of justice. They relied on the decisions in **Teachers Service Commission v Kenya National Union of Teachers & 2 Others [2013] eKLR** and **Mussolini Kithome v Attorney General & Another [2016] eKLR** for the proposition that the reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice

127. In his submissions in response, the 1st Respondent observed that the instances in which this Court has previously issued orders to the effect that omnibus Bills ought not to be used in enacting legislation are fundamentally different from the instant case. Further that the said orders are not binding upon this Court and in any event, there is no separate contempt application filed and personally served upon the alleged contemnors and any other party who is most likely to be affected by them to afford them a fair hearing. The decision of the Court of Appeal in **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others [2014] eKLR** as well as the decision of the High Court in **Republic v Kenya School of Law & 2 others Ex parte Juliet Wanjiru Njoroge & 5 Others, [2015] eKLR** were cited for this position. The 1st Respondent also contended that the decisions on the use of omnibus Bills referred to by the Petitioners were issued *per incuriam* as the concerned courts did not properly apprise themselves of the doctrine of separation of powers and the legislative mandate of Parliament.

128. It was the 1st Respondent's argument that from pleadings on record, the Petitioners had not filed or served any such application for contempt of Court for this Court to determine. Further, that if the Petitioners had contemplated filing such an application, it ought to emanate from the orders whose obedience have been complained of and not in the instant Petition. In view of the foregoing, it was submitted that issuing orders that would adversely affect the Respondents without according them an opportunity to be heard would be in contravention of their absolute right to a fair hearing as outlined in Article 50(1) as read with Article 25(c) of the Constitution. Moreover, in view of the quasi-criminal nature of contempt proceedings, a suit against the Respondents without the requisite application and without the Respondents' knowledge would be in violation of the rules of natural justice and Article 50(2) of the Constitution.

129. On the need to scrupulously follow the procedure in contempt proceedings due to the likelihood of loss of liberty, the Respondents relied on the decisions in **Re Bramblevale Ltd (supra)** and **Mutitika *v.* Baharini Farm Limited (supra)** that contempt of court is an offence of a quasi-criminal character and must be satisfactorily proved, with the standard being higher than proof on the balance of probabilities. In urging the Court to dismiss the invitation to find the Respondents in contempt, reliance was placed on the decisions in **Jihan Freighters Ltd v. Hardware & General Stores Ltd [2015]eKLR** and in **A.B. & Another v. R. B. [2016] eKLR**, that to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing.

130. The arguments by the 1st Respondent were also reiterated by the 2nd Respondent, who further submitted that court orders, which are personal in nature or orders in *personam*, do not affect third parties to a cause. Reliance was placed on the decision to this effect in **Abukar G Mohamed v Independent Electoral and Boundaries Commission [2017] eKLR**. The 2nd Respondent argued further that in the cases cited by the Petitioners, the declarations by the courts were limited to those specific sections of the laws that were being challenged. They did not have a binding or proactive effect with regard to any other or further enactments that were to be done by the National Assembly.

131. It was further submitted that the orders and judgment of the said courts were limited both in scope and in substance to the subject matter that was in controversy before those courts and between those parties, and were never meant to act in *rem* as against the whole world and in respect of any future enactments by the National Assembly. Accordingly, that the averments together with the decisions quoted by the Petitioners can neither be used by the Petitioners nor this Court in substitution of the established principles related to precision in pleadings when it comes to constitutional litigation as espoused in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others, [2014] eKLR**

132. The 2nd Respondent therefore submitted that there was no court order emanating from the aforementioned decisions that was directed at the Speaker of the National Assembly for purposes of making a determination or finding on the question of contempt. Further, that if any such order existed, it was not clear and unambiguous in the manner envisaged in **Jihan Freighters Ltd v Hardware & General Stores Limited, (Supra)**. In its view, the Petitioners have not discharged the burden of proof to secure orders of contempt from this Court.

133. On the allegations that the 2nd Respondent failed to get Parliament to abandon the use of miscellaneous amendment Bills to effect substantive amendments to several statutes at the same time, it was submitted that under the provisions of section 6(h) of the Kenya Law Reform Commission Act, the role of the 2nd Respondent is limited to offering advice to Parliament on the reform and review of legislation while legislative powers lie within Parliament. It was also its case that the Petitioners have failed to demonstrate with precision the manner in which the Commission has failed in its mandate and the manner in which it violated any provisions of the Constitution, reliance being placed for this proposition on **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (supra).**

134. We have carefully considered the pleadings and submissions of the parties on these twin issues, and we take the following view.

135. First, it is important to appreciate the fact that the National Assembly has improved the manner in which it deploys the use of omnibus bills in its legislative business. The decisions relied on by the Petitioners were made in different circumstances and they can only be applied with necessary modification, taking into account the prevailing parliamentary practices. It is clear from the 3rd Respondent's averments that although the targeted amendments were conveyed in a single Bill, the individual statutes were clearly flagged out and committed to the relevant Departmental Committee for consideration and collection of public views. This information was relayed to the public when they were invited through the newspaper adverts to present their views on the Bill. We therefore find it difficult to agree with the Petitioners that the use of an omnibus bill to effect the amendments *ipso facto* impeded public participation.

136. We, however, take cognizance of the fact that the use of an omnibus bill to effect amendments to several Acts of Parliament is likely to hinder the participation of the people in the legislative process. Depending on the number of the proposed amendments, the time given may not be sufficient. This is not the same as saying that public participation was not conducted or that it was inadequate.

137. The second argument advanced by the Petitioners as to why omnibus Bills should not have been used to effect the impugned amendments is that the courts have decreed that omnibus bills should only be used to correct anomalies, inconsistencies, outdated terminology or errors which are minor and non-controversial. Their position is that where the Legislature wishes to make substantive amendments to a statute, it must do so using a stand-alone Bill that allows for full scrutiny, including subjecting the same to effective public participation.

138. In furtherance of their argument, the Petitioners proffer a novel viewpoint to the effect that the 4th and 5th Respondents acted in contempt of court by using an omnibus Bill to effect the impugned amendments in contravention of the pronouncement on the issue by the courts. It is their position that the amendments should not be allowed to stand as they were passed in clear violation of court orders.

139. The question of the use of miscellaneous amendment bills to effect substantive amendments to an assorted number of statutes has received attention from the courts and scholars. The Court in the case of **Law Society of Kenya v Attorney General & another [2016] eKLR** carried out extensive discussions on the use of omnibus Bills in conducting legislative business and held that:

> **"This brings to the fore the question of the circumstances under which statutory amendments ought to be effected by way of Statute Law Miscellaneous legislation. That such a procedure ought to avail only in cases of minor non-controversial amendments was appreciated by the 2nd Respondent when it indicated in the Memorandum of Objects and Reasons of the Bill….that….[t]he Statute Law (Miscellaneous Amendments) Bill, 2015 is in keeping with the practice of making minor amendments which do not merit the publication of a separate Bill and consolidating them into one Bill. That this is the practice is clearly discernible from the practice adopted in most jurisdictions, though the practice is not consistent….While we appreciate that there is no internationally accepted position on the legality of omnibus bills, the reality is that they are used in many jurisdictions."**

140. The cited authority is one of the court decisions relied upon by the Petitioners in support of the assertion that the courts have decreed that omnibus Bills should not be used to effect substantive amendments to statute. It is, however, clear that the words used in the judgment are that the "procedure ought to avail only in cases of minor non-controversial amendments." In the same judgment the Court held that *"omnibus amendments in the form of Statute Law Miscellaneous legislations ought to be confined only to minor non-controversial and generally house-keeping amendments."*

141. The key word used by the court is *"ought"* and not *"shall"*. The court, as we understand it, was saying it would be the proper thing or practice for Parliament to avoid using a miscellaneous amendment Bill to effect substantive changes to statutes. It is therefore incorrect to say that the Court held that Parliament must not use omnibus Bills to effect substantive changes to legislation. Agreeing with the Petitioners' argument would amount to saying that the courts can micromanage the operations of Parliament.

142. Parliament has given reasons why it finds the procedure convenient in certain circumstances. As correctly pointed out by the 3rd Respondent, there is no constitutional or legal provision that prescribes the manner in which omnibus Bills should be used by Parliament. The law only provides that Bills will be used to enact laws without stating when and where an omnibus Bill or a stand-alone Bill should be used. The manner in which omnibus Bills were used previously may have impinged on public participation and even affected the quality of the debates in Parliament.

143. This observation was made in **Law Society of Kenya v Attorney General & another [2016] eKLR** where Louis Massicotte was quoted as having observed in his article titled ***"Omnibus Bills in Theory and Practice,* Canadian Parliamentary Review, Vol. 36 No. 1 (2013)**, that:

> **"The real question, however, beyond the convenience of the government or of the opposition parties, may well be: is the public interest well served by omnibus Bills? Take for example the clause-by-clause study in committee. When a bill deals with topics as varied as fisheries, unemployment insurance and environment, it is unlikely to be examined properly if the whole bill goes to the Standing Committee on Finance. The opposition parties complain legitimately that their critics on**

many topics covered by an omnibus bill have already been assigned to other committees. The public has every interest in a legislation being examined by the appropriate bodies."

144. It is clear from the averments of Mr. Sialai, and which testimony we find no reason to doubt, that each amendment though carried in one "bus" was given individual attention throughout the legislative process. It is our finding therefore and we so hold that the use of a miscellaneous amendment Bill to pass the impugned law did not offend the Constitution or the National Assembly Standing Orders.

146. In light of our finding above, we take the view that it may not be necessary to explore the issue whether the 1st, 2nd and 4th Respondents acted in contempt of court by using or allowing the use of an omnibus Bill to pass the amendments to the impugned Act. While observing that the 5th Respondent, the Speaker of the Senate did not play any role in the enactment of the impugned Act, we make the following conclusions with respect to the other Respondents, for the avoidance of doubt.

146. The parties have expended much energy on the importance of court orders and the need to obey them. This, we believe, is a position that cannot be seriously contested in a State that aspires towards achieving democracy and the rule of law. The question, however, is whether the 1st, 2nd and 4th Respondents disobeyed court orders with respect to the use of miscellaneous amendments Bills in the legislative process and should therefore be held to be in contempt of court.

147. We have considered the submissions made by the parties on the issue. We have held elsewhere in this judgment that there was no positive order issued by any court directing the 4th Respondent on the use of omnibus Bills in the legislative process. Additionally, we find no difficulty in agreeing with the 2nd Respondent that one of its mandates is to offer Parliament advice on the reform and review of legislation but the legislative power lies with Parliament. Consequently, if there was any breach of a court order, we do not see how the 2nd Respondent is to blame for such violation. It has not been demonstrated by the Petitioners that the 2nd Respondent has coercive powers over Parliament and failed to exercise those powers in the enforcement of court orders. There is therefore no merit at all in the accusation against the 2nd Respondent.

148. The same reasoning applies with respect to the 1st Respondent. The Attorney General of the Republic of Kenya has the constitutional mandate to advice the national government on matters of law. He cannot, however, direct Parliament on how to conduct its legislative business. The Petitioners' assertion that the 1st, 2nd and 4th Respondents acted in contempt of court is therefore not sustainable and the Petitioners' case on this point must fail.

Whether the Legislative Process was Constitutional

149. The Petitioners challenge the constitutionality of the process leading up to the enactment of the impugned Act on various limbs. We shall address each of these limbs, starting with the arguments that t relates to the procedure of publication and enactment of the Statute Law (Miscellaneous Amendment) Bill No. 12 of 2018.

Whether the Constitutional and Legal Procedures *were followed*

150. The Petitioners contend that section 3(2) of the Statutory Instruments Act 2013 places an obligation on lawmakers to explain the purpose, effect and operation of a proposed instrument, and that this obligation was not met in respect of the impugned Bill. It is their case further that the Bill was not compliant with the National Assembly Standing Orders 117 and 122 which require every Bill to be accompanied by a Memorandum of Objects and Reasons for the Bill, a disclosure of limitation of fundamental rights and freedoms, if any, how it concerns county government and a statement that it is not a money Bill. According to the Petitioners, the impugned Bill did not have a Memorandum of Objects and Reasons and was therefore invalid, null and void.

151. The Petitioners further challenge the impugned Bill on the basis that the National Assembly debated a different Bill from the one that was subjected to public participation. They submitted that this is demonstrated by the inclusion of amendments to the Public Finance Management Act in the Amendment Act. It was their submission therefore that the entire is void. Reliance was placed on Order 114(1) of the Standing Orders which requires such a Bill and Memorandum to be submitted to the Speaker of the House who in turn, refers it to the Clerk who shall draft it in proper form. It was the Petitioners' position that the omission of some of the statutes proposed to be amended in the Bill from the Memorandum violated the express requirements of Orders 114 and 117, which rendered the memorandum incomplete and therefore incompetent.

152. The Petitioners submitted that when the law is enacted, it should be enacted openly and explicitly in a transparent process which can be attributed to the people and described as a process of self-government. Further, that the errors in the Bill were not minor, such as incorrect punctuation or capitalization, but were significant and misleading and they affected the integrity of the legislative process. It was their contention, in addition, that the requirements for integrity and transparency under Article 10 and for the correction or deletion of untrue or misleading information under Article 35 leave no room for the publication of error laden Bills. In their view, because of the errors in the Bill, it should not have been considered by the National Assembly as it was not in a final form that could be scrutinised effectively.

153. The 1st Respondent's submissions on this issue were that courts should exercise reasonable restraint with respect to the legislative role of Parliament. Further, that Parliament should be allowed to prescribe its own rules of procedure by way of Standing Orders as dictated by the Constitution. To that end, reference was made to the various decisions where courts refrained from intervening in parliamentary affairs on account of the doctrine of separation of powers, including the Supreme Court decision in **The Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR** and **Commission for the Implementation of the Constitution v Senate of Kenya & 2 Others [2013] eKLR**, the Court of Appeal decision in **Pevans East Africa Limited and another v Chairman, Betting Control & Licencing Board and others** Civil Appeal No. 11 of 2018 and the High Court decisions in **Republic v National Assembly Committee of Privileges & 2 others Ex-Parte Ababu Namwamba [2016] eKLR** and **Nathanael Nganga Reuben v Speaker, Machakos County Assembly & Another [2016] e KLR**

154. Similar submissions were made by the 2nd Respondent to the effect that under Article 1(3), 93, 94, 109 and 124(1) of the Constitution, Parliament is the sole body charged with the legislative function under the Constitution and is equally empowered to formulate the rules and procedure that regulates the conduct of its business. It was submitted that the impugned Act was enacted in compliance with the Standing Orders and all applicable laws, and according to the doctrine of separation of powers, it can only be faulted in the event that it is against the Constitution. Reliance was placed on the decision by the Court of Appeal in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others C. A. No. 290 of 2012** for the proposition that separation of powers means that courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent.

155. The 2nd Respondent's in response to the specific allegations made on the propriety of the Bill was that any errors and/or omissions found in the impugned Act can be corrected by the Legislature in deserving circumstances without having to strike down the entire Act or the affected provisions on the basis of unconstitutionality. Reliance was placed on the decision by the Court of Appeal in **Intalframe Limited v Mediterrenean Shipping Company [1986] eKLR** for the submission that statutes must be so construed as to make them operative, and that if errors are found in legislation, they must be corrected by the Legislature, and it is not the function of the court to repair them. The 2nd Respondent reiterated that the intention of the Amendment Act was stated in the Memoranda of Objects and Reasons as being *"to make various wide-ranging amendments to various statutes"* which in effect explains the intent and purpose of the Bill.

156. The 3rd Respondent also cited the decisions relied upon by the 1st Respondent on the application of the doctrine of separation of powers. It further submitted that parliamentary privilege, which underpins the independence of the Legislature, does not allow for decisions of either House or its Speaker to be questioned by any court. Accordingly, that this Petition violates the principle as was held by the Court of Appeal in **John Harun Mwau vs Dr. Andrew Mullei & Others, Civil Appeal No. 157 of 2009.** The 3rd Respondent further relied on the decisions in **Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 Others, [2013] eKLR; Okiya Omtatah Okoiti v the Attorney General and 5 others, Nairobi H.C. Petition No. 227 of 2013; Patrick Ouma Onyango & 12 others v Attorney General & 2 others [2005] 2 KLR** and **Blackburn v Attorney General [1971] 1 WLR 1037,** for the submission that courts should exercise caution not to unnecessarily interfere with the functions of Parliament.

157. The 6th Respondent reiterated that the procedure and process followed in undertaking amendments complained of were legitimate and lawful. His submission was that although there was a slight error in description in the Memorandum of Objects and Reasons, this minor slip did not alter the focus of the amendment because the body of the Bill showed the intent of the proposed amendments and nobody could have been misled by the error.

158. We have given thought to the Petitioners' contention that the impugned Act should be declared unconstitutional for not containing a Memorandum of Objects and Reasons as required by National Assembly Standing Orders 117 and 122. It is also the Petitioners' case that the inclusion of amendments to the Public Finance Management Act in the impugned Act demonstrates that the National Assembly debated and approved a different Bill from the one that was subjected to public participation. This, they submitted, rendered the amendments void for failure to comply with Order 114(1) of the National Assembly Standing Orders which requires the Clerk of the Assembly to draft a Bill in proper form.

159. The Respondents have repeated their consistent argument that parliamentary privilege and the doctrine of separation of powers underpin the independence of Parliament and does not allow the decisions of the Legislature or its speakers to be questioned by any court. Further, that any errors were minor slips that did not alter the focus of the amendments. We need not repeat the jurisdiction of the court conferred by Articles 165(3)(d) and confirmed by judicial precedents.

160. Standing Order 117 of the National Assembly Standing Orders, require every Bill to be accompanied by a Memorandum of Objects and Reasons and prescribes what such Memorandum should contain. We have perused the two Statute Law Miscellaneous Amendments Bills published by the National Assembly, namely Statute Law (Miscellaneous Amendment) (No. 12) Bill, 2018 and Statute Law (Miscellaneous Amendment) (No. 13) Bill, 2018, and note that they were accompanied by a Memorandum of Objects and Reasons. There is therefore no basis for the allegation made by the Petitioners that the Bills were illegally published for want of such a memorandum.

161. We also take the view that the errors pointed out by the Petitioners were generally minor infractions of the rules of the House which do not merit the attention of this court. Those are the kind of errors, not unexpected in matters performed by human beings that may be made by State organs in the discharge of their duties. It has not been shown that the majority of these mistakes prejudiced the right of the members of the public to participate in the legislative process. This court cannot superintend the day to day operations of other State organs as doing so would amount to interfering with the mandates of those State organs.

162. In a case like the one before us, ours is simply to discharge our mandate under Article 165(3)(d) of the Constitution. The view we hold is in line with the decision of the Supreme Court in **The Speaker of the Senate & another v Attorney General & Others [2013] eKLR** where it was held that:

> **"It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of the Constitution. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of the Constitution. It cannot operate besides or outside the four corners of the Constitution. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another."**

163. To a large extent therefore, we do not find merit in the Petitioners' case on this issue. However, we have noticed one error made by the 3rd Respondent which we consider substantive and should not go without a remedy. The Petitioners have raised a specific issue with respect to the amendment to the Public Finance Management Act, 2012 ("PFMA"). They aver that although there was no mention of any proposed amendment to the PFMA in the newspaper advertisement of 7th May, 2018 and in the impugned Bill, the impugned Act ended up amending

section 24 of the PFMA by introducing section 2A which reads:

> **"(2A) Notwithstanding the provisions of subsection (1), the Parliamentary Service Commission may with the approval of the National Assembly, establish any other fund for the purpose of Parliament or a House of Parliament."**

164. We have perused the Statute Law (Miscellaneous Amendment) Bill, 2018 and the advertisement in the newspapers calling for memoranda on the Bill, and find that the Petitioners' averment on this issue is correct. It therefore follows that this particular amendment was effected without following the procedure required by the Standing Orders 114 to 139 of the National Assembly, on the introduction of legislative proposals in Bills, their first reading, second reading, committal to the Committee stage and third reading. Consequently, the amendment to the PFMA was also not subjected to public participation. It consequently failed to meet the edict of the Constitution requiring Bills to be enacted in accordance with the procedures in the Standing Orders and that Parliament involves the public in its legislative business in Articles 109 and 118(1). It is our view therefore, and we so hold, that the amendment to section 24 of the PFMA by introducing section 2A therein made by Statute Law (Miscellaneous Amendment) Act Mo. 18 of 2018 is unconstitutional, null and void.

Whether there was violation of the principle of Public Participation

165. The second major aspect of the Petitioners' challenge to the impugned law related to the requirement for public participation. To the question whether the impugned Bill was subjected to reasonable, effective, and meaningful public participation and stakeholder consultation, the Petitioners submitted that the standard to be applied in determining whether Parliament has met its obligation in this regard is one of reasonableness. In their view, the standard of reasonableness in this case had to be considered in regard to the practicability of asking the public to submit on substantive amendments targeting some 39 pieces of legislation within 7 days, and to do so in circumstances in which the Bill itself lacked clarity and was disorderly.

166. The Petitioners further submitted that whereas it was admitted that the 3rd Respondent issued press adverts calling for public participation, and some state agencies and stakeholders did respond, it was not possible to subject the amendment targeting 69 statutes in the Bill, especially the 39 statutes that proposed substantive amendments, to effective and meaningful public participation within the period running from 7th to 14th May 2018.

167. To buttress this argument, the Petitioners cited the case of **Law Society of Kenya v Attorney General (2013)eKLR** in which the court observed that in order to determine whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation, from the formulation of the legislation to the process of enactment of the statute. They also cited the case of **Doctor's for Life International v The Speaker National Assembly and Others, (CCT12/05) [2006] ZACC 11** in which the South African Constitutional Court explained that the duty to facilitate public involvement in the legislative process is an aspect of the right to political participation recognized in affairs of state, enabled and anchored by other rights and fundamental freedoms such as the freedom of expression, association and freedom of access to information.

168. The Petitioners also relied on the holding by Sachs J. in **Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (2006) (2) SA 311 (CC***)* in which it was held that what matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. They also cited the decision of the High Court in **Robert N. Gakuru & others v Kiambu County Government & 3 others [2014] eKLR** in which it was held that public participation ought to be real and not illusory, and ought not to be treated as a mere formality for the purposes of fulfilment of the constitutional dictates.

169. Other decisions relied upon by the Petitioners were the cases of **Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR**, **Mui Coal Basin Local Community [2015] eKLR, Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** and **Dr. Christopher Ndarathi Murungaru vs. AG and another, Civil Application No. Nai. 43 of 2006 (24/2006),** for the proposition that public participation is a constitutional dictate and cannot be overlooked.

170. The 1st Respondent submissions on the sub-issue were that there was effective public participation leading up to the impugned enactment. It was its case that under Article 118 of the Constitution, Parliament conducts its business in an open manner and its sittings and those of its Committees are open to the public. Further, that it facilitates public participation and involvement in the legislative process, a fact, according to the 1st Respondent, the Petitioners can attest to through the publication of the impugned Bill in the local dailies. Its case therefore was that neither the Petitioners nor any member of the public was denied an opportunity to participate in the process leading up to enactment of the legislation in issue.

171. In any event, by virtue of Article 119, anyone dissatisfied is entitled to petition Parliament, to consider amending, enacting or repealing any legislation, an avenue that is still open for the Petitioners. According to the 1st Respondent, in the absence of cogent evidence challenging the quality of public participation, the legal and evidentiary burden was with the Petitioners and did not shift to the Respondents. Reliance was placed on the case of **Law Society of Kenya -vs- The Attorney-General (supra)** for the proposition that the National Assembly's Standing Orders facilitate public participation.

172. The 3rd Respondent set out in detail the processes leadings to the enactment of the impugned law in its Replying Affidavit sworn on 2nd May, 2019 by Mr. Michael Sialai, the Clerk of the National Assembly, which demonstrated that adequate public participation was indeed conducted in the process leading to the enactment of the impugned Act.

173. The 2nd Respondent also relied on the decision in **Kenya Small Scale Farmers Forum & 6 others -vs- Republic of Kenya & 2 others [2013] eKLR** for the holding that the National Assembly has discretion on how to conduct public participation, and not necessarily at the pre-legislative stage. Its submission was that what matters is that at the end of the day, a reasonable opportunity is offered to members of the

public and all interested parties to know about the issues and to have an adequate say. It was its case, further, that the Legislature is not bound to enact legislation in accordance with the views of any particular interest group, and that public participation should not be used to overrule or veto the acts of the Legislature.

174. In buttressing the position that not every citizen must express their views in order for a legislation to satisfy the constitutional requirement of public participation, reference was made to the cases of **Law Society of Kenya -vs- The Attorney-General & 10 others [2016] eKLR,** and **Josephat Musila Mutua & 9 others v Attorney General & 3 others [2018] eKLR** to the effect that the National Assembly has a broad measure of discretion on how they achieve the object of public participation.

175. The South African case of **Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others (CCT40/15) [2016] ZACC 22** and the decision of the High Court in **Diani Business Welfare Association And Others vs. The County Government of Kwale [2015] eKLR** was also cited on the standard of reasonableness which is to be applied in determining whether Parliament has met its obligation of facilitating public participation.

176. The 2nd Respondent also refuted the submissions that the period provided for public participation by the 3rd Respondent was insufficient and submitted that the 3rd Interested Party in this Petition had submitted its memorandum to the 3rd Respondent for consideration. It relied in support on the decision in **Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others, [2018] eKLR** on the need for evidence that a member of the public was, as a result of the short notice afforded by the Legislature, locked out from presenting his views, noting that no evidence has been adduced by the Petitioners to this effect. The 3rd Respondent further submitted that members of the public were afforded a reasonable level of participation and were invited for stakeholders' meetings which they attended and submitted memoranda, held between 7th May, 2018 and 20th June, 2018.

177. The 3rd Respondent agreed with the 2nd respondent's submissions on this issue. It submitted that the amendments introduced by the impugned Act did not violate the principle of public participation under the Constitution. Reliance was placed on the Court of Appeal decision in **Kiambu County Government & 3 Others v Robert N. Gakuru & Others [2017] eKLR**, with regard to what amounts to public participation, and the case of **Law Society of Kenya vs. The Attorney General and 10 Others, Petition No. 3 of 2016** where the court held that what is required is that a reasonable opportunity be afforded to the public to meaningfully participate in the legislative process.

178. The 6th Respondent took a similar position. It submitted that the impugned Bill was first published on 10th April 2018 and the public invited for comments and public participation on 7th May 2018, manifesting that a reasonable opportunity was presented to members of the public and interested parties to know and raise any issues on the Bill. Reliance was placed on the case of **Moses Munyendo & 908 Others v The Attorney General and Minister for Agriculture, [2013] eKLR** where the court held that there is a presumption of public participation where legislation has been enacted in accordance with National Assembly Standing Orders.

179. The Respondents' positions were also echoed by the 4th Interested Party, who cited the holding in **Law Society of Kenya v Attorney General & Another, [2016] eKLR** that the law does not require that all persons must express their views or be heard or that the hearing must be oral, but requires that reasonable steps be taken to facilitate the said participation.

180. We have considered the parties' pleadings and submissions on this issue. What we discern from them is that none of them question the importance of public participation in our governance structure. The only issue in dispute is whether there was sufficient public participation.

181. In the case of **Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR** the Court summarised the principles of public participation in the area of environmental governance as follows:

> **"97. From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:**
>
> **a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.**
>
> **b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation….**
>
> **c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information….**
>
> **d. Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must**

take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e. Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand."

182. In our view, the above public participation principles, though fashioned for the area of environmental governance, are, with a little bit of tweaking, applicable in all areas of governance, including the people's participation in legislative business.

183. All the parties agree that the 3rd Respondent invited memoranda from the public through adverts in the *Standard* and *Daily* Nation newspapers of 7th May, 2018. According to the Respondents and the Interested Parties opposing the Petition, the advertisement fulfilled the constitutional requirement for public participation. The Petitioners and the Interested Parties who support the Petition think otherwise. The issue for determination in this case therefore revolves around the sufficiency or otherwise of the public participation conducted in respect of the impugned amendments.

184. In **Mui Coal Basin Local Community & 15 Others (supra)** the Court expressed itself on the question of threshold of public participation as follows:

"92. The main question in this context then becomes, what is the test for determining if the threshold of public participation has been met? We are aware that several Courts in Kenya have dealt with the issue. The emerging position in Kenya is exemplified by the decision and reasoning of Justice Emukule in John Muraya Mwangi& 495 Others & 6 Others V Minister For State For Provincial Administration & Internal Security & 4 Others [2014 eKLR. Since it demonstrates the emerging consensus, we apologise for quoting at length the reasoning of the Learned Judge thus:

"The concept of public participation enshrined in Articles 10 and 12 of the Constitution of Kenya 2010, is a difficult one but needs to be given effect both before and after legislative enactment. This may take several forms:-

i. The concept envisages political participation in the conduct of public affairs, such as the right to vote, and to be elected or appointed to public office,

ii. The right to be engaged in public debate and dialogue with elected representatives at public hearings,

iii. The duty to facilitate public participation in the conduct of

public affairs,

iv. Ensuring that ordinary citizens the "hoi polloi," the "lala hoi" have the necessary information and are given opportunity to exercise their say not merely in election and appointment to political office but also economic participation, and conduct of their affairs."

185. As to how to determine whether the public participation conducted was sufficient, the Court stated that:

"96. The issue then arises of how we measure what is sufficient. In our determination we agree with the test applied in the Merafong Demarcation case and state that, the method and degree of public participation that is reasonable in a given case depends on a number of factors, including the nature and importance of the issue at hand and the intensity of its impact on the public."

186. Even though the cited principles are couched in the context of the day to day governance of the populace, we find them applicable to some extent to execution of legislative business by Parliament.

187. Through Standing Order No. 127 of the National Assembly Standing Orders (4th Edition), the National Assembly incorporates the constitutional principle of public participation in its legislative business by providing that:

"127. (1) A Bill having been read a First Time shall stand committed to the relevant Departmental Committee without question put.

(2)….

(3) The Departmental Committee to which a Bill is committed shall facilitate *public participation on the Bill through*

appropriate mechanism, including-

(a) inviting submission of memoranda;

(b) holding public hearings;

(c) consulting relevant stakeholders in a sector; and

(d) consulting experts on technical subjects.

(3A) The Departmental Committee shall take into account the views and recommendations of the public under paragraph (3) in its report to the House."

188. We find that the said provision does indeed incorporate the principles of public participation. A close reading of the provision readily discloses that Parliament has the discretion on the method to be used in collecting views from the public, stakeholders and experts. This observation is in line with the case law on public participation.

189. In the ***Doctors for Life*** case Ngcobo, J was of the opinion that:

"Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement. What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process."

190. The Petitioners have decried the lack of information in regard to the impugned amendments and NIIMS itself. They also raise the issue of the sufficiency of time given to the public to submit their views. The request for representations from the public was published in the newspapers on 7th May, 2018 and the representations were to be submitted before the close of business on 14th May, 2018 The Respondents and the Interested Parties aligned to their cause insist that the pre-enactment information on the impugned amendments was sufficient in the circumstances of this case.

191. We note that neither of the parties addressed us on which party bears the responsibility of informing the public on the Bills for purposes of public participation in the legislative process. This is in light of the fact that the legislative process begins from policy formulation stage, and the sponsor of a legislation, who has the background information is a different entity from the Parliament, and placing the onus on Parliament alone in this respect may be impracticable and unreasonable. In addition, there are opportunities to engage citizens at various stages of the legislative process, and these can be coordinated by various actors who are responsible for the process at any given stage, including during the content development of a Bill. Therefore, there are roles therefore to be played by the Executive, civil society and Parliament as actors in the various stages of the development of a Bill.

192. Be that as it may, we note that the 6th Respondent annexed a copy of the Statute Law (Miscellaneous Amendments Bill) 2018 together with a Memorandum of Objects and Reasons to its Replying Affidavit sworn on 28th February 2019 by Michael Sialai. The said Memorandum of Objects and Reasons explained that the Bill proposed to amend the Registration of Persons Act to establish the National Integrated Identity Management System, and provide for the capture of biometric data and geographical data in the registration of persons in Kenya. The said Bill was published in the Kenya Gazette Supplement No. 35 (National Assembly Bills No 12) on 10th April 2018. In terms of the legislative process, the Bill and Memorandum of Reasons and Objects was therefore in the public domain from 10th April 2018.

193. The 6th Respondent also annexed a copy of the advertisement in the Daily Nation newspaper of 7th May 2018. The said advertisement informed on three events. Firstly, on the publication of the on 10th April 2018. Secondly, that the amendments in the Bill to the various Acts would be committed to various Departmental Committees of the National Assembly that were listed in the advertisement. Lastly, of an invitation to members of the public to submit and representations they may have on the Bill. In this respect, the amendments to the Registration of Persons Act were shown to be committed to the Administration and National Security Committee.

194. The minutes of the sittings of the said Committee on 14th 19th, and 20th June 2019 when the amendments were discussed were also annexed, as was a copy of a memorandum sent by the 3rd Petitioner on dated 25th May 2018 on the said amendments. The Petitioners on the other hand rely on the advertisement published on 7th May 2018 to show that there was insufficient time for public participation, and the contents of the Bill, which was amending 68 Acts of Parliament.

195. Our view is that the time that was available for public participation must be considered in light of all the processes of the legislative process. In the present Petition, the evidence before us suggests that the public was aware of the Bill from 10th April 2018 when it was published, and could have participated from that date. The purpose of publication of Bill in this regard is to notify the public and invite representations through the elected Members or direct submission of memoranda and petitions. It is therefore not entirely correct to state that the members only had the seven days indicated in the advertisement of 7th May 2018 to present their views on the Bill. Even after expiry of the seven days, the doors were not closed for members of the public to participate, as there was still opportunity to participate during the

committee hearings as shown in Standing Order 127. The evidence from the Respondent demonstrates that this opportunity was availed, and that indeed there was participation by the 3rd Petitioner even after expiry of the time stated in the advertisement. It is thus our finding that sufficient time was availed for public participation.

196. There is sufficient authority for the proposition that the entire process has to be interrogated in order to determine whether the requirement for public participation was fulfilled in respect of a given law. In **2013 Law Society Case** the Court held that:

> **"In order to determine whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation; from the formulation of the legislation to the process of enactment of the statute."**

197. We also recognize that there were efforts made by the National Assembly in facilitating public participation when using the omnibus bill mechanism in the Statute Law (Miscellaneous Amendments) Bill 2018. Unlike in the case of **2013 Law Society Case** where the object of the bill was clearly indicated as intended to effect minor amendments, in the instant case there was clear indication that the legislature intended to carry amendments on the targeted Acts without the use of the term 'minor". It is also clear that from the advertisement of 7th May 2018 that each Act targeted for amendment was linked to the relevant committee. Therefore, in effect only a part of the amendments and not all of them were subject to stakeholder engagement in the Committees. Coupled with the fact that there was sufficient time availed to the public to give their views on the amendments, we find that there was sufficient public participations in the circumstances of this Petition.

Whether the impugned Bill required approval by the Senate

108. The Petitioners have argued that failure to commit the impugned Bill to the Senate was fatal. They submitted that the Bill ought to have been committed to the Senate because it was a Bill concerning county governments pursuant to Article 110 of the Constitution. This is because, of the 69 statutes sought to be amended, 20 of them affected the functions and powers of county governments set out in the Fourth Schedule to the Constitution. Their view was that since these statutes were not committed to the Senate, the amendments made by the impugned Act to the 20 pieces of legislation are invalid, null and void.

199. The Petitioners further submitted that from the 11th Parliament's Senate Bills Tracker as at 16th June 2017, it is clear that the Senate had previously considered the Alcoholic Drinks Control Act; The Public Finance Management Act; The National Youth Service Act (Cap. 208); The Universities Act, 2012; The National Drought Management Authority Act, 2016; The National Environment Management and Co-ordination Act 1999; The Registration of Persons Act; The Forest Conservation and Management Act, 2016; and The Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016.

200. Their contention was that to the extent that these Acts were considered and passed by both the Senate and the National Assembly, the amendments made by the impugned Act to these 10 statutes without subjecting them to Senate approval are invalid, null and void. They assert, finally, that the 5th Respondent, Hon. Kenneth Makelo Lusaka, the Speaker of the Senate, failed in his duties under Article 110(3) of the Constitution to determine that the impugned Bill was a Bill concerning county governments.

201. In its response to the Petitioners' arguments on the issue of involvement of the Senate, the 1st Respondent submitted that the Senate under Article 96(2) as read with Article 217 of the Constitution is mandated to participate in law making function of Parliament by debating on Bills concerning counties and revenue allocated to counties. By virtue of Article 109 (1), Parliament exercises its legislative power through Bills it passes and which are assented to by the President. Further, by the provisions of Article 109 (3), a Bill not concerning county government is considered only in the National Assembly and passed in accordance with Article 122 and the Standing Orders of the National Assembly.

202. According to the 1st Respondent, Article 110 (1) of the Constitution defines *'a bill concerning county government'* and, pursuant to the provisions of Article 110(3) of the Constitution, the Speakers of both Houses usually resolve any doubt with regard to whether a Bill concerns county governments. To buttress the position that it does not matter even if there was no consultation between the Speakers, reference was made to the case of **Nation Media Group Limited & 6 others v Attorney General & 9 others [2016] eKLR**, wherein it was held that the requirement contained in Article 110(3), which is part of the Article relating to Bills concerning county governments, comes into play when there is a question or doubt as to whether or not a Bill concerns counties. Further reliance was placed on the Court of Appeal decision in **National Assembly of Kenya & Another vs Institute for Social Accountability & 6 Others (2017) eKLR**, where it pronounced itself on the issue as to when a Bill concerns counties.

203. The 2nd Respondent on its part referred to the 3rd Respondent's Replying Affidavit sworn by Michael Sialai on 2nd May, 2019 in which it had averred that there was no contention in any House of Parliament on whether the impugned Bill was a Bill concerning counties as required by Article 110 (3) of the Constitution. It also cited in support the decision in **National Assembly of Kenya & Another v Institute for Social Accountability & 6 Others (supra)**. According to the 2nd Respondent, the Bill was wholly or substantially within the scope of the functional mandate of the national government, and even though matters ancillary or incidental to it fall within the functional mandate of county governments, the amendments did not in any way affect the functions and powers of county governments.

204. The 3rd Respondent's submissions on this issue were that the impugned Act was not a Bill concerning counties since none of the statutes amended fall under the constitutional definition of a Bill concerning counties to warrant committal to the Senate or to be classified as a Bill concerning counties provided for under Article 217 of the Constitution. It was also its argument that while both Speakers of the Houses of Parliament are required by the Constitution to make a resolution when there is a question or doubt as to whether or not a Bill concerns counties under Article 110(3) of the Constitution, there was no question, doubt or contention in any House of Parliament that the impugned Bill concerned counties.

205. In support of this argument, the 3rd Respondent cited the case of **Nation Media Group Limited & 6 others v Attorney General & 9 others (supra)** in which the court held that there was no violation of the Constitution in the absence of consultation between the Speakers of

the two Houses of Parliament or in the failure to table the two Bills before the Senate. It was therefore its submission that the Bill was subjected to the criteria set out under Article 110(3) of the Constitution and determined to be a Bill not concerning counties. The 3rd Respondent therefore argued that this Court lacks grounds to invoke its jurisdiction under Article 165 of the Constitution to invalidate the legislation.

206. We have considered the respective submissions of the parties on the question whether the Senate had a role in the enactment of the impugned amendments. We note that the parties are agreed that the impugned amendments were originated and passed in the National Assembly without reference to the Senate. The only question therefore is whether the impugned amendments concerned county governments and could only pass with the approval of the Senate.

207. As we understand it, the term "concerning counties" has a wide meaning. According to the Supreme Court in **The Speaker of the Senate & Another and the Attorney General & Others, Advisory Opinion Reference No. 2 of 2013**, the phrase "*creates room for the Senate to participate in the passing of Bills in the exclusive functional areas of the national government, for as long as it can be shown that such Bills have provisions affecting the functional areas of the county governments."* We, however, do not think that the jurisdiction of the Senate extends to each and every legislation passed by the National Assembly. To so hold would render Article 110 of the Constitution redundant since it is difficult to think of any law that does not touch on counties. Although the Fourth Schedule of the Constitution does indeed give a wide array of functions to the counties, it is incumbent upon the person who alleges non-compliance with Article 110 of the Constitution to demonstrate that the law in question is one that concerns county governments.

208. By virtue of Article 110(1), a Bill concerns county governments if it contains provisions affecting the functions and the powers of a county government; relates to election of members of a county assembly or a county executive; or affects finances of a county government. This position was affirmed in **National Assembly of Kenya & Another v Institute for Social Accountability & 6 Others (2017) eKLR**, where the Court of Appeal held that:

> **"A "Bill concerning county government" is defined in Article 110(1) and includes a bill containing provisions affecting the functions and powers of county government set out in the Fourth Schedule and a Bill affecting the finances of county governments."**

209. It is therefore incumbent upon a person who claims that the Senate was not involved in the enactment of a particular law to show that the impugned law concerns county governments. We find that the Petitioners have failed to discharge this duty in this matter. The fact that some of the statutes amended by the impugned Act had previously been amended or passed with the participation of the Senate does not necessarily mean that those laws concern county governments.

210. An agreement between the Speakers of the two Houses of Parliament that a Bill concerns county governments can still be subjected to litigation in order for the court to determine whether the decision of the Speakers is correct. Our holding finds support in the case of **Institute of Social Accountability & Another v National Assembly & 4 Others [2015] eKLR** where it was held that:

> **"66. Accordingly it is clear that if the Speaker of the Senate signifies concurrence with a Bill that it falls within one category or another, it may well be said that would be the end of the matter. However, the issue whether the matter is one for county government is of constitutional importance and the decision of the respective speakers, while respected, cannot be conclusive and binding on the court whose jurisdiction it is to interpret the Constitution and as the final authority on what the Constitution means. Participation of the Senate in the legislative process is not just a matter of procedure, it is significant to the role of the Senate in our constitutional scheme as the Senate's legislative role is limited to matters concerning county governments….**
>
> **69. In our view and we so hold, the fact that the legislation was passed without involving the Senate and by concurrence of the Speakers of both House of Parliament, is neither conclusive nor decisive as to whether the legislation affects county government. In other words, while concurrence of the Speakers is significant in terms of satisfaction of the requirements of Article 110(3) of the Constitution, it does not by itself oust the power of this Court vested under Article 165(3)(d) where a question is raised regarding the true nature of legislation in respect to Article 110(1). The court must interrogate the legislation as a whole and determine whether in fact the legislation meets the constitutional test of a matter, "concerning county government.""**

211. Indeed, the Petitioners have not rebutted the 3rd Respondent's averment that amendments to Acts concerning county governments were lumped together in Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 13) for separate debate and transmission to the Senate for consideration. We have looked at this particular Bill and we find in it proposed amendments to seventeen Acts. The statutes proposed for amendment in the Bill are entirely different from the 69 Acts that were amended through the impugned National Assembly Bill No. 12 of 2018. It is therefore clear that the National Assembly was alive to the role of the Senate in the enactment of Bills concerning county governments and that is why it set aside the amendments which it believed touched on county functions and proposed amendments to those Acts through National Assembly Bill No. 13 of 2018.

212. We have said enough, we believe to show that this particular complaint by the Petitioners lacks merit and is destined for dismissal.

Whether there was Violation and/or Threatened Violation of Rights .

213. The Petitioners have alleged that the impugned amendments contravene or threaten the Constitution. They submitted that other than the fact that they were improperly enacted contrary to the law as decreed by this court, the impugned amendments also violate or threaten the Constitution. It was also their argument that the amendments do not meet the test in Article 24 of the Constitution with regard to legislation that limits fundamental rights and freedoms.

214. The Respondents deny that the impugned amendments violates or threaten to violate constitutional rights. In his submissions, the 1st Respondent submitted that, in considering the Petitioners' invitation to find the impugned statute unconstitutional, the Court should be guided by the principle enunciated in the case of **Ndyanabo -vs- Attorney General [2001] EA 495** to the effect that there is a general presumption of constitutional validity of legislation until the contrary is proved and the burden to rebut that presumption rests on the person alleging unconstitutionality.

215. It was his submission further that in Kenya, the principle was well captured by **Ibrahim, J** (as he then was) in the case of **Mark Ngaywa v Minister of State for Internal Security and Provincial Administration and Another Petition No.4 of 2011**. The 1st Respondent also cited the decision of the Supreme Court of India in the case of **Hambardda Dawakhana v Union of India Air (1960) AIR 554**, and the decision of the High Court in **Susan Wambui Kaguru & Others v Attorney General Another, [2012] eKLR** in which the courts expressed similar views.

216. The 1st Respondent further submitted that while interrogating constitutionality of a statute, the Court is also required to consider the objects and purpose of the legislation. Reliance was placed on the cases of **Murang'a Bar Operators and Another -vs- Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011] eKLR** and **Samuel G. Momanyi -vs- Attorney General and Another High Court Petition No. 341 of 2011.**

217. Additionally it was his case that the Court must also consider the purpose and effect of implementing the statute or statutory provision and whether it would result into unconstitutionality as held in the Ugandan case of **Olum and another v Attorney General [2002] 2 EA 508**. As to the role of the Court the 1st Respondent cited the US Supreme Court decision in **U.S vs Butler, 297 U.S. 1[1936]** that the Court is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and no more.

218. The 2nd Respondent on its part pointed out that Article 165 (3) (d) of the Constitution grants this Court the jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution, and that such a determination can only be made when there is a clear and actual violation of a constitutional provision, citing in support **United States vs Butler, (supra).** The submission was that it is therefore imperative that there be an actual violation of the provisions of the Constitution for the jurisdiction of the Court to be invoked, and there is thus a requirement for precision in pleadings as was observed by the Supreme Court of Kenya in **Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 others, [2014] eKLR**,

219. It was the 2nd Respondent's submission that any other purported intervention by the Court outside the corners of the Constitution would amount to interference with the mandate of the legislative arm of government against the cardinal principles in the doctrine of separation of powers.

220. The 3rd Respondent submitted that the legislative authority of the Republic of Kenya is vested in Parliament pursuant to Article 94 of the Constitution. Where a law is enacted by Parliament therefore, it is presumed to be constitutional unless declared unconstitutional by the courts. It was its submission that the burden of proving that any law is unconstitutional rests with the person alleging otherwise. The 3rd Respondent relied on the case of **Council of County Governors v Inspector General of National Police Service & 3 others [2015] eKLR** in which it was held that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair but instead, that what has been done is fair until the contrary is shown.

221. The 3rd Respondent reiterated that the test for establishing constitutionality of a statute was exhaustively set out by the High Court of Kenya in **Institute of Social Accountability & Another vs National Assembly & 4 Others [2015] eKLR**. It also cited the Supreme Court decision in **Re the Matter of the Interim Independent Electoral Commission Constitutional Application (supra).** Its submission was that in passing the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018, the National Assembly was exercising its legislative authority as required by Articles 95(2), 109 and 186(4) of the Constitution.

222. The 6th Respondent agreed with the other Respondents that there is a general presumption of constitutionality of every statute or statutory provision enacted by Parliament and the burden lay on the person alleging unconstitutionality to prove it. Reliance was placed on the decision of the Court of Appeal of Tanzania in **Ndyanabo vs. Attorney General [2001] EA 495** which reiterated the law in the English case of **Pearlberg vs. Varty [1972] 1 WLR 534**. The decision of the Supreme Court of India in **Hamdarddawa Khana vs Union of India [1960] AIR 554** was also cited in support.

223. We note that the Petitioners listed a number of statutory provisions in paragraph 70 of their Petition which were amended by the impugned Act, and which they allege violate or threaten to violate constitutional rights. These include the amendments to:

a. Section 13 of the Oaths and Statutory Declarations Act, which the Petitioners claimed violate Articles 11 and 44 of the Constitution on culture and it also violates the right to equality and freedom from discrimination in Article 27(4), and the right to freedom of conscience, religion, belief and opinion in Article 32.

b. Section 81(1) and 1A of the Civil Procedure Act, which are alleged to set a new eligibility criteria that affect the application of Articles 10, 27, 73(2)(a) and 232(1)(g) on eligibility for public office.

c. Section 4 of the Probation of Offenders Act which the Petitioners aver infringe on the right to privacy in Article 31 by empowering a probation officer to have the right to access records and any other necessary information.

d. Section 3(2) of the Housing Act which are alleged to affect rights and fundamental freedoms of citizens and infringe on the national values of good governance in Article 10, and the procedure for making appointments to public office in Articles 10, 27, 73(2)(a), and 232(1)(g).

e. Section 49A of the Law of Succession Act, which the Petitioners allege affect the administration of justice including the right to fair trial in Article 50(1) and infringe on the right to access information in Article 35.

f. Various sections of the Traffic Act, which the Petitioners contend impact on the right to administrative action that is expeditious, efficient, reasonable and procedurally fair under Article 47(1).

g. Section 12(2) of the Kenya Roads Board Act, section 113(6) of the Industrial Property Act, section 6 of the Copyright Act , various sections of the Biosafety Act, section 10 of the Competition Act, section 6(1)(a) of the National Authority for the Campaign Against Alcohol and Drug Abuse Act, and various sections of the Kenya Law Reform Commission Act and of the National Drought Management Authority Act, which the Petitioners allege infringe on the national values of good governance in Article 10, and the procedure for making appointments to public office in Articles 10, 27, 73(2)(a), and 232(1)(g).

224. Other than making the above averments, the Petitioners did not demonstrate in what manner these provisions violate the stated rights. Accordingly, they have failed to discharge the burden imposed on them in this regard, and we decline to find the said amendments unconstitutional for this reason. We shall however proceed to consider the constitutionality of provisions on which arguments were made by the parties.

Whether the establishment of NIIMS violates or threatens violation of the Right to Privacy

225. The Petitioners have challenged the introduction of the National Integrated Identity Management System (NIIMS) pursuant to the introduction of a new section 9A to the Registration of Persons Act on the basis that it is unconstitutional. They submitted that the amendments made to the Registration of Persons Act establishing NIIMS violate Article 31 which protects the right to privacy. They further argued that currently, Kenya does not have a specific data protection law neither does it have a specific data protection agency or authority and there is a lacuna in Kenya's computer encryption laws and policies.

226. In addition, that Kenya already has an identity registration regime, namely the Integrated Population Registration System (IPRS), which collects data from a dozen databases held by various government agencies. Accordingly, it was their submission that the amendments made to the Registration of Persons Act by the impugned Act establishing NIIMS are unconstitutional and therefore, invalid, null and void.

227. The 2nd Respondent in response contended that it is not disputed by the Petitioners that in furtherance of its constitutional obligations, the State, through its various institutions and organs, has been collecting citizens' personal information for decades. The personal information collected through NIIMS is of a similar nature as that currently being held by various government agencies. Further, that the issues causing discomfort to the Petitioners is the collection of DNA and GPS information, and that in a similar matter challenging the constitutionality of NIIMS, this Court directed on 1st April, 2019 in **Constitutional Petition No 56 of 2019 (Consolidated) - Nubian Right Forum & 2 Others –v- the Honourable Attorney General & 16 Others [2019] eKLR** that DNA and GPS information was not to be collected by the State during the NIIMS mass registration exercise.

228. The 2nd Respondent further submitted that collection of personal information of citizens is central to the proper functioning of the State, and relied on the decision by the United States Supreme Court in the case of **Margaret O'Hartigan vs Department of Personnell ET AL 118 Wn. 2d 111, P2d 44 (No. 56063-3 En Banc)** that disclosure of intimate information to governmental agencies is permissible if it is carefully tailored to meet a valid governmental interest, and provided the disclosure is no greater than is reasonably necessary.

229. According to the 2nd Respondent, the government interest in this context is in the State's duty of care to its citizens, and that vital and reliable data is central to the discharge of this duty by the State. It was also its submission that the Petitioners have failed to adduce any evidence to demonstrate the manner in which the collection of personal information is an *"unnecessary requirement"* as set out in Article 31 (c) of the Constitution, especially in light of the fact that this information is already held by the State, albeit in different institutions.

230. The 2nd Respondent contended that the right to privacy is not absolute, and that in determining the type of information that may be revealed, it would be prudent to establish the purpose and objective of doing so and the value of that information. Further, that the collection of personal information by the State is in accordance with the social contract theory, in that, when ceding their sovereignty to the State, citizens cede control of certain aspects of their lives and give up the condition of unregulated freedom, including their personal information, in exchange for the security of a civil society governed by a democratically elected government. Reliance was placed on the decisions in **Roshanara Ebrahim v Ashleys Kenya Limited & 3 others [2016] eKLR** and the decision of the European Court of Justice in **Michael Schwarz v Stadt Bochum, C?291/12, EU:C:2013:670 (17 October 2013)** for this position.

231. It was thus the 2nd Respondent's submission that NIIMS does not infringe individuals' right to privacy but instead seeks to protect it by ensuring that all personal identification information is under the safe custody of one government entity. Further, that the measures taken to achieve the State's objectives ensure that a balance is struck between the public interest and individual's right to privacy. Thus, there was no infringement of the right to privacy.

232. On the security of data that is held by the government, the 2nd Respondent submitted that there are safeguards in place to ensure the security of this information, and that Kenya has an extensive legislative framework on data protection, information security, modalities on access to information as well as protection of the integrity of government records and information. Further, that the onus lies on the Petitioners to demonstrate the insufficiency or otherwise of the current existing safeguards on information held by the State, and in its view, they have failed to discharge this burden.

233. In response to the Petitioners' assertion that Kenya already has an Identity regime in place in the form of the Integrated Population Registration System (IPRS), the 2nd Respondent submitted that NIIMS and IPRS perform two separate and distinct functions and there is therefore no immediate need for a transitional mechanism as part of the amendments to the Act. Further, that IPRS performs a passive

function of merely receiving personal information from particular databases and storing the same, while NIIMS performs the active function of collecting information, first hand, from the information subject and regularly integrating and updating the said information.

234. The 2nd Respondent further submitted that IPRS relies on data from other agencies while NIIMS relies on data received directly from the information subject. In the 2nd Respondent's view, the amendments made to the Registration of Persons Act leading to the establishment of NIIMS are in line with the Constitution and are therefore valid.

235. The 3rd Respondent agreed with the 2nd Respondent that the right to privacy is not absolute but is subject to limitation as provided for in Article 24 of the Constitution. Further, that the limitations on the right to privacy under the impugned legislation are intended to enhance state security and are therefore reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. It was its submission that matters of national registration and identification of persons are sanctioned by the Constitution and enactment of a law to regulate them cannot deprive the Petitioners of their right to privacy provided under Article 31.

236. According to the 3rd Respondent, in interpreting the provisions of Article 24 (1) and on the authority of the Constitutional Court of South Africa in **Samuel Manamela & Another V The Director General of Justice, CCT 25/99**, as a general rule, the more serious the impact of the measure on the constitutional right, the more persuasive or compelling the justification must be.

237. Reliance was also placed on the case of **Attorney General & Another v Randu Nzai Ruwa & 2 others [2016] eKLR,** where the court held that where national security has been wrongfully invoked to take away a fundamental right, the court needs to be judicially satisfied that the action of the State is reasonable and justifiable. Similarly, that the Supreme Court of India in **Civil Original Jurisdiction Writ Petition (Civil) No. 494 Of 2012 Justice K.S. Puttaswamy (Retd.) and others v Union of India and Others**) held that the right to privacy is not absolute.

238. In addressing this issue, this Court is mindful of the provisions of Article 31 of the Constitution on the right to privacy, which provide as follows:

> **"Every person has the right to privacy, which includes the right not to have—**
>
> **(a) their person, home or property searched;**
>
> **(b) their possessions seized;**
>
> **(c) information relating to their family or private affairs unnecessarily required or revealed; or**
>
> **(d) the privacy of their communications infringed."**

239. The article therefore guarantees a general right to privacy, and in addition also guards against specific infringements of privacy, including unnecessary revelation of information relating to family or private affairs, which is the bone of contention in this Petition. The South African Constitutional Court discussed the elements and scope of the general right to privacy in **Bernstein vs Bester NO (1996) 2 SA 751 (CC),** wherein Ackermann J. held as follows in the majority judgment:

> **"(67)…..The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."**

240. The Learned Judge went to on to give examples of what is commonly considered an intrusion of the right to privacy as follows:

> ***"(68)….Privacy is an individual condition of life characterised by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state. In Financial Mail (Pty) Ltd v Sage Holdings Ltd ([1993] ZASCA 3; 1993 2 SA 451) it was held that breach of privacy could occur either by way of* an unlawful intrusion upon the personal privacy of another, or by way of unlawful disclosure of private facts about a person. The unlawfulness of a (factual) infringement of privacy is adjudged in the light of contemporary boni mores and the general sense of justice of the community as perceived by the Court.**
>
> **(69) Examples of wrongful intrusion and disclosure which have been acknowledged at common law are entry into a private residence, the reading of private documents, listening in to private conversations, the shadowing of a person, the disclosure of private facts which have been acquired by a wrongful act of intrusion, and the disclosure of private facts contrary to the existence of a confidential relationship. These examples are all clearly related to either the private sphere, or relations of legal privilege and confidentiality. There is no indication that it may be extended to include the carrying on of business activities."**

241. The Learned Judge concluded that the scope of a person's privacy extends only to those aspects in regard to which a legitimate expectation of privacy can be harboured. In this respect, it was held that a person's subjective expectation of privacy is subject to the test that society recognises that expectation to be objectively reasonable.

242. This position was adopted by Kenyan courts in **Roshanara Ebrahim v Ashleys Kenya Limited & 3 Others, [2016] eKLR ,Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 others v Cabinet Secretary Ministry of Health & 4 others, [2016] eKLR,** and in **Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] eKLR.** It is notable that section 13 of the South African interim Constitution which was the basis of the decision in **Bernstein vs Bester NO** was similar to the provisions of Article 31 save for the protection of informational privacy, and stated as follows:

> **"Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications."**

243. In **Tom Ojienda t/a Tom Ojienda & Associates Advocates vs Ethics and Anti-Corruption Commission & 5 others (supra)** was held as follows in this regard:

> **"77. I also note that a legitimate expectation of privacy has two components; the protection of the individual and the reasonable expectation of privacy. The reasonable expectation of privacy test itself has two compartments. Firstly, there must be at least a subjective expectation of privacy and secondly, the expectation must be recognized as reasonable by the society…..**
>
> **78. Ackermann J's reasoning can therefore be summarized as follows; (a) privacy is a subjective expectation of privacy that is reasonable, (b) it is reasonable to expect privacy in the inner sanctum, in the truly personal realm, (c) a protected inner sanctum helps achieve a valuable good-one's own autonomous identity. It emerges to my mind that, and from the decision in Bernstein vs Bester NO (supra), that privacy is not a value in itself but is valued for instrumental reasons, for the contribution it makes to the project of 'autonomous identity'. This protection in return seeks to protect the human dignity of an individual."**

244. The right to privacy has also been expressly acknowledged in international and regional covenants on fundamental rights and freedoms. It is provided for under Article 12 of the Universal Declaration on Human Rights, Article 17 of the International Convention on Civil and Political Rights, Article 8 of the European Convention on Human Rights and Article 14 of the African Charter on Human and Peoples' Rights.

245. The scope of the right to privacy is therefore incapable of definition, and may be described as a bundle or continuum of rights which have a variety of justifications. The Indian Supreme Court in **Justice K.S. Puttaswamy (Retd.) and Another v. Union of India and Others Writ Petition (Civil) No. 494 of 2012**, summarised the holdings in various decision on the right to privacy, and expounded on the scope and aspects of the right to privacy, including the protection of informational privacy as follows in paragraph 232 :

> **i. "privacy has always been a natural right, and the correct position has been established by a number of judgments starting from Gobind. Privacy is a concomitant of the right of the individual to exercise control over his or her personality. Equally, privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III. The fundamental right to privacy would cover at least three aspects (i) intrusion with an individual's physical body, (ii) informational privacy and (iii) privacy of choice. Further, one aspect of privacy is the right to control the dissemination of personal information. Every individual should have a right to be able to control exercise over his/her own life and image as portrayed in the world and to control commercial use of his/her identity.**
>
> **ii. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusions. While the legitimate expectation of privacy may vary from intimate zone to the private zone and from the private to the public arena, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy is a postulate of dignity itself. Privacy concerns arise when the State seeks to intrude into the body and the mind of the citizen.**
>
> **iii. Privacy as intrinsic to freedom, liberty and dignity. The right to privacy is inherent to the liberties guaranteed by Part-III of the Constitution and privacy is an element of human dignity. The fundamental right to privacy derives from Part-III of the Constitution and recognition of this right does not require a constitutional amendment. Privacy is more than merely a derivative constitutional right. It is the necessary basis of rights guaranteed in the text of the Constitution.**
>
> **iv. Privacy has both positive and negative content. The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.**
>
> **v. Informational Privacy is a facet of right to privacy. The old adage that knowledge is power has stark implications for the position of individual where data is ubiquitous, an all- encompassing presence. Every transaction of an individual user leaves electronic tracks, without her knowledge. Individually these information silos may seem inconsequential. In aggregation, information provides a picture of the beings. The challenges which big data poses to privacy emanate from both State and non-State entities.**
>
> **vi. Right to privacy cannot be impinged without a just, fair and reasonable law. It has to fulfil the test of proportionality i.e. (i) existence of a law (ii) must serve a legitimate State aim and (iii) proportionate.**

246. The protection of informational privacy is what is specifically in issue in the instant Petition, and is provided for in Article 31 (c) of the Constitution. The scope of the right to and protection of informational privacy is explained in ***The Bill Of Rights Handbook,*** **5th Edition (2005) by** Iain Currie and John de Waal at page 323, as follows:

> **"More particularly, this is an interest in restricting the collection, use and disclosure of private information. It also encompasses a related interest in having access to personal information that has been collected by others in order to ascertain its content and to check its accuracy. These interests can readily be accommodated under the value of dignity since publication of embarrassing information, or information which places a person in false light, is most often damaging to the dignity of the person. But the right to privacy guarantees control over all private information and it does not matter whether the information is potentially damaging to a person's dignity or not. The publication of private photographs, however flattering, will for example constitute a violation of the right to privacy of in this sense. So would be the use of a person's name or identity without his or her consent. But as with the other two elements of the right to privacy, there must be a reasonable expectation of privacy.** For **example, a person does not have the right to refuse to provide identification to a police official when so requested."**

247. Information privacy includes the rights of control a person has over personal information. Such personal information will in the first place concern information which closely relates to the person and is regarded as intimate, and which a person would want to restrict the collection, use and circulation thereof. Examples include information about one's health. But other information about that person may also be considered 'private' and hence protected under the right to information privacy, even if this information relates to his or her presence or actions in a public place or a place accessible for the public. Such information over which individuals have an interest to keep private in our view also include information and data about their unique human characteristics, which allows them to be recognized or identified by others, as it is information about one's body and about one's presence , image and identity, in both private and public places.

248. We accordingly adopt the definition in **Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 others v Cabinet Secretary Ministry of Health & 4 others (supra)**, where Lenaola J. and Muriithi J. summarised the right to informational privacy as follows:

> **"Article 31(c) *of the* Constitution must be understood in this context – it protects against the unnecessary revelation of information relating to family or private affairs of an individual. Private affairs are those matters whose disclosure will cause mental distress and injury to a person and there is thus need to keep such information confidential. Taken in that context, the right to privacy protects the very core of the personal sphere of an individual and basically envisages the right to live one's own life with minimum interference. The right also restricts the collection, use of and disclosure of private information.**

249. In light of the different facets and bases for the right to privacy, the applicable test in determining whether there is an invasion or violation of the right was laid down in **Bernstein vs Bester NO (supra)** as follows:

> **"It essentially involves an assessment as to whether the invasion is unlawful. And, as with other forms of anuria, the presence of a ground of justification (such as statutory authority) means that an invasion of privacy is not wrongful. Under the Constitution, by contrast, a two-stage analysis must be employed in deciding whether there is a violation of the right to privacy. First the scope of the right must be assessed to determine whether law or conduct has infringed the right. If there has been an infringement it must be determined whether it is justifiable under the limitation clause".**

250. Specifically as regards a determination of whether there is a violation of the right to informational privacy, the Constitutional Court of South Africa in the case of ***Mistry v Interim National Medical and Dental Council of South Africa (1998) (4) SA 1127 (CC)*** stated that the Court ought to take into account the fact; (i) whether the information was obtained in an intrusive manner, (ii) whether it was about intimate aspects of an applicants' personal life; (iii) whether it involved data provided by an applicant for one purpose which was then used for another purpose and (iv) whether it was disseminated to the press or the general public or persons from whom an applicant could reasonably expect that such private information would be withheld.

251. In the present Petition, the Petitioners have alleged that the amendments to the Registration of Persons Act violates the right to privacy as it seeks to introduce the collection of biometric data, which is personal data and is unnecessary as that personal data is in any event already held in other existing registration databases. They also allege that there are inadequate safeguards to protect the data. The Respondents denied that there is any violation as the information being collected is necessary and insisted that there is a legal framework in place for its protection.

252. In normal parlance, biometric data is any physical, biological, physiological or behavioural data, derived from human subjects, which has the potential to identify an individual. Biometric data identifies an individual through one or more unique factors specific to the physical identity of a person. It is in this regard not in dispute that section 3 of the Registration of Persons Act was amended by the impugned Act to include a definition of "Biometric" as "unique identifiers or attributes, including fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves and Deoxyribonucleic Acid (DNA) in digital form." It also introduces a definition of Global Positioning Systems (GPS) coordinates to mean *"unique identifier of precise geographical location on the earth, expressed in alphanumeric character being a combination of latitude and longitude"*.

253. In addition, section 5 (1)(g) of the Act was also amended to include GPS coordinates as part of the information to be provided on place of residence, and a new paragraph 5 (1)(ha) inserted that provides for biometric data to be kept in the register of all persons in Kenya by the Principal Registrar. Lastly, a new section 9A was included, which is the one that establishes NIIMS which will *inter alia* harmonise, incorporate and collate data relating to registration of persons from all registers, including biometric data.

254. We start our analysis by addressing the legitimacy of the privacy concerns raised by the Petitioners about biometric data. The first observation we make in this regard is that biometric data, by its very nature, provides information about a given person, and is therefore in this regard personal information that is subject to the protection of privacy in Article 31. The Data Protection Act No 24 of 2019 has adopted at section 2 the definition of personal data that is in the European Union's General Data Protection Regulations (GDPR), namely, any information which is related to an identified or identifiable natural person. The GDPR details the elements of such information as follows in Article 4(1):

"The data subjects are identifiable if they can be directly or indirectly identified, especially by reference to an identifier such as a name, an identification number, location data, an online identifier or one of several special characteristics, which expresses the physical, physiological, genetic, mental, commercial, cultural or social identity of these natural persons. In practice, these also include all data which are or can be assigned to a person in any kind of way. For example, the telephone, credit card or personnel number of a person, account data, number plate, appearance, customer number or address are all personal data".

255. A similar definition of an identifiable natural person is now provided for in the Data Protection Act 24 of 2019. We note that the unique attributes and identifiers that are included in the definition of biometric data as defined in section 3 of the Registration of Persons Act, GPS coordinates, and the data collected by NIIMS as evidenced by the NIIMS data capture form, clearly fall within the above definition of personal data. The quali?cation of biometric data as personal has important consequences in relation to the protection and processing of such data, and as such invites a risk of violation of the right to privacy in the event of inadequate protection measures.

256. It is also notable that in Article 31 (c) of the Constitution, a violation of the right to informational privacy occurs when personal information is unnecessarily required or revealed. The outstanding question before us, therefore, is whether the requirement and collection of biometric data was necessary or not. The Petitioners have argued that the said biometric data was not necessary as it is already in existence. The justification put forward by the Respondents for the collection of biometric data was that the right to privacy is not an absolute right; that biometric data is necessary as the most deterministic method of identification; and that reliable data is necessary for the State to provide services and security to its citizenry.

257. We have considered and appreciate the detailed information and evidence given by the parties on the nature of biometric data, and its use in identification. We need to clarify two aspects of the relevance of this evidence at the outset. Firstly, it is evident from the various definitions of biometric data that its main utility is with regard to identification of a natural person. To this extent, biometric data is necessary for identification purposes. We in this respect adopt the findings of the Supreme Court of India in **Justice K.S. Puttaswamy (Retd.) and Another v. Union of India and Others (supra)** on the necessity of the different types of biometric data in identification s follows**:**

"251. Face Photographs for the purpose of identification are not covered by a reasonable expectation of privacy. Barring unpublished intimate photographs and photographs pertaining to confidential situations there will be no zone of privacy with respect to normal facial photographs meant for identification.

Face-photographs are given by people for driving license, passport, voter id, school admissions, examination admit cards, employment cards, enrolment in professions and even for entry in courts. In our daily lives we recognize each other by face which stands exposed to all, all the time. The face photograph by itself reveals no information.

2. There is no reasonable expectation of privacy with respect to fingerprint and iris scan as theyare not dealing with the intimate or private sphere of the individual but are used solely for authentication. Iris scan is nothing but a photograph of the eye, taken in the same manner as a face photograph. Fingerprints and iris scans are not capable of revealing any personal information about the individual except for serving the purpose of identification. Fingerprints are largely used in biometric attendance, laptops and mobiles. Even when a privacy right exists on a fingerprint, it will be weak. Finger print and iris scan have been considered to be the most accurate and non-invasive mode of identifying an individual. They are taken for passports, visa and registration by the State and also used in mobile phones, laptops, lockers etc for private use. Biometrics are being used for unique identification in e passports by 120 countries."

258. Therefore, the only relevant consideration as regards the necessity of biometric data is its utility with respect to the authentication or verification of a person. The Article 29 Data Protection Working Party in its **Working Document on Biometrics** identified the necessary qualities required of biometric data for purposes of authentication and verification are that the data should have attributes that are: (a) universal, in the sense that the biometric element exists in all persons; (b)unique, in that the biometric element must be distinctive to each person, and (c) permanent, in that the biometric element remains permanent over time for each person, and a data subject is in principle not able to change these characteristics.

259. It is notable in this respect that the biometric attributes required by the impugned amendments meet these criteria, as most of them are universal and unique to the data subjects. The only reservation we have is as regards the utility of DNA for identification purposes. This is for the reason that unlike other biometric characteristics, the technique used in DNA identification, which is a DNA comparison process, does not allow for the veri?cation or identi?cation to be done "in real time", the comparison is also complex, requires expertise, and takes time.

260. The European Court of Human Rights in **S and Marper v United Kingdom 30562/04 [2008] ECHR 1581** addressed the issue of the utility of holding DNA in a database, and found that the continued holding of DNA samples of individuals who are arrested but later acquitted or have the charges against them dropped, is a violation of the right to privacy under the European Convention on Human Rights. Some of the reasons given by the Court as to why the retention of cellular samples and DNA profiles was a breach of the right to privacy were as follows:

"73. Given the nature and the amount of personal information contained in cellular samples, their retention *per se* must be regarded as interfering with the right to respect for the private lives of the individuals concerned. That only a limited part of this information is actually extracted or used by the authorities through DNA profiling and that no immediate detriment is caused in a particular case does not change this conclusion (see *Amann, cited above, § 69).*

74. As regards DNA profiles themselves, the Court notes that they contain a more limited amount of personal information extracted from cellular samples in a coded form. The Government submitted that a DNA profile is nothing more than a sequence of numbers or a barcode containing information of a purely objective and irrefutable character and that the

identification of a subject only occurs in case of a match with another profile in the database. They also submitted that, being in coded form, computer technology is required to render the information intelligible and that only a limited number of persons would be able to interpret the data in question."

261. We find that the limitations observed by the Court in the said case on the use of DNA equally apply, if not with more potency, to the Kenyan situation, given the concession by the Respondents of their inability to process DNA information for the entire population.

262. We also find that the necessity of GPS monitors in identification is even less evident, given the risk they pose to the right to privacy. This Court takes judicial notice of the fact that GPS technology is satellite-based and its usage has different aspects and is more commonly used in cars and phone mobiles which help in determining directions and locations. The potential usage of such technology may include information from the providers of internet and telecommunication service that permits real-time tracking of the directions, speed and locations of monitors. The privacy implications and risks arising from the use of GPS monitors is that the said devices can be used to track and monitor people without their knowledge.

263. The U.S. Supreme Court addressed these risks and threats in a unanimous decision in **United States v. Antoine Jones 565 US (2012)** and ruled that law enforcement must obtain a warrant prior to attaching a GPS device to a suspect's vehicle in order to monitor its movements. The issue before the Court was whether the attachment of a Global-Positioning-System (GPS) tracking device to an individual's vehicle and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment. The Fourth Amendment provides in the relevant part that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. Sotomayor J., in her concurring judgment, observed that the government had usurped Jones' property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to Fourth Amendment protection, and held as follows in this regard:

"GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations……Disclosed in GPS data will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on The Government can store such records and efficiently mine them for information years into the future…. And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices"

264. We fully agree with the sentiments expressed in the above matter with respect to GPS monitoring.

265. Accordingly, in light of our analysis in the preceding paragraphs of this judgment, the upshot of our findings is that other than the DNA and GPS coordinates, information to be collected by NIIMS pursuant to the impugned amendments is necessary and is therefore not unconstitutional.

266. The Petitioners also raised an issue with regard to the adequacy of the legal framework for protection of the data collected by NIIMS. In light of the enactment of the Data Protection Act of 2019 following the hearing of this Petition but prior to judgment, the parties were given an opportunity to address the court on the implications of the enactment of the Act. All the parties requested the Court to take judicial notice of the Data Protection Act, though there were differing opinions as to how we should do so.

267. Section 60 (1) of the Evidence Act obliges this Court to have judicial notice of all written laws, and provides as follows in this regard:

"*60.* (1) The courts shall take judicial notice of the following facts –

(a) all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Act, in any part of Kenya"

268. The role and effect of judicial notice is explained in **Halsbury's Laws of England, Fourth Edition** at paragraph 100 as a special mode of proving evidence, and it is stated therein that in addition to the adducing of documents and testimony of witnesses, the other modes of proving or establishing a fact are formal admissions, judicial notice, presumptions and inspection. Judicial notice is therefore a rule in the law of evidence that allows a fact to be introduced into evidence if the truth of that fact is so notorious or well known, or so authoritatively attested, that it cannot reasonably be doubted.

269. Furthermore, facts and materials admitted under judicial notice are accepted without being formally introduced by a witness or other rule of evidence, and they are even admitted if one party wishes to lead evidence to the contrary. It is thus our opinion that we will not only take judicial notice of the fact that the Data Protection Act 24 of 2019 was enacted, but also of the law contained therein, as expressly provided by section 60 (1) of the Evidence Act.

270. The protection of personal data depends largely on a legal, regulatory and institutional framework that provides for adequate safeguards, including effective oversight mechanisms. This is especially the case with NIIMS, whereby a vast amount of personal data is accessible to the State, and data subjects currently have limited insight into and control over how information about them and their lives is being used.

271. Having taken judicial notice of the existence of the Data Protection Act, our focus in our analysis of the issues raised by the parties is the extent to which the Act complies with internationally accepted standard on data protection. In considering this issue, we take the view, and will be guided by the principles developed by the Organisation for Economic Co-operation and Development (O*ECD) namely the*

OECD Privacy Principles, which is in our view a comprehensive and internationally recognized data privacy and protection framework that we deem most appropriate for our purposes. We also note that the said principles have been replicated in the African Union Convention on Cyber Security and Personal Data Protection.

272. The first set of principles in the OECD *Privacy Principles* relate to the collection, processing and use of data. In this respect, the Collection Limitation Principle, which provides that there should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject. In addition, the Data Quality Principle provides that personal data should be relevant to the purposes for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up-to-date.

273. Thirdly, the Purpose Specification Principle provides that the purposes for which personal data are collected should be specified not later than at the time of data collection, and the subsequent use limited to the fulfilment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose. The Use Limitation Principle provides that personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance except with the consent of the data subject; or with by the authority of law.

274. Principles 1 to 3 on processing of data in Article 13 of the African Union Convention on Cyber Security and Personal Data Protection in this respect provides for similar principles of consent and legitimacy, lawfulness and fairness, and purpose, relevance and storage.

275. The Data Protection Act has provided for detailed principles on collection , processing and transfer of data in Parts IV, V , and VI of the Act. In particular section 25 of the Act provides for and summarises the principles of personal data protection as follows:

> **"25. Principles of data protection**
>
> **Every data controller or data processor shall ensure that personal data is—**
>
> **(a) processed in accordance with the right to privacy of the data subject;**
>
> **(b) processed lawfully, fairly and in a transparent manner in relation to any data subject;**
>
> **(c) collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes;**
>
> **(d) adequate, relevant, limited to what is necessary in relation to the purposes for which it is processed;**
>
> **(e) collected only where a valid explanation is provided whenever information relating to family or private affairs is required;**
>
> **(f) accurate and, where necessary, kept up to date, with every reasonable step being taken to ensure that any inaccurate personal data is erased or rectified without delay;**
>
> **(g) kept in a form which identifies the data subjects for no longer than is necessary for the purposes which it was collected; and**
>
> **(h) not transferred outside Kenya, unless there is proof of adequate data protection safeguards or consent from the data subject."**

276. The elements of these principles are detailed in subsequent sections of the Act. The next set of principles in the OECD Privacy Principles relate to the storage and rights to collected data. The Security Safeguards Principle provides that personal data should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, modification or disclosure of data. The Openness Principle requires general policy of openness about developments, practices and policies with respect to personal data. Furthermore, that means should be readily available of establishing the existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the data controller.

277. Under the Individual Participation Principle, and an individual should have the right:

a) to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him;

b) to have communicated to him, data relating to him

i) within a reasonable time;
ii) at a charge, if any, that is not excessive;
iii) in a reasonable manner; and
iv) in a form that is readily intelligible to him;

c) to be given reasons if a request made under subparagraphs (a) and (b) is denied, and to be able to challenge such denial; and

d) to challenge data relating to him and, if the challenge is successful to have the data erased, rectified, completed or amended.

278. Lastly, under the Accountability Principle, a data controller should be accountable for complying with measures which give effect to the Privacy Principles. It is notable that the African Union Convention on Cyber Security and Personal Data Protection in this respect provides for the principles of accuracy, transparency, confidentiality and security as principles 4 to 6 in Article 13.

279. The Data Protection Act in this respect provides for an independent office of the Data Commissioner, who is appointed by the Public Service Commission, to oversee the implementation of the Act, and who is also given power to register data controllers and processors. Data Controllers are defined as the persons or entities that determine the purpose and means of processing of personal data, while data processors are the persons or entities that process data on behalf of the Data Controller. The Act also provides for the rights of Data Subjects including rights of access to personal data and correction or deletion of misleading data. It also details the procedures for rectification and erasure of personal data. Lastly, the Act has an enforcement section which among other provisions provides for a procedure for complaints and offences for unlawful disclosure of data. The Data Commissioner is required to give an Annual Report to the relevant Cabinet Secretary, and may carry out audits of data controllers.

280. While we find that the Data Protection Act has included most of the applicable data protection principles, we noted that the Registration of Persons Act is not one of the Acts to which the Data Protections Act applies as part of the consequential amendments. This notwithstanding, since one of the objectives of the Act is the regulation of the processing of personal data, whose definition as we have already found includes biometric data collected by NIIMS, it is our finding that it also applies to the data collected pursuant to the impugned amendments. We also note that there are a number of areas in the Data Protection Act that require to be operationalised by way of regulations, including circumstances when the Data Commissioner may exempt the operation of the Act, and may issue data sharing codes on the exchange of personal data between government departments. It is our view that these regulations are necessary, as they will have implications on the protection and security of personal data.

281. Once in force, data protection legislation must also be accompanied by effective implementation and enforcement. The implementation of the Data Protection Act 24 of 2019 requires an implementation framework to be in place, including the appointment of the Data Commissioner, and registration of the data controllers and processors, as well as enactment of operational regulations. Therefore, it is our finding that while there is in existence a legal framework on the collection and processing of personal data, adequate protection of the data requires the operationalisation of the said legal framework.

282. In addition, while the Respondents explained the measures they have put in place to ensure the safety of the data collected by NIIMS and the security of the system, including the encryption of the data and restricted access, it was not disputed by the Respondents that there are no specific regulatory framework that governs the operations and security of NIIMS. The Respondents also did not provide any cogent reason for this obvious gap. To this extent we also find that the legal framework on the operations of NIIMS is inadequate, and poses a risk to the security of data that will be collected in NIIMS.

Whether the amendments to the Kenya Information and Communications Act, violate Article 34 (2)(a) of the Constitution.

283. The Petitioners have impugned the amendments to KICA which wrought changes to the manner of appointment of members of the Board of the Communication Authority of Kenya, the 5th Interested Party. Their contentions in this regard are that the amendments to KICA out rightly violate Article 34(2)(a) and (5)(a) of the Constitution. It is also their case, as more elaborately set out in the 1st Petitioner's affidavit sworn on 4th June 2019, that even had the amendments to KICA been subjected to public participation, which they were not, they would still have been absolutely barred by Article 34(5)(a) of the Constitution. The reason for this, according to the Petitioners, is that Article 34(5) (a) of the Constitution expressly requires Parliament to enact legislation that provides for the establishment of a body that is independent of control by government, political or commercial interests.

284. It was their contention further that such a body must have clear checks and balances to ensure that the Executive does not do as it wishes in the appointment of the Board of the CAK. According to the Petitioners, by deleting section 6B of KICA, Parliament failed in its obligation to enact legislation that accords with the constitutional requirements in Article 34(5)(a).

285. The Petitioners contend that there is no justification for eliminating the selection panel under section 6B of KICA as the provision ensured that Article 34(2) (a) and (5)(2)(a) would be adhered to through an objective process. They dismissed the 5th Interested Party's argument that the amendments had placed the appointment of the Board of Directors of the CAK in line with the appointment of members of Boards of other State agencies. In any event, according to the Petitioners, these other Boards have no express constitutional underpinnings, unlike the CAK Board which is expressly required under Article 34(2)(a) and (5)(a) of the Constitution to be free of government control.

286. In its response to this issue, the 6th Respondent's submitted that with respect to section 6 (1) (a), (e) and 6B of KICA, the obligation is on the Petitioners to establish that the legislation violates a provision or provisions of the Constitution. Its submission was that the Petitioners had failed to discharge this burden. The 6th Respondent cited in support the decisions in ***Coalition for Reform and Democracy (CORD) vs Attorney General and Others [2015] eKLR*** and ***Association of Retirement Benefits Schemes v Attorney General & 3 others [2017] eKLR*** in which the court stated that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges the contrary.

287. It is also the 6th Respondent's submission that the constitutionality of the amendments to KICA should be interpreted in line with the whole provisions of the Constitution. It contended that the court ought to examine the purpose or effect of the legislation as was observed in the case **Olum and another vs Attorney General (supra)** and the Canadian Supreme Court case **R v Big M Drug Mart Ltd. (supra)**. Its position was therefore that the amendments on appointment of the members of the Board of Directors of the CAK to provide for appointment by the Cabinet Secretary is in line with appointment of members of Board of Directors of other state agencies and does not infringe the freedom of the media and the rights guaranteed by the Constitution.

288. To the question whether the appointments of the CAK Board by the Cabinet Secretary amounts to government control and interference

contrary to the provisions of Article 34 of the Constitution of Kenya 2010, the 6th Respondent submitted that the court must observe a proper balance between the role of the Legislature and the role of the courts. In its view, a rational test involves restraint on the part of the court. The 6th Respondent cited the case of **Re the matter of the Interim Independent Electoral Commission (IEBC); Sup. Ct. Advisory Opinion No. 2 of 2011; [2011] eKLR** where the court observed that the real purpose of the "independence clause" with regard to commissions and independent offices established under the Constitution was to provide a safeguard against undue interference with such Commissions or offices by other persons or other institutions of government. In its view, the CAK is required to be independent of control of government and it does not lose its independence by the Cabinet Secretary appointing members of the Board of Directors.

289. The 6th Respondent cited the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others (supra)** to submit that "independence" is a shield against influence or interference from external forces such as the government, political and commercial interests so that once the law, more so the Constitution, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. The 6th Respondent also relied on the case of **Capital Radio (Pvt) Ltd. vs Broadcasting Authority of Zimbabwe and Others,(162/2001) ((Pvt)) [2003] ZWSC 65** where the Supreme Court of Zimbabwe stated that someone has to make the appointments to the authority and the relevant law did not identify who should be appointed to the authority but merely provides for the number of appointees and who makes the appointment.

290. It was therefore the 6th Petitioner's submission that the impugned amendments simply identifies the Cabinet Secretary as the person who appoints members of the Board CAK provides for the number of appointees of the Board and permits him to make the appointment, and is therefore not unconstitutional.

291. We have considered the submissions of the parties on this issue. The starting point in making a determination of the issue is Article 34 of the Constitution. This Article guarantees freedom of the press and of the media in the following terms:

> **34. (1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression**
>
> **specified in Article 33 (2).**
>
> **(2) The State shall not—**
>
> > **(a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or**
> >
> > **(b) pe*nalise any person for any opinion or view or the content of any broadcast, publication or dissemination.***
>
> **(3) Broadcasting and other electronic media have freedom *of establishment, subject only to licensing procedures that—***
>
> > **(a) are necessary to regulate the airwaves and other forms of signal distribution; and**
> >
> > **(b) are independent of control by government, political interests or commercial interests.**
>
> **(4) All State-owned media shall—**
>
> > **(a) be free to determine independently the editorial content of their broadcasts or other communications;**
> >
> > **(b) be impartial; and**
> >
> > **(c) afford fair opportunity for the presentation of divergent views and dissenting opinions.**

292. Article 34(5) makes specific provision with respect to the body that will be charged with the responsibility of setting media standards, and which will monitor and regulate compliance with those standards. It provides as follows:

> **(5) Parliament shall enact legislation that provides for the establishment of a body, which shall—**
>
> > **(a) be independent of control by government, political interests *or commercial interests;***
> >
> > **(b) reflect the interests of all sections of the society; and**
> >
> > **(c) set media standards and regulate and monitor compliance with those standards**. (Emphasis added).

293. It is not disputed that the CAK is the body mandated to set and regulate compliance with media standards in Kenya. If there was any doubt about it, section 5A of KICA titled **"** *Independence of the Authority*" echoes the provisions of Article 34(5) when it provides that:

> **(1) The Authority shall be independent and free of control by government, political or commercial interests in the exercise of its powers and in the performance of its functions.**

294. Section 5B of KICA provides that:

> **The Authority shall, in undertaking its functions under this Act comply with the provisions of Articles 34(1) and (2) of the Constitution.**

295. Thus, it is correct to state that the CAK is the body established to perform the functions of media regulation which is expressly provided for by the Constitution. As submitted by the Petitioners, unlike other Boards of State corporations, it is the only state body which the Constitution expressly seeks to shield from partisan interests. The body that is in charge of media regulation, according to the Constitution, must be free of government control and of control by political or other interests.

296. In **Nation Media Group Limited & 6 others v Attorney General & 9 others [2016] eKLR** the Court observed as follows:

> **"194. As we understand it, the body contemplated under Article 34 is one that is free from government, political and commercial interests. It must enjoy autonomy in terms of its functioning and decision making, free from influence from any quarter. As is stated in Article VII of the Banjul Declaration of Principles on Freedom of Expression in Africa, 2002:**
>
> > **1. Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.**
> >
> > **2. The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.** (Emphasis added)

297. One may ask: how is this freedom from government control, political or commercial interests to be achieved? According to the Petitioners, the impugned Act now places the powers of appointment of the Board and its Chairperson in the Cabinet Secretary, the 6th Respondent. Previously, the appointment of members of the CAK Board was to be conducted through a process provided for under section 6B, now repealed by the impugned Act. It provided as follows:

> **1.Within fourteen days of the occurrence of a vacancy in the office of chairperson or member, the President or the Cabinet Secretary, as the case may be, shall—**
>
> > **a. by notice in the Gazette and on the official website of the Ministry, declare a vacancy in the Board, and invite applications from qualified persons; and**
> >
> > **b.convene a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Board.** (Emphasis added)

298. The selection panel was, under the provisions of section 6B(2), to comprise the following:

> **2. The selection panel referred to under subsection (1) shall comprise of persons drawn from the following organisations—**
>
> > **a. Media Council of Kenya;**
> >
> > **b. Kenya Private Sector Alliance;**
> >
> > **c. Law Society of Kenya;**
> >
> > **d. Institute of Engineers of Kenya;**
> >
> > **e. Public Relations Society of Kenya;**
> >
> > **f. Kenya National Union of Teachers;**
> >
> > **g. Consumers Federation of Kenya; and**
> >
> > **h. The Ministry responsible for matters relating to media.**

299. Under section 6B(3)-(8), the process to be followed by the selection panel in making the appointments was set out in detail, including the timelines for inviting applications and interviewing candidates, and provision for publication of names in the Gazette. It culminated, at section 8, with the selection of:

> **a. three persons qualified to be appointed as chairperson; and**
>
> **b. two persons, in relation to each vacancy, qualified to be appointed as members of the Board…**

300. The persons so selected were to be forwarded to the President or the Cabinet Secretary for appointment to the respective seats.

301. The impugned amendments do away with this elaborate process and vest the powers of appointment in the President and the Cabinet Secretary. Section 6 now provides as follows:

> **Board of the Authority**
>
> **(1) The management of the Authority shall vest on the Board which shall consist of—**
>
> **(a) a chairperson appointed by the President;**
>
> **(b) the Principal Secretary for the time being responsible for matters relating to broadcast, electronic, print and all other types of media;**
>
> **(c) the Principal Secretary for the time being responsible for matters relating to finance;**
>
> **(d) the Principal Secretary for the time being responsible for matters relating to internal security; and**
>
> **(e) seven persons appointed by the Cabinet Secretary.**
>
> **(2) In appointing the members of the Board under subsection (I) (e) the Cabinet Secretary shall ensure —**
>
> **(a) that the appointees to the Board reflect the interests of all sections of society;**
>
> **(b) equal opportunities for persons with disabilities and other marginalised groups; and**
>
> **(c) that not more than two-thirds of the members are of the same gender.**

302. With the greatest respect to the Respondents and the Interested Parties on their side, we are unable to see how these changes in the law can accord with Article 34(5) of the Constitution. The input of civil society and of the media has essentially been removed from the process of appointment of the Chairperson and members of the Board of the regulator established under legislation intended by the Constitution to set, regulate and monitor compliance with media standards.

303. This body would now, under the amendments made under the impugned Act, comprise of appointees of the Executive. One may ask: where is the freedom from government control? Can a body whose Chair is appointed by the President, whose Board is made up of Principal Secretaries in government, and the rest of whose members are appointed by the Cabinet Secretary, Ministry of Information, Communication and Technology, himself a Presidential appointee, really be the independent body contemplated under Article 34(5)? We must give an emphatic no in answer to this question.

304. In **Nation Media Group Limited & 6 others v Attorney General & 9 others (Supra)** the Court observed as follows:

> **203. Section 6B of the Act provides, in our view, a process of appointment that, in all fairness, cannot be challenged on the lack of independence. It is conducted by a body comprising a large number of persons drawn from various sectors of society, including the media, with the government providing only one of the members of the selection panel. The Act clearly sets out the principles to be followed in the selection process, which are all based on the Constitution.**

305. Freedom of expression and of the media is recognised as critical to the enjoyment of other rights, and to upholding a democratic society. As Odoki CJ observed in ***Charles Onyango-Obbo and Another vs Attorney General, Constitutional Appeal No. 2 of 2002***:

> **"The importance of freedom of expression including freedom of the press to a democratic society cannot be over-emphasised. Freedom of expression enables the public to receive information and ideas, which are essential for them to participate in their governance and protect the values of democratic government, on the basis of informed decisions. It promotes a market place of ideas. It also enables those in government or authority to be brought to public scrutiny and thereby hold them accountable."**

307. In our view, a media regulator that is controlled by government, as we deem to be the case should the appointment of the Board of CAK be left to the process set out in section 6 of KICA as amended by the impugned Act, would pose a serious threat of violation of the right to freedom of expression and of the media guaranteed under Article 34, and would be in conflict with Article 34(5). The impact of such a situation on democracy cannot be contemplated.

307. It is our finding, therefore, and we so hold, that section 6 of KICA as amended by Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 is unconstitutional, null and void.

Whether the amendments to the Children Act were constitutional

308. The Petitioners submit that the amendments to the Children Act, 2001 (No. 8 of 2001) violate Article 2(6) of the Constitution. It was also their submission that the Child Welfare Society Order (Legal Notice No. 58 of 21st May 2014) is invalid, null and void and of no legal effect because it was enacted in contemptuous disregard of Articles 1(1), 2, 3(1), 4(2), 10, 27, 47, 129, 131(2)(a) & (e), 201(a) and 232(1)(d), (e) & (f) of the Constitution. They argue further that it was enacted in deliberate violation of sections 4, 5, 6, 7, and 8 of the Statutory

Instruments Act, and sections 3, 4 and 5 of the Fair Administrative Action Act.

309. In its response, the 2nd Respondent submitted that the constitutionality of the Child Welfare Society Order (Legal Notice No. 58 of 21st May 2014) was first canvassed in the submissions and was not pleaded, and neither does the Petition make any reference to the said Order. It was also its submission that the Petitioners did not adduce any evidence to support its submissions on the issue.

310. We have considered the submissions of the parties on this issue. Firstly, we note that the Petitioners did not demonstrate how the amendments to the Children Act by the impugned law violate the Constitution. Secondly, the Petitioners instead challenged the constitutionality of the Child Welfare Society Order (Legal Notice No. 58 of 21st May 2014). However, as observed by the 2nd Respondent, this challenge is not one of the matters raised in the Petition. We need not reiterate that parties are bound by their pleadings, and a matter that is not in the pleadings cannot be introduced at the submission stage and the Court called upon to make a determination thereon. Accordingly, we shall not address ourselves to the issue.

Summary of Findings

311. At the commencement of our analysis, we identified the issues that arise for determination, and which we proceeded to consider in detail and make findings on. We set out hereunder a summary of our findings and conclusions on these issues.

a. Whether there is a misjoinder of Justin Muturi and Kenneth Lusaka, the 4th and 5th Respondents, in their personal capacity

312. Having considered the provisions of Article 226(5) of the Constitution, we find nothing to suggest that an office holder should be sued in his personal capacity for executing official duties. It is our finding therefore that there is misjoinder of the 4th and 5th Respondents for being enjoined in the Petition in their personal capacity.

b. Whether the Respondents have disobeyed Court orders on the use of Omnibus Bills and are therefore in contempt of court

313. We have noted from our analysis that although the targeted amendments were conveyed in a single Bill, the individual statutes were clearly flagged out and committed to the relevant Departmental Committee for consideration and collection of public views. This information was relayed to the public when they were invited through the newspaper adverts to present their views on the Bill. We therefore find and hold that the use of an omnibus Bill to effect the amendments impugned in this matter did not impede public participation and was therefore not unconstitutional.

314. With regard to the question whether the Respondents are in contempt of court, we find:

i. That there was no order prohibiting Parliament from using omnibus Bills;

ii. There is no constitutional or legal provision that prescribes the manner in which omnibus Bills should be used by Parliament.

iii. The 1st, 2nd, 4th and 5th Respondents were accordingly not in contempt of court orders.

c. Whether the legislative process leading up to the enactment of Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 was constitutional

The Petitioners contended that the impugned Act should be declared unconstitutional for not containing a Memorandum of Objects and Reasons as required by National Assembly Standing Orders 117 and 122. It is also the Petitioners' case that the inclusion of amendments to the Public Finance Management Act in the impugned Act demonstrates that the National Assembly debated and approved a different Bill from the one that was subjected to public participation, which rendered the amendments void for failure to comply with Order 114(1) of the National Assembly Standing Orders. We have found that the errors pointed out by the Petitioners were generally minor infractions of the rules of the National Assembly and which do not render the impugned Act unconstitutional.

315. We have found, however, that the proposed amendment to the Public Finance Management Act, 2012 was not included in the newspaper advertisement of 7th May, 2018 or in the impugned Bill, yet the impugned Act ended up amending section 24 of the Act by introducing section 2A. It is our finding and we so hold that the amendment to section 24 of the Public Finance Management Act, 2012 was effected without seeking the views of the public thereon and consequently failed to meet the edict of the Constitution requiring Parliament to involve the public in its legislative business. It is our finding therefore, and we so hold, that the amendments to section 24 of the PFMA by introducing section 2A therein made by Statute Law (Miscellaneous Amendment) Act Mo. 18 of 2018 is unconstitutional, null and void.

d. Whether the impugned Act was enacted in violation of the principle of Public Participation

316. The Petitioners have alleged that there was no or insufficient public participation in the enactment of the impugned Act. The Respondents counter that they facilitated public participation. We have noted that there were efforts made by the National Assembly to facilitate public participation when using the omnibus Bill mechanism in the Statute Law (Miscellaneous Amendments) Bill 2018. Unlike in the **2013 Law Society Case** where the object of the Bill was clearly indicated as intended to effect minor amendments, in the instant case there was clear indication that the legislature intended to carry amendments on the targeted Acts without the use of the term 'minor".

317. It is also clear that from the advertisement of 7th May 2018 that each Act targeted for amendment was linked to the relevant committee.

Therefore, in effect only a part of the amendments and not all of them were subject to stakeholder engagement in the Committees. We have also found that sufficient time was availed to the public to give their views on the amendments, and we accordingly find that there was sufficient public participation in the enactment of the impugned Act.

e. Whether the impugned Bill required approval by the Senate

318. We have found that it is incumbent on a party who claims that the Senate was not involved in the enactment of a particular law to show that the impugned law concerns county governments. We find that the Petitioners have failed to discharge this duty in this matter. The fact that some of the statutes amended by the impugned Act had previously been amended or passed with the participation of the Senate does not necessarily mean that those laws concern county governments.

f. Whether the impugned amendments violate or threaten violation of rights guaranteed under the Constitution.

319. We have found that while the Petitioners listed a number of statutory provisions which were amended by the impugned Act and which they allege violate or threaten to violate constitutional rights, they have not demonstrated in what manner these provisions violate rights, nor have they demonstrated which rights are threatened with violation. Accordingly, they have failed to discharge the burden imposed on them in this regard.

g. Whether the establishment of NIIMS violates or threaten violation of the right to privacy.

320. The Petitioners have argued that NIIMS is totally unnecessary for purposes of identifying Kenyans since the Integrated Population Registration System (IPRS) already collects data from a dozen databases held by various government agencies. They also argue that the State is yet to adopt data protection legislation to govern the collection, centralisation and sharing of this type of data. They further argue that the state is building capacity through NIIMS to be able to geographically locate every individual in Kenya. These arguments have been refuted by the Respondents.

321. Our findings in this regard are that other than the DNA and GPS coordinates, information to be collected pursuant to the impugned amendments to the Registration of Persons Act is necessary and is therefore not unconstitutional. However, with regard to collection of DNA and GPS co-ordinates for purposes of identification, it is our finding that it is intrusive and unnecessary. To the extent, therefore, that it is not authorised and specifically anchored in empowering legislation, it is unconstitutional and a violation of Article 31 of the Constitution.

322. We also found that the Data Protection Act No 24 of 2019 has included most of the applicable data protection principles, but require to be operationalised by way of an implementation framework being put in place, including the appointment of the Data Commissioner, and registration of the data controllers and processors, as well as enactment of operational regulations. Therefore, it was our finding that while there is in existence a legal framework on the collection and processing of personal data, adequate protection of the data requires the operationalisation of the said legal framework.

323. In addition, it was our view that the biometric data and personal data in NIIMS should only be processed if there is an appropriate legal framework in which sufficient safeguards are built in to protect fundamental rights. It was not disputed by the Respondents that there are no specific regulatory framework that governs the operations and security of NIIMS, and to this extent we found that the legal framework on the operations of NIIMS is inadequate, and poses a risk to the security of data that will be collected in the system.

h. Whether the *amendments to the* Kenya Information and Communications Act, 1998 violate Article 34(2)(a) of the Constitution.

324. We have considered the amendments to section 6 of KICA against the provisions of Article 34(5) of the Constitution. We take the view that a media regulator that is controlled by government, which we find would be the case should the appointment of the Board of the Communications Authority of Kenya be left to the process set out in section 6 of KICA as amended by the impugned Act, would pose a serious threat of violation of the right to freedom of expression and of the media guaranteed under Article 34, and would be in conflict with Article 34(5). It is our finding, therefore, and we so hold, that section 6 of KICA as amended by Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 is unconstitutional, null and void.

Costs

325. The final issue to consider is who should bear the costs of this Petition. The parties hereto submitted at some length on this issue. While they differ in their conclusions, the one point on which they are agreed, and which does not need much belabouring, is that costs are at the discretion of the court. This is particularly so in a matter such as this which clearly raises important public interest concerns. It is our view, and we so direct, that each party shall bear its own costs of the Petition.

Disposition

326. In light of the findings above, we have come to the conclusion that the Petitioners have established, albeit to a limited degree, that there was impropriety in the procedure of amendment to the Public Finance Management Act. They have also established that the amendments to section 6 of the Kenya Information and Communications Act, 1998 by the Statute Law (Miscellaneous Amendments) Act 2018 violate or threaten to violate Article 34(5) of the Constitution.

237. We have also considered and agree with the Petitioners that the collection of DNA and GPS coordinates as mandated under section 3 of the Registration of Persons Act violates or threatens to violate Article 31 of the Constitution.

328. Accordingly, we hereby grant the following declarations and orders:

I. A declaration that section 6 of the Kenya Information and Communication Act 1998 as amended by Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 is unconstitutional, null and void.

II. A declaration that the amendments to section 24 of the Public Finance Management Act introducing sub-section 2A therein made by Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 is unconstitutional, null and void.

III. A declaration that the collection of DNA and GPS co-ordinates for purposes of identification is intrusive and unnecessary, and to the extent that it is not authorised and specifically anchored in empowering legislation, it is unconstitutional and a violation of Article 31 of the Constitution.

IV. Consequently, in so far as section 5(1)(g) and 5(1)(ha) of the Registration of Persons Act requires the collection of Global Positioning Systems coordinates and DNA, the said subsections are in conflict with Article 31 of the Constitution and are to that extent unconstitutional, null and void.

V. The Respondents are at liberty to proceed with the implementation of the National Integrated Identity Management System (NIIMS) and to process and utilize the data collected in NIIMS, only on condition that an appropriate and comprehensive regulatory framework on the implementation of NIIMS, that is compliant with the applicable Constitutional requirements identified in this judgment, is first enacted.

VI. Each party shall bear its own costs of the Petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY 2020

P. NYAMWEYA	**MUMBI NGUGI**	**W. KORIR**
JUDGE	**JUDGE**	**JUDGE**