



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL DIVISION

MILIMANI LAW COURTS

CONSTITUTIONAL PETITION NO. 557 OF 2015

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION

AND

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 26, 47, 93, 118, 159, 160, AND
165 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF
THE INDIVIDUAL AS SET OUT UNDER ARTICLES 19, 20, 21, 22, 23, 24, 26 AND 47 OF THE
CONSTITUTION OF KENYA**

BETWEEN

PHARMACEUTICAL SOCIETY OF KENYA.....PETITIONER

AND

THE NATIONAL ASSEMBLY.....1ST RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

AND

NATIONAL ASSOCIATION OF .

PRIVATE UNIVERSITIES IN KENYA.....INTERESTED PARTY

JUDGEMENT

Introduction

1. The Petitioner herein, the **Pharmaceutical Society of Kenya**, is described in this petition as a Society duly registered under the **Societies Act**, Cap 108 of the Laws of Kenya. It was pleaded that it is the umbrella body for all registered Pharmacists in the country and whose function is to maintain professionalism ethics and conduct of Pharmacy practice amongst Pharmacists.
2. The 1st Respondent, **the National Assembly**, is described as one of the legislative arm of Government established under Article 93 of the Constitution, and whose legislative functions are enumerated under Article 94 of the Constitution, and which arm is required under the provisions of the Constitution to adhere to the Constitution, and as such is mandated to apply fair administrative actions perform while performing its functions, and whose address for purposes of this suit shall be through the Petitioner's Advocates.
3. The 2nd Respondent, **the Speaker of the National Assembly**, according to the petition was elected in pursuance of Article 106 of the Constitution of Kenya, as supported by the Standing Orders of the National Assembly, and is mandated to make administrative acts such as be relevant to this present cause.
4. The 3rd Respondent, the Attorney General, is the principal legal adviser to the Government of the Republic of Kenya, sued in his capacity as a representative of the National Government in all legal proceedings pursuant to the provisions of Article 156 of the Constitution.
5. The interested party, the **National Association of Private Universities in Kenya**, describes itself as an umbrella body of private universities in Kenya being a platform under which the said private universities can advance matters of common interest.

The Petitioner's Case

6. According to the petitioner, **Pharmacy and Poisons Act**, Cap 244 of the Laws of Kenya (hereinafter, "the Act"), is the law that delimits the pharmaceutical industry in Kenya and the implementation of its provisions is overseen by the Pharmacy and Poisons Board (hereinafter, "the Board") whose functions meet the ends of delimitation of pharmaceutical practice in Kenya.
7. It was pleaded that section 3(1)(d) of the **Pharmacy and Poisons Act**, Cap 244 of the Laws of Kenya (hereinafter referred to as "the Act"), provides that the Minister shall appoint a Board to be known as the Pharmacy and Poisons Board which shall consist of, *inter alia*, four Pharmacists appointed by the Minister from a panel of names submitted by the Pharmaceutical Society of Kenya.
8. It was therefore the petitioner's case that the Act recognizes the centrality of pharmacists as a key stakeholder in the pharmaceutical sector, and recognizes the Pharmaceutical Society of Kenya as the body that fronts the interests of pharmacists. Therefore, the petitioner is a crucial stakeholder in this Board, as it is a registered body whose members are Pharmacists, the most affected by the Act. According to the petitioner, it is for this reason that the Act recognizes the centrality of the Pharmacists representing PSK, and requires that:
 - (a) The Cabinet Secretary shall appoint four Pharmacists to the Board;
 - (b) The quorum of the Board must consist of three pharmacists.
9. It was therefore contended that the composition of the Board is such a crucial element of the Act, and is indeed the spine of pharmaceutical practice in terms of oversight and chaperoning of the industry since pharmacy is a very sensitive practice area, as it directly affects the health of the nation, as well as the right to life.

10. What provoked these proceedings was the enactment of the **Statute Law (Miscellaneous Amendment) Act, 2015** (also hereinafter referred to as “the Amendment Act”). The precursor to the Amendment Act was the **Statute Law (Miscellaneous Amendment) Bill, 2015** (also hereinafter referred to as “the Bill”), which was published on 18th September 2015 by the National Assembly which Bill sought to make minor amendments to various statutory enactments.

11. It was averred that on the 2nd of December 2015, it came to the petitioner’s attention that the National Assembly had on the 1st of December 2015 debated and passed a motion to amend the Act through the **Statute Law (Miscellaneous Amendment) Bill** (National Assembly Bill No. 57 of 2015) (hereinafter, “the Bill”).

12. It was pleaded that by the Amendments Act, Parliament has sought for the amendment of the **Pharmacy and Poisons Act**, so as to ultimately reflect the following:

(a) The Petitioner has lost one of its slot in the Pharmacy and Poisons Board, which was given to a new entrant, private Universities.

(b) The Petitioner has been given fresh demands, to issue 9 names, which requirement is not made in reference to the other nominating bodies.

13. It was averred that the impugned amendments were done without inviting PSK - whose representatives are reduced in the amendment - or any other stakeholders prior to the amendment, as is required by law hence the said administrative action was repugnant to the Constitution as it did not comply with the national values and principles of governance articulated in Article 10 of the Constitution. Furthermore, the said action was in violation of the right of fair administrative action which is guaranteed in Article 47 of the Constitution which the National Assembly is required to protect and promote.

14. It was disclosed that the petitioner had erstwhile been invited to such forums where legislative processes are involved, building a legitimate expectation to be invited for such a critical amendment of the Act. The petitioner therefore contended that owing to this surreptitious nature of proceedings, there was said to be no interest in the matter as reported in **The Hansard**, which position is not only erroneous but defective, as the administration of the pharmaceutical sector is one of the areas that attracts tremendous interest, due to the fragile nature of the practice, which directly impinges on the people’s right to Health.

15. In the petitioner’s view, the reasons given for that amendment were pedestrian and unjustifiable, which would ordinarily be opposed had there been sufficient information from the stakeholders. To the petitioner, as the stakeholders in the pharmaceutical sector, they have all reasons to believe that the Parliamentary Health Committee was not notified or involved in the process, since had it been involved, the Committee would have invited the petitioner’s comments and input, as the Committee had always done. The petitioner took the position that by bypassing the Health Committee and the other stakeholders, the passing of this Motion to amend the Act was indeed in defiance of due process.

16. It was disclosed that the petitioner instituted a Judicial Review cause No. 244 of 2015, which sought the court’s interpretation of section 3(1)(d), as it was persuaded that Parliament by taking up this and quickly passing an amendment to purportedly assist the Court come to an outcome ins an attempt to control the judicial arm of Government. The petitioner therefore averred that this action by Parliament to pass a motion in reference to the case so lodged is *sub judice*, and as such the same is an abuse of process.

17. This Court was urged that it has jurisdiction to oversee the role of the National Assembly to change the petitioner’s stake in the Board, as it endeavoured to conduct a quasi-judicial function, which is administrative in nature.

18. To the petitioner, an amendment which practically amends the composition of the Board, which is the spine of the Act, ought to be made with lots of care, and not in the pedestrian way the Respondent did.

19. It was contended that the actions of the 1st Respondent are in violation of law, and the administrative actions taken are improper, in bad faith, unreasonable, among other grounds for Judicial Review. With respect to unreasonableness, the petitioner averred relied on the following:

(a) In the impugned amendment, the Petitioner has been given fresh demands, to issue 9 names, which requirement is not made in reference to the other nominating bodies

(b) The 1st Respondent has also unreasonably refused to adhere to the letter and spirit of the Constitution of Kenya, which demands that public participation be core to any decision-making process including legislation.

(c) This position is unreasonable and defective, as the Respondent has demonstrated wilful misinterpretation of the law to unreasonable tenets.

20. As evidence of demonstration of bad faith it was contended that the 1st Respondent refused follow the law and similarly relied on the fact that this amendment only touches on the Petitioner, and not other nominating bodies. In addition, the fact that this amendment was mooted in September, conveniently after the Petitioner had filed a judicial review cause seeking court's interpretation of Cap 244, in July is in bad faith.

21. With respect to procedural impropriety, it was contended that the 1st Respondent demonstrated lethargy to follow due process by disregarding the positive provisions of the law, requiring respect of Court processes, and also public participation.

22. To the petitioner, the respondent's decision also violated the principle of legitimate expectation in the following manner:

(a) The 1st Respondent has interfered with the Legitimate Expectation of Petitioner, to involve the Petitioner in the Legislative process. Indeed, the Petitioner has always been invited for input in all other legislative processes touching the pharmaceutical sector, and legitimately expected to be involved in this particular one.

(b) The people of Kenya have a legitimate expectation that their right to fair administrative processes would be respected, promoted and protected by Parliament.

(c) The Interested Party, the Applicant, and the people of Kenya had legitimate expectation that the 1st Respondent would respect other arms of government, *to wit*, the judicial arm, and not attempt to arm-twist the courts to render a case moribund.

(d) The Respondent refused to take public interest in consideration, which the Interested Party had legitimate expectations.

23. It was the petitioner's case that though the Respondent was required to uphold the principles of natural justice, it intended to violate this principle.

24. It was submitted on behalf of the petitioner that prior to the challenged amendments, section 3(1)(d) of the **Pharmacy and Poisons Act**, Cap 244 of the Laws of Kenya provided that:

The Minister shall appoint a Board to be known as the Pharmacy and Poisons Board which shall consist of the following persons—

a) the Director of Medical Services who shall be the chairman;

b) the Chief Pharmacist;

c) the Director of Veterinary Services or a veterinary surgeon, nominated by him;

d) four Pharmacists appointed by the Minister from a panel of names submitted by the Pharmaceutical Society of Kenya of whom—

i. one shall be from the Civil Service;

ii. one shall be from the community pharmacy; and

iii. one from the pharmaceutical industry;

e) one representative of the Department of Pharmacy of the University of Nairobi nominated by the Faculty Board; and

f) one pharmaceutical technologist appointed by the Minister from a panel of names submitted by the Kenya Pharmaceutical Association.

25. Section 4(4) thereof, it was submitted accentuates the centrality of pharmacists in the Pharmacy and Poisons Board by requiring at least 3 of the 5 members of the Board to form a quorum must be pharmacists. Indeed, this Act recognizes the centrality of pharmacists as a key stakeholder in the pharmaceutical sector, and recognizes the Pharmaceutical Society of Kenya as the body that fronts the interests of pharmacists.

26. From the foregoing it was submitted that the law intended that the Pharmaceutical Society of Kenya should have substantial representation in the Board. The petitioner's legitimate expectation, it was submitted was based on Article 118(1)(b) of the Constitution that requires in mandatory terms, that Parliament shall facilitate public participation in all legislative processes and other businesses of the House. Further, the repeated or regular practice is the antecedent invitations by Parliament to stakeholders and the public to put in their views on any Bills, Acts or Policies that are going through the legislative process. It was the petitioner's case that by refusing to invite the petitioner in this matter breached the petitioner's legitimate expectation they demand from the 1st Respondents.

27. The petitioner further submitted that the 1st respondent must adhere to the constitutional requirements for public participation, the role of Senate and equal protection of the law and in support of its case the petitioner relied on **Speaker of National Assembly -vs- Attorney General and 3 Others [2013] eKLR**, in which the Court stated that:

“Parliament must operate under the Constitution...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...to assert the authority and Supremacy of the Constitution.”

28. It was submitted that the Constitution provides in Article 10(2)(a) Public Participation as one core National Value and Principle of National Governance. The national values and principles of governance in this Article binds the National Assembly whenever it enacts any law, vide Article 10(1)(b). In this case it was contended that the National Assembly has not furnished any proof that members of the public and stakeholders were invited to a forum to discuss this process of enactment. On public participation the petitioner relied on **LSK -vs- AG and 2 Others [2013] eKLR** where it was 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...any legislation must be published as a Bill and go through the various stages in the National Assembly...the Bill must be advertised and go through various Committees of the National Assembly which admit public hearings and submission of memoranda.”

29. According to the petitioner, public participation envisaged in our Constitution need to be qualitative rather than quantitative and that qualitative public participation in view of legislative duties of the 1st Respondent means that:

- (a) Parliament to take progressive steps to ensure that a greater number of the public take part in the legislative process;
- (b) The views of the stakeholders likely to be affected by an administrative process must be taken into consideration;
- (c) Those legislations dealing with particular sectors to include the stakeholders in that sector for their contribution; and
- (d) Parliament to provide a forum where professionals within the aforesaid sectors can offer expert opinions for consideration.

30. To the petitioner, it is not enough to publish a Bill in the Kenya Gazette. In many instances, the 1st Respondent has literally written to the *Ex Parte* Applicant as well as other stakeholders in the Pharmaceutical sector, even after making publications in newspapers, inviting the professional to a public forum, usually within Parliament Buildings, to discuss a Bill and this is usually done by the Health Committee, the petitioner contended did not even know that the said amendments were being passed. These invitations, it was submitted are done to ensure that public participation is not just participation, but qualitative public participation. In addition, there ought to be public hearings convened by the Health Committee of the National Assembly so that the issues so mooted can be ventilated and memoranda thereof submitted.

31. With respect to miscellaneous amendments, the petitioner submitted that the composition of the Pharmacy and Poisons Board is such a crucial matter that cannot and should not be dictated by way of a Miscellaneous Amendment since miscellaneous amendments are usually designed to make minor changes in law and it cited *Law Society of Kenya -vs- Attorney General and 10 Others (Petition No. 3 of 2016)*, where the Court held that:

“Such procedure ought to avail only in cases of minor non-controversial amendments [to the law]....It is therefore clear that both policy and good governance, which is on of the values and principles of governance in Article 10 of the Constitution...[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.”

32. The petitioner also relied on the practice in *Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 21, October 2007, pp. 5-6* as reproduced by the High Court in the above matter that:

“An omnibus Bill...is designed to make only relatively minor, non-controversial amendments to various Acts and to repeal Acts that are no longer required.”

33. The petitioner further sought support from the American case of *Commonwealth -vs- Barnett (199 US. 161)* where it was stated thus:

“Omnibus Bills became a crying evil, not only from the confusion and distraction of the legislative mind by the jumbling together of incongruous subjects, but still more by the facility they afforded the corrupt combinations of minorities with different interests to force the passage of bills with provisions which could never succeed if they stood on their separate merits.”

34. The petitioner took the view that the amendments pushed by the *Statute Law (Miscellaneous Amendments) Bill, 2015* are neither minor amendments to Cap 244, nor are they non-controversial. This

is so because, according to the petitioner, the Board carries out a very wide mandate, and the main thereof is to ensure that the pharmaceutical sector is running absent of government interference, because of the sensitive nature of the trade and some of its functions which makes it imperative that the Board is properly composed include:

- (a) Drug registration;
- (b) Importation of drugs, medicines and medical devices;
- (c) Inspectorate;
- (d) Budget scrutiny and ownership of PPB Properties;
- (e) Entry of names of practitioners in the Register;
- (f) Deal with issues of professional misconduct;
- (g) Issuance of licences to sell poisons;
- (h) Issuance of Dealers' and Wholesalers' licences;
- (i) Coming up with guidelines regarding the pharmaceutical sector;
- (j) Advertisement of drugs;
- (k) Prohibit and control certain medicines;
- (l) Issuance of import licences;
- (m) Export of medicines and drugs; and
- (n) Issuance of Drug manufacture licences.

35. To the petitioner, when an amendment is made in relation to this Board, it is not a small matter but is a matter of national importance, and cannot possibly be termed so minor as to be amended in a Statute Law Miscellaneous legislation. It was submitted that the Board is mandated to offer checks and balances to the operation of the pharmaceutical industry. Apart from the functions stated above, the Board also ensures that the government meets its obligations to the public, pursuant to Article 43 on the Right to the highest attainable standards of health which includes the right to health care services, including reproductive health care. The petitioner therefore contended that this right to Health is now compromised, when serious administrative functions of the Board are undertaken by a single individual, the Cabinet Secretary, unchecked yet the existence of a Pharmacy and Poisons Board is a crucial component in ensuring that the citizens' right to the highest attainable standard of health is protected, promoted, respected and fulfilled.

36. It was therefore asserted that the amendments that the 1st Respondent are not of the nature to be made in the form of a Statute Law Miscellaneous legislation and reliance was placed on **LSK -vs- AG & 10 Others (Supra)** on pp. 180 - 181.

37. It was further submitted that the amendments in this case are very controversial since the issues of composition of the Board have been brought before this very court by way of **Miscellaneous Application No. 244 of 2015**, where the same provisions presently legislated are impugned. To the petitioner, the nature of amendments in Statute Law Miscellaneous legislations ought to be peremptory and clearly incontrovertible. Indeed, such amendments ought to be for merely offering a clear guideline in the operation of the parent Statute. However, this present amendments are in fact issuing more questions than answers and these were identified as hereunder:

- (a) Why should the Cabinet Secretary be given nine names by the *Ex Parte* Applicant so that he nominates three persons and then appoint them?
- (b) What are the thresholds of balancing 3 names from the 9 names in view of regional, ethnic balance as well as sectorial divisions within the pharmaceutical Sector?
- (c) Which is this 'forum' to nominate persons from the public universities offering pharmaceutical training?
- (d) Which is this 'forum' to nominate persons from the private universities 'forum' offering pharmaceutical training?
- (e) What is the process of arriving with the one name from the Kenya Pharmaceutical Society, since they are not required to submit more names as the *Ex Parte* Applicant?

38. It was therefore the petitioner's contention that these controversial issues are not the kind to permit the amendments within the meaning of Miscellaneous Amendments. To it, if brought independently, the amendments would not pass on their own, since they would not have stood on their separate merits. It was therefore submitted that the issue of composition of the sensitive Pharmacy and Poisons Board are not the kind to be amended in a **Statute Law (Miscellaneous Amendments) Bill, 2015**, as the provisions are very controversial and of great magnitude.

39. The petitioner contended that Article 10 of our Constitution provides that the national values and principles of governance that bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution and that the said national values and principles of governance include, equity, equality, inclusiveness and non-discrimination. Indeed, the National Assembly is required to ensure that the purposes and principles of the Constitution are be protected and promoted. However the 1st Respondent, in making amendments to the Pharmacy and Poisons Board, directed its full wrath to the petitioner Applicant since by the amendments only the petitioner is required to provide more than one name in every position as opposed to the other bodies mentioned in section 3(1) of Cap 244:

40. It was The Respondent intends to violate the principle of natural justice.

41. The petitioner therefore sought the following orders:

- i. A **DECLARATION** that Article 10(1)(b) and Article 10(2)(a) of the Constitution has been violated by the National Assembly in its passing of a motion to amend the **Pharmacy and Poisons Act** without permitting the views of stakeholders in the pharmaceutical field.
- ii. A **DECLARATION** that the amendment of the Pharmacy **and Poisons Act** in the form of the **Statute Law (Miscellaneous Amendment) Bill (National Assembly Bill No. 57 of 2015)**, was passed in a manner that breached the positive provisions of the Constitution, and is thus unconstitutional.
- iii. An Order of **CERTIORARI** to bring to this Court and quash the decision of the 1st Respondent to pass a motion to amend the provisions of the **Pharmacy and Poisons Act** through the **Statute Law (Miscellaneous Amendment) Bill (National Assembly Bill No. 57 of 2015)**, as this breaches the principles of constitutionalism.
- iv. A **PROHIBITORY INJUNCTION** to proscribe His Excellency the President of the Republic of Kenya from assenting to the **Statute Law (Miscellaneous Amendment) Bill of 2015** while it bears that amendment to the Pharmacy and Poisons Act.
- v. Cost of this Petition.

vi. Any other order that this Honourable court deems fit and just in the circumstances.

Respondents' Case

42. The Respondents opposed the petition.

43. According to the Respondents, the National Assembly Departmental Committee on Health (hereinafter referred to as "*the Health Committee*") is established under Standing Order 216 made pursuant to Article 124 of the Constitution of Kenya, 2010 and under Standing Order 216(5), the functions of the Committee are to:

- a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;*
- b) study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation;*
- c) study and review all legislation referred to it;*
- d) study, assess and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;*
- e) investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;*
- f) to vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments) ; and*
- g) Make reports and recommendations to the House as often as possible, including recommendation of proposed legislation.*

44. It was averred that the above outlined functions of the Committee are to be carried out within the purview of the role of the National Assembly stipulated in Article 95(3) of the Constitution which provides that "*the National Assembly enacts legislation in accordance with Part 4 of this Chapter*".

45. The Respondents averred that the ***Statute Law (Miscellaneous Amendments) Bill, 2015*** (the Bill) was published on 18th September 2015, sponsored by **Hon. Aden Duale**, EGH, M.P., Leader of the Majority Party and it was read a first time in the National Assembly on 7th October 2015, and subsequently committed to Departmental Committee on Health, pursuant to Standing Order 127(1) of the National Assembly Standing Orders. It was revealed that considering that the Bill sought to amend various laws falling under multiple ministries, it was further referred to each Departmental Committee to consider the relevant sections of the Bill, and forward its findings to the lead Committee, that is, the Justice and Legal Affairs Committee, to compile any and all proposed amendments into one report.

46. The Respondents appreciated that Article 118(1)(b) of the Constitution requires Parliament to facilitate public participation in the legislative process while Standing Order 127 in sub-paragraphs (3) & (4) of the National Assembly Standing Orders further requires the relevant Committee to undertake public participation, and present a report to the House on a Bill. Accordingly, on 9th October, 2015, the Clerk of the National Assembly published in the ***Nation*** and ***Standard*** newspapers, a request for submission of memoranda from members of the public on the Bill whose deadline was 16th October, 2015 before 5.00 pm. Pursuant to the aforesaid advertisement, the Departmental Committee on Justice and Legal Affairs received memoranda on the Bill from the Parliamentary Initiative Networks; the Commission on Implementation of the Constitution, the independent medical Legal Unit and the Commission on Administration of Justice. The Departmental Committee on Justice and Legal Affairs also received a letter dated 13th October 2015 from an advocate, **Nathan Tororei** of Nathan Tororei Advocates based in

Eldoret, seeking amendments to fourteen pieces of legislation through the ***Statute Law (Miscellaneous Amendment) Bill, 2015***.

47. According to the Respondents amongst the pieces of legislation proposed to be amended was the ***Pharmacy and Poisons Act*** Cap 244 of the Laws of Kenya, which the proposer suggested should be amended to require the Pharmaceutical Society of Kenya to nominate, names of three (3) qualified candidates from each of the following categories:

- i. The Public service;
- ii. The community pharmacy; and
- iii. The pharmaceutical industry.

48. It was averred that Mr. Nathan Tororei Advocate also sought to amend the Kenya ***Information and Communications Act*** to better govern access to information; the ***Ethics and Anti-Corruption Commission Act*** to increase the number of commissioners and the number of nominees for each post to ease the nomination process; and the ***Treaty Making and Ratification Act*** to provide for a clearer law governing the process of considering international agreements by Parliament.

49. It was averred that among the proposals to amend the ***Pharmacy and Poisons Act*** was a proposal to have three categories for nomination of pharmacists by the Pharmaceutical Society of Kenya, that is:

- i. The Public service;
- ii. The community pharmacy; and
- iii. The pharmaceutical industry.

50. The proposal, it was revealed required that **Pharmaceutical Society of Kenya**, the petitioner herein should nominate three (3) names for each category and forward them to the Cabinet Secretary for appointment of one nominee in each category on the ground that this would clarify the lacuna in the existing Act, and prevent the Cabinet Secretary from just rubberstamping the process and would also make the selection process more competitive.

51. It was therefore contended that the process of including the new section 3(1) in the ***Pharmacy and Poisons Act*** Cap 244 did not infringe Article 47 of the Constitution because no right of the petitioner has been curtailed.

52. The Respondents continued that after consideration of all proposed amendments to the entire ***Statute Law (Miscellaneous Amendments) Bill, 2015***, the Departmental Committee on Justice and Legal of the National Assembly compiled its report and tabled it in the House on 28th October, 2015 after which its Second Reading began on 29th October 2015 and ended on 10th November 2015. The Bill was considered at the Committee Stage, clause by clause, and passed at the Third Reading on 1st December 2015 and was subsequently forwarded to the President for assent and it is now known as the ***Statute Law (Miscellaneous Amendment) Act, 2015***.

53. It was submitted by the Respondents that the amendment does not violate any provisions of the Constitution for the following grounds:

- (a) Article 94(1) of the Constitution vests the legislative making function at the national level in Parliament.
- (b) The authority of Parliament in passing the law is not being challenged.

(c) Parliament exercised its constitutional authority in the manner contemplated by the **Statute Law (Miscellaneous Amendment) Bill**, National Assembly Bill No. 57 of 2015.

(d) The National Assembly enacted the **Statute Law (Miscellaneous Amendment) Bill**, National Assembly Bill No. 57 of 2015 in November 2015 and it was assented to by the President on Tuesday 15th December, 2015.

54. In support of their submissions, the Respondents relied on Article 94 of the Constitution which states that:

(1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.

(2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.

(3) Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.

(4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.

(5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

(6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.

55. They further, submitted that the procedure for passing the **Statute Law (Miscellaneous Amendment) Act of 2015** was in line with the principles provided for under article 118 of the Constitution which states that:

(1) Parliament shall—

(a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and

(b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

(2) Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.

56. After restating the process that led to the passing of the **Statute Law (Miscellaneous Amendment) Act, 2015**, the Respondents submitted that the Amendment Act went through the requisite procedures of the Legislative process required under the Constitution of Kenya hence the Procedure applied in passing of the Amendments was sound in law.

57. With respect to the contention that there was no adequate public participation in the passing of the **Statute Law (Miscellaneous Amendment) Act**, the Respondents invited this Court to consider the judgement in where the Court of Appeal, while upholding the decision of this Court in **Robert N Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR**, where the Court discussed the principle of public participation and while acknowledging the centrality of the principle of public

participation, sought to determine what exactly amounts public participation where the Court found *inter alia* that:

“67. It must be made clear that not all persons must be heard orally. Therefore, even in cases where there are oral public hearings, the mere fact that a particular person has not been so heard does not necessarily warrant the whole process being nullified..... In my view, where a Bill has been rejected by the Assembly and a fresh Bill introduced as opposed to mere amendments, the principle of public participation must equally apply. Unless this is so, the principle may be defeated by the Assembly simply rejecting a Bill in which the public has had an input with its own Bill disregarding the input by the public and not subjecting it to public participation. That in my view would defeat the very principle of public participation.

75. In my view, public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purpose of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many forum as possible such as churches, mosques, temples, public *barazas*, national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.”

58. It was submitted that the said decision was upheld by the Court of Appeal in **Civil Application No. 97 of 2014 (UR No. 80/2014) Kiambu County Government & 3 Others vs. Robert N. Gakuru & Others (2014) eKLR.**

59. Based on the foregoing, it was therefore submitted that the ***Statute Law (Miscellaneous Amendment) Bill, No. 57 of 2015*** was subjected to adequate public participation and therefore, complied with the Constitution.

60. The Respondents’ case was that the Court lacks jurisdiction to entertain these proceedings by virtue of two doctrines namely parliamentary privilege and Separation of powers.

61. Parliamentary privilege, it was submitted refers to the powers and immunities possessed by individual Houses of Parliament, their Members, and other participants in parliamentary proceedings, without which they could not perform their functions and is entrenched in Article 117 of the Constitution of Kenya 2010 which provides that *“there shall be freedom of Speech and debate in Parliament”*. This position is further fortified in section 12 of the ***National Assembly (Privileges and Immunities) Act*** (Chapter 6) Laws of Kenya which provides that *“No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court”*.

62. With respect to what constitutes *“proceedings or decisions of the Assembly”*, the Respondents relied on **R vs. Chaytor & Others (2010) UKSC 52**, where the Supreme Court of England considered the question of whether parliamentary action can be impeached by the courts and in considering the meaning of proceedings in Parliament court observed based on ***Eskine May, Parliamentary Practice, 23rded (2004)***, at pp 110-111 as follows:

“The term ‘proceedings in Parliament’ has received judicial attention, (not all of it in the United Kingdom) but comprehensive lines of decision have not emerged and indeed it has been concluded that an exhaustive definition could not be achieved. Nevertheless, a broad description is not difficult to arrive at. The primary meaning of proceedings, as a technical parliamentary

term, which it had at least as early as the seventeenth century, is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision. An individual Member takes part in a proceeding usually by speech, but also by various recognized forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking.

63. It was the Respondents' case that the immunity provided under section 12 of the *National Assembly (Powers and Privileges) Act*, operates as a safeguard of the separation of powers and the sovereignty of Parliament, in that it prevents the other two branches of government, the Executive and the Judiciary, calling into question or inquiring into the proceedings of the legislature. Although this immunity is absolute, it can only extend to those acts of Parliament that are necessary for its survival as well as for the performance of its functions. It was therefore submitted that the hands of the court are tied in this matter as it cannot exercise any of its powers with respect to the proceedings of Parliament. In their view, the decision taken by the National Assembly to pass a special motion certified by the Speaker as having met the constitutional threshold set by Article 261(3)(b) amounts to a formal action taken to enable it perform its constitutional mandate and therefore cannot be the subject of judicial inquiry. In this respect, the Respondents relied the decision of **Majanja, J** in **Frank Mulisa Makola vs. Felix G. Mbiuki and Others EP No. 5 of 2013**, in which he quoted **Mwongo, J** in **Clement Kung'u Waibara and Another vs. Francis Kigo Njenga and Others Nairobi EP No. 15 of 2013** that the question of jurisdiction:

“Inquires into whether the court is competent and has the legitimacy and authority to handle the petition and take a position thereon in any regard. For without jurisdiction, this court can take no further action in the matter and must instantly down its tools”

64. It was contended that the role of the court in such an instance is to consider whether Parliamentary privilege applies and once it finds in the affirmative it can do no more and relied on **Dixon, J** in the Australian case of **R vs. Richards; Ex parte Fitzgerald and Browne [1955] HCA 36** that:

“...it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.”

65. In further support of their position in this subject, the Respondents cited decisions Nairobi HCCC No. 394 of 1993 - **Raila Odinga vs.**

Francis Ole Kaparo and the Clerk of the National Assembly; Stockdale vs. Hansard [1839] 9 Ad. & El at page 209; Miscellaneous Civil Application No. 747 of 2006, Republic –v- Registrar of Societies & 5 Others ex parte Kenyatta & 6 Others; Regina vs Secretary of State for Trade & others ex parte Anderson Strathclyde PLC at page 239; Church of Scientology of California vs. Johnson Smith and Regina vs Secretary of State for Trade Ex parte Anderson; The Republic v The Judicial Commission of Inquiry into the Goldenberg Affair, HC Misc. Application No. 102 of 2006; May, T. E. ‘A Treatise on the Law, Privileges, Proceedings and Usage of Parliament’, at page 170; New Brunswick Broadcasting Co. vs. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319, at p. 389; Bradlaugh v Gossett (1884) 12 QBD 271; Seerval, H.M. ‘Constitutional Law of India: A critical Commentary’ (3rd edition), citing May, *Parliamentary Practice*, 17th edition, page 43; British Railways Board and another vs. Pickin [1974] 1 All ER 609; Edinburgh & Dalkeith Railway Co. vs. Wauchope; Pandit M.S.M. Sharma v. Shri Sri Krishna Sinha (1959) Supp. (1) S.C.R. 806; May’s, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (9th edition) at page 172; and Barnardiston vs. Soame (1674).

66. On separation of powers, the Respondents submitted that the doctrine of separation of powers as envisioned by **Montesquieu**, in his publication, *Spirit of the Laws*, pushed forward the view that political authority in a state should be divided into executive, judicial and legislative powers and that this was

primarily to avoid centralization of power as it allowed for checks and balances by the arms of government but also ensured that no arm of government should encroach the constitutional powers of the other. In this respect the Respondents cited **Speaker of the Senate & another vs. Attorney General & 4 Others [2013] eKLR**, where it was stated that,

“[t]his 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.”

67. It was therefore submitted that as this Court’s jurisdiction is only limited to the question of constitutionality of decisions taken by the National Assembly, it lacks jurisdiction to give the orders sought by the Petitioner, since the amendments to the *Judicial Service Act 2011* (sic) was done in accordance with the Constitution. The Court was therefore urged to dismiss the petition.

Interested Party’s Case

68. On behalf of the interested party herein, the **National Association of Private Universities in Kenya**, it was clarified that Miscellaneous application no 244 of 2015 sought an order of certiorari to remove into the High Court and quash a decision of the respondent which was contained in a letter dated 3rd July 2015 and 17th July 2015 which basically dealt with appointment of the members of the Pharmacy and Poisons Board in accordance with section 3 of the *Pharmacy and Poisons Act*, Cap 244 Laws of Kenya. An order of Prohibition and Order of mandamus were also sought compelling the Cabinet Secretary to appoint certain members of the Pharmaceutical Society of Kenya.

69. However by the amendments introduced vide the *Statute Law (Miscellaneous Amendments) Bill 2015* it was contended that submitted that Miscellaneous Application No 244 of 2015 and the entire judicial review suit was rendered moot. The reason being that the Judicial Review proceedings were premised on the provision of section 3 of the *Pharmacy and Poisons Act*, Cap 244 before it was amended. The law as it is, is as amended by *Statute Law (Miscellaneous Amendments) Bill, 2015* published in Gazette Supplement No 164 (National Assembly Bills No. 57).

70. According to the interested party, Article 118 of the Constitution commands Parliament to conduct its business in an open manner and its sittings and those of the committees in public. Parliament is mandated to facilitate public participation and involvement in the legislative and other business of parliament and its committees.

71. According to the interested party, the Bill which sought to amend several pieces of legislation was published on 18th September 2015 and was sponsored by the majority party leader, **Hon Aden Duale**, EGH, MP. The said Bill was committed to departmental committee on Justice and Legal Affairs, pursuant to standing Order 127(1) given that it sought to amend various laws falling under multiple ministries which Departmental Committees forwarded the same to Justice and Legal Affairs Committee, to compile any and all proposed amendments into One report.

72. According to the interested party, under the relevant standing orders, the relevant committees are required to undertake public participation and parliament is mandated by Article 118(1) (b) of the Constitution to facilitate public participation in the legislative process. Accordingly, on 9th October 2015, the Clerk of the National Assembly duly published a request for submissions of memoranda from members of the public on this bill in the *Nation* and *Standard* newspapers giving a deadline for such submissions to be 16th October 2015. Pursuant thereto, submissions from various stakeholders were received including Parliamentary Initiatives Network, the Commission for Implementation of the Constitution (CIC) and the Independent Medical Legal Unit (IMLU). The committee also received various letters including one dated 13th October 2015 by **Nathan Tororei Advocates and Commissioners for Oaths** seeking amendment to fourteen pieces of legislation. All those submissions and representations were considered and justice and legal affairs committee compiled a report and tabled

it in the house on 28th October 2015. Pursuant to this process of participation which parliament facilitated, the proposed amendment to ***Independent Policing Oversight Authority Act, 2011*** were dropped and certain amendments to the ***Universities Act, 2012*** were withdrawn.

73. It was averred that the second reading of the bill began on 29th October 2015 and ended on 10th November 2015 and that the bill was passed at the third reading on 1st December 2015 and subsequently forwarded to the President for assent.

74. In the interested party's view, the amendments to ***Pharmacy and Poisons Act*** were a mere deletion of the word "Minister" and replacing it with the "Cabinet Secretary" in order to align with the new constitutional dispensation where the word "Minister" became obsolete. With respect to deletion of paragraph 3(1)(d), it had the effect of giving the Cabinet Secretary more names to choose from the names which are submitted to him and to cater for gender equity and sectional interest. The deletion of paragraph 3(1)(e), on the other hand was to add a representative of Private University in order to remove the apparent differential treatment of members of Private Universities while avoiding the bloating of the Board.

75. It was therefore submitted that the said amendments were within the law, did not in any way prejudice the petitioner but were aimed at removing deep rooted self interest exhibited by the petitioner who had time and again held the Cabinet Minister at ransom by forwarding names of their cronies and for people with integrity issues. The Court was therefore urged to have regard to the purpose and effect of the legislation as was held in **Olum and Anor –v- A.G of Uganda [2002] 2 EA 508, 518.**

76. Based on the decision of **Lenaola, J** (as he then was) in **Petitions No. 486 of 2013, Nairobi Metropolitan PSV SACCOS Union Ltd and 25 Others –v- County of Nairobi Government & 3 others (2013) eKLR**, it was submitted that public participation is not the same as saying that particular public views must prevail hence the mere fact that the petitioner through inadvertence or sheer negligence did not respond to the public notice and invitation which was placed in the media does not render the miscellaneous amendments unconstitutional. Similarly, based on **Petition No 72 of 2011 Mt Kenya Bottlers Ltd & others –v- The AG and Others**, it was contended that the court will not nullify legislation because it thinks that such law was enacted in bad taste, unconscionable or inconvenient hence the fact that the petitioner had brought a suit in the judicial review division seeking certain remedies under section 3 of the Act does not in itself render the legislation unconstitutional since the said amendment does not of itself interfere with the judicial function of the court as enshrined in Article 165 of the Constitution.

77. In the interested party's view, the passing of the Bill did in fact comply with Article 10 of the Constitution which establishes the founding values of the State which includes transparency, accountability and participation of the people directly and through their elected members. The interested party cited **Coalition for Reform and Democracy (CORD and 2 Others –v- Republic of Kenya and 10 Others (2015) eKLR**, for the proposition that there is general presumption that every Act of Parliament was constitutional and the burden of proof lay on the person alleging the unconstitutionality and submitted that the petitioner has failed to discharge this duty. A fortiori, the proposed amendments by parliament has removed real threats to differential treatment of some sectors in pharmaceutical industry and enhanced good governance, integrity, transparency and accountability as enshrined in Article 10 of the Constitution.

78. It was contended based on **Robert N Gakuru & others vs. Governor Kiambu County and 3 Others [2014] eKLR**, at paragraph 56 that:

“The phrase facilitate public involvement is a broad concept which relates to a duty to ensure public participation in the law making process...the democratic government that is contemplated in the constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law making process”.

79. In the interested party's submission, in the passing of the bill, Parliament was accountable, responsive and transparent as can be discerned from the dropping of amendments to IPOA legislation and parts of the ***University Act, 2012***. The standing orders, particularly standing order 127 enjoined the relevant committees to undertake public participation which was duly done.

80. The Court was therefore urged to dismiss the petition with costs to the interested party.

Analysis and Determinations

81. I have considered the pleadings and submissions of the parties, as well as the issues that the parties propose as falling for determination. In our view, the constitutionality of the ***Statute Law (Miscellaneous Amendments) Act, 2015*** in so far as it relates to the Pharmacy and Poisons Act is based on the following three grounds:

- 1) Whether there was public participation in the enactment of the said Amendment Act.**
- 2) Whether the nature of the amendments in issue were properly enacted by a Miscellaneous Amendment Act.**
- 3) Whether in enacting the said Amendment Act, the petitioner herein was discriminated against.**
- 4) Whether it was proper for Parliament to enact the said Amendment Act during the pendency of Judicial Review cause No. 244 of 2015**

82. Before dealing with the merits of the petition, however, I propose to deal with the preliminary issues that the Respondents raised. These relate to the twin doctrines of parliamentary privilege or immunity and separation of powers.

Parliamentary Privilege

83. It was contended that since the proceedings of both Houses of Parliament are privileged pursuant to Article 117 as read with section 12 of the ***National Assembly (Powers and Privileges) Act***, this Court has no power to enter into an investigation of the said parliamentary proceedings. On this issue I wish to refer to Article 2 of the Constitution which provides that:

- (1) This Constitution is the Supreme law of the Republic and binds all persons and all state organs at both levels of government.**
- (2) No person may claim or exercise state authority except as authorised under this Constitution.**

84. To my mind, when any of the state organs steps outside its mandate, this Court should not hesitate to intervene. The Supreme Court appreciated this fact in **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** when opined that:

“The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.”

85. In a later case, the same Court in **Speaker of National Assembly vs. Attorney General and 3 Others [2013] eKLR** stated that:

“Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering its opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn *duty under the Constitution and the Supreme Court Act.*”

86. In the Court’s view:

“Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of “right” and “wrong” in such cases, short of a resolution in plebiscite, is only the Courts.”

Separation of Powers

87. The doctrine of separation of powers. on the other hand, was dealt with by Ngcobo, J in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006(6) SA 416 (CC) (17 August 2006)** as hereunder:

“The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation.”

88. According to the learned Judge:

“It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a

determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation. By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does.”

89. It was further held that:

“While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution.”

90. I associate myself fully with the said sentiments. Since this Court is 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, it has the duty and is obliged 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. Since this petition alleges a violation of the Constitution by the Respondents, the invitation to this Court to intervene is more than welcome and the Respondents cannot obstruct it from doing so by placing road-blocks on its path by way of the doctrines of parliamentary privilege and separation of power. In other words, the two doctrines do not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution as that is one of the core mandates of this Court.

91. I therefore hold and affirm that this Court has the power to enquire into the constitutionality of the actions of Parliament notwithstanding the privilege of *inter alia*, debate accorded to its members and its proceedings. That finding is fortified under the principle that the Constitution is the Supreme Law of this country and Parliament 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 twin doctrines of parliamentary privilege and separation of powers to escape judicial scrutiny.

92. In my view the doctrine of separation of powers must be read in the context of our constitutional framework and where the adoption of the doctrine would clearly militate against the constitutional principles the doctrine must bow to the dictates of the spirit and the letter of the Constitution.

93. It is important therefore to appreciate the nature of the Constitution of Kenya, 2010. Our Constitution is a transformative constitution. This must necessarily be so since Article 10 thereof provides that all State organs, State officers, public officers and all persons whenever they make or apply policy decisions are bound by the national values and principles of governance which include participation of the people, inclusiveness, integrity, transparency and accountability. That ours is a transformative Constitution appears from Article 20(3) of the Constitution which provides that:

In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom;

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

94. Similarly Article 259(1) of our Constitution provides that:

This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

95. What the above provisions mean is that in the interpretation of the Constitution the Court must do so in a manner that advances the values and principles of the Constitution. Since ours is a constitutional democracy the authorities handed down in systems that practice parliamentary supremacy are not necessarily relevant to our constitutional set up. Therefore in applying authorities emanating from such systems, care must be taken to ensure that such decisions conform to our transformative constitutional framework. This was the position adopted by **Kasanga Mulwa, J** in **R vs. Kenya Roads Board ex parte John Harun Mwau HC Misc Civil Application No.1372 of 2000** where he expressed himself as follows:

“Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution.”

96. Our Constitution is therefore not just structurally based but is a value-oriented Constitution. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and *inter alia* Article 10 of the Constitution. The distinction between the two was made by **Ulrich Karpen** in ***The Constitution of the Federal Republic of Germany*** thus:

“...the value –oriented, concerned with intensely human and humane aspirations of personality, conscience and freedom; the structure-oriented, concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements.”

97. Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and

duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality. As appreciated by Ojwang, JSC, in Joseph Kimani Gathungu vs. Attorney General & 5 Others Constitutional Reference No. 12 of 2010:

“A scrutiny of several Constitutions Kenya has had since independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of 2010 is dominated by a “social orientation”, and as its main theme, “rights, welfare, empowerment”, and the Constitution offers these values as the reference-point for governance functions.”

98. As was appreciated by the majority in In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct. Advisory Opinion Appl. No. 2 of 2012 at para 54:

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

99. The Court is therefore required in the performance of its judicial function to espouse the value system in the Constitution and to avoid the structural minimalistic approach. The German Federal Constitutional Court in Luth Decision BVerfGE 7, 198 I. Senate (1 BvR 400/51) noted as follows:

“But far from being a value free system the Constitution erects an objective system of values in its section on basic rights and thus expresses and reinforces the validity of the basic rights. This system of values, centering on the freedom of human being to develop the society must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration and judicial decisions. It naturally influences private law as well, no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.”

100. The foregoing position was aptly summarised by the South African Constitutional Court in Carmichele vs. Minister of Safety and Security (CCT 48/00) 2001 SA 938 (CC) in the following terms:

“Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: ‘The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and the judiciary.’ The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.”

101. Therefore the Constitution of Kenya, 2010, just like the post Nazi German Basic Law and the post-

apartheid 1996 Constitution of South Africa, as “a transformative instrument, is the key instrument to bring about a better and more just society”. See **Michaela Hailbronner** in *Traditions and Transformations: The Rise of German Constitutionalism*.

102. It is my view that our position is akin to the one described by the German Constitutional Court in **BVverfGE 5, 85** that:

“Free democratic order of the Basic Law...assumes that the existing state and social conditions can and must be improved. This presents a never-ending task that will present itself in ever new forms and with ever new aspects.”

103. To paraphrase **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57**, the Constitution is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle. It must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. As appreciated **In the Matter of the Estate of Lerionka Ole Ntutu [2008] KLR 452:**

“Constitution of any country of the world should not represent a mere body or skeleton without a soul or spirit of its own. The Court would not like to discard the possibility of the court adopting broader view of using the living tree principle of the interpretation of the Constitution where they are “amongst others, ambiguity, unreasonableness, obvious imbalance or lack of proportionality or absurd situation.”

104. Similarly in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006**, it was held that:

“...the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits.”

105. Nyamu, J (as he then was) in **Richard Nduati Kariuki vs. Honourable Leonard Nduati Kariuki & Another [2006] 2 KLR 356** expressed himself as hereunder:

“The Constitution is a living document. It is a house with many rooms, windows and doors. It is conservative enough to protect the past but flexible enough to advocate new issues and the future.”

106. It follows that the norms and values identified in Article 10 of the Constitution are bare minimum or just examples. This must be so because Article 10(2) of the Constitution provides that:

“The national values and principles of governance include...”

107. By employing the use of the term “include” the framers of the Constitution were alive to the fact that there are other values and principles which may advance the spirit of the Constitution and hence all State organs, State officers, public officers and all persons may be enjoined to apply them. What this means is that the national values and principles of governance in Article 10 of the Constitution are not exclusive but merely inclusive. The Constitution set out to plant the seed of the national values and principles of national governance but left it open to all State organs, State officers, public officers and all persons when applying or interpreting the Constitution, enacting, applying or interpreting any law, or applying or implementing a public policy decision to water and nurture the seedling to ensure that the plant develops all its parts such as the stem, the leaves, the branches and the flowers etc. In other words the national values and principles of governance must grow as the society develops in order to reflect the true state of the society at any given point in time.

108. These constitutional principles apply to judicial review just as in constitutional petitions or references as the South African Constitutional Court (**Chalkalson, P**) expressed itself on the issue in **Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000)** at para 33:

“The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.”

109. It therefore follows that Parliament, being a State organ, in making policy decision must adhere to the national values and principles of governance. If it does not do so, it may well fall foul of Article 10 of the Constitution. To this extent I may not agree with the position adopted by the US Supreme Court in **U.S vs. Butler, 297 U.S. 1 [1936]** line, hook and sinker when it holds that:

“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.”

110. My view on the nature of our Constitution is based on the decision of the Supreme Court of Kenya in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** where it expressed itself as follows:

“Kenya’s Constitution of 2010 is a transformative charter. Unlike the conventional “liberal” Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today’s Constitution is to institute *social change and reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy*. This is clear right from the preambular clause which premises the new Constitution on – *“RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.”* And the principle is fleshed out in Article 10 of the Constitution, which specifies the “national values and principles of governance”, and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government. The transformative concept, in operational terms, *reconfigures the interplays between the States majoritarian and non-majoritarian institutions*, to the intent that the desirable goals of governance, consistent with dominant perceptions of *legitimacy*, be achieved. A depiction of this scenario has been made in relation to the unique processes of constitution-building in South Africa, a country that was emerging from an entrenched racist governance system. Karl Klare, in his article, *“Legal Culture and Transformative Constitutionalism,” South African Journal of Human Rights, Vol. 14 (1998), 146* thus wrote [at p.147]: *“At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent.”*The scholar states the object of this South African choice: *“By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed...to transforming a country’s political and social*

institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.” The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country’s achievements in constitutional precedent. We in this Court, conceive of today’s constitutional principles as incorporating the transformative ideals of the Constitution of 2010”.

111. I therefore associate myself with the views of **Mohamed A J** in the Namibian case of **S. vs Acheson, 1991 (2) S.A. 805** (at p.813) to the effect that:

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals and...aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion.”

112. Having disposed of the background and the preliminary issues I now intend to deal with the substantive issues raised in this petition.

113. On the issue whether the **Statute Law (Miscellaneous Amendments) Act 2015** offended Article 118 with respect to facilitation of public participation and involvement in its public participation in governance is an internationally recognised concept. This concept is reflected in international human rights instruments. **The Universal Declaration of Human Rights of 1948** proclaims in **Article 21** that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. **The International Covenant on Civil and Political Rights (ICCPR)** affirms at **Article 25**, that:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions;

a. To take part in the conduct of public affairs, directly or through freely chosen representatives;

b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

c. To have access, on general terms of equality, to public service in his country.”

114. The right to public participation is based on the democratic idea of popular sovereignty and political equality as enshrined in Article 1 of our Constitution. Because the government is derived from the people, all citizens have the right to influence governmental decisions; and the government should respond to them. Therefore, participation must entail citizens’ direct involvement in the affairs of their community as the people must take part in political affairs. This principle was captured by **Majanja, J** in **Association of Gaming Operators-Kenya & 41 Others versus Attorney General & 4 Others [2014] eKLR** where the learned Judge held that:

“Public participation as a national value is an expression of the sovereignty of the people articulated in Article 1 of the Constitution. The golden thread running through the Constitution is one of the sovereignty of the people of Kenya and Article 10 that makes public participation a national value is a form of expression of that sovereignty.”

115. Similarly, **Lenaola J** (as he then was) in **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others versus County of Nairobi Government & 3 Others [2013] eKLR** expressed himself on the

issue as follows:

“The Preamble of the Constitution sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at Article 10(1) of the Constitution by making it clear that the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. Article 10(2) of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the Constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement. Consistent with this, Article 174(c) of the Constitution provides for the principles of devolved government and has given powers to the people to enhance self-governance and enhance their participation in decisions that affect them. Clearly, the making of county laws by members of County Assembly is, in my view, an essential part of public participation.”

116. It was on the same premise that this Court in **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR** while adopting the decision of the South African Constitutional Court in **Doctor’s for life International vs. The Speaker National Assembly and others (supra)**, held that:

“The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation...The international law right to political participation reflects a shared notion that a nation’s sovereign authority is one that belongs to its citizens, who ‘themselves should participate in government – though their participation may vary in degree.’...This notion is expressed in the preamble of the Constitution, which states that the Constitution lays “the foundations for a democratic and open society in which government is based on the will of the people.” It is also expressed in constitutional provisions that require national and provincial legislatures to facilitate public involvement in their processes. Through these provisions, the people of South Africa reserved for themselves part of the sovereign legislative authority that they otherwise delegated to the representative bodies they created...The very first provision of our Constitution, which establishes the founding values of our constitutional democracy, includes as part of those values “a multi-party system of democratic government, to ensure accountability, responsiveness and openness.” Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process...”

117. Public participation ought not to be seen as a derogation from Parliamentary representation or representation at the County Assembly level. **Ngcobo, J** recognised this in **Doctors for Life International vs. Speaker of the National Assembly and Others** (supra) by expressing himself as follows:

“In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a

continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist. Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the lawmaking processes. Parliament must therefore function in accordance with the principles of our participatory democracy...”

118. Article 118(1)(b) of the Constitution enjoins Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. This provision is a reflection and a restatement of the national values and principles of governance decreed in Article 10 of the Constitution.

119. This view is reinforced by the decision in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)** where Ngcobo, J expressed himself *inter alia* as follows:

“Our constitutional democracy has essential elements which constitute its foundation; it is partly representative and partly participative. These two elements reflect the basic and fundamental objective of our constitutional democracy. The provisions of the Constitution must be construed in a manner that is compatible with these principles of our democracy. Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves.”

120. Therefore apart from the legislative debates in the National and County Assemblies, it is a requirement and expectation of the Constitution that the people must be directly involved in the legislative process and this was recognised in *Matatiele Case* where it was held that:

“What our constitutional scheme requires is ‘the achievement of a balanced relationship between representative and participatory elements in our democracy.’ The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. “The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process...To uphold the government’s submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the people of the provinces in the functioning of their provincial legislatures than simply through the electoral process. The government’s argument that the provisions of section 118(1)(a) are met by having a proposed constitutional amendment considered only by elected representatives must therefore be rejected...”

121. To paraphrase *Gakuru Case* (supra), 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. It behoves Parliament in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not enough to simply “tweet” messages as it were and leave it to those who care to scavenge for it. Parliament ought to do whatever is reasonable to ensure that as many Kenyans are aware of the intention to pass legislation. It is the duty of Parliament in such circumstances

to exhort the people to participate in the process of the enactment of legislation by making use of as many fora as possible such as churches, mosques, temples, public *barazas*, national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. In **Glenister vs. President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6**, it was held that:

“For the opportunity afforded to the public to participate in a legislative process to comply with section 118(1), the invitation must give those wishing to participate sufficient time to prepare. Members of the public cannot participate meaningfully if they are given inadequate time to study the Bill, consider their stance and formulate representations to be made. Two principles may be deduced from the above statement. The first is that the interested parties must be given adequate time to prepare for a hearing. The second relates to the time or stage when the hearing is permitted, which must be before the final decision is taken. These principles ensure that meaningful participation is allowed. It must be an opportunity capable of influencing the decision to be taken. The question whether the notice given in a particular case complies with these principles will depend on the facts of that case.”

122. Whereas the Respondents were accused of not having subjected the Bill to adequate public participation, in this case the replying affidavit sworn on behalf of the Respondents, set out the steps which were taken by them in respect of the Bill before it was tabled before the House and enacted as *Statute Law (Miscellaneous Amendment) Act 2015*.

123. With respect to public participation, it was held in **Commission for the Implementation of the Constitution vs. Parliament of Kenya & 5 Others [2013] eKLR**, at paragraph 74 that:

“The National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is effected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public. Indeed, as Sachs J observed in Minister of Health and Another NO vs New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) at para. 630, “The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. 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. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

124. The same position was adopted in **Doctors for Life International vs. The speaker of the National Assembly and Others** (supra) applied with approval in **Robert N. Gakuru & Others vs. Governor, Kiambu County [2014] eKLR** where the court held that:

“Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes”.

125. Therefore, as appreciated in *Doctors for Life Case* (supra):

“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. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as “a continuum that ranges from providing information and building awareness, to partnering in decision-making...There may well be circumstances of emergency that require urgent legislative responses and short timetables...When it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted. Problems encountered in speeding up a sluggish timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public involvement are reasonable. The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.”

126. Ngcobo, J in Doctors for Life International vs. Speaker of the National Assembly and Others (supra) expressed himself on the issue as hereunder:

“...where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does. While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution.”

127. The law however is not that all persons must express their views or that they must be heard and that the hearing must be oral. Similarly, the law does not require the proposed legislation must be brought to each and every person wherever the person might be. What is required is that reasonable steps be taken to facilitate the said participation. Once this is done the Court will not interfere simply because due to peculiar circumstances of an individual, he or she failed to get the information. In other words, what is required is that a reasonable opportunity be afforded to the public to meaningfully participate in the legislative process. Therefore even in cases where there are oral public hearings the mere fact that a particular person has not been so heard does not necessarily warrant the whole process being nullified. It was therefore held by Ngcobo, J in the above case that:

“Where Parliament has held public hearings but not admitted a person to make oral submissions on the ground that it does not consider it necessary to hear oral submissions from that person, this Court will be slow to interfere with Parliament’s judgment as to whom it wishes to hear and whom not. Once again, that person would have to show that it was clearly unreasonable for Parliament not to have given them an opportunity to be heard. Parliament’s judgment on this issue will be given considerable respect. Moreover, it will often be the case that where the public has been given the opportunity to lodge written submissions,

Parliament will have acted reasonably in respect of its duty to facilitate public involvement, whatever may happen subsequently at public hearings. However, for citizens to carry out their responsibilities, it is necessary that the legislative organs of state perform their constitutional obligations to facilitate public involvement. The basic elements of public involvement include the dissemination of information concerning legislation under consideration, invitation to participate in the process and consultation on the legislation. These three elements are crucial to the exercise of the right to participate in the law-making process. Without the knowledge of the fact that there is a bill under consideration, what its objective is and when submissions may be made, interested persons who wish to contribute to the lawmaking process may not be able to participate and make such contributions.”

128. However the words of caution expressed by Sachs, J in Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) must always be kept in mind. In that case the learned Judge of the Constitutional Court of South Africa pronounced himself thus:

“The passages from the Doctors for Life majority judgment, referred to by the applicants, state reasons for constitutionally obliging legislatures to facilitate public involvement. But being involved does not mean that one’s views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them. To say that the views expressed during a process of public participation are not binding when they conflict with Government’s mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public. It is the specific conjunction of these three factors which, in my view, must guide the evaluation of the facts in this matter. Civic dignity was directly implicated. Indeed, it is important to remember that the value of participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect... Given that the purpose of participatory democracy is not purely instrumental, I do not believe that the critical question is whether further consultation would have produced a different result. It might well have done. On the facts, I am far from convinced that the outcome would have been a foregone conclusion. Indeed, the Merafong community might have come up with temporising proposals that would have allowed for future compromise and taken some of the sting out of the situation. For its part, the Legislature might have been convinced that the continuation of an unsatisfactory status quo would have been better even if just to buy time for future negotiations than to invite a disastrous break-down of relations between the community and the government. Yet even if the result had been determinable in advance, respect for the relationship between the Legislature and the community required that there be more rather than less communication... There is nothing on the record to indicate that the Legislature took any steps whatsoever even to inform the community of the about-turn, let alone to explain it. This is not the sort of information that should be discovered for the first time from the newspapers, or from informal chit-chat.”

129. As to whether there was adequate opportunity for public participation with respect to *Statute Law (Miscellaneous Amendment) Act, 2015*, a three judge bench of this Court in Law Society of Kenya vs Attorney General & 2 Others [2013] eKLR disagreed with the contention that the opportunity provided did not lend itself to meaningful public participation. In that case however, the Court faulted Parliament for having debated a different Bill from the one that was subjected to public participation. In this case

there is no such allegation. What is alleged is that there was no meaningful public participation at inception and this Court having found that that contention was not correct, the challenge, based as it is on public participation must fail.

130. The next issue is whether the amendments in issue could be effected by way of Miscellaneous Amendment Act. The procedure of legislation by way of Statute Law Miscellaneous legislation ought to avail only in cases of minor non-controversial amendments and this was appreciated when it was indicated in the Memorandum of Objects and Reasons of the Bill published in a Special Issue of the Kenya Gazette – Supplement No. 164 (National Assembly Bills No. 57) that:

The 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.[Emphasis added].

131. That this is the norm is clearly discernible from the practice adopted in most jurisdictions, though the practice is not consistent. According to the *Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 21, October 2007, pp. 5-6*:

“An omnibus bill is an avenue for making general housekeeping amendments to legislation. It is designed to make only relatively minor, non-controversial amendments to various acts and to repeal acts that are no longer required. Omnibus bills assist in expediting the government’s legislative program and parliamentary business by reducing the number of separate amendment bills that deal with relatively minor amendments and repeals. They also help to weed out spent or redundant legislation from the statute book. The Department of the Premier and Cabinet has overseen the preparation of the bill to try to ensure that amendments about which there is some contention or complexity, or that make some substantive change to the law, are not included”.

132. This position is similar to that adopted by the Canadian Legislature in regard to omnibus bills as expounded in *Canadian Miscellaneous Statute Law Amendment Program* that only minor, non-controversial amendments are allowed to be made to a number of federal statutes at once in one bill. According to the program, to qualify, a Bill must not be controversial, not involve the spending of public funds, not prejudicially affect the rights of persons, or create new offences or subject a new class of persons to an existing offence. However, the practice in the United States of America as stated by **Louis Massicotte, *Omnibus Bills in Theory and Practice***, Canadian Parliamentary Review, Vol. 36 No. 1 2013, p. 14, is varied with some states permitting omnibus bills and other restricting bills to a single issue. This was the position in a 1901 American case of ***Commonwealth vs. Barnett*** (199 US. 161) where it is stated that:

“Bills, popularly called omnibus bills, became a crying evil, not only from the confusion and distraction of the legislative mind by the jumbling together of incongruous subjects, but still more by the facility they afforded to corrupt combinations of minorities with different interests to force the passage of bills with provisions which could never succeed if they stood on their separate merits”.

133. While there is no internationally accepted position on the legality of omnibus bills, the reality is that they are used in many jurisdictions and noted by **Louis Massicotte** (supra) that:

“From the point of view of the government, omnibus bills have plenty of advantages....First, they save time and shorten legislative proceedings by avoiding the preparation of dozens of distinct bills necessitating as many second reading debates. Second, omnibus bills generate embarrassment within opposition parties by diluting highly controversial moves within a complex package, some parts of which are quite popular with the public or even with opposition parties themselves. [On why omnibus bill are objectionable] 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.”

134. It is therefore clear that both on policy and good governance, which is one of the values and principles of governance in Article 10 of the Constitution, which values and principles form the foundation of our State and Nation as decreed in Article 4(2) of the Constitution, omnibus amendments in the form of Statute Law Miscellaneous legislations ought to be confined only to minor non-controversial and generally house-keeping amendments.

135. To determine the propriety of the procedure adopted in this instance one needs to examine the impact and the import of the amendments. One of the amendments was the substitution of the word “Minister” with “Cabinet Secretary”. Clearly this was necessitated by the constitutional dictates and was clearly not a controversial amendment.

136. The other amendment was the reduction of the number of nominees by the petitioner. The previous provision empowered the Minister to appoint the Board consisting of *inter alia* following persons four Pharmacists appointed by the Minister from a panel of names submitted by the Pharmaceutical Society of Kenya of whom—

- i. one shall be from the Civil Service;
- ii. one shall be from the community pharmacy; and
- iii. one from the pharmaceutical industry;

137. The new provision on the other hand empowers the Cabinet Secretary to appoint the Board consisting of *inter alia* three Pharmacists appointed by the Minister from nine names competitively nominated by the Pharmaceutical Society of Kenya with due regard to gender in respect of each of the following categories -

1. the public service;
2. the community pharmacy; and
3. the pharmaceutical industry

138. Apart from the said nominees the Petitioner was also empowered to nominate one pharmaceutical technologist to be appointed by the Minister from a panel of names submitted by the Kenya Pharmaceutical Association and this power was retained.

139. Unlike the case of appointment of Judges where the powers of the Judicial Service Commission is prescribed in the Constitution which power is exercised by the Commission independently, the constitution of the Board is prescribed by an Act of Parliament and it is not contested that Parliament has the power to decide, subject to compliance with the letter and spirit of the Constitution, how the Board is to be constituted. Whereas I agree with the petitioner that the Board ought to be constituted in such a manner that it is not at the beck and call of the executive, in this case, the change in the composition, according to the Respondents was informed by the realisation that both the public and private universities ought to have been represented therein. It is true that this need diluted the number of nominees by the petitioner. However it still left the petitioner with the power to nominate 5 appointees. In my view taking into consideration the rationale for the said reduction of the number of nominees vis-à-vis the necessity of bringing on board private universities in order to avoid the apparent discrimination, I cannot find that the said action was contrary to the Constitution.

140. The petitioner contended that the requirement that it presents nine names to the Cabinet Secretary for

appointment amounted to interference with its powers. This was however explained by the need to ensure that the appointments adhered to the constitutional requirements in particular with respect to gender. In my view, there can be nothing wrong with an amendment whose intent is to bring the legislation in line with the Constitutional requirements. In fact section 7(1) of the Sixth Schedule to the Constitution provides that:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

141. It therefore follows that even without the enactment intended to bring legislation in conformity with the Constitution, in interpreting existing legislation the Court is enjoined to interpret and construe the same with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. By inserting a clause whereby both the public and private universities are represented in the Board without seriously causing injury to the petitioner's power of nominating members for appointment to the Board, I cannot agree with the petitioner that the amendments were discriminatory as against the petitioner. To the contrary the amendments were meant to bring an end to the manifest discrimination against private universities. In his decision in Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688, Nyamu, J (as he then was) held:

“The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification...The rights guaranteed in the Constitution are not absolute and their boundaries are set by the rights of others and by the legitimate needs of the society. Generally it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Section 82 (4) and (8) constitute limitations to the right against discrimination. The rights in the Constitution may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including (a) the nature and importance of the limitation (b) the relation between the limitation and its purpose (c) less restrictive means to achieve the purpose. The principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:- (1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and (2) Are reasonable in the light of their legitimate aim.”

142. In this case it is contended that the alleged discrimination was meant to pursue a legitimate aim of attaining affirmative action in order to deal with the factual inequalities with respect to gender and the rights of private universities to be represented in the Board. It is therefore my view that the alleged discrimination directed towards the petitioner by reducing the number of its nominees was justifiable under the Constitution, the supreme law of the land.

143. In my view nothing turns upon the requirement that the petitioner submits nine names since even under the previous provision the Minister was empowered to appoint members from “*a panel of names submitted by the Pharmaceutical Society of Kenya*”. That the amendments expressly stated that the said panel would be nine persons does not, in my view, render the amendments unconstitutional since the spirit of the former provisions envisaged that there would be a panel of names submitted by the petitioner.

144. It was further contended that Parliament acted in bad faith in enacting the Amendment Act during the pendency of the petitioner's judicial review proceedings. In my view, there is nothing inherently

wrong in Parliament correcting the law notwithstanding that the same is subject of legal proceedings. In fact such a move on the part of Parliament would be welcome and prudent if the intention is to correct what in Parliament's view is an undesirable legal position. Parliament does not have to wait for the Court to pronounce itself on the issue if it is clear to it that the law needs to be corrected.

145. I have considered the issues raised in this petition. That there is a presumption of constitutionality of legislation is not in doubt though this presumption is rebuttable the burden of rebutting the same falling squarely on the person challenging the legislation. In **Ndyanabo vs. Attorney General [2001] EA 495** the Court of Appeal of Tanzania held that:

“Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative”

See also **Pearlberg vs. Varty [1972] 1 WLR 534**.

146. **Therefore** with respect to legislation that is alleged to violate provisions of the Constitution other than the Bill of Rights, the obligation is on the petitioner to establish that the legislation violates a provision(s) of the Constitution. This was the view taken by the Court in the case of **Coalition for Reform and Democracy (CORD) vs. Attorney General and Others [2015] eKLR** in which it stated:

“We have been called upon to declare SLAA in its entirety, or at the very least certain provisions thereof, unconstitutional for being in breach of various Articles of the Constitution. In considering this question, we are further 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 that every Act of Parliament is constitutional. The burden of proof lies on any person who alleges that an Act of Parliament is unconstitutional.”

147. However, the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article. The criteria in such circumstances was set in **Lyomoki and Others vs. Attorney General [2005] 2 EA 127** where the Constitutional Court of Uganda set out the following principles:

(i) The onus is on the petitioners to show a *prima facie* case of violation of their constitutional rights.

(ii) Thereafter the burden shifts to the respondent to justify that the limitations to the rights contained in the impugned statute is justified within the meaning of Article 43 of the Constitution. Both purposes and effect of an impugned legislation are relevant in the determination of its constitutionality.

(iii) The constitution is to be looked at as a whole. It has to be read as an integrated whole with no particular provision destroying another but each supporting the other. All provisions concerning an issue should be considered together so as to give effect to the purpose of the instrument.

(iv) Where human rights provisions conflict with other provisions of the Constitution, human rights provisions take precedence and interpretation should favour enjoyment of the human rights and freedoms.

148. The same position was adopted in **Institute of Social Accountability & Another vs. National Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR**.

149. Having considered this petition, it is my view and I so hold that the issues raised herein do not meet

the threshold for declaration of unconstitutionality of legislation. I agree with the decision in petition No. 72 of 2011 - **Mt Kenya Bottlers Ltd & Others vs. The AG and Others**, that the court will not nullify legislation because it thinks that such law was enacted in bad taste, unconscionable or inconvenient.

Order

150. In the premises I find no merit in this petition which petition fails and is dismissed but with no order as to costs considering that the petition was largely a public interest litigation.

151. It is so ordered.

Dated at Nairobi this 16th day of January, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Akusala for the Petitioner

Miss Otieno for the 1st and 2nd Respondent

Mr Kibet for Miss Chilaka for the 3rd Respondent

CA Mwangi