REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.628 OF 2014

CONSOLIDATED WITH PETITION NO.630 OF 2014 AND PETITION NO.12 OF 2015

BETWEEN

COALITION FOR REFORM AND

DEMOCRACY(CORD)…….....……1ST PETITIONER

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....2ND PETITIONER

SAMUEL NJUGUNA NG'ANG'A.....3RD PETITIONER

AND

REPUBLIC OF KENYA……..……1ST RESPONDENT

ATTORNEYGENERAL……..……2ND RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTION.....1ST INTERESTED PARTY

THE JUBILEE COALITION.....2ND INTERESTED PARTY

KITUO CHA SHERIA.....3RD INTERESTED PARTY

KATIBA INSTITUTE.....4TH INTERESTED PARTY

REFUGEE CONSORTIUM OF KENYA.....5TH INTERESTED PARTY

ARTICLE 19:GLOBAL CAMPAIGN FOR FREE EXPRESSION.6TH INTERESTED PARTY

TERROR VICTIMS SUPPORT INITIATIVE.....7TH INTERESTED PARTY

AND

LAW SOCIETY OF KENYA.....1ST AMICUS CURIAE

COMMISSION ON THE IMPLEMENTATION OF THE CONSTITUTION...2ND AMICUS CURIAE

JUDGMENT

Introduction

1. We are living in troubled times. Terrorism has caused untold suffering to citizens and greatly compromised national security and the security of the individual. There is thus a clear and urgent need for the State to take appropriate measures to enhance national security and the security of its citizens. However, protecting national security carries with it the obligation on the State not to derogate from the rights and fundamental freedoms guaranteed in the Constitution of Kenya 2010. It is how the State manages this balance that is at the core of the petition before us.

2. In the wake of the terrorist attacks in Kenya in the last months of 2014, the State enacted the Security Laws (Amendment) Act, No 19 of 2014 (**"SLAA')**. The Security Laws (Amendment) Bill was published on 11th December 2014. It was debated on 18th December 2014 and passed. It received Presidential assent on 19th December 2014. SLAA came into force on 22nd December 2014. It amends the provisions of twenty two other Acts of Parliament concerned with matters of national security, and it is these amendments that have precipitated the petition now before us.

3. The petition challenges the constitutionality of SLAA and asks the court to determine four fundamental questions related to the process of the enactment of SLAA as well as its contents.

4. The first question concerns the extent to which this court may inquire into the processes of the legislative arm of government and in particular, whether this court can interrogate parliamentary proceedings. The second question concerns the nature and scope of the constitutional obligation of the legislature to facilitate public involvement and participation in its legislative processes, and the consequences of the failure to comply with that obligation. The third question is whether the amendments to various Acts of Parliament contained in SLAA which are impugned by the petitioners limit or violate the Bill of Rights or are otherwise inconsistent with the Constitution of Kenya. Should the court find such limitation, violation or inconsistency, then it must determine whether the limitation is justifiable in a free and democratic society. The last issue to consider is whether the prayers sought in the Petition should be granted or not.

The parties

5. The 1st petitioner is a coalition of political parties with representation in the National Assembly and Senate known as the Coalition for Reform and Democracy, popularly known by its acronym, **"CORD"** (**"CORD")**. CORD is the petitioner in Petition No. 628 of 2014.

6. The 2nd petitioner, Kenya National Commission of Human Rights,(**"KNCHR"**) is the petitioner in Petition No. 630 of 2014. KNCHR is a constitutional commission established pursuant to the provisions of Article 59 of the Constitution.

7. The 3rd petitioner is Samuel Njuguna Ng'ang'a, an Advocate of the High Court and a citizen of Kenya who filed Petition No. 12 of 2015 alleging a threat of violation of his constitutional rights and freedoms by SLAA.

8. The respondent in the consolidated petition is principally the Attorney General of the Republic of Kenya, though for some unclear reason, CORD enjoined the Republic as a respondent in its petition. The Attorney General was impleaded pursuant to the provisions of Article 156 of the Constitution.

9. Pursuant to orders of this court, the Director of Public Prosecutions ("**the DPP**") was enjoined as the 1st Interested Party. The office of the DPP is established under Article 157 of the Constitution and vested with State powers of prosecution.

10. Also enjoined to the proceedings as the 2nd Interested party is a coalition of political parties known as the Jubilee Coalition ("**Jubilee**"). Jubilee commands a majority in the Parliament of Kenya.

11. Four civil society organisations representing different interests were also permitted to participate in the proceedings as interested parties. These are Kituo Cha Sheria ("**Kituo**"), Katiba Institute ("**Katiba**"); the Refugee Consortium of Kenya **(**"**RCK**") and Article 19: Global Campaign for Free Expression, **("Article 19")** as the 3rd , 4th, 5th and 6th interested parties, respectively.

12. The 7th interested party is the Terror Victims Support Initiative ("**Terror Victims**"), an assemblage of terrorist attack victims in Kenya who assist and support each other as well as engaging the government in the eradication of terror attacks in the country.

13. Finally, the court permitted the participation of two organisations as *amici curiae* or friends of the court. The 1st *amicus curiae* is the Law Society of Kenya**("LSK")**, a statutory body established under the provisions of the Law Society of Kenya Act . Under section 4 of the Law Society of Kenya Act, Cap 16 Laws of Kenya, the LSK has as its objects, inter alia, the obligation to assist the court and protect the public interest.

14. The 2nd amicus curiae is the Commission on the Implementation of the Constitution **("CIC")** which, like KNCHR, is a Constitutional Commission. CIC has its functions outlined under Section 5 of the 6th Schedule to the Constitution. They include monitoring, facilitating and overseeing the development of legislation and administrative procedures required to implement the Constitution.

Factual Background

15. The basic facts precipitating the petition are largely undisputed.

16. On 8th December, 2014 the Security Laws (Amendment) Bill 2014 was published in a special issue of the Kenya Gazette being Supplement No. 163 (National Assembly Bill No. 309) under the hand of Mr. Asman Kamama, the Chairperson of the Administration and National Security Committee of the National Assembly. The following day the Bill was introduced for the first reading in the National Assembly. Pursuant to Standing Order No.120 the period for publication was reduced from 14 days to 1 day.

17. By an advertisement published on the 10th of December, 2014 in the Daily Nation and the Standard newspapers, the National Assembly indicated that the days for public participation would be the 10th, 11th and 15th December 2014. Members of the public were thereby invited to submit their representations on the Bill either through written memoranda to the Clerk of the National Assembly in Nairobi or orally to the Committee which was to sit on the stated days between 10.00 am and 5.00pm.

18. Despite the dates for public participation published in the newspapers, on 11th December, 2014 the Bill was tabled for the 2nd reading. Upon questions being raised in Parliament about the period for public participation, the Speaker of the National Assembly, Mr. Justin Muturi, ruled that public participation would continue after the 2nd reading.

19. The petitioners complain that all this was done contrary to the Standing Order No. 127 which requires that after its first reading, a Bill shall be committed to a committee which then conducts public hearings and incorporates the views and recommendations of the public in its report.

20. On the morning of 18th December 2014, the Bill was presented on the floor of the House, for consideration by the Committee of the Whole House as per Standing Order No. 133. According to the petitioners, there was great disorder in the House during the proceedings and the Speaker adjourned the morning session. In the afternoon of the same day the Bill was again placed before the Committee of the whole house, amendments were proposed to it, and, according to the petitioners, amid much acrimony and disorder, the Bill was purportedly passed.

21. It is not in dispute that on 19th December, 2014 the Bill was assented to by the President and, in accordance with its provisions, became operational on 22nd December, 2014.

Litigation history

22. Hot on the heels of the presidential assent and the coming into force of SLAA, CORD moved to court on 23rd December, 2014 seeking ex-parte conservatory relief to stay the operation of the Act. The court directed that the application dated 23rd December, 2014 be served upon the respondents and set the *inter partes* hearing for 24th December, 2014. The hearing did not however, proceed as the court granted to the DPP and other parties who had been enjoined to the proceedings time to file their responses.

23. On 23rd December 2014, KNCHR filed its petition which was consolidated with the CORD petition on 24th December 2014. On 29th December, 2014 the application for conservatory orders was duly heard by Odunga J.

24. In his ruling on 2nd January 2015, the Honourable Judge granted conservatory orders suspending the following sections of the Act which had been challenged as constituting a threat or violation of the Constitution:

a) Section 12 which inserted section 66A to the Penal Code.

b) Section 16 which inserted section 42A to the Criminal Procedure Code.

c) Section 26 which inserted section 20A to the Evidence Act.

d) Section 29 which inserted section 59A to the Evidence Act.

e) Section 48 which inserted section 16A to The Refugees Act.

f) Section 56 which repealed and substituted Part V of The National Intelligence Service Act.

g) Section 58 which amended Section 65 of the National Intelligence Service Act by deleting the word "Parliament" and substituting therefor the words "National Assembly".

h) Section 64 to the extent that it introduces sections 30A and 30F of The Prevention of Terrorism Act.

25. Pursuant to Article 165(4) of the Constitution the Honourable Judge then referred the consolidated petition to the Chief Justice for purposes of empanelling a bench of an uneven number of judges to hear the petition, leading to the constitution of the present bench.

26. On 21st January, 2015, the 3rd petitioner filed Petition No. 12 of 2015 which was consolidated with the CORD and KNCHR petitions. The petition was argued before us on the 28th, 29th and 30th of January 2015.

The petitioners' case

CORD's case

27. CORD's case is contained in its petition dated 23rd December, 2014 and in the affidavit sworn in support on the same day by Francis Nyenze, the Minority Leader in the National Assembly.

28. Mr. Nyenze set out the background leading to the enactment of SLAA**,** which we have set out above briefly, from the publication of the Special Issue of the Kenya Gazette Supplement, Kenya Gazette Supplement No. 163 (National Assembly Bill No. 309) of 8th December, 2014, through the first and second readings, to the point it was considered by the Committee of the whole house, read a third time, passed and assented to by the President on 19th December, 2014. He contended that the period for publication was reduced from 14 days to 1 day which deprived the members of the public of their right to public participation in the legislative process enshrined in the Constitution. He averred that the public was not given time to read and understand the proposed amendments and could not engage in the debate on the same day of the publication. He concluded that there was therefore no public participation in the enactment of SLAA and if there was, such participation was inadequate, hurried and manipulated to fail.

29. Mr. Nyenze further argued that the Bill was tabled for the 2nd reading without completion of the public participation phase contrary Standing Order No. 127 which requires that after the first reading, a Bill is committed to a Committee which shall then conduct public participation and incorporate the views and recommendations of the public in its report for tabling before the whole house.

30. CORD was also aggrieved by what it viewed as the shortcomings in the Memorandum of objects and reasons. Mr.Nyenze deposed that the Memorandum of Objects and Reasons of the Security Laws (Amendment) Bill 2014 stated that the Bill was for making minor amendments which did not merit the publication of separate Bills. He averred that, on the contrary, the Bill contained extensive, controversial and substantial amendments affecting the Public Order Act (Cap 56) the Penal Code (Cap 63), the Extradition (Contagious and Foreign Countries) Act (Cap 76), the Criminal Procedure Code (Cap 75), the Registration of Persons Act (Cap 107), the Evidence Act (Cap 80), the Prisons Act (Cap 90), the Firearms Act (Cap 114), the Radiation Protection Act (Cap 243), the Rent Restriction Act (Cap296), the Kenya Airports Authority Act (Cap 395), the Traffic Act (Cap 403), the Investment Promotion Act (Cap 485B), the Labour Institutions Act of 2007, the National

Transport Safety Authority Act, Refugee Act No. 13 of 2006, the National Intelligence Service Act No. 28 of 2012, the Prevention of Terrorism Act No. 30 of 2012, the Kenya Citizenship and Immigration Act (Cap 172), the National Police Service Act (Cap 84) and the Civil Aviation Act No. 21 of 2013.

31. CORD was also aggrieved with the manner in which the Bill was tabled before the National Assembly for the third reading. Mr. Nyenze averred that the Supplementary Order Paper tabled on the 18th December, 2014 to present the Bill for the third reading was unprocedurally before the House as the Order Paper was distributed when the House had already sat contrary to Standing Order No. 38(2) that required that the Supplementary Order Paper be made available to the Members of the National Assembly at least one hour before the House meets.

32. Mr. Nyenze averred further that the sittings of the National Assembly on 18th December, 2014 were special sittings convened by the Speaker of the National Assembly following a request of the Leader of the Majority in the National Assembly in accordance with Standing Order No. 29. It was his averment that this was unfair and oppressive as it limited the special sittings to one calendar day. This made it impossible for the House to ensure that there was freedom of speech and debate in the House.

33. CORD faulted the Speaker of the National Assembly for the manner in which proceedings were conducted on the 18th of December, 2014 when SLAA was passed. It argued that neither the Constitution, the Standing Orders nor the customs and traditions of Parliament were invoked for the purpose of the orderly and effective discharge of the business of the National Assembly while at the same time guaranteeing the freedom of speech and debate. Mr. Nyenze averred that during the vote on the Bill, there were strangers in the House and persons unauthorized to vote who participated in a voice vote contrary to Article 122(1) and (2) of the Constitution. He further deposed that there was chaos and bedlam in the Chamber and the debate was not conducted in accordance with the Rules of Debate contained in the Standing Orders.

34. CORD also questioned the constitutionality of SLAA on the basis that being a Bill that involved counties, it was not enacted in accordance with constitutional provisions on such

legislation. Mr. Nyenze contended that the Speaker of the National Assembly did not abide by the mandatory provisions of Article 110(3) (4) and (5) of the Constitution and did not involve the Speaker of the Senate in resolving the question whether the Security Laws (Amendment) Bill was a Bill concerning counties. CORD contended that the Bill should have been discussed in Parliament, implying both the National Assembly and Senate, but that it was only debated in the National Assembly on 18th December, 2014. It was its case therefore that the Act was invalid.

35. CORD set out in the affidavit of Mr. Nyenze the provisions of SLAA which it deemed to be in violation of or inconsistent with the Constitution, and for the above reasons, it asked the court to allow its petition and grant the following prayers:

> ***A) A DECLARATION THAT the Security Laws (Amendment) Bill 2014 in its entirety was not procedurally debated and passed by the National Assembly in accordance with the Constitution of Kenya, is unconstitutional and is therefore a nullity.***
>
> ***B) A DECLARATION THAT the presidential assent to the Security Laws (Amendment) Bill 2014 was unconstitutional and improper, the National Assembly having failed to comply with Article 110(3) and(4) of the Constitution of Kenya and is therefore invalid and therefore null and void.***
>
> ***C) A DECLARATION THAT the Security Laws (Amendment) Bill 2014 was unconstitutional, illegal as the National Assembly failed to comply with mandatory provisions of Articles 10(2)(a) and 118 [sic] the Constitution of Kenya that call for public participation and is therefore invalid, null and void.***
>
> ***D) A DECLARATION THAT the limitations contained in the Security Laws (Amendment) Act are not justified in an open democratic society based on human dignity, equality and freedom, have no rational connection with the objective and extent of the limitation, are unconstitutional, illegal and a nullity.***
>
> ***E) A DECLARATION THAT the provisions of the Security Laws (Amendment) Act are inconsistent with the Constitution of Kenya and therefore null and void to the extent of the inconsistency and that the provisions of the following specific Acts listed below are inconsistent with and in breach or violation of the Constitution and therefore unconstitutional, illegal and null and void:***
>
> ***i) Sections 4,5,12,16,25,26,29,34,48,56,58 and 64 and 86 of the Security Law (Amendment) Act 2014***
>
> ***ii) Sections 8, 9 of the Public Order Act***
>
> ***iii) Section 66A (1) and (2) of the Penal Code***

iv)Section 42A and 344(a) of the Criminal Procedure Code
v)Section 18A of the Registration of Persons Act
vi)Section 20A and 59(A) of the Evidence Act
vii) Section 2 and 4 of the Firearms Act
viii) Section 16A of the Refugees Act
ix) Section 12, 42 and 58 of the National Intelligence [sic] Act
x) Section 30 and 30F (1) and (2) of the Prevention of Terrorism Act.

KNCHR's case

36. The case for KNCHR was set out in its petition dated 23rd December 2014, the affidavit sworn in support by Ms. Kagwiria Mbogori, the Chairperson of the Commission, on the same day and supplementary affidavits sworn by Ms. Jedidah Wakonyo Waruhiu, a Commissioner with KNCHR on 28th December, 2014 and 26th January, 2015. It also filed submissions which were highlighted by its Counsel, Mr. Victor Kamau and Mr. Kiprono.

37. Like CORD, KNCHR was aggrieved by the manner in which SLAA was published, considered and passed by the National Assembly, and subsequently assented to by the President. Ms. Mbogori averred that in her view, the integrity of the entire process leading to the passing of the legislation was wanting and the final product completely lacking any legitimacy and legality whatsoever. She deponed that the National Assembly did not facilitate any meaningful and effective engagement of the public with SLAA, as the Bill was only made available on 9th December, 2014 through the parliamentary website which was not easily accessible. She also averred that on 10th December, 2014, a public notice in the newspapers was issued for public participation to take place on the 10th, 11th and 15th days of December, 2014. That on 11th December, 2014 KNCHR urgently organized a press conference highlighting that the proposed Security Laws (Amendment) Bill changes sought to introduce to the law were not minor as indicated in the Bill's Memorandum of objects.

38. KNCHR averred further that on 12th December, 2014, which was a public holiday, it published in the local dailies, jointly with 9 other organisations, a summary of the key constitutional concerns including the public participation process, right to privacy, access to justice and freedom of assembly and information, among others. Ms. Mbogori further averred that on 15th December, 2014, KNCHR also submitted a joint memorandum to the

Parliamentary committee on Administration and National Security which focused on 38 clauses.

39. KNCHR further made specific averments with regard to provisions of SLAA. Ms. Mbogori averred with regard to the rights of refugees that as at 30th November 2014 the refugee population in Kenya stood at 583,278. It was contended that it would therefore be difficult to implement Section 48 of SLAA, which capped the number of refugees in Kenya at 150,000, without breaching international human rights law and refugee law and specifically the principle of *non-refoulement*. According to KNCHR, setting a ceiling on refugee numbers has never been applied in the African region and would constitute a bad practice in the handling of refugees and would not reflect an open and democratic Republic as contemplated in the Constitution.

40. KNCHR further impugned SLAA on the manner in which it was enacted. It was its contention that the National Assembly passed the Bill in a process fraught with chaos and dishonourable conduct that did not inspire public confidence in the legislative process and personal dignity among the members of the National Assembly, all in violation of Articles 2 and 28 of the Constitution. It termed the process leading to the enactment of SLAA nothing less than a farce to which the people of Kenya were not party to.

41. It was KNCHR's case that the crisis of insecurity afflicting Kenya is not due to a dearth of relevant laws to combat insecurity. Ms. Waruhiu averred that the insecurity is due to a lack of effective implementation of the law by the relevant security actors and agencies, mostly due to other factors including endemic corruption prevalent within the security agencies.

42. KNCHR argued that having conducted extensive research on various aspects of insecurity in the country and also participated in Committees set up by the government, key among them the Ransley Taskforce on Police Reforms and Police Reforms Implementation Committee, it argued that it believes that the newly enacted security laws would not in themselves lead to security and personal safety in the country. This is due to the lack of adequate equipping and tooling of the security agents, corruption and poor implementation of existing legislation. For KNCHR, any excessive and extra-legal security measures always inevitably lead to serious human rights violations mostly by security enforcement officers. It was its case that SLAA is unconstitutional and that the amendments made to the various pieces of legislation directly negate certain provisions within the Bill of Rights.

43. It therefore prayed that the court grants the following prayers:

> ***a) A declaration that this petition is brought in the public interest.***
>
> ***b) A conservatory order suspending the operation of the security laws (Amendment) Act 2014 in its entirety pending the hearing and determination of this petition.***
>
> ***c) A declaration that the processes through which the Security Laws (Amendment) Act was passed is in violation of the Constitution, in that:***
>
> ***1. It failed to meet the Constitutional requirements of public participation.***
>
> ***2. The Senate did not participate in its passage as required by the constitution.***
>
> ***3. The proceedings of the National Assembly on 18th December 2014 were conducted in a manner that violated Articles 10,73 and 94 of the Constitution***
>
> ***The effect of all the above actions is to render the said law illegal and null and void ab initio. [sic]***
>
> ***d) A declaration that the Security Laws (Amendment) Act 2014 is void because it denies, violates, infringes, and threatens fundamental freedoms in the Bill of Rights and is not justified under Article 24 of the Constitution.***
>
> ***e) A declaration that the security laws (Amendment) Act 2014 is inconsistent with the Constitution of Kenya and void.***
>
> ***f) Any other relief and or further [sic] that this Honourable Court may deem fit and just to grant in the circumstances.***

The 3rd petitioner's case

44. The case of the 3rd petitioner, Samuel Njuguna Ng'ang'a, is contained in his petition and the affidavit in support sworn on 19th January 2015. He also filed submissions dated 25th January 2015.

45. The 3rd petitioner argued that the provisions of SLAA have unreasonably and arbitrarily limited the right to fair trial, judicial independence and production of electronic evidence in Court.

46. It was his case that under Article 50 of the Constitution, the right to fair trial is an entire process that begins from the arrest of the accused person to conviction. Consequently, Article 49 of the Constitution is crucial in determining the right to fair trial. It was his case further that the right to fair trial is non-derogable under Article 25 of the Constitution. He relied for this proposition on the cases of **Githunguri vs Republic (1986) KLR 1, Thomas Gilbert Cholmondeley vs Republic(2008)eKLR** and the Supreme Court of India's case of **Kalyani Baskar vs Mrs M.S Sampoornam, Crim. Appeal No 1293 of 2006.**

47. The 3rd Petitioner also challenged the constitutionality of Section 20 of SLAA which provided that in a case where an accused person was released on bail, such orders would be stayed once the DPP indicated an intention to appeal against the order granting bail. The 3rdpetitioner argued that this provision violates the principle of judicial independence and limits the right to fair trial as it limits the right of an accused person to obtain bail on favourable terms because the hands of a magistrate are tied. It was his case that such a law is unlawful as it takes away the judicial arbitration powers and discretion of judicial officers. He relied on the Ugandan case of **Susan Kigula vs Attorney General of Uganda, Constitutional Appeal No. 03 of 2006** in which it was held that no law should tie the hands of judicial officers in making their decisions.

48. As regards electronic evidence and production of evidence, the 3rd petitioner claimed that it is unfair to an accused person to be supplied with the evidence just before the hearing in contravention of the provisions of Article 50 of the Constitution. It was also his case that the provision of Section 31 of SLAA that allows copies of evidence to be produced as compared to originals would allow tampering of evidence. He urged the court to grant the prayers sought in the petition, to wit:

    a. ***This petition be certified urgent and be fixed for hearing on 28th, 29th and 30th January 2015.***

    b. ***A declaration that the right to a fair trial is non-derogable and it cannot be limited, varied, abridged or in any other way interfered with in form or in substance as enacted by the Security Laws Amendment Act No 19 of 2014 without a referendum.***

    c. ***A declaration that section 16 and section 19 of the Security Laws Amendment Act No 19 of 2014 are inconsistent with the Constitution and they are therefore unconstitutional null and void.***

d. A declaration that the Amendments to the Evidence Act as enacted by the Security Laws Amendment Act No 19 of 2014 are unconstitutional.

e. A declaration that section 16 of the Security Laws Amendment Act is null and void to the extent that the prosecution can vary an order of a magistrate granting bail to an accused person, for interfering with the independence of the judiciary.

f. Costs of this petition be award [sic] to the petitioner

g. Any other or further relief as this honourable court may deem fit and just to grant".

The case for the interested parties in support of the petition

49. As indicated above, seven interested parties were allowed to participate in the proceedings. Of these, four, Kituo, Katiba, RCK and Article 19 supported the petition and filed affidavits and /or submissions. We set out hereunder their respective cases.

Kituo's case

50. Kituo, did not file any pleadings, but its Learned Counsel, Dr.Khaminwa, made oral submissions on its behalf. While agreeing with the petitioners that SLAA was unconstitutional, he submitted that it is not for this Court to go through each of the impugned sections of SLAA to determine which one was constitutional or not, as to do so would be to engage in a legislative process.

51. He also agreed with the petitioners that there was no public participation in the passage of SLAA, and that it is therefore inconsistent with the Constitution. It was his submission that a reflection on the history of Kenya was important in determining the petition as the values in the Constitution are important in the context of the new era.

52. Dr.Khaminwa submitted with regard to Article 24 of the Constitution, which provides for the circumstances in which limitation of rights can be permitted, that it was couched in very strict language. It was also his submission that for it to be invoked, the onus of proof lay on the State to show that there was compelling reasons to warrant the limitation, which was not the case in the instant petition.

53. On the issue of reducing the refugees in Kenya to 150,000, he stated that it would amount to expelling many refugees in total breach of the principle of legitimate expectation and international covenants on the rights of refugees to which Kenya is a party. He urged the court to find and declare the entire SLAA, unconstitutional.

Katiba's case

54. Katiba impugned both the process and content of SLAA. With the leave of the Court, Katiba presented in evidence a ten-minute video clip of the proceedings in the National Assembly on the 18th December 2014 to demonstrate the chaos that accompanied the debate on SLAA. Mr.Lempaa who, with Mr.Waikwa Wanyoike, presented the case for Katiba, submitted that the video evidence demonstrated the chaotic nature of the passage of SLAA, and that it revealed the conduct and misconduct of members of the National Assembly who are State Officers.

55. It was also Katiba's case that public participation was one of the national values in the Constitution, but that in the instant case there was no sufficient time to engage the public.

56. Katiba also contended that Standing Orders No. 71, 83, 104, 108 and 114 were not adhered to in enacting the statute. It relied on the decision in **Oloka-Onyango vs Attorney General Petition No 8 of 2014 [2014] UGCC 14** to submit that where the standing orders of Parliament are not adhered to, the Court has jurisdiction to find the legislation enacted unconstitutional.

57. Learned Counsel, Mr.Waikwa Wanyoike, submitted that SLAA has many limitations on fundamental rights and freedoms. He urged the Court to examine all the limitations and to determine whether each was reasonable, justifiable and possible in a democratic society.

58. Counsel also faulted the provisions of SLAA with regard to the appointment of the Inspector General of Police. He submitted that Section 86 of SLAA, which provided for appointment of the Inspector General of Police directly by the President, is wrong and unconstitutional.

RCK's case

59. RCK, through its Learned Counsel, Mr.Chigiti, confined its submissions to the provisions of Section 48 of SLAA which limits the number of refugees acceptable in Kenya to

150,000. RCK contended that the provision offends the principle of *non-refoulment* which prohibits the return or expulsion of refugees and asylum seekers. It was also its case that Section 48 is discriminatory since it does not state what criteria will be adopted in selecting and identifying the 150,000 refugees. Further, it was RCK's case that Section 48 of SLAA is "irregular and illegal" as it introduces another ground for cessation of refugee status not provided for by the Refugees Act, 2006. To achieve the 150,000 limit, refugees would have to be repatriated and blanket repatriation is unlawful.

60. Mr.Chigiti submitted that exceptions to the principle of *non-refoulment* must be interpreted restrictively and with full respect for the principle of proportionality. That the danger posed by a particular refugee to the country of refuge should be very serious and the finding of seriousness must be based on an individual assessment and reasonable grounds as supported by credible evidence. Further, that the expulsion of a refugee must be a decision reached in accordance with the due process of law. Section 48 of SLAA was therefore not in conformity with the Constitution, international, regional and domestic refugee and human rights law particularly the 1951 Convention Relating to the Status of Refugees, its 1967 Protocol, the 1969 OAU Convention on Refugees and the Refugees Act, 2006. RCK therefore urged the Court to grant the prayers sought in the petition.

Article 19's case

61. Article 19, is a human rights non-governmental organization. It described its mandate as being the implementation, promotion and protection of the fundamental right of freedom of expression, opinion and access to information contained in the corresponding Articles 19 of the Universal Declaration of Human Rights **(UDHR)** and the International Covenant on Civil and Political Rights (**ICCPR**), as well as Articles 33 and 35 of the Constitution of Kenya.

62. Its case was limited to the provisions of Sections 12, 64 and 69 of SLAA which it contended impacts negatively on the freedom of expression and privacy as provided for under Articles 31, 33 and 35 of the Constitution. It filed an affidavit sworn by its Executive Director, Mr. Henry Omusundi Maina, and written submissions which were presented before us by its Counsel, Mr.Mbugua Mureithi.

63. Article 19 alleged that Section 12 of SLAA, which adds a new Section 66A to the Penal Code criminalizing publication of certain information, is void on the principle of legality and also for vagueness. It contended that the section offends the principle of legality as it does not peg the commission of the offence on intention (*mens rea*) on the part of the publisher of the material allegedly causing harm. It was also its case that the provision is void for vagueness as the section deploys broad and imprecise terminologies without defining the target and the conduct sought to be prohibited. Article 19 therefore argued that the offence as defined by the section fails the test of 'prescribed by law'. It relied on various decisions to support its contentions which we shall revert to later in this judgment.

64. Article 19 was also aggrieved by the provisions of Section 64 of SLAA, which it also termed as vague and overly broad. It argued that the section, which introduces Sections 30A and 30F to the Prevention of Terrorism Act, uses broad terminologies which are incapable of precise or objective legal definition and understanding. It was its case that freedom of expression protects not only views that are favourably received but those that are controversial, shocking, offensive or dissident. It argued that the section, which prohibit publication of information or photographs related to terrorism acts without authority from the National Police Service, also fails on the principle of legality as it places prior restraint on media freedom and hoists the National Police Service to the position of a regulator and withholder of information. It was also its case that the section violates the fundamental right of citizens to access information held by the State as guaranteed under Article 35 of the Constitution and the obligation to publish important information regarding the nation. It was its case, further that Section 30(F) (1) does not meet the internationally accepted standards on prior censorship of freedom of information on account of national security as contained in Principles 3 and 23 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, U.N Doc. E/CN.4/1996/39.

65. Article 19 further impugned Section 69 of SLAA which amends the Prevention of Terrorism Act by introducing a new Section 36A which permits national security organs to intercept communication for the purpose of detecting, deterring and disrupting terrorism. It contended that the section is an introduction of arbitrary mass surveillance on all and sundry without the necessity for reasonable suspicion or judicial oversight; that the right to privacy was now at the discretion of the national security organs thus violating Article 31 of the Constitution. Further, the section does not satisfy any of the limitation criteria

contained in Article 24 of the Constitution; and that it violates Article 239 of the Constitution since powers to intercept communication has been given to all national security organs. Article 19 urged the Court to declare Sections 12, 64 and 69 of SLAA unconstitutional.

The Attorney General's case

66. The case for the Attorney General (AG) is set out in several affidavits filed in reply and opposition to the petition, and written submissions. The first affidavit is sworn by Mr. Asman Kamama and filed in court on 27th December, 2014. Mr. Justin Bundi, the Clerk to the National Assembly, also swore an affidavit in reply, as did Dr. Monica Juma, the Principal Secretary, Ministry of Interior and Co-ordination of National Government, and Mr.Haron Komen, the Commissioner for Refugee Affairs. The AG's case was argued before us by the Solicitor General Mr.Njee Muturi assisted by Mr.Njoroge Mwangi. The AG maintained that SLAA was procedurally enacted, and does not in any way limit fundamental rights or violate the Constitution. The AG's case can be summarized as follows:

67. Following an attack on Kenyan soil by suspected Al Shabaab terrorists in November and December 2014, the President of the Republic of Kenya constituted a team consisting of members of both the executive and legislative arms of Government to look into the issue of insecurity. The attacks, both of which took place in Mandera, had occurred within days of each other on 22nd November and 2nd December, 2014. The President received the report from the security team on 4th December, 2014. One of the recommendations in the report was that various security laws be amended, and as a result, on 8th December, 2014, the Security Laws (Amendment) Bill, 2014 was published.

68. The Bill's publication period was shortened by the National Assembly pursuant to Standing Order No. 120. After its first reading, the Bill was committed to a Committee with directions by the Speaker that other committees of the National Assembly do look at the Bill if it touched on their mandate, and offer amendments, if any. Members of the public were also invited through an advertisement in the local press to submit their views with respect to the Bill. Debate on the Bill by the committees was concluded on 11th December, 2014 but presentation of the Bill before the committee of the whole House was deferred to 18th December, 2014.

69. The AG stated that such deferral was necessitated by the need for greater public participation; that no less than forty six (46) individuals and legal entities participated and their views received. Various departmental committees of the National Assembly also held joint meetings and amendments were suggested. According to the AG, after consultations, deliberations and considerations of the views and proposed amendments, various clauses were either deleted from the Bill or redrafted to incorporate the views contained in the memoranda by the public. It was the AG's case that no less than twenty seven clauses of the original Bill were either deleted entirely or amended to incorporate the views contained in the memoranda; and the amended Bill was thereafter tabled in the National Assembly. The AG argued that all the procedures prescribed for the enactment of public Bills under Chapter 8, Part 4 of the Constitution, including the participation in the legislative process by the people of the Republic of Kenya pursuant to Article 118 of the Constitution, were followed. The President assented to the Bill on 19th December 2014 and on 22nd December 2014, the Bill was published in the Kenya Gazette as SLAA, 2014

70. The AG asserted that the petition by CORD is incompetent and misconceived as the process of enacting SLAA, including the shortening of the legislative period, was constitutional and that the impugned statute, like the Bill which was published on 9th December, 2014, sought not to extensively amend any particular statute but simply to effect minor amendments to several statutes.

71. It was also the AG's case that CORD's members authored the misconduct witnessed in the National Assembly on the 18th day of December, 2014; that CORD should thus not be heard to complain that such misconduct compromised the process of legislating SLAA and neither should CORD benefit from such illegal acts. It was the AG's position that the process was never compromised and indeed members of the National Assembly not only debated the proposed amendments but also voted for or against the same. He denied that any strangers participated in the process leading to the enactment of the statute.

72. The AG further contended that at all material times the Speaker was in charge of the proceedings and never gave up the legislative authority or independence of the National Assembly to any person.

73. He argued, further, that the Bill did not concern Counties, a matter on which the Speakers of the two Houses of Parliament had discussed and agreed upon.

74. The AG maintained that all the provisions of SLAA are constitutional and the amendments were prompted by the actual yet disheartening reality concerning homeland security.

75. Finally, the AG asserted that the petition are unnecessarily, pre-emptive and are pegged on conjecture, apprehension or misapprehension as no factual matters have been pleaded. He asked the court to dismiss the petition.

The case for the interested parties which oppose the Petition

76. Three of the interested parties opposed the petition. They are; the DPP, the Jubilee and Terror Victims.

The DPP's case

77. The DPP's case is contained in the replying affidavit sworn by The Senior Assistant Director of Public Prosecution, Mr. Edwin Okello, on 22nd January, 2015, Grounds of Opposition dated 22nd January 2015, and its written submissions. The DPP, Mr.Keriako Tobiko presented his case with the assistance of Dr.Maingi and Mr. Okello.

78. The DPP stated that the petition does not satisfy the requirements of Article 22(1) of the Constitution. It was his case that the petitioners' claims are not justiciable and that the Court has no jurisdiction to entertain the petition.

79. The DPP further stated that the mere possibility of abuse is not ground to declare legislation unconstitutional and further that the "purpose and effect" of SLAA do not infringe any fundamental rights. It was his contention that the maligned sections of SLAA are reasonable and justifiable and do not limit any of the fundamental rights and freedoms. In his view, the circumstances of this case dictate that the orders sought by the petitioners be denied and that the various provisions of SLAA be subjected to statutory interpretation by individual courts in future.

Jubilee's case

80. Jubilee's opposition to the petition, in particular to CORD's Petition, was that CORD was simply dragging a lost political battle to court. Its Learned Counsel, Mr. James Singh, submitted that the burden is on the petitioners to prove the unconstitutionality of SLAA. Jubilee asserted that all the petitions are an affront to the doctrine of separation of powers

as SLAA was enacted pursuant to the due process of legislation as enshrined in the Constitution and Parliamentary Standing Orders; that none of the amendments effected were unconstitutional; and that the current state of insecurity in the country dictates that SLAA is not put on ice.

81. Besides, there is on record an affidavit sworn on 29th December 2014 by Mr. Johnson Sakaja, the National Chairman of The National Alliance Party, a member of the Jubilee Coalition. According to Mr. Sakaja, the Bill went through the required process including the consultation between the two Speakers of Parliament where the leader of Minority in the Senate also got involved in the correspondence.

Terror Victim's case

82. Through their Learned Counsel, Mr. Tom Macharia, Terror Victims also opposed the petition. They submitted that SLAA was the perfect direction to take in combating terrorism. They contended that the Constitution itself, under Article 24(1), permits the limitations of fundamental rights save for the rights stipulated under Article 25 thereof. They gave a graphic description of what will happen if the various challenges to SLAA are allowed to stand, and submitted that there were many countries throughout the world which had anti-terrorism statutes. It was their contention that countries with anti-terrorism legislation which limit fundamental freedoms have succeeded in combating terrorism. In their view, SLAA is bound to combat terrorism. They cited in support the case of **Kennedy vs UK (ECHR Application No. 26839 of 2005)**, to submit that the general trend is to place restrictions on fundamental rights where it is strictly necessary in the interest of countervailing public interests such as national security, the need to keep secret certain police methods of investigations or the protection of the fundamental rights of another person. They implored the court to consider public interest and limit other rights for security reasons.

The *Amici Curiae* Briefs

LSK's brief

83. Through Mr.Nzamba Kitonga, SC, LSK filed and presented its brief on 28th January, 2015 in which it made three main points for consideration by the court. .

84. LSK submitted firstly, that questions should be asked of the chaotic parliamentary proceedings which characterized the process of enactment of the impugned Statute. It urged that a scrutiny be undertaken of what transpired on the 18th day of December, 2014 inside the august House before asking whether criminal offences were committed in the process, or whether it was a case of the minority forcing their will through orchestrated chaos. The Court should also avoid being used as the forum for a losing side to gain the upper hand by challenging parliamentary vote in Court.

85. LSK urged the Court to, secondly, consider in detail the concept of public participation in the legislative process. Citing the cases of **Robert Gakuru & 5 Others vs Governor of Kiambu [2014] eKLR a**nd ***I*POA vs Attorney General & Others [2014] eKLR,** LSK urged the court to determine whether the three days set aside for public participation were sufficient in the circumstances of the impugned legislation.

86. Finally, the LSK submitted that certain provisions of the impugned statute required closer assessment and examination to establish whether they conflict with or contradict the Constitution. It drew attention in particular to the amendments to the Criminal Procedure Code, the Registration of Persons Act, the Evidence Act, the Refugee Act, the National Intelligence Service Act and the Prevention of Terrorism Act.

CIC's Brief

87. CIC urged the Court to give an unbroken, generous and purposive interpretation to the Constitution whilst construing the Bill of rights and any limitations. It laid out the test applicable in cases where it is alleged that fundamental rights have been limited, infringed or threatened. It referred the Court to decisions from various jurisdictions for the proposition that the burden is on the State to justify to the Court why the proposed limitations are necessary. We shall refer to these authorities and the tests emerging therefrom later in this judgment.

88. On public participation, CIC submitted that the principle is not merely part of the legislative process but is one of the national values and principles provided for under Article 10(2) (a) of the Constitution. In CIC's view, Parliament ought to satisfy the Court on the adequacy of the level of facilitation of public participation and involvement in the process leading to enactment of the impugned SLAA.

Issues for Determination

89. We have considered the respective pleadings and submissions of the parties and isolated the following as the issues falling for determination in this matter:

    i. Whether the Court has jurisdiction to determine the present petition. In this regard, the Court will be required to consider:
        a. Whether the issues in dispute are ripe for determination;
        b. Whether the Court should be guided by the doctrine of avoidance;
        c. Whether determination of the issues raised in this matter is a violation of the doctrine of separation of powers.
        d. Whether the KNCHR as a constitutional commission can lodge a claim against the State.

    ii. Whether the process of enactment of SLAA was in violation of the Constitution. Under this issue, the Court will be called to determine whether:
        a. The enactment was unconstitutional for failure to involve the Senate in legislation that involved Counties;
        b. The process was unconstitutional in light of the chaotic manner of enactment of SLAA that was in breach of Parliamentary Standing Orders with regard to Parliamentary debate and voting;
        c. The process was flawed and unconstitutional for lack of public participation;
        d. In light of the shortcomings above, the presidential assent to the Bill was unconstitutional.

    iii. Should the answers to the 1st and 2nd issues above be in the affirmative, then the court will proceed to consider the constitutionality of the provisions of SLAA vis -a -vis the Bill of Rights. In that regard, the Court shall consider the question whether SLAA is unconstitutional for violation of:

a. The right to freedom of expression and the right to freedom of the media guaranteed under Articles 33 and 34;
b. The right to privacy under Article 31;
c. The rights of an arrested person under Article 49 and the right to fair trial under Article 50;
d. Entitlement to citizenship and registration of persons under Article 12;
e. The right to freedom of movement under Article 39 and the rights of refugees under Articles 2(5) and 2(6) of the Constitution and International Conventions.

iv. Whether the provisions of the Act are unconstitutional for violating the provisions of Articles 238, 242 and 245 of the Constitution with regard to national security, appointment and tenure of office of the Inspector General of Police, creation of National Police Service Board and the appointment and tenure of National Intelligence Service Director General and the Deputy Inspector General of Police.

v. Finally, the court shall consider the reliefs (if any) to grant.

Analysis and Determination

Applicable Constitutional Principles

90. In addressing the issues set out above, it is important to bear in mind the principles applicable to a matter such as is currently before us, which calls for an interpretation of various provisions of the Constitution and determination of the question whether there has been compliance or violation of the said constitutional provisions.

91. The Constitution has given guidance on how it is to be interpreted. Article 259 thereof requires that the Court, in considering the constitutionality of any issue before it, interprets the Constitution in a manner that promotes its purposes, values and principles,

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

92. We are also guided by the provisions of Article 159(2) (e) of the Constitution which require the Court, in exercising judicial authority, to do so in a manner that protects and promotes the purpose and principles of the Constitution.

93. Thirdly, in interpreting the Constitution, we are enjoined to give it a liberal purposive interpretation. At paragraph 51 of its decision in **Re The Matter of the Interim Independent Electoral Commission Constitutional Application No 2 of 2011**, the Supreme Court of Kenya adopted the words of Mohamed A J in the Namibian case of **S. vs Acheson, 1991 (2) S.A. 805** (at p.813) where he stated 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."***

94. Further, the court is required, in interpreting the Constitution, to be guided by the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other- see **Tinyefuza vs Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3)**.

95. 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.

96. However, we bear in mind that 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 which we shall analyse in detail later in this judgment, 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.

97. The court is also required, in determining whether an Act of Parliament is unconstitutional, to also consider the objects and purpose of the legislation: see **Murang'a Bar Operators and Another vs Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011] eKLR** and **Samuel G. Momanyi vs Attorney General and Another High Court Petition No. 341 of 2011.**

98. In addition, in determining whether a statute meets constitutional muster, the court must have regard not only to its purpose but also its effect. In the case of **R vs Big M Drug Mart Ltd., [1985] 1 S.C.R. 295**, cited by CIC, the Canadian Supreme Court enunciated this principle as follows;

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

99. The case of **Re Kadhis' Court: The Very Right Rev Dr. Jesse Kamau & Others vs The Hon. Attorney General & Another Nairobi HCMCA No. 890 of 2004** also offers some guidance with regard to constitutional interpretation, particularly in so far as the provisions of the Bill of Rights are concerned. In that case, the court expressed itself as follows:

> ***"The general provisions governing constitutional interpretation are that in interpreting the Constitution, the***

Court would be guided by the general principles that; (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed."

100. Finally, it is worth bearing in mind the words of the US Supreme Court in **U.S vs Butler, 297 U.S. 1[1936]** in which the Court expressed itself as follows:

"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. <u>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.</u> 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."

101. These are the principles that we shall bear in mind in determining the challenges to SLAA and its provisions which are alleged to have been enacted in contravention of the Constitution or whose provisions are said to be unconstitutional for violating the Bill of Rights or other provisions of the Constitution.

Whether the Court has jurisdiction to determine the petition

102. Before entering into an analysis of the substantive issues raised in the consolidated petition, it is imperative that we dispose of the question of jurisdiction which has been raised by the AG as well as the DPP and Jubilee.

103. The question of jurisdiction is said to arise in three respects. First, it has been argued that the issues in dispute are not ripe for determination; secondly, that the court should be guided by the doctrine of avoidance and should not deal with issues for which there is a different forum; and thirdly, that determining the issues would interfere with the doctrine of separation of powers as it would be akin to the Court entering a territory reserved by the Constitution for the Legislature. We shall consider each of these three arguments and the submissions made thereon by the parties in turn.

Ripeness

104. The AG and the DPP have argued that the issues before the Court are not yet ripe for determination; and that no person has come before the court to allege that his or her rights have been violated as a result of the application of the impugned provisions of SLAA. They argue further, that in order for any perceived grievance by the petitioners in both petitions to be deemed by this Honourable Court to be justiciable, there has to be a factual matrix, a real life set of experiences to be measured against the law as made by Parliament in order to enable the Court determine an issue. The argument then is made that the challenge raised against the laws even before proof of any actual negative effects of its application can be said to have occurred remains merely an academic argument to take up much needed judicial time.

105. It was the AG's submission in that regard that as there are no factual matters pleaded in these petitions, which are overloaded with unwarranted apprehension, speculation, suspicion and unfounded mistrust which have no basis in law, the petition should be struck out summarily. The AG relied on the decisions in **Center For Rights Education and Awareness and Others vs John Harun Mwau and Others Civil Appeal No. 74 & 82 of 2012** and **Mumo Matemo vs Trusted Society of Human Rights Alliance & 2 Others (2013) eKLR Civil Appeal No 290 of 2012**. The

respondent further cited the case of **The Owners Of Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd [1989] KLR 1** where the court stated that:

> ***"Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."***

106. In response, the petitioners drew attention to the provisions of Article 22 of the Constitution which provides that a party may petition the court alleging that ***"a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."*** They also cited Article 258, which allows a party to approach the court claiming "***that this Constitution has been contravened, or is threatened with contravention***."

107. The jurisdiction of this court stems from Article 165 (3) of the Constitution, which provides that:

> ***(3) Subject to clause (5), the High Court shall have-***
> ***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***
> ***(c) …***
> ***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-***
>
> ***(i) the question whether any law is inconsistent with or in contravention of this constitution.*** (Emphasis added)

108. Article 22 (1) of the Constitution grants every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, while Article 258 of the Constitution provides that:

> ***Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.***

109. We agree with the AG and the DPP that the Court should not engage in an academic or hypothetical exercise. As the High Court stated in **John Harun Mwau & 3 Others v Attorney General and 2 Others, Petition No. 65 of 2011**:

> ***"We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy."***

110. In similar vein, in the case of **Samuel Muigai Ng'ang'a vs The Minister for Justice, National Cohesion and Constitutional Affairs and Another, Petition No 354 of 2012,** Lenaola J expressed himself on the issue of justiciability as follows:

> ***"The Petitioner has crafted questions to which he seeks an answer but where is the dispute that I am supposed to resolve? Elsewhere above, I have merely set out the Law as applicable to the issues raised but what is justiciable about those issues?***
>
> ***Black's Law Dictionary defines 'justiciable' as "proper to be examined in courts of justice". It further goes on to define a 'justiciable controversy' as "a controversy in which a claim or right is asserted against one who has an interest in contesting it." The other definition given of a justiciable controversy is "a question as may properly come before a tribunal for decision."***

111. The Court proceeded to cite the decision in **Patrick Ouma Onyango & 12 Others v The Attorney General & 2 Others, Misc Appl No. 677 of 2005** in which the court endorsed the doctrine of justiciability, as stated by Lawrence H. Tribe in his treatise **American Constitutional Law, 2nd Edition**, p. 92 that;

> ***'In order for a claim to be justiciable as an article III matter, it must "present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted." In part, the extent to which there is a 'real and substantial controversy is determined under the doctrine of standing' by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The***

substantiality of the controversy is also in part a feature of the controversy itself-an aspect of 'the appropriateness of the issues for judicial decision...and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of 'ripeness' which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contigencies and of 'mootness' which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is the 'political question' doctrine, barring decision of certain disputes best suited to resolution by other governmental actors'.

112. However, we are satisfied, after due consideration of the provisions of Article 22, 165(3) (d) and 258 of the Constitution, that the words of the Constitution, taken in their ordinary meaning, are clear and render the present controversy ripe and justiciable: a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the Court. He has a right to do so if there is a threat of violation or contravention of the Constitution.

113. We take this view because it cannot have been in vain that the drafters of the Constitution added **"threat"** to a right or fundamental freedom and **"threatened ……. contravention"** as one of the conditions entitling a person to approach the High Court for relief under Article 165(3) (b) and (d) (i). A **"threat"** has been defined in **Black's Dictionary, 9th Edition** as ***"an indication of an approaching menace e.g. threat of bankruptcy; a Person or a thing that might cause harm"*** (emphasis added). The same dictionary defines "**threat"** as ***"a communicated intent to inflict harm or loss to another…"***

114. The use of the words "**indication", "approaching", "might"** and **"communicated intent**" all go to show, in the context of Articles 22, 165(3) (d) and 258,

that for relief to be granted, there must not be actual violation of either a fundamental right or of the Constitution but that indications of such violations are apparent.

115. What is the test to apply when a court is confronted with alleged threats of violations aforesaid? In our view, each case must be looked at in its unique circumstances, and a court ought to differentiate between academic, theoretical claims and paranoid fears with real threat of constitutional violations. In that regard, Lenaola J. in **Commission for the Implementation of the Constitution vs The National Assembly & 2 Others [2013] eKLR** differentiated between hypothetical issues framed for determination in that case and the power of the High Court to intervene before an Act of Parliament has actually been enacted and in circumstances such as are before us where the impugned Act has been enacted and has come into force. He stated in that regard that:

> ***"…… where the basic structure or design and architecture of our Constitution are under threat, this Court can genuinely intervene and protect the Constitution."***

116. We agree with the Learned Judge and would only add that clear and unambiguous threats such as to the design and architecture of the Constitution are what a party seeking relief must prove before the High Court can intervene.

117. Having so said and contrary to the DPP's assertion, the present petition largely rotates around the issue whether the impugned SLAA and specifically the cited sections are unconstitutional. In addition, there is also the question whether the process leading to the enactment of SLAA has met the constitutional threshold for passage of any legislation. In our collective mind, those issues do not require anything more than this Court's interpretation using the principles elsewhere set out above. The issue of threats to the enjoyment of a fundamental right need not, in the circumstances, require a real and live case for this Court to intervene.

118. In the circumstances we are satisfied that this petition raises issues that are justiciable and ripe for determination by this Court.

The Doctrine of Avoidance

119. The DPP urged the Court to apply the doctrine of avoidance and restrain itself from dealing with the present matter. He contended that the proper forum for the issues raised in this petition is a trial court which can properly deal with the alleged violations by the impugned provisions as and when they come before it. It was his submission that the Court should not enter into a dispute if there are other fora in which the issues in dispute can be resolved.

120. A similar argument was advanced by the AG, who submitted that some remedies remain in the statutory domain and not the constitutional realm, and should not be determined in a constitutional petition as is presently before the Court. The AG submitted further that where the petitioners, as in the present case, perceive that they have a grievance in respect of the statutes in question regarding the actual performance of duties by any person or body under the statutes, they may find remedy under the respective statutes. In such eventuality, the petitioners should only follow up with a constitutional petition if the application for that remedy was unsuccessful. The AG relied on the decision in **Alphonse Mwangemi Munga & 10 Others vs Africa Safari Club Nairobi Petition No. 564 of 2004 [2008] eKLR** in which the court cited the words of the Privy Council in **Harrikison vs. Attorney General Trinidad & Tobago [1980] AC 265** as follows:

> ***"…. the Constitution is the supreme law of the land but it has to be read together with other laws made by Parliament and should not be construed as to be disruptive of other laws in the administration of justice."***

121. Similarly the DPP invoked the doctrine of avoidance to argue that the challenges raised in this petition should be dealt with by the courts before which the impugned provisions are sought to be applied.

122. Mr. Mwangi K.M, Learned Counsel for the 3rd petitioner countered this argument by submitting that the doctrine of avoidance did not apply in the manner alleged by the DPP. It was his submission that if a matter was not a constitutional issue, it should not be converted into a constitutional issue but should be dealt with under the alternative process provided for it in law.

123. The doctrine of constitutional avoidance requires courts to resolve disputes on a constitutional basis only when a remedy depends on the constitution. However, in this case, the petitioners and some interested parties challenge the constitutionality of various provisions of diverse legislation which impact *inter alia* on constitutional guarantees in the Bill of Rights. The Constitution has vested this Court with the jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution. It cannot be left to the trial courts to determine whether or not the amendments to the Penal Code, for instance, or the Prevention of Terrorism Act, are constitutional for that is a mandate vested expressly in the High Court by the Constitution under Article 165 (3)(d). We are therefore satisfied that the doctrine is not applicable in the present circumstances.

Separation of Powers

124. Jubilee, has argued that interfering with the law making powers of Parliament amounts to the Court not respecting the doctrine of separation of powers; and that Parliament has the powers to make changes to the laws as provided under Chapter 8 of the Constitution, particularly Article 95 thereof.

125. We start by observing that this Court respects the principle of separation of powers that is clearly spelt out in our Constitution. It provides for the separation of powers between the three arms of government by spelling out at Article 1 the respective mandates of the Legislature, the Executive, and the Judiciary. Indeed as CORD correctly pointed out, ordinarily separation of power implies that the Legislature makes the law, the Executive implements them and the Judiciary determines whether, in light of the Constitution and the law, the conduct is lawful or unlawful: See the Malaysian case of **Lob Kooi Choon vs Government of Malaysia 1977 2MLJ 187 , [Paragraph 38]** and **Doctors for Life International vs Speaker of the National Assembly and Others (CCT 12/05) [2006] ZACC 11.** We are in agreement with the reasoning of the learned judges in the above cited authorities.

126. We must reiterate that the Constitution is the supreme law of this land. It states at Article 2 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 authorized under this Constitution.***
> ***(3)…***
> ***(4) Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.***
> ***(5) …***

127. This position has been reaffirmed over and over by our courts: See **R vs Kenya Roads Board ex Parte John Harun Mwau Petition No 65 of 2011** and **Commission for the Implementation of the Constitution v Parliament of Kenya and 5 Others, Petition No. 496 of 2013** among others. The supremacy of the Constitution has also been acknowledged by courts in other jurisdictions- See **Speaker of the National Assembly v De Lille and Another 1999 (4) SA 863 (SCA).**

128. To our mind, the doctrine of separation of powers does not stop this court from examining the acts of the Legislature or the Executive. Under Article 165(3)(d) of the Constitution, the Judiciary is charged with the mandate of interpreting the Constitution; and has the further mandate to determine the constitutionality of acts done under the authority of the Constitution as was held in **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No. 2 of 2011** in which the Supreme Court expressed itself as follows:

> ***"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 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.***

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

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

Whether the KNCHR can lodge a claim against the State

130. The final preliminary issue relates to the competence of the petition by KNCHR. The AG challenged the competence of the claim by KNCHR, which he contended is an organ of state. He submitted that the KNCHR claim leads to a conflict of interest as KNCHR, being a State organ, has no *locus standi* to bring a petition against the government. He submitted further that since KNCHR, is a state organ which, under Article 254, reports to the President and Parliament, it should not be a party but a respondent in this matter.

131. In response, KNCHR submitted through its Counsel, Mr. Victor Kamau, that it has the mandate, under Article 59, to lodge a petition where there is violation of constitutional rights and to seek appropriate relief.

132. In its decision in **Judicial Service Commission v Speaker of the National Assembly and 8 Others, Petition No 518 of 2013**, the court acknowledged the powers of Commissions and independent offices under the Constitution. It noted that:

> ***"[78] The starting point in considering this issue is, we believe, the constitutional status of the petitioner. Article 253 provides that:***
> ***"Each commission and each independent office—***
> ***(a)is a body corporate with perpetual succession and a seal; and***
> ***(b)is capable of suing and being sued in its corporate name.""***
>
> ***[83] As observed above, however, in reference to the provisions of the Mutunga Rules, a petition shall not be***

defeated by reason of the joinder or misjoinder of parties. We therefore find and hold that the JSC is the proper petitioner in this matter. In any event, even if there had been a misjoinder, which we find is not the case, the Court would not, by virtue of Rule 5(b), be precluded from dealing with the issues in dispute."

133. A cursory glance at Article 59 of the Constitution under which KNCHR is established indicates that among its objects are to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or to prejudice; to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct and to report on complaints investigated and also take remedial action. We do not believe that there is anything in the Constitution that would preclude a constitutional commission from instituting any proceedings against the government on any ground as a remedial action.

134. This, indeed, has been the practice in the last few years. Constitutional Commissions have routinely lodged questions for interpretation by the Court either against the State or against other state organs: see **National Gender and Equality Commission (NGEC) vs Independent Electoral And Boundaries Commission (IEBC), Petition No. 147 of 2013, In the Matter of the National Gender and Equality Commission, Supreme Court Reference No. 1 of 2013 and Constitutional Implementation Commission vs Attorney General Petition No 496 of 2013.**

135. In addition, Article 249 of the Constitution gives the Commission powers to secure the observance by all state organs of democratic values and principles; and the promotion of constitutionalism.

136. While it may not appear to be the ideal situation for organs of State to litigate against the State, it seems to us that considering the higher goal of securing observance of democratic values and principles, and in light of the broad formulation of Article 22 and 258 with regard to who can approach the court for protection of human rights and interpretation of the Constitution, KNCHR is entitled to lodge a petition seeking

interpretation of legislation that is deemed to violate or threaten violation of the human rights and fundamental freedoms of individuals which it is constitutionally mandated to safeguard. In light of our finding above that this court has jurisdiction to determine the petition before us, we now turn to consider the second main issue that arises.

Whether the process leading to the enactment of SLAA was in violation of the Constitution.

137. While the petition before us has impugned SLAA on many grounds, at the core of the petition is the process leading to the enactment of the legislation.

138. The petitioners have alleged that the process leading to the enactment of SLAA was totally flawed and they have asked the Court to find the Act unconstitutional on that basis. The first limb of their argument in this regard relates to alleged non-involvement of the Senate in the passage of SLAA. They hinge their argument on Article 110 (3) of the Constitution which requires the Speaker of the Senate and the Speaker of the National Assembly to jointly resolve two questions: first, whether the Bill concerns Counties and secondly, whether it is a special or ordinary bill. The second limb is based on the provisions of Article 238. They argue that if the Court were to find that Article 110 (3) did not apply and that the issues above had been jointly resolved by the Speakers, then the impugned legislation is invalid as it was not enacted in compliance with the requirements of Article 238 (2) of the Constitution. That Article requires that matters of national security shall be subject to the authority of Parliament. We shall consider each of the above arguments separately.

Whether the enactment of SLAA was unconstitutional for failure to involve the Senate

139. Article 110 (3) of the Constitution provides that:

> ***Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill.***

140. Further, Standing Order No.122 of the National Assembly Standing Orders provides that:

> ***(1) Upon publication of a Bill, and before the first reading, the Speaker shall determine whether-***
>
> ***(a) It is a Bill concerning County Governments and, if it is, whether it is a special or an ordinary Bill; or***
>
> ***(b) It is not a Bill not concerning County Governments.***
>
> **(2) *The Speaker shall communicate the determination under paragraph (1) to the Speaker of the Senate for concurrence.***

141. We have seen correspondence exchanged between the Speakers of the National Assembly and the Senate in this regard. On 15th December 2014, the Speaker of the National Assembly wrote to the Speaker of the Senate and requested for input into the Security Law Amendment Bill. The correspondence between the Speakers culminated in the letter of 18th December 2014, in which the Speaker of the Senate stated that if four contentious clauses in the Bill had been deleted, then the Bill may not concern counties and therefore the input of the Senate was not required.

142. The submissions by the AG on this issue were to the effect that there was concurrence between the two Speakers and that in any event, even if there had been none, the Bill did not affect County Governments. The petitioners on the other hand argued that the correspondence did not amount to consultation and concurrence and the Court should find and hold that Article 110(3) was not complied with and therefore the law that was subsequently passed was unconstitutional.

143. The question is whether the correspondence between the Speakers amounted to consultation as contemplated under Article 110 (3) of the Constitution and concurrence under Standing Order No 122.

Comment [A1]: JLO Wapi barua?

144. In our view, the correspondence indeed points to the fact that the Speakers of both Houses were aware of the existence and nature of the Bill. The Speaker of the Senate even went further to advise on the clauses that he deemed touched on Counties. Thereafter the said clauses were deleted and in his letter of 18th December 2014, the Speaker of the Senate expressed his view that the Bill may not touch on Counties.

145. How then are the two Speakers expected to deal with the responsibility placed upon them by Article 110(3) and Standing Order No. 122? This question has been the subject of determination by the highest court in this land. The Supreme Court in the matter of the **Speaker of the Senate & Another vs Hon. Attorney General and Others, Advisory Opinion Reference No 2 of 2013** in that regard noted as follows:

> **"[141]** ***It is quite clear, though some of the counsel appearing before us appeared to overlook this, that the business of considering and passing of any Bill is not to be embarked upon and concluded before the two Chambers, acting through their Speakers, address and find an answer for a certain particular question: What is the nature of the Bill in question? The two Speakers, in answering that question, must settle three sub-questions – before a Bill that has been published, goes through the motions of debate, passage, and final assent by the President. The sub-questions are:***
>
> ***(a) is this a Bill concerning county government? And if it is, is it a special or an ordinary Bill?***
> ***(b) is this a Bill not concerning county government?***
> ***(c) is this a money Bill?***
>
> **[142]** ***How do the two Speakers proceed, in answering those questions or sub-questions? They must consider the content of the Bill. They must reflect upon the objectives of the Bill. This, by the Constitution, is not a unilateral exercise;.***
>
> **[143]** ***Neither Speaker may, to the exclusion of the other, "determine the nature of a Bill": for that would inevitably result in usurpations of jurisdiction, to the prejudice of the constitutional principle of the harmonious interplay of State institutions."***

146. We are duly guided by the Supreme Court's rendition of the law. We would only add that the two Speakers are expected to consult and in the instant case in view of the

correspondence between them that has been placed before us we find that they did. We are also of the view that indeed there was concurrence between the Speakers and we say so, bearing in mind that in the **Supreme Court Advisory Opinion No. 2 (supra),** it was the Speaker of the Senate who had moved to Court on the basis that he had not been consulted in the passage of the legislation under consideration in that case. In the instant petition, the Speakers are not parties to the petition and based on the evidence before us, it has not been shown that the Speaker of the Senate has in any way protested that he was not consulted prior to the passage of the impugned SLAA. Neither did the Speaker of the Senate move this Court to express a genuine concern or grievance. We therefore find and hold that there was consultation and concurrence between the Speakers of the National Assembly and the Senate, and SLAA was enacted in compliance with Article 110(3) and Standing Order No. 122.

Compliance with Article 238 (2) of the Constitution

147. CORD alleged that the Constitution not only contemplates the involvement of the Senate in Bills concerning Counties based on the requirement under Article 110 (3) and supported by the **Supreme Court Advisory No 2 of 2014,** but also places a mandatory requirement that Senate be involved in all matters concerning National Security under Article 238(2)(a). Additionally, that National security is subject to the authority of the Constitution and Parliament and since Article 93 (1) of the Constitution defines Parliament to include both Houses and by dint of Article 96 (1) of the Constitution, the Senate represents the Counties and serves to protect the interests of the Counties and their Governments and so, these interests must necessarily involve issues of security.

148. Similarly, KNCHR argued that Section 58 of SLAA deletes the word, “Parliament” and substitutes it with the words, “National Assembly”, thus taking away the role of parliamentary oversight of the National Intelligence Service from the Senate and the National Assembly to exclusively, the National Assembly. In that regard it argued that the National Assembly does not have the power to change/legislate on the functions of Parliament except in accordance with the provisions of Article 256 or 257 of the Constitution.

149. In response, the AG maintained that Article 238(2) (a) of the Constitution cannot be read in isolation of Articles 95 (5) (b) and 95 (6) of the Constitution [as read with Article 259 (3) (a) – (c) and (4) (a)] which give the National Assembly oversight roles of State organs and approvals of declarations of war and extensions of States of emergency, a role which is not donated to Senate by Article 96 of the Constitution.

150. The foregoing therefore calls for a determination of the question whether matters of National Security are exclusively vested on the National Assembly or both the National Assembly and the Senate and in what circumstances.

151. In our view, a wholistic as opposed to a selective reading of the Constitution would give a clear and concise answer to the question before us. In interpreting constitutional provisions, the Court is called upon to give a broad and purposive interpretation, and in accordance with the principle enunciated in **Tinyefuza v Attorney General (supra)**, the Constitution must be read as a whole, with each provision supporting the other.

152. Article 238(2)(a) of the Constitution, which, so far as is relevant to the matter before us, provides that:

> ***(1) …….***
> ***(2) The national security of Kenya shall be promoted and guaranteed in accordance with the following principles-***
> ***(a) The national security is subject to the authority of this Constitution and Parliament;***
> ***(b) National security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms.***
> ***(c) ....***

153. Further Article 95 of the Constitution provides for the role of the National Assembly and states that:

> ***(1) The National Assembly represents the people of the constituencies and special interests in the National Assembly.***
> ***(2) The National Assembly deliberates on and resolves issues of concern to the people.***
> ***(3) The National Assembly enacts legislation in accordance with Part 4 of this Chapter.***
> ***(4) ….***
> ***(5) The National Assembly-***

(a) Reviews the conduct in office of the President, the Deputy President and other State Officers and initiates the process of removing them from office; and

(b) Exercises oversight of State organs.

(6) The National Assembly approves declarations of war and extensions of states of emergency.

154. Elsewhere above, we have determined that where a Bill touches on Counties, concurrence between the Speakers of the Senate and National Assembly would be required as a constitutional imperative. We concluded that in the present case, there was such concurrence and dismissed the Petitioners' submissions to the contrary.

155. Further, in his concurrence, contained in the letter dated 18th December 2014 addressed to the Speaker of the National Assembly, the Speaker of the Senate did not raise any issue as to the applicability of Article 238(2) (a) in the passage of SLAA. That fact notwithstanding, we are obligated to determine whether Article 238(2)(a) was indeed violated in the passage of SLAA as alleged.

156. In that regard, we have taken note of the following relevant provisions of the Constitution;

(i) Article 95(6) – the National Assembly approves declarations of war and extensions of emergency

(ii) Article 240(7) –the National Security Council reports to Parliament annually on the State of Security in Kenya.

(iii) Under Article 240(7), it also deploys national forces outside Kenya for regional, or international peace support operations (plus other support operations) and approve the deployment of foreign forces in Kenya.

157. Looking at Article 238(2) (a) again, the authority of Parliament qua Parliament in security matters is limited *inter-alia* to the matters set out above. The role of the Senate in the circumstances cannot obviously be gainsaid but the said provision must also be read with Article 95(3) of the Constitution which states that the National Assembly enacts legislation

in accordance with Part 4 of Chapter Eight of the Constitution. Part 4 aforesaid has elaborate procedures regarding the Bills and the procedure for enacting legislation. They include Bills that require the input of both Houses of Parliament e.g. a Bill concerning County Governments.

158. Conversely, Article 96 makes provision for the role of the Senate in the following terms;

> ***1. (1) The Senate represents the Counties, and serves to protect the interests of the counties and their Governments.***
>
> ***2. (2) <u>The Senate participates in the law-making function of Parliament by considering, debating and approving Bill concerning counties, as provided in Articles 109 to 113.</u>***
>
> ***3. (3) The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.***
>
> ***4. (4) The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145. (Emphasis added)***

159. We have seen no provision that obligates the National Assembly to legislate on security matters in consultation with the Senate and Article 238(2)(a) cannot be such a provision. In that context, SLAA was an omnibus Act with amendments to existing legislation previously enacted or creation of new provisions. We see no basis for the National Assembly to subject such a legislative process to the Senate whose mandate is largely a matter relating to Counties and not the enactment of every piece of conceivable legislation *per se.* Had the drafters of the Constitution intended otherwise, they would have said so expressly in Article 96.

160. In the event, we are unable to find that Article 238(2) (a) was violated by the National Assembly in the passage of SLAA.

Whether the process was unconstitutional and in breach of Parliamentary Standing Orders

161. The petitioners have further challenged the process that led to the enactment of SLAA on the basis that it was marred by breaches of the Standing Orders of the National Assembly. The AG counters that there was no breach of Standing Orders and the passage of and presidential assent to SLAA was evidence of that fact.

162. The Constitution at Article 124(1) grants Parliament the powers to make Standing Orders. It provides as follows:

> ***(1) Each House of Parliament may establish committees, and shall make Standing Orders for the orderly conduct of its proceedings, including the proceedings of its committees.***
>
> ***(2) ...***

163. The Standing Orders of the National Assembly were adopted by the National Assembly on the 9th of January, 2013 and are admitted to be rules governing debate and the conduct of business and proceedings in the National Assembly.

164. While the petitioners have called upon this court to interrogate the conduct of the National Assembly in regard to the Standing Orders of the House, the key question that arises is this; does this Court have the jurisdiction to interrogate whether the National Assembly breached its own Standing Orders?

165. Courts in various jurisdictions have had an opportunity to examine the jurisdiction of courts in questioning the conduct of business in Parliament. In answering the question posed above, we briefly review some of these decisions.

166. In the case of **Mzwinila vs The Attorney General of Botswana, Case No Misc No 128 of 2003, 2003 (1) BLR 554 (HC)** the High Court of Botswana was faced with a situation where the Speaker was alleged to have violated the Standing Orders of the Parliament of Botswana. The court first considered the facts that led to the matter before it as follows:

> **"*…… Counsel for both sides assumed the jurisdiction of the court, and, notwithstanding being invited to do so, addressed no argument on the issue of parliamentary privilege, save for a bald submission by Mrs Muchiri that the court had no power to intervene in the exercise by the Speaker of his discretion to regulate the proceedings of parliament. This latter submission, although it was not argued in sufficient depth, goes to the heart of the case for, if the court has no jurisdiction to intervene in the proceedings of parliament, or to correct its procedures, then it will be unnecessary to consider the form, content, number, and import of the applicant's 30 questions, nor to examine the parliamentary Standing Orders, nor to evaluate the Speaker's or the Clerk's exercise of their duties in terms of these.*

167. With regard to the Standing Orders, the Court observed as follows:

> ***'' The standing orders reflect the custom and usage of parliament as confirmed by resolution… But if the law does not take notice of a privilege, then it is not a privilege' and also of the cautionary words of Corbett CJ in Poovalingam v Rajbansi 1992 (1) SA 283 (A), that: 'There are clearly cases where Parliament is to be the sole judge of its affairs. Equally there are clear cases where the Courts are to have exclusive jurisdiction..... There are strong policy reasons too for preserving this privilege to the exclusion of the courts. There would be no surer way to undermine the authority and sovereignty of parliament than to permit the interruption of parliamentary proceedings by legal suits for interdicts or orders of mandamus, accompanied by the application of the sub-judice rule. If the courts were to entertain urgent or other applications by, for example, aggrieved members evicted from the House for unparliamentary behaviour, or backbenchers who felt the Speaker was hurtfully ignoring their upraised hands during debate, or members whose points of order were overruled, then the whole doctrine of the separation of powers would be compromised, and the proceedings of parliament would be disrupted."***

The Court concluded thus;

> ***"So too, the courts may not and will not intervene in the application by the Speaker and other officers of parliament of its own standing orders - in this case in the Speaker's decisions to allow or disallow parliamentary questions or to limit their numbers. In fact this case represents a good example of how parliament could be disrupted by the intervention of the courts in its internal procedures*.**"

168. A year earlier, the Zimbabwean Supreme Court, in the case of **Biti and Another vs The Minister of Justice, Legal and Parliamentary Affairs and Another (2002) AHRLR 266 (ZwSC 2002) Supreme Court Judgment No SC 10/02** had also been faced with a comparable question. It rendered itself as follows:

> **"[17.]** ***By virtue of section 57 of the Constitution, it is clear that standing orders have constitutional standing. This section provides as follows:***
>
> ***Standing Orders***
>
> ***(1) Subject to the provisions of this Constitution and any other law, Parliament may make Standing Orders with respect to - (a) the passing of Bills; (b) presiding over Parliament; (c) any matter in connection with which Standing Orders are required to be made by this Constitution; and (d) generally with respect to the regulation and orderly conduct of proceedings and business in Parliament.***
>
> ***(2) Standing Orders made in terms of subsection (1) shall provide for the appointment, membership and functions of a Committee on Standing Rules and Orders.***
>
> **[18.]** ***There is therefore merit in the submission that, having made such a law, Parliament cannot ignore that law. Parliament is bound by the law as much as any other person or institution in Zimbabwe. Because standing orders arise out of the Constitution, and because the Constitution mandates Parliament to act in accordance with Standing Orders, they cannot be regarded merely as rules of a club'. Standing orders constitute legislation which must be obeyed and followed."***

The Court went further to observe as follows:

> ***"*** **[36.]** ***In a constitutional democracy it is the courts, not Parliament, that determine the lawfulness of actions of bodies, including Parliament.***
>
> **[42.]** ***There is therefore no merit in the submission of Mr Majuru when he said that: "... this Honourable Court is precluded from enquiring into the internal proceedings of Parliament with regards to the third reading and passage of the General Laws Amendment Bill (now the General Laws Amendment Act Number 2 of 2002)."***

And the Court concluded:

> **"[43.]** ***It is my view that this Court has not only the power but also the duty to determine whether or not legislation has been enacted as required by the Constitution. Parliament can only do what is authorised by law and specifically by the Constitution.***
>
> **[44.]** ***The manner in which the third reading of the General Laws Amendment Bill was done on 10 January 2002 was contrary to the Constitution and the legislation thereunder, and accordingly was not validly enacted*****."*** (Emphasis added)

169. The Supreme Court of Malawi also considered the question of the role of the court in such matters in the case of **The Attorney General vs The Malawi Congress Party and Others**, **MSCA Civil Appeal No 22 of 1996.** It opined that:

> **"***Our standpoint with regard to SO 27 is simply this. The Courts are not concerned with purely procedural matters which regulate what happens within the four walls of the National Assembly. But the Courts will most certainly adjudicate on any issues which adversely affect any rights which are categorically protected by the Constitution where the Standing Orders purport to regulate any such rights. In the case under consideration, we do not believe that a breach of SO 27 by the Speaker of the House affected any rights guaranteed by the Constitution".... Stephen J summed up this point very clearly in Bradlaugh v. Gosset,at page 286, We also accept that over their own internal proceedings, the jurisdiction of the National Assembly is exclusive, but, it is also our view that it is for the Courts to determine whether or not a particular claim of privilege fell within such jurisdiction. We conclude by holding that by acting in breach of SO 27, the Speaker of the House did not infringe on any constitutional right which is justiciable before the Courts. The remedy for*

> ***such breach can only be sought and obtained from the National Assembly itself.*****"** (Emphasis added)

170. Then in the case of **Oloka-Onyango and 9 Others vs Attorney General, [supra]** the Constitutional Court of Uganda noted that:

> **"***Rule 23 of the Parliamentary Rules of Procedure require the Speaker, even without prompting by any Member of Parliament to ensure that Coram exists before a law is passed. We note that the Speaker was prompted three times by Hon. Mbabazi and Hon. Aol to the effect that there was no Coram in the house. The speaker was obliged to ensure compliance with the provisions of Rule 23 of the Rules of Procedure of Parliament. She did not. Parliament as a law making body should set standards for compliance with the Constitutional provisions and with its own Rules. The Speaker ignored the Law and proceeded with the passing of the Act. We agree with Counsel Opiyo that the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it. We have therefore no hesitation in holding that there was no Coram in Parliament when the Act was passed, that the Speaker acted illegally in neglecting to address the issue of lack of Coram. We come to the conclusion that she acted illegally. Following the decision of Makula International vs Cardinal Emmanuel Nsubuga, supra failure to obey the Law (Rules) rendered the whole enacting process a nullity.***"**

171. Finally, we are guided by the decision of the Supreme Court of Kenya in its **Advisory Opinion No 2 of 2013 (supra)** in which it stated that:

> **"[61]** ***It emerges that Kenya's legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that the Constitution vests the legislative authority of the Republic in Parliament... It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of the Constitution. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of the Constitution. It cannot operate besides or outside the four corners of the Constitution. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.***"**

The Court went on to state;

> **"[62]** ***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....***
>
> **[150]** ***Earlier in this Advisory Opinion we have considered the proper scope of judicial discretion, where a failing is attributed to the internal procedures of Parliament during legislation; and our position is that while the Court has all the powers when such a course of conduct is set against the terms of the Constitution, it is necessary for the Court to have a sense of the prevailing state of fact; thus, the Court has a discretion in appraising each instance, and taking a decision as may be appropriate…"*** (Emphasis added)

172. In our view, the principle that emerges from the above decisions read together with Article 124(1) of the Constitution is that in a jurisdiction such as ours in which the Constitution is supreme, the Court has jurisdiction to intervene where there has been a failure to abide by Standing Orders which have been given constitutional underpinning under the said Article. However, the court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case.

173. In the case before us, it has been alleged that there was fracas and confusion during the passage of SLAA. In the course of the hearing, we received conflicting evidence on the events of 18th December 2014. On one hand, the Hansard shows that there was some debate, albeit acrimonious, but that there was voting prior to the Bill being passed. On the other hand, a ten-minute video clip was played before the Court by Katiba. The clip demonstrated the extraordinary mayhem and chaos, at least for the ten minutes that it ran, that was exhibited by the denizens of what is supposed to be the august House where legislation to govern citizens is enacted.

174. The question that has to be asked is whether what was shown in the clip was all that took place in the National Assembly on that day. The AG took the position that despite the chaos evident in that clip, debate proceeded on the Bill, and a vote took place that culminated in the enactment of the impugned legislation. CORD on the other hand argued that strangers not only participated in the proceedings of the House on 18th December 2014, but that during voting, the Speaker presided over a chaotic voting process in which strangers, including security personnel and other staff, participated in voting during the passing of various clauses of the Bill in breach of the Constitution and Standing Orders.

175. While evidence was presented of the chaotic scenes in the House during debate on the Bill, no evidence was presented of the allegation that there were strangers in the House who participated in the proceedings and voting. However, even if there was evidence of the presence of strangers in the National Assembly, Article 124 (3) of the Constitution anticipated such an eventuality and provides that:

> ***The proceedings of either House are not invalid just because of-***
>
> ***(a) A vacancy in its membership; or***
> ***(b) The presence or participation of any person not entitled to be present at, or to participate in, the proceedings of the House.***

176. Having so said, we have seen and perused a copy of the Hansard of the National Assembly on the material day as availed under oath by Mr. Justin Bundi, the Clerk of the National Assembly which by dint of Standing Order No 247, is the official record of proceedings in Parliament. From the Hansard, we are only able to confirm that there were moments of loud consultations during the debate and vote on the Bill but ultimately the Bill was passed. The petitioners argued that the Hansard may have been doctored and so is not authentic. Unfortunately, such a serious allegation which was made during oral submissions was neither authenticated nor corroborated in any way. Our view is that neither the 10-minute video evidence nor submissions that the Hansard may not have been authentic can override the fact that the Hansard, as the lawful record of proceedings in the National Assembly cannot be wished away by this Court without strong evidence to

the contrary. The 10 minute video clip did not irrefutably demonstrate what the petitioners alleged: that the chaotic scenes in the House occurred when the debate, proposals and voting were on-going. It had no context and this Court being a court guided by evidence placed before it, cannot use the ten minute clip, whose source was never disclosed save that it had a Kenya Broadcasting Corporation (KBC) sideline, as uncontested evidence of mayhem and chaos that so affected the vote on SLAA to the level of illegality.

177. The case of **Oloka – Onyango & Others vs AG (supra)** was specifically cited in support of the proposition that where Standing Orders are blatantly disregarded, then a court can properly declare all proceedings arising from such an action, unconstitutional. We agree with that general principle. However, that case can be distinguished from the matter before us in that it involved a lack of quorum in the Parliament of Uganda; and the Hansard showed that although the Speaker was alerted, thrice, that there was no quorum, **"the Respondent [Attorney Genera**l**] in his pleadings and submissions did not attempt to suggest that the Rt. Hon. Speaker in any way reacted to the objection raised that there was no coram."** In that case there was therefore clear evidence of breach of Standing Orders.

178. In the present case, the Hansard indicated that although there was disorder in the National Assembly, SLAA was passed and was eventually assented to by the President. We are unable for the reasons stated above, to find that there was a clear, blatant disregard of the Standing Orders of the National Assembly for us to follow the decision in **Ol<u>oka – Onyango</u>** (supra).

Whether the process of enactment was flawed and unconstitutional for lack of public participation

179. The petitioners have challenged the constitutionality of SLAA on the basis that there was insufficient public participation prior to its enactment.

180. As correctly pointed out by the petitioners, the sacred fountain of the constitutional doctrine of public participation is embedded in the principle of sovereignty of the people under Article 1 of the Constitution. In addition, Article 2 contemplates direct and indirect exercise of sovereignty by the people through elected representatives, at all times the people reserving the right to direct exercise of sovereignty.

181. The right of public participation is further captured as one of the national values and principles of governance enshrined in Article 10 of the Constitution which provides that:

> ***(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them-***
> ***(a) Applies or interprets this Constitution;***
> ***(b) Enacts, applies or interprets any law; or***
> ***(c) Makes or implements public policy decisions.***
> ***(2) The national values and principles of governance include-***
> ***(a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.*** (Emphasis added)

182. With respect to parliamentary proceedings, Article 118, which is entitled "Public Access and Participation" provides 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) ***…***(Emphasis added)

183. The Standing Orders of Parliament also recognize the right to public participation. Standing Order No 127 (3) of the National Assembly Standing Orders provides thus;

> **(3)** ***The Departmental Committee to which a Bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the committee makes its report to the House*.**

184. Our courts have also recognised the central place of the principle of public participation in the new constitutional dispensation.In the case of **Kenya Small Scale Farmers Forum & 6 Others vs Republic Of Kenya & 2 Others [2013] eKLR** the Court held as follows:

> ***"One of the golden threads running through the current constitutional regime is public participation in governance and the conduct of public affairs. The preamble to the Constitution recognizes, "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." It also acknowledges the people's 'sovereign and inalienable right to determine the form of governance of our country…"Article 1 bestows all the sovereign power on the people to be exercised only in accordance with the Constitution. One of the national values and principles of governance is that of 'inclusiveness' and 'participation of the people."***

185. The AG does not dispute that there is a constitutional obligation on the National Assembly to facilitate public participation in the process of enactment of legislation. His contention, which is challenged by the petitioners, is that there was sufficient public participation prior to the enactment of SLAA. The question before us then is whether the public participation allegedly afforded in the passing of SLAA was reasonable in the circumstances. We shall respond to this question through an assessment of what is considered to be public participation, and what is deemed to be sufficient public participation. We shall do so by considering decisions from this and other jurisdictions.

186. In the case of **Doctors for Life International vs Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 CC** to which the petitioners have referred the Court, the Constitutional Court of South Africa held that:

> **"[145]** ***It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the law-making process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process.*****"**

187. The Court then proceeded to examine what amounts to reasonable participation and held that;

> ***"The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say. In addition, in evaluating the reasonableness of the conduct of the provincial legislatures, the Court will have regard to what the legislatures themselves considered to be appropriate in fulfilling the obligation to facilitate public participation in the light of the content, importance and urgency of the legislation."***

188. The above position was also echoed by the Court in the case of **Glenister vs President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC)** where the Court reaffirmed its decision in **Doctors for Life (Supra)** and it stated that:

> **"[31]** ***This leads to the third reason why this challenge should fail. The applicant has not made out a case for failure to facilitate public***

> ***involvement. In Doctors for Life, we considered the nature and scope of the obligation to facilitate public involvement in the legislative process and said:—Parliament and the provincial legislatures have broad discretion to determine how best to fulfill their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less. In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently."***

The Court then concluded that;

> ***"Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable."*** (Emphasis added)

189. In this jurisdiction, courts have also addressed the question of public participation and the circumstances in which it will be deemed to be sufficient. In the case of **Robert N. Gakuru and Others vs The Governor Kiambu County and 3 Others, Petition No 532 of 2013 Consolidated with Petitions Nos.12, 35, 36, 42 and 72 of 2014 and Judicial Review Miscellaneous Application No 61 of 2014,** the High Court was faced with a

challenge to County legislation on the basis that there had been insufficient public participation. The Court in its decision stated that:

> **"[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 purposes 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 Court was emphatic on the obligation of County Assembly with regard to public participation:

> ***"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 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.***" (Emphasis added)

190. In the case of **Moses Munyendo and 908 Others vs-Attorney General and Another, Petition Number 16 of 2013** the Court pronounced itself further on the same issue as follows:

> **"[21]** ***As concerns the pre-parliamentary or consultative stage, the Permanent Secretary has given evidence on how different stakeholders were consulted. Some of the organisations consulted include the following; Kenya National Federation of Cooperatives, National Cotton Growers Association, Meru Central Diary Co-operative Union Limited, Cereal Growers Association and the Horticultural Farmers and Exporters Association. The organisations consulted are, in my view, broadly representative of agricultural interests in the country. This evidence is not controverted by the petitioners. Furthermore, I do not think it is necessary that every***

> ***person or professional be invited to every forum in order to satisfy the terms of Article 10. Thus the contention that by the first petitioner, "I am aware that majority of Kenyans producers, processors, professionals or policy makers have not been invited to any stakeholders meetings to enrich any of the law" is not necessarily decisive of the lack of public participation…"*** (Emphasis added)

191. Similarly, the court in the case of **Consumer Federation of Kenya (COFEK) vs Public Service Commission and Another, Petition No. 263 of 2013** pointed out that:

> **"[13]** ***…. The Petitioner has latched on to the phrase "participation of the people" in a selective and selfish manner. I have said that there is no express requirement that "participation of the people" should be read to mean that "the people" must be present during interviews but taken in its widest context that their in-put is recognized."***

192. In **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs County of Nairobi Government and 3 others, Petition No 486 of 2013** the High Court stated:

> "[47] ***Further, it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in Minister of Health v New Clicks South Africa (PTY) Ltd (supra) where he expressed himself as follows; "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 issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."***

We entirely agree with the above reasoning and adopt the same in the present petition.

193. The petitioners in this matter argued that the mode of advertisement in the *Daily Nation* and *The Standard* newspapers of Wednesday, December 10, 2014 did not lend itself to a proper avenue for public participation. That the period for publication of the Bill was reduced from fourteen days to one day and the advertisement was only made on the 10th

December 2014 for a consultative meeting with the relevant committee of the National Assembly to be held on 11th December 2014 without proper circulation of the notice or the Bill itself. It was their further argument that the public participation on the Bill was limited to Nairobi County only out of 47 Counties and that there was no attempt to carry out civic education and to widely reach the majority of Kenyans who would be affected by limitations of rights under the Bill, by say advertising in local community radio or other such media.

194. The AG maintained that the notice which was published in local dailies with wide circulation required written memoranda to be submitted within 5 days of the date of the notice and it further informed the public that the Committee would sit for 3 full days in order to receive oral submissions. In his view, the circumstances of emergency that required urgent legislative responses and short timetables warranted the passage of the Act in response to the loss of lives and property due to spiralling insecurity in the country.

195. We have also examined the notice inviting the public to make submissions on the Bill. In inviting submissions, the National Assembly was acting by dint of Article 118 (1) (b) and Standing Order 127 (3). The invitation allowed the submission of views, representations, sending mail to the Clerk of the National Assembly, or making hand-deliveries to the office of the Clerk. The submissions were to be made on or before Monday, 15th December 2014 at 5:00 pm. The notice also indicated that the Committee would be sitting to conduct public hearings on the Bill on Wednesday 10th, Thursday 11th and Monday 15th December in the Mini Chamber, County Hall, Parliament Building between 10:00 a.m. and 5:00 p.m.

196. We further note that a number of persons and organizations engaged the National Assembly on the Bill within the period that was allowed for public participation. The Memoranda of the Administration and National Security Committee on the Security Laws (Amendment) Bill, 2014 indicates that a total of 46 stakeholders gave their input on the Bill. Such organisations included the LSK, KNCHR, Article 19, the Constitution and Reform

Education Consortium (CRECO), Gay and Lesbian Coalition of Kenya (GALCK), Human Rights Watch, Independent Medico-Legal Unit (IMLU), Katiba, Kenya Human Rights Commission (KHRC), Legal Resources Foundation, National Coalition for Human Rights Defenders-Kenya (NCHRD-K) and UHAI-EASHRI, The Federation of Women Lawyers-Kenya, and Haki Focus. Some of these organisations are also parties to this matter. Notably, almost 10 of the 46 stakeholders were represented by the KNCHR whose officials appeared before the Committee and submitted written memoranda.

197. It has been submitted before us that the National Assembly was acting out of some sense of urgency and that is why the National Assembly was recalled from recess to specifically deal with the enactment of SLAA.

198. In the circumstances, and taking into account the views of the courts in the authorities, local and from other jurisdictions, cited above, we are satisfied that the National Assembly acted reasonably in the manner in which it facilitated public participation on SLAA.

199. There is certainly no doubt that the parties that participated and gave their representations during the legislative process of SLAA represent the various and diverse interests of Kenyans. They are also undoubtedly well versed with the contents and areas that SLAA touched on. While acknowledging that an opportunity could have been availed for greater public participation, it would be to expect too much to insist that every Kenyan's view ought to have been considered prior to the passage of SLAA or any statute for that matter. In any event, the members of the National Assembly pursuant to Articles 1(2), 94(2), 95(1) and 97 of the Constitution also represent the people of Kenya. While such representation cannot be said to dispense with the need for public participation, we take the view that, taken together with the views expressed by the organisations set out above, there was reasonable public participation and SLAA cannot be held unconstitutional on account of lack of public participation.

200. *A fortiori*, the Presidential assent cannot be faulted as the process leading to the same was in our view within the ambit of the law.

The constitutionality of the impugned provisions of Security Laws (Amendment) Act vis a vis the Bill of Rights.

201. Having answered the question regarding the process of enactment of SLAA in the affirmative, we turn to consider the third issue in this matter, the question whether the specific provisions of SLAA violate and infringe the Bill of Rights or otherwise violate the Constitution.

202. The petitioners and the 3rd, 4th, 5th and 6th interested parties have asked the court to declare various provisions of the Act, which amend certain provisions of existing legislation, unconstitutional on the basis that they are in violation of fundamental rights and freedoms guaranteed under the Constitution or are otherwise in violation of constitutional provisions. They cited in this regard sections 4, 5, 6, 12, 15, 16, 19, 20, 21, 25, 26, 29, 34,48, 56, 58, 64, 69, 85 and 86 of SLAA and the corresponding provisions in various Acts that they amend or introduce into the law. They argued that in accordance with the provisions of Article 2 of the Constitution, the said provisions are null and void.

Comment [u2]: To confirm this.

203. Article 2 of the Constitution pronounces the supremacy of the Constitution and states as follows:

> ***2. (1) <u>This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.</u>***
>
> ***(2) No person may claim or exercise State authority except as authorised under this Constitution.***
>
> ***(3)…***

(4) <u>Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency</u>, and any act or omission in contravention of this Constitution is invalid.

204. Article 3 of the Constitution is also emphatic in its pronouncement that:

(1) Every person has an obligation to respect, uphold and defend this Constitution.

205. In considering whether or not the impugned provisions of SLAA are constitutional, we do so against certain principles which have been culled from various judicial pronouncements in this and other jurisdictions, but primarily from the Constitution itself.

Assessing the constitutionality of rights limitations

206. Through the provisions of the Constitution, the people of Kenya have provided that the rights and fundamental freedoms guaranteed under the Constitution, with the exception of four rights set out in Article 25, are not absolute. They are subject to limitation, but only to the extent and in the circumstances set out in Article 24 of the Constitution. Article 24 is in the following terms:

24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including––

(a) the nature of the right or fundamental freedom;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically
expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

207. Article 25 expressly provides that the rights set out therein shall not be limited. It states as follows:

> ***Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited–––***
>
> ***(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;***
>
> ***(b) freedom from slavery or servitude;***
>
> ***(c) the right to a fair trial; and***
>
> ***(d) the right to an order of habeas corpus.***

208. In considering whether the impugned provisions limit fundamental rights and freedoms as alleged by the petitioners and if so, whether the limitations meet constitutional standards, we shall also be guided by principles that have emerged from judicial decisions.

209. In the case of **S vs Zuma & Others (1995)2 SA 642(CC)** the Court held that a party alleging violation of a constitutional right or freedom must demonstrate that the exercise of a fundamental right has been impaired, infringed or limited. Once a limitation has been demonstrated, then the party which would benefit from the limitation must demonstrate a justification for the limitation. As in this case, the State, in demonstrating that the limitation

Comment [A3]: To check citation

is justifiable, must demonstrate that the societal need for the limitation of the right outweighs the individual's right to enjoy the right or freedom in question.

210. We are also guided by the test for determining the justifiability of a rights limitation enunciated by the Supreme Court of Canada in the case of **R vs Oakes (1986) ISCR 103** to which CIC has referred the Court. The first test requires that the limitation be one that is prescribed by law. It must be part of a statute, and must be clear and accessible to citizens so that they are clear on what is prohibited.

211. Secondly, the objective of the law must be pressing and substantial, that is it must be important to society: see **R vs Big Drug Mart (1985) ISCR 295**. The third principle is the principle of proportionality. It asks the question whether the State, in seeking to achieve its objectives, has chosen a proportionate way to achieve the objectives that it seeks to achieve. Put another way, whether the legislation meets the test of proportionality relative to the objects or purpose it seeks to achieve: see **R vs Chaulk (1990) 3SCR 1303**.

212. If a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test. They must be rationally connected to the objective sought to be achieved, and must not be arbitrary, unfair or based on irrational considerations. Secondly, they must limit the right or freedom as little as possible, and their effects on the limitation of rights and freedoms are proportional to the objectives.

213. The tests set out above echo the requirements of Article 24 of the Constitution. This Article expresses the manner of considering the constitutionality of a limitation on fundamental rights by requiring that such limitation be reasonable and justifiable in a free and democratic society, and that all relevant factors are taken into account, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to balance the rights and freedoms of an individual against the rights of others, and the relation between the limitation and its purpose, and whether there are less restrictive means to achieve the purpose.

214. It is against these tests that we shall consider the impugned provisions of SLAA.

The Rights to Freedom of Expression and the Media

215. The petitioners and Article 19 argued that there are several provisions in SLAA that violate the right to freedom of expression and of the media guaranteed under Articles 33 and 34 of the Constitution. They cited in this regard Section 12 of SLAA which amends the Penal Code by adding a new Section 66A. Section 12 is in the following terms:

> ***The Penal Code is amended by inserting the following new Section immediately after Section 66-***
>
> ***66A. (1) A person who publishes, broadcasts or causes to be published or distributed, through print, digital or electronic means, insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace commits an offence and is liable, upon conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both.***
>
> ***(2) A person who publishes or broadcasts any information which undermines investigations or security operations by the National Police Service or the Kenya Defence Forces commits an offence and is liable, upon conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years, or both.***

216. They are also aggrieved by the provisions of Section 64 of SLAA which amends the **Prevention of Terrorism Act** by inserting several new sections after Section 30, sections **30A** and **30F** of which the petitioners and Article 19 assert are unconstitutional. The new Section 30A of the Prevention of Terrorism Act, which is titled "***Publication of offending material"*** is in the following terms:

> ***30A. (1) A person who publishes or utters a statement that is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism commits an offence and is liable on conviction to imprisonment for a term not exceeding fourteen years.***
>
> ***(2) For purposes of sub-section (l), statement is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism if-***
>
> ***(a) the circumstances and manner of the publications are such that it can reasonably be inferred that it was so intended; or***
>
> ***(b) the intention is apparent from the contents of the statement.***

(3) For purposes of this Section, it is irrelevant whether any person is in fact encouraged or induced to commit or prepare to commit an act of terrorism.

217. Section 64 of SLAA also introduces Section 30F which is titled "***Prohibition from broadcasting"*** and states as follows:

> ***30F. (1) Any person who, without authorization from the National Police Service, broadcasts any information which undermines investigations or security operations relating to terrorism commits an offence and is liable on conviction to a term of imprisonment for a term not exceeding three years or to a fine not exceeding five million shillings, or both.***
> ***(2) A person who publishes or broadcasts photographs of victims of a terrorist attack without the consent of the National Police Service and of the victim commits an offence and is liable on conviction to a term of imprisonment for a period not exceed three years or to a fine of five million shillings, or both.***
> ***(3) Notwithstanding sub-section (2) any person may publish or broadcast factual information of a general nature to the public.***

218. The petitioners and Article 19 stated that this section constitutes a prior restraint on the freedom of expression and of the media. The petitioners submitted, in reliance on the decisions in the United States Supreme Court cases of **Near vs Minnesota 283 US 697 (1931)** and **New York Times vs United States 403 US 713 (1971)** that there can be no prior restraints to freedom of the media, and that such restraints are only permissible in very limited circumstances. It was their submission that Sections 12 and 64 of SLAA are unconstitutional in light of Article 33(2) and (3) which provide that:

> ***33. (1) Every person has the right to freedom of expression, which includes—***
>
> ***(a) freedom to seek, receive or impart information or ideas;***
>
> ***(b) freedom of artistic creativity; and***
> ***(c) academic freedom and freedom of scientific research.***
> ***(2) The right to freedom of expression does not extend to—***
> ***(a) propaganda for war;***
> ***(b) incitement to violence;***
> ***(c) hate speech; or***
> ***(d) advocacy of hatred that—***
> ***(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or***
> ***(ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).***

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

219. It was their case that Sections 12 and 64 will make illegal the concept of investigative journalism. They submitted that the provisions are also unconstitutional in light of Article 34(2), which takes away the power of the State to legislate on matters relating to freedom of expression and of the media outside the provisions of Article 33(2) and (3). Article 34(2) states as follows:

34. (1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).
(2) The State shall not—
(a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or
(b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.
(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that—
(a) are necessary to regulate the airwaves and other forms of signal distribution; and
(b)are independent of control by government, political interests or commercial interests.
(4)…
(5) Parliament shall enact legislation that provides for the establishment of a body, which shall—
(a) be independent of control by government, political interests or commercial interests;
(b) reflect the interests of all sections of the society; and
(c) set media standards and regulate and monitor compliance with those standards.

220. Article 19, specifically submitted that Sections 12 and 64 are unconstitutional for limiting freedom of the media and of expression. Article 19 averred, in the affidavit of its Executive Director, Mr Henry Omusundi Maina that it is concerned by the chilling effect of the provisions of Section 12 of SLAA which limit the guarantee of freedom of expression by creating a new Penal Code offence criminalizing publication of certain information in vague and overbroad terms, and the imposition of heavy punishments in the event of a conviction.

221. He stated that Article 19 is equally concerned with the chilling effect of the provisions of Section 64 of SLAA which amends the Prevention of Terrorism Act by inserting a new Section 30A which limits the exercise of the freedom of expression by creating overbroad offences of strict liability concerning the publication or utterances of certain information and the imposition of heavy punishment in the event of a conviction; as well as the amendment by Section 64 of SLAA to the Prevention of Terrorism Act by inserting a new Section 30F which limits the exercise of the freedom of expression by imposing the requirement for prior police authorization before publication of certain information and the imposition of heavy punishment in the event of a conviction.

222. Article 19 submitted that these sections are unconstitutional and do not take into account the internationally acceptable standards of limitations of Article 19 freedoms and the right to privacy as contained in numerous interpretative documents of international authority and are therefore in violation of Articles 31, 32(1), 33 and 34 of the Constitution and the corresponding Articles 19 of the UDHR and the ICCPR.

223. Article 19 submitted that Section 12 is constitutionally void on the basis of the principle of legality and for vagueness. With respect to legality, Article 19 submitted that the provision does not peg the commission of the offence it creates on intention or *mens rea* on the part of the publisher.

224. It further argued that the provision fails on the ground of vagueness as it deploys broad and imprecise terminology. Article 19 submitted that the limitation fails the test of legal prescription under Article 19 of the **UDHR** and the **ICCPR.** It relied on the case of **Sunday Times vs United Kingdom Application No 65 38/74 para49**, in which the European Court of Human Rights stated as follows.

> ***"(A) norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able- if need be with appropriate advice- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail."***

225. With regard to a law being "void for vagueness" Article 19 referred us to the US decision in **Grayned vs City of Rock Ford, 408 U.S 104 at 108-109** for the proposition that loosely worded or vague laws may not be used to restrict freedom of expression.

226. The AG's reply to the challenge to Section 12 of SLAA was twofold. First, he submitted that freedom of the media is not an absolute freedom and the limitations of Articles 33 and 34 are justifiable in an open and democratic society. He therefore argued that Section 66A introduced to the Penal Code cannot be unconstitutional since Article 33(2) and (3) prohibits publication of information that extends to propaganda for war, incitement to violence and hate speech. It was also his submission that freedom of expression shall respect the rights and freedoms of others, and that the Media Council has been unable to regulate the media on standards.

227. The AG thus justified the enactment of Section 66A of the Penal Code through Section 12 of SLAA on the basis that freedom of expression has been abused by the media in publishing pictures of fatally injured people and of security operations, to the advantage of the publicity sought by terrorists.

228. Through the Solicitor General, Mr.Njee Muturi, the State submitted that SLAA was necessitated by the fight against terrorism. He argued that the country is at war, just that a war has not been formally declared. The stated purpose of the legislation, therefore, is to protect the public from terrorism, and it was the State's case that the limitations contained in SLAA are justifiable in the circumstances.

229. The DPP agreed in substance with the position taken by the AG. He argued in his Grounds of Opposition to the petition that SLAA, in its purpose and effect, does not infringe on fundamental rights and freedoms and asserted that if there is a limitation of rights in Section 12 of SLAA and Section 66A of the Penal Code (the existence of which he denied), any such limitations are reasonable and justifiable in an open and democratic society.

230. In his affidavit sworn on 22nd January 2015, in opposition to the petition, Mr. Okello, argued that the utility value of Section 12, which adds Section 66A to the Penal Code, is to curb the use of mass media as a tool for propagating terrorist or other criminal agenda, to maintain the integrity of investigations and security operations, and to enhance public peace. He averred that the section is not unconstitutional as it does not go beyond the limitations of Article 33(2) but is in conformity with the Article. It was also his submission

that there are sufficient checks and balances in the law to ensure protection of individual rights.

231. With regard to Section 64 which introduces Section 30A prohibiting publication of offending material, the DPP argued that it captures conduct that encourages or induces others to commit acts of terrorism, and was informed by the methods used by terrorists to create and expand terrorist networks, particularly radicalization. It was the DPP's position that any limitation of rights in the section (which he, again, denied exists) is justifiable under Article 24(1).

232. With regard to Section 30F of the Prevention of Terrorism Act introduced by Section 64 of SLAA, the DPP argued that it is intended to curb the use of media as a propaganda tool for terrorist organizations, maintain the integrity of investigations and security operations, to enhance public peace and to protect victims of terrorist activity. He argued that it is also in accord with Article 33(2) and that it is justifiable under Article 24(1).

233. The DPP conceded in his submissions that the intention behind Section 34 of SLAA, which amends Section 2 of the Firearms Act to include telescopes, was not intended to require a licence for ownership of a telescope by journalist, but a gun scope and the Court should read- in the proper word into the section. In light of the concession by the DPP which the AG did not dispute, we need not labour with an analysis of this section save to state that Section 34 of SLAA is unconstitutional to the extent that it includes telescopes in the Section 2 in the Firearms Act.

234. The question that we are required to determine therefore is this: are the provisions of Sections 12 and 64 of SLAA, and the provisions they introduce in substantive legislation, namely, section 66A of the Penal Code and sections 30A and 30F of the Prevention of Terrorism Act respectively, limitations of fundamental rights and freedoms?

Sections 12 of SLAA and 66A of the Penal Code

235. Though the DPP disputed that there is a limitation of fundamental rights by the provisions of these sections, the AG conceded that there was, and indeed, section 12(3) of SLAA expressly states as follows:

> ***The freedom of expression and the freedom of the media under Articles 33 and 34 of the Constitution shall be limited as specified under this section for the purposes of limiting the publication or distribution of material likely to cause public alarm, incitement to violence or disturb public peace.***

236. It may thus be argued that the State has, by section 12(3), attempted to meet the requirements of Article 24(2)(a) which states that legislation that limits fundamental rights shall not be valid unless it:

> ***specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation.***

237. The question is whether it has met the rest of the criteria set in Article 24. As noted above, Article 24 prescribes that a right or fundamental freedom may only be limited by law, taking into account

> ***the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others, the relation between the limitation and its purpose, and whether there are less restrictive means to achieve the purpose.***

238. We shall now consider whether the provisions of sections 12 of SLAA and 66A of the Penal Code have met the above criteria.

The Nature of the Right to Freedom of Expression and of the Media

239. Aside from the recognition and protection given in the Constitution, the right to freedom of expression is also protected under international covenants to which Kenya is a party and which form part of Kenyan law by virtue of Article 2(6) of the Constitution. Article 19 of the **UDHR** adopted by the United Nations in 1948, provides that

> ***Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.***

240. Similarly, Article 19 (2) of the **ICCPR**, adopted by the United Nations in 1966, provides that:

> ***Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print in the form of art, or through any other media of his choice.***

241. It may be asked: why is it necessary to protect freedom of expression, and by extension, freedom of the media? In **General Comment No. 34 (CCPR /C/GC/34)** on the provisions of Article 19 of the ICCPR, the United Nations Human Rights Committee emphasises the close inter-linkage between the right to freedom of expression and the enjoyment of other rights. It observes at Paragraphs 2 and 3 as follows:

> ***2. Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.***
>
> ***3. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.***

242. The importance of the freedom of expression and of the media has been considered in various jurisdictions, and such decisions offer some guidance on why the freedom is considered important in a free and democratic society. In **Charles Onyango-Obbo and Anor vs Attorney General (Constitutional Appeal No.2 of 2002),** the Supreme Court of Uganda (per Mulenga SCJ) stated that:

> **"Democratic societies *uphold and protect fundamental human rights and freedoms, essentially on principles that are in line with J.J. Rousseau's version of the Social Contract theory. In brief, the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the raison d'etre of the State is to provide protection to the individual citizens. In that regard, the state has the duty to facilitate and enhance the individual's self-fulfilment and advancement, recognising the individual's rights and freedoms as inherent in humanity….***

Protection of the fundamental human rights therefore, is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance." (Emphasis added)

243. In the same decision, Odoki CJ observed as follows:

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

244. In **Print Media South Africa and Another vs Minister of Home Affairs and Another (CCT 113/11) [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC) (28 September 2012)** the Court stated as follows:

> ***"54. In considering the comprehensive quality of the right, one also cannot neglect the vital role of a healthy press in the functioning of a democratic society. One might even consider the press to be a public sentinel, and to the extent that laws encroach upon press freedom, so too do they deal a comparable blow to the public's right to a healthy, unimpeded media."***

245. In **Media 24 Limited and Others vs National Prosecuting Authority and Others In re: S vs Mahlangu and Another (55656/10) [2011] ZAGPPHC 64; 2011 (2) SACR 321 (GNP) (29 April 2011)** cited with approval the decision of the English case of **Lion Laboratories Ltd vs Evans and Others (1984) 2 ALL ER 417** where it was stated that:

Comment [C4]: Check citation

> ***"One should bear in mind that the constitutional promise of a free press is not one that is made for the protection of the special interests of the press.... The constitutional promise is made rather to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself."***

246. We agree. Finally, in the case of **S. vs Mamabolo (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 April 2001),** Kriegler J, while rejecting the pre-eminent place given to the right to freedom of expression in jurisprudence on the First Amendment in the United States, nonetheless emphasized the important place of freedom of expression when he stated as follows:

> ***"Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought-control, however respectably dressed."***

247. The constitutional guarantee of freedom of expression in our Constitution, as in the Constitution of South Africa, is not absolute, and is subject to the limitations set out in Article 33(2) which states that the protection of freedom of expression does not extend to propaganda for war, incitement to violence, hate speech or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm and is based on any ground of discrimination specified or contemplated in Article 27 (4). Such limitations also accord with the provisions of Article 19(3) of ICCPR, which provides as follows:

> ***3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:***
>
> ***(a) For respect of the rights or reputations of others;***
>
> ***(b) For the protection of national security or of public order (order public), or of public health or morals.***

248. Thus, the importance of the right to freedom of expression and of the media cannot be disputed. It is a right that is essential to the enjoyment of other rights, for implicit in it is the

right to receive information on the basis of which one can make decisions and choices. In the words of **Ronald Dworkin** in **Freedom's Law (1996) 200** cited in **Iain Currie & Johan de Waal's Bill of Rights Handbook**, page 360:

> ***"(F)reedom of speech is valuable, not just in virtue of the consequences it has, but because it is an essential and 'constitutive' feature of a just political society that government treat all its adult members … as responsible moral agents. That requirement has two dimensions. First, morally responsible people insist on making up their own minds what is good or bad in life or in politics, or what is true and false in matters of justice or faith. Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to head opinions that might persuade them to dangerous or offensive convictions.***
>
> ***We retain our dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold an opinion from us of the ground that we are not fit to hear and consider it."***

The importance of the purpose of the limitation

249. We consider, next, the objective and purpose of the impugned provisions of SLAA. While the Memorandum of Objects and Reasons to the Security Laws (Amendment) Bill indicates that the amendment to the Penal Code is to make provision for the offence of a public officer facilitating the entry of a criminal into Kenya, and the offence of a public officer concealing the whereabouts of a criminal and prescribes the punishment of these offences; as well as seeking to make it a felony for any person to intentionally insult the modesty of any person and prescribe a punishment for the same, the averments and submissions by the AG are to the effect that the object and purpose of the amendments was to combat terrorism.

250. In her affidavit sworn on 22nd January 2015, in opposition to the petition, **Dr. Monica Juma** averred that the legislation has been necessitated by national security interests and the need to combat terrorism in Kenya, and is in accord with United Nations Resolution 1269. Resolution 1269 (1999) was adopted by the Security Council on 19 October 1999.

251. According to Dr.Juma, the Resolution condemns all acts of terrorism as criminal and unjustifiable regardless of their motivation and calls upon all States to implement fully the international anti-terrorist conventions to which they are parties, encourages all States to consider as a matter of priority adhering to those resolutions to which they are not parties, and encourages also the speedy adoption of pending conventions. It is on this basis that the amendments to various legislation by SLAA are justified. Similar averments are made in the affidavit of Mr. Haron Komen.

252. That terrorism is a serious threat to national and individual security is not in dispute. In a document by the National Police Service marked *"Secret"* and titled "**Draft and Assent of the Security Laws (Amendment) Act 2014**" annexed to the affidavit of Dr. Juma, the National Police Service indicates that there were a total of 47 incidents of terrorism in Kenya in 2014, resulting in 173 deaths and 179 injuries. It states that a total of 409 suspects were arrested and profiled in court.

253. With regard to the causes of terrorism, the report cites continuous recruitment, indoctrination and radicalization of youth. It states that the challenges the Police Service faces in fighting terrorism include securing the Kenya/Somalia border, fighting Al Shabaab radicalization, the numbers returning from training and fighting in Somalia and low levels of awareness among the stakeholders thus hampering effective investigation and prosecution of terrorism suspects.

254. It cannot be disputed that the fight against terrorism is an important purpose. The State has an obligation to protect its citizens from internal and external threats, and as observed by the CIC, it must maintain the delicate balance between protecting the fundamental rights of citizens and protecting them from terrorists by providing national security. The State thus has an obligation to satisfy the Court that the limitations it has imposed in the legislation under consideration is justified by the realities it is confronted with, and that they have a rational nexus with the purpose they are intended to meet.

The Nature and Extent of the Limitation

Comment [u5]: I'm not too happy about this section. I'd welcome your thoughts on how to improve it.

Comment [A6]: To revisit

255. The AG acknowledged that Section 12 of SLAA and Section 66A which it introduces into the Penal Code limit the right to freedom of expression. In his affidavit in support of the petition, sworn on 23rd December 2014, Mr. Francis Nyenze for CORD averred that the two provisions are inconsistent with and contravene Article 33(a) as the definition of the offence is not specific and is extensively broad and over-reaching and may even capture persons whose intention is merely to bring to the attention of the public and authorities matters such as genocide, or to awaken public conscience and elicit or trigger appropriate response or action.

256. The new Section 66A in the Penal Code prohibits the publication, broadcasting or causing to be published or distributed ***"through print, digital or electronic means, insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace"*** and makes doing so an offence which is punishable, upon conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years. The prohibitions in this section are doubtless far reaching. They go over and above the provisions of Article 33(2) which prohibit hate speech, propaganda for war, incitement to violence and advocacy of hatred that constitute ethnic incitement, vilification of others or incitement to cause harm.

257. As submitted by Article 19, the section uses very broad terms, such as "*insulting, threatening, inciting material, images of the dead or injured persons"* which are not defined in the section, and are therefore left to subjective interpretation, misinterpretation and abuse.

258. The section therefore clearly limits media freedom and its penal consequences run counter to the provisions of Article 34(2) which provides that:

> ***The State shall not—***
>
> ***(a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or***
>
> ***(b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.***

259. As we understand it, the State can (and we believe, does) penalize the broadcast or publication of any expression that falls under Article 33(2), namely propaganda for war, incitement to violence, hate speech and advocacy to hatred. This new offence under the Penal Code that seeks to punish ***"insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace"*** thus limits the freedom of expression to a level that the Constitution did not contemplate or permit, and in a manner that is so vague and imprecise that the citizen is likely to be in doubt as to what is prohibited.

260. The principle of law with regard to legislation limiting fundamental rights is that the law must be clear and precise enough to enable individuals to conform their conduct to its dictates. In **Constitutional Law of South Africa, Juta, 2nd ed. 2014 at page 49, Chaskalson, Woolman and Bishop** write:

> ***"Laws may not grant officials largely unfettered discretion to use their power as they wish, nor may laws be so vaguely worded as to lead reasonable people to differ fundamentally over their extension."***

261. In **Islamic Unity Convention vs Independent Broadcasting Authority 2002 (4) SA 294 (CC), 2002 (5) BCLR 43 (CC) at para 44** the Court stated:

> ***"The next question to be considered is whether the provision is nevertheless justifiable despite its inability to be read in the way that the Board suggests. The prohibition against the broadcasting of any material which is "likely to prejudice relations between sections of the population" is cast in absolute terms; no material that fits the description may be broadcast. The prohibition is so widely phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted. No intelligible standard has been provided to assist in the determination of the scope of the prohibition. It would deny both broadcasters and their audiences the right to hear, form and freely express and disseminate their opinions and views on a wide range of subjects."***

262. Finally, In **Dawood v Minister of Home Affairs; Shalabi& Another vs Minister of Home Affairs; Thomas v Minister of Home Affairs2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 47** it was held as follows:

> ***"'It is an important principle of the rule of law that rules be stated in a clear and accessible manner.... It is because of this principle that s 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision"***

263. Measured against this criteria, the provisions of Section 12 of SLAA and Section 66A of the Penal Code limit the right to freedom of expression and of the media to such a large extent that they cannot be said to be in conformity with the Constitution, unless they can be justified as proportional to the object sought to be achieved, and a rational nexus can be discerned between the limitations and the object or purpose sought to be achieved.

The Relation between the Limitation and its Purpose

264. The stated purpose of the new legislation and its limitation of the freedom of expression and of the media is that it is intended to fight terrorism. Thus, there ought to be a rational nexus between the criminalization of publication of ***"insulting, threatening, or inciting material or images of dead or injured persons"*** and the fight against terrorism. From the wording of the section, the limitation is found to be necessary because such publication is ***"likely to cause fear and alarm to the general public or disturb public peace."***

265. One may ask: who and how is one to determine what is likely to cause fear and alarm to the public? How is a determination of what will ***"disturb public peace***" to be made? More critical, however, is the question: in what way is limiting freedom of expression by prohibiting certain publications so as not to cause fear or alarm to the public, or not to

disturb public peace, a standard that is by no means clear, connected to fighting terrorism and national security?

266. In **Rangarajan vs. Jagjivan Ram and Others; Union of India and Others vs. Jagvan Ram and Others (1989 SCR (2) 204, 1989 SCC (2) 574** the Supreme Court of India stated that:

> ***"There does indeed have to be a compromise between the interest of freedom of expression and social interest. But we cannot simply balance the two interests as if they were of equal weight. Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or farfetched. It should be proximate and (have) direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interests. In other words the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg."*** (Emphasis added)

267. In his submissions before us, Mr. Muturi conceded that there are many factors that hamper the fight against terrorism. He identified, in particular, lack of co-ordination between the government agencies involved in counter-terrorism activities, and endemic corruption within the National Police Service.

268. These submissions echo the sentiments expressed by KNCHR. In her affidavit in support of the KNCHR petition sworn on 28th December 2014, Ms. Waruhiu averred at paragraph 30 thereof that the crisis of insecurity in Kenya is not due to a dearth of relevant laws to combat insecurity. Rather, it is due to a lack of effective implementation of the law by the relevant security actors and agencies, mostly due to other factors like endemic corruption prevalent within the security agencies. These views are reflected in the KNCHR report titled **Return of the Gulag, Report of KNCHR Investigations on Operation Usalama Watch, 2014**.

269. The submission of KNCHR was that new legislation will not in itself lead to security and personal safety in the country due to the lack of adequate equipping and tooling of the security agents, corruption and poor implementation of existing legislation.

270. Admittedly, media coverage of terrorist events, if not properly managed, may have a detrimental effect on national and societal interests. In an article titled **Terrorism, The Media, And The Government: Perspectives, Trends, And Options For Policymakers (1997), Washington D.C., USA. UNT Digital Library**.(http://digital.library.unt.edu/ark:/67531/metacrs419/. Accessed February 11, 2015) **Raphael F. Perl** observed that:

> ***"Terrorists, governments, and the media see the function, roles and responsibilities of the media when covering terrorist events from differing and often competing perspectives. Such perspectives drive behaviour during terrorist incidents--often resulting in both tactical and strategic gains to the terrorist operation and the overall terrorist cause. The challenge to both the governmental and press communities is to understand the dynamics of terrorist enterprise and to develop policy options designed to serve the interests of government, the media, and the society. Terrorists must have publicity in some form if they are to gain attention, inspire fear and respect, and secure favourable understanding of their cause, if not their act. Governments need public understanding, cooperation, restraint, and loyalty in efforts to limit terrorist harm to society and in efforts to punish or apprehend those responsible for terrorist acts. Journalists and the media in general pursue the freedom to cover events and issues without restraint, especially governmental restraint."***

271. A media that is cognizant of its role and responsibility to society with regard to terrorism would be expected to exercise restraint in its coverage of terrorism and terrorist activity. Further, a properly functioning self-regulatory media mechanism such as is contemplated under the Media Act, 2013 ought to have and demand strict adherence to clear guidelines on how the media reports on terrorism to avoid giving those engaged in it the coverage that they thrive on, to the detriment of society.

272. However, on the material that has been placed before us, we can find no rational connection between the limitation on publication contemplated by Section 12 of SLAA and

Section 66A of the Penal Code, and the stated object of the legislation, national security and counter terrorism. It is our view; therefore, that Section 12 of SLAA which introduces Section 66A to the Penal Code is an unjustifiable limitation on freedom of expression and of the media and is therefore unconstitutional.

Sections 64 of SLAA and 30A and 30F of the Prevention of Terrorism Act

273. The considerations we have discussed in the preceding paragraphs with regard to Section 12 of SLAA and Section 66A of the Penal Code apply, in our view, to the amendments contained in Section 64 of SLAA which introduces Sections 30A and 30F of the Prevention of Terrorism Act.

274. Section 30F seeks to impose prior restraint on publication and broadcasting by requiring that prior authorization be obtained from the National Police Service before ***"any information which undermines investigations or security operations relating to terrorism"*** is published or broadcast. The section also prohibits, at Section 30F (2), the publication or broadcast of photographs of victims of a terrorist attack without the consent of the National Police Service and of the victim. Anyone who fails to obtain such approval commits an offence whose penalty is imprisonment for a term not exceeding three years or to a fine not exceeding five million shillings, or both.

275. As we observed above, a law that limits a fundamental right and freedom must not be so vague and broad, and lacking in precision, as to leave a person who is required to abide by it in doubt as to what is intended to be prohibited, and what is permissible. With regard to Section 30A for instance, how is ***"any information which undermines investigations or security operations relating to terrorism"*** to be interpreted? Who interprets what information ***"undermines investigations or security operations"***? The effect of such a prohibition, in our view, would amount to a blanket ban on publication of any security-related information without consulting the National Police Service.

276. In our view, the provisions of Section 30A and 30F are unconstitutional for limiting the rights guaranteed under Article 34(1) and (2). The State has not met the test set in Article 24. It has not demonstrated the rational nexus between the limitation and its purpose, which, we reiterate, has been stated to be national security and counter-terrorism; has not

sought to limit the right in clear and specific terms nor expressed the intention to limit the right and the nature and extent of the limitation; and the limitation contemplated is so far reaching as to derogate from the core or essential content of the right guaranteed under Article 34.

277. With regard to the criminalization of publication or broadcast of photographs of victims of a terrorist attack without their consent, we agree that there is cause for concern with media conduct in relation to victims of terror, particularly the use of graphic and shocking photographs in both broadcast and print media. However, there are already in existence clear constitutional and legislative provisions to cover such situations. Article 33(3) contains the restriction that forms the basis for the law of defamation by providing that: **"*In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others*."**

278. To criminalise matters that have a civil remedy in defamation would, as submitted by Article 19, have a chilling effect on the exercise of freedom of the media, and would consequently have a deleterious effect on the right of the public to information. Indeed, it has been recognised that the application of criminal law in defamation matters should be confined to the most serious cases: see the decision of the African Court of Human Rights in **In the Matter of Lohe Issa Konate vs Burkina Faso Application No. 004/2013.**

Whether there are less restrictive means to achieve the purpose.

279. Having found that the provisions of Section 12 of SLAA and Section 66A of the Penal Code as well as Section 64 of SLAA and 30A and 30F of the Prevention of Terrorism Act are unconstitutional for being too vague and imprecise, and for not having any rational nexus with the intended purpose, we do not believe that the question whether there are less restrictive means of achieving the intended purpose can, in the circumstances, arise.

280. In concluding this issue touching on freedom of expression and of the media, we must observe that the concerns that precipitated the legislation now under challenge are real. However, we believe that rather than enacting legislation that goes against the letter and spirit of the Constitution and erodes the fundamental rights to freedom of expression and

of the media, an approach that brings together the State and the media in finding a way to cover terrorism without compromising national security should be explored. **Perl, Raphael** observes in his article above that:

> ***"The media and the government have common interests in seeing that the media are not manipulated into promoting the cause of terrorism or its methods. But policymakers do not want to see terrorism, or anti-terrorism, eroding freedom of the press--one of the pillars of democratic societies. This appears to be a dilemma that cannot be completely reconciled--one with which societies will continually have to struggle. The challenge for policymakers is to explore mechanisms enhancing media/government cooperation to accommodate the citizen and media need for honest coverage while limiting the gains uninhibited coverage may provide terrorists or their cause. Communication between the government and the media here is an important element in any strategy to prevent terrorist causes and strategies from prevailing and to preserve democracy."***

281. We need say no more, we believe, on this issue, save to observe that even with an ethical and properly self-regulated media, the challenge, with the wide spread and the largely uncontrolled use of the internet and social media, of enforcing legislation that seeks to control what is published and broadcast to the public, will be daunting.

Violation of the Right to Privacy

282. The petitioners have challenged the provisions of Section 56 of SLAA which amends Section 42 of the NIS Act by repealing Part V and substituting it with a new part altogether. They asserted that the new part is likely to violate the right to privacy guaranteed under Article 31. The new part states:

> ***(I) In this Part "special operations" means measures, efforts and activities aimed at neutralizing threats against national security.***
> ***(2) Where the Director-General has reasonable grounds to believe that a covert operation is necessary to enable the Service to investigate or deal with any threat to national security or to perform any of its functions, the Director-General may, subject to guidelines approved by the Council, issue written authorization to an officer of the Service to undertake such operation.***
>
> ***(3) The written authorization issued by the Director-General under subsection (2)-***
> ***(a) shall be sufficient authorization to conduct the operation;***

(b) may be served on any person so required to assist the Service or facilitate the covert operation or investigations required to be undertaken;

(c) may authorize any member of the Service to obtain any information, material, record, document or thing and for that purpose-
(i) enter any place or obtain access to anything;
(ii) search for or remove or return, examine, take extracts from, make copies of or record in any manner the information, material, record, documents or thing;
(iii) monitor communication;
(iv) install, maintain or remove anything; or
(v) take all necessary action, within the law, to preserve national security; and
(d) shall be specific and accompanied by a warrant from the High Court in the case of paragraph (c), and shall be valid for a period of one hundred and eighty days unless otherwise extended."

283. The petitioners and Article 19 also contended that Section 69 of SLAA infringes on the right to privacy as it allows interception of communication by the National Security Organs. Section 69 of SLAA introduces Section 36A to the Prevention of Terrorism Act as follows:

36A (1) The National Security Organs may intercept communication for the purposes of detecting, deterring and disrupting terrorism in accordance with procedures to be prescribed by the Cabinet Secretary

(2) The Cabinet Secretary shall make regulations to give effect to subsection (1) and such regulations shall only take effect upon approval by the National Assembly.

(3) The right to privacy under Article 31 of the Constitution shall be limited under this section for the purpose of intercepting communication directly relevant in the detecting, deterring and disrupting terrorism.

284. Do these provisions infringe or threaten the right to privacy? In answering this question, we do so against the criteria set in Article 24, and the principles with regard to constitutionality of legislation intended to limit fundamental rights which we have discussed elsewhere in this judgment. To recap, the first is to consider the nature of the right sought to be limited, the importance of the purpose of the limitation, and the relation between the limitation and its purpose, and whether there are less restrictive means of achieving the intended purpose.

The Nature of the Right to Privacy

285. The right to privacy is guaranteed under Article 31 of the Constitution which provides as follows:

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

286. The right to privacy has also been expressly acknowledged in international and regional covenants on fundamental rights and freedoms. It is provided for under Article 12 of the UDHR, Article 17 of the ICCPR, Article 8 of the European Convention on Human Rights **(ECHR)** and Article 14 of the African Charter on Human and Peoples' Rights.

287. **B. Rossler** in his book**, The Value of Privacy (Polity, 2005) p. 72,** explains the right to privacy as follows:

> ***"The concept of right to privacy demarcates for the individual realms or dimensions that he needs in order to be able to enjoy individual freedom exacted and legally safeguarded in modern societies. Such realms or dimensions of privacy substantialize the liberties that are secured because the mere securing of freedom does not in itself necessarily entail that the conditions are secured for us to be able to enjoy these liberties as we really want to".***

288. As to whether there is need to protect privacy, he goes on to write that:

> ***"Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the***

dignity and spirit of the individual, but also to the integrity of the society of which the individual is part".

289. The New Zealand Supreme Court in **Brooker vs the Police (2007) NZSC 30** at para.252 stated as follows:

> ***"Privacy can be more or less extensive, involving a broad range of matters bearing on an individual's personal life. It creates a zone embodying a basic respect for persons...Recognising and asserting this personal and private domain is essential to sustain a civil and civilised society...It is closely allied to the fundamental value underlying and supporting all other rights, the dignity and worth of the human person."***

290. Applying the normative content of the right to privacy as stated above and what that right seeks to protect, we are clear in our mind that surveillance in terms of intercepting communication impacts upon the privacy of a person by leaving the individual open to the threat of constant exposure. This infringes on the privacy of the person by allowing others to intrude on his or her personal space and exposing his private zone. In the Irish Supreme Court case of **Kennedy vs Ireland (1987) I.R 587** it was held that the phone-tapping of the two journalists in question violated their right to privacy. Hamilton J made it clear that the right to privacy must ensure the preservation of the dignity and freedom of the individual in a sovereign, independent and democratic society. In his view:

> ***"The dignity and freedom of an individual in a democratic society cannot be ensured if his communication of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with."***

291. Any legislation that seeks to limit the right to privacy in a free and democratic open society must be such that it does not derogate from the core normative content of this right.

The Importance of the Purpose of the Limitation

292. While SLAA has not indicated, as required under Article 24(2), that it intends to limit the right to privacy by the provisions of the new Part V introduced by Section 56 of SLAA to the NIS Act, it expressly states that the provisions of Section 36A (3) of the Prevention of Terrorism Act has limited the right to privacy.

293. The explanation for the failure to make this clear in the section amending Part V of the NIS Act may lie in the fact that the new Part V replaces similar provisions in the Act. The former Part V of the Act, which was titled "Warrants", contained the following provisions at Section 42:

> ***42.Application for a warrant by the Director-General***
>
> ***(1) Where the Director-General has reasonable grounds to believe that a warrant under this section is required to enable the Service to investigate any threat to national security or to perform any of its functions, he or she may apply for a warrant in accordance with subsection (2).***
>
> ***(2) An application under subsection (1) shall be made ex-parte and before a Judge of the High Court.***
>
> ***(3) An application under subsection (2) shall subject to section 47 be—***
>
> ***(a) made in writing; and***
>
> ***(b)accompanied by a sworn statement including the following matters—***
>
> ***(i) the purpose for which the warrant is sought;***
>
> ***(ii) whether other investigative procedures have been tried and have failed or are unlikely to succeed;***
>
> ***(iii) whether the urgency of the matter is such that it would be impracticable to carry out the investigation using any other investigative procedures;***
>
> ***(iv) that without a warrant it is likely that information with respect to the threat to national security would not be obtained;***
>
> ***(v) the type of information, material, record, document or thing proposed to be obtained;***
>
> ***(vi) the person, if known, to whom the warrant is to be directed;***
>
> ***(vii) a general description of the place where the warrant is proposed to be executed; and***
>
> ***(viii) if the assistance of any person in implementing the warrant will be sought, sufficient information for a judge to so direct.***

294. Section 43 provided for the issuance of a warrant in the following terms:

> ***A judge may issue a warrant under this Part authorizing the taking of such action as is specified in the warrant in respect of any person, property or thing specified therein if the judge is satisfied that it is necessary for the action to be taken in order to obtain any information, material, record, document or thing which is likely to be of substantial value in assisting the Service in the investigation in question and which cannot reasonably be obtained by any other means.***

295. At Section 44, the Act allowed the Director to request the judge for an order directing any person to assist the Director with the execution of the warrant by furnishing information, facilities or technical assistance necessary to execute the warrant. Section 45 with regard to the effect of a warrant provided as follows:

> ***A warrant issued under section 43 may authorize any member of the Service to obtain any information, material, record, document or thing and for that purpose—***
>
> ***(a) to enter any place, or obtain access to anything;***
>
> ***(b) to search for or remove or return, examine, take extracts from, make copies of or record in any other manner the information, material, record, document or thing;***
>
> ***(c) to monitor communication; or***
>
> ***(d) to install, maintain or remove anything.***

296. Section 46 provided that the period of validity of the warrant was for such period as was indicated in the warrant but not more than one month at any one time. The Act allowed for extension of the period of validity of the notice upon application to a judge. Section 47 of the amended Part V also provided for the making of oral applications, to be followed up by a formal application under Section 42. In the event of an emergency, however, Section 49 allowed the Director to exercise the powers under Section 45 without a warrant but to make an application before a judge within 36 hours from the time of the exercise of the powers.

297. In the circumstances therefore, it appears to us that the requirements of Article 24(2) (a) have been complied with in respect of Sections 56 and 69 of SLAA.

298. Both of these provisions have been challenged on the basis that they limit the right to privacy. With regard to the amendments to the Prevention of Terrorism Act, Article 19 submitted that Section 69 of SLAA which introduces Section 36A to the Prevention of Terrorism Act is unconstitutional as it violates the right to privacy. It was Mr Mureithi's submission that Section 36A introduces uncalled for mass surveillance of communication by all National Security Organs, which is unconstitutional. The core of the State's case with regard to the limitation of the right to privacy, as with the other provisions which have been assailed on the basis that they limit or threaten to limit fundamental rights, is that they are justified in the State's war against terrorism.

299. Mr.Muturi submitted that the measures complained of were justified by the effect of terrorist attacks on innocent Kenyans in the recent past. He illustrated this by enumerating the number of terrorist attacks in the past few years: that there had been 20 attacks in the year 2011, 37 in 2012, 25 in 2013 and 30 in 2014.

300. The need to monitor communication permitted in both Part V of the NIS Act and the Prevention of Terrorism Act, which it is conceded limit the right to privacy has one purpose; to enhance national security by ensuring that national security agents, through their covert operations and monitoring of communication, can be one step ahead of terrorists, and are thus able to thwart terrorist attacks. This, we are convinced, is an extremely important purpose, recognised world over as justifying limitations to the right to privacy.

301. As O'Higgins C.J commented in **Norris vs Attorney General (1984) I.R 587**, a right to privacy can never be absolute. It has to be balanced against the State's duty to protect and vindicate life. What needs to be done, as was recognised in **Campbell vs MGN Ltd (2004) 2 AC 457,** is to subject the limitation and the purpose it is intended to serve to a balancing test, whose aim is to determine whether the intrusion into an individual's privacy is proportionate to the public interest to be served by the intrusion.

302. To our collective mind, and taking judicial notice of the numerous terrorist attacks that this country has experienced in the last few years, we are of the view that the interception of communication and the searches contemplated under the two impugned provisions of law are justified and will serve a genuine public interest. The right to privacy must be weighed against or balanced with the exigencies of the common good or the public interest: see **Haughey vs Moriarty (1999) 3 I.R 1.** In our view, in this instance, the scales tilt in favour of the common good.

303. We are further satisfied that there are sufficient safeguards to ensure that the limitation of the right to privacy is not exercised, as the petitioners and Article 19 fear, arbitrarily and on a mass scale. Under the Prevention of Terrorism Act which had, prior to the enactment of SLAA and the introduction of Section 36A already contained limitations of the right to privacy, there are, we believe, safeguards to ensure that the process is undertaken under judicial supervision. It is, we believe, useful to set out the provisions of the Prevention of Terrorism Act as they are currently. Section 35, which limits various rights, provides as follows with regard to the right to privacy:

> ***35. Limitation of certain rights***
> ***(1) Subject to Article 24 of the Constitution, the rights and fundamental freedoms of a person or entity to whom this Act applies may be limited for the purposes, in the manner and to the extent set out in this section.***
> ***(2) A limitation of a right or fundamental freedom under subsection (1) shall apply only for the purposes of ensuring—***
> ***(a) the investigations of a terrorist act;***
> ***(b) the detection and prevention of a terrorist act; or***

(c) that the enjoyment of the rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others.
(3) The limitation of a fundamental right and freedom under this section shall relate to—
(a) the right to privacy to the extent of allowing—
(i) a person, home or property to be searched;
(ii) possessions to be seized;
(iii) the privacy of a person's communication to be investigated, intercepted or otherwise interfered with.
(b)

304. At Section 36, the Act currently provides as follows:

36. Power to intercept communication and the admissibility of intercepted communication.

(1) Subject to subsection (2), a police officer of or above the rank of Chief Inspector of Police may, for the purpose of obtaining evidence of the commission of an offence under this Act, apply ex parte, to the High Court for an interception of communications order.

(2) A police officer shall not make an application under subsection (1) unless he has applied for and obtained the written consent of the Inspector-General or the Director of Public Prosecutions.

(3) The Court may, in determining an application under subsection (1), make an order—
(a) requiring a communications service provider to intercept and retain specified communication of a specified description received or transmitted, or about to be received or transmitted by that communications service provider; or
(b)authorizing the police officer to enter any premises and to install on such premises, any device for the interception and retention of a specified communication and to remove and retain such device.

(4) The Court shall not make an order under subsection (3) unless it is satisfied that the information to be obtained relates to—
(a) the commission of an offence under this Act; or
(b) the whereabouts of the person suspected by the police officer to have committed the offence.
(5)…
(6)…

(7) A police officer who intercepts communication other than is provided for under this section commits an offence and shall on conviction be liable to imprisonment for a term not

exceeding ten years or to a fine not exceeding five million shillings or to both.

305. The new Section 36A of the Prevention of Terrorism Act cannot therefore be read in isolation. It must be read with Sections 35 and 36, which not only require the involvement of the court, but also include penal consequences for the unlawful interception of communication.

306. Similarly, the monitoring of communication and searches authorised by Section 42 of the NIS Act, which has replaced the previous Section 42 by virtue of the amendments brought in by Section 56 of SLAA contain safeguards in the exercise of the powers under the section. The new section requires that the information to be obtained under Section 42(3) (c) must be specific, shall be accompanied by a warrant from the High Court, and will be valid for a period of six months unless extended.

307. We heard the petitioners to complain that it was not clear whether the section contemplated warrants 'from' the High Court or a warrant 'of' the High Court and whether the High Court meant 'a judge of the High Court' or 'Deputy Registrar'. We think this is hair-splitting. We believe that it is beyond dispute that a warrant from the High Court implies a warrant issued by a judge of the High Court.

308. The upshot of our findings is that while Section 56 of SLAA and the new Section 42 of the NIS Act, as well as Section 69 of SLAA and Section 36A (which it introduces to the Prevention of Terrorism Act) do limit the right to privacy, they are justifiable in a free and democratic state, and have a rational connection with the intended purpose, the detection, disruption and prevention of terrorism. We are also satisfied that given the nature of terrorism and the manner and sophistication of modern communication, we see no less restrictive way of achieving the intended purpose and none was advanced by any of the parties in the course of submissions before us.

The Right to a Fair Trial

309. Our Constitution, which was promulgated through a referendum where *Wanjiku* and others including deadbeats, petty and hard core thieves as well as cranks who never had money voted , ensured that the primary concern of the criminal justice system which is to adjudicate guilt or innocence correctly and fairly was also addressed. This was done through Articles 49, 50 and 51 of the Constitution. These Articles, respectively, provide for the rights of arrested persons, the rights to a fair hearing and, finally, rights of persons detained, held in custody or imprisoned.

310. The petitioners and the interested parties supporting the petition have complained that SLAA is completely inconsistent with these Articles. The *amici curiae* also urged us to consider if rights guaranteed by the Articles are threatened with infringement.

311. We have isolated the following six sections of SLAA as the ones which allegedly violate Articles 49 and 50 of the Constitution:

i. Section 15 which introduced a new Section 36A to the Criminal Procedure Code (the " CPC").
ii. Section 16 which introduced a new Section 42A to the CPC.
iii. Section 20 which amended Section 364 of the CPC.
iv. Section 21 which introduced a new Section 379A to the CPC.
v. Section 26 which introduced a new Section 20A to the Evidence Act.
vi. Section 29 which introduced a new Section 59A to the Evidence Act.
vii. Section 31 which introduced a new Section 78A to the Evidence Act.

312. Article 49 of the Constitution deals with the rights of an arrested person.

313. On the other hand, the right of an accused person to a fair trial is set out expressly under Article 50. The rights under Article 50 are not limited to the enumerated rights therein. Their interpretation and application must not be limiting but must be purposive and liberal, even though the context of the criminal justice system in Kenya must be taken into consideration: see **John Swaka vs Director of Public Prosecutions [2013] eKLR.** The

desire to achieve elemental and essential justice by the criminal justice system would not allow any person or the court for that matter when either enforcing or interpreting Article 50 to ignore any unenumerated right. The unlimited width of the right to fair trial is further illustrated by Article 25 which expressly makes it one of the four (4) non derogable rights. Consequently, attempts to abrogate, abridge or infringe upon the right to a fair trial must be resisted and nipped in the bud.

314. As noted above, Article 24 of the Constitution allows for limitation of rights, and the circumstances under which such limitations are permissible in a democratic society. However, as the right to fair trial is non-derogable, should the Court find that the provisions of SLAA limit the right, then *ipso facto*, such limitations will be found to be unconstitutional. With the foregoing in mind, we will now consider the specific provisions of SLAA alleged to infringe upon the rights guaranteed under Articles 49 and 5**0** of the Constitution.

Section 15 of SLAA and Section 36A of the CPC

315. Section 15 of SLAA introduces the new Section 36A to the CPC. The section reiterated the provisions of Article 49(1) (f) and (g) of the Constitution which deal with the right of an arrested person to be presented before a court of law not later than twenty four hours following his arrest. Once brought to court, he is to be charged or be informed of the reason for his continued detention or be released. Section 36A of the CPC is to the effect that if a police officer deems it that the detention is necessary beyond the constitutional twenty-four hours, then the police officer shall produce the arrested person in court and apply for an extension of time for holding the arrested person.

316. The application for extension of time beyond the constitutional twenty four hours is to be supported by an affidavit, duly sworn by the police officer, which states among other facts the nature of the offence, the general evidence at hand, the inquiries made by the police in relation to the offence and any further inquiries proposed to be made and reasons necessitating the continued holding of the arrested person.

317. The section also gives the process and guidance to the court before whom the arrested person is arraigned and the matters it should consider in determining whether or not to allow the arrested person's continued detention. The court must consider not only the application for extension of the detention period but also any objections the arrested person may have. Thereafter the court is to determine whether to release the arrested person unconditionally or upon reasonable conditions or, more importantly, make an order for the remand of the arrested person. The court is only to exercise the last of the three options if (i) there are compelling reasons for believing that the arrested person shall not appear at trial, (ii) he may interfere with witnesses or the conduct of investigations or commit an offence while on release (iii) it is necessary to keep the arrested person for his own protection or if the suspect is a minor, for his welfare (iv) the person is already serving a custodial sentence and (v) the person having been arrested and released has breached a condition of his release.

318. The section also limits the period of remand to thirty days but allows the police officer to apply for extension of that period, when the court must then be satisfied that having regard to the circumstances under which the earlier extension was issued, the request for a new extension is warranted. The aggregate period for holding the arrested person is not to exceed 90 days.

319. This section was the subject of attack by the petitioners. CORD submitted that the section contravenes the right to a fair trial. In particular, it was stated that it contravened Article 49 of the Constitution as well as Article 50(2) (e) as an arrested person has to be brought to court as soon as is reasonably possible but not later than twenty four hours after being arrested, and that an accused person has a right to have the trial begin and conclude without unreasonable delay.

320. Mr. Kamau for KNCHR added that "Kenyans are staring at a situation where one is held without trial for 90 days". To CORD the right under Article 49 is not derogable when read together with Article 50(2) (e). It was further submitted that Section 36A of the CPC was not justifiable. Similar submissions were made by the 3rd petitioner as well as Kituo, Katiba and Article 19.

321. The main justification advanced by the State for Section 36A was that it would allow investigations to be completed without hindrance. The AG argued that the section was intended and is indeed meant to operationalize Article 50 of the Constitution and further that all safeguards to guarantee a free and fair trial have now been built in the amendment to the CPC. The DPP submitted that provisions similar to Section 36A of the CPC already exist under the Prevention of Terrorism Act and further that the section is not inconsistent with the Constitution as it is subject to judicial authority and is also justifiable under Article 24(1) of the Constitution. Jubilee supported the AG's case.

322. The key issue here is whether the introduction of section 36A of the CPC contravenes Articles 49 and 50 of the Constitution.

323. The rights of an arrested person are enshrined under Article 49 and not Article 50. Article 49(1)(f) and (g) which are of relevance to the instant Petition are as follows:

> ***49(1) An arrested person has the right to:***
> ***..***
> ***f) to be brought before a court as soon as reasonably possible, but not later than:***
> ***(i) twenty four hours after being arrested; or***
>
> ***(ii) if the twenty four hours are outside ordinary court hours or on a day that is not an ordinary day, the end of the next court day.***
>
> ***g) at the first court appearance to be charged or informed of the reason for the detention continuing or to be released.***
>
> ***h) to be released on bond or bail, on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released.***

324. Article 50(2) sets out the rights to which an accused person is entitled to. The two Articles may appear, from a cursory glance, to be distinct as Article 49 refers to an 'arrested' person whilst Article 50 refers to an 'accused' person. An arrested person, in our view is one who has, pursuant to the provisions of the CPC, been arrested and detained for allegedly committing an offence.

325. An accused person on the other hand, as **Black's Law Dictionary 9th Edition** at page 23 defines is one who is formally arraigned in court and charged with committing an offence. He is a person against whom legal proceedings have been initiated. He is no longer a suspect, and his vulnerability is obvious. He is one called to answer to a charge in proceedings that culminate in an acquittal or conviction: see **R. vs Governor of Pentonville Prison, ex parte Herbage (No.3) [1987] 84 Cr App R 149** and also **National Director of Public Prosecution vs Philips 2002 (4) SA 60**. Like an arrested person, an accused person is ordinarily under lawful detention or custody but their status is different in relation to the criminal process.

326. The Constitution protects both arrested and accused persons. Articles 49 and 50 in various instances have similar sets of rights even though one is facing a trial or is about to, while the other faces the prospects of a trial but is subject to and is still under examination.

327. In our view, notwithstanding the fact that Article 49 refers specifically to arrested persons and Article 50 to accused persons, in the context of the instant petition, the rights enshrined under Article 49 would equate 'fair trial rights'. This is despite the fact that some rights, like the right to silence overlap Article 50. We say so because the right to fair trial begins the moment the criminal process is initiated; and the criminal process is initiated at the point at which the coercive power of the State, in the form of an arrest, is exercised against a suspect. As was stated by the Supreme Court of Ireland in the persuasive case of **D.P.P. vs Raymond Gormely [2014] IESC 17 [para 8.8]:**

> ***"....the suspect is [thereafter] no longer someone who is simply being investigated by the gathering of whatever evidence [that] might be available….the suspect has been deprived of his or her liberty and, in many cases, can be subjected to mandatory questioning for various periods….Once the power of the State has been exercised against the suspect in that way, it is proper to regard the process thereafter as being intimately connected with a potential criminal trial rather than being one at a pure investigative stage."***

328. Fair trial rights, we would therefore hold, must be deemed to include the rights guaranteed under Article 49 of the Constitution. A closer and liberal reading of Article 49 would reveal that the right to be arraigned before a court of law within twenty four hours

after being arrested and to be charged is not absolute. An arrested person has to be brought to court within twenty four hours and not necessarily to be charged with an offence. He may be brought to court to be informed of the reason for the detention continuing. He could also be brought to court to be released.

329. Evidently, the Constitution itself limits the 'arrested' person's rights. Sections 36A of the CPC, as urged by both the Solicitor General and the DPP has, in our view, extended the ambit and safeguards of this constitutional limitation. The court's discretion is now limited by way of specific statutory directions. It may well be argued that the Constitution, in setting a 24 hour time limit, anticipated a situation where the arrested person spent a lesser period in lawful detention or custody. While that may be so, the same Constitution left the period for any continued remand by order of the court too open ended and susceptible to abuse, even though the assumption, unless proven otherwise, must be that judicial officers always act constitutionally. The new legislation not only limits time but lays out a detailed process to be followed in stating a case for the continued remand of an arrested person. We are of the view that the provisions of Article 24(1) have been met. The limitation which is specific and keeps intact the constitutional provisions is reasonable and justifiable noting that the burden is imposed on the arresting officer to convince the court, under oath, that the continued remand of the suspect is necessary.

330. Section 15 of SLAA and 36A of the CPC are in our view, based on a reasonably structured statutory framework which deals comprehensively with alternatives available to both the arresting officer and the arrested person as well as to the court. We are therefore unable to find that they are unconstitutional and or in breach of Article 49 and 50 of the Constitution.

Section 16 of SLAA and Section 42A of CPC

331. The petitioners have also challenged the provisions of Section 16 of SLAA which has introduced Section 42A to the CPC.

332. This new section, besides re-encapsulating Article 50(2) (j) of the Constitution as to disclosure by the prosecution states that in proceedings under the Prevention of Terrorism

Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crime and Anti-Money Laundering Act and the Counter-Trafficking in Persons Act ("the Select statutes"), the prosecution may withhold certain prosecution evidence until "immediately" before the hearing if the evidence may facilitate the commission of other offences or it is not in the public interest to disclose such evidence or there are grounds to believe that disclosure of the evidence may lead to attempts to persuade a witness to retract his original statement or not appear in court. The section also defines what 'public interest' is and finally provides that the disclosure of evidence shall be done *in camera*.

333. The petitioners' submissions were to the effect that Section 42A offends the constitutional right to a fair trial in so far as the accused person is denied access to the evidence to be adduced by the prosecution. To the petitioners, allowing access to the evidence immediately before the trial would mean the accused would not have sufficient time to prepare a defence as stipulated under Article 50(2) (c). It would also be contrary to the provisions of Article 50(2) (j) which entitles the accused to the prosecution's evidence in advance.

334. In response, the AG submitted that the right to a fair trial was not limited by Section 42A of the CPC in any way. In his view, the accused would still get the evidence and documents but only at a time when he could not interfere with the process or witnesses. There would also be no prejudice as the accused can always apply for an adjournment. The AG also urged the Court to consider the doctrine of public interest immunity as Section 42A would be applicable to only offences under the Select statutes. The DPP added that the utility of this new section was that informers and witnesses would be protected.

335. We would start by making reference to and adopting the statements of Lord Bingham of Cornhill in the case of **Randall vs R [2002]1 WLR 2237** where, despite the Court holding that it was not possible to maintain impeccable standards of conduct throughout the course of a long criminal trial, the Court nevertheless was firm that the right to a fair trial is absolute. Lord Bingham stated at page 2250:

> ***"The right of a criminal defendant to fair trial is absolute..... It is to be enjoyed by the guilty as well as the innocent for a defendant is presumed to be innocent until proven to be otherwise in a fairly conducted trial"***

336. Likewise, in this jurisdiction, the Court in **Samuel Githua Ngari and Another vs Republic, Criminal Appeal No 34 of 2012** consolidated with **High Court Criminal Appeal No 70 of 2012** reaffirmed this position when it stated thus:

> **"*It is important to note at this juncture that the right to a fair trial is absolute in the sense that under Article 25 of the Constitution, it is one of those rights and fundamental freedoms that cannot be limited*."**

337. We agree fully with the Courts' sentiments above and we also note that Article 25 of the Constitution confirms this fixed seat of the right to a fair trial. Consequently, attempts to curtail this right, whether by legislation or in the course of criminal proceedings, must always be frowned at. The same way that it is the responsibility of a judge to ensure that proceedings are conducted in an orderly and proper manner which is fair to both the prosecution and the defence and in adherence to the Constitution is the same way it is the responsibility of the Legislature to ensure that the right to fair trial, as a fundamental right, is not derogated from through legislation.

338. Against this high standard, we must now determine whether Section 42A of the CPC amounts to a violation of the right to a fair trial encapsulated under Article 50.

339. Section 42A deals with disclosure of or non-disclosure of evidence in camera to both the court and to the accused person. The AG and the DPP in submissions conceded the accused person's right generally to such evidence as may be in the hands of the prosecutor. They, however sought to justify the withholding of evidence on the basis of public interest, which the section has defined to include matters of national security and protection of witness identity.

340. There is no doubt that disclosure of evidence is prompted by fairness. That duty of disclosure runs through all stages of the criminal process in relation to an accused person even though the level of disclosure may not, in our view, be the same at every stage.

Disclosure is required at the very early stage for the obvious reason that the accused person must prepare his defence. What must be disclosed is material relevant to the case. It does not matter whether it strengthens the accused person's case or touches on issues of public interest. It does not matter either that the evidence or material exculpates the accused: see **Morris Kinyalili Liema v Republic (2012)eKLR.**

341. While we agree that the doctrine of public interest immunity in relation to the State is for ever alive to ensure that the administration of justice especially in the criminal sphere is never compromised, we would by the same vein express what the Court in the case of **Taylor Bonnet vs The Queen (2013) 2 Cr. App R 18** stated: the overall fairness of a criminal trial should never be compromised even if a limitation on the rights to a fair trial is geared towards " ***a clear and proper public objective***". It is in this context too ,that in relation to withholding evidence on the grounds of public interest, Lord Bingham stated in **R vs H and C [2004] 2 AC 134** as follows at paragraph 14 of the judgment:

> ***"Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the Defendant, if not relied on as part of its formal case against the defendant should be disclosed to the defence. Bitter experience has shown that miscarriage of justice may occur where such material is withheld from disclosure".***

342. Stripped to detail, Lord Bingham's statement was to the effect that public interest should never be the lead criteria behind a limitation to the right to fair trial. We would agree. There is no doubt that circumstances may exist where disclosure may seriously undermine and prejudice public interest but, under Article 25 of the Constitution the right to a fair trial can never be derogated from. In our view, Section 42A of the CPC does not seem to appreciate this. There is a rather blanket right on the part of the prosecution to withhold disclosure until immediately before the hearing. As was held by the Constitutional Court of Uganda in the case of **Kim vs Attorney General [2008] 1 EA 168**, in an open and democratic society, trial by ambush must not be approved of.

343. In the instant case that appears not to be the position. The right to determine what the statute calls 'certain' evidence is with the prosecution. The prosecution discloses such evidence in camera and only immediately before the hearing begins. This is to happen with the leave of the court. The word 'immediately', used in the said section however gives

the perfect intent a different perspective. Given a plain, natural and practical meaning, the word 'immediately' means without any interval or space of time. It means the same as forthwith without any intervening period or space: ***see Stroud's Judicial Dictionary of Word's and Phrases, 2000 Ed***.

Comment [A7]: ?

344. In the context of section 42A of the CPC, we would say it is meant to be co-terminus with the hearing. It would in the circumstances of the statute, mean that an accused person under the Select statutes would have no time to prepare his defence, to interrogate the evidence, to consult with his counsel if he has one and no time to challenge the evidence. The section does not suggest that the leave of the court is to be obtained in advance and we would have to strictly construe that to mean that the leave is being obtained at the time of disclosure. That would be contrary to what the Constitution prescribes under Article 50 (2) (j).

345. The disclosure contemplated under the Constitution is to be made in '***advance'*** and such prescription was with a purpose and deliberately so. A provision of the law which states or prescribes otherwise would be unconstitutional.

346. In our view, disclosure immediately before the trial would derogate from not only the right to have adequate time to prepare one's defence but also the right to be informed in advance of the evidence the prosecution intends to rely upon.

347. The AG's submissions were also to the effect that if the disclosure is made immediately before the trial, the accused person could always apply for an adjournment. Our brief answer to that is the accused under Article 50(1) (e) is entitled to the right to have his trial begin and conclude without unreasonable delay. We would also add that the mischief sought to be corrected with the late disclosure of evidence would in any event be negated by the fact of granting an adjournment.

348. Section 42A of the CPC cannot therefore be justified in so far as the decision to disclose is left to the prosecution *"until immediately before the hearing".* It would be contrary to the purpose of Article 50(2) (j). It will lead to trials by ambush which both the Constitution as well as international law frown upon. In our further view and as regards the arguments by the DPP that the utility of this new section vis a vis the protection of witness identity is

crucial, we can only state that we are aware that there is already in place a statutory framework for the protection of witnesses as well as informers: see Witness Protection Act, 2006.

349. We have affirmed that the right to a fair trial is non-derogable. We have also found that Section 16 of SLAA and 42A of the CPC derogates from the right. We would rely on Article 25 which is explicit and hold Section 42A to be unconstitutional as it violates Article 50 (2) (j).

Sections 20 of SLAA and 364 of the CPC

350. We will now consider Section 20 of SLAA which amended Section 364 of the CPC by including an additional paragraph. The new paragraph is to the effect that where the Subordinate Court has granted bail to an accused person in the case of proceedings under the Select Statutes and the DPP has indicated an intention to apply for review of the order, then the order of the Subordinate Court is to be stayed for a further period of (14) days pending the filing of the application for revision.

351. The petitioners submitted that this amendment offends both Articles 49 (1) (h) and 159 of the Constitution as the amendment tampers with judicial authority. Mr. K.M Mwangi, was even more emphatic that *"the independence of the judiciary was being taken away by requiring in mandatory terms that a stay of an order granting bail must issue"*. On this issue the DPP conceded that by granting a stay through the use of the obligatory and binding word 'shall' rather than the discretionary and optional word 'may', the section limits the accused as well as any arrested person's right to be released on bail.

352. It is beyond controversy that an arrested person as well as an accused person is entitled to be released on bail or bond on reasonable grounds pending a charge or trial unless there are compelling reasons: see Article 49(1) (h). It is also beyond controversy that since release is secured through a court process, on the first appearance in court, it is the court that determines whether or not to release the accused or arrested person and on what terms, if any. There is already adequate local case law on principles which should guide the Court in the exercise of the discretion to grant bail with the main one being to give

effect to Article 49(1) (h) : see for example **Aboud Rogo Mohammed & Another vs R [2011] eKLR**.

353. In so far as the amendment seeks to have the accused person remanded notwithstanding an order releasing him on bail or bond we are of the view that the same amounts to an unnecessary affront to the accused's liberty earned through due process.

354. The amendment to Section 364 of the CPC in our view also limits the judicial authority of the court to make a determination on matters concerning bail and bond. There is no justification for this amendment and we, without hesitation, find the same to be unconstitutional whilst expressing gratitude to the DPP, in whose custody arrested and accused persons constructively are, for readily making a concession on this issue. We say no more on this issue and do not find it necessary to delve into the requirements of Article 24(1) of the Constitution.

Sections 21 of SLAA and 379A of the CPC

355. Alongside the amendment to Section 364 of the CPC was also the amendment by way of an additional insertion after Section 379 of the same statute. A new Section 379A has been introduced. Under the new section, in proceedings under the Select statutes, where the High Court in exercise of its original jurisdiction has granted bond or bail to an accused person, the DPP may as of right appeal against such decision to the Court of Appeal and the order may be stayed for a period not exceeding fourteen days pending the filing of an appeal.

356. Submissions on this issue by both the petitioners as well as the AG were analogous to the submissions made in respect to the amendments to Section 364 of the CPC.

357. We reiterate the position that the right of an arrested or accused person to be released on bail or bond terms as enshrined under Article 49(1) (h) is not absolute. The Constitution itself limits the same by stating that the existence of a compelling reason may lead to the accused or the arrested person not being released on bail or bond. Such reasons are

determined as genuine and valid or otherwise by a court. The wording of Section 379A of the CPC will not make the stay of the bail or bond orders *de rigueur* once the DPP opts to appeal to the Court of Appeal. The wording makes such stay optional. The discretion is with the Court, be it the appellate Court or the Court of first instance.

358. In our view, the constitutionality of Section 379A is thus not questionable as the safeguards of the limitation are clear in so far as the discretion is still with the court to grant stay for fourteen days and likewise the extent of the limitation is also clear in so far as it is limited to the Select statutes. With the knowledge that a court is not infallible, there will certainly be instances when release on bond or bail should not have been sanctioned and the appeal by the prosecution truly warranted.

Sections 26 of SLAA and 20A of the Evidence Act

359. The petitioners also faulted Sections 26, 29 and 31 of SLAA. These sections introduced various new sections to the Evidence Act immediately after Section 20 thereof.

360. Section 20 of the Evidence Act reads as follows:

> ***Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions*.**

361. Section 26 of SLAA has introduced a new section 20A immediately thereafter reading as follows:

> ***(1) If the person who makes a statement cannot read it, the statement shall be read to him by an officer of or above the rank of a Chief Inspector or a magistrate before he signs it, and an endorsement shall be made thereof by the person who so read the statement to the effect that it was so read.***
>
> ***(2) A copy of the statement, together with a copy of any document referred to in the statement as an exhibit, or with such information as may be necessary in order to enable the party on whom it is***

served to inspect such document or a copy thereof, shall, before the date on which the document is to be tendered in evidence, be served on each of the other parties to the proceedings, and any such party may, at least two days before the commencement of the proceedings, object to the statement being tendered in evidence under this section.

(3) If a party objects under subsection (2) that the statement in question be tendered in evidence, the statement shall not, but subject to the provisions of subsection (4), be admissible as evidence under this Section.

(4) If a party does not object under subsection (2) or if the parties agree before or during the proceedings in question that the statement may be so tendered in evidence, the statement may, upon the mere production thereof at such proceedings, be admitted as evidence in the proceedings.

(5) When the documents referred to in subsection (3) are served on an accused person, the documents shall be accompanied by a written notification in which the accused person is informed that the statement in question shall be tendered in evidence at his trial in lieu of the State calling as a witness the person who made the statement, but that such statement shall not without the consent of the accused person be so tendered in evidence if he notifies the prosecutor concerned, at least two days before the commencement of the proceedings, that he objects to the statement so being tendered in evidence.

(6) The parties to criminal proceedings may, before or during such proceedings, agree that any written statement referred to in subsections (1) which has not been served in terms of subsection (2) be tendered in evidence at such proceedings, whereupon such statement may, upon the mere production thereof at such proceedings, be admitted as evidence in the proceedings.

(7) Notwithstanding that a written statement made by any person may be admissible as evidence under this section-

(a) A party by whom or on whose behalf a copy of the statement was served, may call such person to give oral evidence;

(b) The Court may, of its own motion, and shall, upon the application of any party to the proceedings in question, cause the person giving oral evidence to be summoned before the court, or the court may, where the person concerned is resident

outside the court's jurisdiction, issue summons to be effected through the diplomatic channel.

(8) Any document or object referred to as an exhibit and identified in a written statement tendered in evidence under this section, shall be treated as if it had been produced as an exhibit and identified in court by the person who made the statement.

(9) Any person who makes a statement which is admitted as evidence under this section and who in such statement willfully and falsely states anything which, if sworn, would have amounted to the offence of perjury, shall be deemed to have committed the offence of perjury and shall, upon conviction, be liable to the punishment prescribed therefor.

362. The petitioners' contention was that Section 20A (6) of the Evidence Act as now amended creates a requirement that one must break his silence with regard to the facts to be proved by the prosecution. It is submitted that if an accused person chooses to remain silent then the facts in issue will be deemed to have been admitted. They submitted that this is in contravention of the right to fair hearing as guaranteed in Article 50 (2) (i) of the Constitution.

363. The AG argued that the amendment was justified and further submitted that it is similarly enacted in other jurisdictions. In this particular case he submitted that the provision is similar to Sections 9 and 10 of the Criminal Justice Act, 1967 of the United Kingdom, Paragraphs 7.1 to 7.4 of the United Kingdom's Practice Direction 22A on Written Evidence.

364. The DPP also contested the petitioners' position and submitted that the facts are only admitted with the express consent of an accused person and further that the court retains the discretion to summon the maker to attend court and testify. Reference to jurisdictions with similar provisions was also made by the DPP who particularly drew the Court's attention to Section 184 of the Evidence Act of Australia as well as the International Criminal Court's Rules of Procedure and Evidence. Terror Victims while opposing the petition contended that to expunge the new provision will invite difficulties in prosecution of terror suspects thus denying victim's justice as use of proof of written statement by consent is suspended.

365. We start by pointing out that Section 20A is not limited to persons charged under the Select statutes. It applies to all proceedings including for misdemeanours. We secondly note that this section did not generate much controversy except as it related to subsection (5).

366. A plain reading of Section 20A (3) together with sub-section (5) of the Evidence Act denotes that if a party objects to the production of witness statements, the statements shall not be tendered in evidence. When the statements are served on the accused person, the documents are to be accompanied by a written notification in which the accused person is informed that the statement in question shall be tendered in evidence at his trial in lieu of the State calling as a witness the person who made the statement. Furthermore, the section is to the effect that such statement shall not, without the consent of the accused person, be tendered in evidence if he notifies the prosecutor concerned, at least two days before the commencement of the proceedings, that he objects to the statement being tendered in evidence.

367. This provision leads us to posit the following questions; are two days sufficient for an accused person to examine and evaluate any such statement that is to be adduced as evidence against him? What happens if the accused person does not raise any objection two days prior to the commencement of the hearing, shall the same be tendered in evidence? If the answer to the second question is in the affirmative, does it violate the right of an accused person to remain silent?

368. The answer to the first question is in the positive while that to the other two must also be in the affirmative. We say so because, looking at the sections, they provide a timeline of at least two days, for which an accused person is supposed to notify the prosecutor of his objection to the tendering of such statement into evidence. An accused person, with an advocate in tow, should be able to comprehend a statement and determine its effect. He should be able to assess whether there is need to have the author of the statement summoned to testify or not. He should be able to decide too whether or not to have the statement admitted in evidence as drafted. This is however on the assumption that the statement is handed over to him early enough.

369. Under subsection 4, if the accused person does not object to the production of the statement at least two days prior to the proceedings, it means by implication, the same statement will be tendered in evidence without his consent. His silence is construed as an admission. Once admitted it is not open to the accused to challenge such admission. Subsection 4 generated even more controversy between the parties with the petitioners contending that it negated the right to silence.

370. Foremost, we would point out that the rationale behind the right to silence is the concern for reliability: see **Beghal vs DPP 2014, 2WLR 150** where the European Human Rights Court's decision at Strasbourg in **Saunders vs United Kingdom , 1996, 23 EHR313** was cited with approval. The right, which runs from the moment an individual is arrested and throughout a trial, gives effect to the privilege against self-incrimination and buttresses the presumption of the accused person's innocence: see **Beghal vs DPP (supra).** Because of the latter presumption the accused person cannot be forced into assisting in his or her own prosecution.

371. In our view, where a statute therefore states or purports to state that an accused person's non-reaction or silence in relation to what the prosecution seeks or says in relation to his indictment and trial including a statement(s) by the prosecution witness(es) means that the statement is to be admitted in evidence, then it would imply that the accused person is indirectly being forced to assist the prosecution in his own prosecution. This may also lead to the absurd scenario where there are no witnesses testifying but the accused is still convicted simply because he exercised his right to keep silent.

372. Besides, admission of statements without the maker being called to testify and with the accused person having kept his peace would also mean that the right to challenge evidence prompted by Article 50(2) (k) particularly through cross-examination would be transgressed.

373. For the reasons above we hold that Sections 26 of SLAA and 20A of the Evidence act as amended is unconstitutional as it limits the right to a fair trial by denying the accused the choice to keep silent.

Sections 29 of SLAA and 59A of Evidence Act

374. Section 29 of SLAA introduces an amendment to the Evidence Act. It provides as follows:

> ***The Evidence Act is amended by inserting the following new section immediately after section 59-***
>
> ***59A.***
>
> ***(1) If an accused person has appointed an advocate and, at any stage during the proceedings, it appears to a prosecutor that a particular fact of facts which must be proved in a charge against an accused person is or are not in issue or shall not be placed in issue in criminal proceedings against the accused person, the prosecutor may, forward or hand a notice to the accused person and his advocate setting out the fact or those facts and stating that such fact or facts shall be deemed to have been proved at the proceedings unless notice is given that any such fact shall be placed in issue.***
>
> ***(2) The notice by the prosecutor under subsection (1) shall be sent by registered mail or handed to the accused and his advocate personally at least fourteen days before the commencement of the criminal proceedings or the date set for the continuation of such proceedings, or within such shorter period as may be approved by the court or agreed upon by the accused person or his advocate and the prosecutor.***
>
> ***(3) If any fact mentioned in the notice under subsection (2) is intended to be placed in issue at the proceedings, the accused person and his advocate shall at least five days before the commencement or the date set for the continuation of the proceedings, or within such shorter period as may be approved by the court or agreed upon with the prosecutor, deliver a notice in writing to that effect to the registrar or the clerk of the court, as the case may be, or orally notify the registrar or the clerk of the court to that effect, in which case the registrar or the clerk of the court shall record such notice.***
>
> ***(4) If, after receipt of the notice from the prosecutor under subsection (1), any fact mentioned in that notice is not placed in issue as under subsection (3), the court may deem such fact or facts, subject to subsections (5) and (6), to have been sufficiently proved at the proceedings concerned.***

(5) If a notice was forwarded or handed over by a prosecutor under subsection (1), the prosecutor shall notify the court at the commencement of the proceedings of such fact and of the response thereto, if any, and the court shall thereupon institute an investigation into those facts which are not disputed and enquire from the accused person whether he confirms the information given by the prosecutor, and whether he understands his rights and the implications of the procedure and where the advocate of the accused person replies to any question by the court under this section, the accused person shall be required by the court to declare whether he confirms such reply or not.

(6) ***The court may on its own motion or at the request of the accused person order oral evidence to be adduced regarding any fact contemplated in subsection (4).***

375. The petitioners faulted this new section for being unconstitutional. Without being specific, their basic reasoning was that it tampers with the right to a fair trial. On the other hand, the Terror Victims averred that to expunge this new Section will create difficulties in prosecution of terror suspects thus denying victims of terror justice. On his part Mr. Muturi for the AG submitted that this new provision is similar to Section 184 of the Australian Evidence Act 1995, Sections 2 and 3 of the Evidence Act of New Zealand, 2006, Section 58 of the Bangladesh Evidence Act, 1872, Section 191 of the Evidence Act of Tasmania (Act No 76 of 2001), and Section 75 of the Evidence Act of Nigeria (CAP 112 of 1990) and added that the obvious intended effect was only to save precious judicial time. He submitted further that it actually complements Articles 50 and 159 (2) (b) of the Constitution on the right to a fair trial and principle of "justice shall not be delayed". Similar submissions were made by both the DPP as well as Jubilee who added that an accused person would stand to suffer no prejudice under the section as he is under no compulsion to consent to the admission of any facts.

376. We begin on the premise again that Section 59A of the Evidence Act is not peculiar to homeland or national security issues. It is not to apply to offences under the Select statutes only, but to all criminal proceedings where an accused person is represented by an advocate. The section would not apply where the accused is unrepresented. We also note that the section has several safeguards in relation to the accused person's constitutional rights. Our view is that these safeguards appear to neutralize the petitioners'

stand on this issue. Of critical import are the provisions which state that the agreement on facts will only be invited if the accused is represented by an advocate and also the fact that the accused has a choice, which is expressly granted by the statute. Thirdly, is the fact that the Court still has control over the process of admission of the facts contemplated by Section 59A.

377. Arguments by the petitioners that the accused person's right to silence would be infringed vide the provisions of subsection (4) cannot hold in the face of subsection (6) which is to the effect that the Court may still insist on oral evidence being adduced regarding the facts contemplated by Section 59A. That is where the accused person requests the Court or where the court of its own motion deems it fit.

378. Section 59A of the Evidence Act has adequate accommodating requirements to make us conclude that it is not unconstitutional to invite an accused person who is represented by counsel to admit certain facts in criminal proceedings. Such a process as submitted by both the AG and the DPP can only help to hasten the process of criminal proceedings and meet one of the tenets of fair hearing that the trial should begin and conclude without unreasonable delay. Of course, we emphasise that any judicial officer faced with the trial of an indigent accused person who has no advocate must not allow Section 59A to be invoked.

Sections 31 of SLAA and 78A of Evidence Act

379. The final point of contest, in so far as the constitutional right to a fair trial is concerned, cantered on Section 31 of SLAA. The section introduced a new Section 78A to the Evidence Act. This concerns admissibility of electronic and digital evidence which may be admitted even in its secondary form.

380. This section was challenged by the 3rd petitioner who submitted that it curtailed not only the rights of an accused person but also curbed the duty of the court in the process of admitting evidence. In response, the DPP was emphatic that the section was not unconstitutional but rather it "complimented and supplemented" the provisions of the

Evidence Act. The DPP further submitted that the new section provided safeguards including accuracy, weight and reliability to be attached to such evidence.

381. We would once again point out that the application of Section 78A is not limited to the offences under the Select statutes. We also note that the Evidence Act, in particular, Sections 64 to 69, allows the admission of secondary evidence as is specifically limited in proceedings before the court. It is worth noting that secondary evidence and the admission thereof is not new in our jurisdiction.

382. Secondary evidence has been defined in the case of **Mohammed Ali Mursel vs Saadia Mohammed & 2 Others Election Petition No. 1 of 2013** to mean "***evidence that is inferior to the primary or best evidence and that becomes admissible when the primary evidence is lost or inaccessible*.**" This definition is to be found in the **8th Edition** of **Black's Law Dictionary**. It would seem to us, a matter of common sense, that secondary evidence is only admissible when primary evidence, with good reason, is lacking.

383. We do not find Section 78A of the Evidence Act to be extraordinary. Foremost, it is evidently clear that the section expects the "best evidence" to be availed to court. Subsection (1) does not limit the evidence to its secondary form. A more liberal reading of the section would certainly give the effect that it is primary evidence that will be expected to be availed. The Court will be entitled to admit secondary evidence only if, a reasonable basis for it is laid. Coupled with the specific safeguards outlined in the section and the fact that the unconstitutionality of the section has not, in our view, been not been shown by the petitioners, we hold the view that Section 78A of the Evidence Act as amended meets constitutional muster in view of the ever evolving technology. We would, in the circumstances, be woefully dishonest if we were to hold that electronic evidence must at whatever cost be availed in its original form.

Entitlement to citizenship and Registration of Persons

384. The petitioners have impugned the provisions of Section 25 of SLAA on the basis that the amendments to the Registration of Persons Act through the introduction of Section 18A to the Act is unconstitutional as it violates the rights of citizenship guaranteed under Article 12 and 14 of the Constitution. **SLAA** introduces **Section 18A** to the **Registration of Persons Act** which provides;

> ***(1) The Director shall cancel registration and revoke the identity card of any person issued under this Act if the card was obtained through;***
>
> ***(a) Misrepresentation of material facts.***
> ***(b) Concealment of material facts.***
> ***(c) Fraudulently.***
> ***(d) Forgery.***
> ***(e) Multiple registration or***
> ***(f) Any other justifiable cause.***
>
> ***(2) Before cancellation of the registration and revocation of the identity card as provided in Sub-section (1), the Director shall notify the card holder in writing of the intention to cancel the registration and revoke the card unless the holder can show cause within fifteen days why the cancellation should not be done.***
>
> ***(3) The cancellation of a registration and the revocation of a card under Sub-section (2) shall not take effect until after the expiry of fifteen days from the date of cancellation and revocation to allow the card holder to appeal to a Court of competent jurisdiction.***
>
> ***(4) Any person whose registration has been cancelled and identity card revoked or whose citizenship has been otherwise revoked under an existing law shall be under obligation to surrender the identity card to the Registrar.***
>
> ***(5) The Director shall by notice in the Gazette publish the names and identity card number of the person whose registration is cancelled and the identity cards revoked.***

385. CORD submitted that this amendment does not satisfy **Article 24** of the **Constitution** as no remedy is given to a person whose documents are cancelled on grounds of fraud. The provision therefore contravenes Articles 12 and 14 of the Constitution to the extent that it is unreasonable and unjustifiable to deny a person who is not a Kenyan citizen by birth other documents of registration or identification. This may affect the enjoyment of other constitutional rights and civil liberties.

386. In response, the AG argued that the amendment is constitutional as it does not take away the right of an aggrieved person to go to court for redress. It was also the AG's submission that the section was on all fours with Article 17 of the Constitution which gives the right of cancellation of fraudulently acquired citizenship. Jubilee, agreed with the AG that the section was constitutional. It was its submission that the sections only apply to the revocation of identity cards of people who have acquired them illegally and further that there are adequate safeguards, including a right of appeal to court.

387. The mischief that the amendments to the Registration of Persons Act seek to address is captured in the affidavit sworn by Mr. Haron Komen. According to him, there are many cases of fake registration documents of persons who enter the country illegally, and that the movement of refugees to urban settlements through the exploitation of corrupt networks in registration systems has served to exacerbate the situation.

388. Under the provisions of Article 12 (1) of the Constitution every citizen is entitled not only to the rights, privileges and benefits of citizenship as may be limited, provided or permitted by the Constitution but also to be issued with a Kenyan passport and any other document of registration or identification issued by the State. Under Article 13(2) of the Constitution citizenship may be acquired by birth or registration.

389. Article 17(1) and (2) provides that citizenship may be revoked if the registration was acquired by fraud, false representation or concealment of any material fact by any person. The Constitution under Articles 12(b), 14 and 15 provides for the right of citizenship by birth and registration. Under Article 17 the right to citizenship may be revoked within the parameters provided therein. Further still the revocation of passports and other registration documents is also provided for under Article 12(2) which states:

> ***A passport or other documents referred to in Clause (1)(b) may be denied, suspended or confiscated only in accordance with an Act of parliament that satisfies the criteria mentioned in Article 24.***

390. We have considered the submissions of the parties on this issue. The impugned amendment seeks to control illegal registration and forgery by allowing the Director of Registration of Persons to cancel the registration and revoke the identity card of any person on the conditions and procedure provided in Section 18A (1) and (2). We note that the section provides an elaborate procedure with, in our view, adequate safeguards for the affected person. The person aggrieved not only has an opportunity to appear before the Director to explain his case but also has an opportunity to challenge the Director's decision in a Court of law. There is also no provision barring the affected person from reapplying for another identity card with the proper documents. A liberal reading of the section will reveal that a person likely to be affected by a decision of the Director is:

(i) Notified of the intention to cancel and/or revoke the identity card.

(ii) Given an opportunity by the Director to show cause why it should not be cancelled/revoked. (In other words a hearing is given).

(iii) If dissatisfied with the decision of the Director he/she has a chance to challenge the Director's decision, in a Court of Law.

391. We have also considered similar provisions in other jurisdictions. We note that in the United Kingdom, Section 11(2) of the Identity Cards Act, 2006 which deals with invalidity and surrender of Identity Cards, prohibition, forfeiture and seizure of bogus documents, provides that suspect and bogus documents which have been used to register identity cards or passports are cause for revocation or cancellation of the registration documents. Section 45A and B of the Australian Citizenship Act, 2007 is of similar effect.

392. We are therefore satisfied that Section 18A (1) and (2) of the Registration of Persons Act does not derogate the right to citizenship and/or registration of persons. The above safeguards ensure that the revocation of the identity card is not done arbitrarily. In the case of **Ali Hassan Osman vs The Minister For Immigration And Registration Of Persons & 4 Others, Nrb Petition No. 504 of 2012,** the Court upheld the decision by the Principal Registrar of Persons not to issue the petitioner with the new generation identity

card. The refusal was based on the fact that he had acquired the initial identity card under suspicious circumstances.

393. It is our finding therefore that identity cards can be revoked or cancelled as long as the correct procedure is adhered to. We further find that the right to citizenship under Article 12 of the Constitution has not been derogated from vide Section 25 of SLAA which introduced Section 18A to the Registration of Persons Act.

Right to movement and the rights of refugees

The Right to freedom of Movement

394. The petitioners have challenged Section 47 of SLAA which introduces Section 14(c) of the Refugee Act. They submit that it violates Article 39 of the Constitution of Kenya which provides as follows;

> ***(1) Every person has the right to freedom of movement.***
> ***(2) Every person has the right to leave Kenya.***
> ***(3) Every citizen has the right to enter, remain in and reside anywhere in Kenya.***

395. The right to freedom of movement is therefore not one of the absolute rights under Article 25 of the Constitution. It can be limited under Article 24(1). More importantly, however, Article 39 contains an inherent limitation-the right to enter, remain and reside anywhere in Kenya is guaranteed to citizens.

396. Section 47 of SLAA amended the Refugee Act by inserting a new paragraph after paragraph b – which states that a refugee shall "***not leave the designated refugee camp without the permission of the Refugee Camp Officer."***

397. Mr. Kamau submitted that the above provision is intended to limit the freedom of movement of refugees. In response Mr. Njoroge submitted that the refugees' right of movement was not absolute and could be limited. He referred to Article 2 of the 1951 Refugee Convention and Article 3 of the 1969 OAU Refugee Convention.

398. Article 2 of the 1951 Refugee Convention states;

> ***Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its Laws and regulations as well as to measures taken for the maintenance of public order.***

399. Article 3 of the OAU 1969 Refugee Convention states;

> ***(1) Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with measures taken for the maintenance of public order, he shall also abstain from any subversive activities against any member state of the OAU***

400. The new Section 14(c) of the Refugee Act applies only to those refugees who reside in the designated camps. One of the functions of the Refugee Camp Officer under Section 17(f) of the Refugee Act is to;

> ***Issue Movement passes to refugees wishing to travel outside the camps.***

401. The other functions relate to administrative and management activities in the Camp. There has been no objection raised to the provisions in Section 17 of the Refugee Act which outlines the functions of the Refugee Camp Officer. If the Refugee Camp Officer issues the movement passes to those wishing to travel outside the Camps, it clearly means none can leave the camp without the permission of the Refugee Camp Officer. The permission is through the issuance of a movement pass.

402. The government has a duty to protect and offer security to refugees and it is therefore important that the Refugee Camp officer knows the whereabouts of each refugee. This can only be checked by the refugee seeking permission and a movement pass issued to her/him. This is also important for accountability purposes in light of the security concerns raised by the AG. In any event, the right to enter, remain and reside anywhere in Kenya is constitutionally reserved to citizens and therefore there is no violation of the right to freedom of movement in requiring that refugees wishing to leave the camp obtain permission from the Camp Officer.

403. The limitation has been made to buttress Section 12(f) of the Refugee Act. And we therefore find that it is justified within the meaning of Article 24(1) of the Constitution.

404. The petitioners and Kituo as well as RCK, are aggrieved by the provisions of Section 48 of SLAA. The section amended the Refugee Act by inserting Section 16A which now provides as follows;

> ***(1) The number of refugees and asylums seekers permitted to stay in Kenya shall not exceed One Hundred and Fifty Thousand Persons***
> ***(2) The National Assembly may vary the number of refugees or asylum seekers permitted to be in Kenya.***
> ***(3) Where the National Assembly varies the number of refugees or asylum seekers in Kenya, such a variation shall be applicable for a period not exceeding six months only.***
>
> ***(4) The National Assembly may review the period of variation for a further six months.***

405. The argument against this provision is that it is unconstitutional as it negatively affects the rights of refugees and contravenes Article 2(5) and (6), 24(1) and 59(2)(g) of the Constitution; Articles 3, 4(d), 32, 33 and 34 of the 1951 Convention and Protocol Relating to the Status of Refugees, among other international instruments.

406. It was submitted that the country has a very large number of refugees and it has not been shown how the government will scale the number down to reach the figure of 150,000 refugees and asylum seekers which the amendment provides as the limit. The petitioners and some interested parties argued that there is a fear that a good number of refugees will be forced out of the country, in violation of the principle of *non-refoulment*.

407. Mr. Njoroge, submitted on behalf of the AG that the practice of setting a refugee policy is an acceptable international practice in open and democratic societies. He gave the example of the United States which he submitted is signatory to the 1951 Convention relating to the status of Refugees, yet by law sets the annual number of refugee admissions and allocation by regions. He argued further that the U.S. President consults with Congress on the numbers and submits a report to the House of Representatives and Senate on the proposed refugee ceilings. After consultations the President issues a Presidential determination on the ceiling per year. He gave the ceilings for various regions for the year 2014.

408. Mr. Njoroge submitted further that from the Kenyan scenario it is clear that there is a direct relationship between the presence of refugee populations and the number of terrorist attacks, for which groups based in Kenya are responsible. He mentioned the refugee camps in Northern and North Eastern Kenya, which are clouded with controversy ranging from smuggling of goods and weapons to harbouring of terrorists.

409. He further submitted that United Nations Resolutions 1269 (1999) and Resolution 1373 (2001) call upon States to prevent the granting of refugee status to those who plan, facilitate or participate in terrorism and to ensure that refugee status is not abused.

410. It was also the AG's submission that there are provisions under which a refugee may be expelled to a third country and/or have his/her refugee status cancelled. It was his submission that Section 16A of the Refugee Act is not against the principle of *non-refoulment* and neither is there any indication that refugees will be forcefully returned to places of hostility.

411. The AG relied on the case of **Beatrice Wanjiku & Anor vs A.G & Anor [2012] eKLR** and urged the Court to place a higher premium on Kenyan legislation with regard to regulation of refugees instead of similar provisions of international law.

412. The AG further cited the provisions of Article 4 of the ICCPR and submitted that the provision permits a State to derogate from its obligations in times of public emergency which threatens the life of the Nation and the existence of which is officially proclaimed. The AG's argument was that the country was at war, just that one had not been declared. According to Mr. Muturi, the country, which had a refugee population of approximately 450,000, had experienced 112 terrorist attacks between2011-2014.

413. The petitioners and the interested parties supporting the petition countered that Kenya is not under a state of emergency. They further submitted that though the AG stated that the State is not forcefully returning refugees to danger zones, the effect of some of its policies may indirectly lead to violation of the said principle of *non-refoulement*.

414. The question that we must address ourselves to is whether the State can set a cap on the number of refugees allowed into the country, without running afoul of the Constitution and international treaties to which it is a party, and which now, under Article 2(5) and (6), are part of Kenyan law. Article 2(5) of the Constitution of Kenya provides that ***"The general rules of international Law shall form part of the Law of Kenya"*** while Article 2(6) states that ***"Any Treaty or Convention ratified by Kenya shall form part of the Law of Kenya under this Constitution."***

415. We begin by considering the status of a refugee in law. A refugee is defined in Section 3(1) of the Refugee Act as a person;

> **(1)**
>
> ***(a)*** ***Owing to well-founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion is outside the County of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that County; or***
>
> ***(b)*** ***Not having a nationality and being outside the County of his former habitual residence is unable or, owing to a well-founded fear of being prosecuted for any of the aforesaid reasons is unwilling to return to it.***
>
> **(2)** ***A prima facie refugee is a person who owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his Country of origin or nationality is compelled to leave his place of habitual residence in order to seek refugee in another place outside his Country of origin or nationality*****.**

416. An asylum seeker on the other hand is defined under the Refugee Act as a person seeking refugee status in accordance with the provisions of the said Act.

417. The 1951 Convention on the Status of Refugees together with the 1967 Protocol prescribe a fundamental system of protection for refugees. The structure of rights and standards of treatment of refugees is built upon two key Articles, from which no derogation is permitted, and in respect of which no State reservations may be made.

418. These are Articles 1 of the 1951 Convention which defines who a refugee is. The definition is *pari materia* Section 3 of the Refugee Act of Kenya set out above. The other

relevant Article is Article 33 of the 1951 Convention which sets out the principle of *non-refoulment*. It provides as follows:

> ***No contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.***

419. This Article is *pari materia* Section 18 of the Refugee Act, which states as follows:

> ***18 No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to be subjected to any similar measure as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a Country where;-***
>
> ***(a) The person may be subject to persecution on account of race, religion, nationality membership of a particular social group or political opinion;***
>
> ***(b) The person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that Country.***

420. *Non-refoulment* is also expressed in Article 3 of the 1984 UN Convention against Torture; Article 11(3) of the 1969 OAU Convention; Article 12(3) of the 1981 African (Banjul) Charter of Human and Peoples' Rights; and Article 22(8) of the 1969 American Convention on Human Rights, among others.

421. Thus, both domestically and internationally, the cornerstone of refugee protection is the principle of *non-refoulment* the principle that no State shall return a refugee in any manner whatsoever to where he or she would be persecuted. This principle is widely held to be part of customary international law.

422. What emerges from these international covenants and instruments is that a refugee is a special person in the eyes of the law, and he or she must be protected. Further, since Kenya is a signatory to the regional and international covenants on the rights of refugees set out above, which are now, under the Constitution, part of the law of Kenya, she is bound to abide by them. The question is the extent to which she is bound.

423. The AG relied on the decision of Majanja J in the case of **Beatrice Wanjiku & Anor vs A.G and Anor (supra)** where he stated as follows:

> ***"… the use of the phrase "under this Constitution" as used in Article 2(6) of the Constitution means that the International Treaties and Conventions are subordinate to, and ought to be in compliance with the Constitution. Although it is generally expected that the Government through its Executive ratifies international instruments in good faith on the behalf of and in the best interests of its Citizens, I do not think the framers of the Constitution would have intended that the international conventions and treaties should be superior to the local legislation and take precedence over laws enacted by their own chosen representatives under the provisions of Article 94. Article 1 places a premium, on the sovereignty of the people to be exercised through democratically elected of representatives and a contrary interpretation would put the Executive in a position where it directly usurps legislative authority, through treaties thereby undermining the doctrine of separation of powers which is part of our Constitutional setup.***
>
> ***I think a purposive interpretation and application of international Law must be adopted when considering the effect of Article 2(5) and (6)…."***

424. Mr. Njoroge urged us, in reliance on this decision, to place a higher premium on local legislation as opposed to international covenants. In our view, however, the view expressed by the court in the **Beatrice Wanjiku (supra)** case did not in any way mean that international covenants or treaties have no place in Kenya. What we understand him to say is that the Constitution remains supreme, in all circumstances. As long as the international instruments or treaties do not contravene the Constitution, they are binding on Kenya by dint of Article 2(5) and (6).

425. The AG defended the provisions of Section 48 of SLAA and 18A of the Refugee Act and submitted that it is an acceptable international practice to set a refugee policy. He cited as an illustration the case of the United States which is a signatory to the 1951 Convention but sets a cap on the number of refugees entering the country. We observe from the practice in the United States that there is no limit to the total number of refugees allowed into that country. As we understand it, the numbers alluded to by the AG for which

numbers and regions are set, relate to permanent resident entrants to the United States: see **United States Refugee Admissions and Resettlement Policy of 6th March, 2014**.

426. The amendment to the Refugee Act limits the number of refugees and asylum seekers permitted to stay in Kenya to 150,000. From the AG's submissions, the country has between 450,000 – 583,000 refugees presently staying in Kenya. One must ask, as do the petitioners and some of the interested parties, how the government intends to get rid of the extra 300,000 – 433,000 refugees. Mr. Njoroge argued, citing the US example, that it is in order to set a refugee policy, and that the US sets a limit on the annual number of refugee admissions. These are figures of refugees to be admitted into the U.S and maintained there during the year. That may well be so, but we have not been shown any legislative framework in the United States or any other country where the number of refugees entering any countries has been set.

427. A reading of the provisions of Section 18A of the Refugee Act shows that the intention is not to cap the number of refugees being admitted into Kenya but those allowed to stay. As Kenya already had 450,000 – 583,000 refugees, it means that for the country to reach the 150,000, not only must there be no admission of refugees, but that there has to be expulsion of about 430,000 refugees. The effect of Section 18A is to violate the principle of *non refoulment*, which is a part of the law of Kenya and is underpinned by the Constitution. The provisions of Section 48 of SLAA, as well as the provisions of Section 18A of the Refugee Act, are in our view, unconstitutional, and therefore null and void.

428. In closing on this issue, we must ask whether the State has no recourse, other than to violate the Constitution and international covenants on the treatment of refugees, in order to deal with refugees whom it deems to be engaged in criminal behaviour. We have considered the provisions of the Refugee Act and noted that it has clear provisions for dealing with refugees who are involved in criminal activities, including terrorism. Section 19 of the Act allows the Commissioner for Refugees Affairs to withdraw the refugee status of any person "***where there are reasonable grounds for regarding that person as a danger to national security or to any community of that Country."***

429. Section 20(1) permits the Commissioner to revoke the refugee status of any person where there are reasonable grounds to believe that he should not have been recognised as a refugee, or where his refugee status has ended; while Section 21(1) allows the expulsion of a refugee, after consultation with the Minister (now Cabinet Secretary) responsible for matters relating to immigration and internal security, if the Minister considers that the expulsion of the refugee or a member of his family is necessary on the grounds of national security or public order. These provisions on expulsion are similar to Article 32 of the 1951 Convention.

430. From the above provisions it is clear that the State has legal options for dealing with refugees whom it deems to have engaged in conduct that is not in conformity with their status as refugees, and setting a cap that would lead to violation of the Constitution.

Whether the provisions of SLAA are constitutional for violating Articles 238, 242 and 245 of the Constitution

431. The next issue to consider is whether the provisions of SLAA are unconstitutional for violating the provisions of Articles 238, 242 and 245 of the Constitution with regard to national security and appointment and tenure of office of the National Intelligence Service Director and Inspector General of Police. CORD argued that SLAA, through the amendments made to the Public Order Act, the National Police Service Act, and the National Intelligence Service Act, have violated the Constitution in various ways.

432. We consider the amendments to the three Acts and the alleged violations of the Constitution in turn.

The Public Order Act

433. CORD argued that Sections 4 and 5 of SLAA and the amendments they make to Sections 8 and 9 of the Public Order Act contravene Articles 238 and 239 of the

Constitution by substituting the 'Cabinet Secretary' for 'the Commissioner of Police'. Its argument, which was supported in submissions by the other petitioners and some of the interested parties, was that a Cabinet Secretary, not being a member of any security organs, would not be obligated to comply with the principles of the national security organs or to perform the functions or to exercise the powers of the national security organs as stipulated in Article 239(3) of the Constitution.

434. Section 4 of SLAA provides as follows:

> ***Section 8 of the Public Order Act is amended-***
>
> ***(a) in subsection (1) by-***
>
> ***(i) deleting the words "Commissioner of Police or Provincial Commissioner" and substituting therefor the words "Cabinet Secretary, on the advice of the Inspector- General of the National Police Service";***
>
> ***(ii) deleting the expression "(being, in the case of a Provincial Commissioner within his province)";***
>
> ***(b) by deleting subsection (4);***
>
> ***(c) in subsection (6) by deleting the term "one thousand" and substituting therefor the term "ten thousand.***

435. Section 5 of SLAA amends Section 9 of the Public Order Act and provides that :

> ***Section 9 of the Public Order Act is amended-***
>
> ***(a) in subsection (1) by deleting the term "province" and substituting therefor the term "county";***
>
> ***(b) in subsections (3) by deleting the term "Commissioner of Police" and substituting therefor the term " Cabinet Secretary";***
>
> ***(c) in subsection (6) by deleting the term "one" and substituting therefor the term "ten".***

436. In response, the AG argued that these sections and the amendments only seek to bring Sections 8 and 9 of the Public Order Act into conformity with the Constitution and the offices created thereunder. It was also the State's case that the amended sections relate

to the powers to impose curfews by the Cabinet Secretary and those powers must be read with the provisions of Articles 240(1) and (3) and 153 of the Constitution.

437. Prior to the amendment to Section 8 of the Public Order Act, the powers contained therein were vested in the Police or Provincial Commissioner. The effect of the changes is to vest the power to impose a curfew on the Cabinet Secretary.

438. Article 239(3) of the Constitution states as follows:

> ***(3) In performing their functions and exercising their powers, the national security organs and every member of the national security organs shall not—***
>
> ***(a) act in a partisan manner;***
>
> ***(b) further any interest of a political party or cause; or***
>
> ***(c) prejudice a political interest or political cause that is legitimate under this Constitution.***

439. It is true, as submitted by CORD, that the Cabinet Secretary is not a member of the Security Organs set out in Article 239 which are the National Defence Force, the National Police Service and the National Intelligence Service. However, the Cabinet Secretary is, first, a public or state officer as defined in Article 260 of the Constitution and who is bound by the provisions of the Constitution and subscribes to an oath of office. Secondly and more importantly, the Cabinet Secretary is a member of the National Security Council established under Article 240 of the Constitution and comprises, among others, the Cabinet Secretaries responsible for defence, foreign affairs and internal security.

440. The National Security Council is mandated, under Article 240 (3) to "…***exercise supervisory control over national security organs and perform any other functions prescribed by national legislation.***" That being the case, in our view, there is nothing in the substitution of the Commissioner of Police with the Cabinet Secretary that violates the Constitution. The only limitation, in our view, is that the section does not specify which Cabinet Secretary is being substituted, so that one is left to assume that it is the Cabinet Secretary in charge of internal security.

Appointment and tenure of office of Inspector General of Police

441. The petitioners and Katiba have challenged the provisions of Section 86 of SLAA, which deals with the appointment of the Inspector General of Police. They contended that amending the National Police Service Act to provide for appointment of the Inspector General of Police directly by the President is wrong and unconstitutional.

442. Section 86 of SLAA provides as follows:

> ***Section 12 of the National Police Service Act is amended by-***
>
> ***(a) deleting subsection (2) and substituting therefor the following subsection-***
>
> ***(2) The President shall, within fourteen days after a vacancy occurs in the office of the Inspector-General, nominate a person for appointment as an Inspector-General and submit the name of the nominee to Parliament.***
>
> ***(b) deleting subsections (3), (4), (5), and (6).***

443. To understand the challenge to Section 86, it is important to set out the provisions of Section 12 of the National Police Service Act prior to the amendment. It stated as follows:

> ***(1) Whenever a vacancy arises in the office of the Inspector-General, the Commission shall, within fourteen days from the date of the occurrence of the vacancy, by notice in the Gazette and at least two other daily newspapers of national circulation, declare the vacancy, and request for applications.***
>
> ***(2) The Commission shall consider the applications, conduct public interviews and shortlist at least three persons qualified for the position advertised for under subsection (1).***
>
> ***(3) The names of the persons shortlisted under subsection (3) shall be published in the Gazette.***
>
> ***(4) The Commission shall within seven days from the date of short listing of qualified candidates under subsection (3) forward the shortlisted names to the President for nomination of the Inspector-General.***

(5) The President shall, within seven days of receipt of the names forwarded under subsection (5), by notice in the Gazette, nominate a person for appointment as Inspector-General from among the shortlisted names and submit the name of the nominee to Parliament for approval;

(6) Parliament shall, within fourteen days after it first meets after receiving the name of the nominee—

(a) vet and consider the nominee, and may either approve or reject the nomination, and

(b) notify the President as to its approval or rejection.

444. Prior to the amendments introduced by Section 86, the law as set out in the National Police Service Act required competitiveness and public participation in the process of appointment of the Inspector General of Police. The National Police Commission was required to advertise the position, receive applications, shortlist and carry out interviews. It would then forward the results to the President who would then nominate one candidate and forward his name to Parliament for approval.

445. KNCHR argued that the amendment usurps the powers of the National Police Service Commission provided under Article 246(3) of the Constitution, which provides as follows:

(3) The Commission shall—

(a) recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service;

(b) observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service; and

(c) perform any other functions prescribed by national legislation.

446. In our view, Article 246(3) must be read together with the preceding Article 245 which deals with the command of the National Police Service and provides as follows:

245. (1) There is established the office of the Inspector-General of the National Police Service.

(2) The Inspector-General—

(a) is appointed by the President with the approval of Parliament; and

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

447. It appears to us that the provisions of Section 12 of the National Police Service Act, in keeping with the spirit of the Constitution with regard to public participation, was not in conformity with the provisions of the Constitution at Article 245. The Article is, in our view, clear that it is the President who, with the approval of Parliament, appoints the Inspector General of Police.

448. The provisions of Article 246(3) give the National Police Service Commission, of which the Inspector General of Police is a member in accordance with the provisions of Article 246(2), power to deal with the appointment, recruitment and discipline of other officers in the Service. If the people of Kenya intended that the Inspector General of Police be appointed by the National Police Service Commission, then the Constitution should not have vested such powers in the President under Article 245(2) (a).

449. In the circumstances, we take the view that the amendments to Section 12 of the National Police Service Act is in accord with the Constitution. While the competitive process and public participation that the previous provisions of Section 12 engendered were more in keeping with the spirit of openness that Kenyans desired under the Constitution, it is expected that the provision for Parliamentary approval will provide an opportunity for public participation in the appointment, not only through the elected representatives, but also through the opportunities for such participation that Parliament is constitutionally required by Article 118 of the Constitution to accord the public.

Creation of the National Police Service Board

450. KNCHR in its submissions argued that taken as a whole, the effect of SLAA is to usurp the powers and functions of the National Police Service Commission. More specifically that, Section 95 of SLAA introduces Section 95A to the National Police Service Act which creates the National Police Service Disciplinary Board. The Board is mandated to inquire into matters related to discipline of officers of the rank of or above assistant superintendent, undertake disciplinary proceedings and finally determine and make recommendations to the National Police Service Commission ("the Commission") including recommendation for summary dismissal.

451. The amendment also empowers the Board to devolve its functions to county **"*formation, unit and station levels*".** The person presiding shall be an officer who ordinarily qualifies to be appointed as a judge.

452. It was submitted that, the result of creation of the Board is that the Commission's role of exercising disciplinary control over persons holding or acting in offices within the service is usurped thus diminishing its constitutionally protected mandate. Further that, if the intention of SLAA was to manifestly change or diminish or alter the functions and mandate of the Commission, then the same should be in accordance with Article 255(g) of the Constitution which contemplates amendments to the Constitution through universal suffrage.

453. We have carefully considered the amendment against the constitutional provisions set out above. We note that the duties of the Board are to inquire into matters related to discipline for officers of the rank of or above assistant superintendent, to undertake disciplinary proceedings, and to determine and make recommendations to the Commission, including recommendation for summary dismissal. These functions, in our view, conflict with and overlap with those vested in the Commission under Article 246(3) of the Constitution which mandates the Commission to ***"observe due process, exercise disciplinary control over and remove persons holding or acting in offices within the service."***

454. The effect of the amendment to the Act is to create two disciplinary processes for officers of or above the rank of assistant superintendent, one to be undertaken by the Board and the other by the Commission. The AG did not address us on this issue, so we do not know what the rationale for the amendment is. We are, however, satisfied that the amendment runs contrary to the provisions of Article 246(3) of the Constitution which vests powers of recruitment, appointment and discipline in the National Police Service Commission. The existence of such a Board would not only whittle down the powers and mandate of the Commission and create conflict and confusion, but would also be a violation of the Constitution. We therefore find and hold that the amendment is unconstitutional.

Offices of the Director General of the National Intelligence Service and the Deputy Inspector General of Police

455. Although submissions were made with regard to the two offices above, on consideration of those submissions, we found no serious constitutional questions for our determination and we shall therefore say nothing on that matter.

Conclusion

456. This judgment has raised important questions regarding the role of this Court in determining issues relating to the legislative process and we have determined that whereas under Article 165(3) (d) of the Constitution as read with Articles 22(1) and 23(1), the High Court has wide interpretative powers donated by the Constitution, it must be hesitant to interfere with the legislative process except in the clearest of cases. The words of Nzamba Kitonga, SC must therefore ring in the ears of all; that the High Court should not be turned into an alternative forum where losers in Parliamentary debates rush to

assert revenge on their adversaries. It would render parliamentary business impossible if the deliberate disruption of legislative proceedings by a member or members unhappy with decisions of the speaker was to lead to invalidation of legislation by the courts. In saying so, we maintain that the doors of the courts shall remain open and deserving litigants will always obtain relief from the fountain of justice.

457. The role of the media and the need for discipline, self-regulation and care in the publication of sensitive stories has also come to the fore. Although we have upheld the objections to certain Sections of SLAA that infringe on the free press, the media also ought to know that the issues raised in SLAA are not idle.

458. The tort of privacy may not be known to many a media house. It is alive and well and may sooner or later; find its way into our jurisprudence and bite, not through Constitutional litigation but ordinary civil litigation. Reckless reporting and insensitive publication of gory pictures of the dead and victims of terrorist attacks as happened during the Mandera killings of 2014 may well attract painful Court sanctions including damages. Blogs and social media, generally, may also not escape that sanction.

459. In the fight against terrorism, there is absolute need to balance the right to information with the commensurate duty to ensure that terrorists do not use media reports to achieve their deadly ends. The State has to be innovative in fighting terrorists but within the framework of the Constitution and particularly the Bill of Rights. The media must also be careful not to give solace and comfort to terrorist by publication of images that may be taken to glorify and give impetus to acts of terrorism.

460. The roles of the Speakers of both the Senate and the National Assembly have also come into sharp focus. Whereas we have found no wrong-doing on their part based on the evidence before us and no more, it is incumbent upon them to ensure that their constitutional and Standing Order obligations are undertaken to the highest standards. The respect and dignity of the two Houses can hardly be maintained if the Chambers are turned into anything other than hallowed legislative temples.

461. Let this judgment therefore send a strong message to the Parties and the World; the Rule of Law is thriving in Kenya and its Courts shall stand strong; fearless in the exposition of the law; bold in interpreting the Constitution and firm in upholding the judicial oath.

462. Finally we express our gratitude to counsel appearing for the parties for their in-depth research, diligence and decorum extended to Court and to each other. We also thank our research assistants for their support in preparation of this judgment.

Disposition

463. We now summarise our findings above which are as follows;

(a) **On whether the Court has jurisdiction to determine the present petitions,** we find that:

(i) The Petition raises issues that are justiciable and ripe for determination by this Court.

(ii) The Court is bound by the doctrine of avoidance but it does not apply in the present circumstances. It has jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution.

(iii) The doctrine of separation of powers does not prevent this Court from examining whether the acts of the Legislature and the Executive are inconsistent with the Constitution as the Constitution is the supreme law.

(iv) Kenya National Commission on Human Rights (KNCHR) as an independent commission can lodge a petition alleging a violation of the Constitution by the State or other State organs.

(b) **On whether the process of enactment of SLAA was in violation of the Constitution**, we find as follows:

(i) That the Speaker of the Senate was consulted in determining whether SLAA was a Bill concerning counties. There was concurrence between the Speakers of the National Assembly and the Senate that SLAA did not concern counties.

(ii) That there was reasonable public participation in the process leading to the enactment of SLAA.

(iii) Based on evidence before the Court, there was no violation of Standing Orders of the National Assembly.

(iv) In light of (i), (ii) and (iii) above, presidential assent to the Bill was constitutional.

(c) **On the question whether the impugned provisions of SLAA were unconstitutional for violating the Bill of Rights** we find as follows:

(i) Section 12 of SLAA and Section 66A of the Penal Code are unconstitutional for violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution.

(ii) Section 64 of SLAA which introduced Sections 30A and 30F to the Prevention of Terrorism Act are unconstitutional for violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution.

(iii) Section 34 of SLAA is unconstitutional in so far as it includes “telescopes” in Section 2 of the Firearms Act.

(iv) Section 56 of SLAA and the new Section 42 of the National Intelligence Service Act as well as Section 69 of SLAA and Section 36A of the Prevention of Terrorism Act are constitutional and do not violate the right to privacy guaranteed under Article 31 of the Constitution.

(v) Section 15 of SLAA which introduced Section 36A to the Criminal Procedure Code (CPC) is constitutional and does not breach the right of arrested persons as provided for under Article 49 of the Constitution and the right to fair trial as provided for under Article 50(2) of the Constitution.

(vi) Section 16 of SLAA and Section 42A of CPC are unconstitutional as they violate the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on as provided under Article 50(2) (j) of the Constitution

(vii) Section 20 of SLAA which introduced Section 364A to the CPC is unconstitutional for being in conflict with the right to be released on bond or bail on reasonable conditions as provided for under Article 49(1) (h) of the Constitution.

(viii) Section 21 of SLAA which introduced Section 379A to the CPC is constitutional and does not violate the right to be released on bond or bail on reasonable conditions as provided for under Article 49(1)(h) of the Constitution.

(ix) Section 26 of SLAA which introduced Section 20A to the Evidence Act is unconstitutional for violating the right to remain silent during proceedings as guaranteed under Article 50(2) (i) of the Constitution.

(x) Section 29 of SLAA which introduced Section 59A to the Evidence Act is constitutional and is not in violation of the right to remain silent during proceedings as provided for under Article 50(2) (i) of the Constitution.

(xi) Section 31 of SLAA which introduced Section 78A into Evidence Act is Constitutional and does not violate the right to fair trial as enshrined in Article 50 of the Constitution.

(xii) Section 25 of SLAA which introduced Section 18A to the Registration of Persons Act is constitutional and does not violate the right to citizenship under Article 12 of the Constitution.

(xiii) Section 47 of SLAA which amended the Refugee Act of 2006 by introducing paragraph (c) to Section 14 is constitutional and does not violate the right to movement as provided for under Article 39 of the Constitution.

(xiv) Section 48 of SLAA which introduced Section 18A to the Refugee Act, 2006 is unconstitutional for violating principle of *non-refoulment* as recognized under the 1951 United Nations Convention on the Status of the Refugees which is part of the laws of Kenya by dint of Article 2(5) and (6) of the Constitution.

(d) **On whether the provisions of the Act are unconstitutional for violating the provisions of Articles 238, 242 and 245 of the Constitution with regard to the national security, appointment and tenure of office of the Inspector General of Police, creation of National Police Service Board and the appointment and tenure of the National Intelligence Service Director General and the Deputy Inspector General of Police**, we find as follows:

(i) Section 4 and 5 of SLAA and Section 8 and 9 of Public Order Act are constitutional and do not violate Articles 238 and 239 of the Constitution.

(ii) Section 86 of SLAA which amended Section 12 of the National Police Service Act is constitutional and is consistent with Article 245 and does not violate Article 246(3) of the Constitution.

(iii) Section 95 of SLAA which introduced Section 95A to the National Police Service Act and creates the National Police Service Board is unconstitutional and violates Article 246(3) of the Constitution.

Final orders

464. In the premises we make, the following declarations and orders:

(a) Section 12 of the Security Laws (Amendment) Act and Section 66A of the Penal Code is hereby declared unconstitutional for violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution.

(b) ***Section 64 of Security Laws (Amendment) Act which introduced Sections 30A and 30F to the Prevention of Terrorism Act is hereby declared unconstitutional for violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution***.

(c) Section 34 of the Security Laws (Amendment) Act is hereby declared unconstitutional in so far as it includes "telescopes" in Section 2 of the Firearms Act.

(d) Section 16 of the Security Laws (Amendment) Act and Section 42A of Criminal Procedure Code are hereby declared unconstitutional as they violate the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on as provided under Article 50(2) (j) of the Constitution

(e) Section 20 of the Security Laws (Amendment) Act which amended Section 364A of the Criminal Procedure Code is hereby declared unconstitutional for being in conflict with the right to be released on bond or bail on reasonable conditions as provided for under Article 49(1) (h) of the Constitution.

(f) Section 26 of the Security Laws (Amendment) Act which introduced Section 26A into the Evidence Act is hereby declared unconstitutional for violating the right of an accused person to remain silent during proceedings as guaranteed under Article 50(2) (i) of the Constitution.

(g) Section 48 of the Security Laws (Amendment) Act which introduced Section 18A to the Refugee Act, 2006 is hereby declared unconstitutional for violating the principle of non-refoulment as recognized under the 1951 United Nations Convention on the Status of Refugees which is part of the laws of Kenya by dint of Article 2(5) and (6) of the Constitution.

(h) Section 95 of the Security Laws (Amendment) Act which introduced Section 95A to the National Police Service Act and created the National Police Service Board is hereby declared unconstitutional for violating Article 246(3) of the Constitution.

465. As for costs, it is a matter within the discretion of the Court. Given the nature of this petition which raises matters of great public interest and importance we order that each party bears its own costs.

466. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2015.

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ISAAC LENAOLA

JUDGE

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MUMBI NGUGI

JUDGE

……

HEDWIG ONG'UDI

JUDGE

……

HILLARY CHEMITEI

JUDGE

……

JOSEPH LOUIS ONGUTO

JUDGE