REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO. 377 OF 2015

CONSOLIDATED WITH PETITION NO. 395 OF 2015 AND JR NO. 295 OF 2015

KEVIN K. MWITI & OTHERS…..……..PETITIONERS

VERSUS

KENYA SCHOOL OF LAW.....1ST RESPONDENT

COUNCIL FOR LEGAL EDUCATION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

Introduction

1. The Petitioners/Applicants (hereinafter referred to as "the Petitioners" for ease of reference)in these consolidated petitions/applications (hereinafter referred to as "the Petitions" for ease of reference) are law students from various universities in this Country at various stages of their qualifications some having graduated from the universities and some in the course of their graduation.
2. The 1st Respondent is a public legal education service provider established under the ***Kenya School of Law Act*** but regulated by the Council for Legal Education and is responsible for, inter alia, professional training of persons to be advocates under the Advocates Act as an agent of the Government. It will hereafter be referred to as "the School".
3. The 2nd Respondent is a public entity established under the ***Legal Education Act***, 2011 and is mandated to inter alia regulate legal education and training in Kenya. (It will hereinafter be referred to as "the Council").
4. The 3rd Respondent is the principal legal adviser to the Government of Kenya. (It will hereinafter be referred to as "the AG").
5. The facts of these consolidated Petitions are largely not in dispute.
6. Prior to January, 2013, the law governing admissions to the Advocates Training Programme was the ***Council of Legal Education Act*** Cap 16A, Laws of Kenya with its attendant Regulations vide ***The Council of Legal Education (Accreditation) Regulations, 2009*** and ***Council of Legal Education (Kenya School of Law) Regulations, 2009***.
7. In September 2012, Parliament enacted the ***Kenya School of Law Act, 2012*** (hereinafter referred to as "the Act") which provided for the establishment, powers and functions of the 1st Respondent and which Act came into force on 15th January 2013. That Act however did not provide for a transition period though by the time of its coming into force there were students in various universities undertaking their degree courses including some of the Petitioner.

8. Recognizing that the omission to provide for a transition cause would create a lacuna if the provisions of the said enactment were immediately implemented with respect to the students who were already enrolled in the University system whose constitutional rights and legitimate expectation to complete their education would be adversely affected by the Act, the 1st and 2nd Respondents published guidelines which provided for a three year transition period beginning 15th January 2013. These guidelines were to cater for students who had already been admitted to the university system prior to the enactment of the Act and to allow them to complete their programmes on the basis of the legal framework existing before the enactment of the Act.
9. The said guidelines provided *inter-alia* as follows:

"Accordingly, the following categories of persons will be admissible to the ATP at the Kenya School of Law for the academic year 2014/2015:

I. ***Having passed the relevant examinations of any recognized university in Kenya holds, or have become eligible for the conferment of the Bachelor of Laws Degree(L.L.B) of that university; or***
II. ***Having passed the relevant examinations of a university, university college or other institutions prescribed by the council, holds or have become eligible for the conferment of a Bachelor of Laws Degree(L.L.B) in the grant of that university, university college or other institution and had prior to enrolling to that university/university college or other institution:***

i. Attained a minimum entry requirements for admission to a university in Kenya; and

ii. Obtained a minimum grade of B(plain) in English language or Kiswahili and a mean grade of C(plus) in Kenya Certificate of Secondary examinations or its equivalent.

iii. Having passed the Bachelor of Laws (L.L.B) examinations of a recognized university and having attained a minimum of C (plus) in English and a minimum of an aggregate C (plain) in the Kenya Certificate of Secondary Examination and hold a higher qualification e.g 'A' Levels, 'IB', relevant 'diploma' other 'undergraduate degree' or have attained a higher degree in law after the undergraduate studies in Bachelor of Laws (L.L.B) programme.

iv. Having passed the relevant Bachelor of Laws (L.L.B) examinations of a recognized university and having attained a minimum of C (minus) in the Kenya Certificate of Secondary Examinations sit and pass the Pre-Bar examination set by the Kenya School of Law.

PROVIDED that persons who were eligible to sit for the Pre-Bar examinations but did not do so in 2013 will be given an opportunity to do so when the examination is next offered.

This admission criterion will operate for a transitional period of three (3) years from January 2013 to allow applicants who had joined the university system before the coming to force of the Kenya School of Law Act 2012 to complete their study programmes."

10. The said guidelines, it is not contested, had, before the cause of action herein arose, been applied for the last two admission lots to the Advocates Training Programme (hereinafter referred to variously as "the ATP" or "the Programme). In other words the Council and the School observed the said guidelines in the admissions to the ATP in their admissions of students to the ATP for the academic years 2014/2015 and 2015/2016 and all things being equal would have applied to the third and last lot of admissions to the ATP for the academic year 2016/2017 and to which academic year some of the petitioners belong.
11. That state of affairs was however disrupted when sometime in the year 2014, Parliament enacted the ***Statute Law (Miscellaneous) Amendment Act, 2014*** (hereinafter referred to as "the Amendment Act) which Act amended various Acts including Schedule Two of the ***Kenya School of Law Act, 2012***.The said amendment changed the eligibility for admission to the ATP by making it mandatory for applicants to sit and pass pre bar examinations.

12. As a result of the foregoing the School by way of an advert published in the local dailies on 2nd September 2015 invited the applicants to apply for a 'Pre-bar' examination as a prerequisite for admission to the School to undertake the programme. The said advert listed the eligibility criteria for applicants for the pre bar examinations as follows;

i. **Have attained a mean grade of C+(Plus) with a minimum grade of B in English or Kiswahili at KCSE**
ii. **Be holders of an LLB degree from a university recognized in Kenya (or show evidence of eligibility of conferment)**
iii. **Have passed all the 16 core subjects at the university level as provided under the Legal education Act 2012.**

13. The applicants from foreign universities were also required to provide written evidence of clearance from the Council of Legal Education. Further the said advert required applicants to have made their applications for Pre bar exams on or before 30th September 2015 which exams were scheduled to be undertaken on 2nd November 2015.
14. It was this advert that provoked the proceedings the subject of this Petition and Judgement.

Petitioners' Case

15. It was the Petitioners' case that the petitioners were already undertaking their programmes and as such at all times protected by the letter and the spirit of the aforesaid guideline. To them the aforesaid transition period is still in force and the petitioners expected to be subjected to the aforesaid guidelines. The said guideline created a legitimate expectation on the part of the petitioners to be subjected to the then existing law which was guiding admission to the Advocates Training Programme when seeking to join the ATP programme. However the advertised criteria was a total departure from the transition guideline issued by the 1st and 2nd Respondents which criteria, according to the Petitioners is discriminative for not equating other qualifications for example those who undertook other exams other than KCSE.
16. It was averred that the notice required that as a prerequisite to registering for examinations, the Respondents had to supply a copy of the LLB Certificate (or evidence of conferment), final transcripts and clearance from the Council for Legal Education despite the fact that final transcripts are issued by Universities upon graduation and that previously, students have been admitted to the Respondent Institution with provisional transcripts. Additionally, the impugned notice did not disclose the pass mark that any of the petitioners and the person on whose behalf they were suing would score, to proceed to their Advocates Training Problem. Further, the Notice also required the Petitioners to pay a total of Kshs 7000 for admission into the examination which amount was to be paid in less than a month's period, to the date of the examination.
17. However, the Petitioners stated the notice did not disclose what would become the fate of hundreds of students that would sit for the examination, should they fail to meet the undisclosed criteria or pass mark. The said notice, it was deposed, required the petitioners to undertake examination in respect of which they had been taught, examined and passed, by institutions that are regulated and monitored by both the Council of Legal Education and Council of University Education.
18. In any case, the petitioners will be taught and examined some of those subjects at the Kenya School of Law
19. It was contended that the criteria provided in the advert by the School has the effect of locking out some of the petitioners even from applying for the pre bar examination as they do not qualify under the same even having obtained other relevant qualifications which were recognized by the existing law covered by the transition guidelines. To the Petitioners, the said advert is discriminative, unfair, unreasonable, malicious, and irrational and one made in bad faith as the aforesaid criteria is a violation of the petitioners' legitimate expectation and which seeks to apply the law retrospectively.
20. To the Petitioners, the retrospective application of the law is a threat to the rule of law and the principle of legitimate expectation and the same constitutes an abuse of power by the Respondents.

21. It was further contended that the said Amendment Act, to the extent that it amended Schedule Two of the ***Kenya School of Law Act, 2012*** was done without reasonable public participation especially participation by the Petitioners.
22. It was contended that the actions by the Respondents have by discriminating against the petitioners violated Article 27 of the Constitution of Kenya; are in breach of the right to fair administrative action as provided for under Article 47(1) of the Constitution of Kenya; violated the petitioners right to education as provided for under Article 43(1)(f) of the Constitution of Kenya; and violated the constitutional principle of rule of law, democracy and participation of the people as enshrined under Article 10 of the Constitution of Kenya.
23. It was contended that the petitioners had made plans and even incurred expenses based on the expectation that having begun their Bachelor of Laws programme with a legitimate and reasonable expectation that the criteria to qualify as an advocate would not change or if changed would not apply retrospectively. However, the petitioners effectively stood to be locked out of the ATP if their qualifications which fell within the then existing law are not considered now as a result of introduction of new eligibility criteria in the qualifications since the eligibility criteria contained in the said notice published on 2nd September 2015, does not recognize other relevant qualifications for example persons who have acquired a relevant Diploma in law or any other equivalent or the previously recognised qualifications like KCE and KACE administered by the Kenya National Examination Council and offers no alternatives for holders of such qualifications thus shutting them off from qualifying as advocates.
24. It was contended by the Petitioners that any application of law that does not recognise equivalent qualification violates Article 35 on Economic and social rights which includes right to Education
25. Based on legal advice, the Petitioners averred that the 1st and 2nd Respondents having recognized that the Petitioners had a legitimate expectation to be admitted to the ATP, any intervening legislation passed after the commencement of their studies ought not to affect them adversely.
26. It was the Petitioners' case that by requiring the petitioners to pay a sum of Kshs 7000.00 within a period less than a month, forgetful of its facilitating powers under section 5 (b) of the ***Kenya School of Law Act*** to charge reasonable fees and to liaise with appropriate bodies to extend loans and other assistance to enable needy students to meet their fees obligations, the Respondents institution acted irrationally, unfairly and exclusionary towards the petitioners and persons whose interests they represent. Similarly, by failing to disclose through a notice, to inform the petitioners of the modalities of the examination through notice, despite request by the 1st Petitioner, the Respondents violated Article 35 of the Constitution.
27. To the Petitioners, by insisting that students produce final transcripts when the same are issued only upon graduation and in the absence of evidence that the Respondent Institution has fettered its powers under section 5 (d) of the Act and acted erratically.
28. It was submitted on behalf of the Petitioners that this Petition concerns (a) the legality and (b) the modality of the pre-bar examinations. The facts leading to it spawn from statutory amendments that introduced a phrase "AND" in the Place of a word "OR" and the behaviour of the School towards the statute and the amendment. At the core of the petition are three legal issues namely:

a. **Whether the Respondent violated the anti-discrimination regime;**
b. **Whether the Respondent has countermanded a legitimate expectation in favour of the petitioners; and**
c. **Whether the Respondent has violated article 47 obligations relating to fair administrative action.**

29. According to the Petitioners, this claim arises in two respects. Its first face is indirect discrimination while the second is direct discrimination. In support of this submission the Petitioners relied on **Paul Musili Wambua vs. Attorney General & 2 others [2015] eKLR** in which this Court quoted **Nyarangi & 3 Others vs. Attorney General [2008] KLR 688** and observed:

> **"The Black's Law Dictionary defines discrimination as follows: "The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential**

treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.

30. According to the Petitioners, indirect discrimination claim touches on the constitutionality of the amendment to introduce the word 'AND' in the place of 'OR'. In effect, it demands that all students, notwithstanding where they undertook their first law degrees, are to undertake the *'pre-bar'* examinations. 'Pre-bar' because it is not clear whether parliament meant pre-entry or pre-bar. It was submitted that 'Pre-Bar' examinations are not new in the School as they have been administered by the School in the past only to students who undertook their undergraduate studies in law from other countries and wished to be admitted as advocates of the High Court of Kenya. The rationale must have been that granted the many legal systems; Islamic, common law, civil law, continental or Roman-Dutch it was important that those students be examined a new to determine whether they understood the foundational concepts in common law systems as that is the system in use in Kenya.
31. It was however submitted that this amendment perpetuates discrimination because it affords similar treatment to persons in dissimilar circumstances. To them, Article 27 makes reference to indirect discrimination but it is open textured: it does not delimit the content and scope of indirect discrimination. It was submitted that the concept of indirect discrimination is celebrated as a fruition of the Strasbourg jurisprudence and that ***The Handbook on European Non-Discrimination Law***, making reference to replete decisions of the European Court of Human Rights makes reference to indirect discrimination thus:

> **"Both the ECHR and EU law acknowledge that discrimination may result not only from treating people in similar situations differently, but also from offering the same treatment to people who are in different situations. The latter is labelled 'indirect' discrimination because it is not the treatment that differs but rather the effects of that treatment, which will be felt differently by people with different characteristics."**

32. In functional terms, it was submitted, indirect discrimination treats discrimination on non-proscribed ground as discrimination on proscribed grounds. In so doing, it does not focus on the motive but on the effect. To the Petitioners, in terms of effect, this amendment introduces a facially neutral measure but has an onerous impact on students who have undertaken their LLB degrees from Kenya and despite that the constitution does not list a proscribed ground under which it can be treated; it wields an unseemly effect deserving to be treated as indirect discrimination. As such the amendment fails the article 27 test even in the presence of a proportionality analysis with article 24.
33. With respect to indirect discrimination, it was submitted that the School admitted the Petitioners' predecessors currently at the Respondent institution based on criteria that is different from the one it has proposed and sought to use in admitting the Petitioners. It had suspended the application of the 2nd Schedule in respect of both the petitioners and their predecessors and consequently, they did not sit for the Pre-bar examinations as a prerequisite for entry to the School though they had circumstances that were similar with the Petitioners. Both of them (as has been deposed) were in school when the ***Kenya School of Law Act, 2012*** was enacted. Both of them also fall under the period of the notice that had been issued to the effect that the 2nd Schedule would not apply for three years. Through the impugned notification, the 1st Respondent institution has applied a dissimilar treatment to the Petitioners from the one it applied to their predecessors who had equally joined the University system before the Act came into force. This runs contrary to the tenor and spirit of article 27 the 2010 Constitution.
34. With respect to legitimate expectation, it was submitted that the Gazette Notice by the Board of Directors of the School created a legitimate expectation that the Petitioners, who joined the University system before the coming into force of the Act, would be admitted to the School without having to sit for the Pre-Bar examination. By this guideline, the Board appreciated the equality and non-discrimination provisions in Article 27(1), (2) and (6) of the Constitution that students who had joined the University system prior to the Act would complete their studies under the then legal regime. These guidelines have been applied for the last two admissions and to the ATP course and would have been expected to govern the third and last of admission to the ATP

Programme for the year 2016/2017, an academic year to which the Petitioners belong.

35. However, it was submitted that the notice by the Respondents attempts to extinguish that expectation without disclosing what has changed since the expectation was created. To the Petitioners, the concept of legitimate expectation is a vital one in administrative law and its purport is to limit abuse of discretion by public agencies. Learned Authors the late **Sir William Wade** and **Christopher Forsyth,** in their contribution**,** ***Administrative Law*** at pages 450 and 451 make the following illuminating statements about legitimate expectations:

> **"But good administration demands procedural justice in other situations also. Where some boon or benefit has been promised by an official….that boon or benefit may be legitimately expected by those who have placed their trust in the promise of the official. It would be unfair to dash those expectations…abuse of power has been considered the 'root concept' justifying the protection of legitimate..."**

36. To the Petitioners, though the Respondents contended that if the Gazette Notice by the Board created a legitimate expectation, then it had stood extinguished by the amendment, the amendment had nothing to do with transition.
37. The Petitioners submitted that even assuming for the sake of argument that (a) either the amendment was not unconstitutional or (b) the School has not attempted to discriminate and that (c) there was no legitimate expectation deserving enforcement, Article 47 entitles the Petitioners to the right to administrative action. Equally, it creates an obligation incumbent upon the Respondent to act in a manner that is expeditious, efficient, lawful, reasonable and procedurally fair. To the Petitioners, there are a number of questions that a law abiding citizen would have to grapple with without rational responses just by examining the Respondent institutions behaviour. Why, for instance, does the Respondent issue the notice in September for an examination to be done when it would have issued it in January? Why, also, does it give the Petitioners less than a month to register and pay for the examination? Why does it require the Petitioners to sit for the examination in three hours to determine whether they would move to the next stage of legal education? These questions admit as a convincing response the proposition that there is lack of regard to procedural fairness dictates under the 2010 Constitution.
38. It was added that it is not even reasonable for the Respondent institution to examine students for subjects that they have already been examined at institutions accredited by the interested party. It demonstrates a lack of respect for the competence and discretion universities when they are the lifeblood of knowledge in society. The respondent institution should have examined something else such as understanding of language, classics, history, or metaphysics and not constitutional law when there is a transcript showing that a student passed it at University.
39. Beside the fees it has charged is unreasonable. Statute enjoins it to charge reasonable fees. Some of the students [sponsored by the government] pay less than Kshs 30, 000/= to be taught and examined a cluster of 14 subjects.
40. The Petitioners in the Petitions/Applicant therefore sought the following orders:

a. A declaration that the Petitioners right to legitimate expectation has been infringed by the Respondents.
b. A declaration that the actions of the Respondents are in violation of Articles 10, 27, 35, 43 and 47 of the Constitution of Kenya.
c. **A declaration that the notices issued by the Respondent Institution regarding pre-bar examinations are invalid and an order of Certiorari to bring to this Honourable Court and to quash the 1st Respondent's advert of 2nd September 2015 inviting the applications for pre bar examinations.**
d. **An Order of Prohibition to prohibit the Respondents from subjecting the petitioners to pre bar examinations as pre requisite for admission to the Advocates' Training Programme for the year 2016/2017.**
e. **An Order of Mandamus compelling the 1stRespondents to admit the petitioners and other qualified law graduates who will apply for admission into the Advocates Training Programme for the academic year 2016/2017 and have qualified as per the criteria provided for in the Transition guidelines or in statute before coming into force of the Kenya School of**

Law Act.

f. A declaration that the second schedule **Kenya School of Law Act, 2012 is unconstitutional for perpetuating discrimination by not recognizing and equating various academic qualifications.**

g. A declaration that Statute Law (**Miscellaneous Amendments) No. 18 of 2014, is unconstitutional to the extent that it introduced the word "AND" in the place of "OR" and in so doing unreasonably and unjustifiably perpetuates inequality and discrimination.**

1st Respondent's Case

41. According to the 1st Respondent, the School is established by section 3 of the ***Kenya School of Law Act***, No. 26 of 2012 which came into force on 15th January under which section 4 sets out the objects and functions of the School as a public legal education provider responsible for provision of professional legal training as an agent of the Government. One of the key objects of the School is to train persons to be advocates under the ***Advocates Act*** Cap 16.

42. It was averred that section 5(b) of the Act gives the School power to charge reasonable fees and other charges for services rendered while section 5(f) gives the School power to make regulations as may be considered necessary for regulating affairs of the School. This dispute, it was appreciated, relates to the statutory admission requirements stipulated by the Act for the School's next intake of students. However, section 16 of the Act provides that:

"a person shall not qualify for admission to a course of study at the School, unless that person has met the admission requirements, set out in the Second Schedule for that course."

43. It was the School's position that as a public legal education provider responsible for provision of professional legal training as an agent of the Government, the School is obligated by law to ensure that persons being admitted to the School to train to be advocates under the ***Advocates Act*** Cap 16 meet the admission requirements set out in the Second Schedule to the Act and that failure to do so would mean that the School is in breach of the very law governing its operations.

44. It was admitted that before the ***Kenya School of Law Act, 2012*** came into force, admission requirements were contained in the ***Council of Legal Education Act, Cap 16A*** (now repealed) as read together with the Council ***of Legal Education (Accreditation) Regulations, 2009*** and the ***Council of Legal Education (Kenya School of Law) Regulations, 2009*** (now revoked). Whereas the ***Kenya School of Law Act, 2012*** contained transitional provisions to govern various matters, there were none touching on the matter of admission requirement for persons who were at that time pursuing their Bachelor of Laws degrees meaning that such persons would be required to meet the admission criteria set out in the Second Schedule to the Act. To the School, the very fact that the ***Kenya School of Law Act, 2012*** contained transitional provisions to govern various other matters and none touching on the matter of admission requirement for persons who were at that time pursuing their Bachelor of Laws degrees means that Parliament in its wisdom, saw it fit that going forward, all persons seeking admission to the School meet the new requirements set out in the Second Schedule to the Act. In its view, Parliament did not owe the persons who were at that time pursuing their Bachelor of Laws any duty not to review the law governing admission requirements to the Kenya School of Law and as such, no legitimate expectation was created.

45. It was however conceded that on 17th January, 2014, the School together with the Council did put up an advertisement notice that sought to explain the admission criteria that would be applied for persons intending to join the School for the academic year 2014/2015.The said notice set out in bold the principle that would guide the admission process into the Advocates Training Programme (ATP) for the academic year 2014/2015 to be as follows:

"The Second Schedule to the Kenya School of Law Act will be followed subject to any discretionary powers which have hitherto been exercised by the Council of Legal Education and the Kenya School of Law prior to 2012 to ensure conformance with the anti-discriminatory provisions of Article 27 of the Kenya Constitution, 2010"

46. It was the School's case that the Applicants in all the matters before this Court are erroneously asserting that based on the said notice, they had legitimate expectation that they would be admitted

to the ATP based on the admission criterion contained in the notice, which mirror the criterion in the ***Council of Legal Education (Kenya School of Law) Regulations, 2009*** (now revoked), obtaining before the Act came into force. In its view, the said notice clearly provided that it is the Second Schedule to the Act that would govern admission into the ATP subject to exercise of any discretionary powers by the School and the Council meaning the notice simply reinforced the position that it is the new admission requirements under the ***Kenya School of Law Act, 2012*** that would be the principal criterion for admission subject to the discretion of the Kenya School of Law and the Council of Legal Education. For this reason, the Respondent denied that the said notice created a legitimate expectation that the Applicants would be admitted to the ATP solely based on the pre-existing law.

47. Moreover, it was averred in November, 2014 Parliament passed a number of amendments to the ***Kenya School of Law Act, 2012*** contained in the ***Statute Law (Miscellaneous Amendments) Act, 2014*** which make it compulsory for all persons seeking admission to the ATP to sit for and pass the pre-bar examination set by the School in addition to the other stipulated academic qualifications. It was therefore averred that there can be no legitimate expectation contrary to a clear statutory provision and that even assuming the said notice created legitimate expectation, which is vehemently denied, the amendments that were undertaken subsequent to the notice had the effect of extinguishing any such legitimate expectations with the result that the Applicants cannot rely on the said notice to urge thwarted legitimate expectation.
48. The School therefore, reiterated that, being a public legal education provider responsible for provision of professional legal training as an agent of the Government it is obligated to adhere to the law, and in so doing, cannot be said to be in breach of the Applicants' legitimate expectations claimed to arise from the said notice. The Applicants cannot possibly rely on said notice as the same has been superseded by the express statutory provisions enacted by Parliament.
49. It was averred that the Respondent is entitled by law to charge reasonable fees and other charges for services rendered and whereas the School is charging an application fee of Kshs. 2,000 and an examination fee of Kshs. 5,000, the examination fee is refundable for those who do not meet the application requirements. In arriving at the fees, it was contended that the Respondent had considered that the pre-bar examination will entail one paper and has also considered the cost of setting, administering and marking the examinations as well as related incidentals hence the examination fees are quite reasonable in circumstances of this case.
50. It was further averred that the School had given reasonable notice for preparation for the examination hence it was not true as alleged that the Petitioners had been ambushed. There was at least duration of two months between when the notice was issued and when the examination was scheduled which is reasonable notice by any standards.
51. The School denied that the requirements to sit for the pre-bar examinations were extraneous as alleged by the Petitioners since the requirements set out in the notice were reasonable and were all necessary to determine the suitability and eligibility of the Petitioners to sit the examination. The requirements are in furtherance to the requirements set out under the ***Kenya School of Law Act, 2012*** as well as the ***Legal Education Act, 2012.***
52. To the School, the fact that some of the Petitioners had not finalized their studies and were unable to obtain all the requirements necessary to apply for the pre-bar examination at the moment would not in any way mean that the requirements unfairly disadvantaged them as against their predecessors since the School has the mandate to run its schedule as may be approved by its Board and there is no obligation or requirement on the School that it must call for applications to its programmes at a certain time when the Applicants will have obtained all the requirements and therefore become eligible to apply. The Applicants would however have an opportunity to sit for the pre-bar examinations when they are next offered.
53. It was the School's position that section 28 of the Act gives it the power to make regulations providing for the categories of examinations and the manner in which such examinations shall be administered. Accordingly, the pre-bar examination has been set to examine various subjects which have been determined by the School pursuant to its statutory mandate. Whereas the Petitioners alleged that the requirement for them to sit pre-bar examination which examine on some of the subjects they have undertaken at the University was unreasonable and in breach of Article 47 of the Constitution the School refuted this on the basis that the pre-bar is an entrance examination intended to establish suitability of all applicants to the ATP. To the School, all details

including the subjects to be examined, the pass mark as well as opportunities for re-sits and other modalities were all contained in the ***Kenya School of Law (Training Programmes) Regulations, 2015***.

54. The School asserted that it is charged with a very key object of setting and enforcing standards relating to training persons to be advocates under the ***Advocates Act Cap 16*** hence the Court ought to refrain from directing the Respondents on how best to discharge its statutory mandate as it is being invited to do by the Petitioners in this Petition.
55. On behalf of the School, it was submitted that the newspaper advert took cognizance of equality and non-discrimination provisions outlined in Article 27 of the Constitution. Further, the newspaper advert noted that the Act had not provided any transitional period within which students who had been admitted into the University system prior to the enactment would be allowed to complete their programmes based on legitimate expectations undergirded by the then existing law.
56. According to the School, Admissions for 2014/2015 proceeded under the arrangement communicated in the newspaper advert. In any event, this group would not have been subjected to the pre-bar examination set out in the Second Schedule to the Act because the pre-bar examination was not compulsory at this point in time and the Second Schedule would not have been fully given effect since doing so would have resulted in an absurdity. However by the enactment of the Amendment Act, the Second Schedule made it compulsory for all persons seeking admission to the ATP to sit for and pass the pre-bar examination set by the School in addition to the other stipulated academic qualifications. Up until this time, pre-bar examination was not compulsory. The amendments resolved the absurdity that would have arisen had the Second Schedule taken full effect before the amendments were effected. It was therefore submitted that the School has sought to administer the pre-bar examinations in line with the amendment in the Second Schedule to the Act.
57. The School clarified that before the enactment of the ***Kenya School of Law Act***, the pre-bar examination was taken by applicants who had attained lower grades than those required to entitle them to a direct admission to the School. This particular pre-bar entailed sitting and passing six (6) examination papers. Before enactment of the Act, admission to the School was open to persons who:

> ***(I) Having passed the relevant examinations of any recognized university in Kenya holds, or have become eligible for the conferment of Bachelor of Laws degree (LL.B.) of that university; or***
>
> ***(II) Having passed the relevant examinations of a university, university college or other institutions prescribed by the Council, holds or have become eligible for the conferment of the Bachelor of Laws degree (LL.B) in the grant of that university, university college or other institution, and had prior to enrolling at that university, university college or other institution:***
>
> ***i. attained a minimum entry requirements for admission to a university in Kenya; and***
>
> ***(ii) obtained a minimum grade B (plain) in English language or Kiswahili and a minimum grade of C+ (plus) in the Kenya Certificate of Secondary Examination or its equivalent***
>
> ***(III) Having passed the Bachelor of Laws (LL.B) examinations of a recognized university and having attained minimum of a C+ (plus) in English and a minimum of an aggregate C (plain) in the Kenya Certificate of Secondary Examination and hold a higher qualification e.g. "A" levels, "IB", relevant "Diploma", other "undergraduate degree" or having attained a higher degree in law after the undergraduate studies in Bachelor of Laws (LL.B) programme.***
>
> ***(IV) Having passed the relevant Bachelor of Laws (LL.B) examinations of a recognized university and having attained a minimum of C – (minus) in English and a minimum of an aggregate grade of C – (minus) in the Kenya Certificate of Secondary Examination sit and***

pass the pre-bar examination set by the Kenya School of Law.

58. It was submitted that the Act has provided for a new type of pre-bar examination. After the amendment law came into force, this pre-bar examination is to be sat and passed by all persons who want to join the School. In other words, it is a compulsory entry examination for all persons seeking admission to the Programme and the ***Kenya School of Law (Training Programmes) Regulations, 2015*** provide for matters relating to the current pre-bar examination including the eligibility, areas the examination will test, pass mark and related matters. They also provide for transitional matters including the fate of persons who were in the process of undertaking the previous pre-bar examination.
59. On legitimated expectation, the School cited section 16 of the Act which provides that:

"a person shall not qualify for admission to a course of study at the School, unless that person has met the admission requirements, set out in the Second Schedule for that course."

60. To the School, the said section 16 does not accommodate any discretionary power to vary the admission criteria since the provisions are in mandatory terms. According to it, it is a settled principle of law that legitimate expectation cannot be pleaded or sustained in contravention of what is expressly provided for in statute and cited **Royal Media Services Limited and 2 Others vs. the AG & 8 Others [2014] eKLR** as well as in **Republic vs. Kenya Revenue Authority & 3 Others ex parte Five Forty Aviation Limited [2015] eKLR**.
61. It was submitted that since the provisions of the Second Schedule are now clear and the School is obligated by law to mount the pre-bar examinations as failing to do so would be giving effect to an *ultra vires* representation and a representation is *ultra vires* if it is outside the power of the administrative authority that made the representation (see ***P.P. Craig, Administrative Law*** [5th ed.] London: Sweet and Maxwell, 2003 at p.652). *Ultra vires* representations, it was submitted cannot give rise to legitimate expectation and support for this line of submission was sought from **Wade** and **Forsyth** in ***HWR Wade & C F Forsyth, Administrative Law*** [9th ed.] New Delhi: Oxford, 2004 at p.376 where it is stated that:

> **"An expectation, whose fulfilment requires that a decision maker should make an unlawful decision, cannot be a legitimate expectation. Thus, it is inherent in many of the decisions on substantive legitimate expectations and express in several, that the expectation must be within the powers of the decision maker"**

62. It was therefore contended that even assuming the newspaper advert created some expectation, such expectation is not legitimate since an expectation, whose fulfilment requires that a decision maker should make an unlawful decision, cannot be a legitimate expectation. Therefore, the applicants' expectation cannot be enforced by this Honourable Court for lack of legitimacy. It was urged that the courts will only give effect to a legitimate expectation within the statutory context in which it has arisen (see ***R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd***[1990] 1 WLR 1545, 1573H *per* Judge LJ). Any expectation must yield to the terms of the statute under which the decision maker acts. Accordingly, where a public authority makes a representation that it has no power to honour or which would lead to a conflict with its statutory duty, that representation will not generate an enforceable legitimate expectation (see, in the context of procedural legitimate expectations, ***Attorney-General of Hong Kong v Ng Yuen Shiu*** [1983] 2 AC 629, 638,and in the context of substantive legitimate expectations, ***ex parte MFK Underwriting Agents Ltd***, p 1573 *per* Judge LJ).
63. It was submitted that the public authority will normally only be absolved from giving effect to the legitimate expectation if it is required by statute to act contrary to the legitimate expectation and that this position was taken in **R (X) vs. Head Teacher and Governors of Y School [2008] 1 All ER 249**, para 115 *per* **Silber J**. The School also relied on **Holman vs. Johnson [1775 – 1802] All ER 98** in which the Court held that:

"If, from the Plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says that he has

no right to be assisted. It is on that ground the court goes; not for the sake of the Defendant, but because they will not lend their aid to such a Plaintiff. No court will lend its aid to a man who founds his cause of action on an immoral or on illegal act. If, from the Plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of positive law of this country, there the court says that he has no right to be assisted[…] The principle of public policy is *ex dolo malo non oritur actio*: no Court will lend its aid to a man who founds his cause of action on an immoral or illegal act"

64. It was submitted that public policy would militate against the Court finding in favour of the Petitioners and effecting their claim of legitimate expectation hence the Court was urged not to come to the aid of the Petitioners.
65. On the circumstances when it may be lawful for a public body to rescind from a representation that has created legitimate expectation if such expectation were capable of being given effect, it was submitted that the doctrine of legitimate expectation is often perceived as a fetter on the freedom of administrative authorities to change or alter their policies. This is particularly evident in relation to claims for substantive legitimate expectation. However, it was contended Administrative authorities, as part of Government have a right to change and alter their policies and reliance was placed on **Hughes vs. Department of Health and Social Security, [1985] AC 776** in which **Lord Diplock** stated that:

"Administrative policies may change with changing circumstances, including changes in the political complexion of Governments. The liberty to make such changes is something that is inherent in our form of constitutional Government. When a change in administrative policy takes place and is communicated in the departmental circular….any reasonable expectations that may have been aroused…by any previous circular are destroyed"

66. According to the School, in general terms, there are two broad bases on which it will be lawful for a public authority to rescind from a legitimate expectation. These bases were established in **R (Niazi) v Secretary of State for the Home Department[2008] EWCA Civ 755** as:

i. **First, where it would be unlawful for the public authority to give effect to the legitimate expectation**
ii. **Secondly, where other public interest factors justify not giving effect to the legitimate expectation**

67. To the School, that both bases are applicable to the instant case since it would be unlawful to allow the applicants to join the School without having to undertake the mandatory pre-bar examination. Secondly, Parliament having rendered itself on this matter and having set the criteria to join the School, it would be against public policy and interest to give the applicants direct entry into the School or to direct the School to act in breach of what legislature has enacted. On the issue of discrimination it was reiterated that at the time when their predecessors joined the School, pre-bar examination was not compulsory. As the examination is now compulsory, the applicants are not in the same position their predecessors were and no discrimination would result if the applicants were required to sit for the pre-bar examination.
68. The Court was urged to determine what admission criteria was communicated in the newspaper advert. To the School, since the said notice clearly provided that it is the Second Schedule to the ***Kenya Law School Act, 2012*** that would be followed subject to exercise of any discretionary powers by the Kenya School of Law and the Council of Legal Education, any legitimate expectation inferred from a reading of the newspaper advert must of necessity be within the context of the provisions of the ***Kenya School of Law Act*** as well as the wording of the newspaper advert. To that extent, it was submitted that the only reasonable expectation that can be inferred from the newspaper advert is that in making admission decisions, the 1st Respondent would follow the Second Schedule to the Act. It would be unreasonable for the applicants to expect any other criteria to apply. The newspaper advert provided, additionally, that nevertheless, the 1st and 2nd Respondents would subject that Second Schedule to their discretionary powers exercised by them prior to 2012 to ensure conformance with anti-discriminatory provisions of Article 27 of the

Kenya Constitution, 2010. To the School, it has not departed from the admission criteria that were communicated in the newspaper advert. The School is following the Second Schedule as provided in the newspaper advert. It would be inappropriate for the Court to intervene in the matter that is wholly within the discretion of the School unless it can be shown that in exercise of its discretion, it has not acted judiciously. Additionally, the 1st Respondent was to ensure conformance with the anti-discriminatory provisions of Article 27 of the Constitution. However, in the circumstances of this case, since proceeding with the pre-bar examination does not result in any discrimination, there would be no basis for this Honourable Court to intervene in the matter.

69. The basic features of the doctrine of legitimate expectation are well-known. Where a public authority represents that it will conduct itself in a particular way, that representation may give rise to a legitimate expectation on the part of the representee that the public authority will so act, and the public authority may have to give effect to that expectation. The Petitioners are seeking the Court to restrain the School from administering pre-bar examinations. The Petitioners' prayer is premised on the claim for legitimate expectation alleged to emanate from the newspaper advert. To determine this issue, it was contended, it would be important for the Court to consider whether or not the newspaper advert made any representations on the issue of the pre-bar examinations. To the School, the newspaper advert did not make any promise or representation to the effect that applicants joining the School for 2015/2016 would not be required to sit and pass pre-bar examination set by the School. The newspaper advert was published on 17.1.2014. From the wording of the Second Schedule, it was submitted that as at the time of publication, sitting of the pre-bar examination was not compulsory under the law.
70. However, in November, 2014 Parliament passed a number of amendments to the Act whose effect was to make it compulsory for all persons seeking admission to the ATP to sit for and pass the pre-bar examination set by the School in addition to the other stipulated academic qualifications. The requirement to sit compulsory pre-bar examination took effect on 8th December, 2014. This was way after the newspaper advert of 17th January, 2014. The applicants cannot, therefore, be heard to say that based on the newspaper advert of 17th April, 2014, they had legitimate expectation that they would not be required to sit the pre-bar examination. Such expectation would be unreasonable and not capable of being enforced by this Honourable Court.
71. It was therefore submitted that flowing from our above submissions, even assuming the Court were minded to find in favour of the Petitioners, based on their claim of legitimate expectation, and to hold that the admission criteria that was communicated in the newspaper advert would be the one, in so far as academic qualifications are concerned, to guide the admission into the School with respect to 2015/2016 admissions, there would be no basis for the Court restrain the School from administering the pre-bar examination. To the School, the Petitioners will not suffer any prejudice if they were to sit the pre-bar examination.
72. With respect to the contention that the provisions of the Kenya School of Law Act and the Second Schedule thereto as well as the Statute Law (Miscellaneous Amendments) Act, 2014 have retrospective effect, the School relied on ***Oxford Dictionary of Law*** which defines retrospective (or retroactive) legislation as *"legislation that operates on matters taking place before its enactment, e.g. penalizing conduct that was lawful when it occurred"*. To the School, looked at carefully, the provisions relating to admission criteria complained against are not retrospective since the provisions apply to persons who seek to join the School after the commencement of the ***Kenya School of Law Act***. The law would have been retrospective if it sought to affect the rights of person who had already joined the School. Having submitted that the provisions of the ***Kenya School of Law Act*** are not retrospective, it must be appreciated that retrospective law is not in itself unconstitutional or unenforceable.
73. It was submitted that generally, it is the Constitution and laws of a country that provides limits on legislative power to enact retrospective laws. The School by parity of reasoning cited the Australian position that the Australian Constitution has no express or implied prohibition on making of retroactive laws and relied on the Australian case of **R vs. Kidman (1915) 20 CLR 425**, where the High Court found that the Commonwealth Parliament had the power to make laws with retrospective effect. In that case which concerned a retrospective criminal law, **Higgins, J** rendered himself thus:

"There are plenty of passages that can be cited showing the inexpediency, and the injustice, in

most cases, of legislating for the past, of interfering with vested rights, and of making acts unlawful which were lawful when done; but these passages do not raise any doubt as to the power of the Legislature to pass retroactive legislation, if it sees fit…The British Parliament, by Acts of attainder and otherwise, has made crimes of acts after those acts were committed, and men have been executed for the crimes; and - unless the contrary is provided in the Constitution – a subordinate Legislature of the British Empire has, unless the Constitution provide to the contrary, similar power to make statutes retroactive"

74. According to the School, the power of the Australian Parliament to make laws with retrospective application has been affirmed in a long line of authorities, and is discussed in **Polyukhovich vs. Commonwealth, (1991) 172 CLR 501**. In that case, **McHugh, J**. said that ***Kidman*** *(supra)* was correctly decided and that:

"numerous Commonwealth statutes, most of them civil statutes, have been enacted on the assumption that Parliament of the Commonwealth has power to pass laws having retrospective operation. Since Kidman, the validity of their retrospective operation has not been challenged. And I see no distinction between the retrospective operation of a civil enactment and a criminal enactment."

75. In Kenya, according to the School, the issue of retrospectivity of law has been given due consideration. In **Overseas Private Investment Corporation & 2 Others v Attorney General [2013] eKLR**, **Majanja J**. opined that the Latin maxim *lex prospicit non respicit* encapsulates the cardinal principle that law looks forward not backwards but this principle is neither absolute nor cast in stone and cited ***Municipality of Mombasa vs. Nyali Limited*** **[1963] E.A. 371** in which **Newbold, JA**. stated that:

"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention."

76. It was submitted that ***Overseas Private Investment Corporation*** (supra) went on to observe that the rule against the retrospective application of law is not entirely guarded and in certain cases where the intention of the legislature is clear, the provisions may be construed to have retrospective effect by the Court taking the following view:

"My reading of the authorities is therefore that retrospective operation is not *per se* illegal or unconstitutional. Whether retrospective statutory provisions are unconstitutional was a matter considered by the Supreme Court in the case of *Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others*, SCK Application No. 2 of 2011 [2012] *e*KLR where the Court observed that, *"[61] As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it: (i) is in the nature of a bill of attainder; (ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden.*.It is also worth noting that it is not the role of this court to dictate as to whether a law should or should not apply retrospectively. That is the province of the legislature. The role of the court is limited to product of the legislative process and determining whether its purpose or effect is such that it infringes on fundamental rights and freedoms of the

individual. The duty of courts is to give effect to the will of Parliament so that if the legislation provides for retrospective operation, courts will not impugn it solely on the basis that the same appears unfair or depicts a 'lack of wisdom,' or applies retrospectively. *Francis Bennion* in his seminal work on *Statutory Interpretation, 3rd edition, at page 235* states, *"Retrospectivity is artificial, deeming a thing to be what it was not. Artificiality and make-believe are generally repugnant to law as the servant of human welfare. So it follows that the courts apply the general presumption that an enactment is not intended to have retrospective effect. As always, the power of Parliament to produce such an effect where it wishes to do so is nevertheless undoubted."*

77. According to the School, Article 94(1) provides that the legislative authority of the Republic is derived from the people and at the national level is vested and exercised by Parliament while Article 109 of the Constitution provides that Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President. To the School, the concept of Parliamentary sovereignty or legislative supremacy means that Parliament has a free will to legislate. Applied to this case, Parliament has a free hand to change the admission criteria to the School at any time. Any persons affected by the legislative steps must fit themselves within Article 118 of the Constitution. They have an opportunity to make their representations to Parliament for consideration. To the School, even if the provisions of Kenya School of Law and the Second Schedule had retroactive effect which it denied, that alone would not make them unconstitutional or unenforceable. To the School, there can be no reasonable undertaking by Parliament that the law relating to any matter will not change in future as that would hinder and curtail the legislative authority of Parliament. Such restriction would itself be unconstitutional and against public policy.
78. To the School, any finding in favour of the applicants on this point would have catastrophic results. It would open a floodgate of litigation for persons to challenge any new law on the ground that they had taken certain steps based on the repealed law and the change in legislation would prejudice them.
79. With respect to allegations of breach of Articles 10 and 27 of the Constitution, it was submitted that since the amendment law introduced compulsory pre-bar examination with effect from 8th December, 2014, at a point when admission decisions had been made with respect to 2014/2015 academic year for the School, it would not have been possible to require this group to sit pre-bar examination. The fact that the applicants for 2015/2016 are required to sit pre-bar examinations does not in any way result in discrimination when viewed against their predecessors since their predecessors were admitted to the School before pre-bar examinations became compulsory. It was therefore submitted that proceeding with the pre-bar examination does not in any breach the provisions of Article 10 or 27 of the Constitution as alleged by the applicants or at all.
80. On allegations that in violation of Article 35 of the Constitution, the Petitioners have not been supplied with information regarding the modalities of the pre-bar examination, it was contended that this includes matters such as the pass mark, subjects to be examined and opportunities for re-sits and so on. However, the short reply to this is that all details including the subjects to be examined, the pass mark as well as opportunities for re-sits and other modalities are all contained in the ***Kenya School of Law (Training Programmes) Regulations, 2015*** which information has been available to the applicants.
81. With regard to Article 43, on violation of the Petitioners' right to education, it was submitted that the mere fact of requiring the applicants to sit a pre-bar examination that is stipulated by law does not in itself amount to violation of the applicants' right to education. The 1st and 2nd Respondents are charged with the mandate to ensure standards within the legal profession are maintained. Parliament has vested the said Respondents with power of formulating policy of training and examining persons who wish to become advocates. In discharging this mandate, the said Respondents cannot be said to be violating the applicants' right to education. Also, if Parliament sets the qualification criteria to undertake certain courses or training, it cannot be said to be curtailing the right to education.
82. With regard to Article 47, it was submitted that no expectation capable of being given effect was created by the newspaper advert. Giving effect to the expectation would itself require the School to breach Section 16 of the Act hence the School cannot therefore be said to be in violation of

Article 47 of the Constitution. On the issue of the examination over subjects the applicants have already been taught, section 28 of the Act gives the School power to make Regulations providing for the categories of examinations and the manner in which such examinations shall be administered. Accordingly, the pre-bar examination has been set to examine various subjects which have been determined by the 1st Respondent pursuant to its statutory mandate. The School prepares students to become advocates in Kenya. It offers professional legal training as an agent of the Government. Universities offer academic legal education. Parliament has determined that passing the University law subjects does not make one an advocate. One of the key objects of the School is to train persons to be advocates under the Advocates Act. To the School, it has power to determine its own curriculum and examinations. The pre-bar is an entrance examination intended to establish suitability of all applicants to the ATP. By administering the pre-bar examination, the School cannot be said to be in breach of Article 47. This is notwithstanding the fact that applicants may be examined on some subjects which they may have covered at the undergraduate level.

83. Submitting on the provisions of the ***Fair Administrative Act, 2015***, the School was of the view that the Act defines administrative action to include:

i. ***Powers, functions and duties exercised by authorities or quasi-judicial tribunals; or***
ii. ***Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates***

84. In the School's view, its decision to mount pre-bar examination does not fall within the definition of administrative action set out in the Act since the pre-bar examinations are required by the Kenya School of Law Act hence the Petitioners are deemed to have had notice of the change in law. Therefore they are deemed to have known that they would be required to sit the pre-bar examination as a requirement to join the School. To the School, this was not an administrative action on which the School would have been required to give the Petitioners adequate and prior notice. To the School, to place on it an obligation to communicate changes in law that affect the matters touching on the School is an onerous responsibility without any basis. Granted, the School now has an obligation to comply with provisions of Section 4 of the ***Fair Administrative Action Act, 2015***. However, requirement for apprising oneself of changes in law must remain with the subject. In any event, even assuming Section 4 of the law were to be applicable to the School in the sense of requiring the School to communicate the change in law, such communication could only have been made after the ***Fair Administrative Action Act*** came into force on 17th June, 2015.
85. It was submitted that the School issued a notice of the pre-bar examination on 2nd September, 2015 which was within 2 months or so of commencement of the new law. Therefore, the delay in communicating the change in law was not in inordinate given this was a new legislation and hence delay, if any, may be excused by this Honourable Court.
86. With respect to pre-bar fees, the School reiterated that in arriving at the fees, it considered that the pre-bar examination will entail one paper and has also considered the cost of setting, administering and marking the examinations as well as related incidentals. The examination fees are therefore quite reasonable in circumstances of this case. Dealing with the notice for the same examinations, it was emphasised that the Petitioners had not been ambushed since there was at least duration of two months between when the notice was issued and when the examination was scheduled which is reasonable notice by any standards. To the School, the requirements to sit for the pre-bar examinations are not extraneous as alleged by the applicants. To the contrary, they are reasonable and are all necessary to determine the suitability and eligibility of the applicants to join the School in furtherance to the requirements set out under the ***Kenya School of Law Act, 2012*** as well as the ***Legal Education Act, 2012***.
87. Dealing with the issue of acceptance of provisional transcripts, it was submitted that the fact that some of the Petitioners have not finalized their studies and are unable to obtain all the requirements necessary to apply for the pre-bar examination at the moment does not in any way mean that the requirements unfairly disadvantage them as against their predecessors. It was reiterated that the School has the mandate to run its schedule as may be approved by its Board. There is no obligation or requirement on the School that it must call for applications to its programmes at a certain time when the applicants will have obtained all the requirements and therefore become eligible to apply. The applicants who do not qualify now will have an

opportunity to sit for the pre-bar examinations when they are next offered.

88. It was the School's case that the law requires applicants to the School to demonstrate that they have become eligible for conferment of Bachelor of Laws Degree and applicants may show this by furnishing the School with provisional transcripts. The School will, however, not accept applicants who have not completed their Bachelor of Laws Degree programme since under the law, such applicants are not eligible to join the ATP programme. Its view was that all the other requirements for application are within reach of the applicants. They include applicants furnishing the School with copies of secondary school certificates, national identity card, recent passport photographs, acknowledgement of payment of examination fees and a clearance letter from the Council of Legal Education for foreign degree holders. It was submitted that there is nothing extraneous about these requirements.

89. On the issue of alternative qualifications, it was submitted that since the Second Schedule requires one to possess C+ (plus) mean grade in KCSE or its equivalent, this means various other qualifications are recognized and will be equated to KCSE hence the allegation for discrimination is baseless and cannot stand.

90. The School urged the Court to adopt the holdings in a long list of authorities which have affirmed the mandate of the 1st and 2nd Respondent in setting standards to ensure that the highest professional standards are maintained in the legal profession and that it is not for the Court to concerned with the efficaciousness of the decisions made within the statutory mandate arena of the said Respondents. In this respect the School relied *inter alia* on **Eunice Cecilia Mwikali Maema vs. Council of Legal Education and 2 Others Civil Appeal No. 121 of 2013**, **Susan Mungai vs Council of Legal Education & 2 Others Constitutional Petition No. 152 of 2011** and **Republic v The Council of Legal Education ex parte James Njuguna & 14 Others Misc Civil Case No. 137 of 2004.**

91. Since mandamus may not issue to compel a public body to perform an action which is prohibited by law, it was contended that by requiring the School to admit the applicants based on the criterion in the statute before coming into force of the ***Kenya School of Law Act***, the School would be required to act in breach of statute. Likewise, an order prohibiting the 1st Respondent from administering pre-bar examination would have the same effect since the pre-bar examinations are now mandatory under Section 16 of the ***Kenya School of Law Act*** as read together with the Second Schedule to the Act. Directing the 1st Respondent to admit the applicants without administering the pre-bar examination would be itself an affront to the principle of rule of law espoused in Article 10 of the Constitution which requires that law should govern a nation, as opposed to being governed by arbitrary decisions of individual government officials.

92. It was therefore the School's case that the Petitioners had not made a case for grant of any of the prayers sought and urged that the Petitions and Application for Judicial Review be dismissed with costs and the School allowed to proceed with the pre-bar examinations.

2nd Respondent's Case.

93. In opposition the Council contended that the Petition and Notice of Motion as drawn and filed are grossly misconceived, legally untenable and an abuse of Court process for the reasons:

a. **The Petition and Notice of Motion do not disclose any justiciable fundamental right violation by the Respondent and accordingly fail the test of a competent constitutional petition;**
b. **The Petition and Notice of Motion have been premised on grounds that wholly *ex turpi causa*;**

   i. **Section 16 and Second Schedule to the Kenya School Law Act, 2012 provides mandatory requirements for admissions for the Advocates Training Programme, and the said section and Schedule do not accommodate any discretional power to vary that mandate;**
   ii. **Legal education is a specialized sphere, and is by Parliament intended to be managed by experts, the High Court has no jurisdiction to substitute its discretion in the stead of the discretion of the Respondent, in insisting on highest standards of qualification, in legal training;**
   iii. **Legitimate expectation cannot be pleaded or sustained in contravention of what is**

provided for in statute, this is the law as applied in Kenya in inter alia *Royal Media Services Limited & 2 others v Attorney General & 8 others [2014] eKLR and Republic v Kenya Revenue Authority & 3 others Exparte Five Forty Aviation Limited [2015] eKLR*

c. **Miscellaneous Law Amendment Statute No. 18 of 2014 is not unreasonable and did not perpetuate inequality or discrimination, it served to clarify provisions of the Second Schedule to the Kenya School of Law Act, 2012, and provide better for legal training in Kenya;**
d. **There has been no *acceptable* ground pleaded to necessitate declaration of Statute as unconstitutional. The Petitioners are relying on a purported legitimate expectation, issued *ultra vires*, and which in any event cannot be sustained in the face of section 16 and Second Schedule to the Kenya School of Law Act, 2012;**
e. **The Respondent cannot be held to violate Articles 27, 35 and 47, when it is merely seeking to implement provisions of the Kenya School of Law Act, 2012, which statute has not been repealed or declared unconstitutional and thus enjoys the presumption of legality;**
f. **The notices for pre bar exams issued in consonance with the Kenya School of Law Act, 2012, are legally cushioned, unless and until the Kenya School of Law Act, 2012 is declared invalid;**
g. **Judicial review writ of *Mandamus* cannot issue to compel a public authority to act contrary to law;**
h. **The invitation for pre bar examination is in any event only for five (5) units, which the Petitioners and all other law graduates have undertaken in the LL.B course training, these are:**

    i. **Legal Systems and methods;**
    ii. **General Principles of Constitutional Law;**
    iii. **Law of Tort;**
    iv. **Law of Contract;**
    v. **Criminal Law.**

i. **The Petition and Notice of Motion as drawn and filed are an abuse of court process.**

94. On the issue whether the second schedule to the ***Kenya School of Law Act*** unconstitutional it was submitted on behalf of the Council that based on **Coalition for Reform and Democracy (CORD) & another vs. Republic of Kenya & another [2015] eKLR** the Amendment Act is legal and it is for the Petitioners to prove that the act does not confirm to any article of the constitution for it to be declared unconstitutional. Based on the Council's mandate under the ***Legal Education Act 2015*** it was submitted that since the 2nd Respondent can vary regulations in relation to legal education so as to ensure the highest standards are attainable, the Petitioners must show that the 2nd Respondent went outside its scope to change the regulations. In support of this position the Council relied on **Maharashtra State Board of Secondary And Higher Secondary Education and Another vs. Kurmarstheth [1985]** and **Republic vs. The Council Of Legal Education Ex-Parte James Njuguna & 14 Others [2007] eKLR** and submitted that if the courts were to declare the Amendment Act unconstitutional then it would be interpreting the will of Parliament by usurping the role of Parliament and making new regulations in relation to legal education. To the Council, the Amendment Act was to clarify provisions of the second schedule to the ***Kenya School of Law Act 2012.***
95. Since the Act are to apply to each and every individual who is to join the Kenya School of Law, it was submitted that the Act cannot be said to be unreasonable and perpetuates discrimination and reliance was placed on **Susan Mungai vs. Council of Legal Education & 2 Others [2012] eKLR.** To the Council, it is indeed the Petitioners who are seeking preferential treatment from the 1st Respondent on admissions to the Kenya School of Law.
96. With respect to the alleged infringement of the Petitioner' legitimate expectation to be admitted, it was submitted that the 'guidelines' contained in the Notice in the newspaper dealing with the admission criteria for the year 2014/2015 were *ultra vires* section 16 of the Kenya School of Law Act, 2012 and support for this submission was sought in **Republic vs. Kenya Revenue Authority & 3 others Exparte Five Forty Aviation Limited [2015] eKLR**, to the effect that:

"Whereas it is true that a person may acquire legitimate expectation from the conduct or express promises made by an authority, the words of DE Smith Woolf and Jowell in Judicial Review of Administration Action, 5th Edition pg. 566, ought to be taken into account to the effect that: "Purported authorization, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims."

97. To the Council, the legal concept of legitimate expectation cannot operate against the law. The notice that was put in place was in contravention of the requirements as per the Kenya School of Law Act and further support was sought from **Royal Media Services Limited & 2 others v Attorney General & 8 others [2014] eKLR**, where it was held that:

"Legitimate expectation cannot prevail against statute. See Mason Hayes–Curram, 2008. "THE DOCTRINE OF LEGITIMATE EXPECTATION; RECENT DEVELOPMENTS". I may also add that legitimate expectation, however strong it may be, cannot prevail against express provisions of the Constitution. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends the Constitution, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise."

98. It was however submitted that without prejudice to the foregoing, granted that the 2nd Respondent had all best wishes to assist the last batch of student from the new regulations it was not up to the respondent to amend the *Kenya School of Law Act* that was indeed Parliament that did so.
99. On the allegation of the breach of **the Petitioners Rights under A**rticles 10, 27, 35, 43 and 47 the Council denied that it was discriminating against the Petitioners as other individuals too are subject to the same eligibility requirements and relied on **John Kabui Mwai & 3 others v Kenya National Examination Council & 2 others [2011] eKLR** .
100. To the Council, the Respondents did admit other students into the School who were qualified and whose institutions had met and complied with the regulatory requirements envisaged under the Legal Education Act and the 1st School's regulations and referred to **Muamar Nabeel Onyango Khan vs. Council of Legal Education & 2 others [2015] eKLR**.
101. In response to Article 35 which gives every citizen the right to access information, it was submitted that the Petitioners failed to prove to the Court how this right has been violated by the 2nd Respondent as the issue was not addressed in the pleadings. Dealing Article 43 which gives every citizen the right to education, it was submitted that whereas every Petitioner has the right to education, that right is enforceable subject to legislated restrictions. Referring to the contention that the Respondents are trying to 'cut short' the Petitioners' academic journey by only regarding KCSE as the only determining factor in admission to the 1st Respondent hence creating a disability on the Petitioners, the Council made reference to Articles 21(2) and 24 of the Constitution and submitted that the state had taken all measures including the setting of standards to achieve the right to free education through the enactment of the Council under the ***Legal Education Act 2012***. To the Council, the right to education can be limited if for example a university fails to adhere to the rules set in place by its supervising authority, then the Council has the authority to shut down the university till it adhere to the set requirements. Such was the situation in the case of **Republic vs. Council of Legal Education & others exparte Keniz Otieno Agira & 23 others [2013] eKLR** where the Court held that:

"There is nothing in the Council of Legal Education (Kenya School of Law) which bars the Council from reviewing its earlier decision to admit or deny admission to students from a particular university. In other words there is nothing that bars the Council from reviewing, varying or rescinding its earlier decision. Therefore the mere fact that students from Busoga University may in the past have been admitted to the School would not estop the Respondent from rescinding its decision if it was satisfied that subsequent events made the admission of students from the said University untenable as long as its decision was not irrational, illegal or procedurally improper. I have already stated that the Respondent took the necessary steps to

inform the University of the steps it intended to take. The University has not alleged that the Respondent breached the due process in arriving at its decision. At the time the said decision was taken in May 2012, the applicants had not graduated from the said University. In the circumstances of this case, I agree with the Respondent that it was the duty of the University to take the necessary steps to inform the applicants of the developments."

102. It was therefore submitted that the Council can review its decision and in so far as the notice may have existed the Council acted in accordance with the law to ensure that admission to the School for the year 2016/2017 was in accordance with the ***Kenya School of Law Act***.
103. With respect to Article 47 which gives every citizen the right to administrative action, the Council relied on **Maharashtra State Board of Secondary And Higher Secondary Education and Another vs. Kurmarstheth** (supra) where it was stated that,

"Viewed against this background, we do not find it possible to agree with the views expressed by the High Court that the denial of the right to demand a revaluation constitutes a denial of fairplay and is unreasonable. The Board is a very responsible body. The candidates have taken the examination with full awareness of the provisions contained in Regulations and in the declaration made in the form of application for admission to the examination they have solemnly stated that they fully agree to abide by the regulations issued by the Board. In the circumstances, when we find that all safeguards against errors and malpractices have been provided for, there cannot be said to be any denial of fair play to the examinees by reason of the prohibition against revaluation".

104. Further reliance was sought from **Republic vs. Kenya National Examination Council & Others Ex-parte Kipkurui Michelle D. Jeruto & 34 others [2015] eKLR** to the effect that:

"Similarly, whereas it is true that there are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal and that the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth, the position taken in Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009, in my view holds supreme. In that case the Court of Appeal held:

> **"In the court's view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the present case. The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made.."**
>
> **However, even in that case, the Court was clear that an inquiry ought to be made in order to enable the authority tasked with the decision making power to fairly determine the matter before it. For a body entrusted with the powers to determine the rights of subjects such as the rights to fair administrative action, to be said to have been satisfied, it must have considered all the relevant factors."**

105. To the Council, all relevant factors were taken into account. The pre-bar examination is set around 5 modules (legal systems and methods, constitutional law, tort law, contract law and criminal law) that students who have undergone a law degree have studied. Therefore it is not an examination set on modules students have not covered so as to warrant unreasonableness my asking the applicant to study for modules outside the purview of what they have been taught.
106. Without prejudice to the foregoing submissions the Council submitted that in the spirit of

fairness, it would conceded that the Petitioners may apply to the Kenya School of Law for admission to the Advocates Training Program 2016/2017 using the previous eligibility requirements (those contained in the notice that was for the year 2014/2015 admission). However as per the ***Kenya School of Law Act*** they must sit for the pre-bar examination. This would allow those who were cut off from applying for the pre-bar examination because they did not meet the threshold can now apply for the exam.

107. On the efficacy of the prayer for mandamus the Council relied on **Republic vs. Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu [2014] eKLR** for the holding that:

"Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way…These principles mean that an order of mandamus compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done."

108. To the Council, to grant this order would mean that the Court would be directing that the Respondents should admit the Petitioners contrary to what the Kenya School of Law Act provides.

109. It was therefore contended that the Council had shown that it acted in a reasonable, fair and proportional manner in regards to the admission for the Advocates Training Program 2016/2017 and adhered to its mandate under the ***Legal Education Act 2012*** and the ***Kenya School of Law Act 2012*** as per the eligibility requirements and as such cannot be held to have acted contrary to the law. The purpose of judicial review is not to weigh the merit and demerits of the decision of a public authority but to ensure that the decision was arrived at as per the correct procedure. The Petitioners have failed to show where the 2nd Respondent has acted contrary to the law and as such we urge you to dismiss the Petition with costs.

110. At the hearing however, **Mr Bwire**, learned Counsel for the Council disclosed that the Council had conceded to a small concession. According to him, for the students who were already in the LLB Class prior to the enactment of the ***Kenya School of Law Act***, the outgone Regulations bore to them legitimate expectation that their interest would be preserved in relation to their eligibility to the Advocates Training College. However any other students who joined after the enactment of the said Act, the current legal position is mandatory to all applicants.

The 3rd Respondent's Case

111. On behalf of the 3rd Respondent, the Attorney General, (hereinafter referred to as "the AG"), the following grounds of opposition were filed:

1. **THAT the 1st & 2nd respondents acted within the law while discharging their duties hence the application is an abuse of the court process.**
2. **THAT it must be appreciated in good faith that the Kenya School of Law is the public legal education provider responsible for the provision of professional legal training as an agent of the Government of Kenya. Admission to the Kenya School of Law is regulated by law, and regulations have been made to support that law.**
3. **THAT Parliament clearly vests the power of formulating the policy of training and examining of Advocates on the Council of Legal Education and working together with the Kenya School of Law is the sole body mandated with overseeing the quality of legal education in Kenya. To this end we place reliance on the case of *Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarstheth [1985] LRC***
4. **THAT the Council of legal education has the power to set educational standards to ensure**

that the highest professional standards are maintained in the legal profession and to that extent all those seeking to gain entry into the profession should be ready to and aspire to meet the standards set by the Council. To this end we place reliance on the Court of appeal decision in *Eunice Cecilia Mwikali Maema vs. The Council of Legal Education and 2 Others* and The High court's decision in *Republic v The Council Of Legal Education Ex-Parte James Njuguna & 14 Others [2007] eKLR*

5. **THAT the respondent's actions were performed well within the confines and objectives of The Legal Education Act and The Kenya School of Law together with the regulations as laid down and at no time have the respondents ever acted based on malice, discrimination, bad faith or extraneous considerations.**
6. **THAT the application offends the provisions of section 9 of The Fair administrative Action Act as well as section 29 of The Legal education Act with regard to hierarchy of dispute resolution in relation to matters of legal education.**
7. **THAT with respect to the judicial review application, the same does not meet the threshold and basic tenets of a judicial review application on the grounds of illegality, unreasonableness, irrationality, impropriety of procedure or improper consideration.**
8. **THAT the unconstitutionality of the second schedule to Kenya School of Law Act on the basis of discrimination is untenable in the circumstances. The petitioners allege that the second schedule to the KSL Act is discriminatory for not allowing alternative qualifications for admission to the programme. This allegation is fallacious as the law is not enacted to favour a certain group of individuals. To this end we rely on Lady Justice Mumbi Ngugi's decision in *Susan Mungai V Council Of Legal Education & 2 Others[2012] eKLR***
9. **THAT greater public interest in regulating the legal profession with regard to legal education standards militates against the petitioner's legitimate expectation and applying the doctrine of proportionality, the orders sought should not be granted. To this end we rely on the High court decision *R-Vs-Kenya National Commission On Human Rights Ex-Parte Uhuru Kenyatta (2010) eKLR.***
10. **THAT granting the orders of CERTIORARI, MANDAMUS & prohibition as sought would amount to curtailing the statutory powers of the respondents to discharge their functions as obligated by the law.**
11. **THAT in the circumstances and based on the foregoing reasons, the notice of motion is therefore baseless, misconceived and devoid of any merit and the orders sought should not be granted.**

112. On behalf of the AG, it was submitted that the 1st & 2nd respondents acted within the law while discharging their duties hence the application is an abuse of the court process.
113. It was submitted that within the confines of the ***Council of Legal Education Act*** & the ***Kenya School of Law Act***, the School is the public legal education provider responsible for the provision of professional legal training as an agent of the Government of Kenya and admission thereto is regulated by law, and regulations have been made to support that law. Parliament clearly vests the power of formulating the policy of training and examining of Advocates on the Council and working together with the School is the sole body mandated with overseeing the quality of legal education in Kenya. In this regard the pre-bar examinations are well within the four corners of the aforementioned Acts together with the regulations set thereunder and the court ought to exercise care in interfering with them as sought by the petitioners**.** To this end reliance was placed on the case of **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarstheth [1985] LRC** .
114. It was further contended that the Council has the power to set educational standards to ensure that the highest professional standards are maintained in the legal profession and to that extent all those seeking to gain entry into the profession should be ready to and aspire to meet the standards set by the Council. In support of this position, the AG relied on **Eunice Cecilia Mwikali Maema vs. The Council of Legal Education and 2 Others** (supra) and **Republic vs. The Council of Legal Education Ex-Parte James Njuguna & 14 Others [2007] eKLR** (supra).
115. To the AG, the 1st & 2nd respondents' actions were performed well within the confines and objectives of the ***Legal Education Act*** and the ***Kenya School of Law Act*** together with the regulations as laid down and at no time have the respondents ever acted based on malice,

discrimination, bad faith, arbitrariness, unreasonableness or extraneous considerations as alleged. Further, it has not been demonstrated that by introducing the pre-bar examinations the respondents acted based on any of the aforementioned grounds.

116. It was submitted that this being a matter touching on Legal education, the application offends the provisions of section 29(1) of the ***Legal Education Act*** as well as sections 7 & 9 of the ***Fair Administrative Action Act*** with regard to hierarchy of dispute resolution in relation to matters of legal education. In support of this submission the AG relied on sections 29, 30 and 31 of the ***Legal Education Act*** as read with section 7 and 9 of the ***Fair Administrative Action Act***, and submitted that the dispute herein ought to have been first lodged before the Legal Education Appeals Tribunal being a matter that squarely falls within the docket of Legal education. The AG's position was fortified on two grounds namely that the primary statute being the ***Legal Education Act*** has provided for a statutory mechanism to address dispute arising from the operations of the statute with an appellate right therefrom to the High Court under section 38 of the Act and secondly, that the composition of the Legal Education Appeals Tribunal drawn from various quarters is best suited to evaluate the issues pertaining to Legal Education by effectively analyzing the facts, evidence and the relevant laws. According to the AG, as the applicants have not exhibited any attempt to have approached the Tribunal, it would be premature for this court to assume jurisdiction in the first instance.

117. It was submitted that it is a well settled judicial principle that where statute has provided for a mechanism to solve disputes, that mechanism should be invoked and reliance was sought from **The speaker of the National Assembly vs. The Hon James Njenga Karume,Civil application No 92 of 1992 [1992] KLR 22, Republic v Director of Planning City Council of Nairobi & 12 others JR ELC 102 of 2011**, **Petition 343 of 2012** **Kenya Planters Cooperative Union Ltd & 12 others vs. Minister for Cooperatives Development & Marketing [2012], Kipkalya Kiprono Kones vs Republic & Another Ex-parte Kimani Wanyoike & 4 Others [2008} Bernard Kasingu vs Attorney General & others Nrb Petition Number 4012 of 2012 and Thande vs. Montgomery & Others[1970] EA341**

118. It was further submitted that a litigant who approaches the Court must be clear which jurisdiction, he/she intends to invoke and in this respect the AG cited **Samuel Kamau Macharia & Another vs. Kenya commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR**, where the Supreme Court while approving the decision in **Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1** pronounced itself on jurisdiction thus [paragraph 68]:

> **"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."**

119. In support of its case, the AG also relied on the Supreme Court's first advisory opinion in **In Re The Matter of the Interim Independent Electoral Commission** where the Court in paragraphs 29 and 30 stated:

> **"Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v. Caltex Oil***

***(Kenya) Limited [1989] KLR 1*, which bears the following passage (Nyarangi, JA at p.14):**

> **"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."**

The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution."

120. It was therefore contended that the aforementioned cases reiterate the principle that where the constitution or a statute has established a dispute resolution procedure, then that process must first be used and which is of universal application. The mere fact that the constitution is cited or invoked is not enough to elevate the matter to a constitutional matter or confer a license to the high court to inquire, investigate, arbitrate, surcharge or in any manner deal with the issues which can be dealt with through the dispute resolution procedure provided by statute. Therefore it was submitted that this court's jurisdiction would only arise after the due exercise by the mandated bodies, in this case the Legal Education Appeals Tribunal of it's statutory mandate. To the AG, this court can only exercise its jurisdiction in accordance with the ***Legal Education Act*** as well as the ***Fair Administrative Action Act*** which clearly and without ambiguity places limitation by clearly stating that the High Court only exercises appellate jurisdiction or first instance jurisdiction in exceptional circumstances.
121. In the AG's view, in our country that craves for credible institutional mechanisms it would be in the best interests of the country and justice system to promote and give effect to the establishment of credible institutions provided for under the many statutes that we have and which promote alternative dispute resolution as a quick method of disposing of matters otherwise they would be of no relevance. It was urged that this court has a duty to protect and facilitate the existence of the Legal Education Appeals Tribunal provided for under the ***Legal Education Act*** by refusing to craft, innovate an original jurisdiction on itself contrary to the appellate jurisdiction recognized by the ***Legal Education Act*** unless channelled through the requisite hierarchy. In support of this contention the AG relied on the decision of the Supreme Court by **Justice Mohammed Ibrahim** in **Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 others [2014] eKLR** that:

> **"A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court".**

122. The AG relied further on **Peter OduorNgoge vs. Hon. Francis Ole Kaparo, SC Petition 2 of 2012**,[para. 29-30] where it was held:

> "**The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted. In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or**

of jurisprudential moment, will deserve the further input of the Supreme Court...Consequently, this Court recognises that all courts have the constitutional competence to hear and determine matters that fall within their jurisdictions and the Supreme Court not being vested with 'general' original jurisdiction but only exclusive original jurisdiction in presidential petitions, will only hear those matters once they reach it through the laid down hierarchical framework".

123. It was contended that the argument on unconstitutionality of the second schedule to ***Kenya School of Law Act*** on the basis of discrimination is untenable in the circumstances. The petitioners allegation that the second schedule to the KSL Act is discriminatory for not allowing alternative qualifications for admission to the programme, it was asserted is fallacious as the law is not enacted to favour a certain group of individuals. What the petitioners are asking is preferential treatment and to this end reliance was placed on Lady **Justice Mumbi Ngugi's** decision in **Susan Mungai vs. Council Of Legal Education & 2 Others[2012] eKLR**, where the learned Hon Judge at paragraph 27 while making a finding on discrimination observed as follows:

"From the above matters, it is clear that, rather than the respondents having acted in a manner that was discriminatory against the petitioner, it was the petitioner who was seeking what can only be viewed as preferential treatment from the respondents. The Admission Regulations applicable to all those seeking admission to the Kenya School of Law in 2006 when the petitioner made her application were the Council of Legal Education (Kenya School of Law) Regulations, 1997. There is nothing before this Court to show that all other applicants were not required to meet these qualifications. What the petitioner was asking was for the 1st respondent to waive these requirements with regard to her; and what she is asking this Court to do is to find that even if she was not qualified under those regulations, they were against the requirements of the Advocates Act anyway, and she should not have been required to meet them."

124. On the allegation that the second schedule to the Act is discriminatory for not allowing alternative qualifications for admission to the programme, the AG was similarly of the view that this allegation is fallacious as the law is not enacted to favour a certain group of individuals but is enacted to serve a particular purpose and to strike a balance given a diverse set of circumstances. Thus, if any other person feels aggrieved by a certain law for not accommodating his/her needs, that cannot be a ground to declare a law as unconstitutional and it is only the legislature that can remedy this. To the AG, there is nothing unconstitutional on the second schedule to the Act. Parliament in its wisdom vested the power of formulating policy and of training and examination of advocates on the Council; thus the Council has the power to ensure that legal education is maintained at the highest attainable standards and it is on this basis that the second schedule was framed as it is. The petitioners cannot thus claim to be discriminated upon simply because the standards set by the Council do not favour their expectations.

125. It was submitted that the greater public interest in regulating and setting standards in the legal profession with regard to legal education militates against the petitioner's legitimate expectation and applying the doctrine of proportionality, the orders sought should not be granted and the AG relied on **Justice Nyamu's** decision **Republic vs. The Council of Legal Education Ex-Parte James Njuguna & 14 Others [2007] eKLR** that:

"As long as the requirements as set out in the Regulations are aimed at achieving the objective of the Act or the purpose of the legislation, there cannot be a successful challenge to the regulations or the decisions of Council of Legal Education based on the Regulations. It is the view of the court even if the challenge were to be based on lack of proportionality in this case it has not been so attacked. Instead it has been attacked on alleged unfairness. The challenge on proportionality would still fail because proportionality is concerned with balance and whether the means justify the ends. In Europe the principle has been defined:-

> **"An appropriate balance must be maintained between the adverse effects which an administrative authority decision may have on the rights, liberty or interests of the**

person concerned and the purpose which the authority is seeking to pursue."

In my view the effect of the decision is not out of proportion with the objectives - of the Council of Legal Education Act. The purpose the Council of Legal Education is seeking to achieve is maintaining high standards of qualifications in the legal profession. Even from this standpoint the decision can neither be said to be unfair or unreasonable or out of proportion as explained above…In the matter before the court the relevant body, namely the Council of Legal Education has correctly addressed its mandate and also correctly addressed the relevant law and for this reason the challenged decision must command deference from the court by upholding it. It is for the Council of Legal Education to set educational standards for those to be admitted as advocates. In this, the law has given the Council of Legal Education discretion to set those standards. No other body has that function including the court. A mandamus cannot lie to enforce discretionary power. As a point of principle no civilized society can afford to disregard the results of examinations otherwise it would be farcical to hold the examinations in the first place".

126. The AG also relied on **R-Vs-Kenya National Commission On Human Rights Ex-Parte Uhuru Kenyatta (2010) eKLR** in which it was held:

"….the Court had an onerous responsibility of maintaining the delicate balance between an individual right and those of the public and that sometimes private rights have to bow to public interest. Putting all facts together, this court is of the view that in the circumstances of the case, public interest far outweighs the rights of the ex-parte applicant and in considering the above, balancing and putting all matters to scale this court in exercising its judicial discretion declines to give an order for certiorari and the application therefore fails."

127. The Court was therefore urged, while exercising Judicial Review jurisdiction, to be alive to considerations of public interest in declining the issuance of judicial review orders even where a party has made out a case for issuance of orders of judicial review, pursuant to **Republic vs. Judicial Service Commission ex-Parte Pareno (2004) 1 KLR 203 at 219, Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000,** and ***Halsbury's Law of England* 4th Volume II Page 805 Paragraph 1508.**

128. It was the AG's views that from the pleadings the petitioners/applicants are not seriously challenging the jurisdiction of the Respondents neither have they satisfied the various grounds mentioned earlier herein but are instead, challenging the merits of the decision.

129. It was asserted that the issuance of the order of prohibition as sought should not be granted as it would have the effect of curtailing the statutory duty and function of the respondents. The Respondents urged this Honourable court to be persuaded by similar findings by the High Court in **Republic v Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited** where **Majanja J**. quoted with approval the decision of **Githua J** in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR** as follows;

"It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates."

130. With respect to the order for mandamus, it was submitted that the petitioners are seeking to compel the 1st respondent to admit the petitioners and other qualified law graduates who will apply for admission to the advocates training program for the academic year 2016-2017. However, this prayer cannot be granted as it is without basis and in any event the court cannot supervise or micromanage any institution. The courts duty is to determine whether the respondents' actions are lawful and not to run the particular institution. Mandamus is an order directed at a public body to perform a public duty. In this case, the Kenya School of Law does not admit students arbitrarily. There is a laid down procedure provided by statute on admission. Anyone who falls outside the admission criteria does not qualify for admission even with a court order as that would be unlawful. Thus, the prayer is unmerited. The AG submitted that issuance of the order of *mandamus* as sought should not be issued because a statutory body and office cannot be compelled to act outside the four corners of the law within which it is supposed to operate. Against the backdrop of the objectives of the ***Legal Education Act*** and the ***Kenya School of Law Act***, in this case it will not be prudent to order the 1st respondent to act on the complaints received in a particular manner and support of this submission was sought from the **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR.**

131. The AG relied further on **Edward Gacau Kariuki & Others vs. Registrar of Societies [2007] eKLR** where the Court held thus:

> **'The ex-parte applicants want the court to order the Respondent to act in a specific way. The court has no powers to interfere with the Registrar's discretion as it would be usurping his powers under the Act. The discretion is wholly in the hands of the Registrar, to register or not to register considering all the circumstances of the case.'**

132. To the AG, the Court should not issue the order of *mandamus* as sought by the ex-parte applicants as it would amount to usurping the powers of the 1st & 2nd Respondents. Further, the application does not meet the threshold and basic tenets of a judicial review application on the grounds of illegality, unreasonableness, irrationality, impropriety of procedure or improper consideration.

133. With respect to declaratory and injunctive orders sought, it was submitted that in the absence of satisfying the criteria for grant of the judicial review orders there would be no basis for grant of the injunctive and declaratory orders as sought.

Determinations

134. It was submitted that this being a matter touching on Legal education, the application offends the provisions of section 29(1) of the ***Legal Education Act*** as well as sections 7 & 9 of the ***Fair Administrative Action Act*** with regard to hierarchy of dispute resolution in relation to matters of legal education. In support of this submission the AG relied on sections 29, 30 and 31 of the ***Legal Education Act*** as read with section 7 and 9 of the ***Fair Administrative Action Act***, and submitted that the dispute herein ought to have been first lodged before the Legal Education Appeals Tribunal (hereinafter referred to as "the Tribunal") being a matter that squarely falls within the docket of Legal education. To the AG since there is a Tribunal task with resolving the matters of the nature contemplated herein, this Court ought not to entertain these proceedings.

135. According to section 31(1) of the ***Legal Education Act***:

> ***The Tribunal shall, upon an appeal made to it in writing by any party or a reference made to it by the Council or by any committee or officer of the Council, on any matter relating to this Act, inquire into the matter and make a finding thereupon, and notify the parties concerned.***

136. It is trite that a judicial or quasi-judicial tribunal, such as the Tribunal herein has no inherent powers. In **Choitram vs. Mystery Model Hair Salon [1972] EA 525**, **Madan, J** (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734**, it was held that Rent Restriction Board is the creation of statute and neither

the Board nor its chairman has any inherent powers but only those expressly conferred on them.

137. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal such as Rent Control Board, the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication and that a Tribunal is a creature of statute and has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon** (supra); **Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461**.

138. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly.

139. From section 31(1) of the ***Legal Education Act***, it is clear that the Tribunal's power is restricted to matters relating to the Act. The powers of the Tribunal are however enumerated under section 35 of the said Act as follows:

Upon hearing an appeal the Tribunal may—

(a) confirm, set aside or vary the order or decision in question;

(b) exercise any of the powers which would have been exercised by the Council, in the proceedings in connection with which the appeal is brought; or

(c) make any other order, including an order, for costs, as it may consider just.

140. In this case the Petitioners seek *inter alia* orders declaring legislation unconstitutional. In order to determine such prayers, it is my considered view that an interpretation and application of the Constitution would be necessary and under Article 165(3)(d) of the Constitution, the High Court is the proper forum 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;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191.

141. It is therefore my view and I hold that the dispute herein does not fall within the jurisdiction of the Tribunal in order to warrant the invocation of section 9 of the ***Fair Administrative Action Act***.

142. According to the Petitioners, the said guideline created a legitimate expectation on the part of the petitioners to be subjected to the then existing law which was guiding admission to the Advocates Training Programme when seeking to join the ATP programme. However the advertised criteria

was a total departure from the transition guideline issued by the 1st and 2nd Respondents which criteria, according to the Petitioners is discriminative for not equating other qualifications for example those who undertook other exams other than KCSE. On this issue of the failure to take into account alternative qualifications, the Respondents averred that since the Second Schedule requires one to possess C+ (plus) mean grade in KCSE or its equivalent, this means various other qualifications are recognized and will be equated to KCSE hence the allegation for discrimination is baseless and cannot stand.

143. Section 1 of the Second Schedule to the Act provides:

1. ***A person shall be admitted to the School if—***

> ***(a) having passed the relevant examination of any recognized university in Kenya, or of any university, university college or any other institution prescribed by the Council, holds or becomes eligible for the conferment of the Bachelor of Laws (LLB) degree of that university, university college or institution; or***
>
> ***(b) having passed the relevant examinations of a university, university college or other institutions prescribed by the Council of Legal Education, holds or has become eligible for the conferment of the Bachelor of Laws Degree (LLB) in the grant of that university,***
>
> ***university college or other institution—***
>
> ***(i) attained a minimum entry requirement for admission to a university in Kenya; and***
>
> ***(ii) obtained a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education <u>or its equivalent</u>; and***
>
> ***(iii) has sat and passed the pre-Bar examination set by the school.*** [Emphasis mine].

144. From the foregoing it is clear that the Second Schedule has not locked out those who have alternative qualifications from being eligible for admission to the Programme. What is however required is that whatever qualification an applicant possesses it must be equivalent to a mean grade of C+ in the Kenya Certificate of Secondary Education. I accordingly do not accede to the contention that by applying the standard equivalent to KCSE other applicants with alternative qualifications have been necessarily locked out. However a perusal of the notification of pre-bar examination seemed not to have factored in the other equivalent eligibility for admission. The notification only mentioned KSCE qualifications. To the extent that the notification of pre bar examination did not conform to the Second Schedule to the Act, that notification was clearly unlawful.

145. It was contended that the notice required that as a prerequisite to registering for examinations, the Respondents had to supply a copy of the LLB Certificate (or evidence of conferment), final transcripts and clearance from the Council for Legal Education despite the fact that final transcripts are issued by Universities upon graduation and that previously, students have been admitted to the School with provisional transcripts. It was however contended on behalf of the Respondents that the School has the mandate to run its schedule as may be approved by its Board and has no obligation or requirement to call for applications to its programmes at a certain time when the applicants will have obtained all the requirements and therefore become eligible to apply. The applicants who do not qualify now will have an opportunity to sit for the pre-bar examinations when they are next offered. The law requires applicants to the School to demonstrate that they have become eligible for conferment of Bachelor of Laws Degree and that the applicants may show this by furnishing the School with provisional transcripts. The School will, however, not accept applicants who have not completed their Bachelor of Laws Degree programme. Under the law, such applicants are not eligible to join the ATP programme.

146. Under the Second Schedule aforesaid the criteria for admission to the ATP is *inter alia* that the applicant holds or has become eligible for the conferment of the Bachelor of Laws Degree (LLB)

in the grant of that university, university college or other institution. There is no hard and fast rule thereunder that an applicant must possess the degree certificate since eligibility for conferment thereof is an option. The notice clearly provided for the option of eligibility for conferment. However, the petitioners are aggrieved with the requirement of final academic transcripts. To impose conditions which are not contemplated under the Act in my view amounts to acting *ultra vires* the powers conferred by the Act. Whereas the School is entitled to decide what amounts to proof of eligibility for conferment with a degree, such proof must be reasonable in the circumstances and I do not see why the School cannot rely on documents confirmed by the accredited Higher Institutional of Learning to admit the applicants. To the extent that the notice talked of ***final*** transcripts which the Petitioners contend are only issued upon graduation, I agree that that requirement is not only unreasonable but outside the contemplation of the Act.

147. It was also contended that the impugned notice did not disclose the pass mark that any of the petitioners and the persons on whose behalf they were suing would score, to proceed to their Advocates Training Programme. However according to the School, all details including the subjects to be examined, the pass mark as well as opportunities for re-sits and other modalities were all contained in the ***Kenya School of Law (Training Programmes) Regulations, 2015***. This position was not seriously disputed by the Petitioners and in my view nothing turns on this complaint.

148. To the Petitioners, the Notice also required them to pay a total of Kshs 7000.00 for admission into the examination which amount was to be paid in less than a month's period, to the date of the examination, the School failed to take into account its facilitating powers under section 5 (b) of the ***Kenya School of Law Act*** to charge reasonable fees and to liaise with appropriate bodies to extend loans and other assistance to enable needy students to meet their fees obligations, hence the Respondents institution acted irrationally, unfairly and exclusionary towards the petitioners and persons whose interests they represent. It was however the School's response that section 5(b) of the Act gives the School power to charge reasonable fees and other charges for services rendered. It was averred that the School is entitled by law to charge reasonable fees and other charges for services rendered and whereas the School is charging an application fee of Kshs. 2,000 and an examination fee of Kshs. 5,000, the examination fee is refundable for those who do not meet the application requirements. In arriving at the fees, it was contended that the Respondent had considered that the pre-bar examination will entail one paper and has also considered the cost of setting, administering and marking the examinations as well as related incidentals hence the examination fees are quite reasonable in circumstances of this case.

149. It is true that section 5(b) of the Act empowers the School to:

charge reasonable fees and other charges for services rendered and liaise with appropriate bodies to extend loans and other assistance to enable and assist needy students to meet their fees obligations.

150. Whereas the Petitioner's contention is that to charge the said amount is unreasonable, it is my view and I so hold that it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. This is so because unreasonableness *per se* is largely a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness. Wednesbury unreasonableness was expounded in **Associated Provincial Picture Houses vs. Wednesbury Corporation [1948] 1 KB 223** where it was held:

"**It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers**

familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short vs. Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

151. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

152. I have considered the material placed before me and I am not satisfied that the threshold for Wednesbury unreasonableness or irrationality which in my view is a more appropriate term has been met with respect to the payment required from the Petitioners.
153. The said notice, it was deposed, required the petitioners to undertake examination in respect of which they had been taught, examined and passed, by institutions that are regulated and monitored by both the Council of Legal Education and Council of University Education and that in any case the Petitioners will be taught and examined some of those subjects at the Kenya School of Law. To the Petitioners, it was not reasonable for the School to examine students for subjects that they have already been examined at the said institutions since it demonstrates a lack of respect for the competence and discretion of universities when they are the lifeblood of knowledge in society. To the Petitioners the respondent institution should have examined something else such as understanding of language, classics, history, or metaphysics and not constitutional law when there is a transcript showing that a student passed it at University.
154. As for the School, it was contended that section 28 of the Act gives it the power to make regulations providing for the categories of examinations and the manner in which such examinations shall be administered. Accordingly, the pre-bar examination has been set to examine various subjects which have been determined by the School pursuant to its statutory mandate. Whereas the Petitioners alleged that the requirement for them to sit pre-bar examination which examine on some of the subjects they have undertaken at the University was unreasonable and in breach of Article 47 of the Constitution, the School refuted this on the basis that the pre-bar is an entrance examination intended to establish suitability of all applicants to the ATP. To the School, it is charged with a very key object of setting and enforcing standards relating to training persons to be advocates under the ***Advocates Act Cap 16*** hence the Court ought to refrain from directing the Respondents on how best to discharge its statutory mandate as it is being invited to do by the Petitioners in this Petition.
155. It is true that where a discretion is donated to a particular body the Courts ought to exercise restraint in and ought not to readily accede to invitation to interfere with the exercise of such powers and discretion. I therefore associate myself with the Court of Appeal's view in as

propounded in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** to the effect that:

"The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision…"

156. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
157. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**
158. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**
159. However, according to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority or power.
160. In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of

decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

161. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** the learned Judge expressed himself as follows:

"On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are... essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…Certainty of law is an important pillar in the concept of the rule of law. As is no doubt clear in the findings in this case, it is an essential prerequisite of business planning and survival as well. Yes, the rule of law is a lifeline of the economy as is illustrated in the emerging and thriving economies of the world. The courts in my view have a responsibility to uphold the rule of law for this reason. The ability of businesses to plan stems from the bedrock of the rule of law. "

162. It was in appreciation of this that judicial review was recognised in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** as the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.

163. To hold therefore that a member of the executive is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary, it has been held, is the first victim. Accordingly the Courts are empowered to and are under a duty to investigate allegations of abuse of power and improper exercise of discretion. I therefore associate myself with the holding in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240**, that:

"When litigants come to the courts it is the core business of the courts and the courts' role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance."

164. The circumstances under which the Court would be entitled to interfere with discretion even where it appears to be unfettered are now well known. The Court can interfere (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker

has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

165. In this case the School has been faulted for intending to examine the Petitioners on the subjects which they have undertaken at the University. To the Petitioners the School, in so conducting itself seems to be casting aspersions at the standards of the said institutions by exhibiting lack of respect for the competence and discretion of the universities.

166. With due respect, I disagree. To curtail the powers of the School in deciding what subjects to examine its prospective students would amount to usurping the powers of the School and substituting the Court's discretion for that of the School. There is nothing inherently wrong or unreasonable in the School setting what in its view are appropriate exams for the admission of students to the School as long as the exams in question are relevant to the course of study. This Court cannot decide for the School which subjects are appropriate for it to administer on their prospective students even if the Court was of the view that such subjects are not suitable as long as they are geared towards the attainment of the School's objectives. In other words it is not the Court's view on the suitability of the subjects that should determine whether or not the Court would interfere with the School's choice of examinable subjects. Where it is not shown that the decision was unreasonable I associate myself with the decision of the Court of Appeal in **Eunice Cecilia Mwikali Maema vs. The Council of Legal Education and 2 Others** (supra) that:

"the Council has the power to set standards to ensure that the highest professional standards are maintained in the profession and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the Regulations."

167. I also wish to associate myself with the decision in **Susan Mungai vs. The Council of Legal Education & 2 Others Constitutional Petition No. 152 of 2011 in which Mumbi Ngugi, J expressed herself as follows while citing with approval the case of Republic –vs- The Council of Legal Education ex parte James Njuguna and 14 Others, Misc Civil Case No. 137 of 2004 (Unreported):**

"The Council of Legal Education followed to the letter the purpose and objects of the Act including the applicable regulations and this Court has no reason to intervene in a way that interferes with the merit of the decisions clearly falling within the relevant regulations and which have been applied by the Council of Legal Education without any procedural irregularity or for an improper purpose. I decline to do so. The Council of Legal Education has the power and duty to insist on the highest professional standard for those who wish to qualify as advocates. The Regulations are aimed at achieving this. The decision was made on merit and this Court has no reason to intervene. The Regulations and the policy behind the rules were properly made pursuant to the Act and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the regulations...*The Council of Legal Education is the best judge of merit pertaining to academic standards and not the courts. Parliament clearly vests the power of formulating policy of training and examining of advocates on the Council of Legal Education and it would be wrong in the view of this court to intervene with the merits of the decision by the Council of Legal Education..... a Court of law would only be entitled to inquire into the merits of a decision in circumstances where the decision maker abused its discretion, exercised its decision for an improper purpose, acted in breach of its duty to act fairly, failed to exercise its statutory duty reasonably, acts in a manner which frustrates the purposes of the Act which gives it power to act, exercises its discretion arbitrarily or unreasonably, or where its decision is irrational or unreasonable as defined in the case of Associated Provincial Picture Houses Ltd. –v- Wednesbury Corporation [1947] 1 KB 223*. In the case before me, there is no evidence to suggest that the 1st respondent, in dealing with the application for admission by the petitioner, acted in any of the ways set out above that would justify interference by this Court with its decision." [Emphasis mine].

168.The Court further held:

"I find and hold that it would not be proper or right for the court to veto powers conferred by Parliament on a public authority or body such as the Council of Legal Education and for the court to substitute its own view from that of the Council of Legal Education to which discretion was given except where the discretion has been improperly exercised as enumerated in the ten situations above. In judicial review, the courts quash decision made by public bodies so that these same bodies remake the decisions in accordance with the law. It is not proper for the court to substitute its decision which is what this court is being asked to do by issuing a mandamus to compel a re-sit. I reiterate my earlier findings on this point in the case of *R v JUDICIAL SERVICE COMMISSION ex-parte PARENO Misc Civil Application No.1025 of 2003* (now reported) that it is not the function of the courts to substitute their decisions in place of those made by the targeted or challenged bodies."

169.The same position was taken in **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarstheth [1985] LRC** in which it was held:

"so long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it in the sense that the rules and regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom of the efficaciousness of such rules and regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures substantive as well as procedural would have to be incorporated in the rules and regulations for the efficacious achievement of the object and purposes of the Act. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulation falls within the scope of the regulation-making power conferred on the delegate by the statute. The responsible representative entrusted to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair."

170.The most robust submission however revolved around the breach of legitimate expectation, discrimination and retrospective application of the law.

171.To the Petitioners, the retrospective application of the provisions of the ***Kenya School of Law Act*** and the Second Schedule thereto as well as the ***Statute Law (Miscellaneous Amendments) Act, 2014*** have adverse effect hence is a threat to the rule of law and the principle of legitimate expectation and the same constitutes an abuse of power by the Respondents. The basis for contending that the law was retrospectively being applied was that by the time of the enactment of the ***Kenya School of Law Act, 2012***, some of the Petitioners were already admitted to the university and whereas the guidelines issued by the School subsequent to that enactment recognised this fact, the effect of the Amendment Act was to deny them the benefit of the grace period which had been extended to their predecessors who were in the same position as themselves.

172.This position was seriously contested by the School. According to the School, ***Oxford Dictionary of Law*** defines retrospective (or retroactive) legislation as *"legislation that operates on matters taking place before its enactment, e.g. penalizing conduct that was lawful when it occurred"*. To the School, looked at carefully, the provisions relating to admission criteria complained against are not retrospective since the provisions apply to persons who seek to join the School after the commencement of the ***Kenya School of Law Act***. The law would have been retrospective if it sought to affect the rights of person who had already joined the School. Having submitted that the provisions of the ***Kenya School of Law Act*** are not retrospective, it must be appreciated that retrospective law is not in itself unconstitutional or unenforceable. It was submitted that generally, it is the Constitution and laws of a country that provides limits on legislative power to enact retrospective laws. The School by parity of reasoning cited the Australian position that the Australian Constitution has no express or implied prohibition on making of retroactive laws and relied on the Australian case of **R vs. Kidman (1915) 20 CLR 425**, ***Municipality of Mombasa vs. Nyali Limited*** **[1963] E.A. 371 and Overseas Private**

Investment Corporation (supra).

173. To the School, any finding in favour of the applicants on this point would have catastrophic results. It would open a floodgate of litigation for persons to challenge any new law on the ground that they had taken certain steps based on the repealed law and the change in legislation would prejudice them.

174. As clearly appreciated by the Respondents based on **Overseas Private Investment Corporation & 2 Others v Attorney General [2013] eKLR**:

"retrospective operation is not *per se* illegal or unconstitutional. Whether retrospective statutory provisions are unconstitutional was a matter considered by the Supreme Court in the case of *Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others, SCK Application No. 2 of 2011 [2012] eKLR* where the Court observed that, *"[61] As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it: (i) is in the nature of a bill of attainder; (ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden..* It is also worth noting that it is not the role of this court to dictate as to whether a law should or should not apply retrospectively. That is the province of the legislature. The role of the court is limited to product of the legislative process and determining whether its purpose or effect is such that it infringes on fundamental rights and freedoms of the individual. The duty of courts is to give effect to the will of Parliament so that if the legislation provides for retrospective operation, courts will not impugn it solely on the basis that the same appears unfair or depicts a 'lack of wisdom,' or applies retrospectively. *Francis Bennion* in his seminal work on *Statutory Interpretation, 3rd edition, at page 235* states, *"Retrospectivity is artificial, deeming a thing to be what it was not. Artificiality and make-believe are generally repugnant to law as the servant of human welfare. So it follows that the courts apply the general presumption that an enactment is not intended to have retrospective effect. As always, the power of Parliament to produce such an effect where it wishes to do so is nevertheless undoubted."

175. This was the position adopted by the Court of Appeal in **Said Hemed Said vs. Emmanuel Karisa Maitha & Another Mombasa HCEP NO. 1 OF 1998** while citing the cases of **John Mwangi vs. Francis Mwangi Njuguna Civil Application No. 96 of 1997 & Hutchinson Jaunces (1950) 1 KB 574** where it was stated as follows:

"The general rule is that when the law is altered during the pendency of an action or proceeding, the rights of the parties are to be decided according to the law as it existed when the action or proceeding was begun unless the new statute shows a clear intention to vary or affect such rights and such intention may be even by implication. But in the case of an enactment, which alters or affects only procedure or practice of the Court, the general principle is that it has a retrospective effect unless it has some very good reason against it".

176. Again in the case of **Mistry Jadva Parbat & Company Ltd vs. Ameeri Kassim Lakha & 2 Others Civil Appeal (Application) No. 296 OF 2001** the Court of Appeal citing the cases of **Municipality of Mombasa vs. Nyali Ltd [1963] EA 371; Patel vs. Republic [1968] EA 97; Patel vs. Benbros Motors Tanganyika Ltd [1968] EA 460** stated inter alia as follows:

"It is also a rule of construction of statutes that prima facie, if a provision of legislation affects procedure only, it operates retrospectively. Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts are guided by certain rules of construction and one of these rules is that if the legislation affects substantive rights, it will not be construed to have retrospective effect unless a clear intention to that effect is manifested. Whereas, if it affects procedure only, prima facie, it

operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation, which has to be ascertained, and the rule of construction is only one of the factors to which regard must be had in order to ascertain that intention".

177.The question to be dealt with is therefore whether the Amendment Act affected any rights and if so whether those were substantive or merely procedural rights and if they were substantive rights whether the enactment expressed a clear intention to operate retrospectively. This leads us back to the state of the law before the Amendment Act. Before the said amendment the Second Schedule to the Act at section 1 and 2 thereof provided:

(1) A person shall be admitted to the School if:

(a)having passed the relevant examination of any recognized university in Kenya holds, or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) of that university; or

(b)having passed the relevant examinations of a university, university college or other institutions prescribed by the Council of Legal Education, holds or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) in the grant of that university, university college or other institution:

(i)attained a minimum entry requirements for admission to a university in Kenya; and

(ii)obtained a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent; or

2. ***has sat and passed the Pre-Bar examination set by the School.***

178.Clearly this provision was very poorly drafted. Doing the best of a bad drafting, it would seem that subsection 2 was an alternative to what was required under subsection 1.

179.With the advent of the Amendment Act, this provision was varied to read:

A person shall be admitted to the School if—

(a) having passed the relevant examination of any recognized university in Kenya, or of any university, university college or any other institution prescribed by the Council, holds or becomes eligible for the conferment of the Bachelor of Laws (LLB) degree of that university, university college or institution; or

(b) having passed the relevant examinations of a university, university college or other institutions prescribed by the Council of Legal Education, holds or has become eligible for the conferment of the Bachelor of Laws Degree (LLB) in the grant of that university, university college or other institution—

(i) attained a minimum entry requirement for admission to a

university in Kenya; and

(ii) obtained a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent; and

(iii) has sat and passed the pre-Bar examination set by the school.

180.The import and impact of the amendment was that the pre-bar examination is nolonger an option but an added requirement.

181.It is however clear that the Amendment Act did not make any pretence as to its retrospective operation or effect. The only issue for determination is therefore whether the effect of the Amendment in so far as to relates to the ***Kenya School of Law Act*** was to adversely affect the rights accrued by the petitioners or even some of them. That this fact was appreciated by the Respondents was clear from the notice issued by the School which provided:

"The Second Schedule to the Kenya School of Law Act will be followed subject any discretionary powers which have hitherto been exercised by the Council of Legal Education and the Kenya School of Law prior to 2012 to ensure conformance with the anti-discriminatory provisions of Article 27 of the Kenya Constitution, 2010"

182.Under Article 10 of the Constitution some of the values and principles of governance include equity and non-discrimination. The said Article binds all State organs, State officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements public policy decisions. In enacting the Amendment Act, Parliament did not set out to deprive the Petitioners of their rights if any or discriminate against them and it could not do that. The presumption in my view is and it has always been the principle that Parliament enacts constitutional legislation. That position was reiterated in **Coalition for Reform and Democracy (CORD) & another vs. Republic of Kenya & another [2015] eKLR** where it was held that:

"I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with their delegated sovereign authority."

183. Accordingly, in interpreting the enactments, it is my view that State organs, State Officers, public officers and all persons must adopt an interpretation which promotes and underpins the values and principles of governance set out in the Constitution unless the contrary intention appears in the enactment. In other words a legislative enactment must be presumed to uphold constitutional values and principles including the Bill of Rights unless the provisions of Article 24(1), (2) and (3) of the Constitution are complied with. That Article provides:

(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.

184. I have considered the Amendment Act and I am unable to agree that Parliament set out to apply the enactment retrospectively or in a manner that discriminates against the rights of the Petitioners. Therefore the position in Australia is with due respect inapplicable to the circumstances of this case. It is therefore my view that the position adopted by the School before the Amendment Act was the correct position as it was in line with the values and principles in Article 10.

185. It is therefore my view that since there was no express intention by Parliament to effect the amendment retrospectively, the Amendment Act is not unconstitutional. This Court is however obliged pursuant to Article 20(3)(b) to adopt the interpretation that most favours the enforcement of a right or fundamental freedom and in this case equality and freedom from non-discrimination.

186. Tied to this issue is the issue of legitimate expectation. **De Smith, Woolf & Jowell,** in ***"Judicial Review of Administrative Action"*** 6th Edn. Sweet & Maxwell page 609 state:

"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

187. It was the Respondents' case that since the decision was not theirs but that of Parliament, they had no discretion in the matter but to implement the same. I have already found that Parliament did not dictate the manner in which the implementation was to be done. It must be presumed however that Parliament intended that the implementation of the enactment complies with the dictates of the Constitution which I have enumerated above. Just like the school correctly interpreted the enactment that preceded the Amendment Act, the Respondents were likewise expected to interpret the Amendments Act in a manner that upholds the constitutional values and principles. I accordingly commend the Council for recognising in the oral submissions through its learned counsel **Mr Bwire** that for the students who were already in the LLB Class prior to the enactment of the ***Kenya School of Law Act***, the outgone Regulations bore to them legitimate expectation that their interest would be preserved in relation to their eligibility to the Advocates Training College. It must be appreciated as was held in **South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18]** that:

"Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled."

188. In my view there is a legitimate expectation that public authorities will comply with the Constitution and the law. In our context it is expected that public authorities will adhere to the constitutional values and principles including those enumerated in Article 10. The Petitioners can therefore be said to have expected the Respondents to interpret the Amendment Act in a manner that upholds their rights and fundamental freedoms as long as the interpretation did not contradict the express language of the Act. In my view an interpretation that upholds the freedom of equality and non-discrimination cannot be said to be inimical to the Amendment Act just like it was not

inimical to the prior enactment.

189. It is therefore my view that the contention by the Respondents that by adhering to their earlier position they would be acting contrary to the law is incorrect.

190. Therefore in order to validly withdraw the expectation the Respondents ought to have adhered to the guidelines in **R vs. Devon County Council ex parte P Baker [1955] 1 All ER** where it was held:

"...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision."

191. Similarly, in **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** it was held:

"The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine."

192. In considering its earlier position the School appreciated that some of the Petitioners' predecessors and who were with the said Petitioners at the University had not been subjected to the same treatment. It has not been shown that the circumstances between the said Petitioners and their predecessors had changed. To subject those Petitioners to whom a benefit had been conferred in order to avoid discriminating against them itself amounts to discrimination. In **John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others [2011] eKLR,** it was held that:

" It should be noted that discrimination which is forbidden by the Constitution is unfair or prejudicial treatment of a person or group of persons based on certain characteristics. (James Nyasora Nyarangi and Others –Vs- Attorney General, HC. Petition No. 298 of 2008 at Nairobi). The element of what is unfair or prejudicial treatment has to be determined objectively in the light of the facts of each case. The High Court above cited with approval the observation in President of the Republic of South Africa & Another –Vs- John Phillip Hugo 1997 (4) SAICC Para 41 as follows:- "We need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case, therefore will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in different context." At the heart of this case, therefore, is the recognition that not all distinctions resulting in differential treatment can properly be said to violate equality rights as envisaged under the Constitution. The appropriate perspective from which to analyse a claim of discrimination has both a subjective and an objective component."

193.In **Nyarangi & 3 Others vs. Attorney General [2008] KLR 688**, it was held:

> "The Blacks Law Dictionary defines discrimination as follows: "The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured." Wikipedia, the free encyclopedia defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. The Bill of Rights Handbook, Fourth Edition 2001, defines discrimination as follows:- "A particular form of differentiation on illegitimate ground."…The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of Griggs vs. Duke Power Company 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in job applications was found "to disqualify Negroes at a substantially higher rate than white applicants".

194.Where legitimate expectation is found to apply, if a public authority is to depart from it, it must be demonstrated that there exist good reason for that departure. I reiterate that I am not satisfied that the reasons relied upon by the Respondents for a departure from their earlier position evince justifiable grounds since Parliament did not in the Amendment Act direct the Respondents to depart from their earlier position, a position clearly and rightly in my view appreciated by the Respondents, was geared towards the upholding of the Constitutional principles and values.

195.Having arrived as the aforesaid determination the issue of public participation becomes superfluous.

196.Before I depart from this judgement I wish to express my gratitude to counsel who appeared in these proceedings for the well-researched submissions which I found very useful and which I have considered. If I have not expressly referred to each and every authority cited it is not out of disrespect or lack of appreciation for their industry.

Order

197.Having considered these Petitions and Application these are the orders which commend themselves to me and which I hereby grant:

1. **I hereby declare that to the extent that the notification by the School only mentioned KSCE qualifications, the same notification did not conform to the Second Schedule to the Act, and to that extent alone, the same is unlawful and is set aside.**
2. **I hereby declare that to the extent that the same notice talked of final transcripts, that requirement is not only unreasonable but outside the scope and contemplation of the Act and is set aside.**
3. A declaration that the Petitioners who **were already in the LLB Class prior to the enactment of the *Kenya School of Law Act*** are to be treated in the manner contemplated by the guidelines issued by the School prior to the enactment of the Amendment Act. For avoidance of doubt those who had not been admitted **in the LLB Class prior to the enactment of the *Kenya School of Law Act* are to comply with the provisions of the said Act.**
4. Accordingly all the other reliefs sought which are neither expressly nor impliedly granted are unnecessary and are hereby deemed to have been disallowed.
5. There will be no order as to costs.

198.Orders accordingly.

Dated at Nairobi this 19th day of November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Okubsu for the 1st Petitioner

Mr Masinde for the 2nd Petitioner

Mr Ogoti for the 3rd Petitioner

Mr Kashindi for the 1st Respondent

Mr Odhiambo for the 3rd Respondent

Cc Muruiki