REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CORAM: R. MWONGO, PJ, W. KORIR, J, C.MEOLI, J, H.ONG'UDI, J, C.KARIUKI, J.)

Constitutional And Human Rights Division

PETITION NO. 244 OF 2014

IN THE MATTER OF: ARTICLE 22(1), CONSTITUTION OF KENYA

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF AND OR

FUNDAMENTAL FREEDOMS UNDER THE CONSTITUTION OF KENYA INCLUDING ARTICLES 20, 21(1), 22, 10, 27(1), 27(2), 28, 40, 47,57.

BETWEEN

JUSTICE PHILIP K. TUNOI……..…….…….…..….1ST PETITIONER

JUSTICE DAVID A. ONYANCHA…….…..…….……..…2ND PETITIONER

VERSUS

THE JUDICIAL SERVICE COMMISSION……...1ST RESPONDENT

THE JUDICIARY…….....…….2ND RESPONDENT

JUDGMENT

INTRODUCTION

1. This is the *first* of a trio of petitions filed by judges of the superior courts of Kenya challenging the age of retirement of judges under **Article 167(1)** of the Constitution of Kenya, 2010. The petitions were all heard consecutively by this bench, for purposes of decisional consistency and expedition.

2. These cases, which we refer to as the Judges' Retirement Age Cases, include, in addition to the present suit; **Petition No 495 of 2014 Justice Leonard Njagi v. The Judicial Service Commission, the Judiciary and The Attorney General;** and **Petition No 386 of 2015 Lady Justice Kalpana Rawal v. the Judicial Service Commission, the Secretary of the Judicial Service Commission; Okiya Okoiti Omtatah** (as Interested Party); and **International Commission of Jurists (Kenya Chapter)** and **Kituo Cha Sheria** (both as Amicus).

3. The Petitions were brought in the wake of communications to judges by the Judicial Service

Commission (JSC) notifying them of its decision that the retirement age of all Judges serving at the time of promulgation of the Constitution, 2010, had been determined to be seventy years, contrary to an earlier circular by the JSC communicating a retirement age of seventy four years. Subsequently, each of the Petitioners received a letter from the Chief Registrar of the Judiciary (CRJ) giving them notice of retirement. Aggrieved by the retirement notices, and issues surrounding that question, the Petitioners herein filed this Petition on 27th May, 2014, together with a Notice of Motion under certificate of urgency.

4. This Petition and **Petition No 495 of 2014** had previously been consolidated by order of this bench. On appeal to the Court of Appeal, however, a deconsolidation was achieved by consent in that Court. Further, as a means of efficacious case management, it was agreed by consent during mentions that the three petitions be heard separately but in the same period. Consequently, **Petition No. 386** was heard on 26th, 27th and 29th October, 2015. **Petition No. 244** was heard on 28th October, 2015, and **Petition No. 495** was heard on 29th and 30th October, 2015. This bench set one date for the delivery of the separate judgments in each of the three cases, namely, 4th December, 2015.

5. It is not in dispute that judicial independence is key to proper and fair dispensation of justice. Judicial independence embodies tenure of judges. With the ushering in of a new constitutional dispensation, this court is now called upon to decide the delicate question as to the retirement age of Judges appointed under the former Constitution in light of the provisions under the new Constitution and in particular, **Article 167** of the Constitution.

BACKGROUND

6. By a Circular dated 27th May, 2011 (the Circular), the Secretary to the JSC notified all Judges of Appeal and all Puisne Judges of the High Court that the JSC had resolved in its meeting of 18th April, 2011, that the period of service of all the Judges who were in office on the date of the promulgation of the Constitution was saved under **Section 31(1)** of the **Sixth Schedule** of the Constitution of Kenya. Thus, the Judges would retain their retirement age of seventy four years. By a copy of that letter, the Treasury was notified for purposes of facilitating processing of retirement benefits when the Judges retire.
7. On 27th March, 2014, the Secretary to the JSC revisited the question through a memo (the Memo) to the Deputy Chief Justice/ Vice President of the Supreme Court of Kenya, the President of the Court of Appeal of Kenya and the Principal Judge of the High Court of Kenya. The Memo conveyed the decision of a meeting held on 24th March, 2014 concerning the retirement age for Judges, where it had been determined that the retirement age for all Judges was Seventy years. Thus, all Judges who were due for retirement having attained the stated retirement age, would be issued with notices of retirement.
8. Subsequently, on 28th April, 2014 the CRJ– who is also Secretary to the JSC – followed up on the JSC resolution and wrote to the Hon. Justice Tunoi issuing him with a retirement notice stating that he would be attaining the compulsory retirement age of seventy years on 2nd June, 2014 having been born on 2nd June, 1944. On the same day, the CRJ wrote to the Hon. Justice Onyancha also issuing him with a retirement notice. It stated that he attained the compulsory retirement age of seventy years on 1st December, 2013, having been born on 1st December, 1943.
9. Upon receipt of the notices of retirement, the Petitioners moved to court on 27th May, 2014 seeking prohibitory and conservatory orders to prohibit the Respondents from removing them from office or retiring them from service.
10. In his ruling dated 28th May, 2014 Odunga J., granted the Petitioners conservatory orders. These prohibited the Respondents by themselves, their officers, servants or agents or otherwise howsoever from removing and/or retiring the Petitioners from service as Judges of their respective Superior Courts pending the hearing and determination of the Petition.

The Parties

11. The 1st Petitioner, Phillip Tunoi is a Judge of the Supreme Court of Kenya and the 2nd Petitioner, David Onyancha is a Judge of the High Court of Kenya.
12. The 1st Respondent is a constitutional commission established under Article 171 of the Constitution and constituted as a body corporate with perpetual succession and a common seal under **Article 253** of the Constitution. The 2nd Respondent is a State organ exercising the people's sovereign power of judicial authority. Its mandate is set out in **Article 1** and under **Chapter 10** of the Constitution.
13. The parties urged their respective cases through their counsel. Mr. Nowrojee and Mr. Ngatia represented the Petitioners, while Mr. Muite SC and Mr. Issa acted for the Respondents.

The Petitioners' Case

14. The Petitioners' case is set out in the Petition dated 26th May, 2014 and the affidavits deposed in support thereof, by the 1st and 2nd Petitioners dated 26th May, 2014, and submissions, both written and oral.
15. The Petitioners contend that the Circular, the Memo and the retirement notices issued to them by or at the behest of the JSC and the decision to remove them from office are unconstitutional and illegal. They argue that the offices of Judge of Appeal and Puisne Judge of the High Court, which they respectively held were at all times offices established under **sections 61** and **64** of the repealed Constitution. They contend that by virtue of **Section 62** of the repealed Constitution as read with **Section 9** of the **Judicature Act**, **Cap 8** they could vacate office only upon attaining the age of seventy-four years.
16. It is also the Petitioners' case that the Constitution, saved the retirement age of seventy-four years by dint of **Article 262** and in particular **Section 31(1)** of the **Sixth Schedule.** They add that they are entitled to hold office for the unexpired term of their seventy four years from 27th August, 2010.
17. Accordingly, the Petitioners pray for:

> *"A. A Declaration that the date of retirement of the 1st Petitioner is the date upon which the 1st Petitioner will attain the age of 74 years.*
>
> *B. A Declaration that the date of retirement of the 2nd Petitioner is the date upon which the 2nd Petitioner will attain the age of 74 years.*
>
> C. *A Declaration that the retirement age of the Judges who were in service as at the promulgation of the 2010 Constitution namely as at 24th August 2010, is the age of 74 years.*
>
> D. *An Order of Certiorari to bring into the High Court the decision by Resolution of the Judicial Service Commission made on 24 March 2014 that the retirement age for all Hon. Judges is seventy (70) years, and accordingly all Hon. Judges who are due for retirement having attained the stated retirement age will be issued with notice of retirement, and quash the same.*
>
> E. *An Order of Certiorari to bring into the High Court the decision and Letter of the Judiciary dated April 28 2014 to the 1st Petitioner Ref. PJ 14732, and quash the same in its entirety.*
>
> F. *An Order of Certiorari to bring into the High Court the decision and Letter of the Judiciary dated April 28 2014 to the 2nd Petitioner Ref. PJ 38477, and quash the same in its entirety.*
>
> G. *An Order of Prohibition prohibiting the Judicial Service Commission and or the Judiciary, by themselves, their officers, servants or agents or otherwise howsoever from removing the First Petitioner during his term of office from his office of Supreme Court Justice, save in accordance with Article 167, Constitution of Kenya.*

H. *An Order of Prohibition prohibiting the Judicial Service Commission and or the Judiciary, by themselves, their officers, servants or agents or otherwise howsoever from removing the Second Petitioner during his term of office from his office of Judge of the High Court, save in accordance with Article 167, Constitution of Kenya.*

I. *An Order of Prohibition prohibiting the Judicial Service Commission and the Judiciary from causing and/or aiding and/or authorizing and/or in any manner offering the 1st and 2nd Petitioners pension and/or retirement benefits to be processed in any manner other than as set out in the Letter of Judiciary dated 24th May 2011.*

J. *A declaration that as regards determination of seniority and/ or benefits accruing thereto, Judicial Service Commission and the Judiciary should take into account the length of continuous service effective from the date that the Petitioners and/or any Judge joined the Judiciary.*

K. *Interim conservatory order to prohibit the Judicial Service Commission and/or the Judiciary by themselves, their officers, servants or agents or otherwise howsoever from removing and/or retiring the 1st and/or 2nd Petitioner from service as a Judge of the Supreme Court of Kenya and Judge of the High Court of Kenya respectively during their term of office save in accordance with Article 167 of the Constitution of Kenya.*

And the Petitioners do pray that this Honourable Court do:

L. *Make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing and or securing the enforcement herein of any of the applicable rights and freedoms in Articles 19-57 of the Constitution.*

M. *Make such further, other or consequential orders as this Honourable Court shall deem just.*

N. *Make such order as to costs as this Honourable Court deem just."*

The Respondents' Case

18. The Respondents' case in opposition to the Petition is set out in the replying affidavit of Anne A. Amadi, the Chief Registrar of the Judiciary and Secretary to the JSC, deposed on 4th July, 2014, and the submissions, both written and oral.
19. The Respondents contend that the Constitution in force immediately before the effective date stood repealed on the effective date. Further, that all Judges in office under the previous Constitution, including the Petitioners, took a fresh oath of office and swore to uphold and defend the new Constitution. Thus, they are bound by the provisions therein. They also argue that the 1st Petitioner having been appointed into a new office established under **Article 163** of the Constitution was well aware that his retirement age was seventy and not seventy-four years.
20. It is the Respondents case that the Constitution provides that a judge shall retire from office on attaining the age of seventy years. As such, they urge the court to dismiss the Petition.

Petitioners' Submissions

21. Mr. Nowrojee commenced by submitting in reference to the recent decision of the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others, Petition No. 23 of 2014 (Salat case).** He pointed out that, of relevance to the matter at hand, was a letter in that case addressed to the Chief Justice and President of the Supreme Court. The letter challenged the validity of the constitution of the Supreme Court bench, and in particular members of that Court who had attained the age of seventy years, following the JSC's directive about retirement; and to the fact that there were on-going cases in the High Court regarding the retirement age of Judges.

22. According to Mr. Nowrojee, the fact that the letter was addressed to the Chief Justice should not be deemed merely as an administrative matter. Rather, it was written to him in his capacity as the Court's presiding officer to consider its legal ramifications. In particular, counsel alluded to the purport of the JSC decision, highlighted in the said letter, directing judges who had turned seventy not to preside over matters. It was therefore submitted that the letter brought into the realm of the Petition before the Supreme Court a challenge to the composition of the Supreme Court, hence a challenge to its jurisdiction.
23. It was submitted that the majority decision determined the jurisdictional challenges addressed in the letter as the same could not be determined by administrative direction. It was Mr. Nowrojee's submission that if the 1st Petitioner had not sat on the bench, then it would have been reduced to four, which is below the required quorum.
24. Counsel submitted that the majority holding in the Supreme Court was that the security of tenure of Judges is sacrosanct and not amenable to variation. Further, that the JSC was held to have no supervisory power over a judge. Hence, the action by the JSC was an attempt to vary the bench or direct a court's sittings, even though it lacks competence to direct or determine when sitting Judges should retire. Counsel further stated that only the Constitution can make this determination. Flowing from this decision, and applied to the present Petition, Mr Nowrojee submitted that the directive and notices to the Petitioners were a nullity.
25. According to Mr. Nowrojee, the decision of the Supreme Court is binding on the Respondents and this court. It is not open to the Respondents or this court to regard the decision of the Supreme Court as *obiter dicta* as it was a finding of the Court. Further, that a court should not by judicial craft or innovation, seek to expand its jurisdiction. So too this court cannot take steps to go around a binding decision of the Supreme Court by declaring its decision to be *obiter dicta*.
26. It was also submitted that the minority decision by the Chief Justice acknowledges that the majority decision was not merely a discussion but a finding and holding founded upon the intervening letter of counsel. It was Mr. Nowrojee's submission that, given that the holding was in the majority, their sentiments cannot be treated as *obiter dicta.* Further, that if the Chief Justice disagreed on the challenge in the intervening letter as raising a jurisdictional issue, he should not have appended his signature to the judgment alongside that of the1st Petitioner.
27. It was his further submission that this court is bound by the Constitution and **Article 163(7)** which provides that the decisions of the Supreme Court are binding on all courts below it, with no exceptions.
28. Basing his arguments on the **Salat case**, counsel asked the court to issue orders in the present case declaring that the JSC had no power to terminate the tenure of Judges. Secondly, that the Petitioners could only retire upon attaining the age of seventy four years.
29. Mr. Ngatia's submission argued that there is no uniform retirement age of Judges as, in fact, there are four distinct retirement ages. The first is the age of seventy years provided under **Article 167 (1)** of the Constitution; the second is the optional age of sixty five years also provided under **Article 167 (1);** third is the retirement age of seventy four years which is anchored upon **Section 31 (1)** of the **Sixth Schedule** of the Constitution; and finally, the option of resignation as provided under **Article 167 (5)** of the Constitution.
30. The Petitioners contend that pursuant to the provision of **Article 262**, the transitional and consequential provision of **Section 31(1)** took effect on 27th August, 2010; therefore it applies to them. As such, by virtue of the mandatory provisions of **Section 31(1),** of the **Sixth Schedule**, the Petitioners are entitled to hold office for the unexpired term from 27th August, 2010 to the date upon which each Petitioner attains the age of seventy four years.
31. In any event, **Article 167** of the Constitution does not override **Section 31** of the **Sixth Schedule,** which is a later provision. It was his submission that, **Section 31 (1)** of the **Sixth Schedule** was promulgated with full knowledge that there will be varying unexpired terms, subject to each judge's date of birth.
32. On the Respondents' assertions that no rights accrue by virtue of a repealed constitution, and that the transitional provisions confer no substantive right, counsel submitted that **Section 31(1)** of the **Sixth Schedule** of the Constitution gives the holder of office a fresh right for the unexpired period of their term. Thus, the JSC cannot take away this right which is a personal right that varies from judge to judge.
33. By way of comparison, counsel cited the practice in place until 1959 in England, where Judges

served for life or until such time as they were unable to render service. In 1959, the **Judicial Pensions Act** was enacted providing under **Section 2 (1)** that a judge would retire at the age of 75 years. However, **Section 2(2)** thereof, provides for an optional retirement age. Thus, it was submitted that Judges serving before the enactment of the **Judicial Pensions Act** were not compelled to retire in accordance with provisions of the Act unless they so elected.

34. On what happens when legislation or the Constitution abrogates the retirement age limit, counsel sought to rely on the **Constitutional Judicial Appointments Report dated 7th March, 2012**, **paragraph 197** which states that the House of Lords Committee did not agree that there should be a uniform retirement age. He submitted that the English situation is similar to the Kenyan one, hence the JSC cannot disregard the accrued retirement age by imposing a uniform retirement age, as that would be against the Constitution and best practices in the Commonwealth.
35. On retroactivity of law, the Petitioners assert that laws are forward looking in orientation and effect, and as such, **Article 167** of the **Constitution** does not have a retroactive effect. On this proposition, the Petitioners sought to rely on the Supreme Court decision of **Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others, Sup. Ct. Application No.2 of 2011 (2012) eKLR.** Mr. Ngatia also relied on the **Commonwealth Compendium on the Appointment Report of 2014, page 4,** which states that, it is a violation of judicial independence for the retirement age to be lowered with retroactive effect. Counsel further sought to rely on **Article 8** of the **International Association of Judges- Universal Charter (Best Practices),** as regards security of tenure of office which states that, any change to the judicial obligatory retirement age must not have retroactive effect.
36. The Petitioners contend that the application of laws in such category is, in most jurisdictions, limited by safeguards for rights accrued prior to the moment of promulgation. Thus, according to Mr. Ngatia, **Section 31** of the **Sixth Schedule** appears to have contemplated the provisions of **Section 23** of the **General Provisions Act, Cap 2 Laws of Kenya,** which prohibit retroactive application against a right already acquired by a person, or privilege, obligation due, or liability accrued or incurred under an existing law that stands to be repealed or amended.
37. The Petitioners urge that the decision to retire and remove them from office is unlawful and has denied them a right to fair administrative action. It was Mr. Ngatia's submission that the JSC has no power to retire the Judges as it is not within its purview to determine the retirement age of a judge. Thus, JSC's resolution and decision is *ultra vires*, unconstitutional and illegal as it ignored the express provisions of **Article 168 (1)** of the **Constitution** that sets out the grounds upon which a judge of the superior court may be removed from office.
38. It was Mr. Ngatia's submission that from the public law concept of legitimate expectation, it would be untenable for the JSC to renege on the first representation. Counsel thus urged the court to hold the JSC to its covenant in the Circular.
39. The Petitioners further contend that the Judges who were beneficiaries of the promise (and guarantee) of retirement at the age of seventy four, will if retired at seventy, be prejudiced in their pension entitlement. Accordingly, they contend that by the governing law, that is the **Pensions Act, Cap 189, Laws of Kenya**, a judge is entitled to pension-benefits upon retirement in respect of 10 years of service. Further, that if they retire at the age of seventy years, they will have forfeited their pension-bearing accrued entitlements; they will have also lost their constitutional right, as they served under a valid constitution, thus entitled to pension.
40. According to Mr. Ngatia, **Section 32** of the **Sixth Schedule** provides that the law applicable to pensions in respect of holders of constitutional offices under the former constitution, shall be either the law that was in force at the date on which those benefits were granted or any law not less favourable. It was counsel's submission that on the effective date, the law then in force would entitle the Petitioners to their right to up to seventy four years. Thus, a retirement age that abrogates or abbreviates the seventy four year retirement age for the Petitioners would be less favourable and illegal.
41. He further submitted that pension rights are not to be disregarded as abrogating them amounts to taking away property rights and a violation of **Article 40**. Indeed, we were told that **Sections 31** and **32** of the **Sixth Schedule** refer to the unexpired term that relates to tenure of office, pension and benefits, thus, counsel urged that there cannot be an interpretation other than that retirement is at seventy four years. Counsel's submission is that **Section 6** of the **Sixth Schedule** of the Constitution provides for rights and obligations of the State, however arising, to continue as rights

and obligations, and in this case, in favour of the Petitioners.

42. The Petitioners also contend that they are entitled to equal protection and freedom from discrimination in accordance with **Article 27 (1)** and **(2)** of the Constitution. They contend that they are entitled to the fullest and equal enjoyment of their rights and to equal treatment with all other Judges in similar situations.
43. The Petitioners articulated their right to inherent dignity protected in accordance with **Article 28,** and their rights to protection as older persons of society as contained in **Article 57** of the Constitution. In addition, the Petitioners urged their rights set out under **Article 41** of the Constitution, but which were not pleaded in the Petition.
44. The Petitioners also contend that other constitutional provisions and principles that have been violated include the principle of tenure of Judges, the principle of the independence of the Judges; and, in addition, breach of the national values as provides under **Article 10** of the Constitution.
45. In rebutting the Respondents' assertion that the Petitioners having taken oath under the new Constitution were bound by it, Mr. Nowrojee submitted that the oath ascribed to by Judges is to do justice in accordance with the Constitution. He argued that the oath makes no reference to the terms of service or any new terms of service or tenure. It was further argued that any vetting of Judges under **Section 23** of the **Sixth Schedule** of the Constitution was concerned with their suitability to continue in office and did not alter their tenure.
46. The Petitioners thus urged the court to find in their favour and to grant the prayers sought in the Petition.

Respondents' Submissions

47. In urging the Respondents' case, Mr. Muite submitted that the issue before the court is whether Judges who were serving as at 27th August, 2010 will retire at the age of seventy or seventy four years.
48. It was Mr. Muite's submission that the fundamental consideration in respect of the retirement age of Judges is the intention of the Kenyan people in promulgating the Constitution. In considering this intention, Mr. Muite submitted, the sovereignty of the people as enunciated in the **Preamble** and **Article 1** of the Constitution is key. The court was reminded that it derives its authority from the people of Kenya as provided under **Article 159** of the Constitution, and should therefore endeavour to ascertain the people's will in this matter.
49. Narrating the history of the constitution-making process, Mr Muite, highlighted proposals by the public that the entire judiciary should be reappointed, while others were of the view that Judges and Magistrates undergo a vetting process. Counsel relied on the **Final Report of the Committee of Experts on Constitutional Review dated 11th October, 2010** at **paragraph 6.4.4.** It was therefore Mr. Muite's submission that the vetting process allowed members of the judiciary who wanted to continue serving to be eligible for re-appointment.
50. Further, that there is no suggestion throughout the constitution-making process that the serving Judges would continue to serve to the age of seventy four years. In fact **Section 23** of the **Sixth Schedule** provides for vetting legislation despite **Article 167** of the Constitution. Thus, Counsel submitted, **Section 23** of the **Sixth Schedule** of the Constitution applied **Article 167** to the Judges who would undergo vetting.
51. It is the Respondents' case that the tenure of Judges was not prescribed in the former constitution and was left to the discretion of Parliament. Thus, the argument by the Petitioners that their tenure as Judges was a protected right under the repealed Constitution, or was a proprietary right or that it constitutes "property" is unfounded. Counsel cited the case of **Justice Amraphael Mbogholi Msagha v. Chief Justice of the Republic of Kenya & 7 Others [2006] eKLR**, Mbogholi case where it was held that judicial office was not property.
52. As regards transitional provisions, it was Mr. Muite's submission that a correct understanding of a constitution is dependent upon the history of the country. He referred to **Advisory Opinion No.2 of 2012, In the Matter of the Principle of Gender representation in the National Assembly and the Senate, Task Force on Judicial Reforms, August 2009.** Senior Counsel also urged the court to appreciate that the 2010 Constitution is a transformative instrument and, as such, the court ought to think outside the box to give full effect to the wishes of the people. In doing so, the court was further urged to engage an innovative interpretation method.

53. Mr Muite also submitted that **Section 31** of the **Sixth Schedule** to the Constitution is a provision that applies to all existing offices. Further, that it is trite law that **Section 31** is a provision of general application not intended for Judges as there is a specific provision applicable to them. This explains the opening phrase in **Section 31(1)**: '*Unless this schedule provides otherwise,…*' He thus submitted that **Section 23** of the **Sixth Schedule** is specific to the Judges. Thus, the fact that Judges were to be vetted to continue to serve negates the argument that the vetted Judges were to continue in service until the age of seventy four years, under **Section 31(1).**
54. Regarding the Petitioners' reliance on **The Judicial Pensions Act of England, 1959,** Mr Muite's rebuttal was that **Section 3** of that Act contained an exception stating that the Act would: ***'…. not apply to Judges who were already serving.'*** Thus, if the Constitution intended to apply the age of seventy four years to the serving Judges, it would simply have exempted them from the provisions of **Article 167(1).**
55. Counsel also submitted that the age of seventy four was not fixed under the former Constitution but by statute, namely, **Section 9** of the **Judicature Act**. Thus, it was argued on this score that, under **Section 7** of the **Sixth Schedule** of the Constitution, all law should be construed in conformity with the Constitution. On this assertion, counsel cited the case of **Osotraco v. Attorney General [2003] 2 EA 654; Rojas v. Berllaque (Attorney General intervening) [2003] UKPC 76, [2004] 1 LRC;** and **Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others [2014] eKLR (the CCK Case).**
56. It was the Respondents' submission that any laws that do not conform to the Constitution are void to the extent of their inconsistency, as was held in **Timothy Njoya & 17 Others v. Attorney General & 4 Others [2013] eKLR (Njoya case).** According to the Respondents, **Section 31(2)** of the **Sixth Schedule** provides that a person who held office established by law before the effective date so far as is consistent with the Constitution shall continue to hold that office as if appointed under the Constitution. Further, that **Section 6** of the **Sixth Schedule** provides: '*Except to the extent that the Constitution expressly provides otherwise…*' thus, the express provisions of **Article 167 (1)** on the the retirement age at seventy years provides otherwise. It was Mr. Muite's submission that **Section 9** of the **Judicature Act** is inconsistent with the Constitution, 2010. Therefore, the suggestion that Judges were to serve until the age of seventy four years runs counter to the manifest intention of the Kenyan people.
57. Taking over from Mr. Muite, Mr. Issa submitted that, had it been intended that Judges serve up to the age of seventy four years, then **Section 3** of the **Sixth Schedule** of the Constitution would also have extended the relevant provisions of the former constitution. Instead, **Section 3** of the **Sixth Schedule** only extends **Sections 93, 30-40, 43-46, 48-58** and **108 (2)** of the former constitution. Moreover, the reason behind the constitutional entrenchment of the retirement age is to ensure that Parliament does not alter it on political whims. It is for that reason that the Commonwealth advocated for the fixing of the retirement age of Judges in the Constitution, rather than leaving it to the discretion of the legislature. Thus, it was contended that where there was a clear intention for an officer to serve in terms of the former constitution, clear words would have been used.
58. As regards constitutional interpretation, Mr. Issa urged that the same has to be done in light of our Kenyan circumstances. He relied on the Supreme Court decision in **Jasbir Singh Rai & 3 Others v. Estate of Tarlochan Singh Rai & 4 Others [2013] eKLR. (Rai case).**
59. Mr. Issa also contended that the fact of Judges taking the oath under the new Constitution was to signify a new beginning for all office holders under the new Constitution, with a commitment to adhering to the new set of values which the Constitution 2010 represents. On this aspect, counsel relied on a passage in the case of **Dennis Mogambi Mong'are v. Attorney General & 3 others [2014] e KLR (Mong'are case).**
60. As regards the Supreme Court decision in the **Salat case** (supra), it was submitted that, the Supreme Court decision does not explain how the letters from counsel came to the Court's attention. Further, that in the letter to the Chief Justice, the issue for determination is not whether Judges who were serving on the bench on the effective date should continue to serve until they attain the age of seventy or seventy four years. It was Counsel's submission that, in its decision, the Supreme Court did not pronounce itself on the age of retirement. Neither did the Court pre-empt this Court's hearing and determination. In any event, the Petitioners have conservatory orders, and in particular, the 1st Petitioner who sat on the particular Supreme Court bench did so as a beneficiary of the conservatory orders.

61. Counsel made the distinction that the Supreme Court was not called upon to determine the constitutional issues which are before this Court. All that the Supreme Court did was to pronounce itself on a specific side issue which they had to. On when a decision can be binding on a lower court, Mr. Issa submitted the applicable principle to be that the court has power to distinguish a case upon critical examination of the higher court's decision. For this proposition, he cited the case of **Kibaki v. Moi [2000] EA 115 (CAK).**
62. Mr. Issa submitted that legitimate expectation cannot be premised on a violation of the Constitution, but must be based on that which is competent and lawful. It was thus counsel's submission that, in this instance, no legitimate expectation could arise from the Circular dated 27th May, 2011, issued by the JSC as the same was based on an error.
63. It is the Respondents' contention that the 1st Petitioners' case is without merit as the Supreme Court in which he sits was established under **Article 163** of the new Constitution. Mr. Issa contended that the 1st Petitioner applied for the position of Judge of the Supreme Court with the full knowledge that the retirement age was seventy years, a position not controverted by the 1st Petitioner.
64. As regards pension and other benefits, it was submitted that **Article 160 (4)** protects the remuneration and benefits of a judge, and hence there is no need to revert to the provisions of **Section 32** of the **Sixth Schedule** of the Constitution which deals only with pensions and the law applicable to pensions.
65. The Respondents submit that they did not violate the Petitioners' rights as alleged. In particular, the Respondents state that, the right to fair administrative action under **Article 47** of the Constitution cannot be deemed to have been violated by notification of the impending date of retirement.
66. Moreover, that the Petitioners claim that their rights under **Articles 27, 40** and **47** have been violated is without merit. According to the Respondents, the retirement age of seventy years for Judges is the sovereign decision of the people of Kenya. Thus, it is the Respondents' submission that there can be no violation of the Petitioners' rights under the Constitution as the Respondents complied with the dictates of the supreme law.
67. The Respondents urged the court to dismiss the Petition with no orders as to costs.

ANALYSIS AND DETERMINATION

68. Upon consideration of the Petition, the submissions and material placed before us, we framed the following issues as calling for determination:

1. *What is the effect of the Supreme Court decision in the case of **Salat case** on this Petition?*
2. *What is the historical background and context to, and character of the Kenyan Constitution; and the applicable principles of interpretation?*
3. *Whether the Respondents actions violated the petitioner's constitutional rights.*
4. *Whether the JSC's Memo of 27th March, 2014 was in breach of the Petitioners' legitimate expectation to retire at the age of seventy four years as conveyed by the Circular dated 24th May, 2011.*
5. *What is the nature and function of transitional and consequential provisions under the Constitution?*
6. *What is the role and mandate of the JSC in the retirement of Judges?*
7. *What is the retirement age of Judges who were in office prior to the promulgation of the Constitution, 2010?*
8. *What are the orders as to Costs?*

WHAT IS THE EFFECT OF THE SUPREME COURT DECISION IN THE SALAT CASE ON THIS PETITION?

69. On 19th October, 2015 about nine days before the hearing of this Petition, the Supreme Court delivered its judgement in the Salat Case**.** At the hearing of this case, the advocates stressed upon the import of that decision to this Petition. The Petitioners held the strong view that the said

judgement had given guidance to this court on the question of the retirement age of Judges who were in office on the effective date. The Respondents, however, were of the opinion that the said decision did not determine the core question before this court, to wit, the retirement age of a judge who was in office on the effective date.

70. From our reading of the decision of the Supreme Court in the **Salat case**, it emerges that the Court took judicial notice of two letters that had been written to the Chief Justice and the Registrar of the Court by counsel for the appellant. In those letters, counsel had highlighted certain misapprehensions. He sought to know the effect of delivering the Judgement after the lapse of sixty days in light of the provisions of **Order 21** of the **Civil Procedure Rules.** He was also concerned with the composition of the bench as a result of a directive by the JSC to Judges over seventy years of age not to preside over court matters.
71. The Court (with Chief Justice Willy Mutunga dissenting) identified three issues that needed to be addressed in view of those letters:

> ***"(i) the citizen's guaranteed right "to have any dispute that can be resolved by the application of law", "decided in a fair and public hearing before a court [The Constitution of Kenya, 2010, Article 50(1)];***
>
> ***(ii) the trust held by the Judiciary as custodian of the people's sovereign power [The Constitution of Kenya, 2010, Article 1(3)]; and***
>
> ***(iii) the right and obligation of a Judge who is over 70 years of age and still in office, to preside over matters in Court – in view of the directive of the Judicial Service Commission."***

72. The Court then went ahead and concluded that:

> **"[76] This Court takes the position that the security of tenure for all Judges under the Constitution of Kenya, 2010 is sacrosanct, and is not amenable to variation by any person or agency, such as the Judicial Service Commission which has no supervisory power over Judges in the conduct of their judicial mandate. We find and hold that the Judicial Service Commission lacks competence to direct or determine how, or when, a Judge in any of the Superior Courts may perform his or her judicial duty, or when he or she may or may not sit in Court. Any direction contrary to these principles, consequently, would be contrary to the terms of the Constitution which unequivocally safeguards the independence of Judges. It follows that the said directive concerning Judges of the Superior Courts, issued by the Judicial Service Commission, is a nullity in law.**
>
> **[77] Responding to the issues raised by learned counsel, as regards obligations vested in this Supreme Court [The Supreme Court Act, 2011 (Act No. 7 of 2011), Section 3(a) and (b)], we hereby signal that the Court's Bench, as constituted by the learned Justices who rendered service in this case, indeed bears the constitutional mandate to hear and determine the cause in hand – notwithstanding the apprehensions of learned counsel. Accordingly, we hereby conclude the Court's determination with the Orders set out in paragraph 112 of this Judgment."**

73. Having considered the submissions of the parties and upon perusal of the Supreme Court judgement, we agree with counsel for the Respondents that the Court did not venture into the core issue before us, namely, the retirement age of Judges who were in office on the date of the promulgation of the 2010 Constitution. As correctly submitted by Senior Counsel Mr. Muite, the Supreme Court appears to have proceeded on the background that the JSC had directed Judges over seventy years not to continue to sit despite the existence of an order in these proceedings barring the JSC from taking any action towards the retirement of the Petitioners. The Supreme Court was addressing itself to that question. We take the view therefore that Senior Counsel is

implicitly admitting that the decision of the JSC directing the Petitioners not to sit despite the existence of clear court orders to the contrary, was to say the least, erroneous.

74. We therefore find and hold that the Supreme Court left intact the matter of the retirement age of Judges in office on the effective date of the Constitution. The question remains live for disposal by this bench. Consequently, no purpose will be served by a further determination as to whether the said portion of the Supreme Court judgment is binding in law.

WHAT IS THE CHARACTER OF THE KENYAN CONSTITUTION; HISTORICAL BACKGROUND AND CONTEXT; PRINCIPLES OF INTERPRETATION?

75. This Petition revolves around two distinct periods in the life of the Kenyan nation, namely, the period of the former Lancaster-template constitution and the era of the new constitutional dispensation that is principally characterized by change. We are called upon to determine whether judges in office on the effective date crossed over into the new dispensation with the retirement age of seventy four years as was stipulated in the repealed constitution as read with the **Judicature Act.** Citing transitional provisions in the **Sixth Schedule,** Commonwealth precedent and best practice, the Petitioners argue that the current Constitution envisages the carrying forward of their old tenure. That the history and context attendant to the Constitution is irrelevant in deciding the question before us, as what really are the actual provisions eventually included in the Constitution. In considerably strong tones, Mr Ngatia equated "retroactive abrogation" of the tenure of judges with "heresy", we presume, of the constitutional type.

76. For his part, Mr Muite asserted the importance of history and context in the determination of the issues before us. Equally, he laid stress on the sovereignty of the people and their right to determine the type of government they desired as reflected in the Constitution. Emphasising the supremacy of the Constitution, he urged the view that is transformative in character and hence not amenable to traditional interpretive approaches. The people's intentions, he submitted, not foreign best practices ought to be given effect by this court.

77. On our part, we do not doubt that it is important to set this dispute in its historical context in order to fully appreciate, not only the constitutional issues it raises, but also seek the appropriate resolution thereof, based on a proper understanding of the current Constitution. We propose therefore to examine the historical background and context to and the character of the Constitution and lastly, the applicable principles of interpretation.

The Historical Background and Context to the Constitution

78. Every nation has epochs of tranquility and prosperity; war and discord and attendant decline; reconciliation and rebirth. For Kenya the 1990s were marked by the struggle and campaign for constitutional reform. The 1963 Independence Constitution had undergone several amendments including the introduction of multiparty politics in 1991. Several efforts to bring about a more democratic Constitution had been made culminating principally in the three draft constitutions: two Constitution of Kenya Review Commission (CKRC) Drafts, namely, Ghai and Bomas, and the Proposed New Constitution (PNC, Wako Draft). However, the constitutional process had all but stalled by 2007, the year of the last general election under the old constitution.

79. The results of the general election were disputed by the losing political side. This dispute resulted in hitherto unseen breakdown of law and order. In scenes reminiscent of civil war, neighbours turned against neighbours. In the hotspot areas of the ensuing violence, hundreds of thousands of "outsiders" were evicted from their homes. Slightly over 1,000 people were killed and over 600,000 others were displaced in violent out-breaks all over the country.

80. It is ironic that this spectre of violence and breakdown of law and order served to reinvigorate the stalled constitutional process, ushering in what the **Committee of Experts Report of October, 2010**, **(COE 2010)** refers to as a "*constitutional moment*". Almost overnight, the need for peace and reconciliation rendered legal and constitutional changes inevitable and urgent. The country

had to transit from a not-sufficiently democratic system of government; from conflict to peace; from a fragmented nation to unity; to address the ugly past and aspire to a new future of hope as one people. The Committee of Experts was instituted to conduct a process of harmonisation of existing drafts of the constitution and to spearhead the constitutional process. The **Constitution of Kenya Review Act of 2008** would govern the process.

81. In his paper, **the Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel**, Aeyal M. Gross (*Stanford Journal of Int. Law 47* (2004)) argues that:

> ***"The need to be both backward-looking forward-looking is typical of periods of transition and political change … a Constitution may play a significant role in furthering transitional justice by addressing five critical issues:***

1. ***constitution – making as part of the reconciliation process;***
2. ***defining the nature of the state;***
3. ***including a broad equality provision, addressing the past, history, and collective memory;***
4. ***defining property and land rights; and***
5. ***defining social and economic rights."***

82. The author goes on to contend that the South African constitution making process fits that bill. He continues:

> ***"The law plays an exceptional role during transitions …… is caught between the past and future, between retrospective and prospective, between the individual and the collective."***

83. Here at home, the **Committee of Experts Interim Report, 2009 (COE 2009)** observes at paragraph 2.9:

> ***"Globally most recent constitutions have been made in the aftermath of civil conflicts and, as far as the situation in Kenya is concerned, an important task of the (constitution making) process is to promote reconciliation and national unity."***

84. At the end of the process Kenyans ratified the 2010 Constitution. We think that even on a cursory comparison between the old Constitution and the new Constitution, that the latter, like the South African Constitution does manifest a serious commitment to change in fundamental respects.

85. Insofar as the Judiciary was concerned, the preliminary report of the **COE 2009** dated 17th November, 2009 states at para 6.4.4:

> ***"Submissions to the Committee of Experts on the Judiciary were virtually unanimous on one point: the Judiciary must be reformed.'***

86. The **Report** further states that the CoE received various submissions on how this should be done. The submissions were classified into two groups: those that proposed that the entire judiciary should be reappointed (with all judicial officers or at least all judges being treated as having lost their jobs but permitted to reapply); and those that proposed a more gentle approach - that judicial officers remain in office but are requested to take a new oath and to undergo a 'vetting' process.

87. In their final report dated 11 October, 2010, **(COE 2010)** the CoE stated that this matter was revisited under the heading: "(*iii) Transitional provisions on the Judiciary*". After setting out the views of the public regarding the transitional provisions on the Judiciary, the Committee observed:

> ***"The Judiciary is the third organ of the government. Unlike some members of the executive and the members of the legislature, members of the Judiciary (i.e. judges) are not elected and enjoy security of tenure. While the provisions concerning elections***

would ensure that the constitutional office holders who belong to the other organs of government could be transited effectively through the electoral process, which will actually "vet" their suitability under the new constitution - no such mechanism exists for judges and other appointive constitutional office holders.

There was therefore also need for an appropriate transition mechanism for judges. The Final Report of the Constitution of Kenya Review Commission stated that "serious allegations were made against the Judiciary, including inefficiency, incompetence and corruption." Furthermore the need for Judicial Reform was identified as one of the long term issues causing conflict in Agenda Four of the Kenya National Dialogue and Reconciliation in February 2008. The Judiciary itself acknowledge this need for reform and established a Task force on Judicial Reform, the report of which was published in August 2009 and informed the CoE's proposals.

Like all the other forms of institutional reform that have a constitutional dimension, judicial reform entailed structural reform as well as mechanisms that would enable and require individual officeholders to comply with the provisions for office within the new constitutional order. Given the public's expressed concerns about the poor state of the judicial system, there was need that these concerns be addressed in a way that restored public confidence in the administration of justice. Not providing for a transitional mechanism for the judiciary would have further eroded the public's confidence in the justice system.

Yet the means of restoring public confidence must also not undermine the Judiciary as an institution. The CoE considered the suggestion of the "clean slate" approach but were of the opinion that like the "radical surgery" it ran the risk of undermining the Judiciary and also would condemn wholesale all members of the Judiciary. The CoE held the view that the vetting procedure allowed those members who wanted to continue serving to be eligible for reappointment whilst those who preferred not to could choose the option of resigning with their appropriate benefits. The transitional provisions in the RHDC also provided that the processes for vetting be in keeping with international principles. Accordingly, the Committee of Experts retained the framework of the Harmonized Draft Constitution in the RHDC with some minor modifications to the detail."

88. The foregoing is the background to the provisions relating to the Judiciary and the relevant transitional and consequential provisions in the 2010 Constitution. **Of Constitutions Generally**

89. The Constitution is undeniably "*the supreme law of the Land [in] that it is a written, organic instrument meant to serve not only the present generation, but also several generations yet unborn*" (**Rafiu Rabiu v. the State [1981] 2 NCLR, 293, pg 326**.

90. This view is also taken by **Melvin L.M. Mbao in an article entitled: "*The Politics of Constitution – making in Zambia: where does the Constituent Power Lie?"*** a contribution to the book "***Fostering Constitutionalism in Africa*"** edited by **Charles Fombad & Christina Murray.** The author makes reference to the Mun'gomba Constitutional Commission Review Report (2005) 493 which observed that:

"A constitution is not an ordinary piece of legislation. It is the people's sovereign and inalienable right to determine the forms of governance for their country by giving to themselves a constitution of their own making".

91. Similarly, in the case of **S. v. Makwanyane & Others [1995] ZACC3** at paragraph 267 the Chief Justice of South Africa, Justice Ismail Mohamed observed:

"….all constitutions seek to articulate with differing degrees of intensity and detail, the

shared aspirations of a nation, the values which bind its people and which discipline its government and its national institutions, the national ethos which defines and regulates that exercise and moral and ethical direction which that nation has identified in its future."

92. Emphasising the function of a constitution the Supreme Court of Nigeria in the **Rafiu Rabiu case** stated as follows:

> ***"The function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities, must involve, ours being a plural, dynamic society, and therefore, technical rules of interpretation of statutes are to some extent inadmissible in a way as to defeat the principles of government enshrined in the Constitution."***

93. In the same vein, the Supreme Court had occasion to consider the different styles and expressions in constitutions for indeed they are as varied as the constitutions themselves. In the **Advisory Opinion No. 2 of 2012, In the matter of the Principle of Gender Representation in the National Assembly and the Senate** the Court observed:

> ***"A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, a norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm…."***

94. As the basic law then, the Constitution organizes state power, creates structures and institutions, sets the relationships between the people themselves and the organs of state, engenders change, and in addition espousing the cherished ideals of the nation.

95. By comparing the Constitution and other ordinary law in a country, a clearer understanding of the standing and role of the Constitution can be developed. **Saunders Cheryl** in her article **"Towards a Global Constitutional Gene Pool"** [2009] UMelb LRS 25 (available online at austlii.edu.au), identifies key distinctions between constitutions and ordinary law as follows:

> ***"The first and most obvious distinction between Constitutions and other law is the close identification of Constitutions with the states or other polities to which they relate. Each state has a Constitution of its own, whether embodied in a singled formal document or not. A Constitution may be regarded as constituting or reconstituting the state. In any event, it typically is the source of legitimacy for the authority of the organs of the state. <u>The Constitution derives its own legitimacy from theories about the locus of sovereignty within the state.</u> On any view, therefore, there are at least as many Constitutions as there are states; and no two state Constitutions are the same.***
>
> ***A second point of distinction concerns the roles of a Constitution. Constitutions typically organise the power of the state; create its institutions; structure fundamental***

aspects of the relationship between the state and its people and sometimes between the people inter se; provide the basis on which to identify the validity of other state law. In these respects, Constitutions represent a form of positive law, which is quintessentially state law, although differing in important respects from ordinary state law.

But Constitutions perform other roles in the polity as well. Almost every Constitution has some kind of symbolic value, for which it may deliberately have been designed, although symbolic status may also inadvertently be acquired. In this connection, a Constitution may be used to reinforce certain goals of the state of which national unity, inter-communal respect, peaceful co-existence and national self-determination are possible examples. A Constitution may play, or be perceived to play an expressivist role within a state, reflecting its history and culture. All or parts of a Constitution may be aspirational, particularly during periods of transition or transformation....

Third, Constitutions typically lie somewhere between politics and positive law. In the early 21st century, almost all Constitutions are legal instruments, representing positive law in whole or in large part. Most Constitutions also are accepted as a type of higher law, which is given effect through a form of judicial review. But in the final analysis, the original authority for the Constitution of a state depends on factors that lie beyond law and the ongoing effectiveness of the Constitution as superior law depends on the acquiescence of powerful political actors. Moreover the nature of a Constitution is such that it is likely to be supplemented significantly, not only by a variety of "legal formants" but by political practices and understandings of various kinds. The extent of dependence on the latter varies, with the United Kingdom as an extreme case.

Most contemporary Constitutions are somewhat more contrived, in the sense that they are deliberately made at a particular moment in time, drawing on other constitutional models. A Constitution is likely to be the product of an historical moment, or a succession of such moments. Constitutions tend to be written with past, as well as present problems in mind. All else being equal, constitutional choices are likely to show evidence of path-dependency. Constitutions are written to last, whether or not they actually do so. A Constitution that is long-lived is likely to be encrusted with historical experience that may be critical to an understanding of it. Such a Constitution may well have developed organic characteristics of its own, of which the interdependence of its component parts is a common sign.

One final, potentially relevant point of distinction between constitutional and private law concerns the relationship between constitutional and legal systems. There is a degree of correlation between the two. Most states with a common law legal system have constitutional arrangements that are influenced by one or other of the common law constitutional traditions of the United Kingdom and the United States or, often, by some composite of the two." (Emphasis added)

The Character of the Constitution of Kenya 2010

96.There can be no better place to start than the expansive preamble of the Constitution which states:

"PREAMBLE

We, the people of Kenya—

ACKNOWLEDGING the supremacy of the Almighty God of all creation:

HONOURING those who heroically struggled to bring freedom and justice to our land:

PROUD of our ethnic, cultural and religious diversity, and determined to live in peace

and unity as one indivisible sovereign nation:

……

……

RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law:

EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution:

ADOPT, ENACT and give this Constitution to ourselves and to our future generations."

97. The Kenyan Constitution of 2010 has variously been hailed as transformative and radical in light of its progressive text and tenor. This is what the High Court of Kenya remarked in the case of **Jeanne W. Gacheche & 5 Others v. The Judges and Magistrates Vetting Board JR Misc. Application No. 295 of 2012**:

> ***"It is easy to understand that the new Constitution adopted by Kenyans in 2010 is a reformist Constitution and a radical departure from the old constitutional dispensation in many ways, not the least of which is the recognition of the sovereignty of the people of Kenya and the identification, preservation and development of human rights, both at the individual level and at the communal level."***

98. Distinguishing the Constitution of Kenya 2010 from the conventional "*liberal*" minimalist constitutions of the past which were principally concerned with the legitimacy and control of public power, the Supreme Court of Kenya in the **Speaker of the Senate and Another v. The Attorney General & 4 Others Advisory Opinion No. 2 of 2013** observed:

> ***"Kenya's Constitution … is a transformative charter … the avowed goal of today's Constitution is to institute social change and reforms, through values such as social justice, equality, devolution, human rights, rule of law, freedoms and democracy."***

99. A key feature of the 2010 Constitution is the exalted status of the people and the express recognition of their sovereign power. Thus **Article 1** provides:

> ***"All sovereign power belongs to the people of Kenya and should be exercised only in accordance with this Constitution".***

Additionally, the supremacy of the Constitution as articulated in ***Article 2*** declares it as binding on all persons, state organs, not amenable to challenge on validity, and having force above all other laws.

100. A further defining feature of the Constitution is found in the provision outlining national values and principles of governance in **Article 10 (2),** which states:

> ***"(2) The national values and principles of governance include—***
>
> ***(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***
>
> ***(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;***
>
> ***(c) good governance, integrity, transparency and accountability; and***

(d) sustainable development."

101. Undoubtedly, the crowning feature of the 2010 Constitution is the expansive Chapter on the Bill of Rights (Chapter Five) with specific mechanisms for enforcement. On this aspect alone, the repealed Constitution is a pale shadow of the new Constitution. As a direct consequence of this constitution, multiple statutes have been enacted to give effect to the Bill of Rights and the Constitution generally. This development has in many respects totally overhauled and transformed approaches to geo-politics, the legal system and the socio-economic environment.

102. Outside of Kenya, other jurisdictions have equally transformative constitutions. A case in point is South Africa, which upon abandoning the apartheid system adopted a transformative Constitution. In the case of **S v. Makwanyane** (supra) the court stated:

> ***"The South African Constitution […] represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to democratic, universalistic, caring and inspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic."*** (Emphasis added)

103. The character of the South African Constitution was extensively considered in the case of **Bato Star Fishing (Pty) Ltd vs. Minister of Environmental Affairs and Tourism & Others 2004 (7) BCLR 687 CC**. At Para 73 Ngcobo, J stated:

> ***"South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the interim Constitution, which was designed "to create a new order based on equality in which there is 'equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms''. This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution 'recognizes the injustices of our past' and makes a commitment to establishing 'a society based on democratic values, social justice and fundamental rights'. This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms…."***

104. South Africa had been long characterised by prolonged periods of racial division and exclusion, with the State viewed as belonging to only one racial group – thus the necessity to emphasise in the new Constitution, as in Kenya's, that South Africa belonged to all its citizens and that all were equal.

105. The preambles and equality clauses in both Kenya's and South Africa's constitutions cross resonate in the details. The **South African Constitution of 1997** was preceded by an interim Constitution which contained constitutional principles to direct the future framework of the new Constitution in the future. The principles could not be amended and had a higher status than the interim Constitution. In addition, there were other facilitatory enactments.

106. In the same way, the **Constitution of Kenya Review Act** (as amended) contained enduring principles to guide the constitutional review, as follows:

> ***"4. The object and purpose of the review of the Constitution is to secure provisions therein—***
>
> ***(a) guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;***

(b) establishing a free and democratic system of Government that guarantees good governance, constitutionalism, the rule of law, human rights, gender equity, gender equality and affirmative action;

(c) recognizing and demarcating divisions of responsibility among the various state organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability of the

Government and its officers to the people of Kenya;

(d) promoting the peoples' participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;

(e) respecting ethnic and regional diversity and communal rights including the right of communities to organise and participate in cultural activities and the expression of their identities;

(f) …. establishment of an equitable frame-work for economic growth and equitable access to national resources;

….

(h) strengthening national integration and unity;

….

(k) committing Kenyans to peaceful resolution of national issues through dialogue and consensus."

107. Other provisions such as ***Section 5 and 6*** contained principles to guide review organs and the adoption of the Constitution by a referendum. The will of the people and their participation takes a central place in the principles. It can therefore be seen that the historical context played an important role in shaping the constitutions in place today: "***the backward-looking and forward-looking"*** nature characteristic of transitional periods as described by **Aeyal** (supra).

108. Citing **Ruti G. Teitel's *Transitional Justice* (2000)**, **Aeyal** further states:

"From a <u>transitional perspective, what is considered constitutionally just is contextual and contingent, relating to the attempt to transform legacies of past injustices."</u>

He continues:

"Constitutions thus play an important role in shaping political change, …. If one accepts that the usual role of a Constitution is entrenchment, the outcome will be a status quo constitutionalism that views current distribution of rights and entitlements as fixed and worthy of constitutional protection…. my contention is that constitutions must always engage simultaneously in entrenchment and dis-entrenchment…."

109. The importance of the historical and contextual perspective in locating the heart of the Constitution is underscored by the decision of the Supreme Court as enunciated in the dicta of Mutunga, CJ, in the **JMVB case** (supra) at para. 212 where he stated:

"During the process of formulating new constitution, it became clear that the public's confidence in the judiciary was severely eroded. The Kenyan people wanted all sitting Judges and Magistrates who were in office on or before 27th August, 2010 retired. The public's concerns had to be addressed, and a compromise was reached, which called for

the vetting of the sitting Judges and Magistrates….compromises of this kind have a tendency to create penumbras... In the **Communications Commission of Kenya Case**, ***the Court recalled its decision in Speaker of the Senate and Another vs. Attorney General & 4 others Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR where it had stated that***:

'Constitution making does not end with promulgation; it continues with its interpretation. It is the duty of the court to illuminate legal penumbras that Constitutions borne out of long-drawn compromises, such as ours, tend to create.' "

110. Emphasising the importance of the historical context in giving meaning to the new Constitution the Chief Justice continued in the **JMVB Case**:

"Although the High Court and the majority in the Court of Appeal convincingly argued, relying on jurisprudence from various jurisdictions, that the High Court has supervisory jurisdiction over the decisions of the Vetting Board, they had not appreciated the unique historical context in which Kenya's Constitution should be interpreted." (Emphasis added).

111. The historical context including respect for the will of the people as expressed in the Constitution occupies a special place in many judgments of the Supreme Court of Kenya. From the foregoing, it is evident that the historical context of the 2010 Constitution is critically relevant to a proper adjudication of the matters before us.

112. Clearly, there are other jurisdictions whose constitutional jurisprudence adopts a historical approach. We are thus unable to adopt the approach suggested by the Petitioners that assigns the historical context a peripheral position. The inherent danger in pursuing such an approach is the perception of a constitution in vacuum and distortion of its true character and import. We are persuaded that of necessity, the ***"backward and forward-looking"*** process of creating a new Constitution gave birth to the unique and transformative Constitution that was the end product of that process. As adverted above it is now apposite to turn to the all-important question of interpretation of the Constitution.

Principles of Constitutional Interpretation

113. Undoubtedly, this case will turn on the interpretation this court assigns to the relevant substantive constitutional provisions and the transitional clauses contained in the **Sixth Schedule**. Before dealing with the parties' submissions on this score we wish to set out generally what we consider to be principles of interpretation as are relevant to the matter before us.

114. In so far as the Kenya Constitution is concerned the overarching principles are encapsulated in ***Article 259*** which provides:

"(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

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

(c) permits the development of the law; and

(d) contributes to good governance.

……..

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things—"

115.In addition all State organs, State offices, public officers and all persons are bound by the national values and principles of governance whenever they apply or interpret the Constitution and any law as required under **Article 10 (2)**.

116.It follows that any approach to constitutional interpretation no matter how esoteric and esteemed its source must pass muster the principles set out in ***Articles 10*** and ***259*** of the Constitution.

117.We believe these principles and the legal precedent set by our courts form a practical sifting mechanism for our courts while engaging in comparative constitutionalism.

118.Writing in the University of Melbourne Law School Research Series, **Saunders Cheryl** (supra) identifies the challenges inherent in comparative constitutional law. She states:

"Much of the discourse of comparative constitutional law focuses on the established constitutional systems in North America and Europe and a few outrider states with similar arrangements, based on similar assumptions. These are the progenitors of many of the conceptions of world constitutionalism. They are deeply interesting subjects of comparative study in their own right … One consequence of the concentration on North America and Europe is that constitutional law and practice in other regions where the majority of states are located, is not factored into mainstream comparative constitutional law and is, in effect marginalized. Marginalisation may take a variety of forms: overlooking the constitutional experience of particular state and regions, assuming their effective similarity with western constitutional systems; reserving them for specialist study by those with anthropological or sociological interest and skills. To a greater and lesser degree, all other regions are affected in one or more of these ways; Africa, South America, Scandinavia, the Middle East, and the Pacific."

119.Concerning claims that constitutions are increasingly globalising in form and substance, resulting in convergence on such aspects as the rule of law, democracy, social security and the organisation of territory, **Saunders** asserts that Constitutions are not written in a vacuum; and urges caution by noting:

"…A degree of convergence of constitutional concepts, institutions and norms is the inevitable result. But convergence in form does not necessary mean convergence in understanding, in values and priorities, or in the operation of constitutional arrangements in practice in the face of a plethora of local contextual factors. There may be convergence in these respects as well in consequence of, for example, inter-jurisdictional borrowing by judges at the interpretive stage….

(Emphasis added)

120.She further observes that:

Inevitably, convergence is patchy: most pronounced although far from complete, in relation to rights, less reliable in relation to constitutional features of a Constitution. As in earlier times, it remains true now that apparent similarity may mask underlying difference. Be they ever so similar in design, constitutional arrangements are likely to have different effects in different cultural contexts and in states in different stages of constitutional development. It follows that it cannot be assumed that principles and institutions adopted by one state will operate precisely in the same way … in the

interconnected setting of a constitution moreover, adopted institutions will be affected by the rest of the Constitution, of which they are likely gradually to adopt. The challenge of comparison is further excercabated by the generality with which many key constitutional concepts are expressed, leaving considerable scope for varied understandings."

121. A similar caution is echoed by Mutunga, CJ while exhorting courts to develop local jurisprudence, appropriately fertilized by suitable comparable foreign jurisprudence, in **Rai Case stating:**

> ***"In the development and growth of our jurisprudence, Commonwealth and international jurisprudence will continue to be pivotal. However, the Supreme Court will have to avoid mechanistic approaches to precedent. It will not be appropriate to pick a precedent from India one day, Australia another day, South Africa another, the U.S. yet another, just because they seem to suit the immediate occasion. Each of those precedents has its place in the jurisprudence of its own country. A negative side of the mechanistic approach to precedent, is that it tends to produce a mind-set: "If we have not done it before, why should we do it now?" The Constitution does not countenance such a pre-determined approach. All the cases cited in this matter were subjected to an inquiry into their respective contexts. We sought to find out whether they are still good law, or have been overturned. We did all this because our progressive needs, under the Constitution, are different; and there is the need to bear in mind that our Constitution remains always, as our brother Judge Ojwang has emphasized, a transformative charter of good governance.***
>
> ***While our jurisprudence should benefit from the strengths of foreign jurisprudence, it must at the same time obviate the weaknesses of such jurisprudence, so that ours is suitably enriched, as decreed by the Supreme Court Act.***

122. A Constitution differs in content and effect from a statute. Therefore, certain technical rules of interpretation of statutes may not be applicable to constitutional interpretation: see **Rafiu Rabiu case**(supra). Unlike a mere statute, the Constitution does not mechanically define government structure and relations between the government and the governed, as per Mohamed, A.J in **S. v. Acheson (1991) 2SA 805**. Rather the Constitution is a: *"mirror reflecting the national 'soul', the ….ideals and aspirations of a nation, the articulation of the values that bind its people and discipline its government"*. In **Ndyanabo v. Attorney General [2001] EA 485** the Court of Appeal in Tanzania stated that the interpretation of a Constitution must be guided by the basic principle that it *"was a living instrument with a soul and life of its own." These words are echoed by the Supreme Court in* ***Advisory Opinion No.2 of 2012*** *supra and* ***Articles 10 and 259*** *concerning the interpretation of the Constitution 2010.*

123. In the **JMVB Case,** the Supreme Court (Mutunga, CJ) restated the guidelines for the construction and interpretation of the 2010 Constitution as follows:

a. No Constitutional provision is "***unconstitutional"***
b. The historical context is relevant to the accurate interpretation of the Constitution.

c. That the Constitution ought to be interpreted holistically In context and "in its spirit".

124. Similar principles for the interpretation of the Constitution were articulated by the Constitutional Court of Uganda in **Advocates Coalition for Development of Environment & Others v. Attorney General & Another [2014] 3 EA** where it was stated *inter alia* that:

> ***"i. The widest construction possible in its context should be given according to the ordinary meaning of the words used, and each general word should be held to extend to all ancillary and subsidiary matters. In certain context, a liberal interpretation of the***

constitutional provision may be called for.

ii. A constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come and therefore, should be given a dynamic progressive and liberal flexible interpretation, keeping in mind the ideals of the people and their social economic and political-cultural values so as to extend fully the benefit of the right to those it is intended for. (South Dakota vs. North Carolina, 192, US 268 1940 LED 448.)

iii….

iv. No one provision of the Constitution is to be segregated from the others and be considered alone, but, all provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.

v. Judicial power is derived from the people and shall be exercised by courts established under the Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people and courts shall administer substantive justice without undue regard to technicalities (Article 126(1) and (2) (e) of the Constitution of Uganda of Uganda, 1995.)

vi.The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent or in contravention of the Constitution is null and void to the extent of the inconsistency. (Article 2(1) and (2) of the Uganda Constitution, 1995)

vii. Fundamental rights and freedoms guaranteed under the Constitution are to be interpreted having general regard to evolving standards of human dignity. See also the case of Uganda Law Society vs. Attorney General Constitutional Petition No. 18 of 2005."

125.The Court also referred to the case of **R. v. Elmann [1969] 1 EA 357** where it was stated:

"We do not deny that in certain contexts a liberal interpretation of the Constitution may be called for, but in one cardinal respect, we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment, and that is where the words used are precise and un-ambiguous. They are construed in their ordinary and natural sense. It is only where there is some imprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put on the words."

The overarching principle that permeates the **JMVB** judgment (supra) and resonates with **Article 1** of the Constitution as read together with the preamble, and in light of the process of the Constitution making history is this: *the Constitution embodies the sovereign will of the people of Kenya.'*

126.In the **Mong'are case** it was observed by Otieno- Odek JA as follows:

"The "general will" is the "will" of the people taken together as a whole, constituting an entity. The 2010 Constitution reflects the general will of the people of Kenya and any individual Judge or magistrate can only continue to hold office and serve subject to the terms and conditions as laid out in the general will. The Constitution is an amalgam of the interests of the people of Kenya; their aggregated will constitutes the only legitimate basis of the sovereignty and the goals or value content in Kenya. A Judge is a judge only by delegation of the 'general will' and could be removed whenever rejected by the general will. … As John Austin stated, law is the command of the sovereign and the

people of Kenya are the sovereign: (See John Austin: The Province of Jurisprudence Determined (1832) John Austin (1790 – 1859).”

As we interpret the Constitution, we shall seek the guidance of these principles as applicable.

WHETHER THE RESPONDENTS' ACTIONS VIOLATED THE PETITIONERS' CONSTITUTIONAL RIGHTS

127. The Petitioners' complaint is that the notifications of their impending retirement from the CRJ violated their constitutional rights namely: the Right to Equality and Freedom from Discrimination; Right to Human Dignity; Protection of the Right to Property; Fair Labour Practices; Fair Administrative Action; Access to Justice; and the Rights of Older Persons. They also assert that the decision of the Respondents to retire them at the age of seventy years goes against the national values and principles of governance enunciated in **Article 10** of the Constitution.

Article 27: Equality and Freedom from Discrimination

128. In their submissions, the Petitioners invoke the terms of Article **27(1)** of the Constitution. They contend that their pension expectation-status as long-serving Judges of the superior courts under the employment of the Kenyan Judiciary is a legal right. According to them, by virtue of **Article 27 (1)** of the Constitution, the above pension related right should be protected by the law. Reliance is placed on **Article 27(4)** which states that **“[t]he State shall not discriminate directly or indirectly against any person on any ground, including…age…”**

129. The Petitioners therefore conclude that the retirement notices were inherently discriminatory and in every respect unconstitutional, as they were applying different standards to Judges in similar situations. Further, that the retirement notices contradicted the Circular which had communicated that their retirement age was seventy four years. It is the Petitioners' claim that the Respondents' action of retiring them from the Judiciary at the age of seventy years discriminated against them and deprived them of the full benefit of the law. In particular, their complaint is that other Judges including Hon. Justice Onyango Otieno were allowed to serve up to seventy-four years.

130. In reply, the Respondents assert that the retirement notices were issued to the Petitioners in conformity with **Article 167(1)** of the Constitution which provides that the retirement age of Judges is seventy years. Further, that the Petitioners have not indicated in what manner their rights under **Article 27** have been infringed by the notification that they are due to retire as required by the Constitution.

131. **Article 27** of the Constitution enshrines the right to equality and freedom from discrimination in the following terms:

> ***“27(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.***
>
> ***(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***
>
> ***(3) ….***
>
> ***(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6)….."

132.The term "*discrimination*" has been defined as-

> ***"...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society" (Andrews v. Law Society of British Columbia [1989] I SCR 143,*** as per McIntyre J.).

133.The Court in ***Peter K. Waweru v Republic [2006] eKLR*** defined discrimination as follows:

> *"…**Discrimination means affording different treatment to different persons attributable wholly or mainly to their respective descriptions….Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex….A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured**".*

134.Further, in **Willis v. The United Kingdom, No. 36042/97, ECHR 2002 – IV** *and* **Okpisz v. Germany, No. 59140/00, 25th October 2005**, the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in similar situations.

135.The principle of equality and non-discrimination has its underpinnings in various international instruments which now form part of our laws by dint of **Article 2(5)** and **(6)** of the **Constitution.** For instance, the **United Nations Universal Declaration on Human Rights (UDHR)** provides at **Article 1** that ***"[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."***

136.**Article 7** of the UDHR further states that:

> ***"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."***

137.**Article 2** of the **African Charter on Human and People's Rights** also stipulates that every individual is entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, or sex. **Article 28** goes on to state that:

> ***"Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance."***

138.It is thus evident that both the Constitution and international and regional instruments to which Kenya is a party, recognize the principle of equality of persons and prohibit discrimination on the basis of "***race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."***

139.In our understanding of the law, one can only allege discrimination if in the ordinary circumstances he has been afforded some differential treatment or different standards have been

applied as against him as opposed to another person of equal status as himself based on any of the grounds stipulated under **Article 27(4)** of the Constitution. The Petitioners for instance have not demonstrated to this Court that any other judge who has attained seventy years has not been issued with a retirement notice and continues to serve.

140. In their Petition, the Petitioners allege that:

> ***"The Respondents have after the promulgation of the 2010 Constitution allowed and/or permitted various Judges to serve upto the age of 74 years. Full particulars of those Judges are within the knowledge of the Respondents. Consequently, it is an act of discrimination for the Respondents to demand that the Petitioners should retire at the age of 70 years whilst allowing the other Judges, in identical situation, to retire at the age of 74 years."***

141. The Respondents' reply is that their decision to issue retirement notices to the Petitioners was not discretionary as it was hinged on **Article 167** of the Constitution which requires all Judges to retire at the age of seventy.

142. We note that the Petitioners only introduced the name of Hon. Justice Onyango Otieno during submissions. The Petitioners did not furnish us with particulars relating to the said Judge's retirement. It would therefore be speculative of us to find, on such scanty pleadings and material, that the Petitioners were discriminated against. Moreover, if it is found that the retirement age of Judges serving on the effective date is seventy years, the Petitioners cannot be allowed to allege discrimination on the ground that some Judges benefited from an illegality.

Article 28: Human Dignity

143. **Article 28** of the Constitution provides that:

> ***"Every person has inherent dignity and the right to have that dignity protected and respected."***

The place of **Article 28** in the rights matrix was explained by Majanja, J in the case of **Richard Dickson Ogendo & 2 Others v. Attorney General & 5 others [2014] eKLR** when he opined that:

> ***"Right to dignity is an interpretive principle to assist the further explication of the catalogue of rights and all rights have come to be seen as best interpreted through the lens of right to dignity (see Dawood v Minister of Home Affairs [2000] (3) SA 936(CC)). In my view, enforcement of the law that meets constitutional muster may lead to inconvenience but that by that fact alone is not a violation of a person's right to human dignity."***

144. The Petitioners assert that they are possessed of inherent dignity and are entitled to the respect and protection thereof. According to them, by the illegal, unreasonable, unfair and discriminatory actions, decisions and resolution, the Respondents have failed to respect and protect the dignity of each of them, and thereby acted unconstitutionally.

145. The Petitioners did not provide any material as to how retiring at seventy and not seventy four years will infringe on their status as human beings. We need not say more as the parties' input on this issue was scanty.

Article 40: Protection of Right to Property

146. The right to property is protected by **Article 40** of the Constitution which provides that:

> ***"(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-***
>
> a. ***of any description; and***
> b. ***in any part of Kenya.***
>
> ***(2)….***
>
> ***(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description…"***

147. **Article 260** of the Constitution provides that property inter alia includes any vested or contingent right to, or interest in or arising from money, choses in action or negotiable instruments.

148. The question as to whether the office held by a judge amounts to property, was addressed by the High Court in the case of **Hon. Justice Amraphael Mbogholi Msagha v. Chief Justice of the Republic of Kenya & 7 Others, [2006] eKLR** where it was stated that:

> ***"The colonial judge held office not at the pleasure of the Crown, but so long as he was of good behaviour or conduct in terms of the unwritten constitution, code and ethics of that high office. Where a judge fell short of that standard he was removed not at will, but in accordance with the determination of a tribunal comprised of his peers. <u>His office did not therefore constitute a "property".</u>***
>
> ***In his submissions to us, professor Muigai was on the point when he said that a judge is but one of the constitutional office holders and the intention of the Constitution and Parliament was to accord him dignity of office to enable him perform his duties and that the security is not intended to be for life when Section 62 limits it to an age prescribed by Parliament and is currently under the Judicature Act (Cap 8) limited to 74 years of age. Besides section 62 (3) of the Constitution recognizes the possibility of removal of a judge from office for misbehaviour or inability (due to infirmity of mind or body).***
>
> ***<u>In modern day constitutional law, therefore, the office of judge is not regarded as a "Property" in which we or any one has a proprietary interest in the sense of physical object like land, domesticated animals, machines or other proprietary rights or even intellectual property</u>. The office of judge is more of a calling, of the "priestly caste" (as Bishop C.J. said in the Barnwell case), a privilege which is held in high esteem by society and in which every holder of that office is beckoned and called upon to discharge the functions of that office in accordance with the highest and noblest ethics and standards be-fitting to the office.***
>
> ***We therefore find and hold that the office of judge is not a "property" in terms of section 75 (1) of the Constitution, which can be compulsorily acquired and be subjected to fair and prompt compensation in terms of the provisions of the Land Acquisition Act, Chapter 295 Laws of Kenya."***

(Emphasis added)

149. **Article 260** of the Constitution provides that public office means an office in the national government, county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament. A judge falls under the category of State officers. Consequently, the office of judge is a public office.

150. Does a public office constitute a property right? In the case of **Commission on Election v. Conrado Cruz and others, G.R. N.O. 186616**, **November 20. 2009** the Supreme Court of Philippines answered this question as follows:

> ***"A public office is not a property right. As the Constitution expressly states, a [P]ublic office is a public trust. No one has a vested right to any public office, much less a vested right to an expectancy of holding a public office. In Cornejo v. Gabriel, decided in 1920, the Court already ruled:***
>
> ***Again, for this petition to come under the due process of law [of] prohibition, it would be necessary to consider an office a property. It is, however, well settled x x x that a public office is not property within the sense of the constitutional guaranties of due process of law, but is a public trust or agency. x x x The basic idea of the government x x x is that of a popular representative government, the officers being mere agents and not rulers of the people, one where no one man or set of men has a proprietary or contractual right to an office, but where every officer accepts office pursuant to the provisions of the law and holds the office as a trust for the people he represents."***

The words in this authority resonate with the provisions of **Article 1(3)(c)** of the Constitution which provides:

> **"Sovereign power (of the people) under this constitution is delegated to the following state organs, which shall perform their functions in accordance with this constitution –**
>
> **(a)Parliament and the legislative assemblies in the county government;**
>
> **(b) the national executive and the executive structures in the county governments; and**
>
> **(c) <u>the Judiciary</u> and independent tribunals."**
>
> (Emphasis added)

151. Further **Article 159(1)** provides:

> **"Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution"**

152. As was observed by Odek, JA in the **Mongare case** we agree with the sentiments of the learned Judge of Appeal, for it is indeed true that by dint of the foregoing provisions and **Article 161(1)** Judges of the superior courts are delegates of the people of Kenya.

153. It is the Petitioners' case that the right to a fixed term of service up to the age of seventy four years, as provided by **Section 9** of the **Judicature Act** which was in force at the date of the appointment of each Petitioner as a Judge, is a "vested right". Further, that the right to a computation and payment of a pension subject to completion of service at the age seventy four years is a contingent right. The Petitioners contend that each of them has the right to sue for pension and other benefits, on the basis of service until the age of seventy four years.

154. The Respondents on the other hand assert that the Petitioners' claim of violation of rights under **Article 40** is without merit.

155. The **Black's Law Dictionary, 6th Edition** at **page 1564** defines 'vested rights' as:

> **"In constitutional law, rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or canceled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare. Such interests as cannot be interfered with by retrospective laws; interests which it is proper for state to recognize and protect and of which [an] individual cannot be deprived arbitrarily without injustice. American States Water Service Co. of California v. Johnson, 31 Cal. App. 2d 606, 88 P.2d 770, 774. Immediate or fixed right to present or future enjoyment and one that does not depend on an event that is uncertain. A right complete and consummated, and of such character that it cannot be divested without the consent of the person to whom it belongs, and fixed or established, and no longer open to controversy. State ex rel. Milligan v. Ritter's Estate, Ind. App., 46 N.E.2d 736, 743."**
>
> (Emphasis added)

156. Further, in the American case of **Wawasee Property Owners, et al. v. Wawasee Real Estate & DNR, 11 CADDNAR 88 (2007)**, the Court stated:

> **"Interpreting another statute employing the phrase "vested right", Indiana courts have stated: "To be vested, in its accurate legal sense, a right must be complete and consummated and of such character that it cannot be divested without the consent of the person to whom it belongs. It must be fixed or established and no longer open to doubt or controversy." *State ex rel. Milligan v. Ritter's Estate*, 46 N.E.2d 736, 743 (Ind. Ct. App. 1943)."**

157. From the authorities cited, we are of the considered opinion that the office of a judge is not property within the provisions of **Article 40** of the Constitution. If it were so, then there would be no provision for the removal of Judges as envisaged under **Article 168** of the Constitution. In our view, the office of a judge is an office held in public trust and not a vested right as contended by the Petitioners.

158. However, with regard to pensions and other benefits, **Section 32** of the **Sixth Schedule** of the Constitution provides that:

> **"The law applicable to pensions in respect of holders of constitutional offices under the former Constitution shall be either the law that was in force at the date on which those benefits were granted or any law in force at a later date that is not less favourable to the person."**

159. Further, **Section 6** of the **Sixth Schedule** of the **Constitution** provides for rights, duties and obligations of the State. It states that:

> **"Except to the extent that this Constitution expressly provides to the contrary, all rights and obligations, however arising, of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government under this Constitution."**

160. The Petitioners submit that the law that was in force at the date on which they were appointed granted them the benefit of the term of seventy four years. Further, that **Article 167(1)** of the Constitution which is the law in force at "a later date" is less favourable to them as it requires them to retire at seventy years. Thus, they argue that **Article 167 (1)** cannot apply to their situation and that the law that was in force when they were appointed under the former Constitution "shall" be applicable. Further, the Petitioners submit that, whether the retirement date is to be ascertained as part of the pension and its computation, or to be ascertained separately as an "other benefit" the law applicable is the one "that is not less favourable", which to them is **Section 31** of the **Sixth Schedule** of the Constitution.

161. To counter this argument, the Respondents submit that the transitional provision under **Section 32** of the **Sixth Schedule** was meant to secure the retirement benefits of constitutional office holders. Thus, retirement at the age of seventy in conformity with **Article 167(1)** of the **Constitution** does not affect the applicable law with respect to the Petitioners' pension or retirement benefits as urged before this Court.

162. We are not in doubt that, as submitted by the Petitioners, **Section 104 (3)** and **(5)** of the former Constitution protected the salary and benefits of Judges as follows:

> ***"(3) The salary payable to the holder of an office to which this section applies and his other terms of service (other than allowances that are not taken into account in computing, under any law in that behalf, any pension payable in respect of his service in that office) shall not be altered to his disadvantage after his appointment.***
>
> ***(5) This section applies to the offices of judge of the High Court, judge of the Court of Appeal, member of the Public Service Commission, Attorney-General and Controller and Auditor-General."***

163. The protection was kept alive by **Article 160(4)** of the Constitution which states that:

> ***"Subject to Article 168(6), the remuneration and benefits payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge."***

164.**Section 5** of the **Pensions Act, Cap 189** provides that every officer shall have an absolute right to pension and gratuity.

165. As we stated earlier, it is clear that **Article 40** protects property of any nature. As to whether pension constitutes property, Shah JA (as he then was) stated in the case of **Director of Pensions v. Cockar (2000) 1EA 38** that:

> ***"Property includes choses in action, money or pension. No person who is eligible for pension can be deprived of his pension at the whim of the director of pensions. Once pension becomes due, the director has no choice but to pay the pension."***
>
> (Emphasis added)

It follows therefore that pension is property capable of being owned by a person.

166.Our finding is supported by the Sixth Edition of **Black's Law Dictionary** which at page 1134 defines pension as;

> ***"Retirement benefit paid regularly (normally, monthly), with the amount of such based generally on length of employment and amount of wages or salary of pensioner. Deferred compensation for services rendered."***

Section 5 of the Pensions Act stipulates that every officer shall have an absolute right to pension and gratuity. **Section 6** of the Act then states that the said pension is paid upon retirement from public service based on the pensionable years worked.

167.We are in agreement with the Petitioners that they are entitled to pension upon fulfillment of the statutory conditions for earning it. We however, do not accept the Petitioners' argument that the pension matured into a vested right upon appointment and that therefore they stand to suffer proprietary loss if their retirement is pegged at seventy years.

168. Further, it is clear to us that **Section 32** of the **Sixth Schedule** protects pension and the reference therein to "benefits" is pension related and not to tenure as argued by the Petitioners. Pension and tenure cannot be conflated in the manner suggested by the Petitioners.

169.The right to pension is only protected in so far as that right is in consonance with the retirement age provided by the Constitution. Once the court determines the Petitioners' retirement age, their pension rights will fall in line with that decision.

Article 41: Right to Fair Labour Practices.

170.**Article 41** of the Constitution, *inter alia*, provides that:

"(1) Every person has the right to fair labour practices.

(2) Every worker has the right –

(a) to fair remuneration;

(b) to reasonable working conditions;"

171. The Petitioners submit that a call for "forfeiture" of years of distinguished judicial work stands in violation of the foregoing principles of labour law as it is inconsistent with the notion of "reasonable working conditions".

172. The Petitioners did not plead violation of their right to fair labour practices but only introduced this ground during submissions. We are thus not obliged to address this issue-see **Daniel Toroitich Arap Moi v. Mwangi Stephen Muriithi & another [2014] eKLR.** However, as already stated, whether or not there is a possibility of such forfeiture will depend on our determination of the constitutional retirement age.

Article 47: Right to Fair Administrative Action

173. **Article 47** of the Constitution provides for the right to fair administrative action in the following terms:

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) …."

174. It has been held that Article 47 was intended to subject administrative processes to constitutional discipline. Consequently, relief for administrative grievances was no longer left solely to the realm of common law. See ***Dry Associates Limited v. Capital Markets Authority & Another, Nairobi High Court Petition No. 328 of 2011.***

175. In compliance with **Article 47(3)** of the Constitution the National Assembly enacted the **Fair Administrative Action Act, 2015.** Although the actions giving rise to this Petition occurred prior to the enactment of the said Act, it is noted that the legislation crystallized the common law rules of fair administrative action at **Section 4** as follows:

"4(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure."

176. At **Section 12,** the Act clarifies that the provisions therein are in **"addition to and not in derogation from the general principles of common law and the rules of natural justice."**

177.Given the above provisions of the law and the arguments made by the respective parties, this Court must answer the question as to whether in making its decision to issue the retirement notices to the Petitioners, the Respondents violated their rights to fair administrative action as protected by the Constitution.

178.In that regard, the old and revered rule of natural justice, *audi alteram partem*, that every person must be heard before a decision can be taken against them, is now recognized as a fundamental right and freedom under the Bill of Rights in the Constitution. The principle of the right to a fair hearing is as old as mankind.

179.In the Tenth Edition of **Administrative Law** by H. W. R. Wade & C. F. Forsyth the authors at 403 draw analogy of the trial of Adam and Eve in the Garden of Eden thus: **"that *even God himself did not pass sentence upon Adam, before he was called upon to make his defence.'Adam, says God, where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also."***

180.In the case of ***The Management Committee of Kibiito Primary School and Others v Uganda National Examination Board, HC Civil Misc Applic No.0018 of 2010*** as consolidated with ***The Management Committee of Makondo Primary School and Others v Uganda National Examination Board, HC Civil Misc Applic No.0022 of 2010,*** the Ugandan High Court at Fort Portal stated as follows regarding the rules of natural justice:

> ***"It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God; hence the rules enjoy superiority over all laws made by humankind. It therefore follows that any law, or practice by humankind that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn'; and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given notice, and accorded a just and fair hearing."***

181.The High Court in **Republic v The Honourable The Chief Justice of Kenya & 6 Others Ex Parte Justice Moijo Mataiya Ole Keiwua, [2010] eKLR** also expressed itself as follows:

> ***"We must state that the rules of natural justice are not engraved on tablets of stones. However, fairness demand that when a body has to make a decision which would affect a right of an individual it has to consider any statutory or other framework in which it operates. In essence natural justice requires that the procedure before any making decision authority which is acting judicially shall be fair in all circumstances."***

182.As to what entails the right to be heard, the Court stated that:

"The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence."

183. In summary, where a public body intends to make a decision that will adversely affect any person, the body cannot be deemed to have exercised its legal powers validly without first hearing whoever will be affected by the decision. One of the reasons for this requirement is that once the decision is made, it is difficult to reverse it and the person prejudiced by it will have been affected by the decision in one way or another. See ***Ahmed Issack Hassan v. Auditor General (2015) eKLR.***

184. The application of **Article 47** depends on the circumstances of each case. In determining whether a decision is *ultra vires*, unconstitutional and illegal the same will largely depend on characteristics of the decision, the nature and substance of the decision and the objective it is intended to achieve. This was emphasized by the Court of Appeal in the case of **Judicial Service Commission v. Mbalu Mutava & Another [2015] eKLR** when it stated that:

"JSC as a State Organ exercises the functions specified in article 172. However, not all its decision adversely affects the rights or legal position of any person. What is an administrative action targeted by article 47(1) will depend on a proper construction of article 47(1) in conjunction with relevant provisions of the Constitution including article 10 relating to national values, article 21, on the Bill of Rights, article 73 on leadership and integrity and the empowering provisions of the Constitution or law on the basis of which the decision is made or contemplated to be made. In other words, it will largely depend on characteristics of the decision, the nature and substance of the decision and the objective it is intended to achieve. An administrative action includes an administrative decision which adversely affects or is likely to affect any person made or contemplated to be made by certain public officers, state officers and state organs in the national and county executives pursuant to a power conferred by the Constitution or any written law."

(Emphasis added)

185. The Respondents argue that there was no reason for hearing the Petitioners before the decision was made since its earlier decision to the effect that they were to retire at seventy four years, conveyed through the Circular of 24th May, 2011, had been reached in violation of the Constitution. On their part, the Petitioners submit that the Respondents did not hear them, as required by the Constitution and the law, before reversing the decision that they were to retire at seventy four years.

186. In this Petition, the Respondents did not table any evidence to rebut the Petitioners' assertion. Assuming that the JSC had the mandate to retire the Petitioners, the Petitioners had a right to be heard as the Memo reversed a decision that was favourable to them thus adversely affecting them. We will say more on this matter at a later stage in this judgment.

Article 57: The Rights of Older Persons

187. The Constitution takes care of the rights of older members of society under **Article 57** as follows:

> ***"The State shall take measures to ensure the rights of older persons-***
>
> ***(a) to fully participate in the affairs of society;***
>
> ***(b) to pursue their personal development;***
>
> ***(c) to live in dignity and respect and be free from abuse; and***
>
> ***(d) to receive reasonable care and assistance from their family and the State."***

188. The Petitioners contend that **Article 57** requires the State and by extension State officers and State organs to take measures to ensure the rights of older persons. According to them the JSC and the Judiciary have not acted in accordance with the provisions of **Article 57** and have not secured their rights as required by the said provision.

189. Under **Article 260** of the Constitution, an "older member of society" means a person who has attained the age of sixty years. By that definition, it goes without saying that the Petitioners being over seventy years of age are entitled to the protection extended to older members of society by **Article 57** of the Constitution.

190. The Petitioners did not however specify in what way and manner the Respondents' decision has violated the rights secured for them by the said Article. It is a well-established rule in constitutional litigation that a party must plead his case with some degree of precision and set out the manner in which the Constitution has been violated-see ***Annarita Karimi Njeru v Republic (1976-1980) 1 KLR 14*** and ***Trusted Society of Human Rights v Mumo Matemu and another, Petition No. 279 of 2012.*** We are therefore not in a position to make any worthwhile decision on the Petitioners' contention and we must find that their claim to relief on alleged violation of **Article 57** must fail for want of evidence.

WHETHER THE JSC'S MEMO OF 27TH MARCH, 2014 WAS IN BREACH OF THE PETITIONERS' LEGITIMATE EXPECTATION TO RETIRE AT THE AGE OF SEVENTY FOUR YEARS AS CONVEYED BY THE CIRCULAR DATED 24TH MAY, 2011.

191. From the time the doctrine of legitimate expectation emerged as a ground upon which relief can be granted to a supplicant in public law, it has continued to be fashioned and refined to date. The importance of this tool in the affairs of men was clearly enunciated by Nyamu, J (as he then was) in **Keroche Industries Ltd v. Kenya Revenue Authority and Others [2007] eKLR** when he stated that:

> ***"Legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher interest beneficial to all…which is, the value of***

the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation….public authorities must be held to their practices and promises by the Courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."

192. The principle is thus used to hold the rulers accountable for their promises, for as was stated by **H. W. R. Wade & C. F. Forsyth (supra)** at page 447 **"[u]nless that trust is sustained and protected officials will not be believed and government becomes a choice between chaos and coercion."** In order to maintain certainty and trust between the rulers and citizens, there is need to have a tool upon which the citizen, through the courts, can hold the government accountable.

193. The need for fairness in the management of public affairs is another reason for protection of legitimate expectations. Abuse of power leads to unfairness and public bodies can only treat people fairly if they are made to keep their promises by a concept that is recognised by the law. Abuse of power can only be rectified by protecting legitimate expectations.

194. It is not enough that a government or its agency has made a promise. There are certain characteristics that must accompany that promise for it to be categorised as a legitimate expectation.

195. The courts have in that regard developed principles to guide the grant of relief. **H. W. R. Wade** and **C. F. Forsyth (supra)** at pages outline those tenets as follows:

"It is not enough that an expectation should exist; it must in addition be legitimate….

First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation….

Second, clear statutory words, of course, override and expectation howsoever founded….

Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy….

Fourth, there is no artificial restriction on the material on which a legitimate expectation rests may be based. Thus a legitimate expectation can be founded upon an unincorporated treaty, but it is seldom that the terms of the treaty will be sufficiently precise or known to the individual concerned.

Fifth, the individual seeking protection of the expectation must themselves deal fairly with the public authority. Thus taxpayers seeking clearance for their proposals must make full disclosure before the Revenue's assurances will be binding. The assurance must itself be clear, unequivocal and unambiguous.

Sixth, consideration of the expectation may be beyond the jurisdiction of the court. For instance, when it would involve questioning proceedings in Parliament contrary to the

law of parliamentary privilege."

196.The Supreme Court in the CCK case at paragraph 269 distilled those principles as follows:

> **"a.** ***there must be an express, clear and unambiguous promise given by a public authority;***
>
> **b.** ***the expectation itself must be reasonable;***
>
> **c.** ***the representation must be one which it was competent and lawful for the decision-maker to make; and***
>
> ***(d) there cannot be a legitimate expectation against clear provisions of the law or the Constitution."***

197.We need not reiterate the rules attending to a successful reliance on the doctrine of legitimate expectation by an applicant as they speak for themselves in the cited authorities.

198.The Petitioners contend that the decision to retire and remove them from office is unlawful and has denied them fair administrative action. It was Mr. Ngatia's submission that the JSC has no power as it is not within its purview to determine the retirement age of a judge. Thus, the JSC's said resolution and decision is *ultra vires*, unconstitutional and illegal as it ignored the express provisions of **Article 168 (1)** of the Constitution that sets out the grounds upon which a judge of the superior court may be removed from office.

199.It was Mr. Ngatia's submission that from a public law concept of legitimate expectation, it would be unfair and wrong for the JSC to renege on the initial representation. Counsel thus urges the court to hold the JSC to its covenant in the first communication on retirement age of Judges serving on the effective date.

200.The Respondents' reply is that there cannot be legitimate expectation that is premised on a violation of the Constitution. It was Mr. Issa's submission that legitimate expectation must be based on that which is competent and lawful. Thus, there can be no legitimate expectation against clear provisions of the Constitution. It was counsel's submission that in this instance, no legitimate expectation could arise from the Circular dated 27th May, 2011.

201.As stated above, a legitimate expectation may be created by the giving of assurances. Since it arises from an express promise, the Court has to look at the validity of the promise that is made. If the promise/*decision made unreasonably departs from the publicly stated policy or customary practice or reneges on an earlier decision or undertaking thus confounding the Applicant's legitimate expectation from the decision maker, then it can also be argued that there has been a breach of the duty to act fairly.*

202. There is no dispute that the Circular of 24th May, 2011, conveyed a promise to the Petitioners that their retirement age was seventy four years. The question is whether the representation was one which it was competent and lawful for the JSC to make; and if it had the mandate, whether that representation was premised on a proper reading and understanding of the Constitution, for there cannot be a legitimate expectation against clear provisions of the law or the constitution. (See **CCK case**). These are issues that we will address in due course.

WHAT IS THE NATURE AND FUNCTION OF TRANSITIONAL AND CONSEQUENTIAL PROVISIONS UNDER THE CONSTITUTION?

203. Because this Petition straddles two distinct constitutional dispensations, parties made repeated references to various transitional and consequential provisions in the **Sixth Schedule** of the Constitution. Indeed, the Petitioners' cornerstone clause appeared to be **Section 31** therein. On the face of it the parties appeared agreed as to the nature and function of transitional and consequential provisions, generally. However, the interpretation of these provisions in the context of the Constitution and ultimately the Petition, proved to be a key sticking point. In some ways this was an indication that there were underlying differences as to the perceived essence of transitional and consequential provisions and in particular, those relevant to this Petition. We shall therefore commence this discussion by considering the nature and functions of transitional and consequential provisions.

204. **Article 262** of the Constitution provides as follows:

> ***"The transitional and consequential provisions set out in the Sixth Schedule shall take effect on the effective date."***

And by dint of ***Article 264,*** the former Constitution was repealed ***"subject to the Sixth Schedule***." The transitional and consequential provisions are located in the **Sixth Schedule** of the Constitution.

205. Alternative terms to the word ***"transitional"*** in the **Collins Thesaurus** are:

> ***"1: Changing, passing, fluid, intermediate, unsettled, developmental, transitionary…a transitional period following a decade of civil war….***
>
> ***2: temporary, working, acting, short-term, interim, fill-in, caretaker, provisional, makeshift, make-do, stopgap, pro tem…a meeting to set up transitional government…."***

206. Similarly, for the word **"consequential" Thesaurus** supplies the terms:

> ***"1: resulting, subsequent, successive, ensuing, indirect, consequent, resultant, sequential, following…The company disclaims any liability for incidental or***

consequential damages…

2: important, serious, significant, grave, far-reaching, momentous, weighty, eventful… From a medical standpoint a week is usually not a consequential delay…"

207. Transitional and consequential provisions in the Constitution or statutes are ordinarily limited in time, scope and purpose. Where they are in a Constitution they are best understood from the perspective of their function in the Constitution. They serve as a "bridge" from the old order to the new order. As indicated the parties were generally in agreement that the transitional and consequential provisions are seasonal, and are spent once the purpose is served. However, the Petitioners' argument that ***section 31 (1)*** of the **Sixth Schedule** transited judges in office on the effective date to the new constitutional dispensation was opposed by Mr. Issa on behalf of the Respondents. Overall the contested but unspoken question was whether Section 31(1) or indeed any provision in the Sixth Schedule could by implication revive a right, obligation or benefit arising from a repealed provision in the former Constitution. Would such application amount to conferment of a substantive right hence inconsistent with the essence of transitional and consequential provisions?

208. Considering the nature of the transitional and consequential provisions in the **Sixth Schedule**, we note these provisions have different sunset timelines depending on the purpose. They are spent once the purpose is served.

209. From their arguments, the parties generally agreed that transitional and consequential provisions are as much a part of the Constitution as the substantive clauses are. As to whether the transitional and consequential provisions have an equal standing with the substantive provisions, Mr Ngatia argued that **Article 167(1)** does not override **Section 31(1)** of the Sixth Schedule, that in order to achieve a harmonious reading of the two, the latter provision coming later in sequence must be taken as qualifying the preceding Article. The Respondents did not agree. Seemingly alluding to the effect such reading would have on the question of the disputed tenure, Mr Issa contended that in the absence of an express provision in the sixth schedule extended a provision of the former constitution, an extension cannot be implied. For this proposition --- cited the Mwau case (Supra).

210. The nature, function and place of transitional and consequential provisions in the Constitution of Kenya 2010 is spelt out in the CoE's Report of 2010 as follows:

"When a new constitution is introduced, a range of provisions are needed to ensure that the move from the old order to the new order is smooth, and, in particular, that the changes expected by the new constitution are implemented effectively and those institutions that are retained under the new constitution continue to function properly….The "transitional" provisions that do this are usually not included in the body of the constitution because they have a temporary lifespan. Instead they are included in a schedule which is part of the constitution but, because it is appended at the end of the constitution, its provisions will not interfere with permanent provisions of the constitution in the future. In the Harmonized Draft these provisions appeared in Schedule 7".

211.Otieno – Odek JA approved this concept in the Mangare case by stating that:

> ***"The Sixth Schedule is an integral part of the 2010 Constitution and its provisions have the force and effect on the supremacy of the Constitution as ordained in Article 2(1) of the Constitution […] It is my considered view that the Constitution is one document which contains substantive articles and schedules thereto. The Constitution cannot be severed and dissected into main articles and schedules ….. I hold that each specific schedule and article in the Constitution has an equal footing and equal force of law … a conflict if any must be given a purposive interpretation to attain and maintain logic, coherence and consistency. To arrive at any other conclusion will be stating that there are two Constitutions valid at the same time; one in the Articles and the other in transitional provisions and schedules."***

212.At para 230 of the **JMVB Case** the Supreme Court noted that:

> ***"The transition from the old to the current Constitutional order involved various aspects of public – institutional repositioning. Various institutions and public offices were subject to different modes of transitions.***"

213.From the foregoing discussion, it can be stated generally that in their scope, purpose and duration, transitional and consequential provisions are a mechanism limited to ensuring a smooth transition from the old constitutional order to the new.

214.We now turn to examine the place and import of specific transitional and consequential provisions relevant to this Petition. In so doing, we propose to restate the principles of interpretation applicable.

215.With regard to transitional and consequential provisions these are part and parcel of the Constitution. See **CREAW Case** and **Mwau Case**.

216.It a must be noted from the outset that there cannot be two constitutions in force at the same time. See **Uganda v. Commissioner of Prisons Exparte Matovu** (1996) EA 514 at page 529

217.In the **Mangare** case Otieno – Odek, JA The Judge further articulated the rules of construction of the transitional and consequential provisions in a constitution by stating that:

> ***"A novel submission was to the effect that the Sixth Schedule to the Constitution is a transitional and consequential schedule and the Vetting Board is a transitional mechanism and transitional provisions override and supersede the substantive Articles in the body of the Constitution. It is my considered view that the Constitution is one document which contains substantive Articles and the Schedules thereto. The Constitution cannot be severed and dissected into main Articles and Schedules. The Constitution must be interpreted as one document that has logical flow and consistency in-built within itself and between one Article and another and between all Articles and***

the Schedules thereof. <u>No single Article or Schedule of the Constitution should be interpreted to override other Articles or Schedules unless expressly stated in the Constitution.</u> For example, Article 20 expressly states that the Bill of Rights applies to all laws; Article 25 (c) expressly identifies the fundamental rights that cannot be limited. There is no express constitutional provision that stipulates that transitional provisions and Schedules in entirety override the substantive Articles in the body of the Constitution.

I hold that each specific Schedule and Article in the Constitution has an equal footing and equal force of law and all Articles in the Constitution as well as all Schedules thereto must be interpreted as one document with logical consistency within the Constitution as a single indivisible document. An apparent conflict, if any, must be given a purposive interpretation to attain and maintain logic, coherence and consistency within the Constitution as a one indivisible document. I am not persuaded in the legal reasoning that in general, transitional provisions override substantive articles in the body of the Constitution. The logical reasoning is that unless expressly stated in the Constitution, all provisions in the Constitution whether transitional or main Articles have an equal footing. To arrive at any other conclusion will be stating that there are two constitutions valid at the same time; one in the Articles and the other in the transitional provisions and Schedules. In law, there can be no two constitutions at the same time."

218. Otieno-Odek, JA's approach is also adopted by Sichale & Murgor, JJA's in their dissenting opinions. The Supreme Court decision in the **JMVB Case** upheld the approach. Hence the rules of interpretation applicable to constitutional provisions apply ***mutatis mutandis*** to transitional and consequential provisions. A harmonious and holistic interpretation will be engaged, in the event of an apparent conflict between a transitional and consequential provision and a substantive provision in the main body of the constitution.

219. Applying the foregoing principles, we shall determine the import of the transitional and consequential provisions relied on by the Petitioners in urging their case. The analysis provides the answer to the key question in this Petition, namely, whether the Petitioner's retirement age of seventy four years as provided for in the former constitution was saved in the current Constitution.

WHAT IS THE ROLE AND MANDATE OF THE JSC IN THE RETIREMENT OF JUDGES?

220. Mr. Ngatia submitted that the JSC's decision to retire and remove the two Petitioners is unlawful. He argued that the JSC does not have power to determine the retirement age of the two Petitioners or any judge. He therefore contended that the JSC's resolution and decision are *ultra vires*, unconstitutional and illegal.

221. In their written submissions the Respondents asserted that they had the mandate to do what they

did.

222.They also argued that the retirement age of seventy years for Judges is the sovereign decision of the people of Kenya. That there can be no violation of the Constitution when the Respondents bow to the dictates of the supreme law.

223.The impugned resolution and the decision complained of are contained in the JSC's Circular dated 24th May, 2011 and Memo dated 27th March, 2014, respectively. The retirement notices dated 28th April 2014 to both the Petitioners are consequent to the Memo.

224.We have to decide whether the JSC had the mandate to make the determination on the retirement age of Judges, and to resolve to retire the Judges and subsequently issue the communications complained of by the Petitioners.

225.The core mandate of the JSC is spelt out in **Article 172 (1)** as follows:

> ***"(1) The Judicial Service Commission shall promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice and shall –***

a. ***recommend to the President persons for appointment as Judges;***
b. ***review and make recommendations on the conditions of service of-***

i. ***Judges and judicial officers, other than their remuneration; and***
ii. ***the staff of the judiciary***

c. ***appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;***
d. ***prepare and implement programmes for the continuing education and training of Judges and judicial officers; and***
e. ***advise the national government on improving the efficiency of the administration of justice."***

226.Clearly, the JSC's mandate above is two-pronged. It is *recommendatory and advisory* under **sub-articles (1)(a)(b) and (e)**. This means that JSC's actions thereunder are given effect by the recipient of the advice or recommendation. On the second prong, the JSC has an *executory* mandate under **sub-article (1)(c)** and **(d),** which means the JSC acts to implement its own decisions and related policies.

227.The Court of Appeal in the case of **Judicial Service Commission v. Mbalu Mutava & Another [2015] eKLR,** had occasion to discuss the status of the JSC. It stated thus:

> ***"….A commission is included in the definition of a "state organ" in article 260. More relevantly, JSC as a state organ is bound by national values and principles of***

governance entrenched in article 10 and as provided by article 20(1) is also bound by the Bill of Rights.

JSC is not part of the national executive as defined in article 130(1). Thus, although JSC is not a substructure of the national executive to which sovereign power is delegated, it is nevertheless subject to the Constitution and the law and like other independent commissions and independent offices, has the duty to protect the sovereignty of the people (see article 249(1)(a)."

228. In addition, pursuant to **Article 248, Chapter 15** of the Constitution applies to the JSC *"except to the extent that this Constitution provides otherwise"*. Accordingly, **Articles 249** and **252** on the objects and authority, and general functions and powers of Chapter 15 Commissions, must be read in tandem with JSC's specific mandate as stipulated in **Article 172.**

229. To operationalize the JSC's constitutional mandate as stipulated above, Parliament enacted the **Judicial Service Act, 2011 (the JSA)** which makes provision for the administration of the Judiciary, the powers and functions of the JSC, financial matters, procedures for appointment and removal of Judges, and the discipline of judicial officers and staff, among other matters. These objects of the **Act** are captured in its preamble as follows:

"An Act of Parliament to make provision for judicial services and administration of the Judiciary; to make further provision with respect to the membership and structure of the Judicial Service Commission; the appointment and removal of Judges and the discipline of other judicial officers and staff; to provide for the regulation of the Judiciary Fund and the establishment, powers and functions of the National Council on Administration of Justice, and for connected purposes."

230. The objects and purposes of the **JSA** as set out in **Section 3** are:

"3 The object and purpose of this Act is to, among other things, ensure that the Commission and the Judiciary shall –

a. ***be the organs of management of judicial services and, in that behalf, shall uphold, sustain and facilitate a Judiciary that is independent, impartial and subject only to the provisions of the Constitution and the law;***
b. ***facilitate the conduct of a judicial process designed to render justice to all;***
c. ***be accountable to the people of Kenya;***
d. ***facilitate a judicial process that is committed to the expeditious determination of disputes;***
e. ***facilitate a judicial process that is committed to the just resolution of disputes;***
f. ***support and sustain a judicial process that is committed to the protection of the people and of their human rights;***
g. ***promote and sustain fair procedures in its functioning and in the operations of the judicial process, and in particular, be guided in all cases in which it has the responsibility of taking a decision affecting a judicial officer of any rank or its own employee, by the rules of natural justice;***
h. ***be the administrative manifestation of the Judiciary's autonomy and inherent power to protect and regulate its own process, achieving these objects through application of principles set out in the Constitution and other laws;***
i. ***facilitate accessibility of judicial services to all Kenyans;***
j. ***facilitate the promotion of gender equity in the Judiciary and the protection of vulnerable children in the administration of justice;***
k. ***be guided in their internal affairs, and in the discharge of their mandates by considerations of***

social and gender equity and the need to remove any historical factors of discrimination; and

l. ***apply modern technology in their operations."***

(Emphasis added)

231.To our minds, this objects clause appears clumsily drafted. It intertwines and fuses the disparate constitutional roles of the Judiciary and the JSC, two very different kinds of organs, each with its own objects and principles of governance. The result is that the facilitative role of JSC and the core principles of organization and administration of the Judiciary are conflated, as we shall shortly demonstrate.

232.Looking at the provisions of both the Constitution and the **JSA**, in reference to Judges, we take the following view: Firstly, the JSC has the broad function to facilitate efficient, effective and transparent administration of justice. In order to carry out its functions effectively, the JSC must appreciate the needs of the Judiciary and the nation as it is accountable to the people of Kenya.

233.Secondly, for the effective and efficient delivery of justice, the JSC is specifically tasked under **Article 172(1)(a)** with the responsibility of recommending to the President persons suitable for appointment as Judges.

234.In executing its above roles, the JSC must, of necessity, gather relevant information both internally and externally. In the case of internal information, it will be obtained from the Judiciary.

235.Another core mandate of the JSC is that of inquiring into and making recommendations for the establishment of a tribunal to remove a judge as provided for under **Article 168**. Considering the nature of the actions taken by the JSC in the matter, we do not consider that they are of the character which shows that the JSC was commencing actions to make recommendations for establishment of a tribunal as envisaged by **Article 168.** We are not persuaded by Mr Ngatia's arguments in that regard, and need not address the JSC's mandate under **Article 168.**

236.On the role, if any, of the JSC in the determination of the retirement age of Judges, we first wish to note that the JSC conducts its business through meetings and resolutions, by dint of **Section 22(5)** and **(7) JSA**. All questions arising are determined by consensus and in absence of consensus, by a majority of members present and voting subject to quorum.

237.The Petitioners' complaint is that the resolution on the retirement age by the JSC was illegal and *ultra vires*. Did the JSC have the mandate to make the said resolution and final decision retiring Judges?

238.As earlier stated, the role of the JSC is promotional and facilitative. In defining the word *"facilitate"*, Odunga J, in **Robert N. Gakuru & Others v. Governor Kiambu County & 3 Others [2014] eKLR** cited with approval the decision of **Ngcobo, J** in **Doctors for Life**

International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC), that:

> ***"To 'facilitate' means to 'make easy or easier', 'promote' or 'help forward'."***

239. The **Collins Thesaurus** gives the following synonyms for the word ***"facilitate":***

> ***"further…promote, ease, speed up, pave the way for, fast-track, expedite, …smooth the path of, assist the progress of…."***

The **Collins Thesaurus** also gives words with an opposite meaning to ***"facilitate"***. These are:

> ***"prevent, delay, frustrate, handicap, restrain, thwart… obstruct, impede…."***

240. As for the word ***"promote"***, the meanings given are:

> ***"help, back, support, …aid…forward, champion, encourage, advance, work for, urge, boost … recommend, assist, advocate, nurture, push for, popularise…"***

Therefore, the words to 'facilitate' and to 'promote' both carry the sense of giving assistance, advocating and championing another.

241. Applying the above definition, JSC's role is to *inter alia 'make it easy or easier', 'promote' 'help forward'* the independence and accountability of the Judiciary, and the efficient, effective and transparent administration of justice. Thus, the role of the JSC is essentially supportive in nature.

242. On its part, the Judiciary has its own administrative structures established under the Constitution: the Chief Justice as head of the Judiciary (**Article 161(2)(a)); ** Deputy Chief Justice as Deputy Head of the Judiciary **(Article 161(2)(b))**; the Chief Registrar of the Judiciary as Chief Administrator and Accounting Officer of the Judiciary **(Art 161(2)(c))**; the President of the Court of Appeal **(Article 164(2)); ** the Principal Judge of the High Court (Article **165(2)); ** the Chief Kadhi **(Article 170(1))**; and any registrars appointed by JSC under (**Article 161(3)).** These positions are duly supported by presiding Judges, heads of stations, and respective judiciary staff.

243. **Part II** of the **JSA** provides for the administration of the Judiciary, setting out the functions of the Chief Justice, Deputy Chief Justice and the Chief Registrar of the Judiciary. **Section 5(1)** of the **Act** provides that the Chief Justice is the head of the Judiciary; and **Section 8 (1)** of the Act provides that in addition to the functions conferred by **Article 161** of the Constitution, the Chief Registrar ***"shall in particular – be responsible for the overall administration and management of the Judiciary;"***

244. Based on its **Strategic Plan 2014-2018** (available online: *judiciary.go.ke*) the Judiciary clearly appreciates its role. At the introduction, paragraph 1.2, it is stated:

> ***"Organisation of the Judiciary:***
>
> ***The Head of the Judiciary is the Chief Justice who is also President of the Supreme Court. The leadership is cascaded throughout the courts through the President of the Court of Appeal and the Principal Judge of the High Court and through the Heads of Stations. In carrying out their respective mandates, the courts are facilitated by administrative services provided through the Office of the Chief Registrar....***
>
> ***the Directorates offer professional support for technical activities that involve records management, procurement, performance evaluation, human resource management, public communications, financial, accounting and audit processes aimed at improving the delivery of justice to all"*** (Emphasis added)

245. It bears restating that the Chief Justice is the Head of the Judiciary, which besides being a State organ is also an arm of government, executing the sovereign power of judicial authority delegated to it by the people, pursuant to **Article 1** of the Constitution. The CRJ, on her part, is constitutionally the Chief Administrative Officer of the Judiciary and also the Accounting Officer. Further, and in accordance with the **JSA**, the CRJ is responsible for the *"overall administration and management"* of the Judiciary. An accounting officer has special responsibilities under the **Public Finance Management Act, 2012.** As the accounting officer of the Judiciary, one of the responsibilities of the CRJ is to account for public funds allocated by Parliament to the institution.

246. The JSC, as a constitutional commission, on the other hand is also defined as a State organ under **Article 260** of the Constitution. In addition, it is a body corporate with perpetual succession and a seal **(Article 253).** The JSC chairperson is the Chief Justice, and the CRJ is the Chief Executive Officer and Secretary to the Commission **(Articles 171(3)** and **250(12)(b)).**

247. We have had the advantage of reading the recent decision of the Supreme Court in **Advisory Opinion Reference No. 2 of 2014 National Land Commission v. AG and Others.** Although this decision was not referred to in the submissions made before us, we cannot ignore it in light of its binding nature. In this regard we are comforted by the maxim: *jura novit curia*; the court is responsible for determining the law applicable in any given case.

248. In that Opinion, the Supreme Court considered in detail the role of the National Land Commission – a Chapter 15 Constitutional Commission – vis-à-vis the role of the Ministry of Lands, Housing and Urban Development. The Court, noting the distinction between a State organ to which sovereign power is delegated and a constitutional commission whose role is largely oversight, observed that each State organ should perform its functions keeping in mind the doctrine of separation of powers. The Court stated:

> ***"[200] …the doctrine of separation of powers requires that organs of government should carry out their functions without encroaching on each other. It is thus recognised that there is scope for a Government organ to act in excess of its proper mandate, or to abuse its powers. The system of checks and balances is put in place to empower other organs of Government to apply their countervailing powers, to prevent, or limit the excessive use of powers.***
>
> **…**
>
> ***[211] Collaboration between different State agencies is essential, as it ensures that no State Organ doubles up as* implementer *and* overseer *of operations."*** (Emphasis added)

249. In her concurring opinion in the same matter, Ndungu, SCJ, illuminated the role of constitutional commissions. She stated:

> ***"....However, in addition to the Opinion of the majority, I find it necessary to underline the architectural design of constitutional commissions in the Constitution. In particular there is an underlying philosophy in the creation of these bodies, which is to provide an oversight function over some primary arms of Government. In ensuring their inclusion in the new constitutional order, brought about by the promulgation of the Constitution of Kenya 2010, the people of Kenya wanted to entrust to these institutions a specific oversight mandate…. Conversely, the constitutional commissions were crafted to coincide with specific issues, narrow enough in mandate, to closely monitor their designated areas. To this end, the drafters of the Constitution used language formulated to reflect this specific purpose. It is vital that such wording, as outlined in the Constitution, is not expanded through enabling legislation so as to give it a different purpose, other than that which was intended by the drafters of the Constitution. The watchdog role is therefore so basic to the nature of constitutional commissions, that it cannot be understated or undermined through legislative and policy initiatives or practice. Acts of Parliament, and subsidiary legislation ought to be aligned to, and in harmony with the constitutional provisions; and interpretation of such laws must pay fidelity to the form and the vision of the Constitution.***

[358] Similarly, the institutions so crafted under the Constitution, must also not run contrary to the general remit of the functions of Chapter 15- institutions. As oversight institutions, any mandate that they are given in the Constitution of Kenya must be construed as narrowly as possible so as to avoid role-conflicts; and should not be extended unreasonably by statute.

[359] … The words 'recommend, advise, research, investigate, encourage, assess, monitor and oversight'- are all actions tha[t] provide a facilitative role rather than a primary one. The context in which those words are used, presumes that there is another body or organ whom such recommendations, advice, research, investigations, encouragement, and assessment shall be sent to, received by, and in relation to which the proposals shall be implemented. There is therefore a clear separation of roles between a body providing oversight, and a body upon which the oversight is to be conducted. In my opinion, this means that unless specified within the enabling constitutional provision, a body with oversight function, and a body that implements the recommendations of the former, are different, and their roles do not overlap."

(Emphasis added)

250. As opined by the Supreme Court, the Judiciary and the JSC are two distinct, separate and independent organs of State performing different constitutional functions, with the JSC playing a facilitative and supportive role to the Judiciary. The presence of the Chief Justice and the Chief Registrar of the Judiciary in the JSC enables a seamless flow of organ-relevant information between the two independent bodies.

251. We thus agree with the Petitioners' submission that the determination of the retirement age of Judges is in the Constitution itself. Construing the role of the JSC in accordance with the Opinion of the Supreme Court; and considering the principal roles given to the Chief Justice as Head of the Judiciary and the CRJ as its Chief Administrator; and in light of **Article 10** providing for the interpretation of the Constitution to all State organs, State officers and public officers in the performance of their mandate, we must conclude that in the circumstances of this case, the duty and role of ascertaining the correct retirement age of Judges, lay in the first instance, with the Judiciary. That duty could be assumed by the JSC or any other body without transgressing into the functions of the Judiciary.

252. In so stating, we are cognizant of the fact that the Judiciary has a full complement of professionals starting with the CRJ. Additionally, the tenor and text of the Constitution limits the mandates of the JSC in respect of matters affecting Judges, to those under **Articles 166, 168,** and **172;** and **Chapter Fifteen**, where applicable. The rationale for this limitation is anchored in the concept of the independence of Judges as captured in **Article 160** as read with **Article 161**.

253. We therefore find that the resolution and decision by the JSC through the Circular and the Memo on the retirement age of Judges was unconstitutional. Consequently, nothing turns on the Petitioners' complaint that they were not afforded a hearing.

254. In light of the foregoing, the Petitioners cannot hold onto or rely on the contents of the Circular dated 24th May 2011, to claim that their retirement age was seventy four years as stated therein. Further, the Petitioners cannot rely on the doctrine of legitimate expectation or estoppel, as the JSC was not competent to make any binding representation.

WHAT IS THE RETIREMENT AGE OF JUDGES WHO WERE IN OFFICE PRIOR TO THE PROMULGATION OF THE CONSTITUTION 2010?

255. The Petitioners have taken the position that the 'unconstitutional' action by the JSC to retire them amounted to a removal on grounds not anticipated for removal of Judges under **Article 168**, and is without due process. Further, that the 'attempt' by the JSC to vary the age of retirement of Judges was *ultra vires*.

256. Secondly, that the resolution to retire the Petitioners prematurely ignored **Section 31(1) and 32**

which saved the Petitioners' retirement age at seventy four years as was provided under **Section 9** of the **Judicature Act** which was passed in compliance with **Section 62(1)** of the repealed constitution.

257. In the Petitioners' view, **Article 167** of the Constitution does not override **Section 31(1)** of the **Sixth Schedule** which saved their unexpired terms. They argue that no specific provision was made in the **Sixth Schedule** with regard to Judges and therefore the words ***"unless this Schedule provides otherwise"*** cannot exclude Judges from the application of **Section 31(1)** of the **Sixth Schedule.** In contrast, the Petitioners point to the specific provisions in **Section 31 (2)** and **(7)** in relation to the Attorney-General, Chief Justice and Auditor-General.

258. It seems to us that the Petitioners consider the Circular to be proper, hence their argument that the second notification – the Memo – by the JSC, which expressed otherwise, was *ultra vires* as the Circular had not been rescinded. To buttress this argument, the Petitioners cite **Section 32** of the **Sixth Schedule** and contend that by virtue of that Section, the most favourable law applicable to them would be that allowing them to hold office until the age of seventy four years, and not **Article 167** which provides for retirement at seventy years.

259. It was argued that 'benefits' referred to in **Section 31(1)** of the **Sixth Schedule** also include tenure. The Petitioners called to their aid **Section 6** of the **Sixth Schedule** which preserves the rights and obligations of the state: to the effect that the obligation owed to Judges is included therein. Relying on Commonwealth best practices and the **Judicial Pensions Act, 1959** of England, and the Constitutions of Lesotho and Malawi, the Petitioners argued that the Constitution cannot affect their accrued rights of the Petitioners.

260. With regard to the 1st Petitioner, it was submitted that **Section 31(1)** of the **Sixth Schedule** cannot be read in a manner to exclude him, merely because he occupies an office established under the new Constitution. Because all courts were established afresh under the new Constitution and in any event having undergone vetting, the 1st Petitioner ***'continued in office"*** under **Section 31(1)** as an employee of the Judiciary – a continuous institution. We were therefore urged to read the transitional and consequential clauses harmoniously with **Article 167**, in light of **Article 264**.

261. We were further urged to find that **Article 167** is not retroactive in effect and does not override **Section 31(1)** of the **Sixth Schedule**, but rather that the former is qualified by the latter, and with regard to retroactive application of **Article 167**, be guided by the **Interpretation and General Provisions Act, Cap. 2**. Additionally, we were warned against taking a *"technicist"* interpretation of **Article 167** as such interpretation could not accord with our "rights-centered" Constitution. This is because a "technicist" approach would lead to visiting an injustice upon the Petitioners who would, as a result, lose benefits previously accrued.

262. The Court was further urged to adopt an interpretation that enhances the rule of law and justice and one that allows the fullest enjoyment of human rights. The Petitioners argued that the abbreviation of tenure nullifies the promise of security thereof which is only subject to a removal under **Article 168**. That such abbreviation also abrogated the accrued rights of the Petitioners upon appointment, namely the right to serve until the age of 74 years. In interpreting the provisions of the Constitution the Court was urged to eschew the Committee of Experts Reports presented by the JSC but to rely on the actual written provisions in the Constitution.

263. The Respondents took up this point and argued that the Committee of Experts Reports provide the context to the provisions of the Constitution 2010, and that in this case, a traditional approach based on the Commonwealth best practice and precedent, was not useful in light of the character of the 2010 Constitution. Distinguishing the English **Judicial Pensions Act, 1959,** the Respondents pointed out that the same has a specific and express provision excluding Judges in office at the time of its enactment from its application.

264. Secondly, the Respondents contended that the provisions of the **Interpretation and General Provisions Act, Cap. 2** do not apply to constitutional interpretation. The Respondents contend that in

interpreting the Constitution 2010, the sovereignty of the people and their intentions must be upheld alongside the supremacy of the Constitution itself. The Respondents placed reliance on the **Final Report of the Committee of Experts Report on Constitutional Review, 11th October, 2010** with respect to Judges. In this regard they cited the **Ral case** to buttress their position.

265. On the provisions in contention, the Respondents argued that **Section 31(1)** of the **Sixth Schedule** is general in terms. To demonstrate the effect of the words ***"unless otherwise provided"*** in the Section, the Respondents contended that by virtue of **Section 23** which provided otherwise, it follows that any judge could have been removed through vetting. That despite **Section 31 (1)** the former Chief Justice was removed under **Section 24.** They contend that the Petitioners' interpretation of **Section 31(1)** ignores the provisions of **Sections 3** and **7** in the **Sixth Schedule.** It is their assertion that **Section 62** of the repealed constitution is not among the provisions extended by **Section 3** and that **Section 7** provides that all existing laws be brought into conformity with the Constitution.

266. Citing **Section 10** on the National Assembly as an example, the Respondents asserted that the **Sixth Schedule** stated expressly in the transition provisions where officers were to be retained on the same terms as before the promulgation. Thus by virtue of **Section 7** of the **Sixth Schedule, Section 62** of the former constitution on tenure of Judges appointed before the effective date was not extended. Nothing therefore can be implied to the contrary. On this submission reliance was placed on the **Mwau case.** The Respondents contended that **Section 9** of the **Judicature Act** was void against the provisions of **Article 167,** and the retirement age provided thereunder could not be implied to have been extended through **Section 31(1)**.

267. As regards **Section 32** of the **Sixth Schedule** it was contended that the provisions clearly preserved pensions rather than tenure. Moreover, **Section 6** of the **Sixth Schedule** must be read with proper emphasis on the opening words: ***"Except to the extent that this Constitution expressly provides to the contrary.…"*** It was therefore the Respondents' contention that the provision applicable to the transition of Judges to the new order was **Section 31(2)** of the **Sixth Schedule.**

268. The resolution of the issue of the retirement age of Judges is at the heart of this Petition. In our analysis we will inquire into the question of security of tenure of Judges; whether or not the constitutional provisions related or alleged to be related to the retirement age can be construed to have a retroactive effect; delve into the question as to the meaning and purpose of the oath of office taken by Judges under the new Constitution; and seek to determine the import of **Section 31(1)** of the **Sixth Schedule** in relation to the **Constitution** and **Section 9** of the **Judicature Act**, as well as **Section 62(1)** of the repealed constitution.

269. In order to adequately appreciate the scope and the nuances of these questions, we think it appropriate to commence with an appreciation of the historical background touching on the issue of security of tenure of Judges in Kenya.

The History of Security of Tenure and Retirement Age of Judges

270. The legal history of Kenya goes back to 1897 when, under the **Native Courts Regulations of August 12, 1897,** two classes of Native Courts were established in Kenya: those presided over by a European Officer, for example the High Court; and those presided over by a native authority, for example Native Courts proper. Under **Regulation 6** of those Regulations, a High Court for the Protectorate was established which sat at Zanzibar or Mombasa.

271. The High Court was the highest court of appeal from Native Courts and consisted of two senior Judges of the British Court at Zanzibar established by the **Zanzibar Order-In-Council, 1897** (see **Regulation 7**). The Commissioner was the President of the Court. In this period the tenure of Judges of the court is unclear.

272. In 1902, King Edward VII promulgated **The East Africa Order-In-Council of 11th August.** Under **Article 15(1)** of the Order, the King established a **"Court of Record styled: 'His Majesty's High Court**

of East Africa' ". Every Judge of that court was appointed by His Majesty. Under Paragraph 17 of the Order is the following provision:

> ***"(1) There shall be as many Judges of the High Court as may from time to time be required.***
>
> ***(2) Every Judge shall be appointed by His Majesty, and shall hold office during pleasure."***
>
> (Emphasis added)

Clearly, there was no security of tenure in the office of a judge. Further, under **Paragraph 17(4)**, if a judge was absent due to death, illness or other absence, the Commissioner could appoint an acting Judge.

273. Under the **Statutory Instruments, 1963,** the Queen in Council on 4th December made the **Kenya Independence Order-In-Council 1963**. The **Order** contained in its **Schedule 2** what was defined as the **"Constitution of Kenya**" (the "Independence Constitution").

274. **Section 171** of the Independence Constitution established the Supreme Court with unlimited original civil and criminal jurisdiction throughout Kenya. **Section 172(1)** provided for appointment of the Chief Justice on advice of the Prime Minister; and Supreme Court Judges by the Governor General acting on advice of the Prime Minister and Presidents of Regional Assemblies.

275. Under **Section 172(4)** a vacancy in the office of Chief Justice could be filled by the Governor-General from among the justices of appeal or puisne judges. **Section 173(1)** provided for the tenure of Judges of the Supreme Court in the following terms:

> ***"Subject to the provisions of this section, a person holding the office of judge of the Supreme Court shall vacate that office when he attains such age as may be prescribed by Parliament"***

276. In addition, **Section 173(4)** of the Independence Constitution provided for removal of Judges only on grounds of inability or misbehavior under the advice of the Judicial Committee appointed by the Governor. Further, **Section 177** provided for Parliament to establish a Court of Appeal to which, if established, the provisions of **Section 173** of the Independence Constitution would apply.

277. The Independence Constitution was based on the standard Lancaster House template for former British colonies. However, from independence in 1963 until 1967, Parliament did not enact a law to prescribe a retirement age for vacation of office by Judges. Meanwhile, in 1964 **The Constitution (Amendment) Act, No 38, 1964,** vested the authority for appointing Judges absolutely in the President of the Republic.

278. **The Constitution of Kenya (Amendment) Act, No 14, 1965** then replaced the Supreme Court with the High Court. It also abolished appeals to the Judicial Committee of the Privy Council. **Section 7(1)(c)** provided as follows:

> ***"Any reference in an existing law to the Supreme Court shall be read and construed as from 12th December, 1964, as if it were a reference to the High Court."***

279. In 1967, Parliament, by enacting **The Judicature Act, 1967**, for the first time in Kenya's judicial history, prescribed the age at which a Judge would vacate office. **Section 9** of that Act read as follows:

> ***"For the purposes of Section 173(1) of the Constitution, the age at which a person holding the office of judge shall vacate his office shall be sixty-eight years"***

Under the **Judicature Act**, "judge" was defined to mean:

> ***"…the Chief Justice or a puisne judge appointed under section 172 of the Constitution."***

279. **The Constitution of Kenya (Amendment) Act, No. 5 of 1969** consolidated all the amendments made to the Constitution since independence. The revision of the Constitution resulted in the version commonly known as the 1969 Constitution. This is the Constitution that was subsequently repealed by the current Constitution. On re-publication**, Section 62(1)** of the Constitution read as follows:

> ***"Subject to this section, a person holding the office of judge of the High Court shall vacate his office when he attains such age as may be prescribed by Parliament."***

281. Under the **Statute Law (Miscellaneous Amendments) Act, 1976 (No. 6 of 1976),** Parliament amended **Section 9** of the **Judicature Act** by increasing the prescribed age for vacation of office of a judge of the High Court from sixty eight to seventy years. Up to this point, the Court of Appeal of Kenya did not exist.

282. Following the break-up of the East African Community in 1977, the Court of Appeal of Kenya was established under **The Constitution of Kenya (Amendment) Act, No 13 of 1977.** This amendment to the Constitution also made it possible for the Chief Justice to sit as a judge of both the Court of Appeal as – chair of the Appellate Court – and simultaneously, as a judge of the High Court.

283. Parliament also amended **Section 9** of the **Judicature Act** by the **Statute Law (Miscellaneous Amendments) (Court of Appeal) Act, No. 14 of 1977.** The amendment increased the prescribed age for vacation of office by a judge from seventy to seventy-four years. This provision remained in place even after 1988 when Parliament amended the Constitution effectively removing the security of tenure of constitutional office holders including Judges, the Attorney-General and the Auditor General.

284. **The Constitution of Kenya (Amendment) Act, No. 4 of 1988** repealed, *inter alia*, **sections 62(3), (4), (5), (6)** and **(7)** of the Constitution, eliminating the requirement of a tribunal process for the removal of Judges. These were sections that secured Judges against removal other than on grounds of misconduct and inability. By that amendment, the security of tenure of Judges entirely dissipated. In addition, **Section 61(6)**, was amended to enable the President to fill vacancies of the office of Chief Justice or Judges through acting appointments on the advice of the Judicial Service Commission until such appointment was revoked by the President, on such advice and notwithstanding that the judge had attained or surpassed the prescribed age for vacation of office.

285. Owing to popular resistance and the clamour against the removal of the constitutional provision that secured the tenure of Judges the government backed down and enacted **The Constitution of Kenya (Amendment) Act, No. 17 of 1990.** The amendment reinstated the original constitutional provisions securing Judges, the Attorney-General, and the Controller and Auditor-General against removal, except through a tribunal process.

286. Against this background, it is evident that in the past, the security of tenure of Judges was tenuous, and secondly, that the age of vacation of office was not specifically entrenched in the Constitution. It was in the discretion of Parliament, freely exercisable at any time, to determine the age at which Judges in Kenya would vacate office. The 1990s were marked by heightened political agitation which led to detentions without trial, persecution and politically instigated prosecution of perceived leaders of the agitation. The Judicature was perceived as a complicit party to these acts of state repression.

287. Given the foregoing, the independence of the Judicature was put to increasing doubt, resulting in loss of confidence by the public. Thus, questions as to how to secure the tenure and hence the independence of Judges, and to reform the Judicature was a critical concern in the 1990s as the clamour for constitutional change picked momentum.

288. As a result there was a serious examination of Judges' security of tenure and judicial reforms; this time through open debate by the people. As discussed earlier, during the constitutional review process leading to the promulgation of the Constitution 2010, the Kenyan people were emphatic that the Judicature must be reformed. The demand culminated in the provisions for a vetting process in respect of Judges and magistrates appointed before the effective date.

289. The retirement age of Judges was not identified by the Committee of Experts among the contentious issues emerging from the three existing constitution drafts. In addition to vetting, the people also desired Judges retired earlier. As far back as the National Constitutional Conference (NCC) in 2004, the **CKRC Draft Constitution, 2004,** had **clause 195(1)** that stated that a judge "shall" retire at the age of seventy, but could opt for early retirement at the age of sixty.

290. In the **Final Report of the Technical Working Group "E" on the Judiciary"** issued at CKRC Plenary of 15th December, 2005, the following is recorded at **paragraph 3.12** on *"Tenure of Office of Judges"*:

> ***"…As of now, the retirement age for Judges is 74. In a departure from this, and the Draft Constitution's proposal of 60 years, the Committee proposed that 70 years would be an appropriate retiring age for Judges….The Committee took the view that the appropriate age may vary from person to person so that it should be possible to retire voluntarily with full benefits at an early age of sixty years, while it should be compulsory once a person attains the age of 70 when it will be normal for there to be some reduction in mental capacity to perform judicial functions."*** (Emphasis added)

291. In the same Report under *"Explanatory Notes"* to **The Technical Working Group Draft Report** on the provisions adopted for the *"Tenure of Office of Judges"*, is the following explanation:

> ***"The Committee took the view that the reliving (sic) age was 70 years and that Judges should retire upon retirement (sic) of that age."***

292. These historical public reports provide the contextual background that is relevant to interpreting the constitutional provisions relating to the retirement age of Judges.

The Question of Retroactivity: Whether a constitutional provision can have retroactive or retrospective effect; In particular whether the age of vacation of office of Judges could or can be reduced so as to affect Judges already in office?

293. The starting point is that courts will generally presume that statutory enactment applies to the future and not to the past, unless clearly and manifestly so intended and expressed by the legislature. The word **"retrospective'** in relation to law, is defined in **Black's Law Dictionary, 6th Edition** *as*:

> ***"A law which looks backward or contemplates the past, one which is made to affect acts or facts occurring, or rights accruing, before it came into force.***
>
> ***Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.***
>
> ***One that relates back to a previous transaction and gives it a different legal effect from that which it had under the law when it occurred."***

294. In the case of **American States W S Co. v. Johnson 31 Cal. App. 2d 606 (Cal Ct App. 1939)** it was held that:

> ***"Retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute. The terms 'retrospective' and 'retroactive' are interchangeable….in California a statute is not invalid merely because it is intended to operate retrospectively. It may, however, be invalid if it deprives one of vested rights which are bound to be respected or protected by the state or if it impairs the obligations of a contract… [ ] it is true that statutes will be construed to operate prospectively rather than retrospectively unless the contrary intention clearly appears."***

295. In the US case of **Cooper v. Watson 290 Minn. 362 (Minn 1971)** there is a clear and unambiguous definition of retrospective law, as follows:

> ***"A retrospective law, in the legal sense is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, in respect of transactions or considerations already past. It may also be defined as one which changes or injuriously affects a present right by going behind it and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued, or which relates back to and gives to a previous transaction some different legal effect from that which it had under the law when it occurred. Another definition of a retrospective law is one intended to affect transactions which occurred, or rights which accrued, before it became operative, and which ascribes to them effects not inherent in their nature, in view of the law in force at the time of their occurrence."***

296. Mr. Ngatia referred us to a number of precedents and authorities on "Best Practices" in the Commonwealth, in regard to the preservation of the tenure of Judges in office whenever new laws are passed to vary such tenure. The foregoing American authorities are about interpretation of statute, in particular, common law based statutory provisions. From these materials however, we can draw the meaning of **"retrospective effect".** With regard to Commonwealth precedent, best practice and tradition, these cannot override the actual provisions of the Constitution or be the basis of interpreting it.

297. As earlier pointed, the 2010 Constitution is a transformative one. It has its own clear guiding principles for interpretation contained in **Article 259**, Further interpretive guidance is found in the dicta of the Chief Justice in the **JMVB** case at para. 206, where he stated:

> ***"This Court has set out construction guidelines, and mainstreamed the interpretation of Kenya's new constitution. In particular, we have observed that the constitution should be interpreted in a holistic manner: that the country's history has to be taken into consideration; and that a stereotyped recourse to the interpretive rules of the common law, statutes or foreign cases can subvert requisite approaches to the interpretation of the constitution (See CCK case)".***

298. A constitution looks forward and backward, and it must be construed as always speaking to the past and the future. As we observed earlier, a constitution draws from past experiences and addresses these as it seeks to chart out a future, even for *"unborn generations"*.

299. It bears restating that the current Constitution was intended to create an entirely new constitutional order; a transformation of momentous import, from a former constitution based on the Lancaster template, to a new era based on the sovereignty of the people. Indeed, it is for and from the people. The three arms of government – the legislature, the executive and the judiciary – are mere delegates of the people's sovereign power **(Article 1(1)** and **(3))**.

300. Coming back to retroactivity, we have been referred to a Supreme Court authority, in the ***Macharia Case*** where it was stated as follows:

> ***"At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object rendering political goods. In this way, a Constitution may and does embody retrospective provisions or provision with retrospective ingredients."*** (Emphasis added)

301. What then are the criteria to be used in determining whether a constitutional provision applies retroactively? In the **Macharia case** the Supreme Court had this to say:

> ***"However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provision, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain***

even a whiff of retrospectivity, the court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately accrued before the commencement of the Constitution."

302. From the **Macharia case** we draw three principles that should be taken into account when determining if a constitutional provision is, or can be read to have retroactive effect. The first is: whether the words and the language used in the constitutional provision are forward looking. The second is the "whiff test" i.e. whether the provision has even a slight indication or sense that indicates a retrospective orientation; and the third is: does the provision have the effect of divesting an individual of a right legitimately acquired before the provision came into effect?

303. We must keep in mind the Supreme Court's admonition to interpret the Constitution while keeping at the fore the history and circumstances of Kenya, as stated by the Chief Justice in the Supreme Court's decision in the **JMVB case** at para 210:

"….Thus in interpreting the constitution, courts must take cognisance of Kenya's unique historical context….the majority in the Court of Appeal had not appreciated the unique historical context in which Kenya's constitution should be interpreted, and relied on foreign jurisprudence"

304. Applying these principles to the present Petition, we note that on a plain reading, **Article 167(1)** does not itself fit into the mold of a provision which has retrospective effect. However, we must also take note that **Article 167** is not a transitional provision. It is a substantive provision which has effect for, and over, the long term duration of the Constitution, until otherwise amended in future. Its text and tenor are plain and unambiguous; a judge shall retire on attaining seventy years. It has a forward-looking orientation. Nobody looking at **Article 167(1)** could ascribe a retroactive bend to it. However, **Article 167(1)** must be read with together with the **Sixth Schedule**, and indeed, the entire Constitution. This is the holistic approach to constitutional interpretation.

305. On the other hand, we do not consider that a retroactive provision in the Constitution affecting vested rights of any person would be liable to challenge, as every provision in the Constitution is "constitutional". Secondly, under **Article 2(3),** the validity of the Constitution cannot be challenged. Thus, a retrospective provision in a constitution is neither unlawful nor as strange as the Petitioners seem to suggest.

306. Certain provisions in the Constitution do have clear retrospective effect. This is not surprising because the people of Kenya by their sovereign will intended to usher in large scale change through the Constitution. What the former constitution gave could well be taken away under the new Constitution in accordance with the will of the people. Such is the nature of a constitution borne out of radical rather than incremental political change.

307. As an example of retroactive provisions, **Article 65 (1**) and **(2***)* provide:

"65. (1) A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years.

(2) If a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine year lease, the provision shall be regarded as conferring on the person a ninety-nine year leasehold interest, and no more."

308. **Section 8** of the **Sixth Schedule** then makes provision for the transition envisaged in **Article 65** in these terms:

"8. (1) On the effective date, any freehold interest in land in Kenya held by a person who is

not a citizen shall revert to the Republic of Kenya to be held on behalf of the people of Kenya, and the State shall grant to the person a ninety-nine year lease at a peppercorn rent.

(2) On the effective date, any other interest in land in Kenya greater than a ninety-nine year lease held by a person who is not a citizen shall be converted to a ninety-nine year lease.

(3) The provisions of Article 71 shall not take effect until the legislation contemplated under that Article is enacted."

309. Clearly, the above provisions have the retrospective effect of altering land tenure in respect of non-citizens from freehold to leasehold and converting *already existing leases* from 999 years to 99 years. This is a far reaching change adversely affecting property ownership rights by non-citizens, no doubt informed by long-held grievances by local people in that regard. Yet, undoubtedly, land ownership is a sensitive matter in light of our agrarian-based economy.

310. Equally, and as an obvious mechanism to address glaring inequities in landholding among citizens, **Article 68** empowered Parliament not only to revise existing land laws but also to enact legislation "***to prescribe minimum and maximum land holding acreages in respect of private land."*** The Bill, now pending publication, will certainly retrospectively affect the right and title to land already held above or below the minimum and maximum acreages.

311. These two examples are representative of the dramatic shift introduced by the new Constitution relative to the familiar past. Related to these arrangements is the creation of the National Land Commission (NLC) under ***Article 67***, with the mandate, *inter alia*, ***"to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress."*** These provisions, among others, herald a poignant break with the past and represent a promise and commitment to redress injustices and unfair practices in the past of the nation.

312. Before leaving this point we cannot fail to mention **Section 23,** one of the most remarkable provisions of the **Sixth Schedule**. It provides despite the provisions of **Articles 160**, **167** and **168** of the Constitution, for the vetting of Judges and Magistrates appointed before the effective date on their suitability to remain in office. The applicable standard was **Articles 10** and **159** of the new Constitution – standards not entrenched in the former constitution. This provision, implemented through the **Judges and Magistrates Vetting Act, 2011** facilitated the vetting of Judges regarding matters and complaints against them arising *before* the 2010 Constitution; that is, retrospectively. Various legal challenges to the vetting process ended in the Supreme Court which determined that the retrospective process was protected from curial intervention and asserted that such was the will of the people.

313. Similarly, another retrospective provision is the most extraordinary measure in **Section 24** of the **Sixth Schedule** requiring vacation of office by the erstwhile Chief Justice within six months of the effective date. As observed in the **Bato Star case** (supra) the measures involved in bringing about transformation ***"will inevitably affect some members of the society adversely … {however} the process of transformation must be carried out in accordance with the Constitution."*** In our view therefore, the Petitioners' case cannot succeed on the mere basis of the alleged retrospective application of **Article 167**.

314. The next logical question, therefore, is: under what transitional provision of the Constitution, did the Petitioners transit – or exit from – the old constitutional order and emerge into the present constitutional dispensation? We will return to this important point when dealing with **Sections 23** of and **31** of the **Sixth Schedule**.

Security of Tenure vis-à-vis the 1st Petitioner's Appointment to a New Office under the Constitution 2010

315. We have already discussed security of tenure of Judges by setting out how the concept emerged and developed in Kenya's legal history. On the issue framed here, the 1st Petitioner's contentions are threefold, as summarized below.

316. First, that on a proper interpretation of the Constitution, the 1st Petitioner's security of tenure was preserved and carried forward into the new constitutional dispensation via section **31(1)** of the **Sixth Schedule**, which provided for the 1st Petitioner to *"continue to hold office for the unexpired period"* of his term. Accordingly, any attempt to reduce that retirement age by application of **Article 167(1)** would amount to an unconstitutional diminution of his term.

317. Secondly, that a judge's tenure is personal and is continuous in that it is linked to the person of a judge and his continuous service in the Judiciary. In this respect, it is argued that the 1st Petitioner's security of tenure endured from the date of his first appointment as a judge, and is unaffected by his appointment to the Supreme Court. Further, that once successfully vetted, he continued in office as provided in **Section 23** of the **Sixth Schedule,** and that **Section 31(1)** equally applies to him in respect of his present office**.**

318. Thirdly, and, closely connected to the above point, it was asserted that the 1st Petitioner's appointment before 2010 to the Court of Appeal and subsequently, under the Constitution to the Supreme Court, did not affect the security of his tenure any more than it affected other Judges in the High Court or Court of Appeal.

319. On our part, we do affirm the relevant general principles, accepted internationally, which are summarized as follows: that Judges should generally have security of tenure to enable them serve without any concerns about the possibility of being victimized for their decisions; and that the guarantee of judicial independence should normally be effected domestically through constitutional and legal provisions. It must be stated, however, that the security of tenure is primarily intended for the benefit of the people a judge serves: security of tenure frees the judge to act impartially, courageously and justly without fear.

320. **The United Nations Basic Principles on the Independence of the Judiciary, 1985** call on member states to guarantee judicial independence domestically through constitutional and legal provisions. In Africa, the same principles are found in the **1996 Recommendation on the Respect and Strengthening of the Independence of the Judiciary (ACHPR, 19th Session, 03/26 of 4th April, 1996)** which call on African states to meet certain minimum standards to guarantee independence of the judiciary.

321. We agree that there is some interface between security of tenure and mandatory retirement age. Security is about a guarantee, and tenure of Judges is about the limit of service as imposed by the mandatory age for vacation of office. Under the repealed constitution, the office of judge could not be abolished while there was a substantive holder of the office **(Section 60(4))**, and a judge was to vacate office when he attained an age prescribed by Parliament **(Section 62(1)).** Such tenure could not be curtailed except through removal on grounds of misconduct or inability, through a tribunal established under **section 62(3) and (4**) of the former constitution.

322. It is clear, therefore, that what a judge was constitutionally guaranteed under the former constitution was security of tenure of office that would be vacated upon the occurrence of an event: the 74th birthday as prescribed by Parliament. The age could be raised or lowered by Parliament, but his office could not be abolished. There was no constitutional provision for voluntary retirement or resignation by a judge. However, once a judge attained the mandatory age of retirement, he could not continue holding such office as of right and the security of tenure terminated. The security of tenure therefore ran in tandem with the prescribed age of vacation of office: it took effect upon assumption of office and terminated when he vacated office on attainment of the prescribed age.

323. Under the current Constitution, a judge holds office not so much as a right in and of itself, but as a delegate of the people's sovereign power. Once the period of agency terminates, he must relinquish the office and concurrent authority. This is clear from the wording of **Articles 1** and **159**.

324. We now consider the effect of the creation of the new Supreme Court on the security of tenure of the 1st Petitioner. We begin by considering the nature of the Judicature under the repealed constitution, and

note that the Judicature existed as merely a system of lower courts and two superior courts, namely, the High Court and the Court of Appeal. The Chief Justice was a judge in both superior courts, thus headed both. The Judicature was expressed to have *'jurisdiction and powers'*. It was not established as an arm of government, and was not stated to exercise exclusive judicial authority. There was no indication in the former constitution concerning administrative arrangements for the old "Judicature". Under **Section 61(2**) of that constitution, the JSC was responsible for advising the President on judicial appointments to the superior courts. It was also responsible for appointment, discipline and removal of other judicial officers **(Sec 69(1)).** Indeed, the Judicature under the former Constitution and the Judiciary under the current Constitution are essentially dissimilar.

325. The new Judiciary was designed as a fully-fledged arm of government directly endowed with the peoples' sovereign judicial authority (**Article 1**). It is expressly stated to be independent and not subject to the control or direction from any quarter **(Article 160(1));** a comprehensive administrative and governance structure was set up, as described earlier. In this respect, we do readily agree with Mr Ngatia that the 2010 Constitution re-established the High Court and the Court of Appeal afresh. However, the Supreme Court is a totally new creature.

326. Under the new constitutional order, many new offices were created in the Judiciary, and offices such as that of the Chief Justice were enhanced and reconfigured. For example, in reconfiguring the office of the Chief Justice, a specific *term* is assigned to that office under **Article 167(2)**. The holder can serve as Chief Justice for only ten years, but must retire at the age of seventy, or opt to retire early at the age of sixty five-**Article 167(1)** and **(2).** Clearly, therefore, a judge or any other person who is appointed as Chief Justice under the Constitution 2010 cannot serve beyond the age of seventy years.

327. Amongst the new offices under the Constitution, is that of Judge of the Supreme Court. It has no express term limits. Like that of the Chief Justice, this office falls under the *"New appointments"* part of the transitional provisions in **Section 29(1)** of the **Sixth Schedule** which provides:

> ***"29. (1) The process of appointment of persons to fill vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalised within one year."*** (Emphasis added)

328. The office of a Supreme Court judge came into being consequent to the coming into force of the Constitution 2010. The holder of that office would therefore be subject to the applicable provisions for holders of new offices that came into being as a consequence of, and under the new constitutional provisions. With regard to the 1st Petitioner, he was a Court of Appeal judge before 27th August, 2010, and transited to the new constitutional dispensation before being appointed to the Supreme Court.

329. The 1st Petitioner has argued that his tenure, which is secured, is that of judge, and which under the former constitution, would come to an end when he attains the age of seventy four. According to the 1st Petitioner, that tenure transited under **Section 31(1)** of the **Sixth Schedule**, and he therefore cannot be retired any earlier. That argument, in our view, leads to the *non sequitur* that he is also holding the new office of Judge of the Supreme Court under the repealed constitution by implicit operation of two different constitutions in place at the same time. It is this demonstrable absurdity that renders impossible the proposition that the Petitioner's transition into the new Constitution occurred under **Section 31(1),** with regard to the office of Supreme Court Judge. The 1st Petitioner was in the Court of Appeal on the effective date. He transitioned from the old constitutional order and underwent vetting successfully under **Section 23** of the **Sixth Schedule**. To argue that upon appointment to the Supreme Court he transited yet again under **Section 31(1**) and hence retained his old tenure is to suggest that the 1st Petitioner transited twice under **Section 31(1)** which he asserts to be the current position. That is not possible as only one transition is possible on the effective date, pending vetting as we shall demonstrate at a later stage.

330. Even if we were to accept that tenure attaches to the person, this too, would lead to a further absurdity if such person, who was a judge on the effective date, was to occupy the office of the Chief Justice. Would such person be heard to protest, upon attaining seventy years, that he should remain in

office nonetheless, in spite of the clear prescription of **Article 167(2)**?

331. It is thus erroneous for the 1st Petitioner to assert that he continues to serve in the Supreme Court under the terms of the former constitution as there can never be two constitutions in force at the same time. See **Uganda v. Commissioner of Prisons ex-parte Matovu (1966) EA 514**.

332. We now turn to consider the oath of office and, in detail, **Section 31(1)** of the **Sixth Schedule**.

The Oath ascribed to by Judges under the Constitution 2010

333. **Black's Law Dictionary** 6th Edition at page 1071 defines oath of office as follows:

> ***"various declarations of promises, made by persons who are about to enter upon the duties of a public office. An oath of office is required, by Federal and State Constitutions, and by various statutes, to be made by major and minor officials"***

334. In her replying affidavit the CRJ deposed that after the effective date all serving Judges took oath of office and swore to defend the Constitution. This, she said, was an acknowledgement that they held office under the new Constitution and were bound by its provisions.

335. The Petitioners submitted that they took an oath to uphold and protect the whole Constitution; that this did not take away their tenure as a Judges. On this, Mr Nowrojee submitted that the oath had no reference to tenure.

336. **Article 74** provides:

> ***"Before assuming a State office, acting in a State office, or performing any functions of a State office, a person shall take and subscribe the oath or affirmation of office, in the manner and form prescribed by the Third Schedule or under an Act of Parliament".***

337. The oath ascribed to by Judges under the **Third Schedule** states as follows:

> ***"OATHS FOR THE CHIEF JUSTICE /PRESIDENT OF THE SUPREME COURT, JUDGES OF THE SUPREME COURT, JUDGES OF THE COURT OF APPEAL AND JUDGES OF THE HIGH COURT***
>
> ***I, ……..……, (The Chief Justice/President of the Supreme Court, a judge of the Supreme Court, a judge of the Court of Appeal, a judge of the High Court) do (swear in the name of the Almighty God)/(solemnly affirm) to diligently serve the people and the Republic of Kenya and to impartially do Justice in accordance with this Constitution as by law established, and the laws and customs of the Republic, without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence. In the exercise of the judicial functions entrusted to me, I will at all times, and to the best of my knowledge and ability, protect, administer and defend this Constitution with a view to upholding the dignity and the respect for the judiciary and the judicial system of Kenya and promoting fairness, independence, competence and integrity within it. (So help me God.)"***

338. **Section 13** of the **Sixth Schedule** provides for the taking of an Oath of Office afresh in allegiance to the current Constitution as follows:

> ***"On the effective date, the President and any State officer or other person who had, before the effective date, taken and subscribed an oath or affirmation of office under the former Constitution, or who is required to take and subscribe an oath or affirmation of office under this Constitution, shall take and subscribe the appropriate oath or affirmation under this Constitution."***

339. The importance of taking a new oath of office is emphasised by the fact that this requirement was contained in all the three drafts of the constitution. The **Committee of Experts Report of 2009** outlined the rationale as follows:

> ***"Para 6.4.2: a new oath is to mark a new beginning that the Constitution represents and to highlight the fact that all these office holders are committed to adhering to the set of values that the new constitution represents…we propose that…once the new constitution comes into force….all office holders….(MPs, members of the Executive, Judges, etc) should be required …. to mark a fresh start that a new Constitution is intended to represent, renew their oaths"*** (Emphasis added).

340. In view of the above, the submissions, and what the Constitution itself states concerning the oath to be undertaken under **Section 13** of the **Sixth Schedule**, we find the following to hold:

> i). the taking of the fresh oath was to mark a fresh start;
>
> ii). the oath was significant to the extent that the person taking it was aligning himself/herself to the Constitution 2010;
>
> iii). the Judges were undertaking to uphold, observe, protect, defend and honour the Constitution 2010.

341. We further find that in taking the oath the Judges were pledging their allegiance to the Constitution. This statement of loyalty to the Constitution goes a long way in buttressing the independence of the Judiciary. In the South African case of **Justice Alliance of South African v. President of the Republic of South Africa & others (CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011(5)SA 388 (CC);2011(10) BCLR 1017 (CC) (29 July 2011)** the following was observed in regard to an oath:

> ***"…the requirement of judicial independence is further underscored by the oath or solemn affirmation taken by all Judges when entering office. Judges undertake to uphold and protect the Constitution and administer justice without fear, favour or prejudice."***

342. In the **Mong'are case,** Otieno-Odek, JA, stated the following of the oath ascribed to by the Judges and magistrates at paragraph 42 of his judgement:

> ***"The severance of the old Constitutional order and the tenure of the Judges who were in office on the effective date was transited by the Provisions of Section 13 of the Sixth Schedule relating to the Oath of Allegiance to the 2010 Constitution. The serving Judges took an oath of allegiance to the 2010 Constitution and this effectively transited them from the old Constitution and their continuity to serve in office was made subject to the new Constitutional order which contains Section 23 (1) of the Sixth Schedule to the Constitution – a Section that requires vetting for suitability to continue to serve. The individual Judges who were serving on the effective date took an oath of allegiance to the new constitutional order and cannot turn around and impugn the constitutional order to which they swore to uphold. A Judge cannot abjure the allegiance which he owes to the Constitution and one cannot approbate and reprobate. The oath of allegiance taken by the serving Judges was not a child's play or an empty rhetoric ceremony. It had substantive legal consequences, it severed and cut off the umbilical cord that linked the Judges from the old Constitutional order and subject to vetting, the Oath of Allegiance ushered the Judges into the new constitutional order …. In a lay man's language, you cannot take the marriage vows and still claim to be single, your status changes and the past is cast with annals of history. The Oath of Allegiance is a constitutional estoppel to the Judges and Art 2 (3) of the Constitution binds them to uphold the new Constitutional order and its values."*** (Emphasis added)

343. We are in agreement with this conclusion by the learned Judge of Appeal. Our finding therefore is that the Oath of Allegiance taken by the Judges bound them to the new Constitution with all it entailed.

Constitutionality of Section 9 of the Judicature Act

344. According to the Petitioners, having been appointed as Judges under the repealed Constitution, their retirement age is as stipulated under **Section 62(1)** of the repealed Constitution as read together with **Section 9** of the **Judicature Act**. In response to this submission, Mr. Muite stated that **Section 9** of the **Judicature Act** is unconstitutional as it violates express provisions of **Article 167 (1)** of the Constitution. He therefore urged the court to declare it void.

345. Before us therefore is an issue involving the interpretation of a section of statute vis-à-vis the Constitution. The general presumption is that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise. See **Ndyanabo Case.**

346. In **Direct United States Cable Co. v. The Anglo-American Telegraph Co. (1877) 2 A.C. 394** it was held thus:

> ***"The Tribunal that has to construe an Act of a Legislature or indeed any other document has to determine the intention as expressed by the words used. In order to understand these words, it is natural to inquire what is the subject matter with respect to which they are used and the object in view."***

347. The repealed Constitution at **Section 62 (1)** provided that:

> ***"Subject to this section a judge of the High Court shall vacate his office when he attains such age as may be prescribed by Parliament."***

348. In compliance with this provision, Parliament enacted the **Judicature Act (Cap 8, Laws of Kenya). Section 9** of the said Act provides:

> ***"For purposes of section 62 (1) of the Constitution, the age at which a person holding office of the judge shall vacate his office shall be seventy-four years."***

349. **Article 167 (1***)* of the Constitution provides thus:

> ***"A judge shall retire from office on attaining the age of seventy years, but may elect to retire at any time after attaining the age of sixty-five years."***

350. In light of the Constitution what then is the constitutionality of **Section 9** of the **Judicature Act**? **Section 7 (1**) of the **Sixth Schedule**, which the Petitioners did not refer to, provides that:

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

351. **Section 9** of the **Judicature Act** being one of the laws in force immediately before the effective date, will have to be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. It was Mr Issa's submission with regard to **Section 31(1)** that its full purport cannot be determined without a consideration of **Section 7** of the **Sixth Schedule.**

352. Our reading of **Section 9** of the **Judicature Act** and **Article 167 (1)** of the Constitution reveals that the said Section is not in conformity with the Constitution. It therefore falls afoul of the Constitution which at ***Article 2(4)*** declares that:

> "***Any law ... that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."***

353. The Supreme Court in the **CCK Case** had occasion to interpret **Section 7** of the **Sixth Schedule** of

the Constitution. The Court held that:

> ***"….(iv) In construing any pre-constitution legislation, a court of law must do so, taking into account necessary alterations, adaptations, qualifications and expectations, to bring it into conformity with the Constitution.***
>
> ***(v) Where it is not possible to construe an existing law in accordance with (iv) above, so as to bring it into conformity with the Constitution, that is to say, where a law cannot be conditioned through legal intervention without usurping the role of Parliament such a law is invalid for all purposes"***

354. By dint of **Article 264 of the Constitution** the former Constitution including **Section 62** was repealed. **Section 62** was not one of the provisions extended under **Section 3** of the **Sixth Schedule** of the new Constitution – another provision not taken into account by the Petitioners. Bereft of its anchor in the repealed Constitution, **Section 9** of the **Judicature Act** must be read, if possible, so as to bring it into conformity with **Article 167(1)**, or be rendered unconstitutional and void.

355. Looking at the wording of **Section 9** of the **Judicature Act**, and its declared purpose with regard to the repealed constitution, we are of the view that it is impossible to bring it into conformity with **Article 167(1)** of the Constitution. Such an attempt in our considered view amounts to fitting a square peg into a round hole. In accordance with **Section 7** of the **Sixth Schedule** we hereby declare that **Section 9** of the **Judicature Act** is altogether void.

The import of Section 31 of the Sixth Schedule of the Constitution on retirement of Judges

356. **Section 31** is a transitional provision for **"Existing offices"**. **Section 31(1)** reads as follows:

> ***"Existing offices.***
>
> ***31. (1) Unless this Schedule provides otherwise, a person who immediately before the effective date, held or was acting in an office established by the former Constitution shall on the effective date continue to hold or act in that office under this Constitution for the unexpired period, if any, of the term of the person."*** (Emphasis added)

357. We start by setting out below a few examples of **"Existing Offices"** under the repealed constitution which were intended to be transited into the new constitutional dispensation, but had no specific transitory mechanism in the transition clauses in the **Sixth Schedule**:

a. The Speaker and Deputy Speaker of the National Assembly established under **sections 37** and **38** of the repealed constitution.

b. The Clerk of the National Assembly established pursuant to **section 45A (2)** of the repealed constitution.

c. The Parliamentary Service Commission (PSC) established under **section 45B** of the repealed constitution.

d. The Interim Independent Constitutional Dispute Resolution Court established under **section 60A** of the repealed constitution. That Court had a term of twenty-four months from the commencement of **section 60A** and was to stand dissolved three months after the promulgation of the new Constitution pursuant to **section 60A(11)** of the repealed constitution.

e. The Public Service Commission established under **Section 106** of the repealed constitution See: **Section 31(1)** of **the Public Service Commission Act No. 13 of 2012.**

f. The Committee of Experts established under the **Constitution of Kenya Review Act Cap 3A**

and **Section 60(1)** of the repealed constitution. It was provided that the Committee of Experts would stand dissolved forty five days after the promulgation of the new constitution or non-ratification of the new constitution, whichever was earlier.

358. It is critical to note that the offices which are referred to under **Section 31(1)** were held on a *"periodic term"* under the former constitution, rather than on *"tenure"*. For example, the commissioners of the PSC held office on a term of three years, and therefore if any Commissioner's term had not expired on the effective date, he continued to serve under this Constitution for the remaining period of his term.

359. Mr. Ngatia submitted that the JSC's purported retirement of the Petitioners at seventy years is unconstitutional. He stated that the Petitioners had assumed office under the provisions of **Section 62 (1)** of the repealed Constitution which guaranteed them retirement at seventy-four years.

360. He further contended that the Petitioners' tenure was saved under **Section 31(1)** of the **Sixth Schedule**, and that requiring them to retire under **Article 167(1)** violates their rights vested and accrued prior to the promulgation of the Constitution.

361. It was the Respondents' case that the Petitioners ought to retire at the age of seventy years as stipulated under **Article 167 (1)**. They further asserted that the purpose of **Section 31(1)** of the **Sixth Schedule** was to transit the officers from the repealed Constitution to the new Constitution and that the said clause does not survive the effective date as it expired upon transiting the Petitioners.

362. Mr. Ngatia's argument was that the term of office referred to in **Section 31(1)** was the "unexpired term relative to 74 years", which unexpired period was transferred by dint of **Section 32 of the Sixth Schedule** as the "most favourable" in terms of computation of the Petitioners' pension.

363. Countering this argument, Mr Issa contended that **Section 32** was only concerned with pension and that where tenure is not preserved specifically in the **Schedule**, it could not be implied through **Section 31(1).** He gave the example of **Section 10** of the **Sixth Schedule** which expressly provided that: ***"The National Assembly existing immediately before the effective date shall continue as the National Assembly for the purposes of this Constitution for its unexpired term."***

364. In this regard, we note the use of the words ***"the unexpired term"*** in relation to the National Assembly (**Section 10**); the Commissioners of the Kenya Human Rights and Equality Commission (**Section 26(1))** and its Chairperson (**Section 26(2)**); and the Interim Independent Electoral Commission and Boundaries Commission (**Sections 27 and 28**). These were offices held on fixed terms. In contrast, **Section 23** (on the Judiciary) merely refers to vetting on suitability *"to continue to serve"*, rather than to *"unexpired term"*.

365. In interpreting the Constitution, we are well guided by the principles of interpretation already discussed elsewhere in this judgment: **Section 31** of the **Sixth Schedule** has the same force as any other provision of the Constitution. It cannot be segregated and read in isolation from other provisions of the Constitution. See the cases of: **Mong'are; CREAW; Dakota** and **Tinyefunza;** discussed in regard to interpretation and also **Article 259.**

366. The key words in **Section 31(1)** are those underlined as follows:

> ***"Unless this Schedule provides otherwise…. a person who immediately before the effective date, held or was acting in an office established by the former Constitution shall on the effective date continue to hold or act in that office under this Constitution for the unexpired period, if any, of the term of that person"*** (Emphasis added)

Accordingly, if there are other provisions in the Schedule which have a contrary effect, **Section 31(1)** would obviously not apply. Such are expressly excluded by the wording of the Section. Clearly, the provision is a catch-all provision applicable in a wholesale and unqualified manner to any and sundry constitutional offices not specifically provided for and to officers serving on a *periodic term*, hence, the

reference to ***"the unexpired period, if any, of the term of that person".***

367. This provision would therefore not apply under the **Sixth Schedule** to the National Assembly **(Section 10);** Commissioners and the Chairperson of the Kenya Human Rights and Equality Commission **(Section 26);** and the Interim Independent Electoral Commission **(Section 27**). These are specifically provided for. Ditto, the offices of A-G, the CJ and the Auditor-General by dint of **Sections 24** and **31 (7).**

368. On the basis of the foregoing, it appears to us that there is a clear distinction between the words *"term"* and *"tenure"*. The distinction is evident in both the former constitution and the new Constitution. The word *"term"* is used in reference to an office held for a specific pre-determined period of time in years. Its termination is not dependent on a retirement age or an age set for the vacation of office but rather ends by effluxion of the specified time period in years: for example the President **(Article 142(1)**); Members of Parliament (**Article 102** as read with **Articles 101(1)** and **103(1)(f)**)); DPP (**Article 157(5)**); Controller of Budget (**Article 228(3)**); Auditor-General **Article 229(3)**); Commissioners of Chapter Fifteen commissions (**Article 250(6)(a)**); Chief Justice **(Article 167(2))** etc.

369. Where the word *"tenure"* is used, it refers to an office held for an unspecified duration from appointment date and ending upon attainment of a specified *age*: for example, under the former constitution, the offices of Attorney-General, Auditor-General and Judges; and under the Constitution, the word 'tenure' is used in the headnote to **Article 167** in reference to Judges.

370. However, officers, serving under tenure such as Judges, and those serving for a fixed term, could enjoy *"security of tenure"*. In both cases *"tenure"* refers loosely to the incumbency of an office from which removal is not permissible except by a tribunal on specified grounds such as misconduct or incapacity.

371. Accordingly, in interpreting **Section 31(1)** we conclude that reference therein to **"the unexpired period, if any, of the term of the person"** cannot apply to Judges who were in office on the effective date, because they served until a certain retirement age and not on a fixed term in years. As we have observed before, **Section 23** used the terms **"to continue to serve"** rather than **"unexpired period of term".**

372. In addition, had this been the intention, nothing would have been easier than for the drafters to specifically refer to Judges in **Section 31(1)**, particularly, in light of the fact that questions regarding Judges' vetting and retirement age had featured prominently during the constitution-making process.

373. Moreover, we agree with Mr. Muite that under **Section 23,** every judge was technically liable for removal, and if **Section 31(1)** applied to Judges as proposed by the Petitioners, no judge would have been removed as provided for in **Section 23.** This is because the provisions of **Section 23** would stand neutralised by **Section 31(1)**, if read as the Petitioners propose.

374. We will now consider some of the provisions in the **Sixth Schedule** that *"provide otherwise"* than in **Section 31(1)** in relation to this Petition. The rule applicable being that the constitutional provisions must be read as a whole, and harmoniously, with none destroying the other. See **JMVB Case.**

375. **Section 31(1)** contains a general provision that is qualified by the subsequent **sub-sections (2)-(7**) thereof.

376. **Section 31(2)** and **(3)** are to the effect that a public office established by law could, despite the provisions of **sub-section (2)**, be abolished or the incumbent officer removed from office despite the transition provided for in **sub-section (2)**. With regard to Judges for example, these provisions meant that they could not validly challenge their removal under **Section 23(2).** Thus **Sections 31(2)** and **(3)** clearly maintain consistency with **Sections 23** and **31(1)**, properly read.

377. **Section 31(2)** clearly excludes the Attorney-General, Auditor-General and the Chief Justice from its application as their transition is expressly provided for in **Sections 31(7)** and **24**, respectively. **Section**

31(7) also excludes the application of **Section 31(1**) to the offices of the Attorney-General and Auditor-General. In effect, therefore, **Section 31(1)** and **(2)** could not apply to the Attorney-General, Auditor-General and the Chief Justice.

378. **Section 31(4)** caters for the eligibility for appointment or reappointment of persons who held and vacated offices under the former constitution, provided they qualify and such office was retained or established.

379. **Section 31(5)** and **(6)** provide for the performance of the functions of the Director of Public Prosecutions and the Controller of Budget, pending the appointment of the substantive office holders.

380. **Section 31(7)** provides that the AG and Auditor General continue in office for a period of not more than twelve months, **"despite sub-section (1)"**.

381. From this overall reading of **Section 31**, we perceive that: **Section 31(1)** provides for transition of constitutional offices held on fixed *terms* and those not otherwise provided for in the **Schedule**; **Section 31(2)** appears broader and provides for the transition of persons holding a ***public office***, including Judges, but excluding the Attorney-General, Auditor-General and the Chief Justice.

382. The express reference in **Section 31(2)** to the offices of the AG, Auditor General and Chief Justice – the only other offices which then had security of tenure like Judges, under the former constitution – implies that these provisions could have applied to them, but for the exceptions therein. Secondly, that following the *ejusdem generis* rule this provision applies to Judges, as they had security of tenure under the repealed constitution; they served a tenure, rather than a fixed term.

383. **Section 31(2)** provides:

> ***"(2) Subject to subsection (7) and section 24, a person who immediately before the effective date held or was acting in a public office established by law, so far as is consistent with this Constitution, shall continue to hold or act in that office as if appointed to that position under this Constitution."*** (Emphasis added)

384. For the avoidance of doubt, a *"public officer"* referred to in **Section 31(2)** means a person holding or acting in an office in the public service and includes Judges under **Section 123** of the repealed constitution. Similarly, the definition of *"public officer"* under **Article 260** of the current Constitution is: a state officer or any other person who holds a state office, and includes Judges.

385. Other provisions that "provide otherwise" outside **Section 31**, include **Section 23 (1)** which provides:

> ***"Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all Judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159."*** (Emphasis added)

386. By virtue of **Section 23(1)** only those Judges who were successfully vetted would continue to serve in the new Judiciary. And by dint of **Sections 23(2)** and **31(3)** any Judges removed could not challenge their removal. **Section 23** also provides that the process of vetting would go on "despite" or regardless of **Articles 160, 167, 168** of the Constitution. This reference to the new constitutional provisions is telling as **Article 167** provides for the age of retirement at seventy years.

387. It must be recalled that on the effective date, the only Judges in office were those appointed under the former Constitution. Had the intention been to save their tenure under the former constitution as argued by the Petitioners, reference in **Section 23** would have been made to **Section 62(1)** of the repealed constitution, and **Section 9** of the **Judicature Act**. But at any rate, the life of **Section 62** was not extended

by **Section 3** of the **Sixth Schedule**, and neither is **Article 167** suspended under **Section 3(2)** of the **Sixth Schedule.** We pause here to note that **Section 23(1)** gives the first hint that **Article 167**, though not inherently retrospective, assumed a retrospective application to Judges in office on the effective date by virtue of certain transitional provisions such as **Section 23(1).**

388. Still outside **Section 31** is **Section 24 (1)** which provides:

> ***"24. (1) The Chief Justice in office immediately before the effective date shall, within six months after the effective date, vacate office and may choose either—***
>
> ***(a) to retire from the judiciary; or***
>
> ***(b) subject to the process of vetting under section 23, to continue to serve on the Court of Appeal."***

This section is the reason behind the exclusion of the Chief Justice from the application of **Section 31(2).**

389. Returning to **Section 31(1),** it must be recalled that the Chief Justice under the repealed constitution was a judge of both the High Court and the Court of Appeal hence a constitutional office holder. If **Section 31(1)** is read as proposed by the Petitioners, then it would be in direct conflict with and make nonsense of **Article 167**, **Sections 23, 24** and **Section 31 (2)-(7)** of the **Sixth Schedule**, resulting in absurdity. Secondly, such interpretation obscures the intent and defeats the purposes of **Section 31(1)** on the transition of offices held on fixed terms and not provided for, thus contrary to good governance.

390. Additionally, it would result in the retention of Judges past seventy years of age who despite their seniority would never be eligible for the position of Chief Justice by virtue of **Article 167(2)**, which specifically limits his or her age and term of office. What we heard Mr Ngatia plead on behalf of his clients is that seniority matters, hence such a scenario runs counter to good governance and equality. Retirement is itself a practice of good governance that enables succession planning and the injection of new blood into a workforce for optimum performance.

391. As we read it, therefore, and we agree with Mr Issa, that the purpose of **Section 31(2)** was to transition into the new constitutional order, all *public officers* who were not serving under a fixed period of a term, including Judges. See Odek JA in **Mongare's Case**. We cannot accept the conflation of **Section 32** of the **Sixth Schedule** with the repealed **Section 62** of the former Constitution as proposed by Mr Ngatia. **Section 32** clearly only saves the benefits of pension rights of Judges and other constitutional office holders in office on the effective date based on the law of pension. It has no relation to tenure. On the other hand, **Article 167**, as indeed **Section 62** of the repealed constitution, is concerned with tenure not pension. Neither **Section 31(1)** nor **Section 32** can be read in a manner that "revives" a repealed section of the Constitution.

392. We conclude therefore that the provisions applicable for the transition of Judges serving before the effective date are **Sections 31(2)** and **23** of the **Sixth Schedule**; by which all transitioned officers ***"so far as is consistent with this Constitution, shall continue to hold or act in that office as if appointed to that position under this Constitution"***. (Emphasis added)

393. The import of the emphasized words in **Section 31(2)** with regard to the Petitioners is this: that **Article 167(1)** assumed a retrospective colour that in a sense blotted out all vestiges of their tenure under the former constitution. Under this provision there can be no dispute that the retirement age of Judges in office on the effective date is seventy years. Once the transition is effected, **Section 31(2)** is spent and **Article 167** continues to apply prospectively.

394. In this regard **Section 31(2)** is a true sunset clause as far as Judges are concerned. On the effective date, it transited Judges in office into the new dispensation. This transition was symbolized by the taking of the oath provided for in **Section 13**. Their next hurdle was vetting under **Section 23**, despite **Section 31(3),** which more or less confirmed for successful Judges that they would continue in service under the

new Constitution. Such is the scheme of things as we understand it.

395. In so finding we are bolstered by the words of Rawal, Vice-President of the Supreme Court and DCJ, who in acknowledging the effect of **Section 31(2)** on the transition of Judges in office on the effective date in the **JMVB case** (supra) stated:

> ***"…Judges were among persons who were in office on the effective date. We have found their continuation to hold office was subject to vetting and being found suitable to continue serving. Section 31 (2) provides that such public officers would be deemed to have been appointed to that office under the Constitution 2010."*** (Emphasis added).

396. Considering the nature of transitional clauses, we do not believe that it was the intention of the framers of the Constitution to have those provisions remain in force until the last serving judge attained seventy four years. It would have been more rational in such a case to have an express provision in the body of the Constitution saving the former retirement age, or excluding the serving Judges from application of **Article 167(1).**

397. Equally, and by analogy, it is also our view that **Section 6** of the **Sixth Schedule** must be read with emphasis on the words: **"except to the extent that this Constitution expressly provides to the contrary"** and in harmony with other provisions. As we have already explained, Judges were catered for by **Sections 23, 24** and **31(2)**, thus **Section 6** cannot be used to stake a claim on a retirement age of seventy four years.

398. In conclusion we find and hold that the Petitioners, like other Judges serving on the effective date, transited into the new Constitution under **Section 31(2);** and post-vetting, that they serve on the terms thereunder, including **Article 167(1),** which states that a judge shall retire from office on attaining the age of seventy years.

Summary and Conclusion

399. In view of the above discourse we have come to the conclusion that there was no violation of the constitutional rights and legitimate expectations of the Petitioners; the JSC had no mandate in determining whether the retirement age of judges in office on the effective date was seventy or seventy four years as such mandate belonged to the Judiciary in the first instance; issuing retirement notices is the responsibility of the Judiciary; and the retirement age of judges in office on the effective date is seventy years.

Disposition

400. In light of all the foregoing we answer each of the prayers sought by the Petitioners as follows:

1. **Prayers A, B, C and** of the Petition are **dismissed**, this Court having found that the retirement age of judges serving at the date of the promulgation of the Constitution 2010, is seventy (70) years.

2. **Prayers D, E** and **F** of the Petition are **allowed** on the ground that the Judicial Service Commission had no mandate to make the decision on the retirement of judges and neither is it the body to issue retirement notices to judges.

3. Prayers G, H, I and **J** of the Petition are **dismissed** for reasons set out in this Judgment.

4. **Prayer K** of the Petition is **spent** arising from this Judgment and no further orders are necessary.

5. As for **Prayer L** the Court has not found any violation of the Petitioners' rights to warrant the issuance of the orders sought.

6. For the avoidance of doubt the Judiciary is at liberty to issue retirement notices upon the Petitioners in accordance with the applicable laws.

COSTS

1. In light of the nature and outcome of this matter there is no order as to costs.

2. **Orders Accordingly.**

Signed and Dated at Nairobi this 11th day of December, 2015.

R MWONGO

PRINCIPAL JUDGE

W KORIR

JUDGE

C.MEOLI

JUDGE

H.ONG'UDI

JUDGE

C. KARIUKI

JUDGE

In the presence of:

1. Mr. Nowrojee (also holding brief for Mr. Ngatia) for the petitioners;

2. Mr. Muite and Mr. Issa – for the 1st and 2nd Respondent