REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 425 OF 2015

IN THE MATTER OF ARTICLES 19, 20, 21(2), 22, 23 AND 165(3)(b) OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF

RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 27, 43, 47, AND 55 OF THE CONSTITUTION

AND

IN THE MATTER OF THE LEGAL EDUCATION ACT, 2012

AND

IN THE MATTER OF COUNCIL OF LEGAL EDUCATION ACT, 1995 (REPEALED)

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE UNCONSTITUTIONAL DECISION OF COUNCIL OF LEGAL EDUCATION ON ACCREDITATION OF MOI UNIVERSITY

BETWEEN

MOI UNIVERSITY....…….…...…..… PETITIONER

VERSUS

THE COUNCIL OF LEGAL EDUCATION……...…… RESPONDENT

COMMISSION FOR UNIVERSITY

EDUCATION…….....…… INTERESTED PARTY

JUDGEMENT

Introduction

1. The Petitioner herein is ***Moi University*** (hereinafter referred to as "the University"), a Public University located in Eldoret offering a variety of undergraduate and post-graduate programmes as well as running various research institutions. It was the second University to be established in the Country and its School of Law started as a Faculty of Law in 1994.

2. The Respondent, ***the Council of Legal Education*** (hereinafter referred to as "the Council"), is a body established under section 4(1) of the ***Legal Education Act, 2012***(also referred to as the LEA). Its functions include the regulation of legal education and training in Kenya and licensing legal education providers.

3. The interested party, ***the Commission for University Education***, (hereinafter referred to as "the Commission"), is a body corporate established (as successor of the defunct Commission for Higher Education) under section 4 of the ***Universities Act***, No. 42 of 2012 (hereinafter referred to as "the Act), with perpetual succession and a common seal.

The Petition

4. According to the Petition, the University challenges the arbitrary, irrational, illegal and unconstitutional decision that the University's School of Law has ceased to be a Legal Education Provider under the ***Legal Education Act***, No. 27 of 2012 and requiring the University to prepare a closure plan for its School of Law within 2 months, as contained in the letter dated 23rd September, 2015. This petition, according to the University, was brought under Article 22(1) of the Constitution in vindication of its constitutional rights, those of its students under the Bachelor of Laws Programme and on behalf of its staff employed at the School of Law who are in peril due to the actions of the Council. The petition was hinged upon various provisions of the Constitution such as Article 10(2) the national values and principles of governance including public participation, inclusiveness, the rule of law, equality, social justice and sustainable development; Article 47- fair administrative action; Article 43 (1)(f) the right to education; Article 55(a)-relevant measures to ensure the youth access relevant education and training; and Article 27 –equal protection of the law as enshrined in the Constitution.

5. According to the University, in 1994, in exercise of its powers under section 23(1)(a) of the ***Moi University Act***, the Council of the University established a Faculty of Law to provide a four-year programme of study leading to the award of an undergraduate degree in Law, LL.B and at the time of establishment, reliance was placed on the report of The Presidential Working Party on Establishment of the Second University in Kenya 1981 (Mackay Report). That Report recommended the establishment of a second University in Kenya in addition to other fundamental overhaul of Kenya's Education System which included the introduction of the 8-4-4 system of education as well as the establishment of the Commission of Higher Education (CHE), the precursor to current Commission of University Education (CUE). The recommendation for the establishment of a Second University, now Moi University, it was pleaded was based on the finding that the then existing educational system trained students to pass examinations rather than acquire skills for life hence the report introduced the system of continuous assessment for evaluation of learning outcomes.

6. It was therefore contended that the establishment of the School of Law at the University was hinged upon the niche area already identified by the Mackay Commission, and a curriculum was designed to offer practical skills training, especially at the upper levels of the programme – the clinical approach to legal training. At the time of the establishment of the University School of Law in 1994, no external accreditation process was required, and the programme was mounted upon completion of internal approval mechanisms.

7. It was averred that following the promulgation of the ***Council of Legal Education Act***, 1995 ("***CLE Act***", 1995 or "CLEA"), the Council was reconstituted by section 3(1) thereof and the ***CLE Act, 1995*** while preserving the broad mandate of the CLE as set out under section 5 of the ***Advocates Act*** (repealed), section 6(2) thereof explicitly provided for its specific objects and functions. However, despite the

absence of such a power in the explicit specification of its objects and functions as provided in section 6(2) of the ***CLE Act***, relying on the broad terms of section 6(1) as providing it with statutory authority to regulate and supervise the provision of both undergraduate and post-graduate legal education, by Legal Notice No. 170 of 2009 ("the Accreditation Regulations"), gazetted on 27th November, 2009, the CLE for the first time introduced the accreditation process for law schools. These regulations were promulgated about 10 years after the graduation of the inaugural class of the University's School of Law. The Accreditation Regulations provided in regulation 3(1) that they ***"****shall apply to any institution that is authorized under the Act or any other written law to operate an educational institution in Kenya and intends to offer or at the commencement of these Regulations is offering legal education."* Regulation 3(2) thereof required existing institutions offering legal education at the time, like the University herein, to apply to the Council for accreditation within six months after the commencement of the Regulations and the Third Schedule to the Accreditation Regulations ("Physical, Library and Curriculum Standards for Legal Education Institutions) set out in detail the matters to be contained in an application for accreditation.

8. It was averred that in its report published in 2005, the Ministerial Task Force on the Development of a Policy and Legal Framework for Legal Education in Kenya, in 2012, recommended that the regulation of legal education should be delinked from the provision of post-graduate instruction for admission to the roll of Advocates. In line with this recommendation, Parliament enacted the ***Legal Education Act, 2012*** ("***the LEA***") and the ***Kenya School of Law Act, 2012***. So far as material to these proceedings, the LEA provided for the functions of the Council to include, *accreditation of legal education providers for the purposes of licensing.* The University contended that the Council has prepared Draft Regulations with respect to licensing of legal education providers with are yet to be published.

9. It was averred that on or about 4th December 2009, the Council inspected the University's facilities at the School of Law and by a letter dated 20th April, 2010, the Secretary to Council communicated the Council's decision that a formal application for accreditation was required before any decision could be made, and also requesting for a report. A formal application for accreditation was subsequently made and by a letter dated 29th November, 2010, the Council communicated its decision to grant the University a provisional accreditation for one year and required that the following issues be addressed within that period:

a. Contact hours per lecturer per course which conforms to current regulations must be provided;
b. Library was to be adequately stocked as per regulations and online databases developed;
c. The University to endeavor to recruit staff at senior levels;
d. Details of the Module II programme;
e. Improvement of physical facilities to comply with Commission for Higher Education standards with regard to physical amenities;

10. It was averred that by a letter dated 6th April 2011, the Council granted a six month extension of the Provisional Accreditation issued on 20th April, 2010, with a note that no further extension would be allowed and an application for full accreditation would be required. On or about 4th November, 2011, the University submitted its application for full accreditation and by letters dated 23rd November 2011 and 13th December 2011 the Secretary to the Council sought for a copy of the feasibility study justifying the LLB program and a copy of the curriculum for onward transmission to peer reviewers. By a letter dated 10th May 2012, the Secretary to the Council communicated the Council's decision to decline full accreditation status for the programme until recommendations contained in the report of an inspection conducted by a committee of the Council and the report by experts appointed by the Council to review the curriculum were attended to. This followed a Committee of the Council's inspection visit on 30th March 2012.

11. It was averred that on 2nd November 2012, the Council again made a re-inspection visit to the School, and the response given by the University is contained in the Vice-Chancellor's letter dated 7th December 2012 detailing specific activities undertaken to address the concerns raised. Upon another re-verification

visit on 30th September 2013, a report was transmitted to the University on the findings of the visit vide the Council's letter dated 29th November 2013 which letter communicated the Council's decision to grant the University a provisional accreditation for a period of 2 years during which period, the institution was required to address the issue of infrastructure and resources *vis-a-vis* the student ratio. It was emphasised that the report of Re-Verification Visit carried out on 20th September 2013 made specific recommendations to the University.

12. It is this 2 year provisional accreditation that lapsed on 20th September 2015 upon which the Council's decision to decline full accreditation is hinged and the requirement for submission of a closure plan by the University.

13. While reiterating the foregoing and relying on the constitutional provisions cited hereinabove, the University contended that the Council's decision to decline the University full accreditation and the requirement for submission of a closure plan principally based on alleged failure to address the issues of infrastructure and resources *vis-a-vis* the student ratio notwithstanding the fact that the right to education is to be progressively realised and at a time when the University was progressively implementing the Council's recommendations made in November, 2013 and based on the standards set out in the CLE Regulations, 2009 amounts to a violation of the right to education of not only the University's students but also the academic staff without just cause.

14. To the University, the Council arbitrarily and without just cause simply ignored the progress the University had made with respect to addressing the concerns which had been raised as set out in its letter of 2nd September, 2015 which included:

a. The recruitment of additional staff and reduction of the number of students admitted into its LL.B programme as required by the Council in September 2013 only for the Council to turn around and demand in August 2015 that the Law School should take 250 students overall a requirement that was wholly irrational and impossible to meet before the expiration of the provisional licence on 23rd September, 2015
b. The fact that some of its programme for infrastructural development had stalled due to factors beyond the University's control- they had been taken over by the Ministry of Public Works which delayed in carrying out the construction within the time agreed with the University. As evidenced in detailed reports submitted to the Council, the University had done everything it could to engage the Government of Kenya, which has to date been unable to honour its commitments to the school.
c. The new Library building was scheduled for completion by 31st August, 2015 within the two-year period of the extension of the provisional accreditation. However as a result of a decision to expand the capacity by adding an additional floor so as increase the number of lecture rooms, seminar rooms ICT labs etc, completion was delayed but was on course for completion by end of November, 2015. While this was three months after the two year period required by the Council but this was because the University would exceed the capacity it had originally agreed with the Council.
d. The other infrastructural matters that had been highlighted were either complete or would be completed by or shortly after the expiry of the two-year period of the provisional accreditation.

15. According to the University, the socio-economic right to education is to be achieved progressively and the University, being a Public University, is enjoined to promote the full realization of this right as enshrined under the Bill of Rights. It was therefore the University's case that the Council failed to consider that ability and capacity of the University to provide legal education to government sponsored students who are recommended to the University by the Kenya Universities and Colleges Central Placement Board under section 52 of the ***Universities Act***, thus violating the already admitted governments sponsored student's rights to education and exerting undue, unnecessary burden on the University in catering for these students as per the 2009 regulations, that is by replacement.

16. In further support of its case, the University relied on Article 47 of the Constitution, section 5 of the ***Fair Administrative Action Act***, 2015 and section 21 of the ***Legal Education Act.***

17. It was the University's case that the Council' impugned decision breached Article 47 of the Constitution, section 5(1) of the ***Fair Administrative Action Act***, 2015 and section 21 of the ***Legal Education Act*** in that:-

a. The University was not notified that the Council's decision on its application for full accreditation was to be based on parameters other than those set out in the third schedule of the CLE Regulations.
b. On or about 30th March, 2012 the Council commissioned a team of three experts to review the curriculum of the University's School of Law but neither were the identities of the said experts disclosed nor was their report shared with the University or the Law School.
c. Whereas the Council had granted the University a provisional accreditation for a period of 2 years with effect from 20th September, 2013, within which period the institution was required to address the principal issue of infrastructure and resources *vis-a-vis* the student ratio, the impugned decision of the Council requiring the University to submit a closure report was based on an inspection carried out sometimes in August, 2015 before the expiry of the said 2 year period.
d. To compound matters, the CLE rather than reviewing the Law School's application solely on the basis of the Third Schedule to the Accreditation Regulations, purported to apply the draft 2015 regulations even though these had not be published.
e. The report which is dated 23rd September, 2015, just like the letter forwarding it, is clouded with irrationality, malice, manipulation of previous findings and seems that it was intended to justify a predetermined position and/or objective.
f. The Council did not issue a public notice inviting members of the public to make any representations to the Council regarding the intended closure of the University's School of Law.
g. The Council failed to consider the fact that, the construction of the Library complex was scheduled for completion by May 2015. However, in January 2015, CLE in their audit report stated that the School of Law needed more lecture halls, seminar rooms and computer labs. This necessitated the addition of an extra floor to cater for this further requirement. Consequently, the completion date was thus varied to end of November 2015, which is within the two years the Council had required completion, vide their report of 28th November 2013.
h. In reaching its impugned decision to refuse the grant of Full Accreditation and direct the University to submit a closure plan, the Council was acting under the authority and/or dictation of the Honourable Attorney General as contained in his Speech delivered at a two day stakeholder's workshop on Supporting Legal Education and Training in Developing a Dynamic East African Society and Beyond held on 29th and 30th January 2015 in Naivasha, Kenya.
i. The Council failed to consider the University's Report to the Council of Legal Education addressing all the issues raised on the inspection visit to the Law School on 28th August, 2015.

18. As stated hereinabove the petition was also based on Article 55 of the Constitution which provides, inter-alia, as follows:

> ***The State shall take measures, including affirmative action programmes, to ensure that the youth –***
>
> a. ***Access relevant education and training.***
> b. **……**
> c. ***Access employment***

19. To the University, the Council's impugned decision breached Article 55(a) of the Constitution in that it failed to consider that the increase in intake in 2012/2013 was because the Ministry of Higher Education required all public universities, including the University herein, to reduce the waiting period for K.C.S.E candidates to join universities. The University admitted a double class to eliminate staggering the admissions and disruption of the semester system of instruction as one-off intervention meant to accommodate or implement government policy and a finding in the report that the University had breached the limit of 250 students as prescribed under the Provisional License contravenes the right of students, majority of whom are youths, to access relevant education and training.

20.With respect to the right to equal protection and equal benefit of the law the University while relying on Article 27(1) of the Constitution, averred that the Council is an independent body which is required to discharge its mandate as provided in the ***Legal Education Act, 2012*** as well as any subsidiary legislation made thereunder. However, the actions and decisions with respect to University in 2015 were in fulfilment of a directive issued by the Honourable Attorney-General at the Stakeholder's Workshop on Supporting Legal Education and Training in Developing a Dynamic East African Society and Beyond held on 29th& 30th January 2015 at Simba Lodge, Naivasha to shut down any law school that had not complied with the accreditation requirements. Instead of exercising its own independent discretion, the Respondent acted under dictation of the Attorney-General who has no role and/or any powers under the ***Council of Legal Education Act*** contrary to the fact that the Council's powers under sections 18 and 19 of the said Act must be exercised by it independently and not under the dictation of another body.

21.Further, the Council in seeming compliance with the aforesaid directions/instructions from the Honourable the Attorney-General, unlawfully fettered its discretion in its letter of 4th March, 2015, to grant provisional accreditation to an institution that had applied for accreditation by informing the Respondent even before its submitted a fresh application that *Please note therefore that the provisional accreditation/Licence you are operating on ends on the 20th September, 2015, without any further possibility of extension."* The decision could only be made at the time which the University applied for accreditation. In support of this position the University relied on the position taken in **R vs. Secretary of State for Home Department ex p Venebles [1998] AC 407**.

23. It was, in addition contended that the Council violated the University's rights to equal protection of the law by reviewing and declining to accredit its School of Law on the basis of draft regulations rather the actual existing law.

24.The issues in the petition were expounded in the affidavits sworn in support of the petition.

25.It was submitted on behalf if the University that because it is the very provision relied upon in these proceedings by the Council as giving it the power shut down law schools and require a closure plan, it is important to look regulation 16 of the 2009 Accreditation Regulations. Regulation 16(1) set outs 4 grounds upon which the Council may discontinue, an institution from providing legal education or training while regulation 16(2) prescribes how such discontinuation maybe effected

26. It was submitted that whereas the Council insists that as far the 2009 Accreditation regulations are concerned, every single "i" must be dotted and every single "t" crossed, it failed to comply with this mandatory provision relating to how to effect discontinuation. Though priding itself as being only concern is the highest standards of legal excellence and accuses legal education providers of producing half-baked lawyers, failed in so basic a test as to how to legally effect a discontinuance of a legal education service provide. It was contended that instead of complying with the prescribed form under seal, the Council instead wrote a letter signed by its CEO. In support of this submission the University relied on **Resley vs. The City Council of Nairobi [2006] 2 EA 311** where it was held that:

> **"In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid…the purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's statements that the Court's role is only supervisory will be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed…if a local authority does not fulfil the requirements of law, the court will see that it does fulfil them and it will not listen readily to suggestions of "chaos" and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in**

the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place."

27. The University further relied on High Court Misc. Application No. 220 of 2005 - **Republic vs. Evans Gicheru (Hon) & 3 Others ex parte Joyce Manyasi** where it was held that (i) the remedy of judicial review is not concerned with the merits or demerits of the decision in respect of which the application for Judicial review is made, but rather, it is concerned with the decision making process itself, and if that process is flawed, the decision reached is equally flawed and will not be allowed to stand; (ii) that where a regulation is couched in mandatory terms, it demands strict compliance. Non-compliance with the spirit and letter of such a regulation is fatal to any action taken in pursuance thereof. To the University, non-compliance with the spirit and letter of regulation 6(2) of the 2009 Accreditation regulations is fatal to the purported decision by the CLE to shut down the law school.

28. The University also relied on Article 47 of the Constitution as read with sections 4, 5 and 7 of the ***Fair Administrative Action Act, 2015*** ("the FAA Act") which not only elaborates on the right to fair administrative action but also prescribes for grounds under which an administrative action can be challenged. The said provisions of the Act were reproduced as follows:

Section 4 FAA Act

(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; new regulations, expert evidence;

(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.

Section 5 FAA Act

In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall-

(a) issue a public notice of the proposed administrative action inviting public views in that regard;

(b) consider all views submitted in relation to the matter before taking the administrative action;

(c) consider all relevant and materials facts; and

(d) where the administrator proceeds to take the administrative action proposed in the notice-

> ***(i) give reasons for the decision of administrative action as taken;***
>
> ***(ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and***
>
> ***(iii) specify the manner and period within the which such appeal shall be lodged.***

<u>Section 7 FAA Act</u>

(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-...

(b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

(2)A court or tribunal under subsection (1) may review an administrative action or decision, if-

a) the person who made the decision-

> ***(a) was not authorized to do so by the empowering provision;***
>
> ***(b) acted in excess of jurisdiction or power conferred under any written law;***
>
> ***(c) acted pursuant to delegated power in contravention of any law prohibiting such delegation;***
>
> ***(d) was biased or may reasonably be suspected of bias; or***
>
> ***(e) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;***

b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

c) the action or decision was procedurally unfair;

d) the action or decision was materially influenced by an error of law;

e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

f) the administrator failed to take into account relevant considerations;

g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

h) the administrative action or decision was made in bad faith;

i) the administrative action or decision is not rationally connected to-

> ***(i) the purpose for which it was taken;***

(ii) the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

k) the administrative action or decision is unreasonable;

l) the administrative action or decision is not proportionate to the interests or rights affected;

m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

n) the administrative action or decision is unfair; or

o) the administrative action or decision is taken or made in abuse of power.

29. It was submitted that the scope of Article 47 of the Constitution and the unyielding rigour with which the protection it affords are to enforced have been the subject of several decisions of this Honourable Court. To this end the University referred to the holding in **Geothermal Development Company Limited vs. Attorney General & 3 others (2013) eKLR** and **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1,** at paragraphs135 -136.

30. The position was reiterated by the Court of Appeal in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR,** to the effect that Article 47 gives fair administrative action a constitutional standing whose principles should be developed with the use of common law as guiding principles.

31. In the University's view, the evidence before the Court demonstrates beyond peradventure that the actions of the CLE cannot be viewed as fair.

32. It was submitted that despite the denial by the Council, the Council on its report dated 23rd September 2015 rather than reviewing the Law School's application on solely the basis of the Third Schedule to the 2009 Accreditation Regulations, applied the draft 2015 regulations even though these had not be promulgated. This according to the University was contrary to the provisions of the ***Statutory Instruments Act, 2013*** which lays out the procedure that has to be taken before any statutory instrument made directly under any Act of parliament comes into effect. This procedure includes that the Instrument should be tabled in parliament failure of which it becomes void.

33. According to the University, it is palpably illegal for a statutory body to purport to enforce drafts and reliance was placed on **Fernandes vs. Kericho Liqour Licensing Court, (1968) EA 640** .

34. In the University's view, this principle of legality by which statutory body can do only that which is expressly authorised to by positive law now finds constitutional anchor in section 2(2) of the Constitution. To compound matters, having been invited the University to submit an application under the 2009 Accreditation Regulations, it was not disclosed that the evaluation of that application would be on the basis the draft regulations even though the draft regulation had not been published. This shows bad faith on the Council's side as it would not only be prudent to notify the University that the Draft regulations would apply but it is also against Section 4(3) of the ***Fair Administrative Act***.

35. According to the University, until January 2015, there was a co-operative approach to the issue of accreditation of the University's law school with parties working jointly towards the identification and

resolution of whatever issues were identified, an approach which changed after the Attorney-General essentially instructed the Council to stop extending provisional accreditation. In effect, its actions were at the behest of the Attorney-General. While the Attorney-General is indeed a member of the CLE (section 5(d) of the LEA), neither he nor any individual member has the authority to direct how it should act. It acts as a collective entity as is evident from the First Schedule to the LEA and section 6 of the said Act. To the University, based on ***Judicial Review of Administrative Action*** (5th edition, paragraph 50.2), it is unlawful for a statutory body to reduce itself to someone's else's puppet, however high-ranking or even well-meaning that person may be.

36. It was submitted that whereas regulation 8(2) of the 2009 Accreditation Regulations provides that, "*the Council may issue a provisional accreditation certificate for a period of not exceeding one year to any institution that has complied with regulation 4";* there are only two limitations i.e. compliance with regulation 4 (i.e. submitted an application) and the provisional accreditation should not be for more than a year. There is no fetter to the number of times such provisional accreditation can be exercised. And obviously the occasion for its exercise is from time to time whenever the need arises and an assessment of whether the need arises can only at the time of decision needs to be made i.e. there can be no anticipatory decision whether or not to grant/extend provisional accreditation. Yet this is what the Council freely admits to have done in the case the Petitioner's law school i.e. it decided two years ago that it would not grant any further accreditation and it is sticking to its guns. This, in the Petitioner's view, is unlawful for where discretion is conferred upon a public body, such discretion can only be lawfully exercised when the occasion for its exercised arises unsaddled by any prior commitment. In other words the authority must always keep an open mind. In this respect the University relied on cases cited in ***Judicial Review of Administrative Action*** (5th edition, paragraphs 40, 50.1.1 to 50.1.2, 50.1.6, 50.4)

37. It was further submitted that as statutory body should not exercise its powers irrationally and cited the principle by **Lord Green** in **Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation [1948] 1 KB 223** that:

> **" In considering whether an authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that ought not to be or disregarded matters that ought to be taken into account."**

38. In the University's opinion, the Council in its decision to close down the School did not take into account various matters that it ought to take into account such as:

a. The recommendation by **Prof Situma**, a recommendation relied upon by the Council, for the provisional certificate for the Law school be extended to enable it address whatever issues were outstanding.
b. Programme for infrastructural development was stalled due to factors beyond the University's control. The project was taken over by the Ministry of Public Works which delayed in carrying out the construction within the time agreed. The University has done everything to date to honour its commitments to the school including writing to the Exchequer to ask for funds and finally taking up the project themselves despite the minimal funding.
c. Construction of the library complex was scheduled for completion by May 2015 but in January 2015 the Council report recommended that the University needed more lecture halls, seminar rooms which required an additional extra floor on the library complex hence the completion date was varied to end of November 2015.
d. Other Infrastructural matters that the University was found not in compliance were to be completed shortly before or after the 2 year period ending September 2015 and the inspection was done in August 2015 before the end of the 2 year period.
e. recruitment of additional staff and reduction of the number of students admitted to its LLB programme as required by the Council in September 2013 to turn around in august 2015 that law school should take 250 was wholly irrational and impossible to be accomplished before the expiration of the provisional license on 23rd September 2015. This is because the University's decision to increase intake in 2012/2013 was based on government policy to reduce the waiting

period hence necessitating the double intake.

f. The various reports by the University to the Council showing the progress it had made and the corrective measures that were being undertaken including University's report to the Council on 28th August 2015.
g. The Council instead took into consideration matters it ought not to consider, such as the directive given by the Attorney General at the Stakeholder's workshop in January 2015 instructing the Council to shut down any Law School that had not complied. This in accordance to Section 7(g) of the ***Fair Administrative Action Act 2015*** gives this Court the Power to correct the administrative action on the ground that the administrator (CLE) acted on the direction of a person or body not authorised or empowered by any written law to give such directions.

39. It was submitted that the ***Fair Administrative Act*** (Sections 7(i) and 7(ii)) gives proportionality as a ground to challenge administrative decisions if the decision is not proportionate to the interests or rights affected. Proportionality was recognized by **Lord Diplock,** in **Council of Civil Service Unions vs. Minister for the Civil Service 1AC, 374** where he recognized the development of this ground in the Laws of the European Economic Community. Apart from that the courts have over the years developed a framework within which to conduct a proportionality analysis which is usefully summarised by **De Smith, Woolf and Jowel**, ***Judicial Review of Administrative Action***, Fifth Edition (pp.594-596) that it is "*a principle requiring the administrative authority, when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues*" To the University, the principle, as reviewed by the Courts encompass any or all of the following tests:

a. ***The balancing test, which requires a balancing of the ends which an official decision attempts to achieve against the means applied to achieve them. This requires an identification of the ends or purposes sought by the official decisions. In addition it requires an identification of the means employed to achieve those ends, a task which frequently involves an assessment of the decision upon affected persons.***
b. ***The necessity test which requires that where a particular objective can be achieved by more than one available means, the least harmful of these means should be adopted to achieve a particular objective. …this aspect of proportionality requires public bodies to adopt those regulatory measures which cause minimum injury to an individual or community.***
c. ***The suitability test requires authorities to employ means which are appropriate to the accomplishment of a given law, and which are not in themselves incapable of implementation or unlawful.***

40. The University therefore urged the Court to apply the balancing test and the necessity test to the decision of the Council and in so applying take into account the Council's position that its aim is to make the University have a high standard of education in accordance with the Law (which was promulgated 10 years after the school of law was in existence). However, the Council's option of closing the school as a means to achieve this goal affects the right to education of the University's students as enshrined in Articles 55(a) and 27 of the Constitution. The closure of the second and only Public University that offers Law in the Country is highly detrimental to government sponsored students who cannot afford private universities.

41. It was the University's submission that applying the necessity test the decision of the Respondent to close the school is the most harmful means to achieve their objective out of other possible options that would cause minimum injury to the students and Lecturers of the University.

42. It was contended that section 4(3) of the ***Fair Administrative Action Act*** requires procedural fairness. The material portion of the said provision states:

> ***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; new regulations, expert evidence,…

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

43. The University also relied on **Lord Diplock's** decision in **Council of Civil Service Unions vs. Minister for the Civil Service 1AC, 374**in which he defined procedural impropriety widely to include breach of the basic rules of natural justice, procedural fairness and failure to follow the law giving the administrative body that power and expressed himself thus:

> **"I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."**

44. According to the University, the Council did not notify the University that the Council's full accreditation was based on the draft regulations even though the draft regulation had not been published this was against Section 4(3) of the ***Fair Administrative Act*** that requires the Council to provide prior and adequate notice of the nature and reasons for the proposed administrative action or new regulations.

45. Further, the Council did not issue a public notice inviting members of the public particularly those to be affected by its decision to make any representations to the Council regarding intended closure of school as required by section 5 (a) of the ***Fair administrative Action Act***.

46. The University contended that the Council commissioned a team of three experts to review the Council's curriculum, two of whom were legal experts and one who is an expert in curriculum development. Their reports were adopted by the Council but the identities of the said experts were not disclosed nor were their reports shared with the University or the Law School. This was against section 4(3) of the ***Fair Administrative Action Act*** which required the Council to share with the Petitioner information, materials and evidence to be relied upon in making the decision or taking the administrative action.

47. It was the University's case that the Council used different parameters for the audit report of 23rd September 2015 from the earlier parameters which the Respondent used in the 2009 and 2012 as clearly enumerated in the Petitioner's further affidavit. This was against section 4(3)(g) of the ***Fair Administrative Action Act*** that requires the Council to avail to the University information, materials and evidence to be relied upon in making the decision or taking the administrative action.

48. With respect to Article 10 of the Constitution which provides for the National Values and Principles of Governance, the University relied on **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR** .

49. To the University, the Council by breaching the Petitioner's right to fair administrative action, failed as a state organ in applying national values and principles of governance that they are bound by Article 10 of the Constitution such as the rule of law, human dignity, social justice, good governance, transparency and accountability.

50.The University relied on Articles 43 (1) (f) and 55(a) of the Constitution which provide for the right to education. To the University, the failure of the Council to consider the ability and capacity of the University to provide legal education to government sponsored students who are recommended to the petitioner by the Kenya Universities and Colleges Central Placement Board under section 52 of the ***Universities Act***, violates the already admitted government sponsored student's rights to education and exerts undue unnecessary burden to the petitioner in catering for these students by replacement.

51. It was therefore the University's case that the Council's decision by its letter dated 23rd September 2015, was in violation of the University's Right to fair administrative action, the University's student's right to education and contrary to the National values and principles of governance and the Court.

52. The University therefore sought the following orders:

a. **A Declaration that the report dated 23rd September, 2015, and the letter forwarding it, is clouded with irrationality, arbitrariness, malice, manipulation of previous findings and was intended to justify a predetermined position and/or objective and is therefore contrary to Article 47 of the Constitution.**
b. **A declaration that the Respondent should review the Petitioner's application for accreditation solely on the basis of the Third Schedule to the Council of Legal Education (Accreditation Regulations) 2009.**
c. **A declaration that the application of the draft 2015 regulations in the report dated 23rd September, 2015 even though these had not be promulgated is null and void *ab initio* and that each and every act taken pursuant thereto is null and void**
d. **An order of certiorari calling into this Honourable Court for purpose of quashing forthwith the report dated 23rd September, 2015, as well as the letter dated 23rd September, 2015 forwarding it and communicating the Respondents decision to decline the Petitioner's application for accreditation.**
e. **Such other and/or further relief as this Honourable Court may deem fit to grant.**
f. **An order that the costs of and occasioned by this Petition be borne by the Respondent.**

Interested Party's Case

53. On behalf of the interested party, the Commission, it was contended that the provisions of the ***Advocates Act***, the ***Council of Legal Education Act, 2012*** and the ***Kenya School of Law Act, 2012***, have not taken away the primary and statutory role of the Commission of superintending and overseeing university education in Kenya including university programmes. In its view, section 5 of the ***Universities Act*** enumerates the functions of the Commission of University Education to include: *"(c) promoting, advancing, publicizing and setting standards relevant in the quality of university education, including the promotion and support of internationally recognized standards;(h) undertaking or causing to be undertaken, regular inspections, monitoring and evaluation of universities to ensure compliance with the provisions of this Act or any regulations made under section 70; (i) on regular basis, inspecting universities in Kenya; (j) accrediting universities in Kenya; (k) regulating university education in Kenya; (l) accrediting and inspecting university programme in Kenya; (m) promoting quality research and innovation"*.

54. It was the Commission's case that Moi University is fully accredited by the Commission and was reissued with a fully fledged Charter. Accordingly, it is authorized under the ***Universities Act*** to do all that appertains to university education, including offering legal courses and other professional courses. According to the Commission, the Senate and the Council of University which are creatures of section 18 of the ***Universities Act*** are bestowed with the role of *(a) satisfying itself regarding the content and academic standards of any programme of study in respect of any degree, diploma, certificate or other award of the University; (b) proposing regulations to be made by Council regarding the eligibility of persons for admission to degree, diploma and certificate programmes; (c) proposing regulations to be made by Council regarding the standard of proficiency to be gained in each examination for a degree, diploma, certificate or other awards of the University; (d) deciding which persons have attained such standard of proficiency and are otherwise fit to be granted a degree, diploma, certificate or other awards of the University; and (e) making regulations governing such other matters as are within its powers in accordance with this Charter or the Statutes.*

55. It was averred that the provisions of the ***Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009***, being subsidiary legislation cannot override the express provisions of the ***Commission of University Act*** by dint of section 31 of the ***Interpretation and General Provisions Act*** which provides that, "*no subsidiary legislation ought to be inconsistent with an Act of*

Parliament."

56. According to the Commission, the Respondent's decision to suspend the Petitioner's law school campus from offering legal training was *ultra vires* the express provisions of the ***Universities Act*** and was exercised in a manner which is in breach of the statutory and common law obligation of quasi *judicial* bodies that requires them not to exercise powers in a capricious , arbitrary or unjust way.

57. According to the Commission, while the ***Universities Act*** bestows upon the Commission the overall mandate of overseeing, regulating and having the last word in respect of university education in Kenya, the ***Legal Education Act*** confers upon the Council some fringe and vestigial powers in regard to regulation of legal education in Kenya. In its view, the powers bestowed upon the Council by dint of section 8 aforesaid cannot be exercised to the express or implied exclusion of the Commission which is the sole body mandated to superintend over legal education in Kenya. Further, the fringe powers bestowed upon the Council by the ***Legal Education Act*** does not include the power to close down or suspend a university campus without the involvement of the Commission. Accordingly, the role of the Council in this regard is to supervise and recommend to the Commission of University Education any measures that it may deem appropriate in relation to legal education in Kenya.

58. It was therefore the Commission's position that the ***CLE Act***, the Council's role is purely advisory and technical in nature and does not include the powers to suspend or stop accredited university institutions from offering various courses. The Council's role under the ***CLE Act***, according to the Commission, is merely to regulate and oversee the standards of Legal Education in Kenya and to recommend to the Government through the Commission such recommendation as it may deem necessary in fostering regard to legal training in Kenya. It was contended that the Council is not a professional body capable of regulating professional courses such as law; and accordingly, has no power to close down any University institution whatsoever without express involvement of the Commission of University Education.

59. It was therefore the Commission's position that the Council's callous act of closing down the University's School of Law was an express violation of the ***Universities Act*** for the reasons that the Council of Legal Education is not a professional body capable of closing down institutions offering legal training without the input of the Commission of Legal Education; that Moi University, through its various organs such as the Senate or the Council, is the proper body that is mandated by law to make such decisions; that the impugned closure flies in the face of the provisions of Article 53 of the Constitution on the right to Education; that the interests of the public, including that of students was not taken into account in arriving at the impugned decision; and that the Role of the university Senate and the Council as enumerated in the Moi University Charter is wide enough to capture standards and compliance, to wit: the duty of satisfying themselves that the content and academic standard of any programme of study in respect of any degree, diploma, certificate or other award of the University are met and the duty to make regulations governing such other matters as are within its powers in accordance with this Charter or the Statutes.

60. To the Commission, even if one was to proceed from an erroneous presumption that the Council is vested with the powers to suspend and/or regulate university education in Kenya by didn't of the provisions of the ***Legal Education Act***, it would be clear to a focused mind that these powers would conflict patently with the powers of the Commission under the ***Universities Act***, a scenario which would invite the court to harmonize these two statutes as was appreciated by **Finlay, CJ** in **McGrath vs. McDermott (1988) IR 258 at page 275** cited in **O'Neill & Anor vs. Governor of Castlerea Prison &Ors [2003] IEHC 83 (27 March 2003).**

61. The Commission also cited **Rahill vs. Brady (1971) IR 69** at page 86 also cited in **O'Neill & Anor v. Governor of Castlerea Prison &Ors [2003] IEHC 83 (27 March 2003).**

62. To the Commission, applying these long accepted principles of statutory interpretation, the intention of the legislature as expressed in the ***Universities Act*** and the ***Legal Education Act*** is clear and unambiguous. Apart from the said provisions, it is also trite that the primacy of the new instrument is

founded on the principle *'Legesposterioresprioresconterariasabrogant'*which dictates that new laws are given preference in case of an inconsistency with the older laws. Since it is not in dispute that the ***Legal Education Act, 2012*** came into force on 28th September, 2012 while the ***Universities Act*** came into force on 13th December, 2012; three months after the ***Legal Education Act*** came into force, this implied that the ***Legal Education Act*** preceded the ***Universities Act***. Based on the said legal doctrine that if the provisions of an older statute conflicts with a new one, the provisions of the new one prevails, the provisions of the ***Universities Act*** will prevail.

63. In support of this position the Commission relied on **Martin Wanderi & 19 Others vs. Engineers Registration Board of Kenya & 5 Others [2014] eKLR**, **United States vs. Borden Co 308 US 188, (1939), Steve Thoburn vs. Sunderland City Council 2002 EWHC 195, High Court Petition No. 320 of 2011 Elle Kenya Limited & Others –vs- The Attorney General and Others, Nzioka& 2 Others vs. Tiomin Kenya Ltd, Mombasa Civil Case No. 97 of 2001**

64. Based on the foregoing, the Commission contended the provisions of the ***Universities Act*** (being the later Act) impliedly repealed the (contentious) provisions of the ***Legal Education Act*** in so far as there are apparent inconsistencies therein.

65. It was contended the Council lacks the authority to interfere with University Education in Kenya. According to the Commission, the Council for Legal Education, is improperly constituted and accordingly is incapable of discharging any legal obligation, not least the purported accreditation of Universities. This position was based on section 4(5) of the ***Legal Education Act.***

66. While setting out the current composition of the Council, it was averred that the Council of Legal Education, comprises of ten (10) members out of whom there are four LSK representatives in the Council, the Chairman is not an appointee of the President, there is no representative of the Ministry of Education, and there is only one representative of universities instead of two (2 one representing public and the other representing private universities. To the Commission, the Council, as constituted cannot render any legally viable decision that is capable of legal recognition. In support of this position, the Commission relied on **Noah Kibelenkenya vs. Simore Ololchurie & Another [2015] eKLR.**

67. The Commission was therefore of the view that it is in the interest of fairness and justice that the orders sought in this petition be granted as prayed.

Respondent's Case

68. It was submitted on behalf of the Respondent Legal Education in Kenya has existed as long as there has been university education. However, whilst the Ministry of Education, subsequently the Commission of Higher Education, and presently the Commission of University Education have been in Charge of university education, legal education was primordially differentiated; it was a professional course regulated initially under the office of the Attorney General utilising provisions of the ***Advocates Act*** (Chapter 16 of the Laws of Kenya). However following the inadequacies of that regulation Parliament enacted the ***Council of Legal Education Act*** which established the Council and conferred to it very express functions, at section 6 as follows:

> ***(1) The object and purpose for which the Council is established is to exercise general supervision and control over legal education in Kenya and to advise the Government in relation to all aspects thereof.***
>
> ***(2) Without prejudice to the generality of the foregoing, the Council shall-***
>
> ***(a) establish, manage and control such training institutions as may be necessary for-***
>
> ***(i) organizing and conducting courses of instruction for the acquisition of legal knowledge, professional skills and experience by persons seeking admission to the Roll of Advocates in Kenya, in such subjects as the Council may prescribe;***

(ii) organizing and conducting courses in legislative drafting;

(iii) organizing and conducting courses for magistrates and for persons provisionally selected for appointment as such;

(iv) organizing and conducting courses for officers of the Government with a view to promoting a better understanding of the law;

(v) organizing and conducting such courses for paralegals as the Council may prescribe;

(vi) organizing and conducting continuing legal education courses;

(vii) holding seminars and conferences on legal matters and problems;

(viii) organizing and conducting such other courses as the Council may from time to time prescribe;

(b) conduct examinations for the grant of such academic awards membership of the Council.

(c) award certificates, fellowships, scholarships, bursaries and such other awards as may be prescribed'

69.In was contended that the ***Council of Legal Education Act***, was again discerned to be ineffective and it was determined that there was need for a comprehensive legal framework to regulate legal education which as of today has become quite enlarged, in terms of persons enrolling and therefore need to legislate structures to effectively deal with this critical profession. This therefore led to the enactment of the ***Kenya School of Law Act, 2012*** and the ***Legal Education Act, 2012***. The ***Legal Education Act*** repealed the ***Council of Legal Education Act***, but saved and transitioned instruments and regulations made under the ***Council of Legal Education Act*** that would have been made under the ***Legal Education Act***.

70. It was averred that the ***Legal Education Act*** was:

*'**An Act of Parliament to provide for the establishment of the Council of Legal Education; the establishment of the Legal Education Appeals Tribunal; the regulation and licensing of legal education providers and for connected purposes'.***

71. The Act then proceeds to posit the objective of this law as follows:

'The objective of this Act is to—

(a) promote legal education and the maintenance of the highest possible standards in legal education; and

(b) provide a system to guarantee the quality of legal education and legal education providers.'.

72. According to the Council, the Act, then established the Council at section 4 for the functions at section 8, which are explicitly delivered as follows:

<u>Functions of the Council</u>

(1) The functions of the Council shall be to—

(a) regulate legal education and training in Kenya offered by legal education providers;

(b) licence legal education providers;

(c) supervise legal education providers; and

(d) advise the Government on matters relating to legal education and training.

(e) recognise and approve qualifications obtained outside Kenya for purposes of admission to the Roll.

(f) administer such professional examinations as may be prescribed under section 13 of the Advocates Act.

(2) Without prejudice to the generality of subsection (1), the Council shall, with respect to legal education providers, be responsible for setting and enforcing standards relating to the—

(a) accreditation of legal education providers for the purposes of licensing;

(b) curricula and mode of instruction;

(c) mode and quality of examinations;

(d) harmonization of legal education programmes; and

(e) monitoring and evaluation of legal education providers and programmes.

(3) In carrying out its functions under subsection (2), the Council shall—

(a) make Regulations in respect of requirements for the admission of persons seeking to enrol in legal education programmes;

(b) establish criteria for the recognition and equation of academic qualifications in legal education;

(c) formulate a system for recognizing prior learning and experience in law to facilitate progression in legal education from lower levels of learning to higher levels;

(d) establish a system of equivalencies of legal educational qualifications and credit transfers;

(e) advise and make recommendations to the Government and any other relevant authority on matters relating to legal education and training that require the consideration of the Government;

(f) collect, analyse and publish information relating to legal education and training;

(g) advise the Government on the standardization, recognition and equation of legal education qualifications awarded by foreign institutions;

(h) carry out regular visits and inspections of legal education providers; and

(i) perform and exercise any other functions conferred on it by this Act.'

73. On the other hand, it was submitted that the Commission is established by provisions of the ***Universities Act, 2012***, as the successor of the **Commission of Higher Education** established then by the ***Universities Act*** (Chapter 210B of the Laws of Kenya). The ***Universities Act, 2012*** is:

'An Act of Parliament to provide for the development of university education; the establishment, accreditation and governance of universities; the establishment of the

Commission for University Education, the Universities Funding Board and the Kenya University and Colleges Central Placement Service Board; the repeal of certain laws, and for connected purposes*'*.

74. The functions of the Commission at section 5 are outlined as follows:

(1) The functions of the Commission shall be to—

(a) promote the objectives of university education;

(b) advise the Cabinet Secretary on policy relating to university education;

(c) promote, advance, publicise and set standards relevant in the quality of university education, including the promotion and support of internationally recognised standards;

(d) monitor and evaluate the state of university education systems in relation to the national development goals;

(e) licence any student recruitment agencies operating in Kenya and any activities by foreign institutions;

(f) develop policy for criteria and requirements for admission to universities;

(g) recognize and equate degrees, diplomas and certificates conferred or awarded by foreign universities and institutions in accordance with the standards and guidelines set by the Commission from time to time;

(h) undertake or cause to be undertaken, regular inspections, monitoring and evaluation of universities to ensure compliance with the provisions of this Act or any regulations made under section 70;

(i) on regular basis, inspect universities in Kenya;

(j) accredit universities in Kenya;

(k) regulate university education in Kenya;

(l) accredit and inspect university programme in Kenya;

(m) promote quality research and innovation; '

75. It was however submitted that to fully effectuate the Council and remove any parallel jurisdiction to any other agency, for the functions for which Parliament intended the Council to perform above, section 71 of the ***Universities Act, 2012*** repealed ***The Universities Act (Cap. 210B); The University of Nairobi Act (Cap. 210); The Kenyatta University Act (Cap. 210C); The Moi University Act (Cap. 210A); The Jomo Kenyatta University of Agriculture and Technology Act(Cap. 210E); The Egerton University Act (Cap. 214); The Maseno University Act (Cap. 210D); and The Masinde Muliro University of Science and Technology Act, 2006(Cap. 210F).***However, Parliament does not repeal the ***Legal Education Act, 2012***.

76. Therefore in the Council's view, the mandate of the Commission under the ***Universities Act, 2012*** is general, while mandate of the Council under the ***Legal Education Act*** is special-to Legal education. In its view, from the objectives and functions set out in the ***Universities Act, 2012*** and the ***Legal Education Act, 2012***, it does not require rocket science or prayer for one to clearly see that Parliament intended the Commission be the agency to discharge the general duty of regulation of university education. However, Parliament did not trust the Commission to be effective in regulating legal education, thus committed

legal education to a group of experts appointed in section 4(5) of the ***Legal Education Act, 2012*** for the special mandate of regulating legal education which appointments are deliberate, because legal education is a specialised professional course. This is differentiated with the personalities legislated to staff the Commission, at section 6 of the ***Universities Act***. To make the context clearer, Parliament conceiving that there was a body in existence then (Commission of Higher Education) with the mandate to generally accredit and regulate university education, did specifically and deliberately legislate as follows at section 8 (2) of the ***Legal Education Act***:

> ***'(2) Without prejudice to the generality of subsection (1), the Council shall, with respect to legal education providers, be responsible for setting and enforcing standards relating to the—***
>
> ***(a) accreditation of legal education providers for the purposes of licensing;***
>
> ***(b) curricula and mode of instruction;***
>
> ***(c) mode and quality of examinations;***
>
> ***(d) harmonization of legal education programmes; and***
>
> ***(e) monitoring and evaluation of legal education providers and programmes.'***

77. In the Council's view, this is a clear, express and unequivocal expression of Parliament, that with regard to legal education, it is not the Commission which is responsible, but the Council. According to the Council Parliament further legislated pre-emptively in section 8(4) of the ***Legal Education Act***, as follows:

> ***'(4) Where any conflict arises between the provisions of this section and the provisions of any other written law for the time being in force, the provisions of this section shall prevail.'***

78. Still not done with the Commission, it was submitted that Parliament did not expect any confusion between the statutes, while conferring exclusive mandate on the Council, it gives the Council discretion to cooperate with the Commission and other bodies, such that Parliament defined the relationship between the two in section 13 of the ***Legal Education Act***, in the following terms:

> ***The Council may, in the discharge of its functions, consult, collaborate and cooperate with—***
>
> ***(a) the Commission for University Education and other regulators in the field of education, generally;***
>
> ***(b) the Law Society of Kenya; and***
>
> ***(c) departments and agencies of Government, statutory bodies, and any other body or institution having functions or objects related to the functions of the Council.'***

79. On the allegation that since the ***Legal Education Act*** was operationalised on 28th September 2012 and the ***Universities Act*** on 13th December 2012, the ***Universities Act*** takes primacy over ***Legal Education Act*** on the doctrine of *'leges posteriors priores contrarias abrogant'***,** it was submitted that the doctrine above does not apply in the present case. This is due, firstly, to the fact that Parliament in enacting the ***Universities Act***, 2012 as done and ***Legal Education Act, 2012*** as done was not confusing or conflicting mandates, it was so clear in its mind, that the ***Universities Act*** should deal with general regulation of university education, while the Legal Education should strictly and specially regulate legal education in Kenya. In the Council's view, it is the ***Legal Education Act*** that should get supremacy, for being a special legislation and undertaking special regulation and relied on the legal maxim that '*lex specialis derogate legi generali'*, meaning that a law governing a specific subject matter overrides a law that only governs general matters. It was of the view that ***Legal Education Act*** as a special law on regulation dealing purely with legal education, takes primacy on matters of regulation over the ***Universities Act, 2012*** in the context

of legal education regulation, which is the general law on regulation.

80. Secondly, adherence to the interpretation of the Commission, in the Council's view, would imply that the Kenyan Parliament would only but be a congregation of persons suffering from acute, certifiable amnesia since the Commission's suggestion would be that the Kenyan Parliament would introduce a Bill, have it go through the First Reading, Second Reading, Committee Stage, Third Stage and send it for Assent, then wholly forget that it had made such law in three months, by making a new law with intention of overruling the previous law but without mention of such overthrow. Such interpretation, it was contended is *prima facie* a wrong interpretation since Parliament had no intention of overthrowing the ***Legal Education Act***, that is why, when Parliament was legislating statutes that were repealed to effectuate the ***Universities Act, 2012***, it did not list the ***Legal Education Act*** as one of those statutes that stood repealed.

81. Thirdly, Parliament did not expect any confusion between the statutes, while conferring exclusive mandate on the Council, by giving the Commission the discretion to cooperate with the Commission and other bodies, such that Parliament and defined the relationship between the Commission and the Council in the terms of section 13 of the ***Legal Education Act.***

82. Fourthly**,** in 2014, Parliament made amendments to several statutes. In the same text, which is the ***Statute Law (Miscellaneous Amendment) Act 2014***, amendments were also made to the ***Legal Education Act, 2012*** and the ***Universities Act, 2012***. From page 302 through to page 305 of this Act Parliament made amendments that acknowledged side by side existence and operation of both the ***University Act 2012*** and the ***Legal Education Act, 2012***.

83. According to the Council, therefore, so far as legal education regulation is concerned, the entity with the primary, exclusive and direct jurisdiction to handle the regulation is the Council.

84. With respect to the Composition of the Council, it was contended that prior to the amendment of the ***Legal Education Act, 2012*** by the ***Statute Law (Miscellaneous Amendment) Act 2014***, composition of the Council was borne at section 4(5) differently from how it is presently composed. By gazette notice No. 3167 of 15th March 2013, and in accordance with section 4 of the *Legal Education Act, 2012*, the then Minister for National Cohesion and Constitutional Affairs gazetted appointment of personalities to staff the Council for a period of four (4) years commencing 15th March 2013.When the ***Legal Education Act***, was amended vide ***Statute Law (Miscellaneous Amendment) Act 2014***, the officers staffing the council of legal education were now expanded.

85. In the Council's view, since the amendment was by a statute whose effective date was 2014, a period when the incumbent Council has been in existence since 15th March 2013, at law the right of the incumbent Council appointed on 15th March 2013 until expiry of 4 years has legal protection. To the Council, the amendment to the constitution of the Council vide the ***Statute Law (Miscellaneous Amendment) Act 2014*** did not abolish the Council as it had been constituted hitherto then and that the tenor of the amendment is to be effected at the expiry of the appointment term of the present Council. In other words, at present there is a chairman who has been appointed by the Minister and there cannot be two chairmen with one existing and the other appointed by the President as provided for by the amending statute.

86. It was therefore submitted that the Council as comprised prior to the amendment still has the jurisdiction to act as such and the competence to discharge the functions of the Council of Legal Education.

87. On the veracity of accreditation bench marks applied to Moi University and other legal education institutions, it was submitted that under the provisions of the ***Legal Education Act*** supplemented by the provisions of the ***Council of Legal Education (Accreditation of Legal Institutions) Regulations, 2009*** (hereinafter *'the Regulations'*) the Council has been accrediting and supervising legal education institutions since 2009 and for purposes of uniformity, predictability and fairness in this assessment, the Council has deployed benchmarks contained in section 8 of the ***Legal Education Act*** and the

Regulations.In accordance with its general mandate at section 8 the Council has broken down the benchmarks at statute as given to allow for keener and particular assessment of legal education institutions and has not benchmarked any institution on the criteria that is not in statute and regulations. Further, it has adopted the same said benchmark in assessing all institutions such that there has been zealous observance of equality and fairness. It was contended that the Council in this assessment enterprise has not placed any reliance on draft rules as the Petitioner suggested.

88. According to the Council, the final inspection report bear the 9 benchmarks utilised which are Planning Process and Governance Structure; Admission Requirements, class size and Enrolment; Curriculum and Modes of Delivery; Examinations and Examination Administration; Academic Staff and Qualifications; Research and Publications; Infrastructure and Resources; Library and Library Resources; and Student Services and Support. It was contended that these benchmarks are contained in the ***Legal Education Act*** and in the ***Regulations*** at Schedule III thereof. It was explained that the Council, in execution of this mandate of regulation as per section 8 of the ***Legal Education Act, 2012***, developed the nine (9) points out of the Third Schedule of the ***Regulations*** and the said section, to enable it exhaustively examine hence it is grossly in error to state or even insinuate that the Respondent utilized a standard or benchmark that was not legal. It was reiterated that this nine (9) point benchmark, developed from the law (Third Schedule to the Regulations) and main Act is what has been used on all applicants for accreditation hence the submission of the University indicting and alleging illegality, arbitrary and capriciousness must clearly collapse.

89. On the assessment of the Council's institution, it was submitted that the Council had given and demanded compliance of the Petitioner since 2009 when the regulations were formulated and that patience, proportionality, fairness and judicious exercise of discretion had been accorded to the University. Since the year 2009 the Petitioner has been operating on provisional accreditation because it had not met the threshold for full accreditation. That after several short-term provisional accreditations since 2009, in the year 2013 the CLE resolved to allow accreditation to the Petitioner for a period of 2 years by which time the Petitioner was enjoined to have organised its institution and merit full accreditation. To ensure the Respondent heeded the direction, the Council kept on making periodic inspections and giving updates of the state of its compliance to the University. However, the Council in furtherance of its November 2013 resolution indicated to the University that it would not be giving any further provisional accreditation and that the provisional accreditation that the Petitioner was operating on would efflux without any possibility of extension. To the Council, the Accreditation Regulations provide that Provisional accreditation to continuing institutions is issuable for a period not exceeding one (1) year, indeed Regulation 8(3) proceeds as follows:

> ***The Council may issue a provisional accreditation certificate for a period not exceeding one year to an existing institution that has complied with the provisions of regulation 4.***

90. The Council, however just to ensure continuity, allowed the University a period of two (2) years, with the warning that that Provisional accreditation had no possibility of extension, in accordance with the law. Pursuing the matter the Council performed the last inspection on the University's institution whose purpose was to ascertain that the University's qualification for full accreditation. The benchmark was conducted and the University scored 36.5% out of a pass mark of 67% which was way below the average mark, and for the reason, the Petitioner did not merit to obtain accreditation and this outcome was duly advised to the University.

91. According to the Council, the decision of 23rd September 2015, the impugned decision, was a decision made in accordance with law. The Council was legally restrained from granting the University full accreditation even if it wished, the Council was enjoined by law to grant the accreditation if the Petitioner attained the pass mark, yet the University did not even score 50%.

92. According to the Council, in assessing the University, it places reliance on no other documents or information other than its own assessment reports. Accordingly, there was no reliance on the Report of the University's own expert, **Prof. F.D. P Situma** as well as the report/comments of the Attorney General as the University suggested. To the Council, the Report by **Prof. Situma** was excerpted in the replying

affidavit to show that the University's own expert had made certain findings on independent assessment. It is instructive that it is the Council itself who sent the **Prof. Situma** report to the Council hence this was an objective investigation which cannot be resiled from. In any event, the Council did its own investigation, which report was duly sent to the University.

93. According to the Council, it did not revoke the licence of the Petitioner, it effluxed. The University was on 20th September 2013 given two (2) year Provisional Accreditation and warned that it would automatically lapse on 20th September 2015, which it did. It is thus a case of effluxion, and since accreditation has been denied with reasons, the Petitioner has no licence within the meaning of the ***Legal Education Act, 2012***. The Council emphasised that it had not shut down the University but under its jurisdiction in section 16(1)(d) of the Regulations made the decision to discontinue, on ground of non-accreditation. The Respondent is following the next step of gazettement. In the Council's view, in consonance with section 17(1) of the Regulations, it asked for a closure plan from the Petitioner in two (2) months, which *inter alia* was to advise when the Petitioner's institution would cease offering legal education. What has categorically been directed was that the Petitioner cannot admit a new set of students in its LLB programme. In its opinion, it was grossly in error to state that the Council has shut down the University's institution. In any event the Respondent advised the Petitioner, that it could still earn accreditation if it applied for accreditation.

94. It was therefore the Council's case that the closure notice issued by it to the University was on the basis of non-accreditation and Regulation 16 of the Regulations.

95. Therefore, it was averred, the Council having considered the application of the University for accreditation determined that the Petitioner did not qualify for accreditation. Accordingly the University was an unaccredited institution and such an institution is by law not allowed to continue offering legal education training except for purposes of winding up.

96. While appreciating that under the provisions of Article 47 of the Constitution and ***Fair Administrative Act, 2015***, the Council was enjoined to furnish reasons to the University for its actions, the Council submitted that these reasons were borne in the letter of the Council to the Petitioner of 23rd September 2015 enclosing the inspection report. The decision having been made and articulated to the University the Council then readied to gazette the closure notice issuable under its seal within the tenor of Regulation 16(2) and (3), but before all these could be concluded, the present Petition was filed on 5th October 2015. To the Council, the basis of the Council's letter of 23rd September 2015 is Regulation 17 of the Accreditation Regulations.

97. It was the Council's case that from this Regulation, after a notice of discontinuation, the institution issues a closure plan within two (2) months, stating how it intends to wind up its programmes. This plan has to be approved by the Council, and it is in the approval of the plan that then it is agreed when the institution is to cease offering legal education. In the present case, the Council has not shut down the University as alleged, all the Council demands, in accordance with the law is that the University offers a closure plan, which shall take care of the students in session and of staff in place in order to give ample time for winding up, without prejudicing any party.

98. The Council reiterated that the fundamental issue is that according to its professional judgment, as regulator, the University is not entitled to full accreditation, due to its poor scores hence is an unaccredited institution. To the Council, accreditation cannot be coerced out of the Council, it has to deploy its professional and expert assessment to measure whether or not institutions merit accreditation or not and in the present case it has decided that the University does not.

99. According to the Council, the question whether the High Court can accredit the Petitioner in the stead of the Council was dealt with in **Republic vs. The Council of Legal Education Ex-Parte James Njuguna & 14 Others [2007] eKLR, Muamar Nabeel Onyango Khan vs. Council of Legal Education & 2 others [2015] eKLR, Eunice Cecilia MwikaliMaema v. The Council of Legal Education & 2 Others (2013) eKLR** and **Susan Mungai vs. The Council of Legal Education &**

Others, Nairobi HC Petition No. 152 of 2011.

100.To the Council, this Court cannot concern itself with the policy behind the Act and the regulations governing the threshold criteria as long as they are within the scope of the parent Act, in this case the ***Legal Education Act*** and the support for this position was sought from **Council of Civil Service Unions vs. Minister for the Civil Service [1985] AC 374 HL** .

101.It was asserted that as long as the University has no accreditation, it cannot continue to offer legal education, as that will be against the law.

102.On the issues surrounding fair administrative action, the Council adopted a five pronged approach. Firstly, it was submitted that the replying affidavit of **Dr. Gakeri** filed herein for the Council outlined the numerous engagements that the Council had with the Petitioner on the issue of accreditation since the year 2009 and that this was conceded in the supporting affidavits that the matter took the course of hearings parole and correspondences. From its letter of February 2013, the University was on notice that it had to make necessary compliances to qualify for full accreditation by 20th September 2015, failing which it would suffer the consequences of discontinuance. Secondly, the tools of accreditation, or the bench marks that the Petitioner was called upon to satisfy were always in the Petitioner's possession since the year 2009.

103.Thirdly, this being a specialised process, with own procedure under the Act and Regulations, such Act was adopted. It was submitted that the mechanism under the ***Legal Education Act*** and ***the Regulations*** is such that it gives deference to principles of fair administrative action in Article 47 of the Constitution. Before assessing the accreditation application, there is the announcement that the accreditation process is underway and may result in grant of accreditation or rejection of the same. There is then inspection of the facilities of an institution ascertain levels of compliance, where more information is required, it is sought of a legal education provider and is furnished to the Council which then sits as assessor and scores the institution of the given/known benchmarks and the result is then relayed to the institution. To the Council, this process, due process is followed and in the case of the University, the University was under a two (2) year notice that its application for accreditation would be considered.

104.Fourthly, it was submitted that with regard to claims that a public meeting was not called under section 5(a) of the ***Fair Administrative Act, 2015***, accreditation is a special process, and it is not determined by the feeling of the general public, it is about compliance with technical matters. This is the kind of process that is contemplated by section 4(6) of the ***Fair Administrative Act.***

105.In this respect, the Council relied on **Republic vs. Kenya National Examination Council & Others Ex-parte Kipkurui Michelle D. Jeruto & 34 others [2015] eKLR.**

106.Lastly, it was contended that after the decision, the reasons for the decision were communicated to the Petitioner. It was therefore submitted that there was fairness and strict observance of the principles of fair administrative action, both procedurally and substantively.

107.On the allegations surrounding reasonableness, it was submitted by the Council that the said principle was stated in **Associated Provincial Picture Houses vs. Wednesbury Corporation [1948] 1 KB 223** where it was held:

> "**It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could**

ever dream that it lay within the powers of the authority. Warrington LJ in Short vs. Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

108The Council further relied on the holding in **Nairobi High Court in Kevin K. Mwiti & Others vs. Council of Legal Education & Others (Nairobi JR 377 of 2015-Consolidated with Petition 395 of 2015 and JR 295 of 2015).**

109In the Council's view, the decision that has been impugned as unreasonable is the decision by the Council that the University does not meet the threshold for accreditation, a decision which cannot be deemed unreasonable since the assessment is a technical assessment, not an emotional one. To the Council whereas it is true that the University was granted Charter in 1984 and is one of the oldest universities in Kenya, it cannot get preferential treatment just because it is one of the oldest institutions since Nairobi University was subjected to the same process of accreditation and was determined compliant for a period of five (5) years until the next evaluation. Nairobi University Mombasa Law School was assessed and determined to be non-compliant and a closure notice issued accordingly. The age of the institution is immaterial, it is only material that an institution at all times attains and maintains standards.

110It was appreciated that the law however contemplated this eventuality, the eventuality that after enactment of the ***Accreditation Rules*** in 2009, there would be need to give time to existing institutions to comply with the Rules. However, the Council has struggled with the University's accreditation issue since 2009. It gave six (6) months, then extended, extended again and when it seemed that the Petitioner required time, it gave the University extension of provisional accreditation for two (2) years, a period that's even beyond the law. In its view, the Council's action cannot in the circumstances be termed unreasonable since according to it, it was exercising a general mandate in accreditation. It could not give the Petitioner preferential treatment, it thus as the law requires inspected and assessed the Petitioner, as it did all other institutions.

111.With respect to the exercise of discretion and proportionality, it was reiterated that accreditation is a technical assessment of certain known bench marks and being a mandatory legal requirement, the Petitioner having failed the accreditation test, there was not much to be done here save for the law to take its course. To the Council, the exercise of proportionality is in built in the Regulations; that the institution whose accreditation has been denied, can make amends on the points of noted deficiencies and re-apply for accreditation within three (3) months of rejection of previous application as stipulated under Regulation 6(2) of as hereunder:

> ***An applicant whose application has been rejected under paragraph (1), may within three months of such rejection re-submit the application providing the required information for re-evaluation by the Council.***

112.It was further noted that per Regulation 17, an institution issued with a closure notice is to issue a notice on winding up. The notice could be even a year or so, so long as no new students are admitted. In the meantime such an institution can use the time to make good all deficiencies and entitle it to full accreditation.

113. On the allegations of violation of fundamental rights and freedoms in Article 10 of the Constitution, it was submitted that whereas the Council in enjoined to enforce its mandate for the objectives in its enabling statute, equally, fairly, and consistently, in receiving application by the University for accreditation, giving the University ample time to comply, the Respondent did not infract national values, but heeded them.

114.With respect to the right to education under Article 43 of the Constitution, it was submitted that the said right is subject to limitations of law. It is not intended to be hollow, that is why Parliament invented

regulation to ensure that all pursuing such right indeed get value. The Council rejected the notion that government sponsored students to the Petitioner would be prejudiced as being unfounded since that is to be taken care of by the closure plan as is intended by Regulation 17 of the Regulations. Similarly, the issues surrounding Article 55 on the youth, it was the Council's view that the youth shall be better equipped if the legal education institution builds capacity to offer quality education.

115.The Council therefore urged the Court to dismiss the Petition with costs.

Determinations

116.I have considered the issues raised by the parties in this Petition.

In this petition the following issues were identified by the parties as falling for determination:

(i) Allegations of violation of fundamental rights and freedoms.

(ii) Fair administrative action.

(iii) Reasonableness.

(iv) The veracity of accreditation benchmarks applied to Moi university and other legal education institutions.

(v) Exercise of discretion and proportionality.

(vi) Failure to consider relevant issues.

(vii) The mandate and jurisdiction for legal education regulation in Kenya.

(viii) Composition of the Council of Legal Education.

Allegations of violation of fundamental rights and freedoms.

118The jurisdiction of this Court is derived from Article 165(3) of the Constitution which provides as follows:

> ***Subject to clause (5), the High Court shall have—***
>
> ***(a) unlimited original jurisdiction in criminal and civil matters;***
>
> ***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***
>
> ***(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;***
>
> ***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—***
>
> ***(i) the question whether any law is inconsistent with or in contravention of this Constitution;***
>
> ***(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;***

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

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

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

119In my view, in these proceedings, this Court is being called upon to exercise its jurisdiction under Article 165(3)(b) and (d) of the Constitution. That is clearly a jurisdiction which is distinct from its jurisdiction under Article 165(a) and (e). The distinction is that in exercising its jurisdiction under Article 165(a) and (e), this Court is called upon to investigate the merits of the decision under challenge which is not the same as investigating the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or any question respecting the interpretation of the Constitution.

120.In my view, it is not every time that a person alleges that he or she has been injured by another person then a Constitutional issue is thereby raised which call for the filing of a Constitutional Petition. As was held by the Court of Appeal in **Kamlesh Mansuklal Damji Pattni & Another vs. R. Nairobi HCMA No. 322 of 1999:**

> **"No recognised human right or fundamental freedom is contravened by a Judgement or order that is wrong and liable to set aside on appeal for an error of fact or substantive law… The remedy for errors of this kind is to appeal to a higher court and where there are no higher courts to appeal to, then no one can say that there was an error. The fundamental right is not a legal system that is infallible but one that is fair. It is only errors of procedure that are capable of constituting infringement to the rights protection and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to failure to observe one of the fundamental rules of natural justice."**

121.It was similarly held in **Ngoge vs. Kaparo & 4 Others Nairobi HCMA No. 22 of 2004**, by a three judge bench of this Court that:

> **"Any…inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn trivialise the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case, do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry…The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious ... the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom."**

122.In this case, it is the Petitioner's case that the decision by the Respondent to close its Law School infringed upon Article 55 of the Constitution with respect to access by the youth to relevant education and training and employment. The University relied on Articles 43(1)(f) and 55(a) of the Constitution which provides that:

> ***Every person has the right to education;*** and

The State shall take measures, including affirmative action programmes, to ensure that the youth access relevant education and training.

123.It further relied on Article 21(2) which provides that:

The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.

124.There is no doubt that the rights under Article 43 include the right to Education. To the University, the failure of the Council to consider the ability and capacity of the University to provide legal education to government sponsored students who are recommended to the petitioner by the Kenya Universities and Colleges Central Placement Board under section 52 of the ***Universities Act***, violates the already admitted government sponsored student's rights to education and exerts undue unnecessary burden to the petitioner in catering for these students by replacement.

125.The Respondent's view on the other hand was that the said right is subject to limitations of law and is not intended to be hollow hence the reason why Parliament invented regulation to ensure that all pursuing such right indeed get value. The Council rejected the notion that government sponsored students to the Petitioner would be prejudiced as being unfounded since that is to be taken care of by the closure plan as is intended by Regulation 17 of the Regulations. Similarly, the issues surrounding Article 55 on the youth, it was the Council's view that the youth shall be better equipped if the legal education institution builds capacity to offer quality education.

126.This Court has had the occasion to consider the right to education with respect to the breach of the right to education, in **Republic vs. Commission for Higher Education Ex-Parte Peter Soita Shitanda [2013] eKLR** where expressed itself as hereunder:

"Article 43(1)(f) of the Constitution provides that every person has the right to education. The right to education would make no sense if a person's academic qualification is not recognised by the State on unreasonable grounds. Where therefore the authorities concerned hold the view that a particular person's educational qualification is not recognised, the authority is under a Constitutional duty to furnish the person with written reasons for non-recognition. Once those reasons are furnished, it is not for the Court in the exercise of its judicial review jurisdiction to investigate the merits of the decision."

127.It is however my view that the right to education must necessarily encompass the right to quality education. Therefore there must be standards to be met by those institutions which set out to impart knowledge to its students. The Interested Party herein is therefore empowered under section 5(1)(c) of the ***Universities Act*** to *promote, advance, publicise and set standards relevant in the quality of university education, including the promotion and support of internationally recognised standards*. The issue of setting standards has been considered by the Court of Appeal in various matters. In **Muamar Nabeel Onyango Khan vs. Council of Legal Education & 2 others [2015] eKLR** and **Eunice Cecilia Mwikali Maema vs. The Council of Legal Education & 2 Others (2013) eKLR** the Court expressed itself as follows:

"We are also of the view that the learned judge correctly applied the principle in the decision in Susan Mungai vs. The Council for Legal Education Petition No. 152/2011 to the effect that the Council has the power to set standards to ensure that the highest professional standards are maintained in the profession and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the Regulations."

128.The right to education enshrined in Article 43(1)(f) of the Constitution is not one of the rights that are non-derogable under Article 25 of the Constitution. However, any limitation to the said right ought not to be such that the limitation derogate from its core or essential content. In this case the Petitioner was clearly given an opportunity to prepare the closure plan which would have entailed the relocation of its students to other institutions with what the Respondent deemed proper facilities. Whereas the decision

may well be challenged on its merits, in my view the mere fact that the Respondent took such a decision which decision can lawfully be made within the ambit of the existing legal instruments does not amount to a violation of the right to education.

Fair administrative action and Reasonableness

129.The Petitioner relied on the provisions of Article 47 of the Constitution, section 5 of the ***Fair Administrative Action Act***, 2015 and section 21 of the ***Legal Education Act*** and contended that the Respondent violated its right to fair administrative action.

130.The said provisions provide as follows:

Article 47 of the Constitution

> ***(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) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-***
>
> ***(a) Provide for the review of administrative action by court or, if appropriate, an independent and impartial tribunal; and***
>
> ***(b) Promote efficient administration.***

Section 5(1) of the Fair Administrative Act, 2015

> ***In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall-***
>
> a. ***Issue a public notice of the proposed administrative action inviting public views in that regards;***
> b. ***Consider all views submitted in relation to the matter before taking administrative action;***
> c. ***Consider all relevant and material facts;***

Section 21 of the Legal Education Act

> ***(1) Where the Council has reasonable grounds to believe that a legal education provider is not complying with the terms and conditions of the licence, the Council may, after giving the legal education provider an opportunity to be heard, by notice in writing require the legal education provider to take the corrective action specified in the notice within the period specified in the notice, to the satisfaction of the Council.***
>
> ***(2) f the legal education provider fails to comply with a notice issued under subsection (1) within the period specified in the notice, the Council may, after calling upon the legal education provider to show cause why the licence should not be cancelled, cancel the licence.***
>
> ***(3) The Council may, if it determines that a legal education provider is not carrying out its functions in a proper manner or is in breach of the terms and conditions of its licence—***
>
> ***a) suspend the licence for such period as the Council considers necessary; or***
>
> ***(b) revoke the licence.***

131.The University contended that it was not notified that the Council's decision on its application for full accreditation was to be based on parameters other than those set out in the third schedule of the CLE Regulations. To the University, the Council Commissioned a team of three experts to review the curriculum of the University's School of Law but neither were the identities of the said experts disclosed nor was their report shared with the University or the Law School. In my view the right to fair administrative action clearly required that where an adverse administrative action was to be taken the basis of that decision ought to have been placed before the University so that the University could have an opportunity to respond to its contents before its contents could be used as a basis for such far reaching decision. Such action clearly violates the provisions of section 4(3)(g) of the ***Fair Administrative Action Act*** which requires the administrator to give to a person likely to be affected by his decision information, materials and evidence to be relied upon in making the decision or taking the administrative action. This position was restated in **Geothermal Development Company Limited vs. Attorney General & 3 others (2013) eKLR** to the effect that:

> **"As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See** *Donoghue v South Eastern Health Board***[2005] 4 IR 217).** Hilary Delany **in his book,** *Judicial Review of Administrative Action***, *Thomson Reuters 2nd edition, at page 272*, notes that, '*Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision'*…Article47 enshrines the right of every person to fair administrative action. Article 232enunciates various values and principles of public service including *'(c) responsive, prompt, effective, impartial and equitable provision of services' and '(f) transparency and provision to the public of timely, accurate information'*…Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in*TV3 v Independent Radio and Television Commission* **[1994] 2 IR 439)…In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (*See*Charkaoui v Canada*[2007] SCC 9,** *Alberta Workers' Compensation Board v Alberta Appeals Commission (***2005) 258 DLR (4th), 29, 55and** *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750).***"**

132.The need to adhere to the said principle of fair administrative action as a Constitutional right has been appreciated in other jurisdictions such as in South African where in **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1,** at paragraphs135 -136 it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:

> **"Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of**

administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"

133.It was further contended that whereas the Council had granted the University a provisional accreditation for a period of 2 years with effect from 20th September, 2013, within which period the institution was required to address the principal issue of infrastructure and resources *vis-à-vis* the student ratio, the impugned decision of the Council requiring the University to submit a closure report was based on an inspection carried out sometimes in August, 2015 before the expiry of the said 2 year period. From the material on record, it is clear that the impugned decision was made before the expiry of the end of the lifespan of the provisional accreditation. To that extent the University is right it contending that the Council arrived at a decision to deny the University the full accreditation before the provisional accreditation had run its course. Such action may on the face of it amount to bias as the decision whether or nor to grant the full accreditation could only be made after the period given to the University to take the necessary steps had lapsed. It is therefore not surprising that the University contended that the report dated 23rd September, 2015, just like the letter forwarding it, was clouded with irrationality, malice, manipulation of previous findings and seems that it was intended to justify a predetermined position and/or objective. I therefore associate myself with the position in **R vs. Secretary of State for Home Department ex p Venebles [1998] AC 407** to the effect that:

"a person on whom power is conferred cannot fetter the future exercise of its discretion by committing himself now as to the way in which he will exercise his power… By the same token, the person on whom power has been conferred cannot fetter the way in which will use that power by ruling out of consideration on the future exercise of power factors which may be relevant to that exercise"

134.It was contended that the Council did not issue a public notice inviting members of the public to make any representations to the Council regarding the intended closure of the University's School of Law. This requirement as stated hereinabove is pursuant to section 5(1) of the ***Fair Administrative Action Act***. That the impugned decision was likely to materially and adversely affect the legal rights or interests of a group of persons or the general public is not in doubt since the decision would have affected the rights and interests of the students and their parents/guardians. The importance of this requirement is emphasised by the provision of section 4(3) of the same Act which provides that:

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;

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

135.There is no indication and it has not been contended by the Council that before the impugned decision was arrived at the Council issued a public notice of the proposed administrative action inviting public views in respect of the proposed closure of the School let alone considering the resultant views. In my view the Council cannot hide behind the fact that it did not make a decision to close the School because the accreditation effluxed. Had that been the position, it would have had no reason to notify the University to prepare a closure plan. The Council was no doubt aware of the ramifications of its decision on the general public hence the spirit of the statute dictated that the public be made aware of the proposed action in line with the spirit of Article 10 of the Constitution which obliges all public officers and all persons to be bound by *inter alia* the principle of public participation when applying or interpreting any law or making or implementing public policy decisions. As was held by the Court of Appeal in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**:

"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and

other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

136.In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

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

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

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

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

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

140.learly the action taken by the Council failed to meet this Constitutional and statutory threshold.

141.It was contended that in arriving at its decision the Council failed to consider relevant facts and that it in fact considered irrelevant ones. The Council was accused of failing to consider the fact that, the construction of the Library complex was scheduled for completion by May 2015. However, in January 2015, the Cuncil in their audit report stated that the School of Law needed more lecture halls, seminar rooms and computer labs. This necessitated the addition of an extra floor to cater for this further requirement. Consequently, the completion date was thus varied to end of November 2015, which is within the two years the Council had required completion, vide their report of 28th November 2013. It was further contended that in reaching its impugned decision to refuse the grant of Full Accreditation and direct the University to submit a closure plan, the Council was acting under the authority and/or dictation of the Honourable Attorney General as contained in his Speech delivered at a two day stakeholder's workshop on Supporting Legal Education and Training in Developing a Dynamic East African Society and Beyond held on 29th and 30th January 2015 in Naivasha, Kenya. It was in addition contended that the Council failed to consider the University's Report to the Council of Legal Education addressing all the issues raised on the inspection visit to the Law School on 28th August, 2015.

142.To the University, the Council on its report dated 23rd September 2015 rather than reviewing the Law School's application on solely the basis of the Third Schedule to the 2009 Accreditation Regulations, applied the draft 2015 regulations even though these had not be promulgated contrary to the dictates of the ***Statutory Instruments Act, 2013***.

143.In the University's view, section 7(i) and (ii) of the ***Fair Administrative Act*** gives proportionality as a ground to challenge administrative decisions if the decision is not proportionate to the interests or rights affected. To the University, the Council's option of closing the school as a means to achieve this goal affects the right to education of the University's students as enshrined in Articles 55(a) and 27 of the Constitution. The closure of the second and only Public University that offers Law in the Country is highly detrimental to government sponsored students who cannot afford private universities. It was the University's submission that applying the necessity test the decision of the Respondent to close the school is the most harmful means to achieve their objective out of other possible options that would cause minimum injury to the students and Lecturers of the University.

144.While appreciating that under the provisions of Article 47 of the Constitution and ***Fair Administrative Act, 2015***, the Council was enjoined to furnish reasons to the University for its actions, the Council submitted that these reasons were borne in the letter of the Council to the Petitioner of 23rd September 2015 enclosing the inspection report. The decision having been made and articulated to the University the Council then readied to gazette the closure notice issuable under its seal within the tenor of Regulation 16(2) and (3), but before all these could be concluded, the present Petition was filed on 5th October 2015. To the Council, the basis of the Council's letter of 23rd September 2015 is Regulation 17 of the Accreditation Regulations, which provide as follows:

(1) Where the Council has issued an order of discontinuation to a legal education institution, the institution shall within two months submit for the Council's approval, a discontinuation plan which shall among other things state unequivocally the date on which the institution shall be stopped.

(2) Without prejudice to the generality of paragraph (1), a closure plan shall ensure that, the discontinuation of a legal education programme shall become effective at the end of the academic year in which the order of discontinuation is issued.

(3) Once a discontinuation plan has been approved by the Council, the institution shall–

(a) not admit new students to any of its legal programmes; and

(b) assist its students to transfer to other accredited institutions to complete their legal education programmes.

(4) A legal institution shall, until it discontinues a programme–

(a) continue to follow the course programmes approved by the Council or in the mode existing before the order of discontinuation;

(b) maintain the library and other physical facilities required under these Regulations; and

(c) maintain adequate faculty staff qualified to manage the course programme.

(5) A legal institution shall not enter into a teach-out agreement with an institution that is not accredited under these Regulations'.

145. It was the Council's case that from this Regulation, after a notice of discontinuation, the institution issues a closure plan within two (2) months, stating how it intends to wind up its programmes. This plan has to be approved by the Council, and it is in the approval of the plan that then it is agreed when the institution is to cease offering legal education. In the present case, the Council has not shut down the University as alleged, all the Council demands, in accordance with the law is that the University offers a closure plan, which shall take care of the students in session and of staff in place in order to give ample time for winding up, without prejudicing any party.

146.With due respect this reasoning is faulty. By its letter dated 23rd September, 2015, the Council had already made its decision that the University was undeserving of full accreditation. The only pending action was for the University to implement the said decision. The whole idea surrounding the closure plan in my view is to implement the decision already taken by the Council. This comes clearly from the reading of Regulation 17 of the Accreditation Regulation under which the closure plan is consequent upon *the issuance of an order of discontinuation to a legal education institution.* In other words the letter of 23rd September, 2015 was transmitting the order of discontinuation of the School and it is that order which is being disputed in this petition.

147.On the issues surrounding fair administrative action, the Council adopted a five pronged approach. Firstly, it was submitted that the replying affidavit of **Dr. Gakeri** filed herein for the Council outlined the numerous engagements that the Council had with the Petitioner on the issue of accreditation since the year 2009 and that this was conceded in the supporting affidavits that the matter took the course of hearings parole and correspondences. From its letter of February 2013, the University was on notice that it had to make necessary compliances to qualify for full accreditation by 20th September 2015, failing which it would suffer the consequences of discontinuance. Secondly, the tools of accreditation, or the bench marks that the Petitioner was called upon to satisfy were always in the Petitioner's possession since the year 2009.

148.Thirdly, this being a specialised process, with own procedure under the Act and Regulations, such

Act was adopted. It was submitted that the mechanism under the ***Legal Education Act*** and ***the Regulations*** is such that it gives deference to principles of fair administrative action in Article 47 of the Constitution. Before assessing the accreditation application, there is the announcement that the accreditation process is underway and may result in grant of accreditation or rejection of the same. There is then inspection of the facilities of an institution ascertain levels of compliance, where more information is required, it is sought of a legal education provider and is furnished to the Council which then sits as assessor and scores the institution of the given/known benchmarks and the result is then relayed to the institution. To the Council, this process, due process is followed and in the case of the University, the University was under a two (2) year notice that its application for accreditation would be considered.

149.Fourthly, it was submitted that with regard to claims that a public meeting was not called under section 5(a) of the ***Fair Administrative Act, 2015***, accreditation is a special process, and it is not determined by the feeling of the general public, it is about compliance with technical matters. This is the kind of process that is contemplated by section 4(6) of the ***Fair Administrative Act.***

150.Lastly, it was contended that after the decision, the reasons for the decision were communicated to the Petitioner. It was therefore submitted that there was fairness and strict observance of the principles of fair administrative action, both procedurally and substantively.

151.I have considered the various positions adopted by the parties herein with respect to the steps taken by the Council before the closure. In so far as the said steps go to the merit of the decision in question as opposed to the process itself, it is my view that this is not the right forum to resolve the same. A constitutional petition ought not to be invoked as an option to ordinary civil suits or appeals. Parties ought to appreciate that under section 4(6) of the ***Fair Administrative Act***:

> ***Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 4l of the Constitution, the administrator may act in accordance with that different procedure.***

152.As was appreciated in **Republic vs. Kenya National Examination Council & Others Ex-parte Kipkurui Michelle D. Jeruto & 34 Others [2015] eKLR**:

> **"Similarly, whereas it is true that there are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal and that the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth, the position taken in *Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009*,in my view holds supreme. In that case the Court of Appeal held:**
>
> > **"In the court's view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the present case. The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made.."**
>
> **… For a body entrusted with the powers to determine the rights of subjects such as the rights to fair administrative action, to be said to have been satisfied, it must have considered all the relevant factors."**

153.With respect to the issue of the reasonableness of the decision taken by the Council, this Court in **Nairobi High Court in Kevin K. Mwiti & Others vs. Council of Legal Education & Others (Nairobi**

JR 377 of 2015-Consolidated with Petition 395 of 2015 and JR 295 of 2015) expressed itself at page 93 that:

> **'…it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. This is so because unreasonableness per se is largely a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness. ..'**

154.In this respect I agree with the position taken by the Council that the decision whether the University does not meet the threshold for accreditation, is a technical assessment that depends on a number of factors including matters of policy in the education sector and therefore certain bench marks are necessary to be met before an institution can be accredited as an institution of higher learning in order to ensure that the standards of education acquired are the standards expected in the relevant field of study. This Court therefore does cannot concern itself with the policy behind the Act and the regulations governing the threshold criteria as long as they are within the scope of the relevant legal instruments. This was the position adopted in **Council of Civil Service Unions vs. Minister for the Civil Service [1985] AC 374 HL** where it was held that:

> **"It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show. ."**

155.A similar position was adopted **Republic vs. The Council of Legal Education Ex-Parte James Njuguna & 14 Others [2007] eKLR,** in the following terms:

> **"It would not be proper or right for the court to veto powers conferred by Parliament on a public authority or body such as the Council of Legal Education and for the court to substitute its own view from that of the Council of Legal Education to which discretion was given except where the discretion has been improperly exercised as enumerated in the ten situations above."**

156. I therefore take no issue with the position adopted by the Council that the exercise of proportionality is in built in the Regulations; that the institution whose accreditation has been denied, can make amends on the points of noted deficiencies and re-apply for accreditation within three (3) months of rejection of previous application as stipulated under Regulation 6(2) of thereunder.

157.With respect to the contention that the Council fettered its discretion by relying on the alleged directive of the Attorney General in making the impugned decision, it is my view and I hold that I do not have credible evidence on the basis of which I can arrive at a finding that the impugned decision was dictated by the directive of the Attorney General.

Whether the Closure Notice was in compliance with the law

158.It was submitted that whereas the Council insists that as far the 2009 Accreditation Regulations are concerned, every single "i" must be dotted and every single "t" crossed, it failed to comply with this mandatory provision relating to how to effect discontinuation.

159.This position was based on Regulation 16 of the Regulations which provides that:

> ***(1) The Council may order an education institution to discontinue providing legal education or training–***
>
> ***(a) ……;***
>
> ***(b) ……;***
>
> ***(c) ……..***
>
> ***(d) the legal education institution is not accredited by the Council.***
>
> ***(2) The Council shall, under it's seal, issue an order of discontinuation to a legal education institution in Form CLE No.3 set out in the First Schedule.***
>
> ***(3) The Council shall publish in the Gazette the order of discontinuation issued under paragraph (2), and may also publish the order of discontinuation in the local media'.***

160. The simply answer to this issue is to be found in section 72 of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya, which provides that a "form prescribed by a written law, shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document and is not calculated to mislead". This provision was relied upon by the Court of Appeal in **Daniel Toroitich Arap Moi vs. John Harun Mwau Civil Application No. 131 of 1994 [2008] 2 KLR (EP) 90.**

The mandate and jurisdiction for legal education regulation in Kenya.

161.The issue of accreditation seems to have been introduced by Legal Notice No. 170 of 2009 ("the Accreditation Regulations"), which were gazetted on 27th November, 2009, by which the Council for the first time introduced the accreditation process for law schools. The Accreditation Regulations in Regulation 3(2) thereof required existing institutions offering legal education at the time, like the University herein, to apply to the Council for accreditation within six months after the commencement of the Regulations and the Third Schedule to the Accreditation Regulations ("Physical, Library and Curriculum Standards for Legal Education Institutions) set out in detail the matters to be contained in an application for accreditation.

162.Following recommendations by the Ministerial Task Force on the Development of a Policy and Legal Framework for Legal Education in Kenya, that the regulation of legal education should be delinked from the provision of post-graduate instruction for admission to the roll of Advocates, Parliament enacted the ***Legal Education Act, 2012*** and the ***Kenya School of Law Act, 2012***.

163.According to the Council, the enactment of the ***Legal Education Act*** was informed by the realisation that the ***Council of Legal Education Act*** was ineffective and it was determined that there was need for a comprehensive legal framework to regulate legal education in terms of persons enrolling and therefore need to legislate structures to effectively deal with this critical profession. This therefore led to the enactment of the ***Kenya School of Law Act, 2012*** and the ***Legal Education Act, 2012***. Although the ***Legal Education Act*** repealed the ***Council of Legal Education Act***, it saved and transitioned instruments and regulations made under the ***Council of Legal Education Act*** that would have been made under the ***Legal Education Act***.

164.That leads us to the purpose of the said ***LEA***. The preamble to the said Act provides that it is:

> ***An Act of Parliament to provide for the establishment of the Council of Legal Education; the establishment of the Legal Education Appeals Tribunal; the regulation and licensing of legal education providers and for connected purposes.***

165.Its objective is to:

(a) promote legal education and the maintenance of the highest possible standards in legal education; and

(b) provide a system to guarantee the quality of legal education and legal education providers.

166.The said Act in section 4 establishes the Council whose functions are set out in section 8 thereof as follows:

(1) The functions of the Council shall be to—

(a) regulate legal education and training in Kenya offered by legal education providers;

(b) licence legal education providers;

(c) supervise legal education providers; and

(d) advise the Government on matters relating to legal education and training.

(e) recognise and approve qualifications obtained outside Kenya for purposes of admission to the Roll.

(f) administer such professional examinations as may be prescribed under section 13 of the Advocates Act.

(2) Without prejudice to the generality of subsection (1), the Council shall, with respect to legal education providers, be responsible for setting and enforcing standards relating to the—

(a) accreditation of legal education providers for the purposes of licensing;

(b) curricula and mode of instruction;

(c) mode and quality of examinations;

(d) harmonization of legal education programmes; and

(e) monitoring and evaluation of legal education providers and programmes.

(3) In carrying out its functions under subsection (2), the Council shall—

(a) make Regulations in respect of requirements for the admission of persons seeking to enrol in legal education programmes;

(b) establish criteria for the recognition and equation of academic qualifications in legal education;

(c) formulate a system for recognizing prior learning and experience in law to facilitate progression in legal education from lower levels of learning to higher levels;

(d) establish a system of equivalencies of legal educational qualifications and credit transfers;

(e) advise and make recommendations to the Government and any other relevant authority on matters relating to legal education and training that require the consideration of the Government;

(f) collect, analyse and publish information relating to legal education and training;

(g) advise the Government on the standardization, recognition and equation of legal education qualifications awarded by foreign institutions;

(h) carry out regular visits and inspections of legal education providers; and

(i) perform and exercise any other functions conferred on it by this Act.'

167.On the other hand, the Commission is established by provisions of the ***Universities Act, 2012***, as the successor of the Commission of Higher Education established then by the ***Universities Act*** (Chapter 210B of the Laws of Kenya). The ***Universities Act, 2012*** is:

> ***An Act of Parliament to provide for the development of university education; the establishment, accreditation and governance of universities; the establishment of the Commission for University Education, the Universities Funding Board and the Kenya University and Colleges Central Placement Service Board; the repeal of certain laws, and for connected purposes***.

168.The functions of the Commission at section 5 are outlined as follows:

(1) The functions of the Commission shall be to—

(a) promote the objectives of university education;

(b) advise the Cabinet Secretary on policy relating to university education;

(c) promote, advance, publicise and set standards relevant in the quality of university education, including the promotion and support of internationally recognised standards;

(d) monitor and evaluate the state of university education systems in relation to the national development goals;

(e) licence any student recruitment agencies operating in Kenya and any activities by foreign institutions;

(f) develop policy for criteria and requirements for admission to universities;

(g) recognize and equate degrees, diplomas and certificates conferred or awarded by foreign universities and institutions in accordance with the standards and guidelines set by the Commission from time to time;

(h) undertake or cause to be undertaken, regular inspections, monitoring and evaluation of universities to ensure compliance with the provisions of this Act or any regulations made under section 70;

(i) on regular basis, inspect universities in Kenya;

(j) accredit universities in Kenya;

(k) regulate university education in Kenya;

(l) accredit and inspect university programme in Kenya;

(m) promote quality research and innovation.

169.It is therefore clear that with respect to accreditation the Council's role is restricted to ***setting and***

enforcing standards relating to the accreditation of legal education providers for the purposes of licensing. Nowhere in the ***LEA*** is there an express power conferred upon the Council to accredit Universities or institutions offering legal education. This ought to be juxtaposed with the role of the Commission which is *inter alia* to ***accredit universities in Kenya.*** I therefore agree with the interpretation adopted by the Council that the role of the Commission under the ***Universities Act, 2012*** is general, while mandate of the Council under the ***Legal Education Act*** is special. In other words the overall power of accreditation is placed on the Commission while the setting and enforcement of standards for the said accreditation falls on the Council. My view is reinforced by the provision of section 5(3) of the ***Universities Act*** which provides that:

> ***For the avoidance of doubt, save as may be provided for under any other written law, the Commission shall be the only body with the power to perform the functions set out in this section.***

170.I gather support for this position from the celebrated Court of Appeal decision in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR,** where it was observed that, in respect of the Kenya National Examination Council, that:

> ***" … As a creature of a statute, the council can only do that which it's creature (the Act) and the rules made thereunder permit it to do….If it were to purport to do anything outside that which the Act and the rules permit it to do, then like all public bodies created by Parliament, it would become amenable to the supervisory jurisdiction of the High Court."***

171. Since some of the functions under the said section are to accredit universities in Kenya and to accredit and inspect university programme in Kenya, in the absence of any evidence that its powers thereunder have been delegated to the Council for Legal Education pursuant to section 5(2) of the ***Universities Act*** and in the absence of any other written law expressly endowing another body with such powers, it is clear the Commission is the only body legally mandated to accredit universities in Kenya.

172. Once the Council sets the said standards it is upon the Commission to ensure that the said standards are attained. In other words in the accreditation process both the Commission and the Council play complementary roles. They are expected to work hand in hand in order to ensure that the highest standards of legal education are attained. This in my view is the rationale behind the stipulation in section 13 of the ***Legal Education Act*** that:

> ***The Council may, in the discharge of its functions, consult, collaborate and cooperate with—***
>
> ***(a) the Commission for University Education and other regulators in the field of education, generally;***
>
> ***(b) the Law Society of Kenya; and***
>
> ***(c) departments and agencies of Government, statutory bodies, and any other body or institution having functions or objects related to the functions of the Council.***

173. This collaboration and cooperation in my view is meant to ensure smooth operations of the functions of both bodies in order to avoid a situation which has arisen in these proceedings. In my view the tuff wars that have given rise to and characterised these proceedings are uncalled for and are totally unnecessary. The Commission and the Council ought to realise that they hold offices in the public service and hence the powers they exercise are to be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

174. Therefore whereas the power to accredit universities belong to the Commission, it is not for the Commission to set the standards for the accreditation but the Council and where there is a conflict between the view taken by the Commission and the Council with respect to ***setting and enforcing***

standards relating to the accreditation of legal education providers for the purposes of licensing it is the Council's view that prevails. That is the only way in which the provisions of section 8(4) of the ***Legal Education Act***, can be understood where it is provided that:

> ***Where any conflict arises between the provisions of this section and the provisions of any other written law for the time being in force, the provisions of this section shall prevail.***

175. I associate myself with the position adopted by **Mumbi Ngugi, J** in **Martin Wanderi & 19 Others vs. Engineers Registration Board of Kenya & 5 Others [2014] eKLR** that:

> **"It is true as submitted by the Respondents, that section 2 of the *Engineers Act* provides that "*Where any conflict arises between the provisions of this section and the provisions of any other written law for the time being in force, the provisions of this section shall prevail*." The operative words are "*for the time being in force*", meaning, in my view, any legislation that predates the Engineers Act...The universities Act, being a later legislation, impliedly repealed the provisions of the Engineers Act in so far as the accreditation of courses at universities is concerned."**

176. Therefore since the ***Universities Act*** expressly confers the power of accreditation of universities, including those offering legal courses, on the Commission, and as the ***Universities Act*** being a later legislation cannot have been in the contemplation of Parliament when it referred to "***written law for the time being in force"***, section 8(4) of the ***Legal Education Act*** is inapplicable in so far as accreditation of universities is concerned.

177. However the said section still applies with respect to ***setting and enforcing standards relating to the accreditation of legal education providers for the purposes of licensing*** since that is not a power expressly conferred upon the Commission. In other words the conflict contemplated under section 8(4) aforesaid is only referable to the ***setting and enforcing standards relating to the accreditation of legal education providers for the purposes of licensing*** and not with respect to accreditation itself. Once the standards are set by the Council and are not adhered to it falls upon the Commission to take appropriate action including the withdrawal of the accreditation in which even the process of the closure of the relevant institution will then set in. It is only then that Regulation 16(2) of the Accreditation Regulations can set in. The said Regulation empowers the Council to issue, under its seal, an order of discontinuation to a legal education institution in Form CLE No.3 set out in the First Schedule. It is my view that the said action must necessarily follow a decision by the Commission to withdraw the accreditation where such accreditation has been given. Of course where there is no accreditation, the issue of withdrawing the same would not arise. However where there is a provisional accreditation, the Council cannot purport to withdraw the same and direct the University to submit a closure plan before the same expires as the Council purported to do in this case.

178. My view on this issue is reinforced by the holding in **Rahill vs. Brady (1971) IR 69** at page 86 also cited in **O'Neill & Anor v. Governor of Castlerea Prison &Ors [2003] IEHC 83 (27 March 2003)** in which it was held that:

> **"In the absence of some technical or acquired meaning the language of a statute should be construed according to its ordinary meaning and in according to the rules of grammar. While the literal construction generally has prima facie preference, there is also a further rule that in seeking the full construction of the section of an Act, the whole Act must be looked at in order to see what the objects and intention of the legislature were, but the ordinary meaning of words should not be departed from unless adequate grounds can be found in the context in which the words are used to indicate that a literal interpretation would not give the real intention of the legislature"**

179. The confusion however seems to have been introduced by Regulation 16(1)(d) which suggests that the Council is empowered to order an education institution to discontinue providing legal education or training where the institution is not accredited by the Council. However as rightly pointed out the

Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009, being subsidiary legislation cannot override the express provisions of the ***University Act*** by dint of section 31 of the ***Interpretation and General Provisions Act*** which provides that, *"no subsidiary legislation ought to be inconsistent with an Act of Parliament."*

180. In my view this Court ought to adopt the position of **Finlay, CJ** in **McGrath vs. McDermott (1988) IR 258 at page 275** cited in **O'Neill & Anor vs. Governor of Castlerea Prison & Ors [2003] IEHC 83 (27 March 2003)**,when the Judge dealt with the role of the court in interpreting statutes in the following terms:

> **"The function of the Courts in interpreting a statute…is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even other statutes expressed to be construed with it. "**

181. Confronted with the option of declaring a legal instrument unlawful, this Court has wide powers under Article 23 of the Constitution as discussed elsewhere in this judgement. One such power is the power to "read in" certain words in the instrument to bring it in conformity with its intended objectives in order to avoid absurdity. That this power is now available under the current Constitution was appreciated in **Nancy Makokha Baraza vs. Judicial Service Commission & 9 Others [2012] eKLR** where the Court expressed itself as follows:

> **"The defunct Constitution, as we have already observed was very limited in terms of scope of the remedies available. The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises…We are, therefore, of the view that Article 23(3) of the Constitution is wide enough and enables us to make appropriate reliefs where there has been an infringement or a threat of infringement of the Bill of Rights."**

182. The remedy of "reading in" was invoked by the South African Constitutional Court in **National Coalition for Gay and Lesbian Equality and Others vs. Minister of Home Affairs and Others (CCT10/99) [1999] ZACC** in which the said Court expressed itself *inter alia* as follows:

> **"The difficulty of providing a comprehensive legislative response to all the many people with a claim for legal protection cannot, however, be justification for denying an immediate legislative remedy to those who have successfully called for the furnishing of relief as envisaged by the Constitution. Whatever comprehensive legislation governing all domestic partnerships may be envisaged for the future, the applicants have established the existence of clearly identified infringements of their rights, and are entitled to specific appropriate relief. In keeping with this approach it is necessary that the orders of this Court, read together, make it clear that if Parliament fails to cure the defect within twelve months, the words "or spouse" will automatically be read into section 30(1) of the Marriage Act. In this event the Marriage Act will, without more, become the legal vehicle to enable same-sex couples to achieve the status and benefits coupled with responsibilities which it presently makes available to heterosexual couples."**

183. In **Roodal vs. State of Trinidad and Tobago [2004] UKPC 78,** the majority in the Privy Council cited with approval the South African case of **State vs. Manamela [2000] (3) SA 1** in which it was held:

> **"Reading down, reading in, severance and notional severance are all tools that can be used either by themselves or in conjunction with striking out words in a statute for the purpose of bringing an unconstitutional provision into conformity with the Constitution, and doing so carefully, sensitively and in a manner that interferes with the legislative scheme as little as possible and only to the extent that is essential".**

184. In **Kimutai vs. Lenyongopeta & 2 Others** (supra) the Court held that:

> "The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the "purposive approach". In all cases now in the interpretation of statutes such a construction as will "promote the general legislative purpose" underlying the provision is to be adopted. It is nolonger necessary for the judges to wring their hands and say, "There is nothing we can do about it". Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind."

185. In the exercise of the powers conferred on this Court by the Constitution in the phrase "*the institution is not accredited by the Council*" in Regulation 16(1)(d) of the Regulations the words "*as per the standards set*" ought to be read in so as to paraphrase the same as "*the institution is not accredited as per the standards set by the Council*".

186. It is therefore my view that the enactment of the ***Universities Act, 2012*** was meant to clarify the respective roles of the Commission and the Council hence there is no conflict between their role in order to justify the invocation of the doctrine of implied repeal.

Implied repeal of an old statute by enactment of a new statute

187. However for completion of the issues raised herein had I found that there was a conflict between the ***Universities Act*** and the ***Legal Education Act***, I would have had no hesitation in finding that pursuant to the principle of *'leges posterior respriores contrarias abrogant'* if there was any power of accreditation given to the Council before the enactment of the ***Universities Act***, the same was repealed by the enactment of the later. That principle is to the effect new laws are given preference in case of an inconsistency with the older laws. In this case, it is not in dispute that the ***Legal Education Act, 2012*** came into force on 28th September, 2012 while the ***Universities Act*** came into force on 13th December, 2012; three months after the ***Legal Education Act*** came into force, hence ***Legal Education Act*** preceded the ***Universities Act*** in time. Parliament by conferring the powers of accreditation on the Commission by the enactment of the ***Universities Act*** is presumed to have been aware of the provisions of the ***Legal Education Act***, and by deliberately conferring such power on the Commission, notwithstanding the fact that it did not expressly deal with such powers, as allegedly conferred on the Council, it must be inferred that it intended to repeal any provision conferring such powers on the Council. I gather support for this position from **Street Estates Limited vs. Minister of Health [1934] 1 KB** where it was held that:

> **"But it can also do it another way, namely, by enacting a provision clearly inconsistent with the previous Act; without going through them, four pages of MAXWELL ON THE INTERPRETATION OF STATUTES are devoted to cases in which without using the word "repeal" Parliament has repealed a previous provision by enacting a provision inconsistent with it. In those circumstances it seems to me impossible to say that these words...have no effect."**

188. I also rely on the holding in **Elle Kenya Limited & Others vs. The Attorney General and Others** (supra) that:

> **"It seems to me, in the first instance, plain that the legislature is unable, according to our Constitution, to bind itself as to the form of subsequent legislation; it is impossible for Parliament to say that in a subsequent Act of Parliament dealing with this subject matter shall there never be an implied repeal. If Parliament chooses in a subsequent Act to make it plain that the earlier statute is being to some extent repealed, effect must be given to the intention just because it is the will of the Legislature."**

189. This principle was adopted by the Uganda Court of Appeal in **David Sejjaka Nalima vs. Rebecca**

Musoke Civil Appeal No. 12 of 1985 where it was held that:

> **"According to principles of construction if the provisions of a later Act are so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together, the earlier Act stands impliedly repealed by the latter Act. It is immaterial whether both Acts are Penal Acts or both refer to Civil Rights. The former must be taken to be repealed by implication. Another branch of the proposition is that if the provisions are not wholly inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the Act."**

190. This principle was properly adopted in my view in **Martin Wanderi & 19 Others vs. Engineers Registration Board of Kenya & 5 Others [2014] eKLR**, where the Court, while faced with the dispute pitying the engineers Board and the Commission for University Education rendered itself as follows with regard to the powers of the Commission for University Education:

> **"…Suffice to say that the effect of the enactment of the Universities Act after the Engineers Act, with the same powers vested in the Commission for Universities Education to accredit courses for universities, takes away the powers vested in the Board by section 7(1)(l). This is because of the canons of interpretation with regard to the timing of legislation, and the doctrine of implied repeal, which is to the effect that where provisions of one Act of Parliament are inconsistent or repugnant to the provisions of an earlier Act, the later Act abrogates the inconsistency in the earlier one…."**

191. The same position was restated in **United States vs. Borden Co 308 US 188, (1939)** where the court rendered itself as follows:

> **"…There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy'…"**

192. **In Steve Thoburn vs. Sunderland City Council 2002 EWHC 195** the court stated that:

> **"[I]f they [the two statutes] are inconsistent to that extent [viz. so that they cannot stand together], then the earlier Act is impliedly repealed by the later in accordance with the maxim Leges posterior espriores contrarias abrogant' …Authority to the effect that the doctrine of implied repeal may operate in this limited fashion is to be found in Goodwin v Phillips [1908] 7 CLR 1, in the High Court of Australia, in which Griffith CJ stated at 7:"… if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act."**

193. A similar position was taken in **High Court Petition No. 320 of 2011 Elle Kenya Limited & Others vs. The Attorney General and Others,** where the court stated as follows at paragraphs 39-41 of its decision:

> **[39.] In the English case of Vauxhall Estates Ltd v Liverpool Corporation [1932] 1K.B., the court stated as follows at page 746; "If it is once admitted that Parliament, in spite of those words of the sub-section has power by a later Act expressly to repeal or expressly to amend the provisions of the sub-section and to introduce provisions inconsistent with them, I am unable to understand why Parliament should not have power impliedly to repeal or impliedly to amend these provisions by the mere enactment of provisions completely inconsistent with them..."**

194. To the Court in **Nzioka & 2 Others vs. Tiomin Kenya Ltd, Mombasa Civil Case No. 97 of 2001**:

"...The EMC Act being a more recent Act must be construed as repealing the old Act where there is inconsistency....where the provision of one statute are so inconsistent with the provisions of a similar but later one, which does not expressly repeal the earlier Act, the courts admit an implied repeal."

195 However in light of my finding above the issue of implied repeal does not arise. The case before me is what the Court in **Re Kenya National Union of Teachers [1969] EA 637** contemplated when it held that:

"The Teachers Service Commission Act contains no specific provisions precluding the application to teachers of the provisions of the Trade Disputes Act. Nor is there any provision which by clear implication has such an effect. If the provisions of the later Act were manifestly inconsistent with the earlier, then on general principles of construction the Court would be obliged to treat the earlier as *pro tanto* repealed by the later. But the provisions of the two enactments can stand side by side without contradiction, as long as the dual functions of the commission established by the later enactment are kept distinct. Provided that this is done, there is no conflict between the provisions of the two Acts, nor is it necessary to hold that by taking cognisance of the present dispute the Industrial Court would in any way be usurping the functions imposed by Parliament on the Teachers Service Commission."

196. In other words, the court does not construe a later Act as repealing an earlier one unless it is impossible to make the two Acts or the two sections of the Acts stand together i.e. if the section of the later Act can only be given a sensible meaning if it is treated as impliedly repealing the section of the earlier Act. See **Attorney General vs. Silver Springs Hotel Ltd and Others SCCA No. 1 of 1989** and **Re Berrey [1936] 1 Ch. 274.**

197. In light of my findings hereinabove it is my view and I hereby hold that the Council for Legal Education has no power to purport to accredit an institution of higher learning in the position of the Moi University. A fortiori, the said Council cannot purport to take an action whose effect would be to withdraw such accreditation. To that extent I agree that the Council's role is purely advisory and technical in nature and does not include the powers to suspend or stop accredited university institutions from offering various courses. The Council's role is merely to set, regulate and oversee the standards of Legal Education in Kenya and to recommend to the Government through the Commission such recommendation as it may deem necessary in fostering regard to legal training in Kenya. It therefore, has no power to close down any University institution whatsoever without express involvement of the Commission of University Education.

Composition of the Council of Legal Education.

198. It was contended the Council lacks the authority to interfere with University Education in Kenya. According to the Commission, the Council for Legal Education, is improperly constituted and accordingly is incapable of discharging any legal obligation, not least the purported accreditation of Universities. This position was based on section 4(5) of the ***Legal Education Act*** which provides that:

The Council of Legal Education shall comprise of the following members;

(a) the chairperson, who shall be a person with at least fifteen years' experience in matters relating to legal education and training, appointed by President.

(b) the Principal Secretary of the Ministry for the time being responsible for legal education;

(c) the Principal Secretary of the Ministry for the time being responsible for finance;

(d) the Attorney-General;

(e) the Chief Justice;

(f) two advocates, nominated by the Council of the Law Society of Kenya;

(g) one person who teaches law in a public university, nominated by public Universities; and

(h) the Secretary to the Council.

(i) one person who teaches law in a private university nominated by private universities.

199. However the current composition of the Council comprises of ten (10) members out of whom there are four LSK representatives in the Council, the Chairman is not an appointee of the President, there is no representative of the Ministry of Education, and there is only one representative of universities instead of two (2 one representing public and the other representing private universities. To the Commission, the Council, as constituted cannot render any legally viable decision that is capable of legal recognition. In support of this position, the Commission relied on **Noah Kibelenkenya vs. Simore Ololchurie & Another [2015] eKLR** .

200. According to the Respondent prior to the amendment of the ***Legal Education Act, 2012*** by the ***Statute Law (Miscellaneous Amendment) Act 2014***, composition of the Council was borne at section 4(5) differently from how it is presently composed. By gazette notice No. 3167 of 15th March 2013, and in accordance with section 4 of the ***Legal Education Act, 2012***, the then Minister for National Cohesion and Constitutional Affairs gazetted appointment of personalities to staff the Council for a period of four (4) years commencing 15th March 2013.When the ***Legal Education Act***, was amended vide ***Statute Law (Miscellaneous Amendment) Act 2014***, the officers staffing the council of legal education were expanded as hereinabove stated. In the Council's view, since the amendment was by a statute whose effective date was 2014, a period when the incumbent Council has been in existence since 15th March 2013, at law the right of the incumbent Council appointed on 15th March 2013 until expiry of 4 years has legal protection. To the Council, the amendment to the constitution of the Council vide the ***Statute Law (Miscellaneous Amendment) Act 2014*** did not abolish the Council as it had been constituted hitherto then and that the tenor of the amendment is to be effected at the expiry of the appointment term of the present Council. In other words, at present there is a chairman who has been appointed by the Minister and there cannot be two chairmen with one existing and the other appointed by the President as provided for by the amending statute.

201. It was therefore submitted that the Council as comprised prior to the amendment still has the jurisdiction to act as such and the competence to discharge the functions of the Council of Legal Education.

202. The argument by the Respondent with due respect does not reflect the legal position of a new statute replacing another one whether in whole in part. In **Republic vs. Kenya Anti-Corruption Commission Ex Parte Okoth [2006] 2 EA 276** a three judge bench composed of **Nyamu, Ibrahim** and **Makhandia, JJ** (as they were) expressed themselves as hereunder:

> **"The rule at common law is that the effect of a repeal was to obliterate the law as if it never existed, but subject to any savings in the repealing Act and also the general statutory provisions as to the effects of the repeal. To repeal an Act of Parliament is to cease to be part of the *corpus juris* or body of law. The general principle is that except as to the transactions past and closed, an Act or enactment which is repealed is to be treated thereafter as if it had never existed, but subject to any savings, made expressly or by implication, by the repealing enactment and in most cases is also subject to the general statutory provisions as to the effects of repeal... Under common law the consequences of a repeal of a statute are very drastic. Except as to transactions past and closed, a statute after repeal is as completely obliterated as if it had never existed. Another result of repeal…is to revive the law in force at the commencement of the repealed statute. The confusion resulting from all these**

> **consequences gave rise to the practice of inserting saving provisions in repealing statutes and later on, to obviate the necessity of inserting a saving clause in each and every repealing statute, a general provision was made in section 38(2) of the Interpretation Act 1889...In context of Kenyan situation the general provision on repeal of statutes and the subsequent enactment of others is section 23(3)(e) of the Interpretation and General Provisions Act Chapter 2 of the Laws of Kenya. The provision after correction of one word "repealed" with "repealing" *vide* the challenged Legal Notice number 162 of 2003 states that where a written law repeals in whole or in part another written law, then, unless the contrary intention appears, the repeal shall not affect any investigation, legal proceedings or remedy in respect of a right, privilege or obligation, liability, penalty, forfeiture or punishment as aforesaid, any such investigation, legal proceedings or remedy may be instituted , confirmed or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing written law had not been made...There is a general presumption against absurdity as it is presumed that Parliament intends that the court, when considering, in relation to the facts of the instant case, which of the opposing constructions of an enactment corresponds to its legal meaning should find against a construction which produces an absurd result since it is unlikely to have been intended by Parliament and here absurd means contrary to sense or reason."**

203. It is however my view that the words "**any investigation, legal proceedings or remedy in respect of a right, privilege or obligation, liability, penalty, forfeiture or punishment as aforesaid, any such investigation, legal proceedings or remedy"** cannot be read in order to include the tenure of an office which has been abolished by statute. So unless Parliament preserves the term of an existing office, that office if differently constituted, must of necessity be deemed to have been abolished on the effective date. This in my view is the reason for giving the executive the powers to set the effective date of statutes. This is meant to ensure that there is a smooth transition from one office to another.

204. In my view, Parliament by reconstituting the Council must have intended to cure a particular existing mischief. To contend that the existing Council's term must run its course would in my view amount to thwarting the legislative intent as expressed in the said amendment. As was held by the Court of Appeal in **Kimutai vs. Lenyongopeta & 2 Others [2005] 2 KLR 317**:

> "It is elementary rule that a thing which is within the letter of a statute will, generally, be construed as not within the statute unless it also be within the real intention of the legislature, and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that intention…. It was necessary, in order to arrive at the real meaning, to get to the exact conception of the aim, scope and aspect of the whole Act, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief"

205. In other words, it is necessary, in order to arrive at the real meaning, to get to the exact conception of the aim, scope and aspect of the whole Act, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief.

206. In the premises I agree with the position adopted by **Munyao, J** in **Noah Kibelenkenya vs. Simore Ololchurie & Another [2015] eKLR** thus:

> **"It cannot be said that the Tribunal herein was properly constituted. It clearly was not. It follows that if the Tribunal was not properly constituted, then its decision is null and void. A decision could only be said to be a decision of the Tribunal if the Tribunal was properly constituted".**

207. It was on the same vein that this Court in **Republic vs. Chairman Land Dispute Tribunal Amukura Division & 2 Others exp Jared Mwimali Mukuma & Another [2014] eKLR** expressed

itself as follows:

> **"Under section 4(2) of the Land Disputes Tribunal Act, a properly constituted Tribunal should consist of 3 or 5 members. This clearly shows the Tribunal that heard the dispute was not properly constituted and the orders were therefore issued by an irregularly and unlawfully constituted tribunal. That the Amukura Land Disputes Tribunal was improperly constituted, exceeded its jurisdiction and issued orders that were beyond its powers."**

208. A similar position was adopted in **Kenya Commercial Bank vs. Kenya National Commission on Human Rights [2008] eKLR**, where the Court expressed itself as follows:

> **"The Applicant contends that at the first appearance for hearing, they were informed that the hearing would be presided over by one arbiter. We have considered Regulations 27 (1) & (2) and 35 (2). The chairperson establishes the hearing panel under Regulation 27 (1 & 2) which comprises the presiding Commissioner, and others appointed by the chairperson, legal counsel and members of the Legal Services Department. That Regulation envisages a panel consisting of more than one Commissioner, legal Counsel and other staff. Regulation 35 (2) comes into play during the course of the hearing when for good reason, there is need to replace the absent Commissioners. There is no provision for the sitting of one Commissioner on the panel. Regulation 35 (2) does not apply here because right from the onset, only one Commissioner was appointed to preside over the dispute and the issue of replacement does not arise. The appointment of Godana, a single Commissioner to preside over the dispute out rightly contravenes Regulation 27 (1) & (2) and is unlawful. It is the duty of the Respondent to ensure that the requirements of the panel's composition are met i.e. Regulation 27. They cannot constitute the panel contrary to provisions of the law. In that regard, we do agree with the decision of the court in EQUATOR INN VTOMASYAN (1971) EA 405 that the properly constituted quorum started hearing a dispute where one was seeking a refund of rent. The chairman purported to visit the premises alone and on appeal, the court held that the Chairman of the Rent Restriction Board sitting alone had no power to order a refund of excess rent paid and had no power to hear and determine the application. In this case we find that Mr. Godana had no power to sit alone on the panel presiding over the dispute between the Applicant and the 1st Interested Party, as it is offends clear provisions of the law. The Respondent purported to rely on Regulation 36 which provides that an irregularity resulting from a failure to comply with any provision of this part or any direction of the hearing panel before it has reached its decision shall not of itself render any proceedings void. We find that Regulation 36 cannot remedy that omission because the composition of the Panel having been specifically provided for is a fundamental Provision which should ideally have been in the Act. Those proceedings presided over by Godana contrary to statute call for intervention of this court by way of judicial review."**

See also **Republic vs. Communications Appeals Tribunal & Another exp Safaricom Limited [2011] eKLR**.

209. In the premises, it is my view and I hold that even if the Council had the power to take the impugned decision, as constituted, the said Council could not purport to do so.

210. This decision, the Court appreciates, may have serious repercussions with respect to the decisions already undertaken by the Council. However, Article 23 of the Constitution provides that a court may grant "appropriate relief", including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order for compensation; and an order of judicial review. Under the said Article, the Applicant is entitled to 'appropriate relief' which means an effective remedy: An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. As was held by the Constitutional Court of South Africa in **Fose vs. Minister of Safety & Security [1977] ZACC 6**:

“Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.”

211. One of the remedies which is now recognized in jurisdictions with similar constitutional provisions as our Article 23 is what is called structural interdict. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Five elements common to structural interdicts have been isolated in this respect. In the first instance the court issues a declaration identifying how the government has infringed an individual or group's constitutional rights or otherwise failed to comply with its constitutional obligations. Secondly, the court mandates government compliance with constitutional responsibilities. The third stage is that the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report, which should explicate the government's action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached. Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement and whether it brings the government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government in the intricacies of implementation may be initiated. This stage of structural interdict may involve multiple government presentations at several 'check in' hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders. The chance to assess a specific plan, complete with deadlines, is especially valuable in cases involving the rights of 'poorest of the poor,' who must make the most of rare and costly opportunities to litigate. After court approval, a final order (integrating the government plan and any court ordered amendments) is issued. Following this fifth step, the government's failure to adhere to its plan (or any associated requirements) essentially amount[s] to contempt of court. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Structural interdicts also provide significant advantages for the political branches. The very process of formulating and presenting a plan to the courts can improve government accountability, helping officials identify which organ or department of the State is responsible for providing particular services or for ensuring access to specific rights. In addition, structural interdicts have contributed to a better understanding on the part of public authorities of their constitutional legal obligations in particular areas, whilst also assisting the judiciary in gaining a valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties. The “check in” hearings that follow the initial interdict facilitate information sharing between qualified experts and government officials grappling with critical policy decisions and may clarify the content the rights at stake. In addition, structural interdicts may help authorities comply with otherwise politically unpopular constitutional obligations. An explicit court order to satisfy constitutional obligations can support government officials against pressure from small but politically powerful interest groups opposed to certain rights. Finally structural interdicts may provide a more fundamentally fair outcome than other remedies in Economic and Social Rights litigation. By requiring the responsible government officials to formulate a plan designed to operationalise the right in general, rather than just to remedy an individual violation thereof, structural interdicts can provide relief to all members of a similarly situated class, whether or not any given individual has the resources to litigate his or her own case. As such, structural interdicts do not privilege those who can afford to litigate over those who cannot, and can prevent “queue jumping” in access to Economic and Social Rights.

212. Another remedy is the suspension of invalidity of legislation. Such orders are generally granted where the matters in question are complex or where a declaration of invalidity would disrupt law

enforcement processes. The Constitutional Court of South Africa in **Minister for Transport & Another vs. Anele Mvumvu & Others [2-12] ZACC 20,** expressed itself as follows:

> **"Section 172(1) of the Constitution empowers this Court to make a just and equitable order, following a declaration that legislation is invalid for being inconsistent with the Constitution. In the context of this section, a just and equitable remedy includes an order suspending the declaration of invalidity for a period determined by the court. The operation of the invalidity order is suspended so as to allow Parliament to cure the defect. But sometimes it occurs, as is the position here, that Parliament is unable to correct the defect before the period of suspension lapses….When Parliament fails to cure the defect during the suspension period, it becomes necessary to request the Court to extend the period of suspension in order to prevent the coming into operation of the order of invalidity. However, the request must be made and the decision to extend must come before the suspension expires as an expired one cannot be extended, nor can it be revived."**

213. Similarly, **Sachs, J** in **Doctors for Life International vs. The Speaker of the National Assembly and Others [2006] ZACC 11** dealing with the suspension of invalidity held:

> **"On the facts of this case I accordingly agree with the orders of invalidation made by Ngcobo J, subject to the terms of suspension he provides for. In doing so I do not find it necessary to come to a final conclusion on the question of whether any failure to comply with the constitutional duty to involve the public in the legislative process, must automatically and invariably invalidate all legislation that emerges from that process. It might well be that once it has been established that the legislative conduct was unreasonable in relation to public involvement, all the fruit of that process must be discarded as fatally tainted. Categorical reasoning might be unavoidable. Yet the present matter does not, in my view, require us to make a final determination on that score.....New jurisprudential ground is being tilled. Both the principle of separation (and intertwining) of powers in our Constitution, and the notions underlying participatory democracy, alert one to the need for a measured and appropriate judicial response. I would prefer to leave the way open for incremental evolution on a case by case in future. The touchstone, I believe, must be the extent to which constitutional values and objectives are implicated. I fear that the virtues of participatory democracy risk being undermined if the result of automatic invalidation is that relatively minor breaches of the duty to facilitate public involvement produce a manifestly disproportionate impact on the legislative process. Hence my caution at this stage. In law as in mechanics, it is never appropriate to use a steam-roller to crack a nut."**

214. In this case the decision I have arrived at hereinabove may lead to serious repercussions in terms of decisions made by the Council in respect of legal education in this Country some of which may well be beneficial to the said sector.

215. Therefore where there are minor breaches which can be remedied, it would be appropriate that the principle of proportionality be adopted so as to give the relevant authorities a chance to remedy the defects rather than to invalidate the whole enactment and thereby deprive the society of some useful decisions made by the authority concerned. As was recognised by **Ojwang, J** (as he then was) in Nairobi Misc. Civil Case (Judicial Review) No. 109 of 2004 – **Republic vs. The Minister for Transport & Communications & Others ex parte Gabriel Limion Kaurai & Another** held:

> **"the Court, in coming to its decision, must strike a balance between the two scenarios described above – the public yearning for an effective, humane and civilised passenger transport sector, and the juridical imperatives of compliance with the law as it has been enacted. Such an attempt to find a balance will show that there are no cut and dried borderlines between the social purpose, on the one side, and the sacrosanct law, on the other. Social purposes are more dynamic, sometimes feeding into the domain of legal norms, and their earning acceptance and sanctification by the jurist; but sometimes not getting quite there, and so remaining pre-legal, even though they still represent part of normal human**

venture and endeavours towards improved quality of life."

216. Therefore whereas it is my view that the Council ought to have been reconstituted immediately this Court will make appropriate orders as mandated by the Constitution.

Order

217. Having considered this Petition I grant the following orders:

1. **A Declaration that in arriving at its decision expressed in the report dated 23rd September, 2015, as well as the letter dated 23rd September, 2015, the Council for Legal Education violated the principles of the fair administrative action as enshrined in Article 47 of the Constitution.**
2. **A Declaration that the Council for Legal Education has no jurisdiction on its own motion to accredit or withdraw accreditation of universities in Kenya.**
3. **A declaration that the constitution of Council in a manner other than as contemplated under the Legal Education Act as amended by Statute Law (Miscellaneous Amendment) Act 2014 is unlawful.**
4. **An order of certiorari removing into this Court for purpose of quashing forthwith the report dated 23rd September, 2015, as well as the letter dated 23rd September, 2015 forwarding it and communicating the Respondents decision directing Moi University to commence the process of the closure of its Law School and submit its closure plan which decisions are hereby quashed.**
5. **The declaration of the illegality in the constitution of the Council is however suspended for a period of 60 days to facilitate the proper reconstitution of the said Council. At the expiry of the said period the said Council shall be deemed to be illegally in office.**
6. **Taking into account the public interest involved in the matters raised herein which transcended the interests of the parties to these proceedings, there will be no order as to costs.**

218. Orders accordingly.

Dated at Nairobi this 4th day of April, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Amoko with Mr Okoth for the Petitioner

Mr Murabu for Mr Bwire for the Respondent

Miss Awuor for the Interested Party

Cc Mutisya