REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mutunga CJ & P, Rawal DCJ & V-P, Tunoi, Ojwang, Wanjala & Njoki, SCJJ)

PETITION NO. 13A OF 2013

AS CONSOLIDATED WITH

PETITION NO. 14 OF 2013

-AND-

PETITION NO. 15 OF 2013

-BETWEEN-

1. JUDGES AND MAGISTRATES VETTING BOARD....
2. LAW SOCIETY OF KENYA..... **APPELLANTS**
3. THE ATTORNEY-GENERAL.....

-AND-

1. **THE CENTRE FOR HUMAN RIGHTS AND DEMOCRACY.....**
2. **RICHARD ETYANG'A OMANYALA.....**
3. **BISHOP FRANCIS RANOGWA OZIOVA.....**
4. **JUDICIAL SERVICE COMMISSION.....**
5. **HON. JUSTICE MOHAMMED IBRAHIM.....**
6. **HON. JUSTICE ROSELYN NAMBUYE.....**
7. **HON. JUSTICE JEANNE GACHECHE.....** **RESPONDENTS**
8. **HON. JUSTICE RIAGA OMOLO.....**
9. **HON. JUSTICE SAMUEL BOSIRE.....**
10. **HON. JUSTICE JOSEPH NYAMU.....**
11. **KENYA MAGISTRATES AND JUDGES ASSOCIATION.....**
12. **HON. JUSTICE E. O'KUBASU.....**

(An Appeal from the Judgment of the Court of Appeal of Kenya in Nairobi Civil Appeal No. 308 of 2012 (Kiage, Murgor, Sichale, J. Mohammed & Otieno-Odek, JJ.A) dated and delivered on 18th October, 2013)

JUDGMENT

A. INTRODUCTION

[1] This is an appeal from the Judgment of the Court of Appeal sitting in Nairobi, affirming the decision of the High Court sitting in Nairobi (*Havelock, Mutava, Nyamweya, Ogola & Mabeya, JJ.*) in *Judicial Review No. 295 of 2012*, of 20th October, 2012.

B. BACKGROUND

(a) Proceedings in the High Court

[2] The Petition hearing at the High Court consolidated five cases: *Nairobi J.R. Application No. 295 of 2012, Eldoret Constitutional Petition No. 11 of 2012* and *Nairobi Constitutional Petitions No.s 433, 434 and 438 of 2012*. The Court began by setting out the following jurisdictional issues for determination:

> *(i) whether the High Court's general jurisdiction is subject to limitation;*
> *(ii) whether Section 23 (2) of the Sixth Schedule to the Constitution ousts the jurisdiction of the High Court;*
> *(iii) whether the High Court has supervisory jurisdiction over the Judges and Magistrates Vetting Board; and*
> *(iv) whether the conservatory orders made in these matters should remain in force.*

[3] The rest of the issues raised in the separate petitions were to be determined individually, subsequently, in the Courts of origin. So that remains the position, once the Supreme Court disposes of this matter. The Law Society of Kenya raised a preliminary objection to the High Court's jurisdiction, and was supported by the Attorney-General, the Judicial Service Commission, and the Judges and Magistrates Vetting Board. It was urged that the Court's jurisdiction under Article 165 of the

Constitution is limited, and falls short of the remit attendant upon the vetting process. The Court, however, agreed with the respondents in their submission that its jurisdiction in Articles 22, 23, 165 and 258 of the Constitution is only subject to the limitations in the Constitution. The High Court rejected the contention by the objectors, that its jurisdiction was limited by the principle of separation of powers, in a political question such as this one which was not justiciable. The High Court held that this was not a jurisdictional question, but an issue of substantive law, requiring its assumption of jurisdiction. The Court disallowed the preliminary objection.

[4] On the contention that the High Court's remit was limited by an ouster clause, the Court proposed a number of principles, informed by a comparative perspective on the jurisprudence evolved in Britain, the Bahamas, Barbados, Trinidad and Tobago, India and Pakistan; these were as follows:

> *(a) statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly;*
> *(b) the Court will not normally intervene where the agency whose decision is contested acts within its permitted field, even when the emerging decisions are wrong;*
> *(c) in spite of a finality clause, it is open to the Court to examine whether the action of the agency in question is in excess of its jurisdiction, or contravenes a mandatory provision of the law conferring upon it the power to take such action;*
> *(d) breach of the principles of natural justice, including the right to a fair hearing, opens up the decision of the agency to review even if there is an ouster clause;*
> *(e) breach of fundamental rights and freedoms enshrined in the Constitution, including the right to protection of the law, and to respect for fundamental human rights, will entitle a Court to intervene, notwithstanding the existence of a finality or ouster clause;*

(f) an ouster clause may, ultimately, be negated if there are strong and compelling reasons.

[5] The Law Society of Kenya and the Judges and Magistrates Vetting Board urged that the vetting process was insulated from the supervisory jurisdiction of the High Court. This was justified by arguments that the provisions in the Sixth Schedule to the Constitution were more specific than those that defined the High Court's jurisdiction, and should therefore be accorded greater significance; and that the plain meaning of Section 23 of the Sixth Schedule was clear: it was the intention of the Kenyan people to oust the jurisdiction of the High Court. It was urged that in view of the delegated nature of judicial authority, this Court should find that such authority could be, and had been, entirely excluded from supervision role in respect of the Judges and Magistrates Vetting Board. In the alternative, the Court was urged to find that the Vetting Board was a creature of the Constitution, and as such was not amenable to the supervisory jurisdiction of the High Court.

[6] The High Court rejected these arguments, in favour of a restrictive interpretation of the ouster clause as regards the enforcement of fundamental rights and freedoms. The Court held that there was no express signal in the ouster clause to limit the jurisdiction of the High Court under Article 165. The Court held that the wording of Section 23 of the Sixth Schedule did not give birth to the Vetting Board as a body corporate, and that such status was only created by the Vetting of Judges and Magistrates Act (Cap 8B, Laws of Kenya); thus, the Vetting Board as such, was a creature of ordinary legislation, an inferior tribunal, amenable to the High Court's supervisory jurisdiction.

[7] However, the High Court was alive to the sensitive nature of the vetting process, as an aspect of Kenya's prescribed constitutional transition. The Court paid

regard to the obligation to ensure the smooth operation of the Vetting Board, by setting out the following rules to guide the exercise of its jurisdiction:

> (i) the High Court is not to stop the process of vetting of Judges and Magistrates, as conducted under the Vetting of Judges and Magistrates Act, *save to the extent determined as merited in individual cases;*
>
> (ii) the High Court shall have jurisdiction to intervene and review the process and decisions of the Vetting Board, to the extent that the exercise of the Board's mandate is shown to have exceeded its remit under the Constitution and the Vetting Act;
>
> (iii) the High Court shall have jurisdiction to consider and adjudicate upon alleged breaches of fundamental rights and freedoms arising from the exercise of the Vetting Board's mandate under the Constitution and the Act;
>
> (iv) the High Court shall have jurisdiction to consider matters relating to extension of time for the operations of the Vetting Board, in the context of Article 259(9) of the Constitution;
>
> (v) the High Court shall have jurisdiction to issue, review, uphold or vacate conservatory orders in connection with the vetting process;
>
> (vi) the High Court shall have jurisdiction to determine any questions ancillary to or consequential upon the vetting process.

[8] The Court concluded by extending the interim orders to allow the Vetting Board to continue with the vetting of judicial officers, but barring the de-gazettement of any judicial officer found unsuitable to serve, pending the completion of review causes lodged in the High Court.

(b) Proceedings in the Court of Appeal

[9] Dissatisfied by the decision of the High Court, the Law Society of Kenya lodged an appeal in the Court of Appeal. The Law Society raised 41 grounds of appeal, which the Appellate Court summarised into five grounds, as follows:

> *(a) whether the learned Judges of the High Court applied the wrong principles in interpreting the constitutional ouster clause;*
> *(b) whether the learned Judges erred in holding that Article 165 of the Constitution conferred upon them a supervisory jurisdiction over the Vetting Board;*
> *(c) whether the learned Judges fell into error in not treating the vetting process as a political question, reserved to the Legislature and not open to judicial enquiry;*
> *(d) whether the learned Judges erred, by applying inappropriate common law judicial decisions to ouster or finality clauses; and*
> *(e) whether the learned Judges fell into error in holding the High Court's jurisdiction to interpret the Constitution under Article 258, or to enforce fundamental rights under Article 22, to be unlimited.*

[10] At the hearing, the Law Society, supported by the Attorney-General, the Judicial Service Commission and the Vetting Board, urged that the core issue was "*whether the High Court has jurisdiction to review decisions of the Vetting Board, despite the ouster clause in Section 23 of the Sixth Schedule*." It was contended that Section 23 of the Sixth Schedule ousted the High Court's jurisdiction to review the decisions of the Vetting Board. The said parties deprecated the High Court's reliance on foreign decisions, especially the British House of Lords decision in ***Anisminic Ltd v. Foreign Compensation Commission and Another*** [1969] 2 A.C. 147, as a basis for a strict application of ouster clauses, in relation to the High Court's

supervisory jurisdiction. Their argument was that the Constitution was unequivocal on the ouster of the High Court's jurisdiction; the Court of Appeal was urged to assert the Constitution's supremacy, in view of the differing persuasive authorities. In the words of the Attorney-General, "*unless something is so out of place, so out of the way, the vetting process should be upheld without reference to the High Court.*"

[11] Another limb of the appeal was that vetting was a popularly negotiated resolution in the constitution-making process, which had made a concession from a more radical, original stand, whereby all Judges would resign upon the promulgation of the new Constitution. In this context, the proponents of the appeal argued that it was untenable for Judges themselves to sit in review of decisions affecting their colleagues, due to potential conflicts of interest, and bias. Lastly, it was argued that the vetting process is a political process, vested in other arms of government, and therefore not amenable to judicial review, as it is not justiciable.

[12] The rest of the parties contested the appeal, agreeing with the High Court that the Vetting Board was an inferior tribunal, subject to the ordinary supervisory jurisdiction; and its decisions were therefore amenable to reference in the High Court, especially where there was an alleged infringement of fundamental rights.

[13] After these submissions, the Appellate Court further consolidated the issues for determination as follows:

> *(i) the jurisdiction of the High Court;*
> *(ii) the mandate of the Vetting Board; and*
> *(iii) whether the provisions of Section 23 of the Sixth Schedule to the Constitution oust the jurisdiction of the High Court.*

[14] In the leading majority Judgment, *Kiage J.A*. firstly outlined the historical background to the establishment of the vetting process, notably the rampant corruption among judicial officers, that led to a considerable decline in public confidence in the Judiciary. Secondly, he outlined the constitutional provisions that were set out in Section 23 of the Sixth Schedule to the Constitution, noting that not only did Section 23(1) reconfigure the constitutional principles relating to the independence and security of tenure of Judges under Articles 160, 167 and 168, but Section 23(2) also had an ouster clause on the review jurisdiction of the Courts, with regard to vetting decisions.

[15] However, in view of the *non-derogable right to fair trial* under Article 50 as read with Article 25 of the Constitution, the learned Judge was of the view that the right to the protection of this fundamental right clothed the High Court with jurisdiction, despite the ouster clause. He held that neither the history of the judiciary, nor the fear of unsettling the new constitutional order, could justify a human rights abuse. On this account, the Judge also rejected the political question argument, in so far as the vetting process raised questions of derogation of *fundamental rights*. He also found that the Vetting Board was an *inferior tribunal, amenable to the supervisory jurisdiction of the High Court*. He therefore found no basis for interfering with the High Court's decision.

[16] Concurring substantially with *Kiage J.A, Mohamed J.A* stated that the protection of fundamental rights, and the right to initiate judicial proceedings for the enforcement of fundamental rights, was an important entitlement of all Kenyans; and this entitlement could not be clawed back exclusively for Judges and Magistrates – not even for the sake of achieving finality in dispute-settlement, or on the excuse of past ills within the Judiciary. It was also the learned Judge's view that the Vetting Board was an *inferior tribunal*, and therefore, the High Court's review jurisdiction in Article 165 (6) of the Constitution was not ousted.

[17] *Otieno-Odek, J.A.* reached a similar conclusion, finding that the "review" ousted in Section 23 of the Sixth Schedule to the Constitution and Section 22 (1) of the Vetting of Judges and Magistrates Act, was not the same as "judicial review." Rather the review contemplated in Section 22 of the Act was one based on "new and important matters", much like that in Order 45 of the Civil Procedure Rules, 2010, and not *judicial review*, in its conventional sense, as contemplated by Order 53 of the Civil Procedure Rules. The learned Judge considered the remedies such as would issue from such novel review (namely, confirmation or reversal of the decision to remove a Judge), to be different from those issuing in judicial review proceedings – *certiorari, prohibition* and *mandamus*. He also noted that Article 165 (6) of the Constitution, from which judicial review arose, was absent in the Articles enumerated in Section 23 (1) of the Sixth Schedule. Lastly, he based his conclusion on the fact that the Constitution has not used the words "review" and "judicial review" interchangeably.

[18] The learned Judge held that the Vetting Board was not an "inferior tribunal", but was a quasi-judicial organ *sui generis*, with a precise mandate, time-frame, and a distinct legislative framework. However, he found that the Vetting Board was still amenable to the supervisory jurisdiction of the High Court under *Article 165 (6) of the Constitution, which was not limited to inferior tribunals but was over all persons and bodies exercising quasi-judicial functions*. He also found that there was a legitimate expectation that the principles governing vetting would be adhered to. While perceiving that the vetting process was a "political process", the learned Judge found that this was not in and of itself a bar to the Court's supervisory jurisdiction. He held that political issues are subject to the rule of law, good governance and the supervisory jurisdiction of the High Court.

[19] On two ancillary points, *Odek, JA* found that the five Judge-Bench of the High Court was in order in remitting the rest of the questions raised in the appeals (except for the jurisdictional questions) back to the High Court.

[20] On the exercise of the High Court's supervisory jurisdiction, the learned Judge held that no Court had the power to determine whether a judicial officer was *fit to remain in office*. Consequently, if the High Court should quash the vetting of a judicial officer, it should remit the case *back to the Vetting Board for vetting*.

[21] The learned Judge perceived a mandatory element to the vetting law: thus, where vetting as conducted by Vetting Board was quashed by judicial review, and the mandate of the Board had already ended, the judicial officer would be treated as one who had been in office before the promulgation of the Constitution, yet he or she had not been vetted. Such a judicial officer would be under obligation to vacate office – the effect being that the process of vetting was mandatory for those who were in office as at the date of promulgation of the Constitution.

[22] *Murgor, J.A* dissented from the majority view, holding that the persuasive authority of the ***Anisminic*** case, which dealt with an ouster clause arising from *ordinary legislation*, could not apply to the instant case. She agreed with *Otieno-Odek, J.A*. that the Vetting Board was not an inferior tribunal, but rather, had a jurisdiction *akin* to that of the High Court, or the Environmental and Land Court, or the Industrial Court – and was therefore not amenable to the supervisory jurisdiction of the High Court. The learned Judge held that the transitional provisions were to take precedence at the transitional stage of the Constitution, and the ouster clause was inserted precisely to ensure that the provisions on the supervisory jurisdiction of the High Court, and the enforcement of fundamental rights, were suspended, to allow for the full exercise of *transitional mechanisms* such as the Vetting Board. The fundamental rights were, in the learned Judge's view, catered for by the Vetting of

Judges and Magistrates Act, which took into consideration the ouster, and *provided for the right to fair trial within its framework, including guidelines on the vetting process, and on internal review mechanisms.* The learned Judge perceived that the differing stand, as taken by the majority, would result in Judges judging their own causes, and one Judge protecting another – which was untenable as a matter of law.

[23] In the same vein, *Sichale, J.A.* differed with the majority, holding that it was not necessary for the Vetting Board to be expressly mentioned in the exceptions to the High Court's supervisory jurisdiction under Article 165(5) of the Constitution, as it was transitional in character; but the ouster clause suspended the supervisory jurisdiction under Article 165(6) of the Constitution. She proposed that this was a harmonious reading of the substantive and the transitional provisions: the latter would set up the environment for the expression of the values of the Judiciary, and judicial power could not be validly exercised without the vetting process.

(c) Proceedings in the Supreme Court

[24] This is a consolidation of three appeals arising from the Judgment of the Court of Appeal. The three appeals, raised by the Law Society of Kenya, the Attorney-General, and the Judges and Magistrates Vetting Board, are supported by the Judicial Service Commission. The respondents are: Judges affected by the vetting of Judges and Magistrates, pursuant to Section 23 of the Sixth Schedule to the Constitution (the ouster clause) and the Vetting of Judges and Magistrates Act; the Kenya Judges and Magistrates Association (KJMA) – the umbrella body dealing with the welfare of judicial officers; and the 1st, 2nd and 3rd respondents, who filed petitions at the High Court challenging the proceedings of the Vetting Board.

[25] Aggrieved by the Appellate Court's decision, the following parties filed appeals in the Supreme Court: the Judges and Magistrates Vetting Board (*Petition No. 13A*

of 2013); the Law Society of Kenya (*Petition No. 14 of 2013*); and the Attorney-General (*Petition No. 15 of 2013*).The three appeals were consolidated in a Ruling of this Court dated 8th April, 2014 (*Wanjala & Njoki, SCJJ*), pursuant to an application by the Law Society, with a further order that *Petition No. 13A of 2014* be the pilot file. The gist of the appeals takes the form of one central issue: *whether Section 23 of the Sixth Schedule to the Constitution ousts the High Court's supervisory jurisdiction to review the decisions of the Vetting Board*. The appeal seeks the following prayers, in summary:

(i) the Judgment and Order given by the Court of Appeal on 18th October, 2013 and the Ruling and Order given on 30th October, 2010 by the High Court, upholding the jurisdiction of the High Court, be reversed and set aside; and an Order be granted in favour of the appellants, varying and restating the jurisdiction of the High Court, and upholding the ouster provision in the vetting clause in regard to the various petitions/applications filed.

(ii) the Orders given on 30th October, 2010 stopping the de-gazettment of Judges found unsuitable and ordering the determination of their petitions/applications individually be set aside and replaced with an order dismissing the petitions/applications on the ground of lack of jurisdiction and/or merit.

(iii) the appeal be allowed with costs.

C. THE PARTIES' RESPECTIVE CASES

(a) The 1st Appellant's Case

[26] Learned counsel for the appellant, Mr. Rao submitted that the main issue before the Court concerned the interpretation of the Constitution and, in particular,

Section 23 of the Sixth Schedule: the *transitional and consequential provisions*. The crucial issue in this regard is the interpretation *Section 23(2)*, which stands out as an ouster to the jurisdiction of the High Court to review decisions of the Judges and Magistrates Vetting Board. Learned counsel also asked the Court to interpret Section 23(1), which obligates Parliament to enact legislation establishing the mechanism for the vetting of Judges and Magistrates.

[27] Counsel submitted that the Appellate Court in its majority Judgment, had adopted the wrong approach in the interpretation of the ouster clause and finality clause, as it failed to take into account the distinctive nature of the transitional clause, and the fact that an operational crisis in the Judiciary itself had given rise to the need for vetting. He urged that the purpose of Section 23(2) was to ensure that the Judiciary remains with only Judges and Magistrates who measure up to the values and principles set out in Article 10, and who execute their duties as contemplated in Article 159 of the Constitution.

[28] Counsel submitted that it was the Kenyan people's intent that the Judges be protected from an appearance of conflict of interest, during the vetting process. Thus, Judges were to be precluded from reviewing matters of their professional colleagues. He submitted that it would be improper for this Court to interpret Section 23 (2) as giving approval for the Courts to question the process and decisions of the Vetting Board; this is because the Court will be divesting the provision its intended meaning, and thus jeopardizing the intended contribution of the vetting process in strengthening the rule of law.

[29] Learned counsel submitted that a protection of the Vetting Board's mandate was consistent with the principle of the purposive interpretation of the Constitution, as pronounced in the case of ***In Re Interim Independent Election Commission,*** Sup. Ct. Constitutional Application No. 2 of 2011; [2011] eKLR. He urged that such an approach had been adopted in other countries, such as South

Africa, which regard the Constitution as an instrument of transformation. He invoked the persuasive authority of the South African case, ***S v. Makwanyane*** (1995) ZACC 3; 1995(6) BCLR 655; 1995(3) SA at paragraph 262, where the *Mohomed DP* observed:

> ***"In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, repressive and a vigorous identification of and commitment to a democratic ,universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution".***

[30] Secondly, counsel submitted that the Constitution should be interpreted in the manner envisaged in Articles 20(4) and 259(1). Thus, it should be interpreted in a harmonious way, without giving one provision a meaning that negates another provision. In this context, Section 23(2) of the Sixth Schedule is part of the Constitution, and should be considered in a harmonious way with other constitutional provisions. In support of the aforesaid principle, counsel relied on the cases of ***Tinyefuza v. A.G,*** Uganda Sup. Ct. Constitutional Petition 1 of 1996; ***Centre for Rights Education and Awareness and Others v. John Harun Mwau and Others*** Civil Appeal No.'s 74 and 82 of 2012; [2012] eKLR, and ***Republic v. El Mann*** [1969] EA 357.

[31] Learned counsel submitted that the 8th and 9th respondents have misinterpreted the meaning and effect of an ouster clause; and that they had interpreted the clause "away from the Kenyan context" through cases like: ***Anisminic*; *Khan v. Musharafa and Others*** (2008) 4LRC 157; and ***A.G. v. Joseph and Another*** (2007) 4 LRC (CCJ). He submitted that this Court should not adopt such a view, because ordinarily, Governments anchor themselves on national interest, to resolve a national crisis, and in this context they would justify ouster of judicial review; but in the Kenyan context, the crisis was within the Judiciary itself, and Kenyans demanded that the Judges be vetted by the Vetting Board, whose decision will be final.

[32] Learned counsel contests the 8th and 9th respondents' contention that the 2007/2008 post-election violence was not as a result of lack of confidence in the Courts but a political phenomenon – for Court process all over the world begins with parties lodging matters before the Courts, and this did not happen in Kenya during the period in question.

[33] Mr. Rao submitted that the vetting process, as envisaged in Section 23 of the Sixth Schedule to the Constitution, was inspired by lack of confidence in the Judiciary during the 2007 election and the ensuing violence. He relies on the Constitution of Kenya Review Commission Report in 2002, suggesting that the lack of confidence in the "radical surgery" previously applied to the Judiciary, did contribute to the malaise of 2007/2008, and urges that lack of a vetting mechanism may further erode the public confidence in the Judiciary.

[34] In response to the argument that the ouster clause is discriminatory against Judges and Magistrates contrary to Article 27 of the Constitution, Mr. Rao submitted that the historic idea of the vetting of Judges was meant to bring about a trustworthy Judiciary, as a pillar in the operation of the rule of law. In support of this argument, counsel relied on the Court of Appeal decision in the case of ***Dennis Mogambi***

Mong'are v. Attorney-General Civil Appeal 123 of 2012; [2014] eKLR, where it was held that the Vetting statute is consistent with the Constitution. In this context, counsel also invoked the finding by *Otieno-Odek*, *JA* that the Act is not unfair in its retrospective application, as it grants Judges a fair hearing.

[35] Mr. Rao submitted that the Vetting Board's mandate is still in force, by virtue of the amendment effected on the 27th December, 2013, extending its term to the 31st December, 2015.

(b) The 2nd Appellant's Case

[36] Learned counsel for the Attorney-General, Mr. Njoroge, urged the Court to purposively interpret the Constitution, as contemplated in Article 259(1)(a).He submitted that Section 23(1) of the Sixth Schedule to the Constitution was enacted for the purpose of effecting an overhaul of the Kenyan Judiciary.

[37] Counsel submitted that Section 23(1) of the Sixth Schedule had expressly ousted the jurisdiction of the High Court, as contemplated in Articles 165(5),(6), and (7), with respect to matters before the Vetting Board. He urged that in enacting Section 23, the framers of the Constitution were alive to the existence of Article 165 and, had they intended the decisions of the Board to be subject to High Court's review jurisdiction, they would have stated so. In the present context, counsel urged, the Vetting Board holds the same legal position as the Industrial Court, and the Land and Environment Court.

[38] Mr. Njoroge submitted that Section 23(1) of the Sixth Schedule forms a substantive part of the Constitution: for it is a constitutional clause, as opposed to an ordinary statutory clause. He urged that the provision was an expression of the Kenyan people's will, as contemplated in Article 1 of the Constitution – the sovereign power belongs to the people and is exercised only on their behalf.

[39] Learned counsel urged the Court to consider the merits of the Court of Appeal's analysis on the historical perspective of the vetting of Judges. The Kenyan people expressing their will under Article 1, had proposed two options: upon the enactment of the Constitution, all Judges and Magistrates should vacate their offices within a certain time; alternatively, they be subjected to the vetting process. He submitted that had the first option been adopted, it would have given rise to a situation similar to the one contemplated in Sections 24 and 31(7) (where the Chief Justice and the Attorney-General were, respectively, compelled to vacate office within 6 and 12 months, from the date of the promulgation of the Constitution), and the High Court would not have had jurisdiction to review the cessation of office-holding by Judges.

[40] Learned counsel submitted that the Vetting Board was an independent board because it has its own rules and procedures, independent of outside influence; and that the terms of Section 23(2) of the Sixth Schedule insulate the Board from any perceptions of bias, especially from members of the public. Counsel submitted that the principle of recusal was relevant in this matter: even though a Judge may not personally influence a matter, he or she should recuse himself or herself, depending on the public perception; and in this context, the High Court cannot have jurisdiction to review the process or decision of the Board.

[41] Counsel questioned the perception that the Vetting Board performs both a quasi-judicial and judicial function. He urged that the Board's mandate to conduct investigation, goes beyond the quasi-judicial function; it involves *receiving complaints from the public, the Ethics and Anti-Corruption Commission, the Kenya Police Service and the JSC, before taking a decision based upon evidence*. A decision thus arrived at, counsel urged, is objective in every sense and is founded upon the terms of the law and the Constitution. He submitted that there is no remedy which

can be obtained in the High Court, because the ouster clause is a creature of the Constitution, and not ordinary statute.

(c) The 3rd Appellant's Case

[42] Learned counsel, Mr Kanjama urged that the High Court had no jurisdiction to countermand decisions rendered by the Judges and Magistrates Vetting Board. Relying on the Court of Appeal case, ***Owners of Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Limited*** [1989] KLR 1, counsel submitted that it is a grave issue for the Court to claim jurisdiction where none exists.

[43] Learned counsel contested *Otieno-Odek JA*'s interpretation of Section 23(2) of the Sixth Schedule. It was submitted that the learned Judge wrongly construed the aforesaid provision, to exclude "judicial review" from ordinary "review". Counsel submitted that the use of the phrase, 'question or review' in the vetting clause relates to a question of interpretation of the Constitution, or of the application of fundamental rights and freedoms; and that the phrase 'review' in the vetting clause includes judicial review.

[44] Mr. Kanjama submitted that the ouster clause was in line with Article 259 of the Constitution, in its contribution to good governance, and in its promotion of the development of the law. He contested the view of *Mohamed J.A*, that the Vetting Board cannot determine its own jurisdiction, preferring the position that the Board can determine its jurisdiction just like other tribunals.

[45] With regard to *Kiage J.A's* analysis, and reliance on the ***Anisminic*** case, learned counsel submitted that the ***Anisminic*** case is distinguishable, simply because it dealt with a finality clause as to the actions of the House of Commons to oust the jurisdiction of the High Court. He urged that the decision is operative only in England, a country which has no written Constitution.

[46] Learned counsel submitted that, by Article 20 of the Constitution, the Vetting Board has the constitutional mandate to give meaning and life to the Bill of Rights; and in this regard, the Board has the authority to interpret the Constitution, for purposes of deciding whether a Judge is suitable to serve.

(d) The 1st Respondents' Case

[47] Learned Senior Counsel, Dr. Khaminwa supported the submissions of all the respondents except the 4th respondent. He submitted that the Vetting Board's decision was subject to review on account of the common law concept of judicial review, which forms part of Kenyan judicial practice. He submitted that such review is practised in almost all the common law jurisdictions such as the United States of America, and has now been operationalised in the Constitution; and so it is not tenable to portray constitutional requirements as standing apart from principles of the common law.

[48] Learned Senior Counsel urged the relevance of judicial review, as the basis for upholding the rule of law as contemplated in Article 259 of the Constitution; and its aptness in the fulfilment of the National Values and Principles of Good Governance, as set out in Article 10.

(e) *The 2nd Respondent's Case*

[49] Learned counsel, Mr. Kigen associated himself with the decision of the majority in the Court of Appeal, and asked the Court to dismiss the instant appeal with costs. He submitted that the Vetting Board was subordinate to the High Court, and was subject to the Court's supervisory jurisdiction under Article 165(6) of the

Constitution. It was his further submission that the Vetting Board was a creature of statute, and statute could not be invoked in derogation of the terms of Article 165(6) of the Constitution.

[50] Counsel urged that it was not the intention of Section 23(2) of the Sixth Schedule to take away the authority of the High Court, or render the Vetting Board infallible. He further submitted that a reading of Section 23 of the Schedule into Article 165(6) of the Constitution would lead to discrimination against Judges and Magistrates.

(f) The 3rd Respondent's Case

[51] Learned counsel, Mr. Gicheru submitted that the majority Judgment of the Court of Appeal was right on the question whether the High Court can intervene in matters relating to the Vetting Board, by interpreting the Constitution as a whole, and by evaluating the provisions of Section 23 of the Sixth Schedule against the Constitution as a whole.

[52] Counsel contested the argument that the Vetting Board is a constitutional body; rather, it is a quasi-judicial body exercising a quasi-judicial function, that involves the determination of rights of individuals. Counsel urged that, on the basis of Section 23(2) of the Sixth Schedule and Chapter Six of the Constitution, the Vetting Board is not a creature of the Constitution but of ordinary legislation, the Vetting of Judges and Magistrates Act, enacted pursuant to that Section 23 of the Sixth Schedule in the Constitution.

[53] Counsel urged it to be wrong in principle to sustain the contention that the Vetting Board can operate as a body with unfettered powers. He urged the Court not

to allow a situation where certain classes of citizens of this Republic are prevented from seeking relief from the Courts. He submitted that all citizens of Kenya, be they Judges, or anybody else, should have access to Court, for the purpose of having their grievances adjudicated upon.

[54] On the issue of ouster clauses, counsel submitted that a provision ousting the jurisdiction of the Court should be construed strictly and, where it is capable of more than one interpretation, the Courts should lean towards the interpretation that preserves the ordinary jurisdiction of the Court.

[55] Counsel submitted that the right to move a Court of law ought to be preserved. He urged the Court to uphold the position that an aggrieved person, even in respect of a decision of the Vetting Board, has a right of access to Court.

(g) The 4th Respondent's Case

[56] Learned Senior Counsel, Mr Muite supported the appeal subject to one exception: that under Article 165 of the Constitution, the High Court can assume jurisdiction to determine whether the Vetting Board or the vetting process itself was unconstitutional, when there are "high thresholds" of alleged violations of fundamental rights and freedoms. He argued that in determining the issue, this Court should be guided by Article 1 of the Constitution, taking into consideration the interests of the Kenyan people.

[57] Counsel urged that to ascertain the interests of the Kenyan people, the Court should first adopt the principle of a holistic and harmonious interpretation of the Constitution, as laid down in Article 259, and as exemplified in the case of ***James v. Commonwealth of Australia*** [1936] AC 578 where it was held that:

> "***A Constitution must not be construed in a narrow or pedantic manner and that construction must be beneficial to the widest possible amplitude of its powers…[and] a broad and liberal spirit should inspire those whose duty is to interpret the Constitution.***"

[58] Learned counsel urged the Court to consider the historical context as expressed in the ***Speaker of the Senate & Another v Hon. Attorney-General & Another & 3 Others*** Supt. Ct. Advisory Opinion Reference No. 2 of 2013; [2013] eKLR, in the concurring Judgement by the Chief Justice where he observed that one needs to examine the historical context in order to understand why the Kenyan people use particular language in particular Articles of the Constitution. Counsel urged that Section 23 of the Sixth Schedule was informed by the Kenyan people's lack of confidence in the Judiciary, and as a consequence it was their intent that the Vetting Board's decision should be final and should not be subjected to review or appeal.

[59] As to whether the Vetting Board could err in the vetting process, as contended by the 11th respondent, counsel submitted that as long as the mistake is genuine, the Kenyan people are obliged to accept it, for the purposes of moving forward, and of enhancing the rule of law.

[60] Learned Senior Counsel contested the Court of Appeal's (*Kiage, J.A.*) position that the Vetting Board is an inferior body subject to the supervisory jurisdiction of the High Court. He urged that the High Court has no supervisory competence over the Vetting Board – simply because the Board is a constitutional organ created by Section 23 of the Constitution's Sixth Schedule, and operationalised by a designated Act of Parliament. Counsel was in agreement, on this point, with the dissenting Judgment of *Sichale* and *Murgor JJA* in the Court of Appeal.

[61] Mr. Muite submitted that the extent of the ouster clause is confined to the *removal* or *process of removal*; and in this sense, Section 23 refers to Articles 161, 167, and 168 of the Constitution, and not the entirety of Article 165 of the Constitution. In conclusion, counsel submitted that the High Court can only assume jurisdiction under Article 165 in instances where a petitioner is not seeking to challenge the *removal* or *the process of removal* of a Judge.

(h) The 6th, 7th and 12th Respondents' Case

[62] Learned counsel, Mr. Mwenesi, contested the appeal, seeking its dismissal with costs.

[63] Counsel agreed with Mr. Rao, counsel for the 1st appellant, that the proper issue before the Court is whether Courts have jurisdiction to entertain any question arising out of the vetting process. Counsel relied on ***Anisminic,*** for the principle that a limitation of judicial recourse was itself a question for the Courts. Counsel also cited the case of ***Ndyanabo v. The Attorney-General*** which was referred to by the 4th and 5th respondents. In this case the Court observed that: *"access to courts is undoubtedly a cardinal safeguard against violation of one's rights, whether those rights are fundamental or not. Without that right, there can be no rule of law and therefore no democracy. A court of law is the last result of the oppressed and bewildered. Anyone seeking a remedy should be able to knock on the doors of justice and be heard".*

[64] Learned counsel submitted that, by Articles 20, 21, 22, 23, 24 and 25 of the Constitution, the Bill of Rights governs all legislation, all State organs, and all persons. He urged that the Bill of Rights had not been ousted by Section 23 of the 6th

Schedule to the Constitution; and that the arbiter in respect of such rights is unquestionably the Court.

[65] Counsel contested a line of submission advanced in the High Court and the Court of Appeal, that the vetting of Judges is a "political question", that has been entrusted to other arms of Government, rather than the Court. Learned counsel relied on the Tanzanian case of ***Attorney-General v. Kaburu*** 1995, where the Court considered a constitutional ouster clause, holding that:

> ***"the Court of Appeal of Tanzania would not see this as an ouster of their jurisdiction."***

The Court further stated that:

> ***"there is a fundamental principle of democratic constitutions, the principle of the rule of law".***

[66] From such persuasive authority, counsel urged that any exception to judicial inquiry would apply only to acts or deeds that were in accordance with the Constitution, or the relevant law; and consequently, any act or deed contrary to the Constitution, or the relevant law, is subject to review or inquiry by the appropriate Courts of law.

(i) The 8th and 9th Respondents' Case

[67] Learned counsel, Mr. Oduol submitted that it was not the public's intention to create a rogue institution that was not subject to the Constitution, or any rules. He urged that Section 23(2) of the Sixth Schedule had been enacted with the legitimate expectation that the vetting of Judges would be carried out in compliance with the

Constitution and the provisions of the Vetting of Judges and Magistrates Act, especially Section 13 of the Act.

[68] Counsel expressed agreement with the Court of Appeal, in upholding the decision of the High Court to give Section 23 of the Sixth Schedule a purposive interpretation. He submitted that as the transitional provisions are part of the Constitution, the Court was bound to interpret them in a manner that promotes the purpose, values and principles of the Constitution as a whole, and in a manner that upholds the rule of law and human rights, and contributes to good governance.

[69] Counsel submitted that the High Court has jurisdiction under the enforcement and interpretive provisions of Article 23(1) of the Constitution, as well as supervisory jurisdiction under Article 165(6) of the Constitution, to hear and determine a complaint by a Judge who has been vetted. He urged that the only issues suspended under Section 23 of the Sixth Schedule were: *security of tenure of Judges under Article 167, and the process of removal of a Judge under Article 168 – and not the jurisdiction of the High Court on the Bill of Rights.*

[70] Mr. Oduol submitted that this Court was obligated by Articles 20, 21 and 259 to interpret the Constitution in a purposive manner, that advances the rule of law, human rights and fundamental freedoms which can only be limited in accordance with Article 24 of the Constitution.

(j) The 10th Respondent's Case

[71] Learned counsel, Mr. Nyaribo submitted that Section 23 of the Sixth Schedule did not apply to the original jurisdiction of the High Court as set out in the Constitution, as it was not provided for under Article 165(2) as an instance in which the High Court was without jurisdiction. He urged that Section 23 only ousted

specific provisions of the Constitution, but the Vetting Board could not operate outside the provisions of the Bill of Rights, or of Articles 2, 10, 19, 48, 159 and 165 of the Constitution. He submitted that the ouster clause presupposed that the exercise of jurisdiction by the Board was lawful, and thus, where the Board exceeded its mandate, the High Court had jurisdiction to intervene.

[72] Counsel submitted that the provisions of limited review envisaged under Sections 22 and 23 of the Vetting of Judges and Magistrates Act fell short of the provisions of Article 47(3) of the Constitution, and short of Principle 20 of the United Nations Basic Principles on the Independence of the Judiciary.

[73] Learned counsel urged that Article 258 of the Constitution gave every person a right to institute proceedings claiming that the Constitution had been contravened, or threatened with contravention, and the Vetting Board could not claim that the petitioners lacked that right. It was his further submission that neither the ouster clause nor the Vetting of Judges and Magistrates Act could have the effect of limiting the fundamental rights and freedoms of Judges and Magistrates, which were inalienable and inherent in every individual.

[74] Mr. Nyaribo submitted that the provisions of the Sixth Schedule could not oust the operation of substantive provisions of the Constitution, especially Article 165(6) and 165(3)(b) on the supervisory jurisdiction of the High Court.

(k) The 11th Respondent's Case

[75] Learned counsel, Mr. Ochieng adopted the perception of "review" held by *Otieno-Odek JA* in the Court of Appeal. It was his submission that the review contemplated under Section 23 of the Sixth Schedule was not review to consider the merits of what the Vetting Board had done, and the supervisory mandate of the High

Court under Article 165(6), as a check-and-balance, remained valid on a general plane.

[76] Mr. Ochieng urged that Section 23 (2) of the Sixth Schedule was not absolute, and lent itself to more than one interpretation. He urged the Court to be guided by the decision in ***Anisminic,*** that where there was more than one possible interpretation of the law relating to an ouster clause, the meaning that should be taken was the one that preserves the ordinary jurisdiction of the Court. He submitted that, in the instant case, the original jurisdiction is the High Court's jurisdiction to supervise the exercise of power by the Board, and this gives the Courts an opportunity to consider the vetting process against constitutional principles, and the principles of natural justice.

[77] Learned counsel submitted that the Vetting Board and the vetting process were not infallible; and that if the Board errs by infringing on a person's right of access to justice, its actions cannot be overlooked, merely on the basis of Section 23(2) of the Sixth Schedule. He urged that Section 23(2) did not suspend the Bill of Rights, especially Article 25 (c) on the right to fair trial, which right cannot be limited. Counsel submitted that the vetting process contemplated was one that took due consideration of the rights of the Judges and Magistrates subjected to the process; and in the event that any question arose as to whether their rights were breached during the process, such could only be questioned and determined at the High Court. He urged that it would be an instance of discrimination, if persons coming before other tribunals had recourse to the Court, but not Judges and Magistrates.

D. ISSUES FOR DETERMINATION

[78] From the pleadings, and the written and oral submissions of the parties, the following two main issues arise for determination:

(i) whether Section 23(2) of the Sixth Schedule to the Constitution and Section 22(4) of the Vetting of the Judges and Magistrates Act oust the jurisdiction of the High Court to review the decision of the Judges and Magistrates Board; and

(ii) whether the learned Judges of the Appellate Court erred in law, regarding the supervisory jurisdiction conferred upon the High Court under Article 165 of the Constitution, over the JMVB.

There are secondary questions as well, which arise from the two main issues; and we will accord them due attention.

E. HISTORICAL CONTEXT, AND GOVERNING PRINCIPLES

[79] The Judiciary, in the run-up to the promulgation of the current Constitution on 27th August, 2010 was an institution largely distrusted by members of the public. Thus an official document, "*The people's choice: The Report of the Constitution of Kenya Review Commission"* (September, 2002) thus records (at page 52):

> ***"The judiciary rivals politicians and the police for the most critisised sector of the Kenyan public society today. For ordinary Kenyans the issues of delay, expense and corruption are the most worrying. For lawyers, there is concern about competence and lack of independence."***

[80] In the *Final Report of the Committee of Experts, 2010,* it was recorded that the unanimous submissions presented to the Committee of Experts had asked that there be a reform in the functioning of the Judiciary, and urged that this could only be done with a *change in judicial officers*. At the time of drafting the new Constitution, two basic approaches to removal, or to a re-organisation of the judicial

set-up, were considered by the Committee of Experts. The first was that, all judicial officers (Judges and Magistrates) were to relinquish their jobs, and then reapply afresh for the same. The second approach entailed the judicial officers remaining in office, but subject to the requirement that they undergo the 'vetting' process (See *the Final Report of the Committee of Experts, 2010* at page 75). The vetting process was perceived as crucial in the new constitutional dispensation, as the Judiciary was the focal institution bearing the mandate of interpreting the Constitution, in a manner that would uphold the rule of law in a democratic society.

[81] The vetting process is transitional in nature, as it was intended to work with a defined time-frame – a position aptly depicted in the Interim Report of the Judges and Magistrates Vetting Board, of September 2011- February 2013: *"it would function in an ad hoc manner on a short-term basis, and automatically expire on the accomplishment of its mission."*

[82] The Committee of Experts relied on comparative experience from countries such as Bosnia and Herzegovina, (former) East Germany, and the Czech Republic. But the Committee took into account the differing historical situations, noting that these other countries were in post-conflict situations, unlike Kenya where the course of constitutional reforms had taken more than two decades of incremental initiatives. Many countries with a post-conflict background, upon attaining peace, have had an overhaul-reform of the entire Judiciary – this institution being crucial to the constitutional underpinnings of the democratic processes.

[83] For example, the Comprehensive Peace Agreement of Liberia of 2003 provided that all the members of the Supreme Court were to resign – even though this would inevitably affect the day-to-day running of the Judiciary. The Czech Republic adopted the sanitizing process by which a Judge who held office in the secret police, or the ruling Communist Party during the period of political

oppression, was barred from continuing in office as a Judge. And in East Germany, Judges who had committed inhumane acts contrary to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as those who were engaged in political activity as active members of the ruling party, or the secret police, were disqualified from the office of a Judge. In Bosnia-Herzegovina, there was a two-fold reform of the Judiciary: first, the federal Courts with redrawn boundaries replaced the local Courts, which had been re-shaped by warlords and regional governments; and second, all Judges in the former Courts were relieved of their positions but, for the purpose of continuity, heard cases in an acting capacity until the pending cases were concluded, or their application for entry into the new Court structure was heard and determined – from the apex Courts to the lowest Courts. The Kenyan vetting scheme has a similar kind of outlook in terms of reform of the Judiciary.

[84] The *Final Report of the Committee of Experts* (at page 96) addressed three main views, as regards the transitional provisions dealing with the Judiciary. The first view was that the members of the Judiciary were to resign, upon the promulgation of the Constitution, with the Harmonized Draft Constitution providing that sitting Judges could opt to resign with benefits, while those who chose to remain would be vetted in a phased-out approach. The second view was that the transitional provisions were unfair, and the Judges should be sworn in on the promulgation of the new Constitution, without being subjected to the vetting process. The third view was that all Judges should relinquish office, and that after the promulgation of the new Constitution, new Judges were to take over, on a clean slate.

[85] However, the Committee of Experts upon considering the "clean slate" concept, noted that such a process would not only undermine the functioning of the Judiciary, but would be perceived as a generalized condemnation of all members of the Judiciary.

[86] It is to be recognized that the Constitution of Kenya, 2010 was a radical departure from the earlier norms of governance. Article 1 provides that all sovereign power belongs to "the people". And Chapter 10 contains elaborate provisions on judicial authority and the legal system, with Article 159 declaring that judicial authority is derived from the people and vested in Courts and tribunals established under the Constitution. The vetting process was included in the Constitution as part of a reform process, whereby judicial officers could be assessed on the basis of the values and principles set out in the Constitution. This was because the Judiciary was considered one of the most important institutions to ensure the Constitution is upheld; it was perceived as the main arbiter, in instances where interpretation or application of the Constitution was essential.

[87] Vetting is not defined in the Constitution, but Section 2 of the Vetting of Judges and Magistrates Act defines it as follows:

> ***"the process by which the suitability of a serving judge or magistrate to continue serving in the Judiciary is determined in accordance with the Act."***

[88] The Constitution provides for the vetting process under Section 23 of the Sixth Schedule. This Schedule in its wider scope, provides for the transitional and consequential procedures of the Constitution. Section 23 provides thus:

> ***"(1) Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in***

accordance with the values and principles set out in Articles 10 and 159.

"(2) A removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court."

[89] Vetting is defined in the *Webster's Ninth New Collegiate Dictionary* (p. 1312) as ***"1. a. to provide veterinary care for (an animal) or medical care for (person) b. to subject (a person or animal to a physical examination) or 2. To subject to expert appraisal or correction, evaluate".*** The Kenyan model of vetting is defined in The Judges and Magistrates Vetting Board, *Interim Report,* September 2011- February 2013 (page 4) as follows:

"Vetting was a term originally used by veterinarians when checking on the physical health and soundness of horses before they participated in a race. In our context, vetting means a thorough examination to determine suitability for a particular office or function."

[90] The *Final Report of the Committee of Experts* notes that transitional provisions are not contained in the body of the Constitution because they are of a temporary lifespan. Such provisions are usually considered technical, though they may have significant policy implications. Some of the transitional provisions provide that existing obligations, laws and rights will remain in force, until other laws or amendments to laws are enacted; and others provide that existing public offices will continue to function and operate, so as to prevent situations of gaps or vacuums in the discharge of the functions of these offices.

[91] At the Court of Appeal, *Mohammed J.A* in her concurring opinion aptly remarked that transitional and consequential provisions in the Constitution *are a bridge between two constitutional dispensations*. Section 23 of the Sixth Schedule to the Constitution is an example of a transitional and consequential provision in relation to the operations of Judges who were in office prior to the promulgation of the Constitution, on 27th August, 2010. This provision fits the criteria of a transitional provision, because it deals with the enactment of legislation by Parliament to deal with the procedures and time-frames of *vetting all judges and magistrates who were in office on the effective date;* and it provides that the removal, or the process of the removal of a Judge during vetting "shall not be subject to review by any Court".

[92] On 22nd March, 2011, the Vetting of Judges and Magistrates Act came into force, in furtherance of Section 23 of the Sixth Schedule. According to Section 3 of the Act, the object and purpose of the Act is to provide for the procedure for the vetting of Judges and Magistrates, in accordance with Section 23 of the Sixth Schedule. Section 6(1) also established the Judges and Magistrates Vetting Board, which is an *independent body entrusted with responsibility for the conduct of the vetting process*. Section 7(1) provides that the Board must consist of nine members. Six members must be Kenyan citizens (three lawyers and three non-lawyers), and three non-Kenyan citizens. The chairperson of the Vetting Board has the discretion, under Section 17(1) of the Act, to constitute three panels, consisting of a non-citizen serving or retired Judge, a lawyer and a non-lawyer, for purposes of expeditious disposal of matters.

[93] Against this background, it is evident that the Vetting Board was formed pursuant to the Constitution's intent. Its origin is directly traceable to Section 23(1) of the Sixth Schedule to the Constitution, which empowers Parliament to enact legislation providing for the vetting procedure; and in this case, Parliament enacted the Vetting of Judges and Magistrates Act, which consequently provides that the

Judges and Magistrates Vetting Board shall conduct the vetting process. However, the Vetting Board is not a "constitutional body" in exactly the same sense as, for instance, the Independent Electoral and Boundaries Commission which is expressly provided for in the Constitution. It is a "legislative body" which derives its powers directly from the Vetting of Judges and Magistrates Act – an Act that flows from the Constitution's direct signal.

[94] At the Court of Appeal, *Otieno-Odek J.A* in the majority decision considered the nature of the Vetting Board as follows [at para. 29]:

> ***"What then is the nature of the Vetting Board? I find that the Vetting Board is neither part of the court system in Kenya nor is it a local tribunal; it is a*** *sui generis* ***quasi-judicial organ with precise mandate, time-frame and distinct legislative framework. Its mandate is exclusive and*** *sui generis*. ***The Board is an exceptional institution in the epoch of Kenya's juridical system. The Board is neither a Superior Court as defined in Article 162 (1) of the Constitution nor a subordinate court as stipulated under Article 169 (1) of the Constitution. It is not a local tribunal established by Parliament under Article 169 (1) (d). The Vetting Board as established is unique; transitional in nature with a life-span determinable by Parliament; and above all and of significance, it fulfils the exceptional transitional constitution-making role of restructuring the judiciary. This exceptional transitional role is not vested upon the court system in Kenya."***

[95] Section 14(1) of the Vetting of Judges and Magistrates Act provides that the Vetting Board has the power to – *"(a) gather relevant information, including*

requisition of reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information as and when necessary; (b) interview any individual, group or members of organizations or institutions and, at the Board's discretion, to conduct such interviews; and (c) hold inquiries for the purposes of performing its functions under this Act."

[96] Indeed, the vetting process as described in the Vetting of Judges and Magistrates Act is *sui generis,* or of its own kind, as the Vetting Board does not act as a Court of law which is exclusively an arbiter; *it can conduct an investigation, and can act as an adjudicator*. The Judges and Magistrates Vetting Board's *Interim Report* (September 2011- February 2013) recognises this (at pages 37-38), when it states that the Vetting Board is *sui generis,* because it is not similar to a civil or criminal trial, or to any scheme of job interview.

[97] With regard to the time-frame of the Vetting Board, Section 23 of the Sixth Schedule to the Constitution provides that Parliament was required to enact legislation setting out the time-frame for the vetting process. Pursuant to this, Section 23 of the Judges and Magistrates Vetting Act provides that:

> *"**(1)** The vetting process **once commenced shall not exceed a period of one year, save that the National Assembly may, on the request of the Board, extend the period for not more than one year.***
>
> *"**(2)** The vetting process**, once commenced, shall be concluded not later than the 31st December, 2013** and any review of a decision of the Board shall be heard and concluded within the above specified period.*

"(3) Despite subsection (2), the Board shall conclude the process of vetting all the judges, chief magistrates and principal magistrates not later than the 28th March, 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period" (emphasis supplied).

[98] The foregoing Section was amended by the Vetting of Judges and Magistrates (Amendment) Act, 2013 (Act No. 43 2013), which came into force on 10th January, 2014. Section 3 of the Amendment Act extended the time-frame for the vetting process to 2015, as follows:

"Section 23 of the principal Act is amended –
(a) in subsection (1) by deleting the words ***'a period of one year, save that the National Assembly may, on the request of the Board, extend the period for not more than one year' and substituting therefor by the words 'the period specified by this section';***

(b) in subsection ***(2) by deleting the expression '2013' and substituting therefor the expression '2015'"*** (emphasis supplied).

[99] By virtue of the above amendments, the legislature changed the initial time-frame within which the Vetting Board would carry out the vetting process, at the request of the Board itself. First, the legislature extended the vetting process to a period exceeding the initial one year, upon request. Second, it extended the period of completion of the vetting process after its commencement, from 31st December, 2013 to 31st December, 2015 – an additional two years as from the initial conclusion date. This time-frame gives the valid span of time within which the Vetting Board carries

out its functions, and any functions outside the said time-frame would be contrary to the law.

F. ANALYSIS

(a) Section 23(2) of Constitution's Sixth Schedule; Section 22(4) of the Vetting Statute: Do these constitute an Ouster to the High Court's Supervisory Jurisdiction?

[100] The appellants asked this Court to determine the scope and effect of the *"ouster clause"* contained in Section 23(2) of the Sixth Schedule to the Constitution. In the petition of appeal, it was contended that the Courts below adopted the wrong approach to the interpretation of the ouster clause and the finality clause in this case, by failing to take account of the distinctive *transitional context*, and the fact that a *crisis in the Judiciary* itself had given rise to the need for vetting. It was also contended that the High Court and the Appellate Court failed to recognize that the ouster clause (Section 23(2) of the Sixth Schedule) is not at odds with the rest of the Constitution, but is in harmony with the constitutional objectives of promoting good governance and the rule of law.

[101] It was also contended that this case is one entailing special circumstances, and quite distinct from the Courts' traditional approach to ouster clauses – as in ***Anisminic,*** or ***Khan v. Musharaf and Others*** (2008) 4 LRC 157. The appellants' position was that while Courts all over the world strived to preserve the accountability of those empowered, in instances in which Governments use aspects of national security to justify an ouster of judicial review, the instant case is one in which the embodiment of the crisis being addressed is the Judiciary itself; and the ouster clause was an antidote prescribed by the Constitution, to preclude the Judges from interfering in the judicial transition, and to ensure that they did not become Judges

in their own cause. The petitioners urged that Section 23(2) of the Sixth Schedule had been drafted in unequivocal language, with the objective of barring Judges from making pronouncements in respect of fellow Judges.

[102] Regarding *Kiage JA*'s holding that there was herein a typical clash between the High Courts' general powers of review and supervision by virtue of Article 165 – on the one hand – and the exclusionary rules of ouster as embodied in Section 23 of the Sixth Schedule – on the other hand – the petitioners perceived quite the reverse: namely, that even though the language of Section 23(1) excluded Article 165 of the Constitution, that Section was concerned with defining the *criteria for vetting,* rather than with *the Courts*. It was urged that as Articles 160, 167 and 168 provide for the guarantees of judicial independence, for security of tenure, and for the steps to be followed in removing a Judge from office, these processes had been suspended for the transitory period, in order to allow the vetting Board to conduct its mandate.

[103] It was submitted that the transitory mechanisms were so designed as not only to guarantee the rule of law, but also to bring about *institutional reforms* necessary to ensure that the rule of law was upheld and maintained in practice; and that the dictates of practice required that the Judiciary be brought in line with the values and principles of the Constitution, in an expeditious manner, to avoid destabilizing trends in the judicial process.

[104] The petition also outlined the distinction between the "constitutional ouster clause," and statutory ouster and finality clauses. It was contended that, by Section 23(2) of the Sixth Schedule, the people of Kenya had specifically denied the Judiciary the opportunity to form part of the review process, because most, or all of the Judges were considered interested parties, especially because of the historical disposition of the Judiciary. It was further contended that Parliament would not have enacted legislation that was prejudicial to the rights of Judges; and that in the prevailing

circumstances in Kenya at the time, the protective measures for the Judges was legislative and institutional, as opposed to judicial, Parliament having been given the special role of establishing a mechanism to determine the suitability of the Judges.

[105] It was contended that Section 23(1) and (2) was a finality clause, allowing Judges to seek a review of the decision of the Vetting Board, which decision according to Section 23(2), by the Board itself, would be final. It was urged that this provision gave statutory expression to the "constitutional ouster clause," prohibiting Courts from entertaining proceedings from the Vetting Board.

[106] It was submitted that the ouster clause would only be activated following the satisfaction of the requirements enumerated under Section 23(2) of the Sixth Schedule to the Constitution: the legislation (establishing the Vetting Board) had to be that envisaged under Section 23(1); and the clause covers only actions that amount to a "removal or a process leading to the removal of a Judge." These two conditions as pleaded, engage the applicability of the ouster clause. The Vetting of Judges and Magistrates Act requires that no serving Judge was to be appointed as a member of the Board [Section 8(3)(b)], and that any Board member was barred from becoming a Judge or a Magistrate within five years of leaving office [Section 32]. It was, therefore, urged that these measures were a clear indication that the decisions of the Board were not to be subject to review by the Judiciary.

[107] But Mr. Mwenesi, learned counsel for the 6th respondent, maintained that the Court was the proper forum to determine the constitutionality or otherwise of the Board's decision. He submitted that it is only through the rule of law that the Courts can protect the rights of citizens. Counsel urged the Court not to allow the "blunders of the Board" to be covered up by the ouster clause. Counsel contended that the ouster could only apply if it was in keeping with the limits of the Constitution and the legislation contemplated, failing which the Court had authority to intervene.

[108] Mr. Mwenesi submitted that the High Court has jurisdiction to determine whether the decisions made by the Board were proper in law; and that the Supreme Court is enjoined by Articles 20, 21 and 259 to interpret the Constitution in a purposive manner, such as advances the rule of law and the fundamental rights and freedoms which can only be limited by the Constitution under Article 24.

[109] Learned counsel Mr. Ochieng, on behalf of the Kenya Magistrates and Judges Association, pursued that general argument, urging that the power of review is not one exercised on the merits, on what has been determined by the Board, but rather, is a power of check-and-balance by the High Court, a power that cannot be taken away. He urged the Court to adopt the view in the ***Anisminic*** case, that where there is more than one meaning that can be attributed to an ouster clause, that which should prevail is the one that retains the ordinary jurisdiction of the Court. He submitted that Section 23(2) of the Sixth Schedule did not suspend the Bill of Rights, and any question as to whether rights in this category were infringed, falls to the High Court.

[110] This general theme was advanced to incorporate conventional rules of the common law: where there is a wrong there is a remedy; and equity would not suffer a wrong to be without a remedy. For the 10th respondent it was contended that the ouster clause in Section 23 (2) of the Sixth Schedule did not apply to the original jurisdiction of the High Court as set out by the Constitution, as it is not provided for under Article 165 (2) of the Constitution on instances where the High Court does not have jurisdiction. Counsel also submitted that the ouster clause in question, for its validity, presupposed that the action of the Board was lawful.

[111] Learned counsel, Mr. Rao for the Vetting Board submitted that Article 165 was a provision in the general part of the Constitution, while Section 23 of the Sixth Schedule was specifically relevant to the transitional provisions. He submitted that

it would not make sense for Article 165 (6) to be included in the terms of Section 23 of the Sixth Schedule, as the only bit that had been removed from the High Court's jurisdiction was the "removal and the process leading to the removal of Judges".

[112] To resolve the ouster question, several elements have to be considered: *what is an ouster clause? how is such a clause portrayed in relevant comparative judicial practice? what is the standing of the ouster clause in the Constitution of Kenya, 2010 in the light of the fundamental rights and freedoms safeguarded in the Constitution? is the ouster clause an applicable concept in relation to the functioning of the Judges and Magistrates Vetting Board? is the 'ouster clause' a special, time-bound provision, or a long-lasting provision? what is its implication for judicial review?*

[113] Section 23 of the Sixth Schedule to the Constitution provides:

> ***"(1) Within one year after the effective date Parliament shall enact legislation which shall operate despite Articles 160, 167, 168, establishing a mechanism and procedure for vetting within a timeline to be determined by the legislature, the suitability of Judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Article 10 and 159.***
>
> ***"(2) A removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court."***

[114] Section 22(4) of the Vetting of Judges and Magistrates Act provides:

"A removal or a process leading to the removal of a judge or magistrate from office under this Act shall not be subject to question in, or review by, any court."

[115] The foregoing provisions lie at the centre of the ouster-clause controversy. Ouster clauses are provisions in the Constitution or a statute that take away, or purport to take away the jurisdiction of a competent Court of law. They deny the litigant any judicial assistance in the relevant matter, and at the same time deny the Courts the scope for making any arbitral contribution with respect to the relevant matter. In short, ouster clauses curtail the jurisdiction of the Court, as the relevant matter is rendered non-justiciable before the Courts. The English case, ***Pyx Granite Co. Ltd v. Minster of Housing*** [1966] AC 260 indicates that an ouster clause connotes exclusion of the jurisdiction of the Courts, and nothing less.

[116] Ouster clauses have been adopted for certain practical and procedural reasons: protecting the integrity of the relevant body, by separating it from the formal legal process; and ensuring finality, preventing unnecessary litigation, or interventionist judicial proceedings. The relevant tribunals, boards or other bodies are perceived as agents of justice in their special modes, and it is deemed unnecessary to review their decisions. By this arrangement, these bodies or organs are seen to protect the integrity of the relevant system.

[117] Ouster clauses can be categorized as *constitutional* or *statutory*. Where they are statutory ouster clauses, the statute may confer exclusive jurisdiction on the relevant body to determine the relevant matter. In such a case, the relevant body must act under the statute, and not outside it.

[118] The existence of ouster clauses in the instant matter raises complex issues.

(i) *First, is the question of the rights of citizens to access the Courts. This encompasses three issues: isn't access to the Courts an essential pre-condition for the operation of the rule of law and consequently, shouldn't ouster clauses be read down? Alternatively, if the content of the law must be given effect, shouldn't ouster clauses be given effect, and ouster clauses enforced? But, what then is the standing of the broad principle that the Constitution proffers judicial bodies, and provides to individuals, so they may enforce their rights and expectations, such as those associated with natural justice?*

(ii) *Second, is the issue of constitutionally-conferred jurisdiction. Can the High Court's supervisory jurisdiction under Article 165 (6) of the Constitution be abrogated? How should the High Court reconcile an ouster clause with its supervisory jurisdiction? Can an ouster clause be interpreted consistently with the Constitution? What if the ouster clause is contained in the Constitution itself?*

(iii) *Thirdly, shouldn't ouster clauses be enforced, since Parliament is democratically elected (representative democracy), and is in a more legitimate position to prescribe legal constraints, than Courts are to review decisions taken by virtue of formal legislation?*

(iv) *Lastly shouldn't the separation of powers be adhered to? Doesn't the ouster clause give the Vetting Board the power to decide on the legal limits of its power? Isn't this conferring adjudicative authority upon a body that is not a Court?*

All these are *bona fide* questions for intellectual and juristic inquiry. The answer to them is by no means preordained; and, with the benefit of forensic inputs, and after taking into account the broader scenario of governance-objects, and the core values

of civilized society, this Court bears the responsibility for making a legitimate determination.

[119] The question as to the extent to which Courts can intervene in a matter in respect of which there is express exclusion of jurisdiction, has been the subject of discussion worldwide, by scholars and the Courts alike. The *comparative lesson*, a recognized basis of objectivity in ascertaining proper directions in matters of dispute-settlement, especially in vital spheres such as constitutional rights, should be considered in the instant matter.

[120] The 1963 Republican Constitution of Nigeria provided for ouster clauses in Articles 158 (4) (a) and 161 (3), in respect of the institution of chieftaincy.
Article 158 (4) provided as follows:

> ***"Where immediately before the date of the commencement of this Constitution any proceedings on appeal from a decision of the Federal Supreme Court are pending or any right to bring such proceedings has accrued, the proceedings or right shall abate on that date in so far as any question for determination in the relevant proceedings is:***
>
> ***(a) A chieftaincy question; or.....***
>
> ***and where immediately before that date any proceedings are pending in any court in Nigeria or any right has accrued to bring the proceedings on appeal to such a court, the proceedings or rights shall abate on that date in so far as any question for***

determination in the relevant proceedings is a chieftaincy question."

Article 161(3) thus provided:

"Notwithstanding anything in any other provision of this Constitution.....no chieftaincy question shall be entertained by any Court in Nigeria....."

[121] The precedent set by the Nigerian Supreme Court, was one excluding from review any matters that pertained to chieftaincy. In ***Salami Olaniyi v. Gbadamosi Aroyehun and Others*** (1991) 1 SCNJ 25, the plaintiff challenged the validity of the appointment and installation of *Oni Ira of Ira*. The High Court of Kwara State assumed jurisdiction. The Court of Appeal reversed the decision of the High Court, on the ground that the Court lacked jurisdiction, as the matter concerns chieftaincy. The Supreme Court, affirming the decision of the Court of Appeal, held that *Section 3 of the Chieftaincy Disputes (Preclusion of Courts) Ordinance No. 30 of 1948 was an existing law, and therefore ousted the jurisdiction of the Court from matters relating to Chieftaincy affairs.*

[122] However, in ***Senator Chief T. Adebayo Doherty v. Sir Abubakar Tafawa Balewa and Others*** (1961) NSCC 248, the Commission and Tribunals of Enquiry Act gave power to the Prime Minister to issue a commission, appointing commissioners to hold a commission of enquiry relating to matters specified in the Act; and it was provided that the action of the Commission and that of the Prime Minister was not subject to question in any Court of law in Nigeria. The Prime Minister exercised this power by appointing Commissioners to hold enquiry into the activities of certain persons, including the plaintiff. *The Supreme Court, although holding the action to be a valid exercise of donated power, invalidated Section 3 (4)*

of the Act as unconstitutional, because it sought to limit the jurisdiction of the Court to hear and determine civil rights and obligations and constitutional matters, contrary to Sections 21, 31 and 108 of the Constitution.

[123] Currently, the Constitution of the Federal Republic of Nigeria, 1999, Section 6(6) vests in the Courts the inherent judicial power to adjudicate over all parties that come before them, in the following terms:

> "***The judicial powers vested in accordance with the foregoing provisions of this section –***
>
> ***(a) shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law;***
>
> ***(b) shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person;***
> ***(c) shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution;***
>
> ***(d) shall not, as from the date when this section comes into force, extend to any action or proceedings relating to any existing law made on or after 15th***

January, 1966 for determining any issue or question as to the competence of any authority or person to make any such law."

[124] It is to be noted that Section 6 (c) above provides that the Court may not adjudicate in respect of the provisions of Chapter II of the Constitution. This can be construed as an ouster clause. The Nigerian Constitution contains a number of ouster clauses, for instance: Section 143 (10), which relates to the President's removal from office: Section 188 (10), on the removal of a Governor or a deputy; and Section 308, which provides for immunity for some officers of Government.

[125] The foregoing examples show "ouster clauses" to be a challenge to the Courts, which are yet to find a rational and legitimate principle of interpretation. The main anxiety is in respect of the merits of such clauses, as it is apprehended that they have the tendency to extend immunity to negative governmental action. This scenario is thus depicted by M.C. Okany in an article in ***Ebonyi State Law Journal*** entitled "The Continuation of Ouster Clauses in Nigeria after 1999: A Beneficial Wrongdoing":

'At the mention of 'ouster clauses' most Nigerian legal minds and the insufficiently informed masses simply think of the draconian military legislation wherein the jurisdiction of courts to entertain causes and matters brought by deprived Nigerians in respect to human rights and property issues was normally excluded in a most insensitive way. Such persons therefore have a resentful disposition to ouster clauses and would almost always off-handedly assert that the only legitimate judicial attitude towards ouster clauses should be to oppose and strike down."

[126] The challenge is well depicted in the Barbados High Court case, ***Austin v. Attorney-General,*** Case No. 1982 of 2003, in which *Chandler, J.* thus remarked:

> ***"In my judgment these strict approaches to constitutional ouster clauses cannot be applied to every case. In fact,*** *Hyatali, CJ* ***in his reasoning recognized that an ouster clause may be usurped if there are 'strong and compelling reasons'. In light of this, I am of the opinion that the breach of fundamental human rights and breaches of natural justice are enough to satisfy 'strong and compelling reasons' and that where such breaches are alleged an ouster may be ignored. There is sufficient authority to support this."***

The learned Judge is clearly contemplating a tussle between the beneficiary of the ouster clause, and the Courts exercising their conventional judicial power; he perceives such conflict as nothing novel, and sees legitimacy in the Courts, in a proper case, "usurping" the protections of the ouster clause.

[127] A Caribbean practice emerges from the ***Austin*** case: namely, that the Court may, where it finds "strong and compelling" cause, "oust the ouster clause". This is clearer still from the Judgment of *Hyatali, CJ* in ***Harrikisson v. Attorney-General of Trinidad and Tobago,*** Civ. Appeal No. 59 of 1975:

> *"I am firmly of the opinion that a Court would be acting improperly if a perfectly clear ouster provision in the constitution of a country is treated with little sympathy or scant respect, or is ignored* ***without strong and compelling reasons."***

[128] The decision in ***Endell Thomas v. Attorney-General of Trinidad and Tobago*** [1982] AC 113 (Privy Council), dealt with a constitutional ouster clause. The issue was whether the ouster clause in Section 102(4) of the Constitution would allow for *judicial review*. This Section provides that a question whether the Police Service Commission has validly performed any function vested in it by or under the Constitution, shall not be enquired into by any Court. The Court thus held:

> "***If the Police Service Commission had done something that lay outside its functions, such as making appointments to the Teachers Service or purporting to create a criminal offence, section 102(4) would not oust the jurisdiction of the High Court to declare that what it had purported to do was null and void.***"

[129] In the ***Endell Thomas*** case, the Judicial Committee of the Privy Council signalled yet another limitation to the applicability of the ouster clause: where –

> ***"the challenge to the validity of an order made by the Commission against the individual officer is based upon a contravention of 'the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligation.'...The general 'no certiorari' clause in section 102(4) does not in their Lordships' view override the special right of redress under section 6."***

[130] In another Privy Council decision, ***Khemraj Harrikison v. Attorney-General of Trinidad and Tobago*** (1979) 31 WIR 348, the scope for judicial intervention when the human rights issue is raised, was considered. Lord Diplock in that case raised a caution as to the demarcation between normal cases of judicial

review for breaches of law by public agencies – on the one hand – and the special protections for human rights and fundamental freedoms – on the other. He expressed himself as follows:

> ***"The notion that whenever there is a 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 Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), 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 unlawful administrative action which involves contravention of any human right or fundamental freedom."***

The significance of the foregoing statement, in the present context, is that it elevates the standing of fundamental rights and freedoms, but without ceding ground to collateral causes such as may seek cover under the eminence of those rights.

[131] In ***In the Matter of the Application by John Rives for Leave to apply for Judicial Review*****,** Supreme Court of Belize Action No. 299 of 1991, the issue before the Court was whether it had jurisdiction to inquire into a decision of the Belize Advisory Council, in view of Section 54(15) of the Belize Constitution. That Section provides:

> ***"The question whether or not the Belize Advisory Council has validly performed any function entrusted to it by this Constitution or any other law shall not be enquired into by any court of law."***

The Court held that it had jurisdiction, in the following terms:

> *"It is clear that the Supreme Court has jurisdiction to inquire into the purported exercise of authority by an inferior court or tribunal, despite the existence of an ouster clause, where it is alleged that such court or tribunal acted in excess of the jurisdiction conferred upon it....****Unique or not, any institution, be it inferior court or superior tribunal, which deals with the legal and human rights of any subject, in any capacity whatsoever, must conform to the time - honoured and hallowed principles of fundamental rights and natural justice.*** *Any allegation that there has been a breach of any of these principles in relation to any person must, in my view, be subject to inquiry by the Supreme Court, irrespective of the calibre of the*

institution in respect of which the allegation has been made" [emphasis supplied].

[132] In coming to this determination, the Court remarked that an ouster clause in a Constitution cannot take precedence over another provision in the Constitution which seeks to protect and preserve the fundamental rights of the individual. Consequently, where the Belize Advisory Council arrived at a decision without having due recourse to the fundamental principles of natural justice, the Courts are seized of jurisdiction to inquire into the validity of such decisions.

[133] In ***Nava v. Native Land Commission*** (1994) FJCA 52, the Court of Appeal of Fiji determined the issue as to whether the decision of the Native Land Commission would be subject to review by the Court, in view of Section 100(4) of the 1990 Constitution which provides:

> ***"For the purposes of this Constitution the opinion or decision of the Native Lands Commission on:***
> ***(a) matters relating to and concerning Fijian customs, traditions, and usages or the existence, extent, or application of customary law; and***
>
> ***(b) disputes as to the headship of any division or sub-division of the Fijian people having the customary right to occupy and use any native lands,***
> ***shall be final and conclusive and shall not be challenged in a court of law."***

[134] The Court, in preserving the decisions of the Commission from being reviewed by the Courts, thus held:

> *"The intention of the Parliament is clear that on matters of custom relating to native lands, the formal courts should not have any jurisdiction. The people most qualified to deal with these matters are the Fijian people themselves who are knowledgeable on matters of custom. The Parliament in its wisdom charged the Native Lands Commission with this responsibility under the* ***Native Lands Act****. The Constitution under s.100(4) renders the decisions and the opinions of the Commission in relation to matters set out under s.100(4)(a) and (b) to be final and conclusive. In the present case, what the appellant sought to do in the High Court was to question or challenge the decision of the Commission on the content or the extent of the Fijian customs and their application to the chiefly position in this particular case.* ***Section 100(4)(a) and (b) of the Constitution clearly protects the decision of the Commission in both respects and the High Court has no jurisdiction to review the decision****"* [emphasis supplied].

[135] In arriving at that decision, the Court took into consideration the fact the Lands Commission had the requisite expertise, and was therefore better placed to adjudicate on matters of customs relating to native lands.

[136] In the Australian case, ***Hockney v. Yelland*** **(1984) HCA,** 72; (1984) 157 CLR 1243, the High Court considered the question whether a privative clause (ouster clause) excluded the remedy of *certiorari* – a conventional administrative law remedy. A medical board had refused compensation to Hockney, on the ground that he had not suffered an injury in the sense prescribed by the Workers Compensation Act 1916 (Cth). Section 14 of that Act provided that the determination of the board…shall be final and conclusive and the claimant shall have no right to have any of those matters heard and determined by way of appeal or otherwise by any Court or judicial tribunal whatsoever. Hockney sought *certiorari* to quash the Board's decision, on the ground

that it revealed an error of law on the face of the record. The issue before the Court was whether Section 14 (c) precluded the issue of writ of *certiorari.*

[137] *Gibbs CJ* held that Hockney's right of recourse to the Court was not to be taken away except by *clear words*. He stated that had the sub-section provided that the determination is not to be 'quashed' or 'called into question' *it would have been effective to oust certiorari for error of law, but not jurisdiction.* He observed that simply providing for 'final and conclusive' determinations is not enough to exclude *certiorari*. The High Court determined that the remedy of *certiorari* was not excluded but, on the facts, there was no error of law disclosed by the decision.

[138] In another case from the High Court of Australia, ***Houssein v. Department of Industry & Technology (1982) HCA,*** 2; (1982) 148 CLR 88, the issue was whether Section 84 (1) of the Industrial Arbitration Act 1940 (NSW) prevented recourse to prerogative writs. The provision read as follows:

> ***(a)....any decision of the commission shall be final; and no award....shall be vitiated by any reason only of any informality or want of form or be liable to be challenged , appealed against, reviewed, quashed or called into question by any court; or judicature on any account whatsoever***
> ***(b) No writ or prohibition or certiorari shall lie in respect of any award ....of....(i) the commission ...or (ii) any member of the commission....relating to any industrial matter or matter in which a tribunal has jurisdiction."***

[139] The Court found that only c*ertiorari* had been sought, and there was no jurisdictional error, error of law or any other basis of review. It held that the words of Section 84 (1) (a) referred to 'quashed' (being the result of *certiorari* and not any other procedure), and were wide enough to include *certiorari,* thereby ousting it. On

the other hand, Section 84 (1)(b) took the unusual step of distinguishing between industrial and other matters, specially protecting the former from review, but not the latter. Even so, the Court determined that the ouster was effective, and no prerogative writ would be issued.

[140] The decision in ***Plaintiff S157 of 2002 v. The Commonwealth of Australia*** [2003] HCA 2 is another relevant case on ouster clauses. In this matter, the plaintiff was a citizen of Bangladesh who had arrived in Australia with an Indian passport. Having been refused a protection visa by the Refugee Review Tribunal, and having failed to have that decision reversed by the Federal Court, he sought to invoke the jurisdiction of the High Court under section 75 (v) of the Constitution, for issuance of writs of *prohibition* and *mandamus* against officers of the Commonwealth. It was claimed on his behalf that he had been denied natural justice. The issue in this case was whether Section 474 of the ***Migration Act 1958 (Cth)*** could be construed as *ousting judicial review by the High Court*. The Section provides as follows:

> ***"(1) A privative clause decision:***
>
> ***(a) is final and conclusive; and***
>
> ***(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and***
>
> ***(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.***
>
> ***"(2) In this section:***
>
> *privative clause decision* ***means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether***

in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).”

The foregoing provisions fall within the context of Section 75 of the Australian Constitution which provides:

“Original jurisdiction of High Court
In all matters – … (v) In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth the High Court shall have original jurisdiction.”

[141] The plaintiff in the Australian case instituted proceedings despite the provisions of Section 474 *of the* Migration Act 1958 (Cth), against the Minister for Immigration and Multicultural and Indigenous Affairs, and the Tribunal. The plaintiff contended that the Migration Act was unambiguous in declaring that decision of the Minister could not be challenged, or subjected to *mandamus*, *prohibition* or *certiorari* in any Court, on any account; and the effect was that the Section purported to oust the jurisdiction conferred upon the High Court by Section 75(v) of the Constitution. The plaintiff urged that Section 474 was invalid, as it led to a denial of procedural fairness, or natural justice, and should be declared so by the High Court.

[142] The Commonwealth, to the contrary, submitted that Section 474 of the Migration Act should not be read literally, as it had a more restricted meaning, having been enacted against a background of established judicial interpretation of similar provisions.

[143] The Court unanimously rejected the ‘literal’ interpretation, affirming however, that the Section would be invalid, had it attempted to oust the Court’s jurisdiction.

After referring to a long line of authorities, all the Judges held that as the constitutional writs of *prohibition* and *mandamus* are available for jurisdictional error, Section 474 could not be read as protecting from review decisions involving jurisdictional error.

[144] *Gleeson CJ* in that case, thus set out the relevant principle:

> ***"The Parliament cannot abrogate or curtail the Court's constitutional function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution.*** *However, in relation to the second aspect of that function, the powers given to Parliament by the Constitution to make laws with respect to certain topics, and subject to certain limitations, enable Parliament to determine the content of the law to be enforced by the Court"* [emphasis supplied].

[145] The learned Chief Justice in that case, was of the opinion that ouster clauses must be construed on the basis that *the legislature does not intend to deprive its citizens of the right to access the Courts*. He acknowledged, however, that *ouster clauses could apply in either State or Federal jurisdiction, and thus in these circumstances, there was a real possibility of inconsistency between one set of principles and another*. In his words:

> ***"Legislation which confers power or jurisdiction on officials or tribunals, or imposes public duties, or enacts laws which govern official conduct, and which, in addition, deprives, or purports to deprive, courts of jurisdiction to control excess of power or jurisdiction, or to compel performance of duties, or to restrain breaches of the law, involves a potential inconsistency."***

[146] As a mode of solution, in case of such inconsistency, the Australian Court thus remarked:

> *"71 There are two basic rules of construction which apply to the interpretation of privative clauses. The first, which applies in the case of privative clauses in legislation enacted by the Parliament of the Commonwealth, is that* ***'if there is an opposition between the Constitution and any such provision, it should be resolved by adopting [an] interpretation [consistent with the Constitution if] that is fairly open.'***
>
> ***"72 The second basic rule, which applies to privative clauses generally, is that it is presumed that the Parliament does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies. Accordingly, privative clauses are strictly construed.***
>
> *"73 Quite apart from s 75(v), there are other constitutional requirements that are necessarily to be borne in mind in construing a provision such as s 474 of the Act. A privative clause cannot operate so as to oust the jurisdiction which other paragraphs of s 75 confer on this Court, including that conferred by s 75(iii) in matters 'in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party'.* ***Further, a privative clause cannot operate so as to allow a non-judicial tribunal or other non-judicial decision-making authority to exercise the judicial power of the Commonwealth. Thus, it cannot confer on a non-judicial body the power to determine conclusively the limits of its own jurisdiction"*** [emphasis supplied].

[147] The stand of the Australian Courts, quite clearly, is that *Parliament bears the popular mandate, and that it can, indeed, provide for an ouster clause*: save that Parliament has to have spoken unequivocally. This is particularly clear from ***Craig v. South Australia*** **[1995] 184 CLR**, in which the High Court observed:

> ***"Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so.***
>
> *The position is of course* ***a fortiori*** *in Australia where constitutional limitations arising from the doctrine of separation of judicial and executive powers may preclude legislative competence to confer judicial power upon an administrative tribunal. If such an administrative tribunal falls into an error which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or at least in some circumstances, to make erroneous finding, or reach a mistaken conclusion, and the tribunal's exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it"* [emphasis supplied].

[148] In another Australian case, ***R v. Hickman; ex parte Fox and Clinton*** (1945) 70 CLR 598 the issue in contention was a Commonwealth Regulation which provided that the decisions of a statutory board, which had the authority to make awards in relation to the coal mining industry and settle disputes between employers and employees, 'shall not be challenged, appealed against, quashed or called into

question, or be subject to prohibition, mandamus, or injunction, in any court on any account whatever.' The High Court upheld the validity of the ouster clause by construing it as defining the extent of a decision-maker's power, rather than as seeking to remove the High Court's jurisdiction to grant relief as allowed by the Australian Constitution. *Dixon J* held that the interpretation of an ouster clause *'becomes a question of interpretation of the whole legislative instrument'*. He set out a rule of construction by which the two contradictory provisions could be read together, thus *allowing a reconciliation of the apparent contradiction* between a provision that granted a limited jurisdiction to a decision maker, and an ouster clause stating that the decision was not to be challenged. In this manner, the ouster clause was not interpreted as seeking to remove the High Court's constitutional jurisdiction, but rather, as protecting a decision made in excess of a decision maker's statutory powers, by *expanding the area of valid decision-making*. However, *Dixon J* also subjected this interpretation to what is now known as the ***Hickman principles:*** firstly, the decision made must be a *bona fide* attempt to exercise the power; secondly, it must relate to the subject matter of the legislation; and thirdly, it must bear a real relationship to the power given to the body.

[149] The first ***Hickman*** condition has been interpreted to require a decision-maker to *act in good faith. If the decision maker acts out of 'malice, spite, dishonesty, or some other improper motivation', then the decision will not be protected by an ouster clause.* The second constraint is considered to entail that an ouster clause will not protect a decision if the decision-maker *strays from the subject matter of the legislation* under which the decision is being made. The third
constraint has been interpreted by the High Court to mean that the decision must not, on its face, exceed the authority of the decision-maker. **(*R. v. Metal Trades Employers' Association,* *ex parte* *Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208).**

[150] The Courts of India too have had occasions to consider the legal standing of ouster clauses. The Supreme Court, in the ***State of A.P. v. Manjeti Laxmi Kantu Rao,*** considered that it was necessary to ascertain legislative intent to exclude jurisdiction, whether this was explicit or arose by necessary implication. *The Court must first try to determine the precise reasons for the exclusion of civil Courts, and consider the underlying justification. Such justification is itself not open to judicial review.* Once the Court satisfies itself of the justification, it should determine whether the statute which bars such jurisdiction provides a *suitable remedy. An alternative remedy, in this respect, must be capable of performing the functions that would have been performed by the civil Court,* in the absence of such exclusion, and must incorporate such order as the civil Court, in like circumstances, would have dispensed. In the absence of such alternative mechanism, the jurisdiction of the civil Court cannot be excluded.

[151] The said decision is largely to the effect that, if the statute bearing the ouster clause can provide an *adequate relief to aggrieved parties*, then there is no need for the issue to be determined by the Courts. But otherwise, the matter cannot be excluded from the Court's jurisdiction.

[152] In England, ouster clauses are also known as "finality clauses". The design of such clauses is that decisions of a particular tribunal cannot be challenged in any Court. However, numerous decisions of the English Courts are to the effect that the Courts do not consider such clauses as excluding judicial review, especially where errors have been made that go to jurisdiction.

[153] In ***R. v. Medical Appeal Tribunal, ex p. Gilmore*** [1957] 1 QB 574**,** the issue involved the National Insurance (Industrial Injuries) Act 1946, under which Section 36 (3) provided that any decision of a claim or question "shall be final". On the basis on an error on the face of the record, the applicant sought the remedy of

certiorari. *Denning LJ* allowed the remedy at the Court of Appeal. He held that *though the words of the statute may have been strong enough to exclude an appeal,* they did not prevent *judicial review*. He found it to be well settled that the remedy by *certiorari* is never to be taken away by statute *except by the most clear and explicit words;* he doubted that the phrase "*shall be final"* was sufficient to achieve this objective. He observed that if tribunals were to exceed their jurisdiction without any checks by the Courts, it would be the end of the rule of law.

[154] A crucial case-reference of the respondents in the instant matter is ***Anisminic v. Foreign Compensation Commission*** [1969] 2 A.C. 147. ***Anisminic Ltd*** was a British mining company which had owned property in Egypt, but during the Suez Canal Crisis in 1956, the property was taken over by Israeli troops. In November 1956 it was sequestrated by the Egyptian Government. In 1957, the Egyptian Government authorized the sale of this company, including a substantial amount of manganese ore, for less than its real value. Dissatisfied with this deal, ***Anisminic Ltd*** sought to discourage its former customers from purchasing its stockpile of ore. As a result, an agreement was reached between the Egyptian Government and ***Anisminic Ltd,*** whereby £500,000 was paid in compensation as full settlement with the Egyptian Government. The agreement did not exclude compensation from other sources. In 1959 a treaty was negotiated between the Egyptian Government and the British Government which provided that 27.5 million pounds was to be paid to the UK for any property confiscated in Egypt in 1956.

[155] The Foreign Compensation Commission was responsible for distributing these funds. This commission was operated under the Foreign Compensation (Egypt) (Determination and Registration of claims) Order 1962. ***Anisminic Ltd*** made a claim. The Commission determined that under this Order, applicants, or their successors in title who made a claim, had to be of British nationality. On this basis, the Commission found that ***Anisminic*** had failed in its claim, as its successor in title

was not a British national. ***Anisminic*** sought a declaration that the Order had been misconstrued by the Commission.

[156] There existed legislation, the Foreign Compensation Act, 1950 which provided under Section 4(4), in unequivocal language, that the determination by the Commission of any application made to it under the Act, was not to be called into question in any Court of law. This statutory ouster clause posed a major obstacle, and it had to be determined whether it could prevent intervention of the Courts.

[157] At first instance, *Browne J* put the issue succinctly:

> ***In my view, where Parliament creates a new inferior tribunal, the High Court has an inherent jurisdiction to supervise and control it, and any person aggrieved by a decision of the tribunal has an inherent right to ask the Court to exercise those powers.***

[158] The House of Lords considered this question and concluded that the ouster clause *only related to valid determinations*. Their Lordships determined that the Commission was acting *ultra vires,* and its determination in this case was void *ab initio;* judicial intervention could not be precluded by such clause. Their position is thus stated by *Lord Reid*:

> *"There are many cases where although the tribunal has jurisdiction to enter on the inquiry it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it has no power to make. It may have failed in the course of the inquiry to comply with the requirement of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to*

act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which by the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But ***if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly"*** [emphasis supplied].

[159] It is a principle of interpretation adopted in ***Anisminic,*** that where a statutory ouster clause is invoked, *Courts should interpret it in a manner likely to preserve the jurisdiction of the Courts*.

[160] "Judicial review", as a process of the rule of law which bears upon the interplay between the Courts and the administrative processes, has been thus depicted by Sir Anthony Mason in his article, '*The Tension between Legislative Supremacy and Judicial* Review' (2003) 77 ALJ 803 (at page 805):

"(1) what Parliament enacts as law within the limits of the powers committed to it by the Constitution must be respected and applied by the courts. The responsibility of the courts to give effect to laws validly enacted by Parliament is a central element of the rule of law;

(2) the courts and the courts alone, under our system of government have the jurisdiction and authority to make an authoritative determination of what the law is;

(3) the rule of law presupposes that the individual has a right of access to the courts for the determination of his or her rights;

the proposition is expressed in the presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily implied; and

(4) judicial review is the means by which the administrative decision-maker is prevented from exceeding the powers and functions conferred by law, with the consequence that individual interests are protected accordingly."

[161] When Courts conduct judicial review, they are in essence ensuring that the decisions made by the relevant bodies are lawful. Consequently, should they find that the decision made is unlawful, Courts can set aside that decision. Judicial review, therefore, can be said to safeguard the rule of law, and individual rights; and ensures that decision makers are not above the law, but have taken responsibility for making lawful decisions, in the knowledge that they are reviewable.

(b) Ouster clauses, and the Principles and Values of the Constitution of Kenya, 2010

[162] Issues pertaining to constitutional governance, and to judicial practices and methods have *certain universal dimensions*: hence the value of the comparative experience to shed light on Kenya's complex jurisprudential matters. Our consideration of the judicial experience in other countries shows that the ouster clause in Constitutions and in statute law is by no means a novelty. It is apparent, in the case of all the jurisdictions we have considered, that the Courts have perceived such clauses as no more than a professional juristic challenge, each to be resolved in the context of its special facts and circumstances. However, the Courts have in general been guided by certain inclinations, especially the following: (i) the legislative bodies have a popular mandate to make law as they find appropriate, in the public interest;

(ii) but their law-making function falls within a constitutional order in which *the Judiciary* is the regular custodian of the rule of law, and of the rights and freedoms of the individual; (iii) it is presumed by the Courts that the legislature perceives them as a critical player in the scheme of the process of justice, and so does not intend to deprive them of jurisdiction, in those cases in which special tribunals or agencies are established to perform particular tasks; (iv) the Courts have a conventional inclination to interpret statutes in a manner that precludes a ceding of jurisdiction to other agencies; (v) subject to these principles, the Courts have recognized that, indeed, there will be proper instances of jurisdiction being conferred upon other agencies by the legislature; (vi) but when the legislature does so, it has an obligation to express itself in *clear, firm and unequivocal language* – otherwise judicial interpretation is apt to take the stand that jurisdiction lies with the Courts; (vii) legislative provision for commensurate remedies at the hands of a non-judicial agency, is a relevant factor in determining whether or not the Court's jurisdiction has been ousted; (viii) it is also a relevant factor whether the ouster clause is likely to be a conduit for excess of power, such as would distort the principle of separation of powers, and the principle of balanced exercise of public powers.

[163] Such are clearly progressive values which the Courts, in the comparative experience, have evolved, within the flexible, Judge-centred common law system which has developed in parallel with the fundamentals of good governance, and with the designs of modern constitutional settings.

[164] New Constitutions, such as that of Kenya, have emerged within a historical context marked by the foregoing developments; and on this account, we are not in agreement with some of the submissions of counsel in the instant matter, that the other countries were partly those associated with unwritten Constitutions, and their ouster clauses only related to ordinary Acts of Parliament and not constitutional charters. For the constitutional pillars of governance were essentially the same,

however detailed, or sketchy the relevant documents were; indeed, some of the statutes providing for ouster clauses could well be regarded as primary constitutional instruments, given their real significance in the countries in question. This is the line of principle which we would adopt, in considering the nature of the ouster clause in the instant case. The comparative jurisprudence, therefore, is a valid and proper reference-point for us in this Judgment.

[165] Article 259(1) of the Constitution of Kenya, 2010 thus provides:

> *"This Constitution shall be interpreted in a manner that –*
>
> **(a)** *promotes its* ***purposes, values and principles;***
> ***(b)*** *advances the* ***rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***
> *(c) permits the development of the law; and*
> (d) *contributes to good governance*" [emphasis supplied].

[166] Now, what interpretation ought to be accorded to the Constitution, for the purpose of *advancing human rights, and the rule of law?* And what line of interpretation will give effect to the "purposes, values and principles" of the Constitution" Or to the charge of "developing the law?" Or to the objects of "good governance?"

[167] Article 10(2) of the Constitution provides that the national values and principles of governance include: rule of law, human dignity and human rights. Chapter Four on the Bill of Rights indicates that the fundamental rights and freedoms are attributable to every individual. Article 21 enjoins the State and its organs to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

[168] Section 23(1) of the Sixth Schedule to the Constitution expresses the key purpose of the vetting process*: to ensure that the Judges and Magistrates continued to serve in accordance with the values and principles set out in Articles 10 and 259.* This shows the vital place held by the Bill of Rights in our Constitution, and the importance of adhering to the rule of law. Section 23(2) contains the *constitutional ouster clause* which relates to the decisions of the Vetting Board; such decisions are not subject to question, or review, *by any Court*. This runs in parallel with a *statutory ouster*, in the Vetting of Judges and Magistrates Act, Section 22 (4) (which echoes the provisions of Section 23(2) of the Sixth Schedule to *the Constitution*).

[169] In order to give effect to the values and principles declared in the Constitution, Article 22 gives the right to any person to institute Court proceedings, to enforce the Bill of Rights.
Article 22 (1) provides:

> ***"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."***

[170] Pursuant to Article 23 (1) of the Constitution, the High Court can hear and determine applications for redress, in respect of denial, violation, infringement or threat, against a right or fundamental freedom in the Bill of Rights, in accordance with Article 165. In the light of Section 23(2) of the Sixth Schedule, what redress does a person have, as regards infringement of fundamental rights and freedoms by the Vetting Board? Article 25 provides that the right to a fair trial cannot be limited. Under the Constitution, every person has a role to play in the implementation process. Consequently, the vetting Board ought to be guided by the Constitution, as it undertakes its mandate. It ought to be alive to the fundamental rights and freedoms safeguarded by the Constitution, for all individuals. Indeed, pursuant to Section 5 of

the vetting statute, the Vetting Board's guiding principles are the standards of *judicial independence, natural justice and international best practices*.

[171] Where an individual is denied fair trial, the Constitution states that such a person has a right to institute proceedings seeking to enforce this right – a right that cannot be limited. The constitutional ouster clause therein, therefore, ought to be *interpreted in a manner that safeguards the fundamental rights and freedoms enshrined in Chapter 4 of our Constitution*.

[172] The ultimate power of interpretation of the Constitution, or the statutes, rests with the Court. The Courts, therefore, will always jealously guard their jurisdiction, and save it from being inappropriately curtailed. The preliminary question as to whether the High Court has jurisdiction, eminently falls in the first place to that Court. The High Court has the obligation to consider the question carefully, in the light of all relevant law, and on the basis of legal reasoning and of constructive precedent, thereafter determining whether or not it has jurisdiction in that particular instance. In a case such as the instant one, in which it was alleged that the Constitution's fundamental rights and freedoms had been violated, the High Court, on a *prima facie* basis, indeed had the jurisdiction to determine whether or not it had jurisdiction, in the light of the ouster clause.

[173] Comparative law, insofar as it synthesizes the broad span of social experience and provides a reference-point for perceiving the particular case, is in a true sense, the very scientific paradigm for the Judge. And from our review of the comparative example, we have found that, protective though they be of their jurisdiction, or of their mandate to determine issues of fundamental rights and freedoms, the Courts have recognized proper instances of ouster clauses in law. Such clauses may properly confer exclusive merit-issues in respect of a particular question, upon a non-judicial agency: owing to the unique elements of that question; and owing to particular needs

and priorities that have been publicly acknowledged. However, any public agency thus entrusted with special responsibility, is under obligation to incorporate certain special safeguards for the public interest: such as acting validly within the prescribed remit; acting in all good faith; restraining itself from infringing upon fundamental principles of law and of the Constitution; adopting transparent and fair procedures; securing the rights of any persons affected. In short, the relevant principle is that the said public agency is to sustain the public interest, and the established principles of law and the Constitution. The public agency is to act consistently with the "purposes, values and principles" of the Constitution, and is to keep in tune with the objects of "good governance."

[174] It follows that where a judicial or quasi-judicial body (such as the Judges and Magistrates Vetting Board, in the instant case) exercises jurisdiction, it properly falls to the High Court to inquire as to the course taken in arriving at such a body's decision: did it have jurisdiction? Did it do something falling outside its jurisdiction? Did it omit some fundamental step in arriving at its decision? And consequently, does its decision stand, or is it a nullity?

[175] The main issue for determination herein is whether Section 23(2) of the Sixth Schedule to the Constitution ousts the review jurisdiction of the High Court of Kenya, otherwise provided for in Article 165(6) of the Constitution, with respect to the *removal,* or a *process leading to the removal from office of a Judge*. Learned counsel, on this question, devoted themselves to finding an answer within the general concept of the "supervisory jurisdiction of the High Court."

[176] It was the position of the Law Society of Kenya that the Judges and Magistrates Vetting Board was exempt, by virtue of the ouster clause, from the Court's supervision as regards the question of *removal of a Judge from office*, or the *process of removal of a Judge from office*: so that the Board would only be subject to such

supervision if it departed from its remit, for instance, by determining that a medical doctor be removed from office; or by rendering a criminal judgment against a Judge. It was urged that if the Vetting Board departed from its remit in such a manner, then the residuary jurisdiction for supervision by the High Court would set in. It was submitted that such a supervisory jurisdiction was not, on account of the ouster clause, applicable to the vetting process.

[177] The foregoing argument was buttressed by the observation that the Vetting Board had the unique character of being entrusted with both administrative and judicial powers – so that it could be sued in respect of exercises of the first, but not the second category of powers.

[178] Learned counsel Mr. Rao, on behalf of the Vetting Board, submitted that Section 23 of the Sixth Schedule to the Constitution is, in effect, an ouster of the supervisory jurisdiction of the High Court, in that its ordinary meaning (as flows from Section 23(2)) excludes judicial review. He urged that there is no conflict between the High Courts' general powers of review and supervision as provided for in Article 165, on the one hand, and the exclusionary rules of ouster, as embodied in Section 23 of the Sixth Schedule, on the other hand; for Section 23(2) deals specifically with the jurisdiction of the Courts in relation to vetting; and that Section, in effect, stipulates that a Court must down its tools, when faced with a question relating to the *"removal, or a process leading to the removal of a judge from office by virtue of legislation contemplated under subsection 1"*.

[179] Accordingly, the position taken by the Judges and Magistrates Vetting Board is that Section 23(2) of the Sixth Schedule does not detract from the broader constitutional position: the High Court retains jurisdiction to verify that the Vetting of Judges and Magistrates Act conforms to the constitutional standard contemplated under Section 23(1) of the Sixth schedule.

[180] The respondents would not subscribe to such a delicate distinction between the High Court's broad powers of supervision, and the more narrowly-defined mandate of the Vetting Board. The 2nd respondent's position, for instance, is that the Vetting Board is so radically inferior to the High Court, that it must be subject to the supervisory jurisdiction, so long as the Board exercises judicial functions. It was the 2nd respondent's position that the High Court's supervisory authority by virtue of Article 165(6) of the Constitution, in relation to inferior bodies exercising judicial and quasi-judicial powers, is entirely unqualified: and so it is not tenable to read into Article 165(6) the exceptions embodied in Section 23(2) of the Sixth Schedule to the Constitution.

[181] The 2nd respondent is, thus, in agreement with the holding of *Kiage, JA* that the Vetting Board is a creature of statute, and that statute cannot be injected into Article 165(6), to compromise the full force of Article 165(6) of the Constitution.

[182] The Judicial Service Commission (4th respondent), however, has submitted that the provisions of the Sixth Schedule should be interpreted in harmony with the provisions of Article 165 of the Constitution. The JSC, in this regard, cited the persuasive authority of the Australian case, ***James v. Commonwealth of Australia*** [1936] AC 578, wherein the following passage occurs:

> ***"A Constitution must not be construed in a narrow or pedantic manner and construction must be beneficial to the widest possible amplitude of its powers,...and a broad and liberal spirit should inspire those whose duty is to interpret the Constitution".***

[183] The Judicial Service Commission takes the position that the Constitution insulates the decisions of the Judges and Magistrates Vetting Board from review, or being questioned by any Court; but it does not contest the proposition that the High Court retains a residual jurisdiction under Article 165(3)(b), to determine whether fundamental rights and freedoms of individual Judges and Magistrates have been violated in the vetting process. Learned counsel for the JSC submitted that Article 165(3)(d)(ii) ensures the High Court has jurisdiction to hear any question regarding the interpretation of the Constitution, where the act in question is said to be done under the authority of the Constitution.

[184] For the Attorney-General, it was submitted that in light of Section 23 of the Sixth Schedule ,the Court of Appeal's distinction between "judicial review" and plain "review" was insufficient to bring under the jurisdiction of the High Court any proceedings forming part of the process of removal of a Judge, or a decision of the Vetting Board that a Judge was unfit to continue to serve under the new constitutional order. Learned counsel contested the following remark of the Appellate Court (*Odek J.A.,* at para.27):

> ***"interpretation of Section 23(1) of the Sixth Schedule explicitly shows that judicial review under the High Court's supervisory jurisdiction as conferred by Article 165 of the Constitution is not ousted in the vetting process".***

[185] The Attorney-General's position was that as the Appellate Court had rightly recognized the Vetting Board as a unique body with the task of restructuring the Judiciary, in accordance with the Constitution, it should have held that there was no scope for judicial interference with the functions of the Board; and that during the transitional period, the High Court had no constitutional role in the matter. The

Attorney-General urged that the Court does not have jurisdiction in matters relating to the process of removal of Judges, through the vetting process.

[186] The 8th and 9th respondents urged that Article 23(1) of the Constitution expressly vests in the High Court the jurisdiction to hear and determine questions on whether fundamental human rights have been breached; and that the matters currently pending at the High Court of Kenya, having been lodged by Judges subject to vetting, fall squarely within the enforcement and interpretive jurisdiction of the High Court, under Articles 23(1) and 165 (3) (b) and (d) of the Constitution. These two parties also anchored their cases upon Article 165(6) of the Constitution, which relates to the High Court's supervisory powers over subordinate Courts and over any person, body or authority exercising a *judicial or quasi-judicial function*. They urged that the 1st appellant being a body exercising quasi-judicial authority, is *prima facie*, amenable to the supervisory jurisdiction of the High Court.

[187] *Article 262 of the Constitution* provides for the coming into effect of certain "transitional and consequential provisions," set out in the Sixth Schedule. Among such provisions is *Section 23*, which required that within one year, Parliament should enact legislation establishing mechanisms *for vetting for suitability all Judges and Magistrates who were in office at the time of the promulgation of the Constitution*. The purpose of the vetting is to ascertain, by the mechanisms of the relevant body, *"the suitability"* of such judicial officers *"to continue to serve in accordance with the values and principles set out in Articles 10 and 159"* (Section 23(1) of the Sixth Schedule to the Constitution).

[188] It is a logical inference, in our perception, that *the vetting process was anchored in law, in the shape of the Constitution (Article 262), and the Vetting of Judges and Magistrates Act (Cap. 8B, Laws of Kenya).* In March 2011, the Act came into force, establishing the Judges and Magistrates Vetting Board, which was to

conduct the vetting. The Board's mandate is *to vet all Judges and Magistrates who are serving in the Judiciary, who were in office on the effective date, for suitability to continue to serve in accordance with the values and principles set out in Articles 10 and 159 of the Constitution*. Article 2(3) of the Constitution provides for the supremacy of the Constitution over other laws; and there have been challenges to the validity of Section 23(1) of the Vetting of Judges and Magistrates Act. But in ***Dennis Mogambi Mong'are v. The Attorney-General and Two Others***, Nairobi High Court Petition No. 146 of 2011 *(Ngugi, Majanja and Odunga, JJ)* it was unanimously held as follows (para. 70):

> ***"We do not see anything in these provisions that is in conflict with the provisions of the Constitution. The provisions have been enacted in conformity with the provisions of Section 23 of the Sixth Schedule. Having found that Section 23 of the Sixth Schedule is not in conflict with the Constitution, it follows that these Sections of the [Vetting of Judges and Magistrates Act] in which Parliament has enacted provisions that echo the constitutional provisions, are valid."***

[189] The High Court's determination was subsequently affirmed by the Court of Appeal (Civil Appeal No. 123 of 2012), in respect of which certain passages in the Judgment are eminently relevant in this instance:

> ***(i) "I find that transitional provisions and Schedules are only sequential provisions; they must be applied and implemented before the provisions in the main Articles of the Constitution can be effective. In other words, transitional provisions are….constitutional conditions-precedent to the operation of specified Articles of the Constitution. In the context of this appeal, the transitional provision in Section 23 of the Sixth Schedule is not***

an overriding Section, but a Section which requires an individual Judge or Magistrate to be vetted before he/she can continue to serve the new Constitution. Section 23 of the Sixth Schedule constitutionalises the vetting process, and vetting is thus made a constitutional condition-precedent for a Judge or Magistrate to continue to serve under the 2010 Constitution" *(Odek, JA*, at para.69).

(ii) "On the constitutionality of Section 19(3) of the [Vetting of Judges and Magistrates Act], I note that the Sub-section requires that every Judge or Magistrate to be vetted should be given sufficient notice. This is a rule of natural justice. In line with Article 159(2)(c) of the Constitution, one of the facets of the rule of law is that an individual is entitled to adequate notice and the particulars of any complaint against him/her. This principle is recognized in Article 50(2)(b), (c) and (j). It is my considered view that Section 19(3) and (4) of the [Vetting of Judges and Magistrates Act] is in conformity with the provisions of Article 50 of the Constitution....I do find that Section 19(5) of the [Vetting of Judges and Magistrates Act] is constitutional as it complies with Article 10(2)(a),(b) and (c) of the Constitution relating to the values...of rule of law, human rights, good governance [and] transparency as well as Article 28 which [safeguards] the dignity and human rights of the individual Judges. Section 19(5) of the [Vetting of Judges and Magistrates Act] is also in conformity with Article 50(2)(d) of the Constitution to the extent that the hearing by the Vetting Board shall not be conducted in public, unless the concerned Judge or Magistrate requests a public hearing. I find that Section 19(6) of the [Vetting of Judges and Magistrates Act] is constitutional as it encompasses the objects and purposes of the Constitution wherein the rules of natural justice apply to the

Vetting Board's proceedings. In sum-total, my analysis of Section 19 of the…Act as compared to Articles 10 and 159 of the Constitution reveals that the Section is *intra vires* ***the Constitution****" (Odek, JA* at para.85).

[190] Both superior Courts held that a right of appeal from the determination made by the Judges and Magistrates Vetting Board could not be read from the terms of the Judges and Magistrates Vetting Act, or from Section 23 of the Sixth Schedule to the Constitution. It was held that the Constitution had foreclosed the possibility of appeal to a higher Court, and such a right could not be judicially implied.

[191] In our perception, just as in that of the learned High Court and Court of Appeal Judges in the ***Dennis Mogambi Mong'are*** case, the ouster clause is not devoid of valid and effective grounding in law. The Constitution itself speaks from the platform of *Article 262* (on "transitional and consequential provisions"), and by *Section 23(2) of its Sixth Schedule*, declaring thus:

> *"A removal, or a process leading to the removal, of a judge, from office* ***by virtue of the operation of legislation*** *contemplated under subsection (1) shall not be subject to question in, or review by, any court."*

[192] Hardly any cogent argument has been advanced before this Court, that the Judges and Magistrates Vetting Act, which implements the ouster clause, is not indeed the legislation contemplated under Section 23(1) of the Sixth Schedule to the Constitution; and as there is no other legislation such as would claim that status, we have come to the conclusion that there is nothing out of harmony in the *common purpose of the Constitution, Section 23 of its Sixth Schedule, and the relevant statute* – the Judges and Magistrates Vetting Act.

[193] It follows that a contest to the decision of the Judges and Magistrates Vetting Board, insofar as such a decision affects particular Judges involved in the vetting process, is in effect, a collateral challenge to the Board's authority: and this would be inconsistent with the terms of the Constitution.

[194] The foregoing point clearly falls within the relevant historical context. It is to be recalled that the vetting process for judicial officers was the people's command, for the purpose of aligning the Judicial Branch to the new Constitution. Such a design is clear from the fact that the vetting process was defined by a restricted, transitional time-frame the logistics of which were regulated by a dedicated Schedule to the Constitution. The transitional concept is well depicted in the dissenting Judgment of *Lady Justice Sichale* at the Court of Appeal, as follows:

> ***"When a new Constitution is introduced, a range of provisions [is] needed to ensure that the move from the old order to the new order is smooth and, in particular, ...the changes expected by the new Constitution are ...effectively [implemented] [so as to sustain] [the] institutions that are retained under the new Constitution.... [Such] transitional provisions...are usually not included in the body of the Constitution because they have a temporary lifespan. Instead they are included in a schedule which is part of the Constitution but, because it is appended at the end..., its provisions will not interfere with the permanent provisions of the Constitution in the future."***

[195] The learned Appellate Judge thus proffers true justification for the design of Section 23 of the Sixth Schedule to the Constitution: it is a transitional and consequential provision, which is the foundation for the Vetting of Judges and Magistrates Act – the detailed law giving effect to the vetting principle of the constitutional document.

[196] By the Constitution and by the Vetting of Judges and Magistrates Act, a comprehensive scheme is established, as a valid basis for the vetting process for Judges and Magistrates. The Vetting Board is required to vet the judicial officers *in accordance with the principles set out under Articles 10 and 159 of the Constitution* (see para. 173 of this Judgment). Article 10 in this regard, spells out the "national values and principles": the rule of law; democracy and the participation of the people; human dignity; equity; social justice; inclusiveness; equality; human rights; non-discrimination; protection of the marginalized; good governance; transparency and accountability. And Article 159 sets out three principles of operation: justice to be rendered to all persons irrespective of status; justice is not to be delayed; justice be done without undue regard to technicalities.

[197] It is in that *broad context of principles and values*, that the Judges and Magistrates Vetting Act is to be seen. Its operations, centred on the Vetting Board, were conceived as *transitional;* it would conclude its mandate during the transitional period.

[198] It emerges, as we have set out in detail, that the process of vetting for Judges and Magistrates is a *requirement* of the Constitution of Kenya, 2010; and that by a valid ouster clause, the main question which relates to the *suitability of a judicial officer to continue in service* under the new constitutional dispensation, is a matter reserved by law to the Judges and Magistrates Vetting Board. Not only is this the only tenable position in our perception, but it also emerges from relevant authority relied upon by *Sichale, JA* in her dissenting opinion: ***Harrikison v. Attorney-General of Trinidad and Tobago*** (1979) 31 WIR 348. The learned Judge made the following apposite inference:

> ***"I am of the opinion that a Court would be acting improperly if a perfectly-clear ouster provision of the Constitution of a country***

[in] which it is [the] supreme law is treated with little sympathy or [with] scant respect, or is ignored, without strong and compelling reasons."

[199] This is the background against which we now proceed to resolve the main question brought before this Court. That question is *"whether Section 23(2) of the Sixth Schedule to the Constitution of 2010 ousts the jurisdiction of the High Court to review the decision of the Judges and Magistrates Vetting Board declaring a Judge (or Magistrate) as being unsuitable to continue serving as such."*

[200] We find that neither the High Court's Ruling of 30th October, 2012 nor the Court of Appeal's decision of 18th December, 2013 achieved clarity as to the relationship between the Courts' jurisdiction, on the one hand, and the jurisdiction of the Judges and Magistrates Vetting Board, on the other hand. We would clarify that by the terms of the Constitution itself, the High Court's general supervisory powers over quasi-judicial agencies, and its mandate in the safeguarding of the fundamental rights and freedoms of the Constitution, by no means qualify the ouster clause which reserves to the Judges and Magistrates Vetting Board the exclusive mandate of determining the suitability of a Judge or Magistrate in service as at the date of promulgation of the Constitution, to continue in service. The basis of the said ouster clause is found in the history attending the Constitution; in the requirement of the Constitution for essential transitional arrangements; and in the express terms of the Constitution, by virtue of which the Vetting Board was established to determine the suitability of certain judicial officers, for the purposes of the values and principles declared in the Constitution itself.

[201] The intent of the Constitution is to be safeguarded by the High Court, even when that Court acts within its supervisory remit in relation to quasi-judicial bodies, with the recognition that a holistic interpretation of the Constitution requires the

fulfilment of its transitional provisions, such as those relating to the vetting process for Judges and Magistrates.

[202] For the avoidance of doubt, and in the terms of Section 23(2) of the Sixth Schedule to the Constitution, it is our finding that none of the Superior Courts has the jurisdiction to review the process or outcome attendant upon the operation of the Judges and Magistrates Vetting Board by virtue of the Constitution, and the Vetting of Judges and Magistrates Act.

G. THE CONCURRING OPINION OF MUTUNGA, CJ & PRESIDENT

[203] I concur with the opinion of the majority and the final orders. I further write separately to expound on the jurisprudential route of the two dissenting Judges at the Court of Appeal, and to reinforce this Court's mainstreamed theory of constitutional interpretation. Under ***Article 163(7)*** of the Constitution this theory of constitutional interpretation binds the Superior Courts and the Magistrate's Courts.

[204] I adopt the respective dissenting opinions of the learned Appellate Judges, *Murgor* and *Sichale, JJ.A*. which present persuasive, authoritative textual and historical arguments to support the conclusion that the decisions of the Judges and Magistrates Vetting Board are not subject to review by the High Court. Although the High Court and the majority in the Court of Appeal convincingly argued, relying on jurisprudence from various jurisdictions, that the High Court has supervisory jurisdiction over the decisions of the Vetting Board, they had not appreciated the unique historical context in which Kenya's Constitution should be interpreted.

[205] In their separate dissenting opinions, both *Murgor* and *Sichale JJA*, held that the transitional provisions were enacted in the Schedules to the Constitution

because they were meant to be operative for a limited period of time. *Murgor* and *Sichale, JJA* found that there was no reason to incorporate the Vetting Board in ***Article 165(6)*** of the Constitution, because doing so would have required amending the Constitution. They further found that the transitional provisions were also enacted to avoid encumbering the Constitution with provisions that would cease to be of any consequence once the Constitution was fully implemented. They held that this was, therefore, a rationale for suspending the supervisory jurisdiction of the High Court in this specific, and time-prescribed period of vetting. *Murgor, JA* reiterated the Court of Appeal's finding in ***Center for Rights Education & Awareness (CREAW) & another v. John Harun Mwau & 6 others***, Civ. App. No. 74 of 2012; [2012] eKLR, where that Court held that although the Sixth Schedule is an integral part of the Constitution, and has the same status as the other constitutional provisions, it is meant for a limited duration. Both Judges of Appeal adopted this Court's position that the Constitution is to be read as a whole.

[206] This Court has set out construction guidelines, and mainstreamed the interpretation of Kenya's new Constitution. In particular, we have observed that the Constitution should be interpreted in a holistic manner; that the country's history has to be taken into consideration; and that a stereotyped recourse to the interpretive rules of the common law, statutes or foreign cases, can subvert requisite approaches to the interpretation of the Constitution (s*ee* ***Communications Commission of Kenya & 5 others v. Royal Media Services Ltd. & 5 others***, Sup. Ct. Petition No. 14 of 2014; [2014] eKLR (***CCK***) (at paragraphs 137, 356 and 358)).

[207] In the ***CCK*** case, we held that the Constitution has to be interpreted holistically, within its context, and in its spirit (at paragraph 137). In that case we took into account this Court's advisory opinion in ***In Matter of the Kenya National Human Rights Commission***, Sup. Ct. Advisory Opinion No. 1 of 2012; [2014] eKLR, where we had stated (at paragraph 26):

> *"…But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context**. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances.** Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result"* **(**emphasis supplied).

[208] The Court earlier recognised this holistic approach to constitutional interpretation in ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate,*** Sup. Ct. Appl. No. 2 of 2012, where it held (at paragraph 83):

> ***"We would state that the Supreme Court, as a custodian of the integrity of the Constitution as the country's charter of governance, is inclined to interpret the same holistically…"***

[209] This Court has also found that Section 3 of the Supreme Court Act introduces such non-legal phenomena into constitutional interpretation, as tend to enrich the evolving jurisprudence in constitutional interpretation (s*ee the* ***CCK*** case at paragraph 357 – *citing* ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others***, Sup. Ct. Petition No. 2B of 2014; [2014] eKLR at paragraph 233). The Supreme Court Act is so designed as to allow the Court significant scope for exploring the interpretive space in Kenya's history. In particular, Section 3(d) provides:

> *"(d) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation**, to be determined having due regard to the circumstances, history and cultures of the people of Kenya"*** (emphasis supplied).

[210] Thus, in interpreting the Constitution, Courts must take cognizance of Kenya's unique historical context which is aptly captured in the majority opinion, and by the dissents of *Murgor* and *Sichale JJA*. In holding that the English case, ***Anisminic*** was not applicable to the vetting process, *Murgor JA* observed that where the ouster clause is part of *the Constitution* itself, most jurisdictions such as the West Indies, India and England have followed the principles set out in ***Anisminic***. The learned Judge held (at paragraph 76) that given Kenya's unique historical circumstances, ***Anisminic*** was not applicable *"on all fours,"* in the interpretation of Section 23(2) of the Sixth Schedule to the Constitution; hence that case is to be distinguished.

[211] The learned Judges of Appeal were clearly heeding the caution which Professor Gathii has expressed. He has urged us not to develop what he has termed a "two-tracked system of judicial review," with decisions influenced by the common law on the one hand, and others decided under the judicial review principles enshrined in the 2010 Constitution, on the other hand (see his paper, *"The Incomplete Transformation of Judicial Review,"* presented at the Annual Judges' Conference, 2014 under the theme, "Judicial Review in Transformative Constitutions: The Case of the Kenya Constitution, 2010," Nairobi, August 19, 2014; *see also* the ***CCK*** case at paragraph 361). In the ***CCK*** case, this Court cautioned against *"unthinking deference to canons of interpreting rules of common law, statutes, and foreign cases…"* which can subvert the theory of interpreting the Constitution (at paragraph 358).

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

Compromises of this kind have the tendency to create legal penumbras; and it is such penumbras that the Supreme Court is called upon to illuminate. In the ***CCK*** case, the Court recalled its decision in ***Speaker of the Senate & another v. Attorney General & 4 others***, Sup. Ct. Advisory Opinion No. 2 of 2013; [2013] eKLR where it had stated that (paragraph 156):

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

[213] Thus, the ouster clause in issue in this matter ought to be strictly construed as a *transitional clause*, in the context of Kenya's unique historical background. The supervisory jurisdiction of the High Court, and indeed the jurisdiction of any other Court, should remain in abeyance during the vetting process – as this is what the Kenyan people demanded. The people's voice is clearly and unambiguously sounded in the Constitution, and it remains supreme. What Kenyans wanted and envisaged was a new Judiciary, that they would have confidence in – with the new Judges being selected through a competitive process by the Judicial Service Commission, and the sitting Judges undergoing a vetting process, undertaken by an independent body, *the Vetting Board*. The voice of the people cannot be silenced or subverted by any Court of law, or any other institution.

[214] This Court has also found that no provision of the Constitution is "unconstitutional". Thus, although the Constitution does not obliterate judicial review, the fundamental principles of judicial review can be suspended as a transitional matter. The Vetting of Judges and Magistrates Act bears fidelity to the ouster clause, signalling that the intention was to suspend judicial review, in the transitional period. However, the Act has provisions to ensure that due-process concerns are duly addressed. The Court of Appeal (*Odek, JA*) in this matter, held

that the Bill of Rights must be seen and read as part and parcel of the vetting procedures (at paragraph 53, p. 67). The Act specifically preserves judicial officers' due-process rights, and allows them to seek review before the Board (Section 22 of the Act).

[215] In the context of such painstaking care on rights-issues, in the conception of the vetting scheme, I have great difficulties with the argument that the ouster clause could have subverted, or even suspended the human rights of the Judges being vetted. The Act comprehensively addresses these constitutional concerns, as *Justice Odek* rightly finds. It is on this basis that the ouster clause is harmonized with the provisions of Bill of Rights, in Chapter 4 of the Constitution.

[216] Once the historical context of the ouster clause is appreciated, its harmonization with the provisions on the supervisory jurisdiction of the High Court, and the suspension of that jurisdiction during the transitional period, cannot be doubted. In the apposite words in the Ugandan case, ***Tinyefuza v. AG***, Constitutional Appeal No. 1 of 1997, [1997] UGCC 3:

> ***"...the entire Constitution has to be read as an intergrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution."***

[217] In my concurring opinion in ***Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others***, Sup. Ct. Pet. No. 4 of 2012; [2013] eKLR, I stated (at paragraph 101) that:

> *"While our jurisprudence should benefit from the strengths of foreign jurisprudence, it must at the same time obviate the weaknesses of such jurisprudence, so that ours is suitably enriched, as decreed by the* ***Supreme Court Act"*** (emphasis supplied).

Thus, the purpose of our theory of constitutional interpretation is *to rescue the weakness of comparative jurisprudence, while at the same time building on its strengths.*

[218] Although certain jurisdictions, such as India and Germany, have perceived judicial review as an immutable structure of their Constitutions, these jurisdictions do not have Constitutions that are as unique as Kenya's. We must ask whether the foreign jurisdictions we seek reliance upon, have Constitutions and, if they do, whether these Constitutions have provisions akin to ***Articles 1, 23, 159*** and ***259*** which emphasize the *sovereignty of the people*; or whether they have *principles and values,* like the ones found in Article 10, which apply to the interpretation and application of the Constitution; or whether they have legislation similar to our *Supreme Court Act,* which introduces Kenya's historical context into the interpretation of the Constitution. If the answers to these questions are in the negative, then the common law doctrines found in other jurisdictions, foreign cases and foreign constitutions, must be interpreted in such a manner as to reflect our modern Constitution, and our unique conditions and needs.

H. THE CONCURRING OPINION OF RAWAL, DCJ AND VICE-PRESIDENT

[219] I concur entirely with the decision of the majority, but write separately to elaborate the constitutional interpretation of the normative, prescriptive nature of Section 23 of the Sixth Schedule to the Constitution, *vis-á-vis* the institutional, transitional requirements under the Constitution. I also note from the decision of the majority that whereas Section 23 of the Sixth Schedule covers the aspect of *review* (which was extensively and almost exclusively canvassed by the parties), it also specifically bars the *questioning of* the decisions of the Vetting Board by any Court. It is this second aspect of *'questioning,'* that this opinion partly examines. The

framework of this opinion takes root in the Constitution of Kenya, with its supporting statutory referencing, drawing also from comparative judicial perspectives.

[220] I remain convinced that, as this Court held in ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate,*** Sup. Ct. Advisory Opinion Appl. No. 2 of 2012, a broad, purposive and fused interpretation of the Constitution is requisite. In particular:

> *"Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a* ***fused form*** *in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions…."*

[221] The vetting of Judges and Magistrates was one of the constitutional precursors to the enforcement of Chapters Six and Ten of the Constitution, and was intended as a mechanism for the judicial fulfillment of Articles 10 and 159 of the Constitution. Based upon the intended objective of the vetting process, it was also a filter, to ensure that according to the dictates of Article 73, the authority entrusted to Judges and Magistrates as State Officers would be exercised in a manner that enhances public confidence in the integrity of the office (and the institution) of the Judiciary. In order

to ensure that this was effected, Section 13 of the Vetting of Judges and Magistrates Act (Cap 8B, Laws of Kenya) [VJM Act] sanctioned the vetting of Judges and Magistrates, conducted in accordance with the provisions of the Constitution and the VJM Act. This requirement, as elaborated under Section 23 to the Sixth Schedule, underscored vital object of examining the *suitability* of judicial officers appointed in the pre-2010 constitutional era, to continue serving in accordance with the Constitution, and in the reformulated framework of constitutional governance in Kenya. As such, the foundational objective of the vetting process was the psychic alignment of the Judiciary to the dictates of the Constitution, both in *institutional* and *leadership* capacities. This transformation or realignment was to be guaranteed primarily through the process of vetting, to ensure the commitment of the Judges and Magistrates in office, to constitutional imperatives, in values and principles. As a point of emphasis, the examination of this constitutional alignment was to be conducted in accordance with the Constitution.

[222] Section 23 of the Sixth Schedule to the Constitution, as indicated in the Judgement of the majority, bears certain notable elements: first, the time-prescription of the Constitution for the enactment of required legislation; and secondly, the limitations of time attached to the vetting mechanisms and procedures. Such time prescription reinforces the transitional nature of the vetting process. This transitional aspect was specifically prescribed to guarantee the *suitability* of all Judges and Magistrates serving in the pre-2010 constitutional era to serve as Judges and Magistrates within the normative scheme of the Constitution. This transitory mechanism can be seen as an addition to the normative guarantees mandated by the Constitution, in its governance profile. It is worthy of note, that the vetting clause elevates the effect of the statutory provision that was anticipated beyond that of Article 160 (Independence of the Judiciary), Article 167 (Tenure of Office of the Chief Justice and other Judges) and Article 168 (Removal from Office). In passing the Constitution, Kenyans may be regarded as saying: *"We acknowledge the*

independence of the judiciary - the post-transitory Judiciary." In addition, the Constitution entrenched several mechanisms to ensure that the objectives achieved by the vetting process would be constantly sustained, by other institutions, and through mechanisms established or authorized under the Constitution, agencies in this category being, for instance, the Judicial Service Commission.

[223] Besides ousting the jurisdiction of the High Court, or any other Court for that matter, in reviewing either the removal or the process leading to the removal, of a Judge from office, the Constitution in my view, also excluded the powers of the High Court to exercise original jurisdiction in claims brought before it as a consequence of the mandate of the Vetting Board. The application of the phraseology, "shall not be subject to question in," in my view, represents an immunity for the Vetting Board's decision. The intended finality of the decisions of the Vetting Board is further reinforced. *Black's Law Dictionary* (9th Edition), at pp. 1366 defines ***"question"*** as ***"2. An issue in controversy; a matter to be determined."*** The Constitution specifies the causes of action open to the remit of the High Court. Article 165 (3) (b) gives the High Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Article 165 (3) (d) further empowers the High Court to hear any question regarding the interpretation of the Constitution. This jurisdiction, is distinguished from the High Court's appellate jurisdiction [Art.165 (3)(c)], and its supervisory jurisdiction [Art. 165 (6)].

[224] The precursors to the judicial provisions in the new Constitution can be traced back to the processes outlined at paragraphs 79-92 of the Judgement of the majority; and its mode of operation can be recognized from the recommendations of the Taskforce on Judicial Reforms, led by the Mr. Justice Ouko, which was appointed on 29th May, 2009. While the initial Taskforce dealt with issues unique to the Judiciary before the promulgation of the Constitution, its expansion following the

presentation of its initial report was mandated to consider the recommendations in the initial Report, against the provisions in the proposed Constitution. It was also required to consider any other measures or proposals necessary to strengthen and enhance the performance of the Judiciary. This Taskforce recommended that legislation be enacted to establish an independent tribunal, and mechanisms and procedures for vetting sitting Judges and Magistrates, as envisaged in Clause 23 of the Sixth Schedule to the proposed Constitution. The Taskforce recognized (page 81 of its Report) that the vetting process was a means of restoring public confidence in the Judiciary, and providing a fresh start under the new Constitution. Essentially, it was seen as a duty on the part of the State to prevent the recurrence of human rights abuses, corruption, and abuse of office, within the Judiciary.

[225] It is clear that the vetting process as conceptualized, was an act in institutional accountability and, ultimately, an aspect of the re-birth of a State guided by norms of Constitutionalism. The assurance of such accountability, through the process of vetting, is what has been challenged, in the instant matter, as creating a jurisdictional conflict with the High Court which also plays a critical role in guaranteeing constitutional accountability, through the enforcement of the Constitution. But as already noted, the vetting process was premised upon a call by Kenyans, to regularize the delivery of justice by the Courts. The past malaise in the Judiciary had necessitated the conception of a mechanism to restore public confidence in that organ. Vetting was a constitutional obligation defined and set out in the Vetting of Judges and Magistrates Act. The obligation was reposed in specified body, for a specified time-frame, in order to allow the institution of the Judiciary to be brought into conformity with the dictates of the Constitution. The composition of the Vetting Board included international personalities, and was anchored upon international best practice.

[226] Once has to take a holistic view of the Constitution: with the roles of the Judiciary, Parliament and the Executive, guided by normative prescriptions such as Articles 10 and 129; and the provision on Parliamentary representation, as sanctioned by Article 81, within the framework of the principles of the electoral system. The centrality of governance in Kenya is based upon the sovereignty of the people, which is uniquely delegated to Parliament and the legislative assemblies in the county governments, the national executive and executive structures in the county governments, and the Judiciary and independent tribunals. The people, by directly electing members of Parliament and the legislative assemblies in the counties under the Constitution, delegated that power through the ballot. The composition of the Executive, as sanctioned by processes under the Constitution, was also a direct derivation from the people's mandate. The special feature regarding the Judiciary's transition, was that there was no elective component emanating from a direct donation of power by the people. A solution was therefore necessary, and this solution was an *evaluation of suitability*, a *transitory mechanism,* to lodge the Judiciary into the *normative functional structure* of the Constitution; a one-off prescription that would constitutionalize the operations of this arm of government. Such was the command of the Constitution. The mechanism adopted was a direct constitutional derivative, with a clear and specific mandate. Transitions, as judicial notice may be taken, do bear unsettling demands, and there is no exception in the present instance. I might add that the vetting process, though personified, not only concerned the Judge, but also the public. Judges in the pre-constitutional regime operated in a constitutional structure which, though not as elaborate or as desirable as that which we adopted in 2010, did have limitations arising from the scheme of public power.

[227] Different jurisdictions have dealt with this question of transition in different ways; and perhaps the most complex was the experience of East and Central Europe, after the fall of the communist regimes. It is not my intention to delve into the merits

or demerits of this process, but rather, to show the radical measures taken by other jurisdiction during such transition. In the said regions, there had been an attempted purification of existing societal and power structures, with individuals targeted, as a means of achieving post-Communist reforms. The Judgement of the majority extensively covers comparative judicial practice as regards ouster clauses. The unique case of East-Central Europe goes to the actual process drawn from a historical overlap of change of the local society, and the global shift in international politics. The Kenyan case of vetting, though exacting and challenging, had its foundations in the people's will, as expressed in the Constitution. It was only temporary in nature. Judicial officers experienced the tumult of transition in their own personal ways; but the Constitution required it; the country needed it; and that obligation had to be fulfiled.

[228] In conclusion, the people of Kenya ordained legislation on mechanisms and procedures for vetting, to be conducted within a specified time-frame, to determine the suitability of Judges and Magistrates. The majority Judgement (at paragraph 189) cites paragraphs from the decision of the Court of Appeal which are relevant to the issue of the constitutionality of Section 19(3) of the VJM Act. In concurrence, I would reiterate the content of paragraph 189 in the majority Judgement, to the effect that the High Court lacks jurisdiction to adjudicate upon the *suitability* of a Judge or Magistrate to continue in service; and the responsibility for such a determination, during the period of transition, was constitutionally vested in the Judges and Magistrates Vetting Board.

I. THE CONCURRING OPINION OF NJOKI NDUNGU, SCJ

[229] I concur with the Judgement of the majority but write separately to place the conceptualization and purpose of the vetting process in context from the basis of a

constitutional drafter and a member of the Committee of Experts. Constitutional transition was one of the contentious issues presented for deliberation before the Committee of Experts. It was clear that a transition from the old to the new constitutional order ordained and approved by all Kenyans was imperative. There were two submissions in relation to the transition of the Judiciary presented to the Committee of Experts for consideration. The first submission proposed a complete overhaul of the institution, with the requirement that all judicial officers reapply to continue serving in the judiciary. The other submission was the conceptualization of a vetting process to bring the judiciary into conformity with the new Constitution. After intensive deliberations, the option of vetting was adopted as had been proposed in the Constitution of Kenya Review Commission (CKRC) and Bomas Drafts as well as the 2009 Task Force on Judicial Reforms. The vetting process was adopted and as a result, Section 23 of the Sixth Schedule was enacted. This process was not designed to strip the judiciary of power to enforce the Constitution and the law. Rather, it was a mechanism to ensure that the concerns of the people with regard to the institution were addressed. The vetting process was designed as an isolated process with the consideration that any disruption to the functioning of the Judiciary was undesirable. This consideration therefore informed the time prescription with regard to the process.

[230] The transition from the old to the current constitutional order involved various aspects of public-institutional repositioning. Various institutions and public offices were subject to different modes of transition. Honouring the demands of transition was a reaffirmation of the adoption, by those institutions, of their constitutional character and a reaffirmation of the people of Kenya's sovereign and inalienable right to determine the form of governance as indicated in the Preamble to the Constitution. The nature of these transitions and the designed processes encapsulate elements of transformative constitutionalism with sovereign power which would be delegated to the Judiciary emanating from the people. As such, the

judiciary had to be transformed to conform to the will of the people. This transformation was to take the initial form of vetting to assess the suitability of Judges and Magistrates to continue in service. The other forms of transformation within the judiciary were exhibited in Article 159 (Judicial Authority), Article 160 (Independence of the Judiciary) the system of Courts, appointment of Judges, the Judicial Service Commission and the Judiciary fund.

[231] Drawing comparative perspective from South Africa, a country whose transformation was solidified in a comprehensive people-driven Constitution such as our own, I would echo the opinion of Froneman J. in ***Qozoleni v Minister of Law and Order*** 1994(1) BCLR 75(E), that *"the previous constitutional system of South Africa was the fundamental "mischief" to be remedied by the new Constitution."* Indeed the *mischief* in our societal and political system was remedied by our new constitutional order. The shift from that old dispensation to the new one required a bridge which was availed in the form of transitional provisions. According to Article 264 ***the Constitution in force immediately before the effective date stood repealed on the effective date, subject to the Sixth Schedule.***

[**232**] It is acknowledged that transitions from one constitutional order to the next have been the subject of novel occurrences in various jurisdictions, each with a different approach. In South Africa for instance, the *judicial certification* of the Constitution was an unprecedented occurrence aimed at aiding the transition from one political and constitutional order to the next. Paragraph 1 of the ***Certification of the Constitution of the Republic of South Africa,*** **1996 (CCT 23/96) was instructive:**

> ***"The formal purpose of this judgment is to pronounce whether or not the Court certifies that all the provisions of South Africa's proposed new constitution comply with certain principles contained in the country's current***

constitution. But its underlying purpose and scope are much wider. Judicial "certification" of a constitution is unprecedented and the very nature of the undertaking has to be explained. To do that, one must place the undertaking in its proper historical, political and legal context; and, in doing so, the essence of the country's constitutional transition, the respective roles of the political entities involved and the applicable legal principles and terminology must be identified and described. It is also necessary to explain the scope of the Court's certification task and the effect of this judgment, not only the extent and significance of the Court's powers, but also their limitations. Only then can one really come to grips with the certification itself."

[233] Our own transitional experience has been marked by various constitutional causes in our Courts seeking the interpretation of certain provisions of the Constitution. This duty ought to be clearly exercised even where the provisions to be interpreted go to the heart of *judicial transition*. The language of Section 23 of the Sixth Schedule leaves no doubt as to the intention of the Constitution to hasten the process of vetting and to restrict it to a single body established in line with the Constitution. It was submitted that the ouster clauses could not have ousted the supervisory jurisdiction of the High Court in the framework of rights and freedoms. While the values and principles embodied in the Constitution must always be promoted while interpreting the Constitution, the clear language of the Constitution ought also to be heeded. Justice Bhagwati expressed the vital importance of considering the purpose and intention of the framers of the Constitution in ***India v Sankalchand Himatalal Sheth*** AIR 1977 SC 250 and which resonate with my view in the present matter as far as the clear language of Section 23 is concerned:

"When the Court interprets a Constitution, it breathes life into the inner Words used in the founding document. The problem before the Constitutional Court is not a Mere verbal problem. The Court cannot interpret a provision of the Constitution by making a fortress out of the dictionary. The significance of the constitutional problem is vital, not formal. It has to be gathered not simply by taking the words to dictionary but by considering the purpose and intention of the framers as gathered from the context and the setting in which the words occur".

[234] I deeply recognize the constitutional struggle and sacrifice of all Kenyans. The constitutional review process, our near immersion into civil war in 2007/2008 and the realization that everything about public institutions and republican engagement had to be remodeled culminated into the subsequent restructuring of our nation. These difficult moments inspiring the promulgation of the Constitution of Kenya, 2010 can perhaps be understood in the words of Thomas Paine (Common Sense, 1776), "*when my country, into which I just set my foot was set on fire about my ears, it was time to stir. It was time for every man to stir*." It was a duty, required of every Judge and Magistrate on the effective date to participate in the patriotic duty of conforming to the dictates of the Constitution. Although this process has been long contested in the Courts, it is finally time for this Court to affirm with finality, that the vetting process was a constitutional-transitional imperative, akin to a national duty upon every judicial officer to pave way for judicial realignment and reformulation.

J. ORDERS

[235] We make the following Orders, in relation to such matters as have come up before the Superior Courts, with regard to the vetting of Judges and Magistrates:

(a) The Petition before this Court is hereby allowed.

(b) The Orders of 30th October, 2012 stopping the de-gazettement of Judges or Magistrates found unsuitable to continue in service are hereby discharged.

(c) The respective Superior Court Divisions or stations having to adjudicate upon matters of any of the following categories shall list them for mention within 15 days of the date hereof, and shall dispose of them forthwith, in accordance with the terms of this Judgment and these Orders, that is to say:

(i) alleged lack of jurisdiction or merit on the part of the Vetting Board;

(ii) alleged want of exclusive competence of the Vetting Board to determine the suitability of a Judge or Magistrate to continue in service;

(iii) any contest to the Vetting Board's process (or outcome thereof) for determining the suitability of a Judge or Magistrate to continue in service.

(d) The parties shall bear their own respective costs.

DATED and **DELIVERED** at **NAIROBI** this 5th day of November, 2014.

....

W. M. MUTUNGA **CHIEF JUSTICE & PRESIDENT** **OF THE SUPREME COURT**	**K.H. RAWAL** **DEPUTY CHIEF JUSTICE & VICE-PRESIDENT** **OF THE SUPREME COURT**
.....	.....
P. K. TUNOI **JUSTICE OF THE SUPREME COURT**	**J. B. OJWANG** **JUSTICE OF THE SUPREME COURT**
.....	.....
S. C. WANJALA **JUSTICE OF THE SUPREME COURT**	**N. S. NDUNGU** **JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR, SUPREME COURT