REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. HCCHRPET E037 OF 2026

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF ARTICLES 1(3), 2(1), 2(4), 3(1), 10(2), 19(1) and (3), 20(1) and (2), 22(1) and (2)(c), 23(1) and (3), 24, 27(1) and (4), 38, 40(1) and (2), 43(1)(e), 47(1) and (2), 48, 50(1), 73, 94(1), 94(5),
151(3), 159(1) and (2), 165(3)(b) and (d), and 258(1) and (2)(c) OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF: THE PRESIDENTIAL RETIREMENT BENEFITS ACT, CAP. 197A, LAWS OF KENYA - SPECIFICALLY SECTION 4 & 6 THEREOF

AND

IN THE MATTER OF: THE RIGHT TO PROPERTY, SOCIAL SECURITY, FAIR ADMINISTRATIVE ACTION, FAIR HEARING, EQUALITY, AND POLITICAL RIGHTS UNDER THE CONSTITUTION

AND

IN THE MATTER OF: THE PROHIBITION AGAINST ARBITRARY, RETROSPECTIVE, AND DISPROPORTIONATE DEPRIVATION OF ACCRUED RIGHTS AND BENEFITS

BETWEEN

SHERIA MTAANI NA SHADRACK WAMBUI…….PETITIONER/APPLICANT
AND
THE SENATE OF KENYA…….1ST RESPONDENT
THE NATIONAL ASSEMBLY OF KENYA…….2ND RESPONDENT
THE HON.ATTORNEY GENERAL…….3RD RESPONDENT
AND

SENATOR KIPROTICH CHERARKEY……1ST INTERESTED PARTY
JUBILEE PARTY……2ND INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. Before this Court is an Amended Petition dated 11/05/2026 which only differs from the initial Petition dated 05/05/2026 by the addition of the 2nd Interested Party. The Amended Petition impugns Sections 4 and 6 of the Presidential Retirement Benefits Act [Chapter 197A of the Laws of Kenya] allegedly violating Articles 38 and 151(3) of the Constitution.

2. Section 4 empowers the National Assembly, upon a motion supported by not less than two-thirds of its members, to resolve that a retired President or his surviving spouse shall be denied or deprived of the whole or part of their retirement benefits. Section 4 of the Act reads as follows:

> ***"4. Circumstances under which benefits may not be paid***
>
> (1)Notwithstanding the provisions of section 3, *the National Assembly may, on a motion supported by the votes of not less than two-thirds of the members thereof, resolve that a retired President or his surviving spouse, as the case may be, shall not be entitled to the whole or any part of the benefits conferred by this Act, on the grounds that the retired President—*
>
> *(a)ceased to hold office on account of having acted in wilful violation of the Constitution, or was guilty of gross misconduct;*

or(b)has, since ceasing to hold office—

(i)been convicted of an offence and sentenced to imprisonment for a term of three years or more, without the option of a fine; or

(ii)held office in, or actively engaged in the activities of any political party contrary to the provisions of section 6 (1).

(2) Where the National Assembly passes a resolution under subsection (1), a retired President or his surviving spouse shall not be entitled to any benefits under this Act, or their entitlement to such benefits shall be reduced in accordance with such resolution.

(3) Where a retired President entitled to the benefits conferred by this Act, holds any appointive or elective post in or under the Government to which there is attached a rate of pay, other than a nominal rate, the benefits to which he is entitled shall be reduced by the amount of such pay.

(4)The benefits conferred by sections 6 and 7 on a surviving spouse shall—

(a)commence on the day after the retired or serving President dies;

(b)not be payable unless such spouse waives the right to any other annuity or pension to which the spouse is entitled under the provisions of any other Act;

(c)during any period in which such spouse holds an appointive or elective post in or under the Government to which there is attached a rate of pay, other than a nominal rate, be reduced by the amount of such pay;

(d)cease on the last day of the month during which such spouse dies or remarries. "

3. Consequently, Section 4 permits the withholding, reduction or deprivation of retirement benefits payable to a former President in specified circumstances.

4. With regard to Section 6 of the Act, it sets out the roles of a Retired President and imposes restrictions upon their holding of office in a political party after leaving the Presidency. Section 6 reads as follows:

"

6. Role of a retired President

(1)A retired President shall not hold office in any political party for more than six months after ceasing to hold office as President.

(2)A retired President shall be expected to play a consultative and advisory role to the Government and the people of Kenya.

(3)A retired President may be requested by the Government to perform specific official functions and shall be paid a reasonable allowance in respect of such official functions.

(4) Notwithstanding the provisions of section 1, this section shall come into operation on the date of publication of this Act in the Gazette."

5. In that regard, the Amended Petition dated 11/05/2026 seeks the following prayers:

a) A Declaration be and is hereby issued that Article 151(3) of the Constitution creates an absolute constitutional safeguard over presidential retirement benefits, such that no legislative, administrative, or parliamentary process may lawfully vary or diminish such benefits to the disadvantage of the beneficiary during their lifetime, save as may be expressly permitted under the Constitution itself.

b) A Declaration be and is hereby issued that Section 4 and 6 of the Presidential Retirement Benefits Act, Cap. 197A is unconstitutional, null and void to the extent that it purports to authorize the variation, reduction, suspension, withdrawal, or extinguishment of retirement benefits of a former President or his surviving spouse; impermissibly vests adjudicative and punitive authority in the National Assembly in violation of the doctrine of separation of powers; and unlawfully limits political rights under Article 38 by subjecting continued enjoyment of such benefits to considerations of political activity, association, or participation, contrary to Articles 2(1), 2(4), 10, 27, 40, 43(1)(e), 47, 50(1), 151(3) and 24 of the Constitution of Kenya, 2010.

c) An Order of Certiorari be and is hereby issued bringing into this Honourable Court and quashing the motion dated 4th May 2026 and any proceedings, deliberations, or steps taken pursuant to or in reliance upon Section 4 and 6 of the Presidential Retirement Benefits Act in so far as they relate to the review, variation, or alteration of retirement benefits of a former President.

d) An [SIC] permanent order of Prohibition be and is hereby issued restraining the Respondents from initiating, entertaining, proceeding with, or in any manner giving effect to any motion, resolution, or process founded upon Section 4 and 6 of the Presidential Retirement Benefits Act aimed at reviewing, reducing, or altering retirement benefits of a former President.

e) Costs of this Petition be awarded to the Petitioner.

f) Such further, ancillary, or consequential relief as this Honourable Court may deem just, fit, and appropriate in the circumstances. "

6. The Amended Petition makes clear that the issues it raises are neither mundane nor academic. The Petitioner avers that the Amended Petition was necessitated by a public motion by the 1st Interested Party, a Member of Parliament serving in the 1st Respondent, in which the 1st Interested Party sought to move Parliament as constituted by the 1st and 2nd Respondents to negatively review and vary the retirement benefits and allowances of the Fourth President of the Republic due to his holding of political office in the 2nd Interested Party as well as wider post-presidential political activities.

7. As we continue our journey of deepening and perfecting both our commitment to constitutionalism as well as the vibrancy and vitality of our political environment, it is natural that the High Court will be called upon to weigh legislative measures and proposals that have political effect against the exacting standards of our 2010 Supreme Law. The Amended Petition herein is one such call.

THE PETITIONER'S CASE

8. The Petitioner's case, as set out in the Amended Petition, Supporting Affidavits and the Petitioner's Written Submissions dated 15/06/2026, is that it is a duly registered non-governmental organization engaged in the advocacy, protection and enforcement of constitutional rights and freedoms, particularly in matters concerning land justice, economic and social rights, good governance and constitutionalism. It states that it has instituted these proceedings in its own interest, in the public interest, and on behalf of its members and concerned citizens.

9. The Petitioner contends that Section 4 of the Presidential Retirement Benefits Act is inconsistent with Article 151(3) of the Constitution, which provides that the retirement benefits payable to a former President and former Deputy President, together with the facilities and privileges available to them, shall not be varied to their disadvantage during the lifetime of the former President. Article 151 of the Constitution reads as follows:

"151. Remuneration and benefits of President and Deputy President

(1) The remuneration and benefits payable to the President and the Deputy President shall be a charge on the Consolidated Fund.

(2) The remuneration, benefits and privileges of the President and Deputy President shall not be varied to their disadvantage while in office.

(3) The retirement benefits payable to a former President and a former Deputy President, the facilities available to and the privileges enjoyed by them, shall not be varied to their disadvantage during their lifetime. "

10. It is the Petitioner's case that the statutory power to reduce, suspend, withdraw or extinguish such benefits as provided under Section 4 of the Act amounts to the very variation prohibited by the Constitution at Article 151(3). To their mind, and noting that there is no qualification text within Article 151(3) that would make the same subject to any provisions of Statute, Section 4 is therefore void to the extent of the inconsistency with Article 151(3) as provided for under Article 2(4).

11. The Petitioner further contends that Section 4 violates the doctrine of separation of powers by conferring upon the National Assembly functions which, in its view, are judicial and executive in character. It

submits that the provision enables Parliament to investigate allegations of willful violation of the Constitution or gross misconduct, determine culpability and impose the consequence of deprivation of retirement benefits. Reliance is placed on ***Institute of Social Accountability & another v National Assembly & 3 others [2015] KEHC 6975 (KLR), Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & Katiba Institute (Interested Parties) [2019] KEHC 10892 (KLR)*** and ***Mate & another v Wambora & another [2017] KESC 1 (KLR).***

12. The Petitioner also alleges that the impugned provisions infringe Article 40 of the Constitution by exposing accrued retirement benefits, which it characterizes as vested proprietary interests, to deprivation through a political process without adequate procedural safeguards. The Petitioner further alleges violations of Articles 47 and 50 and the principles of natural justice; contending that Section 4 does not provide for notice, disclosure of allegations, an opportunity to be heard, evidentiary standards, an impartial adjudicator, reasons for the determination or a right of appeal. Article 25(c) and the Fair Administrative Action Act, No. 4 of 2015, are relied upon in this regard.

13. The Petitioner further alleges discrimination contrary to Article 27, contending that only former Presidents are subjected to a distinct regime under which accrued retirement benefits may be withdrawn through a political process.

14. The Petitioner also challenges Section 6 of the Act as allegedly being contrary to Article 38 of the Constitution. The Petitioner argues that the restriction on holding office in a political party places a condition upon the continued enjoyment of retirement benefits and unjustifiably limits political participation. Article 24 is invoked by the Petition to show that there is allegedly no justification for that limitation of Article 38 rights.

15. The Petitioner additionally relies on Article 43(1)(e), contending that retirement benefits form part of the right to social security, and on Article 10(2), particularly the values of the rule of law, human dignity, transparency, accountability and good governance. It further challenges Section 4 for vagueness and uncertainty, particularly the expressions *"wilful violation of the Constitution"* and *"gross misconduct",* which it contends are undefined and lack ascertainable standards.

16. The Amended Petition also raises complaints of retrospective interference with accrued benefits and double jeopardy. The Petitioner contends that Section 4 permits benefits already accrued upon retirement to be withdrawn on account of a subsequent criminal conviction, thereby imposing an additional punitive consequence for conduct in respect of which criminal punishment may already have been imposed. Articles 50(2)(n) and (o) are relied upon.

17. The Petitioner's position is that the limitations imposed by Sections 4 and 6 cannot satisfy Article 24 and are disproportionate in their effect upon property rights, political rights, and social security. It relies substantially on

Kenya National Commission on Human Rights v Attorney General & another [2015] KEHC 7634 (KLR) and ***Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & Katiba Institute (Interested Parties) [2019] KEHC 10892 (KLR),*** while acknowledging that those decisions are persuasive and that the present Amended Petition must be determined on its own facts. It also relies on ***R v Big M Drug Mart Ltd (1985) 1 SCR 295*** on the relevance of the purpose and effect of legislation.

18. The Petitioner consequently seeks the declarations and orders outlined above at Paragraph (5) herein.

THE 1ST RESPONDENT'S CASE

19. The 1st Respondent, the Senate of Kenya, opposes the Amended Petition. Its case is principally that the proceedings are premature and constitutionally impermissible, and that the reliefs sought would improperly interfere with parliamentary proceedings. It relies on the doctrines of ripeness, separation of powers, parliamentary privilege and freedom of speech and debate, the independence of Parliament, and the presumption of constitutionality of legislation.

20. On ripeness, the 1st Respondent submits that although Article 165(3)(d) confers constitutional jurisdiction upon the High Court, that jurisdiction does not require the Court to determine hypothetical or premature disputes. It relies on ***County Assembly of Fortun & 6 Others v Attorney General & 2***

Others; Senate of the Republic of Kenya, Attorney-General & 2 Others v Ndii & 79 Others and ***Munga v Kenya Maritime Authority & Another***. It maintains that the alleged motion had not crystallized into an actual parliamentary decision and that no deprivation of retirement benefits had occurred.

21. The 1st Respondent further contends that the permanent order of Prohibition sought would interfere with Parliament's constitutional functions, including the initiation and consideration of motions. It relies on ***Mate & Another v Wambora & Another, Benjamin v Gitiri & 4 Others*** and ***Benson Ambuti Ambega & 2 Others v Kibos Distillers Limited*** in urging judicial restraint. It also relies on Article 117 of the Constitution and the Parliamentary Powers and Privileges Act, 2017, contending that parliamentary speech and debate encompass motions, proposed resolutions, debates, votes and other recognized parliamentary proceedings.

22. The 1st Respondent nevertheless acknowledges that parliamentary action is subject to constitutional scrutiny. Its position is that, should a motion to vary retirement benefits ultimately be passed, the High Court would retain jurisdiction under Article 165(3)(d) to determine its constitutional validity. Its objection is therefore directed principally at the timing of the proceedings.

23. On the substantive challenge, the 1st Respondent relies on Article 94 and the presumption of constitutionality of legislation. It contends that the Petitioner bears the burden of demonstrating the alleged inconsistency and has failed to do so. It further submits that Sections 4 and 6 regulate the administration and

enjoyment of presidential retirement benefits and do not, in their purpose or effect, violate Articles 27, 38, 40, 43, 47, 50 or 151(3). It accordingly asks the Petition be dismissed with costs.

THE 2ND RESPONDENT'S CASE

24. The 2nd Respondent, the National Assembly of Kenya, likewise opposes the Amended Petition arguing that Sections 4 and 6 were enacted pursuant to Parliament's constitutional legislative mandate and are thus procedurally as well as substantively constitutionally valid. It relies on Articles 93, 94 and 95 and contends that Article 151(3) provides the constitutional framework for presidential retirement benefits without itself prescribing or quantifying the benefits payable.

25. The 2nd Respondent invokes the presumption of constitutionality and submits that the Petitioner has not demonstrated with sufficient clarity and precision the manner in which the impugned provisions contravene the Constitution. It relies on ***Susan Wambui Kaguru & 7 Others v Attorney General & Another*** and ***Cabinet Secretary for the National Treasury and Planning & 4 Others v Okoiti & 52 Others.***

26. On separation of powers, the 2nd Respondent submits that the Judiciary should not usurp the legislative function or substitute its policy preferences for those of Parliament. It relies on ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others*** and ***Institute for Social Accountability &***

Another v Senate & 5 Others and urges judicial restraint in the absence of a demonstrated constitutional violation.

27. The 2nd Respondent further relies on the decision in ***Coalition for Reforms and Democracy (CORD) v Attorney General & Others [2019],*** contending that the concerns identified in that case were addressed by the present legislation. It points to the requirement for a two-thirds majority and the specified circumstances in which benefits may be withheld or reduced, which it contends provide sufficient certainty, proportionality and procedural safeguards.

28. With regard to Article 151(3), the 2nd Respondent disputes the contention that the provision creates an absolute prohibition against conditions governing presidential retirement benefits. It submits that Article 151(3) must be read together with the Constitution as a whole, including Articles 10 and 201, and maintains that Sections 4 and 6 regulate the enjoyment of statutory benefits rather than unconstitutionally depriving a former President of them.

29. The 2nd Respondent similarly disputes the alleged violations of Articles 40, 47 and 50. It contends that any proprietary interest in retirement benefits is defined by the statute creating the entitlement and that, where a criminal conviction is relied upon, Parliament does not itself determine criminal culpability but acts upon an established judicial conviction. It further maintains that Section 6 imposes only a limited and time-bound restriction under Article 38, capable of justification under Article 24.

30. The 2nd Respondent also challenges the precision of the Petition, relying on ***Anarita Karimi Njeru v Republic*** and the Mutunga Rules. It accordingly urges the Court to dismiss the Petition with costs.

THE 3RD RESPONDENT'S CASE

31. The 3rd Respondent, the Hon. The Attorney General, opposes the Petition on the basis that it is misconceived, premature and founded upon speculative apprehension rather than an actual or imminent constitutional violation. It relies on the presumption of constitutionality and contends that the Petitioner has not demonstrated the alleged inconsistency between Sections 4 and 6 and the Constitution.

32. The 3rd Respondent's principal position on Article 151(3) is that the provision does not create an absolute or unconditional entitlement to presidential retirement benefits. It submits that the provision must be read holistically with the Constitution, including Articles 10, 73 and 94, and that Parliament remains empowered to legislate on the regulation of such benefits, subject to constitutional limits.

33. The 3rd Respondent relies on Article 24 and contends that the statutory conditions governing the enjoyment of retirement benefits are capable of justification within the constitutional framework. It also relies on the principle of holistic constitutional interpretation as stated in ***In the Matter of the Kenya National Commission on Human Rights [2014] KESC 33 (KLR)***

and ***In the Matter of the Speaker of the Senate & another [2013] KESC 7 (KLR).***

34. The 3rd Respondent maintains that Section 4 prescribes specific circumstances in which benefits may be withheld or reduced and that those circumstances are connected to legitimate constitutional objectives, including constitutionalism, integrity, accountability, good governance and prudent management of public resources. It rejects the contention that Parliament thereby assumes judicial power and disputes the alleged violations of Articles 40 and 43(1)(e).

35. In relation to Articles 47 and 50, the 3rd Respondent submits that the impugned provisions do not exclude constitutional safeguards of fair administrative action and fair hearing, and that any future process undertaken in breach of those safeguards may be challenged in the appropriate forum. It maintains, however, that the present proceedings are founded upon anticipated rather than actual violations.

36. The 3rd Respondent also disputes the challenge under Article 38, contending that the Petitioner has not demonstrated that the statutory restriction on political activity constitutes an unjustifiable limitation of political rights. It reiterates the presumption of constitutionality and relies on ***Bloggers Association of Kenya (BAKE) v Attorney General & 6 others [2026] KECA 430 (KLR)*** and ***Muchiri & another v Attorney General & 6 others [2025] KEHC 8929 (KLR).***

37. Finally, the 3rd Respondent submits that no former President or surviving spouse has been shown to have been deprived of retirement benefits under the impugned provisions and that no unconstitutional process has been demonstrated. It therefore contends that the reliefs of declaration, Certiorari and Prohibition have no sufficient foundation and urges the Court to dismiss the Petition in its entirety.

THE 1ST INTERESTED PARTY'S CASE

38. The 1st Interested Party did not enter appearance nor did he participate in these proceedings.

THE 2ND INTERESTED PARTY'S CASE

39. As was the case with the 1st Interested Party, the 2nd Interested Party did not enter appearance nor did it participate in these proceedings.

ANALYSIS AND DETERMINATION

40. Having considered the pleadings, the constitutional and statutory framework, the submissions of the parties and the applicable jurisprudence, I am of the considered view that the following issues commend themselves for determination:

i. ***Whether the Amended Petition is premature, speculative, and/or non-justiciable for reasons of infringing on the Role of Parliament and/or the Doctrine of Separation of Powers.***

ii. ***Whether Sections 4 and 6 of the Presidential Retirement Benefits Act are inconsistent with Article 151(3) of the Constitution.***

iii. ***Whether Sections 4 and 6 of the Act violate the doctrine of separation of powers and the constitutional allocation of functions among the Legislature, Executive and Judiciary.***

iv. ***Whether Sections 4 and 6 of the Act violate the rights and freedoms guaranteed under Articles 27, 38, 40, 43(1)(e), 47 and 50 of the Constitution, including the principles of legality, fair hearing and natural justice.***

v. ***Whether the Petitioner is entitled to the declarations, orders of Certiorari and Prohibition, and the other reliefs sought in the Amended Petition***

vi. ***Costs of the Amended Petition.***

Whether the Amended Petition is premature, speculative, and/or non-justiciable for reasons of infringing on the Role of Parliament and/or the Doctrine of Separation of Powers.

41. All three Respondents have submitted and argued this issue for determination in the affirmative. It is there individual and collective position that this Amended Petition is 'much ado about nothing' as no motion had been presented or is planned to be presented on the subject matter, whether by the 1st Interested Party of by any other Member of Parliament in either House of Parliament. They, therefore, characterize the Amended Petition as speculative, premature, and academic.

42. Additionally, the Respondents fault the Amended Petition's prayer for orders of prohibition on the basis that the same would be an unconstitutional prior restraint on Parliament. To their mind, rather than speculatively and anticipatorily stopping Parliament from developing and processing a motion under either Sections 4 or Six of the Act; this Court should await such a motion being tabled, and perhaps even passed, before acting.

43. The Respondents, and in particular the 2nd Respondent, rely heavily on the Doctrine of Separation of Powers in arguing against what they see as constitutionally impermissible prior restraint of Parliament. The Judicial Branch, they argue, should not encroach into the Parliamentary Realm and decide that a future motion that has not been tabled and whose substance and grounds cannot be known at this point in time is unconstitutional, even before it is drafted and tabled.

44. On its part, the Petitioner argues that there is a real, crystalized constitutional question that is ripe for determination by this Court. Even though the 1st Interested Party may or may not have tabled a motion invoking Sections 4 and/or 6 of the Act, those two provisions are part of an Act of Parliament and thus form part of the Laws of Kenya. The question then before this Court, as per the Petitioner, is whether Sections 4 and/or 6 are constitutionally valid. The Petitioner contends that a looming or present motion before a House of Parliament is not required for that question to be real, vital, and justiciable.

45. It is clear to this Court that the questions before this Court as to the alleged unconstitutionality of Section 4 and Section 6 of the Presidential Retirement Benefits Act [Chapter 197A of the Laws of Kenya] fall squarely within the adjudicative ambit of both Article 22(1) of the Constitution *("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")* as well as the High Court's jurisdiction under Articles 135(3)(b) and (d)(i) & (ii) of the Constitution.

46. Sections 4 and 6 of the Act are current statutory provisions. The question of whether they violate or do not violate the Apex Law is thus not dependent on there being a motion before Parliament brought under either or both provisions. For the same reason, it cannot be contrary to the Doctrine of Separation of Powers for the High Court to determine whether or not those statutory provisions are constitutionally compliant.

47. Accordingly, I do find and hold that the Amended Petition herein is not premature, speculative, and/or non-justiciable for reasons of infringing on the Role of Parliament and/or the Doctrine of Separation of Powers.

Whether Sections 4 and 6 of the Presidential Retirement Benefits Act are inconsistent with Article 151(3) of the Constitution.

48. The starting point in determining this issue must be the Constitution itself. Article 2(1) declares the Constitution to be the supreme law of the Republic of

Kenya and which binds all State Organs, State Officers and persons. Article 2(4) is categorical that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency. Article 165(3)(d) expressly clothes this Honourable Court with jurisdiction to determine the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution.

49. The question before the Court is therefore not whether Parliament's legislative policy choice was desirable, prudent or politically expedient. It is whether, in enacting sections 4 and 6 of the Presidential Retirement Benefits Act, Parliament remained within the constitutional limits imposed upon its legislative authority.

50. Article 94 vests legislative authority in Parliament. That authority, however, is not without constraints. Article 94(2) provides that Parliament manifests the diversity of the nation, represents the will of the people and exercises legislative authority on their behalf. Article 94(4) requires Parliament, in exercising its legislative authority, to protect the Constitution and promote democratic governance. Article 94(5) further provides that no person or body other than Parliament has the power to make provision having the force of law in Kenya except under authority conferred by the Constitution or legislation.

51. Parliament is consequently a constitutionally established legislature rather than an inherent primordial one. Its powers are extensive, but they are not

superior to the Constitution and they are given to Parliament by the Constitution alone. The National Assembly cannot, by ordinary legislation, confer upon itself a power which the Constitution has expressly withheld.

52. The specific constitutional provision engaged in the present Amended Petition is Article 151(3), which provides in clear and unequivocal terms:

> *"The retirement benefits payable to a former President and a former Deputy President, the facilities available to and the privileges enjoyed by them, shall not be varied to their disadvantage during their lifetime."*

53. The language employed by the framers of the Constitution is deliberate and admits no ambiguity. The Constitution does not qualify that provision or make it subject to the provisions of any written law. It is an express and absolute protection that is written in plain language. It is a clear stand-alone provision of the Supreme Law that does not require any cross-reading or being read together with any other provisions of the law.

54. The Framers of the Constitution could have put qualifications into Article 151(3) in the same way they did to the similar provision for serving judges of the superior courts that exists at Article 160(4) of the Constitution. Article 160(4) reads:

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

and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge.

55. Clearly, had the Constitution wished to have Article 151(3) cross-read or read together with any other Article, it would have provided for the same in the same manner it has elsewhere within it. The fact that it does not, and noting especially its constitutional importance (which is discussed extensively elsewhere below), not only creates a stand-alone constitutional provision but one which was made so by deliberate choice.

56. This is made clear from the substantive elements of Article 151(3). Three features of that constitutional provision are material. First, the subject matter protected is the retirement benefits payable to the former President. Secondly, the prohibition is against variation "to their disadvantage." Thirdly, and most significantly, the protection endures "during their lifetime." The constitutional protection therefore survives the cessation of the presidential office, with the earlier Article 151(2) having protected those that accrue while the President serves in officve.

57. It is not a protection available only while the person occupies State office. The Constitution deliberately distinguishes between the remuneration and benefits of a serving President and the retirement benefits of a former President. Once the President leaves office, the protection does not disappear. Rather, Article 151(3) expressly ensures that the retirement benefits payable to the former President remain protected during his or her lifetime.

58. The ordinary meaning of "vary" is to alter, modify, change, reduce or otherwise cause something to be different from what it was. When the Constitution qualifies the prohibition by the words "to their disadvantage," it captures every alteration which operates adversely against the protected beneficiary. The provision therefore cannot sensibly be read as permitting Parliament to withdraw the benefit altogether while merely prohibiting a technical alteration to its quantum. To hold otherwise would elevate form over substance and would permit the very thing the Constitution expressly prohibits to be achieved through different legislative language.

59. This constitutional protection must now be considered against the actual wording of the impugned legislation. Section 4 of the Presidential Retirement Benefits Act provides:

"4. Circumstances under which benefits may not be paid

(1) Notwithstanding the provisions of section 3, the National Assembly may, on a motion supported by the votes of not less than two-thirds of the members thereof, resolve that a retired President or his surviving spouse, as the case may be, shall not be entitled to the whole or any part of the benefits conferred by this Act, on the grounds that the retired President—

(a) ceased to hold office on account of having acted in wilful violation of the Constitution, or was guilty of gross misconduct; or

(b) has, since ceasing to hold office-

(i) been convicted of an offence and sentenced to imprisonment for a term of three years or more, without the option of a fine; or

(ii) held office in, or actively engaged in the activities of any political party contrary to the provisions of section 6(1).

(2) Where the National Assembly passes a resolution under subsection (1), a retired President or his surviving spouse shall not be entitled to any benefits under this Act, or their entitlement to such benefits shall be reduced in accordance with such resolution.

(3) Where a retired President entitled to the benefits conferred by this Act, holds any appointive or elective post in or under the Government to which there is attached a rate of pay, other than a nominal rate, the benefits to which he is entitled shall be reduced by the amount of such pay.

(4) The benefits conferred by sections 6 and 7 on a surviving spouse shall-

(a) commence on the day after the retired or serving President dies;

(b) not be payable unless such spouse waives the right to any other annuity or pension to which the spouse is entitled under the provisions of any other Act;

(c) during any period in which such spouse holds an appointive or elective post in or under the Government to which there is attached a rate of pay, other than a nominal rate, be reduced by the amount of such pay;

(d) cease on the last day of the month during which such spouse dies or remarries."

60. Section 6, on the other hand, provides:

> ***"6. Role of a retired President***
>
> *(1) A retired President shall not hold office in any political party for more than six months after ceasing to hold office as President.*
>
> *(2) A retired President shall be expected to play a consultative and advisory role to the Government and the people of Kenya.*
>
> *(3) A retired President may be requested by the Government to perform specific official functions and shall be paid a reasonable allowance in respect of such official functions.*
>
> (4) *Notwithstanding the provisions of section 1, this section shall come into operation on the date of publication of this Act in the Gazette."*

61. The statutory architecture is therefore important. Section 4 creates the consequence; Section 6 creates one of the triggers for that consequence. Section 4(1)(b)(ii) expressly provides that where a retired President has *"held office in, or actively engaged in the activities of any political party contrary to the provisions of section 6(1*)," the National Assembly may resolve that the retired President shall not be entitled to the whole or any part of the benefits conferred by the Act.

62. Section 6 cannot therefore be considered in isolation from Section 4. The two provisions form one statutory scheme: Section 6 regulates the conduct of the retired President, while Section 4 attaches the drastic consequence of loss or reduction of retirement benefits for the alleged breach of that regulation.

63. The constitutional question is consequently not whether Parliament may legislate on the administration of presidential retirement benefits. Parliament plainly has legislative authority to establish the machinery for payment and administration of benefits, subject always to the Constitution. Nor is the question whether Parliament may provide for circumstances concerning the administration of public funds. The decisive question is whether Parliament may enact a law which permits the very retirement benefits protected by Article 151(3) to be withdrawn, reduced or extinguished to the disadvantage of a former President during his or her lifetime.

64. The Constitution did not grant a conditional entitlement with protections that are subject to legislation or parliamentary withdrawal. The answer must, therefore, be in the negative.

65. Section 4(1) is constitutionally problematic from its very opening words. It begins with the phrase *"Notwithstanding the provisions of Section 3"* and proceeds to authorize the National Assembly, by a two-thirds vote, to resolve that a retired President "shall not be entitled to the whole or any part" of the benefits conferred by the Act. Section 4(2) then makes the consequence even more explicit by providing that, once such a resolution is passed, the retired President *"shall not be entitled to any benefits under this Act, or their entitlement to such benefits shall be reduced in accordance with such resolution."*

66. There can be little doubt as to the legal effect of these provisions. They do not merely regulate the administration of an existing benefit. They do not merely provide machinery for calculating or paying the benefit. They confer upon the National Assembly the power to cause a retired President to lose the whole or part of a benefit which the law otherwise makes payable to him or her. The provision therefore authorizes precisely the type of adverse alteration which Article 151(3) prohibits.

67. Indeed, it is difficult to conceive of a clearer example of a variation "to their disadvantage" than the withdrawal, reduction, or extinguishment of the retirement benefits payable to a former President during his or her lifetime. A provision which says that the beneficiary may cease to be entitled to *"the whole or any part"* of the benefit is not a provision regulating the benefit. It is a provision authorizing its deprivation despite an express constitutional provision to the contrary.

68. Section 4(3) requires separate consideration. It provides that where a retired President entitled to the benefits conferred by the Act *"holds any appointive or elective post in or under the Government to which there is attached a rate of pay, other than a nominal rate, the benefits to which he is entitled shall be reduced by the amount of such pay*." Unlike subsections (1) and (2), this provision does not empower the National Assembly, by resolution, to withdraw the benefits as a sanction for misconduct, criminal conviction or political activity. It operates instead by adjusting the amount payable where the former President simultaneously receives remuneration from an

appointive or elective governmental position. The constitutional question is therefore whether such an adjustment amounts to a variation of retirement benefits *"to their disadvantage"* within the meaning of Article 151(3), or whether it is properly understood as a statutory mechanism preventing a former President from receiving, from public funds, both the full retirement benefit and remuneration attached to another governmental office.

69. In my view, the distinction is material. Article 151(3) does not necessarily prohibit every legislative provision which determines the manner in which a retirement benefit interacts with other remuneration lawfully received by a Retired President from the State's coffers. What Article 151(3) prohibits is a disadvantageous variation of the retirement benefits payable to a former President during their lifetime.

70. Section 4(3) does not confer upon Parliament an unfettered power to reduce or extinguish the benefit at its discretion; rather, it prescribes by law a specific adjustment consequent upon the former President assuming another remunerated governmental position. Its constitutional validity must accordingly be assessed separately from the deprivation mechanism established by sections 4(1) and 4(2).

71. The attempt to save Section 4 by pointing to the two-thirds threshold cannot succeed. A constitutionally prohibited act does not become constitutionally permissible merely because Parliament requires a larger majority before undertaking it. The two-thirds requirement may be a procedural safeguard, but

it cannot enlarge Parliament's substantive constitutional power. The question is not whether Parliament has imposed sufficient internal restraint upon itself. The question is whether Parliament possessed the constitutional power to authorize the deprivation in the first place. Article 151(3) answers that question by expressly prohibiting disadvantageous variation during the lifetime of the former President.

72. Nor can the constitutional difficulty be avoided by describing the deprivation as a *"condition"* of entitlement. Parliament cannot do indirectly what Article 151(3) prohibits it from doing directly. A constitutional protection cannot be defeated by 'clever' legislative drafting. If Parliament were permitted to say that a constitutionally protected retirement benefit is payable only so long as the former President satisfies conditions subsequently imposed by ordinary legislation, then Article 151(3) would cease to provide any meaningful protection. Parliament would, in essence, be adding words to Article 151(3) through 'the backdoor' and without amending the Constitution.

73. Parliament could always create a condition, declare its breach, and then withdraw the benefit. The constitutional guarantee would consequently become entirely dependent upon the continued legislative grace of Parliament rather than it being a true constitutional guarantee. That cannot have been the intention of Article 151(3).

74. The reasoning in ***Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & Katiba Institute (Interested Parties) [2019] KEHC 10892 (KLR)*** is instructive in this regard. The

High Court considered provisions of the Retirement Benefits (Deputy President and Designated State Officers) Act, 2015 which permitted the National Assembly to determine whether entitled persons should receive retirement benefits. The Court treated retirement benefits as an entitlement and held that the impugned provision interfered with retirement benefits expressly protected by Articles 151(3) and 160(4). The Court further recognized that retirement benefits are in the nature of property and are not susceptible to arbitrary deprivation.

75. The present case goes further in a critical respect. Article 151(3) itself expressly protects the retirement benefits payable to a former President from disadvantageous variation during his or her lifetime. The statutory provision must therefore be measured against that specific constitutional command. Where the effect of Section 4 is to permit the National Assembly to withdraw or reduce the protected benefits, the conflict is direct.

76. The grounds set out in section 4(1)(a) do not alter that conclusion. That provision permits deprivation where a President *"ceased to hold office on account of having acted in wilful violation of the Constitution, or was guilty of gross misconduct."* Whatever may be the seriousness of such conduct, the constitutional question remains whether Parliament may subsequently attach the consequence of deprivation of constitutionally protected retirement benefits. It cannot.

77. The Constitution itself provides mechanisms for dealing with misconduct by a sitting President. Article 145 establishes the procedure for impeachment of the

President, including the grounds upon which removal may be sought and the constitutional procedures which must be followed. Parliament cannot create, through an ordinary statute concerning retirement benefits, a collateral mechanism which effectively imposes an additional post-retirement financial sanction for conduct associated with the former President's tenure in office, where the consequence is prohibited by Article 151(3).

78. There is a constitutional distinction between removal from office and deprivation of retirement benefits after retirement. The former is expressly contemplated by the Constitution and is subject to constitutionally prescribed procedures. The latter is expressly constrained by Article 151(3). The existence of constitutional mechanisms for accountability cannot therefore be treated as an implied license to impose additional consequences which contradict an express constitutional protection.

79. The same defect is present in section 4(1)(b)(i), which permits deprivation where the former President has, after leaving office, been convicted of an offence and sentenced to imprisonment for three years or more without the option of a fine. A criminal conviction may, of course, attract all consequences properly imposed under the criminal law. However, Section 4 purports to add another consequence: the loss or reduction of retirement benefits otherwise payable to the former President.

80. The seriousness of the offence does not answer the constitutional question. Nor does the fact of conviction by a competent court. The question remains

whether Parliament may use a subsequent criminal conviction as the statutory trigger for withdrawing a benefit which Article 151(3) commands shall not be varied to the disadvantage of the former President during his lifetime. The answer remains no. A lawful criminal conviction cannot confer upon Parliament a power which the Constitution itself withholds.

81. Section 4(1)(b)(ii) presents an even more immediate constitutional difficulty because it links the deprivation of retirement benefits to political activity. It provides that the National Assembly may deprive a retired President of benefits where he or she has "held office in, or actively engaged in the activities of any political party contrary to the provisions of section 6(1)." Section 6(1), in turn, provides that:

"A retired President shall not hold office in any political party for more than six months after ceasing to hold office as President."

82. Before considering the constitutional validity of that restriction, however, the Court must identify precisely what Parliament has prohibited. The statute does not say that a retired President shall not be a member of a political party. It does not say that a retired President shall not express political opinions. It does not say that a retired President shall not campaign for a political cause. Nor does it prohibit a retired President from participating in public political discourse. Its language is narrower: a retired President shall not "hold office" in a political party beyond six months after ceasing to hold presidential office.

83. The Political Parties Act, 2011 provides the relevant statutory definition. Section 2 defines "office holder", in relation to a political party, as:

"any person who is elected by the members of the political party to hold office and is registered with the Registrar of Political Parties."

84. Once that definition is appreciated, a deeper constitutional question emerges. What constitutional mischief is Parliament addressing by preventing a former President from holding office in a political party after six months has lapsed since his exit from State Office? If the concern is the continued exercise of presidential power, that concern falls away upon retirement. A retired President no longer exercises the constitutional powers of the presidency, no longer controls the Executive, no longer appoints public officers by virtue of presidential office, and no longer commands public resources by reason of being Head of State and Government and the Commander in Chief of our Defence Forces.

85. A former President does, of course, remain a person of extreme public consequence. He or she would, of course, retain considerable experience, standing, knowledge, and influence. That being said, influence is not office. Influence is not executive authority. Influence is not a constitutional disability. The fact that citizens may listen to a former President, respect his or her views or seek his or her counsel cannot, without more, justify the conclusion that the former President has thereby forfeited the constitutional rights attaching to citizenship and Article 38 of the Constitution.

86. Indeed, the argument that a former President should not hold office in a political party beyond six months from the date of exit on account of their influence requires particular caution. If the mischief sought to be addressed is the influence of a former President, that influence does not begin when the former President assumes the office of chairman, secretary-general or any other office within a political party, and it does not necessarily disappear when the former President relinquishes that office. A former President would remain influential without holding any party office at all. A former President, as a member of a political party, is not an 'ordinary' member of a political party. Their voice, opinions, status, and impact within that political party and indeed across the length and breadth of our political environment is immense, whether or not they are a political party official.

87. The statutory classification must therefore be distinguished from the asserted justification for it. Parliament has selected the holding of party office as the prohibited conduct. The Court must examine whether that classification bears a sufficient constitutional relationship to the purpose advanced to justify the restriction. It is not enough to invoke the former President's stature in the abstract.

88. The Constitution itself recognizes the political character of citizenship. Article 38 provides that every citizen is free to make political choices, which include the right to form, or participate in forming, a political party; to participate in the activities of, or recruit members for, a political party; and to campaign for a political party or cause. The constitutional guarantee is expressed in terms of

citizenship. It does not contain an exception for a citizen who has previously occupied the presidency.

89. A retired President remains a citizen. Retirement from office ends the office; it does not end the person. The former President does not become a constitutionally diminished citizen merely because he or she previously occupied the highest elective office in the Republic.

90. That proposition is not altered by the fact that the former President may possess an unusually significant public profile. Constitutional rights cannot be understood as diminishing in proportion to the persuasiveness, popularity, or influence of their holder. Democracy is not properly constituted only by the participation of citizens whose views attract little attention. Political participation necessarily includes the participation of persons whose experience or public standing causes their views to receive greater attention.

91. The contrary proposition would produce a curious constitutional result. The more valuable the experience of a former President to public debate, the weaker his or her constitutional entitlement to participate in that debate would become. The Constitution cannot sensibly be interpreted to establish such a hierarchy of citizenship.

92. Nor does the fact that a retired President may continue to have political influence amount to a continuation of presidential power. The constitutional order must distinguish between authority and influence. Authority derives from office and is conferred by the Constitution. Influence derives from the

person and may continue after office has ended. The State may regulate the exercise of public authority; it does not follow that it may suppress lawful political participation merely because the participant once exercised public authority.

93. This distinction finds some support in comparative jurisprudence. In ***Trump v United States, 603 U.S. 593 (2024),*** the Supreme Court of the United States, in distinguishing official presidential conduct from unofficial conduct, recognized that there may be circumstances in which a President, notwithstanding the prominence of the office, speaks in an unofficial capacity, including *"as a candidate for office or party leader".*

94. The relevance of that observation to the present case is not that the decision determines the Kenyan constitutional question it plainly does not but that it illustrates the legal distinction between presidential authority and partisan political activity. Even the extraordinary prominence of the presidential office does not cause every political act associated with its occupant to become an exercise of governmental authority.

95. The distinction between political expression and governmental authority is equally important in the jurisprudence of the United States concerning political participation. In ***Buckley v Valeo, 424 U.S. 1 (1976),*** the Supreme Court of the United States described discussion of public issues and debate concerning the qualifications of candidates as integral to constitutional government and recognized that political association is constitutionally

protected alongside political expression. The Court also observed that restrictions upon political association must be justified by sufficiently important governmental interests and drawn so as to avoid unnecessary abridgment of associational freedoms.

96. Similarly, in ***NAACP v Alabama ex rel Patterson, 357 U.S. 449 (1958),*** the Supreme Court of the United States recognized the constitutional significance of association, particularly where association facilitates effective advocacy of public and private views. These authorities are not binding upon this Court and are not invoked as though they are. Their persuasive force lies in the broader constitutional principle they illuminate: that political association is not a peripheral incident of democratic citizenship, but an essential means through which citizens organise, articulate, advance and contest ideas in the public sphere.

97. Any legislative measure which places a substantial burden upon that freedom must therefore be approached with particular constitutional care. The mere fact that the person seeking to exercise that freedom is a former holder of the highest public office does not, without a constitutionally sufficient justification, diminish the importance of the freedom itself.

98. The same principle is reflected, in a different constitutional setting, in the jurisprudence of the United Kingdom and the European human-rights tradition. Protection of political discourse is a foundational pillar of democratic accountability. This is powerfully illustrated by the United Kingdom Supreme

Court in ***R v ABJ; R v BDN*** **[2026] UKSC 8**, which reaffirmed that "***political expression occupies a particularly important position within freedom of expression because of its relationship to democratic accountability and public debate.***"

99. In evaluating the scope of Article 10 of the European Convention on Human Rights, the Court has repeatedly recognized that freedom of expression remains particularly important in relation to political speech and debate on questions of public interest, and that restrictions upon such expression require strict justification under a proportionality assessment.

100. This Court follows that reasoning to hold that restrictions on public interest debates cannot bypass a strict proportionality assessment.

101. The Court does not cite these foreign authorities as substitutes for the Constitution of Kenya. Rather, they illuminate a proposition which is already firmly embedded in our constitutional order: that political participation is not an incidental liberty but it lies at the heart of democratic citizenship.

102. The argument that the restriction is justified by the continuing influence of a former President therefore requires closer scrutiny. Influence, however substantial, is not itself a constitutional office, nor is it an exercise of executive authority. A retired President no longer occupies the presidency and no longer exercises the powers conferred by the Constitution upon a serving President. The mere fact that the public may continue to attach significance to the views of a former Head of State and Government cannot, without more, convert the

former President's continued participation in political life into a constitutional disability.

103. There is an additional difficulty. Section 6 does not prohibit a retired President from being politically heard. It does not prohibit the expression of an opinion upon a matter of public importance; criticism of the Executive Government of the day; support for or opposition to a political cause; political advice; or participation in public discourse. Its prohibition concerns the holding of office in a political party. If the mischief is the former President's influence upon political discourse, it is not immediately apparent why that influence becomes constitutionally problematic only when exercised through a formal party office and not by the former President being a member of a political party or politically active at all.

104. A retired President may address a political rally without holding party office. He or she may advise political actors without holding party office. He or she may publicly support a political position without holding party office. He or she may criticize Government policy without holding party office.

105. Every statement of a former President of the Republic of Kenya will attract public attention precisely because the speaker is a former President of a nation as respected and significant as Kenya is. The influence therefore exists independently of the statutory classification of political party office.

106. This does not mean that Parliament is powerless to regulate the conduct of former Presidents. A former President remains subject to the Constitution and

to laws of general application. There may be legitimate concerns concerning corruption, misuse of confidential information, misuse of State resources, conflicts of interest, unlawful conduct, incitement to violence, or other conduct properly regulated by law. There **may** even be legitimate grounds to limit the extent to which a former President may participate in the political scene. However, to have a broad prohibition that is constitutionally non-justifiable and which infringes on Article 151(3) by denying those constitutionally protected benefits offends our Supreme Law.

107. If the concern is the misuse of governmental power, governmental power may be regulated. If the concern is corruption, corruption may be prohibited. If the concern is lobbying or conflict of interest, the law may address those particular mischiefs. If the concern is incitement to violence or other unlawful conduct, the ordinary criminal and constitutional law may apply. The constitutional difficulty arises when the asserted mischief is simply that the former President remains politically influential and the legislative response is to attach the enjoyment of retirement benefits to abstention from political office.

108. The difficulty is further exposed by Section 6(2), which provides that a retired President *"shall be expected to play a consultative and advisory role to the Government and the People of Kenya."* Section 6 therefore contemplates that the former President retains a continuing public role after retirement. Section 6(3) goes further and permits Government to request a former President to perform specific official functions for a reasonable allowance.

109. The statutory scheme thus recognizes, on the one hand, the continuing value of the former President's experience, counsel, and public standing, while on the other hand, imposing a restriction upon the former President's ability to occupy a political-party office. This Court does not say that these provisions are necessarily irreconcilable. It does, however, observe that the legislative recognition of the former President as a continuing source of counsel and institutional experience makes it necessary to identify with precision the constitutional purpose served by depriving that person of the ability to hold political-party office at the constitutionally impermissible peril of losing their constitutionally protected retirement benefits.

110. There is also a broader constitutional consideration. A former President serves as a national elder, statesman, mediator, adviser, and repository of institutional memory. The experience accumulated in the presidency is not extinguished on the day the person leaves office. Such experience may be of value during periods of political tension, national difficulty, regional diplomacy or intergenerational dialogue. The Constitution does not establish retirement as civic death.

111. It would therefore be a curious constitutional result if the retirement benefits intended to recognize and support a former President after service were simultaneously deployed as an instrument to compel political disengagement. The State would, in that approach, provide the former President with retirement benefits on the one hand while placing a statutory condition upon those benefits which discourages participation in political affairs on the other.

112. The question becomes even more serious when Section 6 is read together with Section 4(1)(b)(ii). Section 6 establishes the restriction. Section 4 transforms breach of that restriction into a ground for deprivation. Section 4(2) authorizes the resulting loss or reduction of benefits. The statutory scheme therefore creates more than a regulatory restriction upon party office. It creates an economic consequence for non-compliance.

113. The retired President is thus placed in a position where the exercise of a political choice may carry the price of forfeiting a retirement entitlement. That is not merely a matter of political-party regulation. It is an economic burden placed upon the exercise of political activity.

114. This is where Article 38 and Article 151(3) intersect. Article 38 protects political participation. Article 151(3) protects retirement benefits from disadvantageous variation during the lifetime of the former President. Parliament cannot avoid either constitutional command by using one to qualify the other through ordinary legislation.

115. The Respondents may contend that Article 24 permits limitation of rights and fundamental freedoms. Article 24 indeed establishes the constitutional framework within which a right in the Bill of Rights may be limited. But Article 24 is not an independent source of legislative power. It does not authorize Parliament to create a limitation merely because Parliament considers it desirable. The limitation must be prescribed by law and must satisfy the constitutional requirements of reasonableness and justification in **an open and**

democratic society based on human dignity, equality and freedom. I emphasize that constitutional stand set out by Articles 20(4) and 24(1)as it provides not just a useful guide out of the maze but a binding instruction on how this Court must determine the present Amended Petition.

116. Article 20(3) is equally material. In applying a provision of the Bill of Rights, a court is required to develop the law to the extent that it gives effect to a right or fundamental freedom. The interpretive obligation is therefore rights-enhancing, not rights-suppressing. Where two plausible interpretations of legislation are available, the Court should prefer the interpretation which gives effect to the Constitution and protects the right, provided that such interpretation remains faithful to the statutory text.

117. In the present case, however, the difficulty is more fundamental. Section 6 is expressed in mandatory terms: *"A retired President shall not hold office in any political party for more than six months..."* Section 4(1)(b)(ii) then expressly makes conduct contrary to section 6 a ground upon which retirement benefits may be withheld. The Court cannot, without rewriting the statute, convert that prohibition into a mere advisory provision.

118. The State must therefore demonstrate a constitutionally sufficient justification for the limitation. The mere assertion that a former President is influential cannot discharge that burden. Nor can the mere fact that the individual previously occupied the presidency. The Constitution itself has not prescribed

a general period of political inactivity following retirement from the presidency.

119. This is particularly significant because constitutional limitations upon political rights must be considered in their practical effect. A right which formally remains available but whose exercise carries a substantial economic penalty may be materially burdened. In the present case, the statutory consequence is potentially severe: section 4 permits the loss of the whole or part of retirement benefits.

120. The Court must therefore consider not merely whether Section 6 uses restrained language but what the statutory scheme does in operation. A former President who holds political-party office beyond the prescribed period may face the prospect of losing benefits which Article 151(3) expressly protects unconditionally against disadvantageous variation during his or her lifetime. The effect is to place economic pressure upon the former President's political conduct.

121. The Court is not persuaded that a two-thirds parliamentary vote cures that constitutional difficulty. The threshold regulates the manner in which the deprivation may occur; it does not determine whether Parliament possesses the substantive power to impose the deprivation. A constitutionally prohibited act does not become permissible merely because it requires a super-majority.

122. Nor does the voluntary character of the assumption of or resignation from political office cure the defect. A retired President may voluntarily choose

cease holding political party office upon their exit from State Office. However, and most importantly, Article 151(3) does not make the protection of retirement benefits conditional upon the former President's continued political abstinence.

123. There is therefore a critical distinction between the first question whether Parliament may regulate eligibility to hold a particular office within a political party and the second question whether Parliament may make a constitutionally protected retirement entitlement contingent upon compliance with that regulation.

124. Even if Parliament were entitled, in an appropriate constitutional setting, to prescribe qualifications concerning the holding of a particular political-party office, it would not follow that Parliament may attach to breach of that qualification the loss of retirement benefits protected by Article 151(3). The latter consequence must independently satisfy the Constitution.

125. The comparative experience is instructive in this respect. There are constitutional systems in which the political participation of former Heads of State is subjected to significant statutory or institutional restraints, sometimes extending to restrictions upon their continued receipt of retirement benefits. Such arrangements are not without constitutional consequence. They reflect a conception of the relationship between the State and the former office-holder in which retirement from high public office may carry with it continuing limitations upon political participation.

126. The existence of such regimes, however, cannot by itself establish their compatibility with the constitutional order of Kenya. If anything, the comparative experience demonstrates that the question whether a former Head of State may continue to participate in political life lies at the intersection of political freedom, democratic pluralism and the constitutional protection accorded to former holders of public office.

127. The position in established constitutional democracies is materially different. The concern that a former Head of State or Head of Government may retain considerable political influence has not, in those jurisdictions, ordinarily been treated as a sufficient reason, without more, to place the former office-holder outside the ordinary sphere of political discourse. Former Presidents and Prime Ministers continue to speak on matters of public concern, to criticize the policies of their successors, to advocate political causes and, subject to the constitutional and statutory framework applicable in the particular jurisdiction, to participate in political life. The termination of high public office does not, merely by reason of the influence acquired while holding that office, extinguish the individual's status as a political citizen.

128. Indeed, the comparative analysis is important as it informs whether the municipal position is indeed what should occur in **an open and democratic society based on human dignity, equality and freedom**. In constitutional democracies founded upon political pluralism and the protection of political expression and association, influence is not ordinarily treated as a ground for political disability.

129. A former President may be influential precisely because he or she has served as Head of State, but influence, however considerable, is not itself the exercise of State power. The former President no longer occupies the constitutional office, commands the Executive or exercises the powers of the State attached to that office. To treat the mere possession of influence as sufficient justification for restricting political participation would risk converting the very experience and public standing acquired through service to the State into a continuing disability after that service has ended. Such a proposition requires clear constitutional authority. It cannot be assumed merely from the fact of former presidential office.

130. The experience of other constitutional democracies is instructive, albeit not binding upon this Court. The concern that a former Head of State or Government may retain considerable political influence has not, in those jurisdictions, been treated as a sufficient reason, without more, to place the former office-holder outside the ordinary sphere of political discourse. The contrary practice is sufficiently well established to demonstrate that retirement from the highest political office is not synonymous with retirement from public debate.

131. This baseline is routinely observed across the Commonwealth and other mature democracies. In the United Kingdom, for instance, former Prime Ministers have historically maintained a robust presence in national affairs: Winston Churchill served as Leader of the Opposition to challenge the policies

of his successor before returning to Downing Street, while Gordon Brown continued as a Member of Parliament and a Labour Party figure, subsequently authoring major constitutional blueprints on devolution while outside government.

132. Similarly, in the United States, figures such as former President Barack Obama has continued, after leaving office, to speak publicly on matters concerning American democracy, governance and contemporary political affairs; including biting criticism of serving State Officers. There is no bar on former US Presidents holding political office after leaving the White House.

133. Indeed, our democratic contemporaries as well as our democratic elder siblings are all united in one aspect, despite their varying constitutional structures, systems, and traditions. They do not bar former Heads of State/Government from holding political party office post-exit.

134. These examples are not invoked as constitutional precedents governing Kenya. They are relevant for a more modest but important reason. They demonstrate that the continued political voice of a former Head of Government or Head of State is not, in itself, regarded as incompatible with democratic government. The constitutional question is therefore not whether a retired President may remain influential. He or she plainly will be by virtue of having been a Kenyan President. The question is whether that influence, without more, furnishes a constitutionally sufficient justification for withdrawing from that person a political freedom enjoyed by other citizens, and, more particularly, for placing

his or her constitutionally protected retirement benefits at risk. The comparative experience suggests that political influence, standing alone, is not treated as a constitutional disability. It is the exercise of actual governmental power, and conduct falling within recognised constitutional or statutory limitations, that may properly attract restriction. Retirement from office does not, by itself, place the former office-holder beyond the protection of the ordinary constitutional order.

135. In Kenya, we may politically and socially wish for a former President to remain politically silent and to let their successor or successors ' govern without interference.' This may even be politically and socially sound. It is, however, not constitutionally backed, and it is an impermissible and unjustifiable infringement of the political rights of both the former President as well as the members of the political party and the wider People of Kenya.

136. Holding political office post-exit allows a former President, like every other adult citizen, to participate in our politics and democracy to a great extent. It allows the former President to serve as a canary in the mine and to use his or her experience to mentor the next generation of Kenya's leaders. I cannot see any constitutionally compliant reason why this should be prohibited generally, much less at the peril of the loss or reduction of what should be constitutionally protected retirement benefits.

137. If the issue is that a former President of the Republic of Kenya retains outsize influence that skews discourse in one direction or impedes the successor administrations from delivering on their mandate; that fear is easily allayed just by reference a simple question: what in being a party official enhances that outsize influence in a way that being an ordinary member or even a non-member does not?

138. Even without being a political party official, a former President would still have exactly the same political gravitas, national influence, and local and international impact. What Parliament ought to have done is to attempt to bar all political activity by a former President. Whether that would have been lawful is not for this Judgment to say, but at least then there would have been a clear legislative objective, whether constitutional or not.

139. In the present circumstances, there is no justification that is acceptable to the Constitution or even understandable as to why holding political office should be specifically barred for a former President. The Respondents, tellingly, did not proffer any such reason.

140. The Court is equally mindful that Article 38 rights are not absolute. Political participation may, in appropriate circumstances, be regulated consistently with the Constitution. There may be circumstances involving national security, public order, prevention of crime, integrity of elections, corruption, incitement to violence or other legitimate constitutional objectives in which carefully drawn restrictions may be justified. The point is not that a former

President is immune from regulation. The point is that the State must identify the constitutional objective served by the particular restriction and demonstrate that the means selected are constitutionally justified.

141. In the present case, the Court has not been shown why the mere holding of political-party office by a retired President, beyond six months, constitutes such a constitutional danger that it warrants the additional sanction of possible deprivation of retirement benefits. The argument based upon continuing political influence does not sufficiently answer the question because political influence extends beyond party office.

142. Nor does the statutory scheme distinguish between forms of party office according to the particular constitutional risk said to arise. The definition of "office holder" under the Political Parties Act is broad. It encompasses a person elected by members of the political party to hold office and registered with the Registrar. Section 6 of the Presidential Retirement Benefits Act does not identify any particular category of office whose functions might imperil the constitutional order. It simply prohibits the retired President from holding office in any political party beyond the prescribed period, even if the party position held is extremely minor.

143. That breadth matters because section 4(1)(b)(ii) then attaches to breach the possibility of losing the whole or part of the retirement benefits. The more serious the consequence, the greater the need for precision in identifying both the mischief and the relationship between the prohibited conduct and the constitutional objective.

144. The Court therefore finds that the statutory scheme cannot be sustained merely by describing the retired President as a person of exceptional influence. The Constitution does not establish a category of citizen whose political rights are reduced because other citizens attach particular significance to his or her opinions.

145. The Petitioner impugned the entirety of Section 4 of the Act. However, it is the finding of this Court that not all of Section 4 of the Act is unconstitutional. Section 4(4) concerns benefits payable to a surviving spouse. It provides for when those benefits commence, the circumstances in which they are not payable because of another annuity or pension, reduction during periods in which the surviving spouse holds a remunerated governmental position, and cessation upon death or remarriage. Those provisions are materially different from section 4(1) and section 4(2), which confer upon the National Assembly a power to deprive a retired President of his or her benefits.

146. More importantly, the Petition before the Court challenges sections 4 and 6 in the context of the constitutional protection afforded to a former President. Section 4(4) operates in relation to a surviving spouse and is further qualified by the statutory scheme, including Section 7, which is not impugned in the Petition. The Court should therefore avoid declaring invalid that which is not properly before it and this Court should preserve Section 4(4), to the extent that its operation is independent and consistent with the constitutional and statutory scheme.

147. The appropriate constitutional conclusion is accordingly not that every word of section 4 is incapable of application. Rather, Section 4 is unconstitutional to the extent that it purports to authorize the withholding, reduction or extinguishment of the retirement benefits payable to a former President during his or her lifetime. Section 4(4), concerning the benefits of a surviving spouse and operating within the statutory framework including section 7, should remain undisturbed.

148. The severability principle is particularly important here. Article 2(4) provides that unconstitutional law is void "to the extent of the inconsistency." The constitutional command is therefore one of precision. The Court need not destroy an entire statutory provision where the unconstitutional portion can be identified and severed from provisions which are constitutionally unobjectionable. The proper remedy is consequently to declare the impugned deprivation mechanism void to the extent that it conflicts with Article 151(3), while preserving section 4(4).

149. Sections 4(1), 4(2), and 4(3) do not and cannot pass the constitutional muster. Section 4(4) does.

150. Section 6, however, stands on a different footing. Section 6(1) provides that:

"A retired President shall not hold office in any political party for more than six months after ceasing to hold office as President."

151. Sub-sections (2) and (3) are extensions of the same constitutionally unsustainable reasoning that seeks to impermissibly and unjustifiably limit the political rights of a former President and the attendant political and social rights of other Kenyans; and are tied with the sub-section (1) in a way that cannot be severed. Similarly, Sub-Section (4) as an operative clause is interwoven with sub-section (1). The entirety of Section 6 must therefore fall.

152. The Court therefore finds and holds that Sections 4(1), 4(2), and 4(3) and Section 6 of the Presidential Retirement Benefits Act are inconsistent with Article 151(3) of the Constitution and Article 38 are thus unconstitutional.

Whether Sections 4 and 6 of the Act violate the doctrine of separation of powers and the constitutional allocation of functions among the Legislature, Executive and Judiciary.

153. The second issue for determination is whether Sections 4 and 6 of the Presidential Retirement Benefits Act violate the doctrine of separation of powers and the constitutional allocation of functions among the Legislature, the Executive, and the Judiciary.

154. This issue must be considered against the determination already made under Issue Two immediately above. The Court has found that Section 4, save for Section 4(4), is inconsistent with Article 151(3) and Article 38 to the extent that it purports to authorize the withholding, reduction or extinguishment of

retirement benefits payable to a former President during his lifetime. That finding addresses the substantive constitutional validity of the power which Parliament purported to create. The present issue is different. It concerns the institutional character of that power and whether, by assigning the determination contemplated under Section 4 to the National Assembly, Parliament crossed the constitutional boundary separating legislative authority from judicial or executive power.

155. The doctrine of separation of powers is a structural principle of the Constitution. Article 1(3) provides that sovereign power is delegated to Parliament and the County Legislative Assemblies, the National Executive and the executive structures in the County Governments, and the Judiciary and independent tribunals.

156. Each of these organs is required to exercise the sovereign power delegated to it in accordance with the Constitution. The Constitution therefore distributes public power among distinct institutions and assigns to each a constitutionally defined sphere of responsibility. At the same time, the constitutional order does not establish absolute institutional isolation. The several arms of Government interact through a system of checks and balances, each exercising its own mandate while remaining subject to the Constitution and to appropriate constitutional scrutiny.

157. The Supreme Court's decision in ***Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] KESC 1 (KLR)*** provides an important starting point. The Apex Court recognized that the doctrine of separation of powers requires each arm of Government to respect the independence of the others and to refrain from directing another constitutional organ on how it should exercise its mandate. At the same time, the Supreme Court emphasized that the Constitution establishes checks and balances between the organs of State and that the courts retain their constitutional responsibility to determine whether public power has been exercised within constitutional bounds. The Apex Court further cautioned that judicial intervention must be undertaken with objectivity, specificity and restraint, having regard to the constitutional mandate of the institution whose action is under review.

158. The Court of Appeal expressed a similar position in ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR)***, recognizing separation of powers as both a feature and a pre-commitment of the constitutional order. The Court acknowledged that the constitutional structure permits and indeed contemplates checks and balances among the arms of Government, but that such interaction does not authorize one organ to assume functions constitutionally vested in another. The Judiciary consequently retains its interpretive and constitutional supervisory role, even as it accords due respect to the constitutional sphere occupied by Parliament and the Executive.

159. These authorities demonstrate that the proper question is not whether Parliament has enacted legislation which touches upon a matter that may also have judicial or executive consequences. The question is whether, in doing so, Parliament has assumed a function which the Constitution has vested exclusively in another organ. The Court must therefore examine the nature and character of the function assigned by Sections 4 and 6 rather than its mere practical consequences.

160. Article 94 vests legislative authority in Parliament. That authority includes the power to oversight, and to also enact legislation establishing statutory rights, benefits, obligations and conditions governing the use of public resources. The Presidential Retirement Benefits Act is itself an exercise of that legislative authority. It establishes the statutory framework governing the benefits available to retired Presidents and their surviving spouses. Parliament was therefore plainly entitled, subject always to the Constitution, to legislate on presidential retirement benefits.

161. Section 4 of the Presidential Retirement Benefits Act must be considered within that constitutional framework. As earlier set out in this judgment, the provision empowers the National Assembly, by a resolution supported by not less than two-thirds of its members, to determine that a retired President or surviving spouse shall not be entitled to the whole or any part of the benefits conferred by the Act upon the occurrence of the specified circumstances. The section further provides for the consequential withholding or reduction of those benefits upon the passing of such a resolution.

162. The constitutional question is not, however, whether Parliament may legislate on presidential retirement benefits. It plainly may. Nor is it whether Parliament may prescribe conditions governing the enjoyment of a statutory benefit. It may, provided that such conditions remain within the limits imposed by the Constitution. The question is of a more precise character: whether, in conferring upon the National Assembly the power contemplated by Section 4, Parliament has assigned to the Legislature a function which, by its very nature, belongs to the Judiciary or the Executive; and thereby transgressed the constitutional allocation of powers.

163. The answer requires the Court to examine the true nature and legal character of the power conferred by section 4, rather than its form or the fact that it is exercised through a parliamentary resolution.

164. In my view, it has not, merely by reason of the fact that the National Assembly is required to undertake a factual or evaluative determination. The fact that a statutory decision-maker must ascertain facts, consider information, apply statutory criteria and arrive at a conclusion does not, without more, transform the function into a judicial function. The constitutional character of a function is determined by its substance and legal effect, rather than merely by the presence of features which may also be found in judicial proceedings.

165. There is a fundamental distinction between Parliament determining the conditions upon which a statutory benefit created by Parliament is payable and Parliament purporting to exercise the judicial power of the State. Parliament

would plainly cross the constitutional boundary if it purported to determine criminal guilt, adjudicate an ordinary civil dispute between private parties, issue binding judicial remedies, or exercise a general jurisdiction over legal disputes. Section 4 does none of those things.

166. This is particularly clear in relation to section 4(1)(b)(i). The provision is triggered only where a retired President has already been convicted of an offence and sentenced to imprisonment for the prescribed period without the option of a fine. The National Assembly is not called upon to determine whether the former President committed the offence, nor is it vested with authority to revisit the conviction or sentence. Those matters fall within the judicial function and have already been determined by a competent court exercising judicial authority. Parliament's role under the provision is therefore consequential rather than adjudicative: it is required only to ascertain whether the statutory condition namely, the existence of a qualifying conviction and sentence has arisen so as to activate the statutory mechanism contemplated by section 4.

167. The position under Section 4(1)(a) requires closer consideration because it refers to a retired President having ceased to hold office on account of having acted in willful violation of the Constitution or having been guilty of gross misconduct. Those expressions necessarily require some factual and legal assessment. The National Assembly would therefore have to consider the circumstances surrounding the cessation of office and determine whether the statutory description is satisfied.

168. Even so, that does not necessarily amount to an assumption of judicial power. A legislative body may, within the scope of a statutory function, undertake factual inquiries and apply statutory standards without becoming a court. The decisive question remains whether the body is exercising a judicial jurisdiction constitutionally reserved to the courts or whether it is performing a function which Parliament has itself created as part of a legislative scheme.

169. The distinction is important because Parliament frequently enacts legislation under which statutory consequences follow upon the satisfaction of prescribed factual conditions. The existence of an evaluative element does not, by itself, alter the constitutional identity of the decision-maker. What matters is whether the function assigned is in substance the adjudication of a legal dispute in the exercise of judicial authority or the administration of a statutory scheme created by Parliament.

170. In the present case, Section 4 forms part of a statutory scheme governing presidential retirement benefits. It does not establish a court, confer general jurisdiction upon the National Assembly, or authorize Parliament to determine criminal or civil liability. Its function is confined to the statutory regime created by the Act itself.

171. I therefore find that the mere assignment of the Section 4 determination to the National Assembly does not constitute an impermissible assumption of judicial power.

172. Nor does Section 4 vest an executive function in Parliament. The Executive is ordinarily responsible for implementing and administering laws and policies within the constitutional framework. Section 4 does not transfer to the National Assembly the administration of an executive programme or the general implementation of Government policy. It creates a parliamentary mechanism for making a determination within a statutory scheme established by Parliament.

173. The financial nature of the consequence does not alter this conclusion. Parliament is constitutionally competent to legislate concerning public expenditure, remuneration, pensions and statutory benefits. Indeed, Article 94 would have little practical meaning if Parliament were constitutionally disabled from legislating upon matters having financial consequences. The constitutional prohibition is not against Parliament legislating on matters involving public expenditure; it is against Parliament exercising a function constitutionally reserved to another organ.

174. This conclusion is, however, subject to an important qualification. The fact that Parliament has legislative competence over the subject matter does not place its legislation beyond constitutional review. Article 94 does not confer plenary or sovereign legislative power. Parliament exercises delegated sovereign authority and must exercise that authority in accordance with the Constitution. Article 2 establishes the supremacy of the Constitution, while Article 165(3)(d) expressly vests this Court with jurisdiction to determine whether anything said

to be done under the authority of the Constitution or of a law is inconsistent with or in contravention of the Constitution.

175. The principle of separation of powers therefore operates in both directions. The Judiciary must respect the constitutional sphere of Parliament and should not substitute its own policy preferences for legislative choices properly within Parliament's mandate. Equally, Parliament cannot invoke separation of powers to shield legislation from constitutional scrutiny or to enlarge its legislative authority beyond the limits imposed by the Constitution.

176. This is the balance reflected in **Justus Kariuki Mate.** The Court must accord Parliament the constitutional space necessary for it to discharge its legislative mandate, but institutional respect cannot amount to abdication of the judicial duty to determine whether that mandate has been exercised constitutionally. The constitutional responsibility of the Judiciary is not displaced merely because the impugned power is contained in an Act of Parliament.

177. The same principle emerges from **Mumo Matemu**. The existence of institutional checks and balances does not mean that the arms of Government are immune from constitutional scrutiny. Rather, each institution operates within its own constitutional sphere, while the Judiciary retains the responsibility of determining whether governmental action remains within constitutional limits.

178. The present case consequently does not require the Court to determine whether Parliament made a wise or desirable policy choice in assigning the

function under Section 4 to the National Assembly. That would improperly draw the Court into the legislative domain. The question is narrower: whether the Constitution prohibits Parliament from establishing a statutory mechanism under which the National Assembly itself makes a determination concerning the continued enjoyment of benefits created by legislation.

179. On that narrower question, I find that the mere allocation of the function to the National Assembly does not violate the doctrine of separation of powers.

180. That finding, however, does not save the substantive consequence which Section 4 purports to attach to the parliamentary determination. There is a fundamental distinction between the constitutional competence of an institution to undertake a statutory determination and the constitutionality of the consequence which the statute authorizes that institution to impose.

181. The distinction is decisive in this case. Under Issue one, the Court has already found that Article 151(3) constitutionally protects the retirement benefits of a former President against variation to his disadvantage during his lifetime. Section 4, save for Section 4(4), purports to empower the National Assembly to withhold, reduce or extinguish those benefits. Parliament cannot acquire authority to do indirectly what the Constitution prohibits it from doing directly merely by entrusting the decision to a parliamentary process.

182. The two-thirds voting threshold prescribed by Section 4 does not alter the analysis. A procedural safeguard cannot cure a substantive constitutional prohibition. Nor does the fact that the determination is legislative rather than

judicial make the resulting deprivation constitutionally permissible. The vice identified under Article 151(3) lies in the substantive consequence authorized by the provision, not in the institutional identity of the decision-maker.

183. The Court must therefore keep the two inquiries separate. The first is whether Parliament could constitutionally assign the statutory determination to itself. On that question, the answer is yes. The second is whether Parliament could constitutionally authorize the deprivation of benefits which Article 151(3) protects against disadvantageous variation during the former President's lifetime. On that question, the answer, for the reasons already given under Issue one, is no.

184. The same analysis applies to Section 6. As earlier set out in this judgment, Section 6 regulates the political activities of a retired President by limiting the period during which such a President may hold office in a political party and by prohibiting active engagement in the activities of a political party.

185. Section 6 does not confer upon the National Assembly any judicial jurisdiction, nor does it vest in Parliament an executive function. Unlike Section 4, it does not establish a mechanism by which Parliament is required to make an adjudicative determination concerning the liability or entitlement of an individual. Rather, it prescribes a substantive rule governing the conduct of a retired President after leaving office.

186. Its constitutional implications therefore arise principally from the nature and extent of the restriction imposed upon the political rights of a retired

President, rather than from any alleged usurpation of judicial or executive power. The question whether that restriction is constitutionally permissible falls to be determined by reference to the constitutional protection of political rights and the applicable constitutional limitations, as considered under Issue Three.

187. The relationship between Sections 4 and 6 is nevertheless material. Section 4(1)(b)(ii) expressly identifies the holding of office in, or active engagement in the activities of, a political party contrary to Section 6(1) as a ground upon which the National Assembly may deprive a retired President of the whole or part of his retirement benefits. Section 6 therefore operates as one of the statutory triggers for the consequence created by Section 4.

188. That statutory connection does not, however, transform Section 6 into an exercise of judicial or executive power. The constitutional question it raises is whether Parliament was entitled to impose the restriction itself, and whether the restriction is compatible with the constitutional protection of political participation. Those questions belong to the separate inquiry concerning Article 38 and, where applicable, the constitutional requirements governing limitations of rights.

189. The Court should therefore resist the temptation to use separation of powers as a general constitutional ground against provisions whose real constitutional difficulty lies elsewhere. Constitutional adjudication requires precision. Each impugned provision must be tested against the constitutional norm which its legal operation engages.

190. I accordingly find that the Petitioner's challenge to Sections 4 and 6 on the ground of separation of powers have not been established. Neither provision, merely by reason of the functions assigned to the National Assembly, constitutes an impermissible assumption of judicial or executive power. Parliament did not, by enacting Section 4, establish a parallel court or confer upon itself the general judicial power of the State; nor did it assume the ordinary functions of the Executive. Section 6 likewise does not allocate judicial or executive functions to the Legislature.

191. This finding does not affect the Court's determination under Issue Two that Section 4, save for section 4(4), is unconstitutional to the extent of its inconsistency with Article 151(3). The constitutional infirmity in Section 4 arises from the substantive consequence which the provision purports to authorize, and not from any lack of institutional competence on the part of the National Assembly to make the statutory determination contemplated therein.

192. Equally, this finding does not determine the separate constitutional validity of Section 6. The unconstitutionality of Section 6 has been determined under Issue Two above.

193. Accordingly, on Issue Three, I find and hold that Sections 4 and 6 of the Presidential Retirement Benefits Act do not violate the doctrine of separation of powers or the constitutional allocation of functions among the Legislature, the Executive and the Judiciary.

Whether Sections 4 and 6 of the Act violate the rights and freedoms guaranteed under Articles 27, 38, 40, 43(1)(e), 47 and 50 of the Constitution, including the principles of legality, fair hearing and natural justice.

194. The fourth issue for determination is whether Sections 4 and 6 of the Presidential Retirement Benefits Act violate the rights and freedoms guaranteed under Articles 27, 38, 40, 43(1)(e), 47 and 50 of the Constitution, including the principles of legality, fair hearing and natural justice.

195. This has already been answered to a limited extent above, with reference to aspects of Article 38; but the Petitioner cited a myriad of Articles and a plethora of grounds that are similarly still ripe for determination.

196. The determination of this issue must be approached against the findings already made. The Court has found, under Issues Two and Three, that Article 151(3) affords absolute constitutional protection to the retirement benefits of a former President from detrimental change and that Section 4 is unconstitutional to the extent that it purports to authorize the withholding, reduction or extinguishment of those benefits during the former President's lifetime. The Court has further found, under Issue Three, that the constitutional infirmity in Section 4 does not arise merely because Parliament is the institution required to make the statutory determination contemplated by the section. The infirmity lies principally in the substantive consequence which Parliament has purported to attach to that determination.

197. The present issue therefore requires the Court to consider whether, independently and cumulatively, the impugned statutory scheme infringes the other constitutional rights invoked by the Petitioner.

198. The starting point is Article 20(1), which binds all State organs and all persons to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. Article 2(4) makes the constitutional consequence of inconsistency equally clear: any law, including customary law, which is inconsistent with the Constitution is void to the extent of the inconsistency. Parliament's legislative authority under Article 94 is consequently not plenary. It is authority exercised within, and subject to, the Constitution. The fact that a provision is contained in an Act of Parliament does not immunise it from constitutional scrutiny, nor does the presumption of constitutionality relieve the Court of its constitutional duty to determine whether legislation conforms to the supreme law.

199. The Court of Appeal in ***National Assembly of Kenya v Ole Kina & another [2022] KECA 548 (KLR)*** affirmed that the presumption of constitutionality is a principle applied in statutory interpretation and does not oust the jurisdiction of the Court to determine whether legislation infringes the Constitution.

200. I begin with Article 27. Article 27(1) guarantees every person equality before the law and equal protection and equal benefit of the law, while Article 27(4) prohibits discrimination on any ground. It is nevertheless settled that constitutional equality does not require identical treatment in circumstances

which are materially different. Differential treatment will amount to discrimination where it lacks a legitimate basis, is arbitrary or bears no rational relationship to the object sought to be achieved. The Court of Appeal has repeatedly recognised that the existence of a distinction is not, of itself, sufficient to establish discrimination. In ***National Assembly of Kenya v Ole Kina & another supra,*** the Court reiterated the need to examine whether the differentiation bears a rational connection to a legitimate purpose and whether the measure is proportionate to the purpose sought to be achieved.

201. Applying that principle, I am unable to find that the creation of a statutory regime specifically governing former Presidents, without more, violates Article 27. The Constitution itself recognises the special constitutional position of the President and, in Article 151(3), expressly provides for the protection of presidential retirement benefits. Parliament was therefore entitled, subject to the Constitution, to enact legislation regulating the incidents of retirement from the presidency. The fact that former Presidents constitute a distinct class does not, by itself, render the statutory regime discriminatory.

202. The constitutional difficulty arises at a different level. A classification which is constitutionally permissible at its inception cannot be used as a vehicle for authorizing a consequence which the Constitution itself prohibits. Section 4 does not become constitutionally valid merely because it applies uniformly to former Presidents. Its defect lies in what it permits to be done to members of that class: the withholding, reduction or extinguishment of retirement benefits which Article 151(3) expressly protects against disadvantageous variation

during the beneficiary's lifetime. I therefore find no independent violation of Article 27 merely by reason of the classification of former Presidents. The invalidity of section 4 rests principally upon the substantive constitutional protection already identified under Article 151(3), reinforced by the proprietary and procedural protections considered below.

203. The position with respect to Article 38 is materially different. Article 38 guarantees every citizen the right to make political choices and, in particular, the right to participate in the activities of, or recruit members for, a political party; to campaign for a political party or cause; and to participate in free, fair and regular political activities. Political participation is not a privilege reserved for persons who presently occupy public office. It is a constitutional right attaching to citizenship.

204. Section 6(1) provides in express terms that:

"A retired President shall not hold office in any political party for more than six months after ceasing to hold office as President."

205. The statutory provision must be examined not as an abstract regulation of retirement, but against the constitutional status of the person upon whom it operates. A President is a political office-holder. A person who has served as President will ordinarily have participated in political life for a substantial part of his or her public career. Upon leaving office, that person does not cease to be a citizen, nor does the Constitution extinguish his or her political rights. The transition from serving President to retired President terminates the exercise

of presidential power; it does not terminate citizenship or the right to participate in the political life of the Republic.

206. The question is therefore whether Parliament may, by ordinary legislation, impose upon a former President a continuing disability from holding office in a political party merely because he or she has previously occupied the office of President.

207. In my view, it may not do so in the breadth contemplated by Section 6.

208. The difficulty is not that Parliament is wholly incapable of regulating the conduct of former State officers. The Constitution itself recognizes that public office carries particular responsibilities, and Parliament may legislate against conflicts of interest, misuse of public resources, abuse of office and other conduct properly connected to the integrity of public institutions. The difficulty is that section 6 does not identify a particular mischief of that character. It imposes a general disability upon the political participation of a former President solely by reason of the office previously held.

209. The constitutional significance of that distinction cannot be understated. The office of President is held for a constitutionally defined period. Upon cessation of office, the former President ceases to exercise the coercive and executive authority of the State. The person thereafter stands in a fundamentally different constitutional position: he or she is a private citizen, albeit one who has previously occupied the highest elective office in the Republic. The former President's experience may give him or her influence, stature and political

relevance, but influence is not itself a constitutional disqualification from political participation.

210. Indeed, the Act itself recognizes that a retired President continues to have a public role. Section 6(2) provides that a retired President shall be expected to play a consultative and advisory role to the Government and the people of Kenya, while section 6(3) permits the Government to request a retired President to perform specific official functions. These provisions are significant. Parliament itself contemplated that retirement from the presidency does not render the former President irrelevant to public affairs. To the contrary, the statutory scheme envisages that the experience, knowledge and institutional memory acquired in office may continue to serve the Government and the people of Kenya.

211. It would therefore be constitutionally incongruous to recognize the former President as a person whose counsel may be sought by Government and whose experience may benefit the people of Kenya, while simultaneously imposing a statutory disability which substantially restricts his or her participation in the political process merely because of the office previously held.

212. There is, moreover, a qualitative distinction between ceasing to exercise presidential power and ceasing to participate in political life. The former is an inevitable consequence of the expiration or termination of the presidential mandate. The latter is a constitutional freedom. A former President no longer

commands the machinery of Government, does not exercise the executive authority of the State by virtue of the former office, and cannot lawfully purport to continue exercising presidential powers. Those considerations substantially diminish the justification for treating political participation after retirement as though it were a continuation of presidential office.

213. The statutory restriction is also problematic because the Act does not define what is meant by the expression *"hold office in any political party"* with sufficient precision to illuminate the full extent of the disability which Parliament intended to impose. The constitutional question cannot be answered by assuming that political participation is synonymous with holding formal party office. A citizen may participate in political life in numerous ways which do not amount to holding a formal office in a political party. Political association, political speech, political advocacy, consultation, endorsement of political causes and participation in public political discourse are all capable of falling within the broader sphere protected by Article 38. The Court must therefore guard against an interpretation of section 6 which, by uncertainty or breadth, produces a chilling effect upon constitutionally protected political participation.

214. The constitutional defect becomes even more pronounced when section 6 is read together with section 4(1)(b)(ii). Section 4 makes the holding of office in, or active engagement in the activities of, a political party contrary to section 6(1) a ground upon which the National Assembly may resolve that a retired President shall not be entitled to the whole or part of his retirement benefits.

The two provisions cannot therefore be viewed as unrelated statutory provisions. Section 6 creates the prohibited conduct, while section 4 attaches to that conduct the extraordinary consequence of deprivation of retirement benefits.

215. The practical effect is that a former President is placed in the position of choosing between the continued enjoyment of constitutionally protected retirement benefits and the exercise of political activity which the Constitution otherwise guarantees. The right is thus burdened not merely by the direct prohibition contained in section 6, but by the severe economic consequence attached to its alleged contravention.

216. In my view, that statutory architecture cannot withstand constitutional scrutiny. The Constitution does not contemplate that a citizen may be compelled, through the threatened loss of a constitutionally protected retirement benefit, to surrender a political right. A right which is formally available but whose exercise carries the risk of losing an accrued constitutional entitlement is not being enjoyed on equal constitutional terms. The effect is coercive and has the potential to chill political participation.

217. This is particularly significant in the context of former Presidents. These are persons whose political identities, public relationships and experience necessarily predate and survive their presidential tenure. To suggest that the conclusion of presidential office should, for an indefinite or extended period, carry with it a diminution of political citizenship is to treat the retirement from

office as though it were a retirement from democratic participation. The Constitution does not make such a distinction.

218. I therefore find that section 6(1), insofar as it imposes upon a retired President a disability from holding office in a political party after the expiry of six months from cessation of presidential office, is inconsistent with Article 38. The defect is aggravated, rather than cured, by section 4(1)(b)(ii), which purports to attach loss or reduction of retirement benefits to the exercise of the very conduct restricted by section 6.

219. The fact that Section 6 imposes a six-month period does not alter that conclusion. A time-limitation of a constitutional right is not rendered constitutional merely because it is temporary. Duration is relevant to proportionality, but it is not determinative of constitutional validity. The Court must examine the nature of the right, the nature of the restriction and the constitutional justification for the restriction. Here, the statutory scheme fails to establish a sufficiently compelling constitutional basis for disabling a former President from political participation in circumstances where the person has ceased to exercise presidential authority and has reverted to the position of a citizen.

220. The same conclusion is reinforced by the statutory recognition of the former President's continuing public role. The Act contemplates that retired Presidents may advise Government and the people of Kenya and may perform official functions at the request of Government. It would be anomalous for the law to regard their experience and judgment as sufficiently valuable to be

deployed in the public interest while simultaneously treating their participation in the political life of the Republic as a disqualifying activity. The Constitution does not require former Presidents to become politically voiceless in order to become retired Presidents.

221. I now turn to Article 40. Article 40 protects the right to property and expressly prohibits Parliament from enacting a law permitting the State or any person to arbitrarily deprive a person of property or of any interest in, or right over, property. The question is whether the retirement benefits payable under the Act constitute an interest or right capable of attracting that protection.

222. I find that they do. Once the statutory conditions giving rise to entitlement have been satisfied, the benefit is not a mere gratuity or act of executive benevolence. It is a legally enforceable entitlement arising from the statutory scheme. The High Court in ***Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & Katiba Institute (Interested Parties) [2019] KEHC 10892 (KLR)*** recognised the proprietary character of retirement benefits and, significantly, held that retirement benefits protected by Article 151(3) could not lawfully be varied to the disadvantage of the beneficiary.

223. The Court of Appeal has likewise recognised the constitutional significance of accrued retirement interests in the context of Article 40. It does not follow that retirement benefits can never be regulated. Regulation of the administration, financing and implementation of retirement schemes is plainly possible. What Article 40 prohibits is resolve that a retired President shall not be entitled to

the whole or any part of the benefits conferred by the Act, or that the entitlement shall be reduced. That is not merely administrative arbitrary deprivation of the proprietary interest. The distinction is between regulation of an entitlement and destruction of the entitlement.

224. Section 4 crosses that constitutional line. It authorizes the National Assembly to resolve that a retired President shall not be entitled to the whole or any part of the benefits conferred by the Act, or that the entitlement shall be reduced. That is not merely administrative regulation. It is deprivation.

225. The constitutional infirmity is aggravated by the fact that the benefit in question is not merely statutory property. In the case of a former President, the entitlement enjoys the additional and express constitutional protection of Article 151(3). Parliament therefore purports to exercise a statutory power over an interest which the Constitution itself has placed beyond disadvantageous variation during the beneficiary's lifetime.

226. The result is that section 4 impermissibly converts a constitutionally protected entitlement into a contingent privilege, dependent upon a subsequent parliamentary resolution. That cannot be reconciled with the constitutional hierarchy. A right protected by the Constitution cannot be reduced to a revocable statutory concession by the very legislation through which Parliament seeks to regulate it.

227. Section 4(4) is distinguishable. It concerns benefits payable to a surviving spouse and operates within the separate statutory scheme governing such

benefits, including section 7, which is not challenged in this Petition. The declaration of invalidity in respect of section 4 therefore does not extend to section 4(4).

228. The question of procedural fairness presents an additional and independent difficulty. Article 47 guarantees every person administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The constitutionalisation of administrative justice through Article 47 was a deliberate departure from a system in which public authorities could affect rights through processes governed only by ordinary administrative law. In ***Judicial Service Commission v Mbalu Mutava & another [2015] KECA 741 (KLR),*** the Court of Appeal recognized that Article 47 subjects the exercise of public power to constitutional standards of legality, reasonableness and procedural fairness and incorporates the principles of natural justice.

229. The Fair Administrative Action Act, 2015 gives practical content to those constitutional guarantees. Section 4(3) of the Fair Administrative Action Act, in particular, contemplates prior and adequate notice of the proposed administrative action, an opportunity to be heard and to make representations, notice of review or appeal rights, reasons for the proposed action and, where applicable, access to the information, materials and evidence to be relied upon.

230. Section 4 of the Presidential Retirement Benefits Act contains no equivalent procedural architecture. It prescribes the grounds upon which benefits may be withheld or reduced and the parliamentary majority required for the

resolution, but it does not establish a process through which the former President is to be notified of the allegations, furnished with the material upon which those allegations rest, afforded an opportunity to respond, permitted to challenge adverse evidence, or given reasons for the ultimate decision.

231. That omission is constitutionally significant. The power contemplated by Section 4 is capable of producing the most serious of financial consequences. Yet the statute does not prescribe the minimum procedural safeguards ordinarily expected where public power is exercised to determine adversely the rights or interests of an individual.

232. The defect is particularly acute in respect of section 4(1)(a), which refers to a former President having ceased to hold office on account of having acted in willful violation of the Constitution or having been guilty of gross misconduct. Those are serious allegations involving factual and legal questions. They cannot fairly be treated as self-proving. A person whose retirement benefits are placed at risk by such allegations must know the case against him or her and must have a meaningful opportunity to answer it.

233. The two-thirds threshold prescribed by Section 4 does not cure this defect. A super-majority is a voting requirement; it is not a hearing. It determines how many members must support the resolution, but says nothing about how the affected person is to be heard, what evidence may be relied upon, whether that evidence must be disclosed, whether the decision-makers must consider the response made, or whether reasons must be supplied.

234. Nor can parliamentary debate, without more, be equated with procedural fairness. Parliament is principally a legislative and representative institution. The fact that a parliamentary process involves debate does not mean that the person whose individual rights are at stake has been afforded the constitutional guarantees of notice, disclosure, hearing and impartial consideration. The institutional character of Parliament, considered under Issue Two, remains relevant here. The Court does not require Parliament to become a court of law. It requires, rather, that where legislation purports to authorize an adverse exercise of public power against an individual's protected rights, the statutory mechanism must conform to the Constitution.

235. The principles of natural justice lead to the same conclusion. The maxim *audi alteram partem* requires that a person affected by an adverse decision be afforded a genuine opportunity to be heard. The complementary principle, nemo judex in causa sua, requires impartiality in decision-making. These principles are not ornamental procedural requirements. They are safeguards against arbitrary exercises of public power.

236. Section 4 is deficient because it provides no structured mechanism through which those principles may be realized. The absence is especially troubling where the consequence is deprivation of retirement benefits and where the grounds include concepts such as willful violation of the Constitution and gross misconduct. Such allegations may be contested and may admit of different factual and legal interpretations. A statute which exposes a person to severe financial consequences without prescribing a fair procedure for establishing

the factual foundation of those consequences leaves too much to the discretion of the decision-making institution and creates an unacceptable risk of arbitrary action.

237. The position under Article 50 requires greater precision. Article 50(1) protects the right to have a dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, where appropriate, another independent and impartial tribunal or body. As already found under Issue Two, the Court does not regard Parliament, merely by performing the statutory function assigned to it by Section 4, as thereby assuming the judicial power of the State. It would therefore be analytically unsound to characterize every parliamentary consideration under Section 4 as a criminal or civil trial attracting the entirety of Article 50.

238. That does not, however, mean that Parliament is free from the constitutional demands of fairness when its statutory action directly affects an individual's protected rights. The minimum requirements of fair process remain applicable through Article 47 and the principles of natural justice. Article 50 reinforces the constitutional value placed upon impartiality and fair hearing, but the principal constitutional source of the procedural defect in section 4, in the circumstances of this case, is Article 47.

239. I would therefore decline to find that Section 4, merely because it permits a parliamentary resolution affecting benefits, necessarily constitutes a violation of Article 50(1) in every application. Such a finding would improperly collapse the distinction between legislative functions and adjudicative functions

addressed under Issue Three. The constitutional conclusion is nevertheless clear: the absence of a fair and structured process renders the exercise of the statutory power constitutionally infirm under Article 47 and the principles of natural justice.

240. Nor is it necessary to determine that every consequence following a criminal conviction amounts to double jeopardy under Article 50(2)(o). Section 4(1)(b)(i) operates after a conviction and sentence by a competent court. The subsequent statutory consequence is not, without more, a second criminal trial. Likewise, Article 50(2)(n), which protects an accused person against conviction for conduct which was not an offence when committed, should not be expanded beyond its constitutional language merely because a later statutory consequence is imposed. The stronger and constitutionally sufficient basis for invalidity remains the express protection of Article 151(3), the proprietary protection under Article 40 and the requirements of procedural fairness under Article 47.

241. I turn finally to Article 43(1)(e). The Constitution guarantees every person the right to social security. Retirement benefits are an important component of social protection, particularly where the benefit is created by law and is intended to secure the welfare of a person after leaving public service. The right to social security does not mean that every statutory retirement scheme is incapable of regulation. Parliament may establish and administer social-security schemes and may determine the machinery through which benefits are provided. But such regulation must itself conform to the Constitution.

242. In the present case, the constitutional problem is not the existence of conditions governing the administration of presidential retirement benefits. It is the statutory power to withdraw or reduce the benefit after entitlement has accrued and notwithstanding the express constitutional protection against disadvantageous variation. Section 4 therefore does more than regulate the manner in which social-security protection is delivered. It places the continued enjoyment of that protection at the discretion of a subsequent parliamentary resolution.

243. The right to social security cannot sensibly be understood as being fulfilled where the State creates a statutory retirement entitlement, recognizes it as payable during the lifetime of the former President, and then reserves to itself the power to extinguish that entitlement on grounds and through a procedure which are inconsistent with the Constitution. I therefore find that the impugned mechanism is also inconsistent with Article 43(1)(e), not because the Constitution renders every retirement benefit immutable, but because the particular statutory mechanism permits the withdrawal of the protected retirement entitlement in a manner inconsistent with the constitutional guarantees governing it.

244. The cumulative effect of the foregoing is important. The Court is not declaring every provision concerning presidential retirement benefits unconstitutional. Nor is the Court holding that Parliament lacks authority to legislate in respect of former Presidents. Parliament unquestionably has such authority, but it must exercise it within the constitutional limits already identified.

245. Section 6(1) is constitutionally infirm because it imposes upon a retired President a restriction upon political participation which is inconsistent with Article 38. The restriction cannot be justified merely by reference to the fact that the person previously occupied the presidency. Upon leaving office, the former President remains a citizen entitled to participate in the political life of the Republic. The Constitution does not establish a category of former citizens whose political rights may be diminished by reason of their having served as President.

246. Section 4 is constitutionally infirm for a different but related set of reasons. Its principal defect is the one identified under Issue One: it authorises the withholding, reduction or extinguishment of retirement benefits in circumstances contrary to Article 151(3). That substantive defect is compounded by the fact that the statutory mechanism permits interference with a proprietary and social-security entitlement without adequate procedural safeguards, contrary to Articles 40, 43(1)(e) and 47 and the principles of natural justice.

247. The Court also does not find an independent violation of Article 27 merely because Parliament has created a distinct statutory regime for former Presidents. Nor does the Court find that every consequence flowing from a criminal conviction constitutes double jeopardy under Article 50(2)(o). The constitutional findings must be confined to the actual defects demonstrated by the statutory provisions.

248. Ultimately, the constitutional position is this. A former President does not cease to be a citizen upon leaving office. Retirement from the presidency terminates the exercise of presidential authority; it does not terminate the constitutional rights that attach to citizenship. The Constitution recognises that a former President may continue to contribute to the public life of the Republic, and section 6 itself acknowledges that such a person may serve a consultative and advisory role to Government and the people of Kenya. To impose upon such a person a statutory disability which restricts political participation, and then to place constitutionally protected retirement benefits in jeopardy as the price of political engagement, is incompatible with the constitutional order.

249. Equally, Parliament cannot confer upon itself, by ordinary legislation, the power to extinguish an entitlement which the Constitution has expressly protected from disadvantageous variation during the beneficiary's lifetime. Nor may it accomplish indirectly, through a parliamentary vote, what the Constitution prohibits directly. The requirement of a two-thirds majority cannot cure that defect. A super-majority cannot override the Constitution, and a statutory voting threshold cannot substitute for the procedural guarantees of legality, fairness, notice, hearing and impartiality.

250. I therefore find that the constitutional challenge under Issue Four succeeds to the following extent: Section 6(1) of the Presidential Retirement Benefits Act is inconsistent with Article 38 and is unconstitutional to the extent that it restricts the political rights of a retired President in the manner prescribed

therein; Section 4 is unconstitutional to the extent that it permits the withholding, reduction or extinguishment of presidential retirement benefits contrary to Article 151(3), and the mechanism established for effecting that deprivation is further inconsistent with Articles 40, 43(1)(e) and 47 and the principles of natural justice for want of constitutionally adequate procedural safeguards. There is no independent violation of Article 27 merely by reason of the statutory classification of former Presidents, and the Court declines to hold that the impugned provisions invariably engage the protections against double jeopardy under Article 50(2)(o).

251. The declarations of invalidity must consequently be understood in that limited but substantive sense. The Court does not strike down Parliament's power to legislate for former Presidents. It strikes down the statutory exercise of that power insofar as it purports to curtail constitutional political rights or to expose constitutionally protected retirement benefits to deprivation through a process which does not meet the minimum requirements of the Constitution.

252. That, in my view, is the conclusion compelled by the Constitution when Articles 27, 38, 40, 43(1)(e), 47 and 50 are read together with Articles 1, 2, 10, 20, 24, 94 and, most importantly, Article 151(3). The Constitution protects both the dignity and continuing citizenship of the former President and the constitutional interests of the Kenyan people whom that former President may continue to serve through counsel, experience and participation in public life. A statutory regime which seeks to make retirement from the presidency synonymous with retirement from political citizenship, or which makes the

continued enjoyment of a constitutionally protected retirement benefit conditional upon political silence, cannot stand.

Whether the Petitioner is entitled to the declarations, orders of Certiorari and Prohibition, and the other reliefs sought in the Amended Petition.

253. The fifth issue for determination is whether, in light of the foregoing findings, the Petitioner is entitled to the declarations, orders of Certiorari and Prohibition, and the other reliefs sought in the Amended Petition.

254. The starting point is Article 23(3) of the Constitution. It confers upon this Court a broad remedial jurisdiction in proceedings brought under Article 22 and expressly empowers the Court to grant appropriate relief, including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that contravenes the Constitution, compensation and an order for judicial review. The enumeration is not exhaustive. The constitutional jurisdiction to grant relief is therefore not confined to the remedies traditionally available under the common law. The Court is required to fashion relief that is effective in vindicating the Constitution and the rights and freedoms guaranteed by it.

255. That remedial jurisdiction is, however, neither at large nor without principle. The remedy granted must bear a rational and proportionate relationship to the constitutional violation established and must be capable of giving practical effect to the Court's determination without exceeding the judicial function. In

Attorney General v Okoiti & 3 others [2025] KECA 309 (KLR), the Court of Appeal emphasised that constitutional remedies under Article 23 must be appropriate, specific, clear and effective, while at the same time guarding against judicial overreach. The Court must therefore identify the precise constitutional wrong established and tailor the relief to that wrong.

256. The Court has, in the preceding issues, made two material findings. First, Section 4 of the Presidential Retirement Benefits Act is unconstitutional to the extent that it authorises the withholding, reduction, withdrawal or extinguishment of retirement benefits payable to a former President during his lifetime contrary to Article 151(3) of the Constitution.

257. Secondly, section 6 is unconstitutional because the restriction which it imposes upon the political participation of a retired President is inconsistent with the constitutional protection of political rights, and its operation cannot be sustained within the constitutional framework governing those rights. These findings must inform the relief to be granted. The Court is not called upon at this stage to reopen those questions, but to give them effective juridical consequence.

258. A declaration is plainly appropriate. A declaration serves the important constitutional function of stating authoritatively the legal position between the parties and, where the challenge is directed at legislation, identifying the extent to which the impugned provision cannot lawfully operate. Article 2(4) provides that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency. Article 165(3)(d)

correspondingly vests this Court with jurisdiction to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution.

259. The declaration must nevertheless be carefully framed. The Court has not found that the entire Presidential Retirement Benefits Act is unconstitutional. Nor has it found that every provision touching upon presidential retirement benefits is incapable of operation. The constitutional vice identified in section 4 lies in the statutory power to disadvantageously vary the retirement benefits protected by Article 151(3), together with the constitutionally deficient mechanism through which that deprivation is contemplated. Section 6, on the other hand, has been found unconstitutional in its own right. The relief must therefore correspond to those distinct findings and preserve, so far as constitutionally possible, the remainder of the statutory scheme.

260. The Court accordingly considers that the appropriate declaratory relief should identify the particular provisions and the particular extent of their constitutional invalidity, rather than purporting to invalidate the Act wholesale. Such an approach accords with the principle of constitutional avoidance and the general judicial preference for preserving legislation to the extent that it can operate consistently with the Constitution. The Court's task is to remove the constitutional infirmity, not to rewrite the legislative scheme.

261. The question of Certiorari requires a different analysis. Certiorari is a quashing remedy. Its purpose is to bring before the Court a decision already made by a public body or decision-maker and to quash that decision where it has been

made without or in excess of jurisdiction, in breach of the law, or in violation of the principles of natural justice. The classic exposition remains that of the Court of Appeal in ***Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR,*** where the Court explained the distinct character of Certiorari and the circumstances in which it lies.

262. The essential question, therefore, is whether there exists a completed decision capable of being quashed. On the material before the Court, the alleged motion dated 4 May 2026 does not, without more, constitute a completed parliamentary decision varying, withholding, reducing or extinguishing the retirement benefits of a former President. A motion or proposal is not synonymous with the final determination which the remedy of Certiorari is designed to quash. Certiorari does not operate upon an anticipated decision in the abstract. There must be an identifiable decision or determination which has acquired legal effect and which is capable of being brought before the Court for quashing.

263. This is not a merely technical distinction. It goes to the nature of the remedy itself. A court cannot quash a decision which has not been made. The fact that an unlawful process may have been initiated, threatened or contemplated does not convert the contemplated outcome into a completed decision. The Court therefore finds that, in the absence of an identifiable completed decision by the relevant authority producing the impugned legal consequence, the remedy of Certiorari does not lie.

264. The position in relation to Prohibition is materially different. Prohibition is prospective. It is directed at preventing a public body or authority from continuing or undertaking proceedings which are unlawful, in excess of jurisdiction or otherwise contrary to law. The Court of Appeal in ***Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others*** explained that Prohibition lies to prevent an inferior tribunal or body from continuing proceedings in excess of jurisdiction or in contravention of the law. It does not, however, operate retrospectively to quash a decision already made, that is the function of Certiorari.

265. The distinction assumes particular importance in the present case. The Court has found that Section 4, to the extent identified above, cannot constitutionally support the withholding, reduction, withdrawal or extinguishment of presidential retirement benefits, and that Section 6 is unconstitutional. It would be incongruous for the Court, having reached those conclusions, to declare the relevant statutory provisions constitutionally infirm and yet leave open the possibility of their continued invocation to produce the very consequences which the Constitution forbids.

266. At the same time, the Court must observe the constitutional boundaries governing judicial intervention in parliamentary affairs. Parliament derives its legislative authority from Articles 1, 2, and 94 of the Constitution and must remain free to discharge the functions constitutionally entrusted to it. The Court is not entitled to supervise parliamentary debate or to restrain Parliament from considering matters merely because those matters touch

upon presidential retirement benefits. The remedy must therefore be directed at the unlawful exercise of the impugned statutory power and not at Parliament's constitutional legislative or deliberative functions generally.

267. The appropriate distinction is between Parliament's authority to deliberate and legislate, which remains constitutionally protected, and the use of an unconstitutional statutory provision to produce a legal consequence which the Constitution does not permit. The Court may restrain the latter without purporting to restrain the former.

268. That approach is consistent with the constitutional remedial principle emphasized in ***Attorney General v Okoiti & 3 others [2025] KECA 309 (KLR):*** a remedy under Article 23 must be specific, clear and effective, but must also remain proportionate to the violation established. A blanket order prohibiting Parliament from initiating, debating or considering any motion touching upon presidential retirement benefits would therefore go further than necessary and would risk impermissibly intruding upon Parliament's constitutional mandate.

269. The appropriate prohibitory relief must instead be confined to the unconstitutional legal consequences identified in this judgment. Parliament cannot lawfully rely upon the invalidated portions of section 4 to withhold, reduce, withdraw or otherwise disadvantageously vary the retirement benefits protected by Article 151(3). Equally, the unconstitutional restriction contained in section 6 cannot lawfully be enforced against a retired President merely by invoking the statutory provision itself.

270. The Court's conclusion in this regard does not amount to an injunction against Parliament in the exercise of its general legislative mandate. It is a recognition of the supremacy of the Constitution under Article 2 and of the binding effect of a judicial determination as to the constitutional validity of legislation. Parliament remains free to legislate within the constitutional field. It cannot, however, exercise legislative or statutory power in reliance upon a provision which this Court has determined to be unconstitutional.

271. The prayer for further or consequential relief must be approached on the same footing. Such a prayer does not confer upon the Court an unrestricted power to grant whatever relief it considers desirable. Its purpose is to enable the Court to give practical effect to the declarations and substantive remedies arising from the findings made in the judgment. The Court should therefore grant only such ancillary relief as is necessary to render the principal relief effective.

272. In the circumstances of this Petition, the declarations concerning the invalidity of section 4 to the extent identified, and section 6, together with the appropriate prospective protection against the implementation of those unconstitutional provisions, sufficiently vindicate the constitutional rights in issue. There is no demonstrated necessity for the Court to assume continuing supervision over Parliament or to prescribe the manner in which Parliament should conduct its constitutional business. Such intervention would neither be necessary nor consistent with the institutional restraint required by the doctrine of separation of powers.

273. I have also considered whether the findings made under Articles 40, 43, 47 and 50 require any additional or independent remedy. In my view, they do not. The violations identified arise from the statutory scheme challenged before the Court and are adequately addressed by declaring the impugned provisions unconstitutional to the extent found and by restraining their unconstitutional operation. The Court should not multiply remedies where the relief already available is sufficient to vindicate the rights infringed.

274. The same applies to the findings concerning section 6. Having found that section 6 is unconstitutional, the Court must give effect to that finding. It would be internally inconsistent to pronounce the provision unconstitutional and thereafter decline to afford any relief against its continued enforcement. The declaratory and consequential relief must therefore encompass section 6 to the extent necessary to prevent the continued enforcement of the unconstitutional restriction.

275. The Court is mindful that constitutional adjudication is not concerned merely with identifying an abstract violation. Article 23 requires effective vindication. A declaration which leaves the impugned provision free to be invoked against the person whose constitutional rights have been vindicated would be an inadequate response where prospective enforcement remains a real possibility. The remedy must therefore be sufficiently operative to ensure that the unconstitutional statutory consequences do not continue to be visited upon the Petitioner.

276. The Court therefore concludes that the Petitioner has established a proper basis for declaratory and consequential relief. Section 4 cannot lawfully be relied upon to effect the disadvantageous variation of presidential retirement benefits prohibited by Article 151(3), and section 6, having been found unconstitutional, cannot lawfully continue to be enforced. Certiorari, however, cannot issue in the absence of a completed decision or determination capable of being quashed. Prohibition is the more appropriate judicial-review remedy insofar as prospective enforcement of the unconstitutional statutory consequences remains threatened. The precise terms of the declarations and consequential orders shall be set out in the final orders of the Court.

COSTS

277. The general principle that costs follow the event is not an inflexible rule, particularly in constitutional litigation involving questions of public importance and the interpretation of the Constitution. The discretion on costs must be exercised judicially and with regard to the circumstances of the particular case, including the public character of the litigation, the conduct of the parties, the extent to which the Petition has succeeded and the constitutional significance of the questions raised.

278. In the present matter, the Petition raises substantial questions concerning the constitutional protection of presidential retirement benefits, the political rights of a former President and the limits of legislative power under the Constitution. The Petitioner has succeeded on material aspects of the

constitutional challenge, although not necessarily on every ground or every relief sought. The Court must therefore approach the question of costs with that mixed outcome and the public character of the litigation in mind.

279. The Petitioner has expressly characterized itself as a Public Interest Litigator. There is no narrow constitutional interest at play in the present case, nor a direct individual harm that the Petitioner suffered. Rather, the Petitioner approached court as a civic-minded organization that sought to regularize what it saw as constitutional infirmities in both statute as well as a proposed parliamentary motion.

280. In doing so, the Petitioner incurred costs. Public Interest Litigators are increasingly asking for costs, arguing that the financial impact of Public Interest Litigation (PIL) for non-funded entities is enormous; and courts ought to recognize that and award them costs. They are increasingly arguing that defending the Constitution should, at the very least, result in them being awarded costs in successful petitions so that they are returned to the same financial position as they were before filing.

281. In any case, they argue, such costs would be modest and would be paid from public coffers in advancement of the public interest in deepening constitutionalism and democracy.

282. The Petitioner herein has similarly prayed for costs. The Amended Petition has succeeded and a significant constitutional infirmity will be healed due to their litigation action.

283. The Petitioner, and other self-funded Public Interest Litigators, may have a point regarding costs, however the law applicable to costs in PIL is currently as settled as settled can be. Public Interest Litigation, of which the present Amended Petition undoubtedly is, ordinarily results in each party bearing their own costs in almost all instances; with the exceptions only applying in very limited cases. This is not one of those limited cases where exceptional circumstances are at play. It is fit, proper, and just that each Party bears their own costs.

CONCLUSION

284. Accordingly, and for the reasons set out in this judgment, the Court makes the following final orders:

a. **A declaration be and is hereby issued that Section 4(1), 4(2), and 4(3) of the Presidential Retirement Benefits Act are unconstitutional, null and void.**

b. **For the avoidance of doubt, Section 4(4) of the Act, and to the extent that its operation is qualified by Section 7 of the Presidential Retirement Benefits Act, which provision was not challenged in these proceedings, has not been found to be unconstitutional.**

c. **A declaration be and is hereby issued that the mechanism established under Section 4 of the Presidential Retirement Benefits Act, insofar as it permits the deprivation or adverse variation of an accrued**

presidential retirement benefit without constitutionally adequate procedural safeguards, is inconsistent with Articles 40 and 47 of the Constitution and the principles of natural justice, and is void to that extent.

d. **A declaration be and is hereby issued that Section 6 of the Presidential Retirement Benefits Act is unconstitutional and void in its entirety.**

e. **An order of Prohibition be and is hereby issued restraining the Respondents, their servants, agents or any person acting under their authority from relying upon or giving effect to the unconstitutional portions of Section 4 of the Presidential Retirement Benefits Act for the purpose of withholding, reducing, withdrawing, extinguishing or otherwise varying to the disadvantage of a former President of the Republic of Kenya the retirement benefits protected by Article 151(3) of the Constitution.**

f. **An order of Prohibition be and is hereby issued restraining the Respondents, their servants, agents or any person acting under their authority from applying, enforcing, or giving effect to Section 6 of the Presidential Retirement Benefits Act.**

g. **The prayer for an order of Certiorari is hereby declined, there being no completed decision or determination before the Court capable of being quashed by that remedy.**

h. **This being Public Interest Litigation without any exceptional circumstances: each party shall bear its own costs.**

Orders accordingly. File closed accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 21ST DAY OF SEPTEMBER 2026.

…….
BAHATI MWAMUYE MBS
JUDGE.