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## Transformative Constitutionalism and the Adjudication of Elections in Kenya

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FLORIDA INTERNATIONAL UNIVERSITY

Miami, Florida

TRANSFORMATIVE CONSTITUTIONALISM AND THE ADJUDICATION OF ELECTIONS IN KENYA

A dissertation submitted in partial fulfillment of

the requirements for the degree of

DOCTOR OF PHILOSOPHY

in

GLOBAL AND SOCIOCULTURAL STUDIES

by

Carl Bevelhymer

2021

To: Dean John F. Stack, Jr.  
Green School of International and Public Affairs

This dissertation, written by Carl Bevelhymer, and entitled Transformative Constitutionalism and the Adjudication of Elections in Kenya, having been approved in respect to style and intellectual content, is referred to you for judgment.

We have read this dissertation and recommend that it be approved.

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Florida International University, 2021

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ABSTRACT OF THE DISSERTATION

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by

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Florida International University, 2021

Miami, Florida

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The judicialization of politics has been an ongoing and expanding global phenomenon for decades. In Kenya, the record number of cases brought before courts prior to and following the 2017 elections is evidence of the continued growth and spread of the judicialization of politics, and more specifically elections. It is also the result of Kenya's 2010 Constitution, which introduced a new form of governance, expanded the number of elective seats, and mandated judicial and electoral reforms. One of the most remarkable events of the 2017 election period was the Supreme Court's nullification of the presidential election due to electoral irregularities. The decision was a historical first for the African continent and a rare occurrence by international standards. It was praised for affirming judicial transformation, electoral justice and transformative constitutionalism. It was also commended for departing from the precedent established by the Supreme Court's decision to uphold the flawed 2013 presidential election, which was criticized for continuing the status quo of a history of electoral injustice. The Supreme Court's nullification of 2017 presidential election inspired hundreds of petitions contesting the outcomes of the 2017 elections for the five other categories of elective seats, yet only a small fraction resulted in nullifications. This raised the question – how could courts judge the presidential

election as deeply flawed, but uphold hundreds of other elections when all were managed by the same electoral commission? This research examines the judicialization of elections in Kenya as a framework for understanding advancements towards electoral justice and transformative constitutionalism. Using a petitioner-centric analysis that focuses on how petitions were pleaded, a court-centric analysis that focuses on the reasonings and rulings of courts, and analysis of news media reports that situate judicial election disputes within broader sociopolitical contexts, this research investigates continuities and discontinuities in the adjudication of election petitions, how aspects of electoral and judicial reforms and the transformative principles and values enshrined in the 2010 Constitution are expressed in the emerging jurisprudence on elections, and how the judicialization of elections relates to broader issues of judicial independence and the balance of power within the state.

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## Chapter 1. Introduction

The judicialization of politics has been an ongoing and expanding global phenomenon for decades. In Kenya, the record number of cases brought before courts prior to and following the 2017 elections is evidence of the continued growth and spread of the judicialization of politics, and more specifically elections. It is also the result of Kenya's 2010 Constitution, which introduced a new form of governance, expanded the number of elective seats, and mandated judicial and electoral reforms. One of the most remarkable events of the 2017 election period was the Supreme Court's decision to nullify the election of an incumbent presidential candidate. The decision was significant for a number of reasons: it was a historical first for the African continent and a rare occurrence by international standards; it was a departure from the much-criticized precedent the Supreme Court established in its decision to uphold the flawed 2013 presidential election; and it inspired hundreds of petitions contesting the outcomes of the 2017 elections for the five other categories of elective seats, of which only a small number succeeded in nullifications.

Historically in Kenya, elections were marred by irregularities, malpractices and fraud (Ndunguru and Njowoka 2008; Shilaho 2013); and courts exhibited extreme subservience to the executive, vulnerability to external influence (Mutua 2001; Gathii 1994), and a propensity to dismiss election petitions on procedural technicalities rather than consider their substantive merits (Kibet and Fombad 2017; Thiankolu 2013).<sup>1</sup> The outcome was electoral injustice that often led to elec-

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<sup>1</sup> E.g. Nyamai v Moi High Court Election Petition 70 of 1993, Moi v Matiba Court of Appeal Civil Appeal 176 of 1993; Moi v Mwau Court of Appeal Civil Application 131 of 1994; Kibaki v Moi High Court Election Petition 1 of 1998; Kibaki v Moi Court of Appeal Civil Appeal 172 and 173 of 1999.

toral violence. Particularly since the return of multiparty democracy in 1991, heightened political tensions and ethno-political violence have been recurrent features of Kenyan elections – the worst of which occurred following the flawed 2007 presidential election (Kanyinga 2014; Gondi and Basant 2015).<sup>2</sup> The electoral management body lacked creditability to conduct elections and the courts lacked credibility to resolve election disputes (Mueller 2011). The ensuing conflict, which prompted months of widespread violence, loss of life, displacement of people and destruction, required international mediation to broker a power-sharing agreement between the two main political factions and restore peace. But the 2007 post-election crisis also gave new impetus to the decades-long quest for comprehensive constitutional reforms.

In 2010, Kenya promulgated a new constitution. This constitution was designed to achieve a number of objectives, which included moderating the winner-takes-all character of presidential elections and preventing the likelihood of electoral violence. The new constitution dramatically reorganized the structure of government by reducing the overcentralization of power in the executive, by strengthening the power of coequal branches of the national government – a bicameral parliament (with a National Assembly and a newly reinstated Senate) and the judiciary, and by devolving power to 47 new subnational county governments (each with an executive

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<sup>2</sup> The level of violence following the 2007 elections (over 1000 deaths and over 500,000 internally displaced people) was shocking, but not unprecedented. Elections in 1992 and 1997 resulted in similarly high incidence of deaths and internal displacements (Cheeseman 2008: 170). Owuor (2017:131) attributes this history of electoral violence to “deeply entrenched structural factors inherent in the political system as well as [an] imperfect constitutional and institutional framework [that was] used to gain political advantage.” Gondi (2017:xii) argues that a “culture of violence and brutality... has become synonymous with elections in Kenya, particularly with regard to state security agencies and political elites who use violence as a means of [voter] mobilization during electoral cycles.”

and legislature). Thus, the new constitution created more checks on the abuse of power and increased the number of elective seats to provide more electoral choices for parties and voters (Long et al. 2013).

Two key sectors for reform under the new constitution were the electoral system and the judiciary. Electoral reforms involved a comprehensive review and revision of election laws and creation of a new election management body – the Independent Electoral and Boundaries Commission (IEBC). The core objective of electoral reforms was to improve the credibility and integrity of elections. Judicial reforms involved a rigorous vetting of judicial officers, creation of new courts (including the Supreme Court), strengthening judicial independence and autonomy, and judicial transformation (Judiciary 2012b). Core objectives of judicial reforms, which were integral to electoral reforms, were to establish viable channels for peaceful, nonviolent election dispute resolution and to improve electoral justice.

When confronted with its first and greatest test in the post-2010 constitutional era, the Supreme Court's decision to uphold the flawed 2013 presidential election was criticized for affirming fidelity to the jurisprudence of a pre-2010 constitutional era and for continuing the status quo of a history of electoral injustice. In contrast, the Supreme Court's decision to nullify the August 2017 presidential election due to electoral irregularities was praised for departing from its 2013 precedent and for embracing a post-2010 jurisprudence on elections that affirmed judicial transformation, electoral justice and transformative constitutionalism. The Supreme Court's nullification of the August 2017 presidential election also inspired roughly 300 petitions contesting the outcomes of the 2017 elections for the five other categories of elective seats, yet

only a small fraction resulted in nullifications. The divergent outcomes of petitions contesting the 2017 elections raised the question – how could the courts rule that the presidential election was so deeply flawed as to warrant nullification, but then uphold hundreds of other elections when all were managed by the same electoral commission, on the same day and at the same polling stations? Although the Supreme Court’s nullification of the August 2017 presidential election may evidence a changed judiciary that more strongly embraces its role in advancing transformative constitutionalism and electoral justice, the fact that courts dismissed the majority of petitions contesting other elective seats in subsequent rulings presents a more nuanced and ambiguous reading of the emerging jurisprudence on elections.

This research examines the judicialization of elections in Kenya as a framework for understanding advancements towards electoral justice and transformative constitutionalism. The judicialization of politics and transformative constitutionalism are two areas of study that inform the theoretical foundation of this research, which is the focus of Chapter 3. The judicialization of politics refers to a decades-long and ongoing increase in the transfer of authority for decision-making and the settlement of political disputes to courts or quasi-judicial venues vis-a-vis the political branches of government – the legislature and executive (Tate and Vallinder 1995; Ferejohn 2002; Hirschl 2006; VonDoepp 2009). Transformative constitutionalism aims at achieving social and political transformation through the law, attaining substantive justice and equality, and entrenching egalitarianism in social, political and economic relationships (Klare 1998; Davis and Klare 2010; Kibet and Fombad 2017).

These two areas are germane to research in Kenya because the 2010 Constitution is defined as transformative and because the nation has experienced an increase in the judicialization of politics. The increasing judicialization of politics in Kenya aligns with the global trend, but it is also the result of other contributing factors that are unique to Kenya: the new constitution increased judicial independence, which improved the image of courts as appropriate channels for resolution of political and electoral disputes; the new constitution increased the number of elective seats from three to six;<sup>3</sup> and the number of candidates vying for those seats increased (14%) between 2013 and 2017 (IEBC 2013, 2018). Thus, judicial reforms, combined with more elective seats and more candidates, has contributed to an increase in the number of election petitions filed in courts.<sup>4</sup>

This research also uses the term electoral justice (Orozco-Henríquez 2010; Ojwang 2015). In the context of Kenya's 2010 constitutional dispensation, electoral justice encompasses a number of facets that center on conformity with the constitution and laws. These pertain to the right to participate in elections as a voter and/or candidate; the electoral process – free, fair, simple, efficient, secure, impartial, transparent, accountable and verifiable; and election dispute resolution – accessible, fair, impartial, progressive, substantive and timely.<sup>5</sup> This research evaluates electoral justice in terms of how courts assessed and enforced compliance with the constitution and laws in the conduct of elections and the adjudication of election petitions.

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<sup>3</sup> The 2010 Constitution provides for six categories of elective seats (president, senator, member of parliament, woman representative, governor and member of county assembly); the previous constitution included approximately three (president, national assembly and local government).

<sup>4</sup> Following to 2013 elections, less than 200 petitions were filed compared to roughly 300 in 2017.

<sup>5</sup> E.g. Constitution of Kenya 2010, Articles 38, 50, 81, 83, 87, 88, 140, 159, 163.

Kenya's long history of electoral injustice was largely due to the inability of election management bodies to conduct credible elections and lack of confidence in the ability of courts to adjudicate election disputes fairly. Despite great hopes for the electoral and judicial reforms instituted under the 2010 Constitution, the first elections to be held in the new constitutional era were disappointing – the 2013 elections were perceived as deeply flawed, the election management agency still lacked credibility and was accused of malpractices, and the Supreme Court's judgement to uphold the presidential election was harshly criticized. These factors all suggested continuity with a pre-2010 constitutional era rather than change.

This history of electoral justice, combined with dissatisfaction over the outcome and adjudication of the 2013 presidential election, initially convinced Raila Odinga, the presidential candidate for the primary opposition party – National Super Alliance (NASA), that petitioning the Supreme Court to contest the outcome of the August 2017 presidential election would be futile, despite his assertions that the election had been rigged and was not free and fair. Odinga lost the 2013 and 2017 presidential elections to Uhuru Kenyatta who was the presidential candidate for Jubilee, the establishment party. Kenyatta was personally chosen by Kenya's second president, Daniel arap Moi, to be the successor candidate for the Kenya African National Union (KANU) party, which was the ruling regime that had governed Kenya from independence in 1964 until 2002.<sup>6</sup>

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<sup>6</sup> Uhuru Kenyatta is the son of Kenya's first president, Jomo Kenyatta, who ruled Kenya from independence in 1964 until his death in 1978. Daniel arap Moi was president of Kenya from 1978 to 2002. Raila Odinga is the son of Oginga Odinga, who was briefly Kenya's first vice president from 1964 to 1966. He resigned due to ideological and policy disagreements with Jomo Kenyatta and became a prominent opposition figure.

However, a state crackdown on civil society organizations that were likely to file a Supreme Court petition to contest the August 2017 presidential election, coupled with violent state suppression of opposition supporters who were protesting the election results, prompted new resolve and greater urgency for Odinga to petition the Supreme Court. In doing so, Odinga argued he was not only contesting a flawed election, he was fighting to end a history of electoral injustice and to reverse the retreat of democracy, which was under threat from the increasingly authoritarian tendencies of the ruling regime. Moreover, Odinga argued that his petition constituted “a second chance for the Supreme Court,” which the court could use “to redeem itself, or, like in 2013, it can compound the problems we face as a country” (Ng’etich and Obala 2017).

Odinga’s assertion was more than a critique of the Supreme Court’s judgement on the 2013 presidential election, which was criticized for affirming fidelity to the status quo of a pre-2010 jurisprudence rather than advancing a post-2010 jurisprudence that was more attuned to the transformative vision of the 2010 Constitution. It was also a critique of the historical role of Kenya’s judiciary in subverting constitutionalism, the rule of law, fundamental freedoms and human rights. Chapter 4 focuses on this notion of a judiciary in need of redemption by examining the troubled past of the Kenyan judiciary. This chapter provides an overview of how the judiciary was used as a tool for the colonial project, its subservience to a powerful executive and challenges to judicial independence in the post-independence period, and the role of courts in elections following the return of multiparty democracy in 1991 and constitutional reforms in 2010.

The key questions this research asks are: Why was the outcome of the petition for the August 2017 presidential election, which was nullified, different than the outcomes of petitions for the

2013 presidential election and the 2013 and 2017 gubernatorial elections, which were upheld? And what does the increasing judicialization of politics and the emerging jurisprudence on elections indicate regarding the advancement or retreat of electoral justice and transformative constitutionalism and the balance of power within the state? Two answers are proposed for the first question: petitioners adopted different approaches and arguments; and courts adopted different approaches and reasoning. To answer how and why, this research employs qualitative document analysis of two sets of data: court records (judgements, rulings) for the 2013 and 2017 presidential election petitions at the Supreme Court and the 2013 and 2017 gubernatorial election petitions at the High Court, Court of Appeal and Supreme Court; and news media reports from national newspapers (Standard, Daily Nation and Star).

Chapter 2 describes the research methodology. Three analytical approaches are used for data interpretation. The first is a court-centric analysis that focuses on the rationale and reasoning courts apply in their rulings. The rulings of courts can serve as valuable indicators of how courts enforce compliance with the rule of law in the conduct and adjudication of elections, and as valuable indicators of the entrenchment of electoral reform, electoral justice, judicial transformation and transformative constitutionalism. However, progress towards democratization and constitutionalization requires more than transformation of judiciaries and judicial culture; it requires a broader transformation of the legal practice and practitioners, political culture, the electoral process and the public at large. This perspective informs the second analytical approach – a petitioner-centric analysis that focuses on the arguments and reasoning petitioners apply in their pleadings.



A recurring refrain from the 2017 election petitions was that petitioners are bound by their pleadings. To a large extent, courts too are bound by the pleadings of petitioners and the responses of respondents. The output of courts (rulings) is often greatly contingent on the input of parties (arguments); courts are better able to safeguard constitutional principles when litigants raise constitutional issues (Seidman 1974; Ghai 2014b; Mutunga 2014). If the 2010 Constitution is to be a tool for transformative constitutionalism and electoral justice, it must be used not only by courts, but also by petitioners, candidates and the public. The third analytical approach examines news media reports to situate judicial election disputes within broader sociopolitical contexts. This research investigates continuities and discontinuities in the adjudication of election petitions, how aspects of electoral and judicial reforms and the transformative principles and values enshrined in the 2010 Constitution are expressed in the emerging jurisprudence on elections, and how the judicialization of elections relates to broader issues of judicial independence and the balance of power within the state.

Chapter 5 applies a petitioner-centric analysis of the arguments and approaches of petitioners and a court-centric analyses of the reasoning and approaches of the Supreme Court to examine why the 2013 presidential election was upheld and why the August 2017 presidential election was nullified. The chapter begins by focusing on two major points of contention raised by critics regarding the Supreme Court's judgement on the 2013 presidential election, which the court went to great lengths to remedy in the August 2017 petition – the prioritization of procedural technicalities over substantive merits and sparse references to constitutional principles. Next, the chapter assesses how the court, petitioners and respondents approached the question of threshold for nullification and irregularities pertaining to technology and statutory results forms.

Whereas the Supreme Court's judgement in 2013 was criticized for affirming fidelity to a pre-2010 jurisprudence on elections and continuation of a status quo of electoral injustice, the Supreme Court's judgement on the August 2017 petition was commended for advancing a post-2010 jurisprudence on elections that was more aligned with the objectives of transformative constitutionalism and electoral justice. The Supreme Court's nullification of the August 2017 presidential election marked a significant break from the precedent it established in upholding the 2013 presidential election – but did it establish a new precedent in subsequent rulings on petitions contesting the other elections from 2017? This query is the focus of Chapter 6.

The nullification of the August 2017 presidential election by the Supreme Court motivated an influx in the number of petitions contesting the outcomes of the 2017 elections for the five other categories of elective seats.<sup>7</sup> But the vast majority of these election petitions were dismissed and the elections upheld. This prompted the question of how courts could rule that the presidential election was so flawed as to warrant nullification and then uphold the majority of other elections when all were conducted by the same electoral management agency, by the same election officials, at the same polling stations and on the same day?

To investigate this question, Chapter 6 examines the adjudication of gubernatorial elections from 2013 and 2017. This chapter applies a petitioner-centric analysis to assess variances in the arguments and approaches of petitioners in different gubernatorial petitions and in comparison to petitioners in presidential petitions. A recurring theme among courts in the adjudication of election petitions was that petitioners are bound by their pleadings, and in the majority

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<sup>7</sup> I.e. senator, member of parliament, woman representative, governor, member of county assembly.

gubernatorial cases courts found that petitioners failed to adduce sufficient evidence to prove their claims. This chapter identifies a number of challenges petitioners confronted, which help to explain why so many petitions failed and why only a few succeeded.

Chapter 6 also applies a court-centric analysis to assess variances in the reasonings and approaches of courts in the adjudication of gubernatorial election petitions and in comparison to presidential election petitions. Although the majority of gubernatorial petitions were dismissed, a small number of gubernatorial elections were nullified by the High Court and the Court of Appeal, but then upheld by the Supreme Court. This suggests that different courts applied different reasoning and approaches to the various gubernatorial election petitions and presidential election petitions. Whereas the Supreme Court's nullification of the August 2017 presidential election broke its 2013 precedent, Chapter 6 examines the 2017 gubernatorial election petitions to determine whether a new precedent is evident in the emerging jurisprudence on elections.

When the Supreme Court nullified the August 2017 presidential election, it ordered a repeat presidential election to be held in October 2017. Just weeks before the scheduled repeat election, Raila Odinga, the candidate for the main opposition party – National Super Alliance (NASA), withdrew his candidacy citing lack of confidence in the IEBC because the electoral management agency had failed to institute reforms to correct irregularities that had marred the August presidential election. Odinga also urged his supporters to boycott the repeat election. This meant that Uhuru Kenyatta, the incumbent presidential candidate of the ruling Jubilee party, effectively competed in the repeat election unopposed. He won 98 percent of the votes compared to 54 percent in August, but voter turnout dropped in half from nearly 80 percent in August to less

than 40 percent in October. Following the IEBC's declaration of Kenyatta's victory in the repeat election, a group of voters filed a petition before the Supreme Court to contest the results.

Chapter 7 compares the adjudication of the August presidential election, which was nullified, and October repeat election, which was upheld. A petitioner-centric analysis and a court-centric analysis are applied to identify variances in how petitioners and the Supreme Court approached the two petitions. This chapter examines the divergent outcomes of the August and October petitions by highlighting two critical factors – that differences in how petitioners were positioned in relation to the elections (i.e. as candidates or voters) and the broader sociopolitical contexts of the two elections (i.e. heightened political tensions) – had profound implications on how petitioners framed their arguments and the reasoning courts applied in their judgements.

This dissertation initially intended to answer a different set of research questions using a different set of research methods (although these were still utilized for data collection as described in Chapter 2). The original research design involved approaching the 2017 election period as a context for examining aspects of the exercise of power and authority among various state and non-state actors within a state that has undergone extensive restructuring and a raft of institutional reforms following the promulgation of the new constitution in 2010. For example, Gathii (2017: 1) argues that elections can be utilized as “a major lens [to assess] the extent to which this new constitutional order has been an agent of change or of continuity.” Similarly, Sihanya (2012:1) proposes that “General Elections are essentially a referendum on fidelity to the Constitution, on the one hand, or the reversal or manipulation of the reform process.”

However, a shift in the focus of this research was prompted by the Supreme Court's unexpected and unprecedented nullification of the election of an incumbent presidential candidate. This was the most significant event of the 2017 election cycle. It marked a defining moment for Kenya, and it was also a historical first for the African continent and a rare occurrence by international standards. The potential ramifications of the Supreme Court's ruling on the August 2017 presidential election quickly gained momentum as it inspired hundreds of election petitions contesting the outcomes of the 2017 elections for the five other categories of elective seats.

There was anticipation that the Supreme Court had set a new precedent in its nullification of the August 2017 presidential election, which other courts would then apply in the adjudication of petitions for other elective seats, thus resulting in a broad scale nullification of elections across the country. Yet, out of the hundreds of election petitions, only a small fraction succeeded in nullifications. A close reading of court records on election petitions, particularly for presidential and gubernatorial elections, began to reveal great variances, but also some strong similarities, in the arguments and approaches of petitioners and in the reasoning and approaches of courts. The divergent outcomes of election petitions, combined with inconsistencies and discontinuities in the emerging jurisprudence on elections, prompted further inquiry and motivation to shift the research design to focus more acutely on the adjudication of elections.

Whereas the original research design intended to examine whether institutional reforms and the restructuring of the state under the 2010 Constitution had resulted in change or continuity in the interrelationships and the exercise of power among various state and nonstate actors, the subsequent revision of the research design focused more squarely on a single state institution –

courts. This revised design used the adjudication of election petitions as a framework for examining whether the emerging jurisprudence on elections suggests progress towards the principles and values of a post-2010 constitutional era or continuity of the status quo of a pre-2010 constitutional era. But findings from this revised research design also revealed insights into the interrelationships among various state and nonstate actors such as courts and parties to petitions, which included the election management agency, politicians aligned with both the ruling regime and the opposition, and civil society actors.

Chapter 8 provided an opportunity to revisit the questions proposed in the original research design. Two key problems that have historically beleaguered Kenya are the overcentralization of power in the executive and the deliberate weakening of state institutions that would normally institutionalize the balance of power within the state and provide the conditions to check the abuse of power. The 2010 Constitution was designed to remedy these problems by restructuring the distribution of power within the state: executive power was reduced and dispersed both horizontally and vertically. On the horizontal axis, the new constitution strengthened the power, independence and autonomy of the legislature and judiciary, and affirmed their coequal status vis-a-vis the executive. The constitution also strengthened the power and autonomy of independent state agencies such the Independent Electoral and Boundaries Commission (IECB) and the Ethics and Anti-Corruption Commission (EACC). On the vertical axis, the new constitution devolved power from the national level of government to 47 newly created subnational level county governments. Thus, the objectives of the new constitution were both to reduce executive power through horizontal and vertical decentralization and to empower other state agencies to perform horizontal and vertical accountability functions to check the abuse of power.

Much of the research on decentralization in Kenya has focused on the vertical dimension of the devolution of power downward from the national government to county governments. But the horizontal dimension of decentralization is sparsely referenced in the literature, whereas literature on the related concept of horizontal accountability is abundant. Chapter 8 applies these two concepts – horizontal decentralization and horizontal accountability – as analytical frames to examine the exercise of power among various bodies of the state in the context of the 2017 election cycle – particularly the executive, parliament, the judiciary and the IEBC. The analytical frame of horizontal decentralization is applied to assess the extent to which the overcentralization of power in the executive has been dispersed – i.e. does the executive exercise power differently in pre- and post-2010 constitutional eras. The analytical frame of horizontal accountability is applied to assess the extent to which other state bodies have been empowered – i.e. do other state agencies, particularly the legislature and judiciary, exercise power differently in pre- and post-2010 constitutional eras, do they exhibit independence from and perform checks on the executive. Chapter 8 begins by detailing a variety of attacks on the judiciary by the executive and collaborations between the executive and the legislature to curb powers of the judiciary and the IEBC. The chapter then evaluates how these attacks are indicative of the balance of power within the state.

The Supreme Court's nullification of the August 2017 presidential election was an encouraging testament to judicial independence, power and authority as envisioned by the 2010 Constitution, but it also revealed the vulnerability of courts and the precarious position of the judiciary in the balance of power within the state. The hundreds of petitions contesting the 2017 elections

are clear evidence of the increasing judicialization of politics in Kenya and a positive indicator of the accessibility and utilization of courts for election dispute resolution. But Kenya's experience from the 2017 elections also highlights problems that can arise with the judicialization of politics such as the politicization of the judiciary and the difficulties the nation faces in overcoming the inertia of a pre-2010 status quo to advance the transformative vision of a post-2010 constitutional era.

Chapter 9 concludes the dissertation. The chapter provides a summation of key research findings. It evaluates how Kenya's experience from the 2017 elections, and the adjudication of those elections by courts, are indicative of the nation's democratic trajectory. Lastly, the chapter reflects on challenges for the conduct and adjudication of future elections in Kenya.



## Chapter 2. Methodology

This research was originally designed to collect data through interviews, informal conversations, ethnographic methods and document analysis of news media reports (also documents from other sources including state agencies and nongovernment organizations). However, the unexpected, unprecedented and historical significance of the Supreme Court's nullification of the August 2017 presidential election, coupled with the high number of petitions contesting other elective seats and the divergent outcomes of the various petitions, prompted a shift in the research design to focus on the adjudication of elections. The above research methods were still employed over the course of eighteen-months of fieldwork between June 2017 and December 2018, but the methodology was adjusted to rely more heavily on document analysis.

The key questions this research asks are: Why was the outcome of the petition for the August 2017 presidential election, which was nullified, different than the outcomes of petitions for the 2013 presidential election and the 2013 and 2017 gubernatorial elections, which were upheld? And what does the increasing judicialization of politics and the emerging jurisprudence on elections indicate regarding the advancement or retreat of electoral justice and transformative constitutionalism and the balance of power within the state. Two answers are proposed for the first question: petitioners adopted different approaches and arguments; and courts adopted different approaches and reasoning. To answer how and why, this research examined two sets of data: court records of election petitions (rulings and judgements) and news media reports.

This research uses qualitative document analysis. Altheide (2000:290) notes that whereas quantitative document analysis focuses on quantities and numerical relationships between two or more variables, qualitative document analysis applies an interpretive and empirical focus on discovery and description of underlying meanings, patterns and processes. Altheide and Schneider (2013:5) define document analysis as an integrated and conceptually informed method, procedure and technique for locating, identifying, retrieving and analyzing documents for their relevance, significance and meaning. According to Bowen (2009:28), document analysis is a systematic procedure that entails finding, selecting, reviewing, evaluating and synthesizing data contained in documents. This research assesses two sets of data (court records and news media reports) as a form of triangulation (Denzin 1970). The objectives of triangulation are to elicit convergence and corroboration through use of multiple sources of data or methods, to provide a confluence of evidence that breeds credibility and checks contradictions (Bowen 2009:28), to gain several perspectives on the same phenomenon (Jensen 2002:272), and to strengthen reliability and validity, and reduce the impact of potential biases that can exist in a single source or method design.

This research uses court records to examine the emerging jurisprudence on elections in Kenya as a framework for understanding progress towards electoral justice and transformative constitutionalism. It uses analysis of news media reports to situate judicial proceedings and court records within broader historical and contemporary contexts, and to assess how social and political factors may have influenced petitioners to seek judicial interventions in the resolution of election disputes and the reasonings of courts in the adjudication of election petitions. Two advantages of using court records and news media reports are availability and stability – these

documents (particularly in printed form) are nonreactive and stable in that they are final and constitute historical records, and they are publicly available and easily and readily accessible.

### Document Analysis of Court Records

This dissertation draws on socio-legal research methods (Feeley 2001; Banakar and Travers 2005; McCrudden 2006), which aim to highlight the social-dimension, social-performance or social-auditing of law, its impact on social behavior, and to what extent certain legal rules work. Vibhute and Aynalem (2009:87, 93) propose socio-legal research endeavors to answer a variety of questions: What forces, factors, objectives or groups have influenced the shaping or re-shaping a particular set of laws or legal norms? Are laws and legal institutions suited to serving the needs of the society in which they operate? For whose benefit were laws enacted and are they utilized or underutilized by the intended beneficiaries? Are laws properly administered and enforced by regulators and adjudicators or do they exist only in statute books? What factors account for weak or non-implementation of laws? What factors influence courts or administrative agencies in interpreting and administering laws and the outcomes of legal processes and decisions-making? What has been the impact of laws or legal institutions on social behavior?

Vibhute and Aynalem (2009:81, 86, 89)<sup>8</sup> note there nearly always exists a certain gap, tension or disjunction between the “law-in-the statute book” and “law-in-action,” between behavior de-

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<sup>8</sup> Vibhute and Aynalem’s (2009:98), among others, distinguish doctrinal and non-doctrinal forms of legal research, although there is overlap between these two categories; the former is more specific to the study of law or legal discipline, whereas the latter encompasses an interdisciplinary study of the law in relation to social and political contexts, which the authors equate with socio-legal research and sociology of law. Wheeler and Thomas (2002:271) contend the “socio” in socio-legal studies does not refer to sociology or social sciences, but represents “an interface with a context within which law exists.” The

manded by the legal norm and actual social behavior, between legal idealism and social reality. Socio-legal research attempts to assess the logical coherence, consistency and technical soundness of the law, legal principles or doctrines; reveal gaps, defects, ambiguities or uncertainties; and invite amendment, repeal or revision so that the law can be more purposive and effective as a vehicle for social, political and economic justice – or in the case of the present research, to strengthen the potential for electoral justice, the rule of law, transformative constitutionalism and democracy.

Hall (2011:2) proposes case law and judicial decisions merit careful study because they constitute detailed repositories that show what kinds of disputes come before courts, how parties frame their disputes, and how judges formulate reasons for conclusions, but also in terms of how they connect and interact with the broader political, social and economic systems. Kirkham and O’Loughlin (2019:2) define socio-legal content analysis as a form of discourse analysis that is applied to comprehensively and systematically analyze a sample of documents, specifically court judgements, to interrogate how judges make decisions and what strategies and approaches they employ in their decision making, to identify patterns in legal reasoning such as consistent or inconsistent features, and to draw inferences and conclusions. Webley (2010:11) notes legal documents provide evidence of policy directions, legislative intent, understandings of perceived shortcomings or best practices in a legal system, and agenda for reform, in addition to facilitating analysis of longitudinal change over time.

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present discussion uses the broader term socio-legal, which can draw on both doctrinal and non-doctrinal approaches (McCrudden 2006:634).

This dissertation applies socio-legal document analysis to examine court records (rulings and judgements) for election petitions from the 2013 and 2017 presidential elections at the Supreme Court and the 2013 and 2017 gubernatorial elections at the High Court, Court of Appeal and Supreme Court. Presidential and gubernatorial election cases were purposively selected for analysis because both are highly competitive executive positions, there are parallels between the issues raised in the two sets of cases, and because the number of cases is manageable – Kenya elects one president and 47 governors.

Historically, elections in Kenya have been fiercely contested, marked by heightened political tensions, and often accompanied by ethno-political violence, particularly since the return of multiparty democracy in 1991 (Ajulu 2002; Njogu 2011). The overcentralization of power in the executive and the winner-takes-all character of presidential elections have been perennial problems, which the 2010 Constitution was design to remedy by significantly reorganizing the structure of governance: power was diffused from the executive and rebalanced horizontally among coequal branches of the national government – the legislature and judiciary; and power was decentralized vertically through devolution of authority to 47 newly created subnational county governments, each with its own executive (governor) and legislature (county assembly). In the post-2010 constitutional era, the office of the president has remained a focal point of power and competition, but the 2010 Constitution created new centers of power, and governorships have become new arenas of intense competition as the second most coveted elective seats after the presidency due to access to and control of immense budgets and resources (Opanga 2015; Steeves 2015, 2016; Cheeseman et al. 2016; Aywa 2016; Abdille 2017; Thuo 2019).

Cases from 2013 and 2017 were selected because these are the most recent election years and the only two elections held since promulgation of the 2010 Constitution. In addition to creating governorships and county governments, the new constitution introduced major reforms to two key sectors – the electoral system and the judiciary.<sup>9</sup> Electoral reforms involved a review of election laws and creation of a new election management body – the Independent Electoral and Boundaries Commission (IEBC). The objective of these reforms was to improve the credibility and integrity of elections. Judicial reforms involved a rigorous vetting of judicial officers, creation of new courts (including the Supreme Court), strengthening judicial independence and autonomy, and a new program of judicial transformation and institutional renewal (Judiciary 2012b). The objectives of judicial reforms included establishing courts as viable channels for peaceful, nonviolent election dispute resolution and improving electoral justice. Thus, this research focuses on the post-2010 period because many of the elective seats (e.g. governors), many of the courts (e.g. Supreme Court), and many components of the legal and institutional framework that governs the electoral system (e.g. IEBC, Elections Act of 2011, Constitution of 2010) did not exist prior to 2010 – although this research does include a brief overview of Kenya’s judicial and electoral history prior to 2010 in Chapter 4.

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<sup>9</sup> Both institutions were implicated as contributing to the political crisis following the highly disputed 2007 presidential election: the electoral management body lacked credibility to conduct free and fair elections and to fend off allegations of election rigging and fraud; and the courts lacked credibility to resolve election disputes, particularly one of the magnitude and intensity of the unfolding political crisis. Those aggrieved with the outcome of the election felt there was no other recourse than to take to the streets in protest. Widespread violence quickly erupted in many regions of the country leading to significant loss of life (over 1000), internal displacement of people (over 500,000) and destruction of property, which necessitated international intervention to restore peace by brokering a power-sharing agreement between the two leading presidential candidates and their parties. But the 2007 post-election crisis also gave new impetus to the decades-long quest for comprehensive constitutional reforms (Republic of Kenya 2008, 2008b; KNCHR 2008; Ambani 2009; Mueller 2011; Kanyinga and Odote 2019).

This research applied two approaches to analyze and interpret data: the first is a court-centric analysis that focuses on the rationale and reasoning courts apply in their rulings. The rulings of courts can serve as valuable indicators of how courts enforce compliance with the rule of law in the conduct and adjudication of elections, and as valuable indicators of the entrenchment of electoral reform, electoral justice, judicial transformation and transformative constitutionalism. However, progress towards democratization and constitutionalization requires more than transformation of judiciaries and judicial culture; it requires a broader transformation of the legal practice and practitioners, political culture, the electoral process and the public at large.

The second form of analysis is petitioner-centric, which focuses on the arguments and reasoning of petitioners. A recurring refrain from the 2017 election petitions was that petitioners are bound by their pleadings. To a large extent, courts too are bound by the pleadings of petitioners and the responses of respondents. The output of courts (rulings) is often greatly contingent on the input of parties (arguments); thus, courts are better able to safeguard constitutional principles when litigants raise constitutional issues (Seidman 1974:834; Ghai 2014b:4; Mutunga 2014: 72). If the 2010 Constitution is to be a tool for transformative constitutionalism and electoral justice, it must be used not only by courts, but also by petitioners, candidates and the public.

Court documents (rulings and judgements) were downloaded in portable document format (PDF) from the online archive of the National Council for Law Reporting (aka Kenya Law).<sup>10</sup> Cases

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<sup>10</sup> The National Council for Law Reporting (aka Kenya Law) hosts the most comprehensive public archive for election petitions; however, even this collection is incomplete. For example, the Court of Appeal judgement on the 2013 Migori gubernatorial election petition (Obado v Oyugi Civil Appeal 39 of 2013) was not included in the list of 2013 election petitions or the searchable case file database. As an alternative, information from this missing record of the Court of Appeal was extracted from records of the Supreme Court (Obado v Oyugi Civil Application 7 of 2014, Ruling; Obado v Oyugi Election Petition 4 of

purposely selected include: presidential election petitions from 2013 (1 Supreme Court) and 2017 (2 Supreme Court – August and October); and gubernatorial election petitions from 2013 (19 High Court, 13 Court of Appeal, 7 Supreme Court) and 2017 (31 High Court, 19 Court of Appeal, 9 Supreme Court) (Table 2).<sup>11</sup> Document analysis focused on three thematic categories: prioritization of procedural technicalities or substantive justice, references to the constitution and legal statutes, and references to illegalities and irregularities.

### *Prioritization of procedural technicalities or substantive justice*

Historically, courts in Kenya prioritized procedural technicalities over consideration of the substantive merits of election petitions, which often resulted in the cursory dismissal of election petitions and electoral injustice (Muigai 2004; Kabaa 2015; Oloka-Onyango 2017).<sup>12</sup> In the 2013

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2014, Judgement), which include summations of the case history and direct references to the 2013 Migori petition before the High and Appeal Courts. The Judiciary (2014a, 2014b, 2017a, 2017b, 2017d) has consistently identified a need to increase capacity for law reporting (i.e. to record, transcribe, collect, archive, upload and disseminate judicial decisions and court records).

<sup>11</sup> In addition to election petitions, other court records for cases related to elections were also reviewed and analyzed. For example, IEBC v Kiai Court of Appeal Civil Appeal 105 of 2017 clarified the procedures for the conduct of the August 2017 elections and became a foundational, precedent-setting case that was a major point of reference in subsequent petitions contesting the 2017 elections; Aukot v IEBC High Court Constitutional Petition 471 of 2017, required the IEBC to expand the list of candidates for the October repeat election from only Kenyatta and Odinga to include all eight candidates from the August election, which saved the October election from potential cancellation following Odinga's withdrawal; Republic v IEBC ex parte Khalifa High Court Judicial Review Miscellaneous Application 628 of 2017 (aka Khalifa v IEBC) almost derailed the October repeat election when the High Court determined the IEBC's appointment of election officials was illegal, but in IEBC v Khalifa Court of Appeal Civil Application 246 of 2017 the Court of Appeal suspended the High Court ruling and allowed the repeat election to proceed as scheduled.

<sup>12</sup> E.g. Nyamai v Moi High Court Election Petition 70 of 1993, Kibaki v Moi High Court Election Petition 1 of 1998, and Kibaki v Moi Court of Appeal Civil Appeal 172 and 173 of 1999 were struck out for want of personal service to the respondent, President Moi; Moi v Matiba Court of Appeal Civil Appeal 176 of 1993 was struck out because the applicant's wife had signed the petition on his behalf due to his physical incapacity and despite having granted her power of attorney to do so.



presidential election petition, the Supreme Court was harshly criticized for disallowing an additional affidavit submitted by petitioners largely on the grounds that it was filed late.<sup>13</sup> This disposed of a substantial portion of the petitioners' evidence at a preliminary stage in the petition, which many observers perceived as an indication that the court prioritized procedural technicalities (strict timelines) over substantive justice (merits of the petition) (Musila 2013; Sanga 2013; Harrington and Manji 2015; Odote and Musumba 2016; Musau 2017a). Perhaps in part due to cognizance of criticism of its 2013 judgement and mindfulness of how its subsequent rulings would be reviewed, in 2017 the Supreme Court adopted a more flexible approach to procedural technicalities by allowing late submissions from both petitioners and respondents (Kanyinga 2017; Onyango 2017b; Kanyinga and Odote 2019).<sup>14</sup>

This flexibility with regard to procedural technicalities was evident in many gubernatorial election petitions filed in lower courts (High and Appeal). Although many courts faulted petitioners on procedural and technical grounds related to improper case filings (missing information such as dates and results of elections, and correct names of respondents, including deputy governors), courts often excused these infractions by reference to Article 159 of the 2010 Constitution: "justice shall be administered without undue regard to procedural technicalities." However, the prioritization of procedural technicalities was particularly pronounced at all three levels of superior courts<sup>15</sup> in gubernatorial petitions for Kwale and Kirinyaga.

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<sup>13</sup> Odinga v IEBC Supreme Court Presidential Election Petition 5 of 2013, Ruling.; Odinga v IEBC Supreme Court Presidential Election Petition 5 of 2013, para. 214, 215, 217, 218.

<sup>14</sup> Odinga v IEBC Supreme Court Presidential Election Petition 1 of 2017, Preliminary Applications 1, 2, 3.

<sup>15</sup> Superior courts include the Supreme Court located in Nairobi and composed of seven judges, the Court of Appeal with approximately 30 judges across nine counties, and the High Court with approximately 80 judges across 38 counties (Judiciary 2019b). Other than the Supreme Court, which has exclusive jurisdic-

The Kwale case was dismissed by the High Court for non-inclusion of the deputy governor, by the Court of Appeal for improper withdrawal and substitution of petitioners, and by the Supreme Court for failing to cite a specific article of the constitution to properly invoke the jurisdiction of the apex court.<sup>16</sup> The Kirinyaga gubernatorial petition was heard a total of five times: the case was first dismissed by the High Court for failing to include the date and results of the election, then returned to the High Court by the Court of Appeal to be heard again on merit, then dismissed in a second appeal before the appellate court on the basis that the statute of limitations had lapsed, which the Supreme Court affirmed.<sup>17</sup> Thuo (2019:340), among other observers, noted: “an analysis of the rulings of the courts indicates that a great deal of weight was attached to compliance with the procedural imperatives. Many petitions were struck out for not complying with procedural guidelines.”

Analysis for this category assessed: whether technical or procedural flaws in petitioners’ case filings were raised by respondents or courts; and how courts addressed these matters – whether courts ruled such infractions rendered petitions fatally defective to warrant dismissal (which would evidence a judicial disposition that prioritized procedural technicalities over substantive

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tion for presidential election petitions and final appeal for petitions contesting the other elective seats, the chief justice gazettes specific judges and courts to hear all other election petitions. High Courts have original jurisdiction for petitions contesting elections for senator, members of parliament, women representative and governor. Magistrate Court, a subordinate court, has original jurisdiction to hear petitions for members of county assembly. Parties to election petitions have right of appeal to higher level courts.

<sup>16</sup> Mbwana v IEBC High Court Election Petition 5 of 2017, Ruling 1; Mbwana v IEBC Court of Appeal Election Petition Appeal 4 of 2017; Warrakah v Mbwana Supreme Court Election Petition 12 of 2018.

<sup>17</sup> Karua v IEBC High Court Election Petition 2 of 2017, Ruling 3; Karua v IEBC Court of Appeal Election Petition Appeal 1 of 2017; Karua v IEBC High Court Election Petition 2 of 2017, Judgement.; Karua v IEBC Court of Appeal Election Petition Appeal 12 of 2018; Karua v IEBC Supreme Court Election Petition 3 of 2019.

merit and suggest fidelity to a pre-2010 jurisprudence on elections) or minor transgressions that could be amended or ignored (which would evidence a judicial disposition that elevated substantive justice over procedural technicalities and suggest embrace of a more progressive post-2010 jurisprudence on elections).

*Reference to constitution and legal statutes*

Kenya's electoral system is structured by a highly prescriptive and complex legal and institutional framework, which includes the 2010 Constitution, legislative acts and regulations, and institutional procedures established by the IEBC, but by far the legal provision most central to the adjudication of election petitions has been Section 83 of the Elections Act of 2011. Traditionally, courts in Kenya, and elsewhere, have conformed to a longstanding practice of assessing the validity of elections based on statutes such as Section 83, which are adopted from English common law with precursors in Section 13 of the English Parliamentary and Municipal Elections Act of 1872 (aka Ballot Act). Section 83 establishes a threshold for invalidating an election on the basis of two conditions or limbs: (i) if an election was not conducted in accordance with the constitution and laws on elections; (ii) if noncompliance or irregularities affected the results of an election. Section 83 raises two questions for interpretation: whether both limbs must be proven or if proof of only one limb will suffice to invalidate an election; and whether both limbs are equally important or if one is more important.

The dominant jurisprudence on elections in Kenya, and elsewhere, has tended to prioritize the second limb – did irregularities substantially affect results (i.e. substantial effect rule) (Kaaba

2015; Azu 2015). This interpretation places greater emphasis on the quantitative aspects of the outcome of an election (i.e. results) and deemphasizes the qualitative aspects of the conduct of an election (i.e. processes) – whether an election was conducted in accordance with the constitution and laws is a secondary concern. Because the 2010 Constitution is unique to Kenya and addresses elections in great detail,<sup>18</sup> there is a strong argument that validity should be assessed on the basis of a strictly constitutional threshold, and that the continued reliance of courts on Section 83 inhibits the development of a jurisprudence on elections that is firmly grounded in the 2010 Constitution (Evelyn and Wanyoike 2016). However, a caveat is that because the 2010 Constitution is still relatively new and the jurisprudence on elections in the post-2010 constitutional era is still evolving, a strict constitutional test may not yet exist, which necessitates continued reliance on Section 83 as the measure for validity of elections.

In its judgement to uphold the flawed 2013 presidential election, the Supreme Court was criticized (Maina 2013; Wanyoike 2013; Evelyn and Wanyoike 2016; Otieno-Odek 2017) for adopting a conjunctive interpretation of Section 83 and for prioritizing the second limb over the first. This interpretation required petitioners to prove both limbs of Section 83, which effectively increased the burden proof for petitioners and lowered the standards of conduct of the IEBC. This interpretation also elevated the quantitative aspects of the election (results) over the qualitative aspects (processes), thereby diminishing the centrality of constitutional principles in the conduct of elections by the IEBC and adjudication of elections by courts.<sup>19</sup> The Supreme Court affirmed

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<sup>18</sup> E.g. Articles 81 and 86.

<sup>19</sup> Odinga v IEBC 2013, para. 196, 304, 305, 306, 386.

the approach it adopted in the 2013 presidential case in subsequent rulings on petitions contesting other elections from 2013, including gubernatorial cases for Garissa, Meru and Migori.<sup>20</sup>

The Supreme Court's judgement on the 2013 presidential election was also criticized for sparse references to the 2010 Constitution (Murunga 2013; Wanyoike 2013; Harrington and Manji 2015; Evelyn and Wanyoike 2016). Where the court did reference the constitution, the articles cited were more frequently provisions on procedures rather than provisions on principles (Table 1a). Examples of provisions on procedures include: Article 83 on procedures for voter registration, Article 138 on procedures for calculating majority votes for a winning candidate, Article 140 on procedures for filing a presidential election petition, and Article 163 on procedures for the Supreme Court's exclusive jurisdiction to determine presidential election petitions. Examples of provisions on principles include: Articles 4 and 10 on national values of good governance, transparency, integrity and accountability, and Articles 81, 86 and 88 on principles for the electoral system – free, fair, simple, secure, accurate, verifiable, accountable and transparent (Table 1b). By failing to adopt a more rigorous engagement with the constitution, and particularly constitutional principles, as pertains to the conduct and adjudication of the 2013 presidential election, the Supreme Court was perceived as missing a critical opportunity to advance progress towards transformative constitutionalism and electoral justice.

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<sup>20</sup> Adam v Mohamed Supreme Court Petition 13 of 2014, para. 52, 79, 81, 87, 96; Munya v Kithinji Supreme Court Petition 2B of 2014, para. 178, 196, 206, 210B, 214, 225; Obado v Oyugi Supreme Court Election Petition 4 of 2014, para. 126, 138, 139, 141.

In contrast, the Supreme Court’s judgement to nullify the flawed 2017 presidential election was applauded for adopting a disjunctive interpretation of Section 83,<sup>21</sup> meaning an election could be nullified on the basis of either of the two limbs of Section 83, which effectively reduced the burden of proof for petitioners and raised the standards of conduct for the IEBC. The court also was commended for prioritizing the first limb – compliance with the constitution and laws on elections, over the second limb – effect on results (Houghton 2017; Mungai 2017a; Wairuri 2017).<sup>22</sup> Compared to 2013, the Supreme Court’s 2017 judgement included a substantially large number of constitutional references, and the articles cited were more frequently provisions on principles and far less provisions on procedures (Table 1a). The reasoning and approach adopted by the Supreme Court in the 2017 presidential election petition suggest the court was affirming the centrality of constitutional principles in the conduct and adjudication of elections, and embracing a more assertive role in advancing the principles of transformative constitutionalism and electoral justice. Although the Supreme Court’s decision to nullify the 2017 presidential election broke the court’s precedent from 2013, the outcomes of petitions contesting other seats from the 2017 elections, including gubernatorial petitions, suggests the court did not establish a new precedent.

For this thematic category, qualitative content analysis was used to examine presidential and gubernatorial election petitions from 2013 and 2017 in terms of references to the constitution and Section 83. This analysis identified which articles of the constitution were cited by petitioners and courts, how frequently constitutional articles were cited, and whether the articles were

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<sup>21</sup> Odinga v IEBC 2017, para. 193, 210, 211.

<sup>22</sup> Odinga v IEBC 2017, para. 215, 224, 301, 303, 378, 379, 383, 385

provisions on procedures or principles. This analysis also assessed how petitioners referenced Section 83 – whether they presented arguments on either or both limbs, and how courts interpreted Section 83 – whether disjunctively or conjunctively and whether they prioritized both limbs equally or prioritized one over the other. An interpretation on Section 83 that requires both limbs to be proven and places greater emphasis on the second limb (effect on results) and less emphasis on the first limb (compliance with the constitution and laws on elections) would suggest fidelity to a pre-2010 jurisprudence on elections and continuation of the status quo of judicial affirmation of flawed elections and electoral injustice, whereas an interpretation of Section 83 that requires only one of either limb to be proven and places greater emphasis on the first limb and less emphasis on the second would suggest a shift to a post-2010 jurisprudence that more strongly embraces transformative constitutionalism and electoral justice.

#### *Irregularities and illegalities*

Although Section 83 makes no direct reference to irregularities or illegalities, there is a predominant tendency among petitioners to attempt to prove, and for courts to assess, violations of either/both limbs on the basis of whether irregularities and illegalities were evidence of non-compliance with the constitution and laws and/or affected the results. Irregularities refer to violations of the constitution, election laws, regulations and procedures. The irregularities most frequently cited pertained to improper use of technology (e.g. to biometrically register and identify voters, to electronically transmit election results, and to post election results on a publicly accessible online portal) and improper execution of statutory results forms by IEBC officials (e.g. lack of official IEBC signatures, stamps and security features, incomplete handover/takeover

sections, discrepancies in data within forms and across various sets of forms, missing signatures of candidates or their party agents, and missing forms). Illegalities pertain to criminal election offenses such as voter intimidation, bribery, improper influence and misuse of public resources.

In the 2013 presidential election petition, petitioners attempted to prove that the election was marred by a multiplicity of irregularities that constituted violations to both limbs of Section 83.<sup>23</sup> However, the Supreme Court was dismissive of irregularities that violated the constitution and laws on elections without further proof from petitioners that irregularities substantially affected the results of the election.<sup>24</sup> The Supreme Court affirmed its approach to the 2013 presidential petition in subsequent rulings on petitions for gubernatorial elections in Meru, Migori and Garissa.<sup>25</sup> In contrast, the Supreme Court's approach to the August 2017 presidential election petition surprisingly broke from its 2013 interpretation by stating: "a concise reading of Section 83 of the Elections Act would show that the results of the election need not be an issue where the principles of the Constitution and electoral law have been violated..."<sup>26</sup>

However, in subsequent rulings on petitions contesting other seats from the 2017 elections, including gubernatorial petitions, the Supreme Court reverted to its 2013 approach. In gubernato-

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<sup>23</sup> Odinga v IEBC 2013, para. 9,10,17, 17, 34, 44, 53, 134, 137.

<sup>24</sup> Odinga v IEBC 2013, para. 256.

<sup>25</sup> Munya v Githinji Supreme Court Election Petition 2B of 2014, para. 178, 179, 210B, 224; Obado v Oyugi Supreme Court Election Petition 4 of 2014, para. 126, 141; Adam v Mohamed Supreme Court Petition 13 of 2014, para. 87, 88, 90, 92, 96.

<sup>26</sup> Odinga v IEBC 2017, para. 384.



rial election petitions for Wajir, Homa Bay and Machakos,<sup>27</sup> petitioners presented nearly identical arguments as petitioners in the presidential petition,<sup>28</sup> which the Supreme Court nullified, yet the Supreme Court upheld these gubernatorial elections largely on the basis that the effects on results were not substantial enough to warrant nullification.<sup>29</sup> Notably, the majority of petitions from the 2017 elections were dismissed by courts because petitioners failed to adduce sufficient evidence to prove their allegations (Ngirachu and Ochieng 2018; Nyamori 2018).

For this thematic category, qualitative content analysis was used to assess which irregularities and illegalities were alleged by petitioners, whether petitioners buttress their claims by explicitly stating how allegations constituted violations and directly linking them to specific citations of articles of the constitution, legislative acts and regulations or institutional procedures established by the IEBC, and what arguments and evidence petitioners adduced to support their claims. Analysis for this category also assessed how courts referenced, interpreted and applied the various constitutional, legislative and institutional provisions that govern elections and how they evaluated petitioners' arguments and evidence. The objective of this analysis was to determine whether there were similarities or differences in how petitioners presented and argued

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<sup>27</sup> Mohamad v Mohamed High Court Election Petition 14 of 2017, para. 192, 201, 208; Mahamud v Mohamad Court of Appeal Election Petition 2 of 2018, pg. 2; Magwanga v IEBC High Court Election Petition 1 of 2017, para. 173, 179, 183; Awiti v IEBC Court of Appeal Election Petition of 2018, para. 182, 183, 185, 186, 224.

<sup>28</sup> Odinga v IEBC 2017, para. 264, 288, 345, 356, 357, 359, 362, 365, 367, 368, 375, 378, 383, 384, 389.

<sup>29</sup> Mahamud v Mohamad Supreme Court Election Petition 7 of 2018, para. 68, 80, 82, 83, 85.; Awiti v IEBC Supreme Court Election Petition 17 of 2018, para. 92, 94, 104, 106; Mutua v Ndeti Supreme Court Election Petition 11 and 14 of 2018, para. 65, 68, 72.

their claims, and whether there were consistencies or inconsistencies in the reasoning and approaches courts adopted in presidential and gubernatorial cases from 2013 and 2017.

Qualitative content analysis of the 2013 and 2017 presidential election petitions involved creating an index in a Word document. Sections of the Supreme Court judgements were excerpted and organized under thematic subheadings: constitutional articles (principles and procedures), Section 83, Elections Act, Elections Regulations, precedents (specifically for references to 2013 cases in the 2017 judgement), technicalities, irregularities (use of technology, execution of statutory forms – IEBC signatures, stamps, security features, handover/takeover sections, candidate/party agent signatures, missing forms), results (tally, count, numbers), scrutiny, illegalities (violence, bribery, intimidation, influence, misuse of public resources, etc.). Each thematic subheading was subdivided into three sections for arguments of petitioners, responses of respondents and determinations of courts. Qualitative content analysis also was used to identify which constitutional articles were cited and the frequency of citations by petitioners and courts. Data were organized in an Excel spreadsheet to tabulate which articles were referenced and the paragraphs in which they were referenced for both petitioners and courts, and whether the articles were provisions on procedures or principles (Table 1a).

Qualitative content analysis of the 2013 and 2017 gubernatorial election petitions used an Excel spreadsheet. Cases were arranged into three tiers – High Court, Court of Appeal and Supreme Court. For each case (rows), sections of the judgements were excerpted and organized under thematic subheadings (columns): constitutional articles (principles and procedures), Section 83, Elections Act, Elections Regulations, precedents (specifically for references to 2013 cases and

the Supreme Court judgment on 2017 the presidential election in 2017 gubernatorial cases), technicalities, irregularities (use of technology, execution of statutory forms – IEBC signatures, stamps, security features, handover/takeover sections, candidate/party agent signatures, missing forms), results (tally, count, numbers), scrutiny, illegalities (violence, bribery, intimidation, influence, misuse of public resources, etc.). For each case, each thematic subheading was subdivided into three sections (within a cell) for allegations of petitioners, responses of respondents and determinations of courts. Qualitative content analysis also was used to identify which constitutional articles were cited and the frequency of citations by petitioners and courts (for High Court petitions). Data were organized in an Excel spreadsheet, which tabulated the articles referenced and the paragraphs in which they were cited for both petitioners and courts, and whether the articles were provisions on procedures or principles.

*Additional variables – variance over time, different elective seats, different levels of courts*

Comparative analysis of presidential and gubernatorial election petitions considered three additional variables. First, whether there was variance over time – were there differences in the reasoning and approaches of the Supreme Court in presidential election petitions from 2013 and 2017, and were there differences in the reasoning and approaches of the High, Appeal and Supreme Courts in gubernatorial election petitions from 2013 and 2017? Regarding petitioners in presidential and gubernatorial election cases, were there changes in their arguments and approaches between 2013 and 2017, and were petitioners in 2017 guided by successes and failures of petitioners from 2013?

Second, whether there was variance for different categories of elective seats – were there differences in the approaches of petitioners and courts (Supreme) in presidential petitions compared to the approaches of petitioners and courts (High, Appeal, Supreme) in gubernatorial petitions? Third, whether there was variance for different levels of courts – how do various levels of courts (High, Appeal, Supreme) reference and interpret the decisions of other courts, and were there differences in the reasoning, approaches and judgements of courts at the same level (e.g. comparing High Court to High Court) and across levels of courts (e.g. comparing High Court, Court of Appeal and Supreme Court)?

### *Limitations*

One limitation of document analysis of court records is whether they can be treated as complete and accurate representations of the events that transpired in courtrooms in terms of the pleadings of petitioners, responses of respondents, and the decision-making process of courts (Hall 2011). This research uses judgements and rulings of courts mainly because there are readily accessible public documents. Alternative sources of data are transcripts of court proceedings and case filings of petitioners and respondents – but these documents are not publicly accessible and they are voluminous in content.<sup>30</sup> This potential limitation of completeness and accuracy of court records can be partially offset in cases that were heard before multiple courts – for example, gubernatorial election petitions were first heard by the High Court and can be appealed to the Court of Appeal and finally the Supreme Court (this strategy does not apply to presidential

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<sup>30</sup> E.g. Odinga's 2017 petition was roughly 25,000 pages in length (Menya and Kiplagat 2017).

election petitions, which are the exclusive jurisdiction of the Supreme Court and have no option for appeal). The rulings and judgements of courts in cases of appeal generally include the submissions of petitioners and respondents, a case history of the petitions in lower courts and the appellate courts' (Court of Appeal and Supreme Court) evaluation and determination of the appellate case. If there were errors or discrepancies in petitions before lower courts, these would most likely be highlighted by petitioners, respondents and courts in appellate cases. Another strategy to offset limitations of potential inaccuracy or incompleteness in court records is analysis of news media reports on election petitions, which can help fill in details that may have been left out of court records.

#### Document Analysis of News Media Reports

The second data set used in this research was news media reports from national newspapers. Analysis of news media reports was intended to achieve two objectives: to provide political and social context and to provide commentary and reaction to what was happening in courtrooms and recorded in court documents. Data for analysis of news media reports were collected from three national newspapers in Kenya: the Standard, the nation's longest running and second highest circulation newspaper; the Daily Nation, the highest circulation newspaper; and the Star, a newcomer established in 2007. Print editions of newspapers were designated as the primary document for analysis, and online editions were used as an alternative or secondary document – this is because print editions are stable, non-changeable documents and have a defined beginning and end, whereas online editions are subject to change, updating, editing or removal, and

because news media websites have no defined beginning or ending as hypertext links embedded in online news articles can jump forward and backward in time.

Analysis of news media reports was a multi-step process. First, print editions of the newspapers were read daily and articles of relevance to the research were identified. Relevance was broadly defined to capture articles that pertained to election petitions but also encompass articles on broader contemporaneous social and political contexts. This wide capture approach was designed to build an extensive and comprehensive databased that would be useful for other research projects. The second step was to save articles in an Excel spreadsheet. Newspaper websites were searched based on date parameters that corresponded with the print editions.<sup>31</sup> Any differences between print and online visions of articles were noted. Articles were then copied from the websites and saved as text in Excel. For print articles that did not have a corresponding online version, the print article was photographed, converted into text using Google Docs and saved in the Excel database. Although print editions were the primary document, articles of significance that only appeared online were also saved in the Excel database. On occasions where print editions were not available, online articles for corresponding dates were substituted.<sup>32</sup>

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<sup>31</sup> E.g. for print edition September 1, 2017, website search date parameters would include September 1, 2017, August 31, 2017 and September 2, 2017. The search parameter of “day, plus one, minus one” was used because an article appearing in the print edition may appear in the online edition on the same day, a day before or a day after.

<sup>32</sup> Print and online editions of newspapers were not available in some locations such as extremely remote areas with poor road networks or lack of internet service. For example, Lamu town, located on an Indian Ocean archipelago, has only one newspaper vendor. Newspapers come by road to the Lamu County mainland, then across waterways by boat, before arriving on the island in the evening, often a day late, and typically sell out within hours. Occasionally, newspapers may not arrive due to inclement weather or regional insecurity. Another example is Ibrahim Khalif Abdow, who has been Mandera County’s only newspaper vendor for the past two decades (Akello 2018). Across the nation, printed newspapers are often in short supply for a number of reasons: (a) high demand means many newspaper vendors sellout early in the morning; (b) because newspapers are considered by many to be a costly, nonessential expense, newspapers have a high pass-along rate of 10 to 15 readers per copy (Obonyo and Nyamboga 2011; Nyabuga

Due to the potential resource constraints of reading, analyzing and archiving daily print editions of multiple newspapers, and occasional unavailability of either print or online editions, the three newspapers were prioritized as follows: Standard must be read and cataloged daily; Daily Nation should be read and cataloged daily; Star can be read and cataloged intermittently. This prioritization was structured largely on the basis of qualities and limitations of the newspaper websites. The Standard newspaper website had a smaller volume online archive, limited search options (keywords with results sorted by date or relevance), and the availability of articles diminished over time (same limitations for the Star website). In contrast, the website for the Daily Nation had a more extensive online archive with longer availability of articles over time, and more extensive search options (keyword, category, date range with results sorted by date or relevance). The rationale for this prioritization was that articles from the Standard would be harder to search, retrieve and catalog farther from the date of publication compared to the Daily Nation. Collection of news media reports focused mainly on articles published within the date range of June 2017 to December 2018 (which corresponded with the timeframe for fieldwork),<sup>33</sup> although some articles from before and after these dates also were included.<sup>34</sup>

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and Booker 2013); (c) there is a robust secondary market for newspapers, which are quickly collected for resale to recyclers; (d) there are tertiary demands for newspapers for domestic and commercial use, such as wrapping food or lining the floor of a chicken coop. Thus, due to short supply and high demands, newspapers are occasionally hard to come by but always easy to give away.

<sup>33</sup> Key events within this timeframe included: the latter part of the campaign period, the August 2017 elections, the Supreme Court judgement on the August presidential election in September, the repeat election in October 2017, the Supreme Court judgement on the October presidential election in November, Odinga's self-inauguration as the People's President in January 2018, the handshake agreement between Kenyatta and Odinga in March 2018, and the period between March to December 2018, which was marked by both a return to normalcy as the heightened tensions from the political stalemate were resolved and a dramatically altered political landscape due to the new alliance between the leader of the ruling regime and the leader of the opposition.

<sup>34</sup> Examples of news media reports collected that were published after the date parameters pertained to election petitions contesting various seats from the August 2017 elections that were still pending in courts

The Excel database included separate spreadsheets for the Standard, the Daily Nation, and other Kenyan news, which included articles from the Star. Articles were organized in rows by date in reverse chronological order. Columns were labeled: rank, date, author, headline, article (text), keywords, people/places, and notes. Rank was on a 1 to 5 scale with a lower number indicating greater significance. The keyword column was for coding (and for quick search using the find function) (e.g. supreme court, election petition, judicial assault, police brutality, devolution, political violence, etc.). The notes column was used to organize excerpts from the articles and record researcher comments and analysis. The people/places column was used for tracking individuals, organizations and locations that appeared in the news, particularly if they appeared often. Information in this column was used to identify potential people to contact for interview and places to visit. Thus, news articles also provided a starting point for who to talk to and where to go, but also what to talk about and look for once there (a brief discussion of interview, conversation and ethnographic methods follows below).

In much of the existing research that uses analysis of news media documents, news media are the focus of study (Atheide and Schneider 2013); however, this is not the case in the present research. The analysis of news media herein does not assess discourse analysis, news media bias, how news media organizations produce or frame the news, or how audiences consume or are influenced by news. Whereas Atheide and Schneider (2013:14) propose that “context, or the social situations surrounding the document in question, must be understood to grasp the significance of the document itself, even independently of the content of the document,” the present

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into 2019; examples of news media reports collected that were published before the date parameters pertained to the 2013 Supreme Court presidential election petition.



research uses analysis of news media reports to achieve two objectives: to provide social and political context and to provide commentary and reactions in relation to the conduct and adjudication of elections. The selection and use of data from news media reports was intended to reflect an inclusive, balanced representation of the diverse array of perspectives of various social and political groups (e.g. supporters of the ruling party and the opposition party, government officials, independent agencies, civil society organizations, legal practitioners, lay people, the privileged and the marginalized).

Although this research does not evaluate issues of bias, reliability, credibility or quality of news media, it is germane to consider some of these issues in terms of potential limitations they could impose on the use of news media. Two observations are illustrative: First, a number of surveys have indicated that Kenyans express positive views and high levels of trust and confidence in Kenya's traditional mainstream news media. A 2016 InfoTrack opinion poll found Kenyan news media collectively were the most trusted institution with 87 percent of respondents expressing confidence in the news media (Ngetich 2016).<sup>35</sup> A 2017 Portland/GeoPoll (2017) study indicated that 76 percent of Kenyans trusted traditional mainstream news. The 2019 Status of the Media Report found that 89 percent of Kenyans expressed favorable views of news media reporting, two-thirds expressed some or high confidence in news media and one third indicated little or no confidence (Media Council of Kenya 2019; Chepkoech 2019).<sup>36</sup>

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<sup>35</sup> Civil society ranked second with 63 percent, followed by the ruling Jubilee government (55), the opposition (48), and parliament (45); the judiciary and the Ethics and Anti-Corruption Commission (EACC) inspire the least confidence (Ngetich 2016).

<sup>36</sup> There was a decrease in public confidence in the news media in the 2019 survey compared to the 2018 survey in which 77 percent of respondents indicated some or a lot of confidence in the media and 22 percent indicated little or no confidence (Media Council of Kenya 2018).

The second observation is anecdotal. The 2017 election cycle was marked by a tense political atmosphere that started during the campaign period before the August 2017 elections and lasted until the March 2018 handshake agreement between President Uhuru Kenyatta and opposition leader Raila Odinga, which ended a turbulent, months-long political stalemate. Throughout this period, the news media and individual journalists were the targets of assaults and attacks by various state bodies, including the president, other elected leaders and officials from different levels of government and state security forces, by opposition leaders, and by members of the public and supporters of both political factions (Chepkoech and Rotich 2019; Mariita 2019; CPJ 2017). For example, in January 2018, a spokesperson for Deputy President Ruto was recorded on phone call threatening a journalist over perceived media bias (Ngina 2018; Nation Reporter 2018). Later in January, NASA threatened to rally its supporters to boycott particular news media due to alleged negative coverage of the opposition (Star Reporter 2018). The anecdotal conclusion is that there is perhaps no better proof of political neutrality and balance in news reporting than when opposing sides of the political divide both perceive and allege bias.

#### Other Research Methods

This dissertation was originally design to answer a different set of research questions using different research methods, which included – interviews, conversations, site visits and ethnographic observation. These methods were still employed during fieldwork between June 2017 and December 2018. Although use of these methods produced rich data that was invaluable to the research project, they are less pronounced in the dissertation.

*Interviews and Conversations:* Individuals selected for interview were identified primarily based on either referral or reference (purposive sampling). In the case of referrals, individuals were recommended or suggested by other people as possible candidates for interview. In the case of reference, news articles were used to identify individuals or organizations as possible candidates for interview. Interviews were conducted in formal (office space) and informal (cafe, hotel lobby) settings, and occasionally over the phone or via text/email correspondence. Interviews generally followed a semi-structured or open format, and a list of discussion topics was usually provided to participants prior to the interview. Interview responses were recorded as text either using a smartphone notes app or laptop. Interview data were stored and analyzed in Word documents and an Excel database.

Individuals were selected for informal conversations primarily randomly, but occasionally by referral. Informal conversations usually took place in informal settings, both individually and in groups. In group settings, group dynamics added an insightful dimension, particularly when participants varied in terms of gender, socioeconomic status, ethnicity, age, where they currently lived and where they were from in terms of region and whether urban or rural. However, individual settings allowed for more candid exchanges. Informal conversations were primarily random because many came by way of chance encounters and by chance if individuals were inclined to converse. Examples included sharing a table in a busy cafe, chatting while waiting for the matatu (public transport minibus), with bar, restaurant and hotel staff and patrons, with drivers, boat pilots, tour guides, the cleaning lady, gardener, shoe shiner and

neighbors. A typical opening to an informal conversation would be, did you see this in the news today, what do you think of this?

A significant, and unanticipated, subset of informal conversations occurred with the aid of ridesharing apps. A few observations are notable: first, both passenger (researcher) and driver were randomly selected and paired by the app; second, demographic characteristics of the drivers were both varied and random (most strongly for age, ethnicity, region of origin and political affiliation, but less so for gender as most drivers were male); third, the space of the vehicle provided a setting that was both intimate and informal, yet still mediated by a passenger-driver dynamic, which itself is disciplined by both the norms of basic interpersonal social interactions and by the peer review and rate feature of ridesharing apps (one to five stars); fourth, due to usual traffic conditions, the setting of a car ride generally allowed for an optimal amount of time (average twenty to forty minutes) to initiate and conclude an insightful informal conversation. Reflections on informal conversations were compiled later and stored and analyzed in Word documents and an Excel database. Data from informal conversations provided background information and were not used for verbatim quotation or attribution.

In terms of advantages and limitations, one drawback of interviews was that the individuals selected by referral or reference were generally newsmaker types – government officials, representatives from nongovernment and civil society organizations, academics and also journalists. Thus, these were people who presented perspectives that were usually already publicly accessible, often already printed in the news or available in organizational documents, and who were unlikely to saying anything different in an interview setting or to only offer the most interesting

comments off the record. On the other hand, informal conversations provided richly layered and intersectionally variegated perspectives: I am from that political hotspot where there was violence; I am from the same tribe as that political candidate; I am an ethnic minority in my region; I live in the stronghold area of that political party. Although informal conversations were not recorded for verbatim quotation or attribution, these served as valuable sources of deep background information and provided opportunities to test and receive feedback on different conjectures, assumptions and perspectives.

Interestingly, informal conversations related to research topics occurred more often with men than women. Attempts to increase balance by speaking to more women seemed to have been counterbalanced by women being less likely than men to engage in informal conversations pertaining to research topics. This variation between males and females may have been due to normative intracultural and intercultural gender dynamics that govern interpersonal interactions. Another reason for this variation may be that the field of politics in Kenya remains gendered in that the political realm continues to be predominantly a male space. The problems related to the historical gender imbalance in Kenyan politics and the marginalization of women in the nation at large are thoroughly addressed in the 2010 Constitution.<sup>37</sup>

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<sup>37</sup> Constitution of Kenya 2010, Chapter 4 Bill of Rights, Part 2 Rights and Fundamental Freedoms, Section 27 Equality and freedom from discrimination, Subsection 3 states: “Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.” Subsection 8 establishes the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. Part 5(59)(2)(b) establishes the Kenya National Human Rights and Equality Commission “to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development.” Chapter 5 on Land and Development, Part 1(60) Principles of land policy establishes that “Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—(f) elimination of gender discrimination in law, customs and practices related to land and property in land.” Chapter 7 Representation of the People, Part 1 Electoral Systems and Processes, Section 81 states that “The electoral system shall comply with the following principles—(b) not more than two-thirds of the members of elective public bodies shall be of the same gender. Chapter 8 Legislature,

Intercultural dynamics were beneficial in some contexts where out-group status of the researcher allowed for certain kinds of dialogue that may have been less likely in in-group situations. The following two paraphrased interactions are illustrative: Because you are a foreigner and we are alone walking in the forest, I can tell you that, even though they are my tribesmen, I do not support either of those politicians; You are from another country, so I can say what I have never said out loud, I think this candidate was the better choice, but I would have had to lie to my family and friends, so I could not vote for him.<sup>38</sup> On less frequent occasions people sometimes initially shied away from discussing more controversial topics (e.g. electoral violence, ethno-political conflict, police brutality, etc.) seemingly due to concerns of giving a bad impression and wanting to promote a positive national image in the eyes of a foreigner; but more often the tendency was for candid exchanges and to overexplain on the assumption that a foreigner may not be aware of historical or contemporary contexts.

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Part 2(97) Membership of the National Assembly establishes the elected position of Women Representative from 47 counties. Chapter 10 Judiciary, Part 4 Judicial Service Commission, Section 172(2) states “In the performance of its functions, the Commission shall be guided by the following—(b) the promotion of gender equality.” Chapter 11, Part 1 Objects and principles of Devolved Government, Section 172 states “County governments established under this Constitution shall reflect the following principles—(c) no more than two-thirds of the members of representative bodies in each county government shall be of the same gender.” Part 2 County Governments, Section 177(1) states Membership of a county assembly consists of—(b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.” Part 7 General, Section 197 “County assembly gender balance and diversity (1) Not more than two-thirds of the members of any county assembly or county executive committee shall be of the same gender.” Chapter 15 on Commissions and Independent Offices, Article 250 on Composition, appointment and terms of office, Section 11 states “The chairperson and vice-chairperson of a commission shall not be of the same gender.”

<sup>38</sup> Male, early 30s, Luhya, community forester, at Kakamega Forest, April 2018; Female, early 40s, Kikuyu, international NGO, apartment in Muthaiga area of Nairobi, October 2018.

Perhaps unsurprisingly, the contentious election period the year before in the US was a frequent point of reference and comparison raised by individuals during conversations. In many cases, the people I interacted with were as interested in what was happening in the US as I was in what was happening in Kenya. What was often most revealing in these conversations was the reminder that regardless of the age of a country or its status as developed or developing, no country has a monopoly on the perfect form of democracy or governance.

*Ethnography and site visits:* Fieldwork was undertaken over the course of eighteen months – June 2017 to December 2018. The first few months were spent primarily in Nairobi, mainly in the Central Business District (CBD). The original plan was to stay in Nairobi only for the period immediately before and after the August elections, then move to other areas; however, the electioneering cycle did not end with the August elections. It was followed by a long, drawn out series of events, which included: the Supreme Court's nullification of the August presidential election in September; a repeat election in October; a second Supreme Court petition in November that upheld the reelection of Uhuru Kenyatta, who was the incumbent candidate of the ruling Jubilee party; plans to self-inaugurate Raila Odinga, who was the losing presidential candidate of the main opposition party (NASA), as the "People's President" in January 2018; followed by a months-long political stalemate, which finally culminated with a handshake agreement in March 2018 between the leaders of the two main political factions, Kenyatta and Odinga.

The time period from before the August 2017 elections through the March 2018 handshake was frequently tense, punctuated by economic recession (Omondi 2017) and ongoing confrontations between supporters and protestors on both sides of the political divide and state security

forces. There were weeks when the CBD was a ghost town (Odhiambo 2017; Omulo and Mukinda 2017) and months when the city was drenched in clouds of tear gas (Odenyo 2017; Nation Team 2017h; Makokha 2017; Ombati 2017c; Adhiambo 2017). This was the scenario in various parts of Nairobi, Kisumu, and other areas around the country.<sup>39</sup>

Although the original research design did not include staying in Nairobi for such a long period, two reasons are provided as rationale for augmenting the schedule. First, the advice of local people, perhaps out of an abundance of caution for a foreigner, suggested that I remain in Nairobi, in case the political situation deteriorated, it would be easier to get to the airport to leave the country.<sup>40</sup> It should be noted that leading up to the August election, a number of foreign governments issued advisories warning travelers to avoid Kenya and for expatriates living in Kenya to travel abroad (Ondieki 2017c; Mutambo 2017a). Many international companies and nongovernment organizations temporarily closed, staff were advised to take leave outside of the country, and contingency plans were devised for remaining staff in case of emergency (Editorial 2017b; Ondieki 2017b). However, the mass exodus from Nairobi and other urban areas was not only due to fear of civil unrest and electoral violence; many Kenyans vacated cities and traveled upcountry because they registered to vote in their home areas, and because the August elections coincided with a regular holiday period when many schools were not in session.

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<sup>39</sup> In Miami, grocery store shelves are emptied and cities shut down and evacuated due to threats of hurricanes and inclement weather – a natural disaster. In Nairobi, and other parts of Kenya, the same occurred but due to general elections, threats of civil unrest and impending violence – a political disaster.

<sup>40</sup> Styles (2009) includes a narrative of her decision to suspend fieldwork in Naivasha and leave Kenya when political tensions during the 2007 presidential election erupted into the 2007 post-election crisis.



On one hand, it may seem contradictory to advise a foreigner to remain in the city for safety while both foreign workers and Kenyans alike were vacating due to the possibility of the city becoming unsafe; but on the other hand, there was a sense that as a foreigner with no direct stake in the political contest, I would be in some ways immune to the effects of any political outcome. Moreover, my inability to participate in the political process by voting meant that as a noncitizen I could not pose a threat to any group or party of a particular political persuasion. The notion that foreigners were somehow immune to the events unfolding was buttressed by the fact that whereas many businesses catering primarily to Kenyans, such as grocery stores and restaurants serving traditional local foods were often closed, businesses targeted primarily to foreigners remained open and unfazed, particularly hotels such as the Fairmont, Hilton, Stanley and Intercontinental, despite the presence of few tourists and international business travelers.

However, this sense of foreign immunity was fluid and fluctuated over the course of the election period. As a caveat, there was one notable occasion where my status as a US citizen became a momentary point of conflict. While walking through the CBD with an acquaintance on the way to have lunch, we inadvertently encountered a large group of protesters who were retreating from security forces a few blocks away. Following the Supreme Court's nullification of the August presidential election, the opposition organized daily demonstrations to demand a number of reforms at the IEBC before the October repeat election, including the resignation of IEBC officials who had been blamed for irregularities in the August election. I happened to be wearing a t-shirt with a Miami, USA logo, which caught the attention of a handful of protesters who encircled us and shouted, "John Kerry go home, USA supports a rigged election." John Kerry, as head of the US election observation mission with the Carter Center, had given a positive appraisal of

the presidential election along with the EU and other international observer groups (Obwocha 2017). Additionally, US President Donald Trump had already, prematurely, congratulated Kenyatta's electoral win (Lang'at 2017d). The role of international observer groups, and their endorsement of the election – which respondents in the presidential petition had referenced to buttress their claims that the election was valid and credible<sup>41</sup> – were sharply criticized following the Supreme Court's nullification of the election (Some 2017; Musau 2017b; Nyamori 2017c).

My acquaintance, speaking in Swahili and his native Luo, joked that I had already voted in the US the year before, that my vote also had been “stolen,” and that Hillary Clinton, much like Odinga, was also a victim of a “rigged” election.<sup>42</sup> The protesters responded with a quick, commiserative “Hill-ar-y, Hill-ar-y” chant and then continued onward with their “Chiloba must go; No reforms, no elections” mantras (Ezra Chiloba was the IEBC CEO). In this situation, I did not feel threatened or unsafe, rather at the time and in retrospect it seemed like a funny interaction between a foreigner and a group of protesters. Yet, this is not to diminish the reality that protests can and did become violent and many people did lose their lives.<sup>43</sup> This incident also highlights how the actions and pronouncements of foreign leaders and representatives with regard to other countries can precipitate consequential repercussions that affect the citizens of those countries and also foreign nationals living in or visiting those countries.

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<sup>41</sup> Odinga v IEBC Supreme Court Presidential Election Petition 1 of 2017, [para. 53](#), 302.

<sup>42</sup> Interestingly, in an NPR interview a month later, Hillary Clinton related controversies over Kenya's 2017 presidential election to her own experiences in the 2016 US presidential election (Gross 2017).

<sup>43</sup> By early September 2017, in Kisumu county alone, there were reports of 170 people injured and 10 killed, many of whom were not even protesters, including a six-month-old infant (Mbenywe 2017).

The second reason for remaining in Nairobi longer than anticipated was that there was a lot going on during this time period and the capital city was a primary epicenter. Witnessing the transformations of the city from a traffic congested, bustling metropolis to shuttered shops and empty streets to streets closed to traffic and flooded with protesters and state security forces, and then returning to the normal flows of daily life, all provided a rich backdrop for observing the effects of a highly energized and contested political process on an urban space and how these events impacted the lives of its inhabitants in various ways. Nairobi was ideal for fieldwork in Kenya as the city is populated by people of all walks of life and highly socioeconomically and ethnically diverse. It is easy to encounter and interact with people from all regions and ethnic groups and in settings as varied as an urban slum or a high-end shopping mall.

Outside of Nairobi, fieldwork was undertaken in the following areas in order of decreasing length of time (months, weeks): Lamu, Naivasha, Kisumu, Kakamega and Laikipia. Other areas visited for one or more shorter periods (weeks, days) include: Nyeri, Samburu, Baringo, Uasin Gishu, Nandi, Kericho, Bomet, Meru, Isiolo, Kilifi, Kwale and Mombasa. These locations were selected based on a number of factors. One factor was references to locations in news reports. A second factor was that it was important to visit areas that had been identified as strongholds for particular candidates or parties and as hotspots for political conflict.<sup>44</sup> For example, following

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<sup>44</sup> In the months leading up to the August election, state agencies composed a list of areas with high risk of civil unrest, public disorder and election-related violence. NASA questioned the criteria for identifying hotspots and claimed opposition strongholds were overrepresented (Standard Team 2017a). Some reports rebutted NASA claims as untrue (Ng'ethe 2017a). Differences in geographical levels or units of analysis partially account for the discrepancy – at the county level the list was fairly evenly split based on party affiliation; but looking within counties at the constituency and ward level (Mukinda 2017a) and pinpointing the exact locations revealed that hotspots were more likely to be opposition aligned areas and with particular ethnic majorities (HRW 2017). The heavy deployment of security forces to hotspot areas is perceived by locals as a form of occupation and often accompanied with hostile, punitive policing.

the August 2017 election, Kisumu, which was listed as a likely hotspot, experienced months of intense civil unrest and political violence characterized by extensive property damage, strong state suppression and cases of extreme police brutality – the most infamous example of which was the death of six-month-old Baby Pendo, who died as a result of severe head trauma when security officers stormed her parents’ home in search of protesters (Ojina 2017; Omolo and Mulindi 2017). Hearing the perspectives of people in Kisumu was revealing for understanding certain dimensions of state-society relations, how state protection of citizens, which is sacrosanct under the new constitution and bill of rights, contradicts a long history of state suppression and violence in an area that has been an opposition stronghold since the colonial era.<sup>45</sup>

A third factor for location selection pertained to ethnicity. It is pertinent to note that many areas of Kenya are linked to contradictory narratives of identity and belonging. On one hand, there are exclusive notions of autochthonous ethnic majority and ethnicized territoriality (Jenkins 2015; Lynch 2011; Lonsdale 2008). On the other hand, a point of pride for many locales is their high degree of ethnic diversity and inclusivity – it is common to hear of places proudly referred to as cosmopolitan.<sup>46</sup> This tension and contradiction (Landau 2015; Klopp 2002; Lockwood 2019) between values of autochthony and cosmopolitanism over place provided context for exploring what it means to be on the majority or minority side in a political or ethnic stronghold.

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<sup>45</sup> Kisumu, the home area of the Odinga family, historically has had a complicated relationship with the state due to its image as a “defiant” and “troublesome” opposition stronghold (Mutah and Ruteere 2019).

<sup>46</sup> E.g. Nakuru advertises itself as a “multicultural and profoundly diverse” county that “comprises of all major tribes of Kenya who have coexisted peacefully together for many, many years” (nakuru.go.ke); Uasin Gishu is described as a “cosmopolitan society” characterized by political goodwill, stability, peace, hospitality and cohesion (uasingishu.go.ke); Trans Nzoia, Kericho and Narok also are describe as cosmopolitan (transnzoia.go.ke, kericho.go.ke, narok.go.ke). Uasin Gishu and Nakuru both experienced extreme intercommunal violence during the 2007 post-election crisis.

Although the above research methods – interviews, informal conversations, ethnography and site visits – were less pronounced in the dissertation, they served as valuable sources of deep background information and produced rich data that was invaluable to the research project. For example, these methods provided a means to observe firsthand the effects of a highly tense and contested election cycle on various groups of people and locations. Used in conjunction with primary research methods of qualitative document analysis of court records and news media reports, these additional research methods functioned as an additional layer of triangulation that enabled opportunities to test and received feedback on different conjectures, assumptions and perspectives that informed this research.

### **Chapter 3. Theoretical Framework**

This research engages two broader areas of study: the judicialization of politics and transformative constitutionalism. The chapter begins with a discussion of the concept of the judicialization of politics and problems that can potentially arise pertaining to the political question doctrine, the countermajoritarian dilemma and the politicization of the judiciary. Next, the chapter examines the concept of transformative constitutionalism and how it both entangles and ameliorates problems that may accompany in the judicialization of politics. The chapter concludes with a discussion of the judicialization of politics and transformative constitutionalism in Kenya.

#### Judicialization of Politics

The judicialization of politics refers to the expansion and transfer of decision-making power to the judiciary, often at the expense of the executive and legislative branches of government, particularly with regard to issues that are distinctly political in nature; and to the spread of judicial decision-making methods outside the judicial province proper (Tate and Vallinder 1995; Von-Doepp 2009). In the 1990s, Tate and Vallinder (1995) observed that from the 1940s onward the role of the courts and judges greatly expanded to the extent that the judicialization of politics was advancing as a world-wide phenomenon. In the 2000s, Ferejohn (2002) noted that the judicialization of politics had become global in its reach. And in the 2010s, Hirschl (2011) proposed that the judicialization of politics was one of the most significant phenomena of government in the late twentieth and early twenty-first centuries.

Other scholars have argued that the judicialization of politics, although noteworthy, was not a new phenomenon; rather, what changed was scholarly attention on the topic (Domingo 2004). While conceding that there has been some real increase in the global spread and significance of judicial interventions in public policy-making in the latter half of the twentieth century and beyond, Shapiro (2008:329) argues that popular usage of the term judicialization of politics “implies that courts did not do much politics yesterday, but do a lot today;” in contrast, he suggests that “to a very large degree it is not so much that courts do more now as that students of politics now see more of what courts do.” Thus, he proposes that the judicialization of politics “applies more aptly to the study of comparative politics than to the actual politics being studied.”

According to Hirschl (2006), the significance of the judicialization of politics is that it signals an ever-accelerating shift from “ordinary” jurisprudence to the judicialization of “mega politics” or “pure politics.”<sup>47</sup> Ordinary jurisprudence pertains to the expanding purview of courts in determining standard administrative and judicial review of public policy-making, enforcement of procedural justice, constitutional rights protections, and limits on legislative or executive powers. The judicialization of mega politics includes judicial scrutiny of executive branch prerogatives (e.g. fiscal policy, foreign affairs, national security), judicialization of electoral processes and outcomes, judicial corroboration of regime transformation and legitimacy, fundamental restorative justice dilemmas, and the judicialization of formative collective identity issues, nation building processes, and struggles over the very nature and definition of a polity (Hirschl 2006:727). The judicialization of mega politics involves the wholesale transfer to the courts of some of the most

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<sup>47</sup> Hirsch (2006:728) notes that the qualitative distinction between these two categories is subtle and elusive, yet intuitive and important, and also dependent on how the term “political” is conceptualized and what matters, questions or decisions are defined as a “political.”

pertinent and polemical controversies, and core moral predicaments that are of an outright and utmost political nature and significance, which “define the boundaries of the collective or cut through the heart of entire nations” (Hirschl 2008:98). These emerging areas of judicialized politics expand the boundaries of judicial involvement in the political sphere beyond any previous limit and mark a transition to what Hirschl (2004) defines as “juristocracy.”

A number of factors have contributed to the judicialization of politics and expansion of judicial power including global shifts toward democratization, constitutionalization and the rule of law, the increasing complexity of the modern bureaucratic state, the popularization of legal and rights discourses, and elite interests. Democratization itself produces expectations for some form of separation of powers among the major branches of government, of which an active judiciary with powers of judicial review is both a prerequisite and a byproduct of viable democratic governance premised upon principles of constitutionalism, rule of law and rights protection (Hirschl 2008:96). The growth of judicialization, the expanding role of courts and scope of their judicial purview, are an inevitable institutional response to the increased complexity of government, the proliferation of administrative and regulatory agencies within the state, the systemic need to adopt standardized legal norms and administrative regulations, and to maintain compliance and discipline within the state’s own bureaucratic machinery (Hirschl 2006:724; Ginsburg and Moustafa 2008:4). Judicialization also extends beyond national borders through globalization and the transnationalization of political, social and economic relations between states. This is evident at the international and supranational level with the establishment of numerous transnational courts, quasi-judicial tribunals, international legal



frameworks and treaties dealing with issues of governance, economy, security, environment and human rights (Domingo 2004:110; Hirschl 2006:726).

Judicialization is also evident in the pervasiveness and popularization of judicial decision-making methods and legal discourse, rules and procedures outside the judicial province proper and into the political sphere and virtually every aspect of modern life (Tate and Vallinder 1995; Hirschl 2006). The judicialization of politics has transformed the ways in which social, political and economic actors relate to the law, formulate their demands in legal and judicial terms, and use legal mechanisms, litigation and recourse to the courts for dispute resolution, to advance particular interests or challenge policy decisions (Domingo 2004:110). This correspondingly relates to what Epp (1998) refers to as the rights revolution and to what Domingo (2004:109, 107) refers to as the critical role of legal mobilization from below through which civil society articulates demands and concerns as rights-based issues to be addressed as matters of law, and judicial institutions become instruments of civil society empowerment.

What may be termed “judicialization from below” requires not only awareness of how to use the law and legal system to mobilize around rights issues, but also sufficient resources to sustain legal mobilization. Other prerequisites include access to justice through supportive and responsive judges; judicial institutions that are perceived to be reputable, impartial, apolitical, at least semiautonomous, and effective; and a conducive political environment hospitable to acceptance of the rule of law to which all political actors are required to adhere (Hirschl 2008:96; Domingo 2004:109). Thus, the emergence of judicialized politics and judicial empowerment is dependent on the interaction between social, political and economic struggles that shape a given polity,

and cannot be understood separately in isolation from the concrete institutional and structural contexts in which they emerge (Domingo 2004:109; Hirschl 2006:744).

The emergence and sustainability of judicial empowerment and entanglement with pure politics is also dependent on tacit or explicit support of powerful political stakeholders. This “judicialization from above” may be motivated by strategic elite interests (Hirschl 2008; VonDoepp 2009). The judicialization of politics reflects the degree to which regime legitimacy based on democratic credentials is increasingly constructed upon public perception of the state’s capacity and credibility in terms of ensuring rights protection (both human rights and personal liberties, and property rights as a means to attract capital and facilitate trade and investment), acceptance of the rule of law to which all political actors are required to adhere, constraints on arbitrary rule and the use of force, and the existence of constitutional and judicial checks on political power and public office (Domingo 2004:110,122; Ginsburg and Moustafa 2008). However, the constitutionalization of rights and judicial empowerment do not necessarily reflect a genuinely progressive reality within a polity; rather, they may be evidence that the rhetoric of rights and judicial review have been appropriated by elites to reinforce their own position (Hirschl 2004:12).

The notion that “more democracy equals more courts” raises a number of caveats. Hirschl (2008:96) notes that the “proliferation of democracy” thesis does not adequately explain the judicialization of politics in quasi/non-democratic polities or the variance in levels of judicialization among new and stable democracies. Particularly in young democracies, the judicialization of politics and greater judicial empowerment does not necessarily imply improvement to the rule of law (Domingo 2004:104). Along similar lines, Shapiro (2008:330) argues “written constitu-

tions with some sort of bill of rights have become almost like national flags as an integral symbol of national sovereignty for all states, including authoritarian regimes that have no intention of doing anything other than waving them in the international arena.” Prempeh (2006:1296) observes that in the context of Africa, democracy and constitutionalism, which were previously discredited by political elites, have become the primary sources of legitimacy for national politicians in a growing number of states. Ginsburg and Moustafa (2008:2, 9) note there is no necessarily connection between empowerment of courts and the liberalization of a political system as many states characterized by unconsolidated democracy and soft authoritarianism exhibit an increasingly prominent role for judicial institutions; authoritarian regimes may foster the image of an empowered judiciary to enhance their claims to “legal” legitimacy to justify their continued rule in the absence of popular support through elections.

The strategic calculations of political elites and other influential stakeholders may be primary catalysts of judicial empowerment and the judicialization of politics (Hirschl 2008; VonDoepp 2009). Hirschl (2004:12, 214) argues that judicial empowerment through constitutionalism can be an outcome of self-interested hegemonic preservation and the product of strategic interplay among three key groups: political elites who seek to preserve or enhance their political hegemony by insulating policy-making preferences from the vicissitudes of democratic politics while professing support for democracy; economic elites who favor the constitutionalisation of rights (particularly those related to property, mobility and occupation), limitations on government intervention and regulation, and promotion of a free-market, pro-business agenda; and judicial elites who seek to enhance their political influence, symbolic power and institutional position. Political, economic and legal powerholders are likely to either encourage or refrain from

blocking increased judicial empowerment in the political sphere based on the assumption that their absolute or relative positions will be improved and their interests best served.

Ginsburg and Moustafa (2008:10) suggest judicial empowerment is not necessarily indicative of judicial strength vis-a-vis other branches of government; rather it may evidence an alignment of policy-making objectives achieved through strategic delegation by politicians and strategic compliance by judges who are better insulated from the political repercussions of controversial rulings. Elected officials and political elites may rely on the public image of courts as professional, apolitical and semiautonomous decision-making bodies and welcome judicial intrusion into the prerogatives of legislatures and executives, particularly when public disputes in majoritarian decision-making arenas are likely to put their own policy preferences or the institutions in which they operate at risk (Hirschl 2008:95, 106, 107; Tate and Vallinder 1995:32). Political power-holders may transfer decision-making authority to nonpolitical judicial institutions to determine politically contentious and sensitive questions or implement unpopular, controversial policies as a means of depoliticizing issues, minimizing political fallout from difficult or politically costly decisions, or deflecting responsibility and accountability (Domingo 2004:108; Graber 1993:43).

The increasing judicialization of politics potentially can give rise to three problems pertaining to the political question doctrine, the countermajoritarian dilemma and the politicization of the judiciary. The political question doctrine, and the related principle of separation of powers, suggests that a certain degree of judicialization is easily reconcilable with the constitutional function of checks and balances through judicial scrutiny and review; however, there is an expectation that courts should exercise restraint in dealing with certain types of explicitly

political questions that are considered nonjusticiable because they fall within the exclusive domain of politically elected legislatures and executives (Hirschl 2002:193). The judicialization of politics and expansion of judicial power becomes increasingly controversial when judicial review infringes on the separation of powers vis-a-vis the executive and legislative branches and when the decision-making authority of courts is extended to matters that are essentially political, which previously had been, or perhaps should be, made by representative institutions of government (Fombad 2007:43; Hirschl 2008:97; Tate and Vallinder 1995:2).

The judicialization of politics and expansion of the judicial power can potentially raise concerns regarding democratic representation, the political accountability of courts, and the balance between judicial guardianship of constitutional principles and majoritarian rule (Domingo 2004: 111). Critics point to the countermajoritarian nature of judicial review and the democratic deficit inherent in transferring policy-making authority from elected and accountable politicians and majoritarian democratic institutions to judges who have no popular electoral mandate (Hirschl 2002:211; Bickel 1962:16). The countermajoritarian dilemma conjures fear that expanded judicial empowerment may increase the potential for tyranny. Juma (2010:227) notes the discretionary nature of constitutional interpretation and problems of weak judicial accountability can create enabling conditions for judges to impose their own views and invalidate the choices of democratically constituted branches of government. Waitara (2017:47) and Ngugi (2007:15) suggest the judicialization of politics taken to an extreme can become inconsonant with traditional ideals of representative democracy and separation of powers, and potentially lead to tyranny by judiciary.

Tate and Vallinder (1995:5, 527) cite critics who argue that the expansion of judicial power and transfer of policy-making authority to judges, who are part of the socioeconomic and political elite, can contribute to sustaining the rule of privileged and unrepresentative elites, weaken majoritarian democratic institutions, and foreclose access to effective policy-making processes and responsive decision-making bodies for those who should be represented in a democratic state. Fombad (2017:43) cautions there is a risk that judicial empowerment may result in judicially mediated democracy where courts cease to serve as defenders of constitutionalism and constitutional justice, but rather serve as a means for affluent, powerful elites to restrain and suppress the broader advancement of constitutionalism and the wider democratic yearnings and impulses of the people. From this perspective, a likely outcome is a tyranny of an elite minority whose self-interested pursuit of their own anti-majoritarian objectives is the antithesis of democracy (Hirschl 2002:212).

A number of scholars have argued the countermajoritarian critique of the judicialization of politics is conceptually flawed and based on a number of faulty premises – that there is tension between judicial review and democracy, that countermajoritarian institutions are inherently undemocratic, that majoritarian politics yield majoritarian results or are responsive to majoritarian preferences, and that courts as countermajoritarian institutions necessarily make countermajoritarian decisions (Bennett 2001; Friedman 2001; Graber 1993). Because democracy can be used to subvert constitutionalism, and because majority rule itself may be undemocratic, Fombad (2007:43, 45) proposes that an empowered judiciary with an expanded scope for judicial review is not necessarily antidemocratic, and its countermajoritarian role may be beneficial to ensure that the majority adheres to the rule of law. Domingo (2004:108, 109) notes that the

political role of courts can be validated, particularly if the problem of democratic deficit is the result of a crisis of representation, credibility or legitimacy of democratic institutions, whereby the courts may provide the only forum where policy decisions can be contested as issues of constitutionality or public interest.

When majoritarian institutions are perceived to be immobilized, self-serving or corrupt, judiciaries may function as democratizing and equalizing institutions to ensure fundamental democratic principles of free, open and equal political participation and representation (Tate and Vallinder 1995:31; Hirschl 2002:213). The existence of a constitutional framework for judicial review and intervention may serve as an instrument of civil society empowerment and provide political actors, who do not have access to political representation or are unwilling to advance their policy preferences or political grievances through majoritarian decision-making institutions, with an alternative institutional channel through the courts (Hirschl 2004:170; Domingo 2004:109). Because the needs of the poor and minority interests may be neglected by majoritarian institutions, the active involvement of courts in politics may be well warranted as an antidote to the deficits of representative democracy, and because they are untethered to any policy preferences associated with elective office, judiciaries can reverse the dangers of tyranny of the majority (Juma 2010:226, 227).

Lastly, the judicialization of politics may give rise to a concomitant problem of the politicization of the judiciary. Ginsburg and Moustafa (2008:2, 4, 14, 21) note powerholders may welcome judicial empowerment in order to harness the regime-supporting potential of judiciaries and exploit courts as tools to advance elite interests, establish and maintain social control, sideline

and minimize the utility of legal recourse for political opponents or to achieve other political aims. Conversely, political oppositions may seek to judicialize politics and politicize the judiciary by transforming courts into critical sites of political resistance that can open space for activists to mobilize against the state and enable the emergence of synergistic alliances with judges who also wish to expand their mandate and affect political change. Opposition politicians and civil society may use courts through petitions, injunctions and litigation to harass and obstruct governments or to enhance their exposure and legitimacy (Hirschl 2006:745).

Judicial intervention in the political sphere and unwelcome judgments on contentious political issues can generate significant political backlash from both the political class and the general public (Hirschl 2006:747). Judicial empowerment may provoke executives and legislatures to resist judicial encroachment, override controversial or unfavorable judgments, subvert judicial reforms, constrain judicial powers, decrease fiscal allocations, adjust terms of appointment and tenure, or discipline noncompliant judges (Domingo 2004:123). Political powerholders may attempt to destabilize the judiciary by propagating the impression that judicial decisions are politically motivated or that courts seek to reduce the legitimate legislative abilities of elected representatives or diminish the policy preferences of the people.

The judicialization of politics can increasingly expose courts to political attack and effectively puts judges on trial as each decision becomes a test of judicial independence against allegations of political bias (Prempeh 2016:154). Judicial empowerment carries the danger that courts may be perceived as too assertive or overinvolved in moral and political matters, or lacking principled neutrality in their judgements. The judicialization of politics increases the likelihood of courts



being dragged into unwinnable zero-sum political conflicts with the potential to undermine the credibility and reputation of the judiciary. Fombad (2017:43) notes that empowered judiciaries in fragile democracies face heightened risks as courts may still struggle to maintain public confidence and respect and to assert themselves after decades of subordination and domination by powerful, repressive executives.

### Transformative Constitutionalism

The concept of transformative constitutionalism both entangles and ameliorates problems pertaining to the political question doctrine, the countermajoritarian dilemma and the politicization of the judiciary that can arise with the judicialization of politics. Klare (1998:150) defines transformative constitutionalism as a long-term project for inducing large-scale social change through nonviolent political processes grounded in law and committed to constitutional enactment, interpretation and enforcement with the objective of transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction. More succinctly stated, transformative constitutionalism aims at achieving social and political transformation through the law, attaining substantive justice and equality, and entrenching egalitarianism in social, political and economic relationships (Kibet and Fombad 2017:365).

Transformative constitutionalism can arouse controversy because it obscures the law-politics divide (i.e. political question doctrine) by necessarily engaging the judiciary in the judicialization of politics, which raises the potential for conflict between the judicial and political branches of government (Kibet and Fombad 2017: 353, 361). This seemingly violates the principle of separa-

tion of powers, which demands commitment to an ethos of judicial restraint from overstep upon the legislative prerogative based on the notion that judges are neither authorized nor competent to make decisions that are legislative in nature (Davis and Klare 2010:500). However, contrary to the core tenets of the separation of powers and law-politics divide, Davis and Klare (2010:409) note judicial law-making is normal as judges make some of the law in all representative democracies. Generally, judicial legislation, in which courts go beyond mere interpretation to development of law, does not pose a threat to the separation of powers if judges restrict themselves to legislating within gaps in extant legislation so as to give effect to a particular constitutional right or to further the legislature's goals and intentions, and with deference to the superior law-making prerogative of the legislature. The problem with the basic premises of the separation of powers principle is that what is political and what is judicial is often more blurred than self-defining, and the common framing of a sharp law-politics divide is simplistic as the distinction is far more nuanced (Klare 1998:159, 161), or as Davis and Klare (2010:500) suggest, a “threadbare fiction.”

Muigai (1991:20, 28) proposes the traditional conception of a strict dichotomy between matters that are “purely legal” and “purely political” is premised on a number of flawed precepts – that some matters are nonjusticiable and beyond the competence of the courts, and that constitutions, constitutional interpretation, judges and judicial processes are value-neutral in terms of having no predisposition towards any political or social outcome. In contrast, Muigai (2004:3) argues that constitutions by their very nature are both legal and political documents, that constitutional adjudication raises questions that may be as much legal as they are political, and that the judiciary is a political actor within the state. Despite assumptions of adjudicative apolitical

neutrality, the open-textured quality of the law means that the possibility always exists for the judicial interpretation of the law to be shaded by the personal values and preferences of judges, that the choices judges make are likely to have significant social and political ramifications, and that the process of adjudication cannot be isolated from public pressures or the broader political, ideological and socioeconomic contexts in which judiciaries operate (Klare 1998).

Transformative constitutionalism clashes with a traditional notion of the rule of law that is premised on a sharp distinction between law and politics and a precise differentiation between the roles of judges and politicians (Klare 1998:157). This is because transformative constitutionalism obliges transformative adjudication; it aims to achieve social and political transformation through the law by embracing judicialism and positioning courts as prominent actors in the transformation process. Because transformative constitutionalism is an activist philosophy that inevitably calls for an activist approach in adjudication, the judiciary must assume a more assertive position than what is ordinarily called for in traditional constitutional contexts, and courts must liberate themselves from restraints self-imposed by their position within the equilibrium of power among state institutions structured by a traditional notion of the separation of powers (Kibet and Fombad 2017:357, 361). Fombad (2011:1067,1068; 2017:358) argues transformative constitutionalism may lead to a progressive judicialism that risks blurring the boundary between law and politics; and although controversial, judicial activism has an important role to play in entrenching the rule of law and constitutional governance. Core to the concepts of judicial activism and progressive judicialism is the notion that courts must reform the law where it is found to be defective, and that judges should go beyond their traditional role as interpreters of laws and assume a role as independent policymakers on behalf of society.

Transformative constitutions, such as those of South Africa and Kenya, go further in mandating judiciaries with the development of law to promote and ensure conformity with constitutional values and aspirations (Kibet and Fombad 2017:360; Davis and Klare 2010:410).<sup>48</sup> Musila (2013: 179) notes transformative constitutionalism purposefully introduces fundamental change in social, political and economic spheres of life and obliges key actors, such as courts, to give effect to the transformative project. Davis and Klare (2010:422) propose under transformative constitutionalism, courts have power and obligation to make law so as to fulfil the constitutional vision where the legislature has failed to do so or has done so inadequately. This mandate means courts can and should interfere with decisions of political branches of government where they offend or exceed the limits of the constitution and law. Transformative constitutionalism challenges traditional conceptions of the separation of powers by authorizing judge-made law and the law-making competence of courts. According to Mutunga (2013:21), where few people now maintain the “myth” that judges do not make law, Kenya’s transformative constitution tears away the last shreds of that “illusion.” Thus, transformative constitutionalism enables courts to be producers, developers and shapers of law; it authorizes a judicial interpretation that invokes nonlegal phenomenon and considers political, social, economic, cultural and historical contexts.

Writing prior to the enactment of Kenya’s 2010 Constitution, Ngugi (2007:14, 16) urged caution against the judicialization of politics, arguing that Kenyan courts should refrain from adjudicating on political questions. This perspective was informed by a history of judicial involvement in the political realm in which Kenya’s judiciary exhibited reluctance to check the powers of the execu-

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<sup>48</sup> Constitution of South Africa Sections 8 and 39; Constitution of Kenya Articles 20 and 259.

tive and failure to protect the fundamental rights of citizens. Kuria and Ojwang (1979:277) noted that under the repealed constitution, the weak facade of judicial independence and rule of law masked the reality of a judiciary that functioned as a device for the “vindication of prevailing political interests.” However, it was the judiciary’s restrained approach and reluctance to explicitly engage in political questions that resulted in a disturbing inability to exercise any meaningful check on public powers. According to Gondi and Basan (2015:75), the negative effects of a judiciary too restrained and conservative to curb the power of the executive and legislature reinforces the importance and necessity of enabling judicial activism to advance a progressive and transformative constitutionalism that embraces human rights and democratic values.

Where Ngugi (2007:14, 18) proposed that transformative constitutionalism necessitates reformulation of the political question doctrine, Langa (2006:353) and Waitara (2017:35) argue that transformative constitutionalism entirely removes and rejects the law-politics conflict. Although the progressive judicialism that emerges from transformative constitutionalism may be criticized as a form of judicial activism that trespasses the law-politics boundary, Fombad (2017:358) argues it is a necessary risk because African politicians have proven over decades that when unconstrained by clear constitutional rules and effective systems of constitutional review, the outcome has resulted in a creeping usurping of rights and a harsh authoritarianism.

Because judiciaries are central to transformative constitutionalism, there is a necessity for transformation of judiciaries themselves and a shift in legal culture to reflect the new spirit of transformative constitutionalism (Klare 1998.; Fobmad 2011; Harrington and Manji 2013; Mutunga 2017). Mureinik (1994:32) proposes such transformation requires transition from a “culture of

authority,” in which judiciaries observed a conservative constitutional interpretation and deference to the will of executive authority, to a “culture of justification,” which requires judges to justify their decisions, not with reference to authority or undue regard to technicalities, but by reference to fundamental principles, ideas and values contained within transformative constitutions (Harrington and Manji 2015; Juma 2010; Langa 2006). Transformative constitutionalism embraces a progressive judicialism and a purposive judicial approach to constitutional interpretation, which requires that judges actively strive to reverse historical injustices and to promote more just, equal and fair societies (Fombad 2017:385)

Recognizing that the judiciary is central to the entire configuration of a new structure of government and that the success of transformative constitutionalism is directly linked to the judiciary, Kenya’s 2010 Constitution mandated immediate transformation of the judiciary through wide-ranging institutional reforms, such as the vetting of all judicial officers to remove those deemed unsuitable on grounds of corruption, incompetence, malpractice or abuse of office, and structural reorganization of the judiciary, which included the creation of the Supreme Court itself (Ojwang 2013; Harrington and Manji 2015; Akech 2010; Judiciary 2012b).<sup>49</sup> Kibet and Fombad (2017:357) note that the judiciary is the greatest beneficiary of Kenya’s transformative constitutionalism, because contrary to its previous weak form under the old constitution, the judiciary under the new constitution enjoys immense powers as the final arbiter of legal and constitutional matters, including those that are political.

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<sup>49</sup> Constitution of Kenya, 2010, Chapter 10, Articles 159, 160, and 163; Sixth Schedule, Sections 23 and 24.

The inherently interventionist nature of Kenya's constitution ameliorates the countermajoritarian and political question problems that may arise with the judicialization of politics. Under the new constitution, the judiciary is assigned a twofold obligation – a constitutional mandate and a popular mandate, which are both intertwined. Chapter One of the Constitution, which establishes the sovereignty of the people and supremacy of the constitution, states sovereign power is delegated by the people to the judiciary among other state organs. This formulation means the exercise of the sovereign power of the people is no longer an exclusive preserve of the elected branches of government. Waitara (2017:58) argues the constitution epitomizes the judicialization of politics, and any criticisms of judicial activism or the expansion of judicial power need to be viewed within the context that the constitution provides firm foundation for the enhanced role of courts in Kenya's democratic, political space and the expanded scope for judicial review to assess the legality of democratic processes or state actions.

Because the constitution was enacted by referendum, with voter turnout of 70 percent and 68 percent voting in favor of promulgation, it can be argued that in addition to its constitutional mandate, the Kenyan judiciary does in fact have a popular mandate. Ojwang (2013:30) notes the people chose a constitutional order in which "the conduct of government is to be legitimated by majoritarian principles founded on the express voice of the people and by countermajoritarian principles founded on the mediatory voice of judges." The decades long project of constitutional reform is clear evidence that the people of Kenya wanted a counter-establishment break with the past order under the post-independence constitution, which was characterized by judicial subservience to the executive and the negation of fundamental rights and freedoms. By drafting and enacting a new constitution with specific provisions for judicial empowerment, the people

expressed a deliberate effort to protect judicial independence and to ensure that the judiciary contributes to political, social and economic improvement within the country (Franceschi 2017).<sup>50</sup> Because the judicialization of politics and judicial empowerment in Kenya derives in a very direct sense from the people and reflects their will, Waitara (2017:46) argues failure of the judiciary to give effect to its expanded mandate would not only be unconstitutional and undemocratic but also “would go against the zeitgeist that gave birth to the constitution.”

### Judicialization of Politics in Kenya

The judicialization of politics in Kenya has undoubtedly increased, which aligns with the general global trend towards democratization and constitutionalization; but is also a particular result of Kenya’s 2010 Constitution. The judicialization of politics and the expanded scope of judicial authority has firm foundations in the text and design of the constitution, and has been greatly embraced by a judiciary that is conscious of and willing to exercise its independence (Waitara 2017:48). Since the enactment of the 2010 Constitution, courts have emerged as an epicenter of politics and the involvement of the judiciary in political matters has been abundant and ubiquitous (Ochieng 2017:7). Munabi (2017:70) observes courts have demonstrated their power to check other branches of government and readiness to engage political controversies, which has made the judiciary a useful instrument for entrenching constitutional supremacy based on a culture of justification and for countering the totalitarian tendencies of representative organs of government. But positive developments in the judiciary are accompanied by further challenges such as the politicization of the judiciary and criticism of judicial activism.

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<sup>50</sup> E.g. Constitution of Kenya 2010, Article 19(1).



Criticism of judicial activism and accusations of judges acting politically are not a phenomenon new to the post-2010 constitutional era. Rather, such claims have been used historically to denigrate and discredit judges whose rulings go against the status quo or who fail to uphold the dictates and edicts of the executive and political elite (Gathii 1994). The political climate under the old constitutional order did not allow judges to make progressive judgments, and those who did faced sanctions, often severe (Mutua 2001). Although the 2010 Constitution has engendered a new political climate for the judiciary that grants license for progressive jurisprudence and protects judicial independence, the judiciary as an institution and judges individually remain vulnerable to various forms of interference and assault.

The problem of the politicization of the judiciary – which can arise with the judicialization of politics, and particularly the judicialization of elections – has emerged as an intensely contentious issue. The adjudication of elections, which are included within Hirsch’s (2006) category of pure or mega politics, is an area of the political arena that previously had been deemed off-limits to courts, but has increasingly come under the purview of judiciaries in many countries (Oloka-Onyango 2017; Prempeh 2016). The judicialization of elections raises questions of balance between a traditional approach to adjudication based on a technical and positivist interpretation of the law and a strict legalism that eschews political exigencies, or an approach aligned with the principles of transformative constitutionalism based on a progressive interpretation of the law that obligates consideration of political and extralegal contexts (Kanyinga and Odote 2019).

In the 2013 presidential election petition (upheld), the Supreme Court was criticized for exercising too much judicial restraint,<sup>51</sup> and in the August 2017 presidential election petition (nullified), it was criticized for intervening too aggressively in the political contest. Aywa (2016:55) argues that the Supreme Court adopted a restrained approach in 2013 based on the reasoning that a presidential election was essentially a political process which necessitated the court to assume a limited role so as not to be seen as usurping the role of the electorate. According to Kanyinga and Odote (2019: 240), the Supreme Court's judgement in 2013 was criticized for failing to provide a coherent and progressive jurisprudence and for focusing on technical and procedural matters at the expense of substantive merits and electoral justice. In the August 2017 petition, the Supreme Court was accused of failing to function as an apolitical arbiter and delivering a judgment that was politically motivated, lacked basis in law, and constituted a judicial coup (Anami 2017a, 2017c; Nyamori and Obala 2017; Ochieng 2017).

The increasing judicialization of elections was evident in Kenya's 2013 and 2017 elections where courts played a central role in the electoral process and resolution of election disputes. These included pre-election disputes regarding electoral rules and regulations, procurement of election technology and ballot materials, and post-election disputes over the conduct and results of elections. In the 2013 election period a record-breaking number of nearly 200 petitions were filed, which was exceeded by roughly 300 petitions during the 2017 election period. Kanyinga

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<sup>51</sup> The Supreme Court stated: "The office of the President is... constituted strictly on the basis of majoritarian expression... through the popular vote. As a basic principle, it should not be for the Court to determine who comes to occupy the Presidential office. It follows that this Court must hold in reserve the authority, legitimacy and readiness to pronounce on the validity of the occupancy of that office" (Odinga v IEBC 2013, para. 298, 299, 300).

and Odote (2019:235) note that the 2017 elections stand out as the most litigated and judicialized in the country's history,<sup>52</sup> and that the judiciary played a critical role in moderating the electoral process, resolving election related disputes, correcting "wrong" and "unclear" decisions made by other institutions, and ultimately overshadowed the election management body (IEBC).

This substantial increase in the number of election petitions is evidence that the judiciary has emerged as an impartial, trusted, viable and proper avenue for the resolution of election disputes. Yet, Kanyinga and Odote (2019:247) note such improvements can also bring further challenges and negative consequences. These positive developments in the judiciary have contributed to the increasing judicialization of elections as politicians from across the political divide rushed to courts hoping to secure and advance their interests. Courts commendably made decisions independent of any party and candidate, which repeatedly went against the interests and raised the ire of either the government and ruling party or the opposition. Yet, because election petitions, like elections themselves, produce clear winners and losers, judicial decisions were inevitably attacked in a manner that tended to undermine the reputation and credibility of courts, resulting in the politicization of the judiciary (Ochieng 2017:10). Waitara (2017:48) suggests that despite various allegations of judicial activism by the political class, the judiciary has demonstrated a robustness more attuned to the law than to unduly idealistic or political persuasion.

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<sup>52</sup> Kanyinga and Odote (2019), among others, note the increase in the number of election petitions from the pre-2010 period to 2013 and 2017 is significant evidence of the increasing judicialization of politics, and more specifically elections, which aligns with the global trend; however, it is also the result of three other factors unique to Kenya: first, the number of categories of elective seats increased from approximately three under the previous constitution (president, national assembly, local) to six under the new constitution (president, senator, member of parliament, woman representative, governor, member of county assembly); second, the number of candidates vying for all elective seats (1,882) combined increased from 12,776 in 2013 to 14,542 in 2017 (IEBC 2013, 2018); third, the 2010 Constitution and judicial reforms improved the image of courts as viable and proper channels for election dispute resolution.

The judicialization of elections in Kenya will likely continue because judicial reforms have resulted in a stronger judiciary that has demonstrated independence and willingness to make brave decisions, but also because the judiciary operates in a partisan political environment in which other institutions, such as the election management agency (IEBC), remain weakened and the broader political culture remains unchanged – politicians who prioritize winning above all else will continue to use courts as a channel to advance their interests (Kanyinga and Odote 2019). Ochieng (2017:32) suggests judicial independence will continue to be challenged by political elites, many of whom have not been cultivated in a culture of accountability to other actors and maintain a pre-2010 political mindset. In the post-2010 era, the judiciary has often, but not always,<sup>53</sup> demonstrated a strong commitment to the rules and values of the 2010 Constitution and to holding the political branches and other state institutions accountable, which Gathii (2017:20) proposes is evidence of its independence as the only arm of the government that does not owe its loyalty to the executive or the party system.

Although the opposition, civil society groups and the public, particularly in opposition strongholds, have often benefitted the judiciary by defending its independence and providing broad-

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<sup>53</sup> E.g. The Supreme Court declined to enforce the constitutionally mandated two-thirds gender rule (as per Articles 27(8), 81(b), 97(1), 98 (1), 197(1), 250(11)), which was intended to ensure gender balance in state institutions and offices (In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Supreme Court Advisory Opinion Application 2 of 2012). The timing of the Supreme Court’s majority opinion (Mutunga dissenting), just prior to the 2013 elections, removed pressure from political parties to nominate and promote female candidates. The court determined that gender parity in the constitution was aspirational, not an immediate right, and that gender quotas should be realized progressively over time. Kabira and Kameri-Mbote (2016:212) urged the Supreme Court “missed [an] opportunity for the judiciary to force a country that has historically discriminated against women in electoral matters to change... it failed to move the country towards gender equality in the remaining citadel of male political privilege.”

based support, confidence, credibility and acceptance, they can also be a source of criticism when judicial decisions are perceived to favor the wishes of the executive and an executive-aligned parliament (Gathii 2017:20). Public support and constitutional protections may insulate the judiciary from executive and legislative interference, but they do not entirely eliminate risks to judicial independence. The Supreme Court's nullification of the August 2017 presidential election constituted a bold intervention to enforce the rules and standards embodied in the constitution and election laws. By sanctioning violations, the judiciary affirmed its oversight role over the electoral process. Ochieng (2017:8) proposes that this is a particularly important development in the context of Kenya where democracy is still in transition from an authoritarian legacy. But this expression of judicial power and independence also provoked retaliation from the executive and an executive-aligned parliament, which reveals the continued vulnerability of courts and the precarious position of the judiciary in the balance of power within the state, despite a new era of transformative constitutionalism.

#### **Chapter 4. History of Kenya's Presidential Elections, Judiciary and Constitutional Reforms**

This chapter presents a brief political history of Kenya. The chapter begins by providing background on Kenya's August 2017 presidential election and the circumstances that prompted the filing of a Supreme Court petition to contest the election results. The second section of the chapter examines the historical role of the judiciary from the colonial era into the post-independence period and ongoing changes to judicial independence. The third section of the chapter focuses on the role of courts following the return of multiparty democracy in 1991 and constitutional reforms in 2010.

The two leading contenders for the office of the president in Kenya's August 8, 2017 elections were incumbent candidate Uhuru Kenyatta of the ruling Jubilee party and Raila Odinga, the candidate for the main opposition party – the National Super Alliance (NASA).<sup>54</sup> On August 11, Kenya's Independent Electoral and Boundaries Commission (IEBC) declared Kenyatta as the winner. Prior to and immediately after the IEBC's announcement, Odinga and NASA alleged the election had been rigged and was not free and fair; however, opposition leaders had publicly maintained they would not file a petition at the Supreme Court to contest the outcome of the August 2017 presidential election.

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<sup>54</sup> Uhuru Kenyatta is the son of Kenya's first president, Jomo Kenyatta, who ruled Kenya from independence in 1964 until his death in 1978. Raila Odinga is the son of Oginga Odinga who was briefly Kenya's first vice-president from independence in 1964 until 1966. Due to growing friction with president Jomo Kenyatta over ideological and policy disagreements, Oginga Odinga resigned from his post as vice president and became a prominent opposition figure.

NASA's reluctance to directly petition the Supreme Court stemmed from its dissatisfaction with the Supreme Court's ruling to uphold the 2013 presidential election. In the 2013 election, Kenyatta and Odinga were the main presidential candidates, and Kenyatta was declared with winner. Odinga contested the 2013 results at the Supreme Court, which ruled in favor of Kenyatta in a judgement that was criticized for being strong on technicalities and short on substance (Ng'etich and Obala 2017; Maina 2013; Shah 2013). The 2013 presidential election petition is discussed in detail in Chapter 5.

Despite public pronouncements by the opposition that they would not directly petition the Supreme Court to contest the results of the August 2017 presidential election, there was speculation that NASA was pursuing two other options. The first was to push for an independent audit of the presidential election results by organizing mass action in the form of street protests and demonstrations. The second was to lodge a petition by proxy – already a group of civil society organizations had been meeting to discuss the possibility of challenging the election in court (Onyango 2017a; Oruko and Namunane 2017). Yet in coming days, events would transpire to eliminate the viability of either option forcing the opposition to resort to a third contingency.

The first option raised alarm because Kenya has a history of peaceful protests that become violent resulting in loss of lives.<sup>55</sup> Following the contested presidential election in 2007,<sup>56</sup>

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<sup>55</sup> Such violence can take the form of intercommunal conflicts between supporters of opposing ethno-political factions and conflicts between citizens and state security forces (Mutahi and Ruteere 2019; Biegon and Mugo 2017).

<sup>56</sup> The primary contenders for the 2007 presidential election were incumbent candidate Mwai Kibaki and opposition candidate Raila Odinga. Days after declaring Kibaki's victory, Samuel Kivuitu, chairperson of the electoral commission publicly admitted, "I don't know whether Kibaki won the election" (Ongiri 2008).

because the electoral management agency lacked credibility and courts were not perceived as a trusted mechanism for election dispute resolution, the opposition resorted to mass action (Ndegwa 2007; Klopp and Kamungi 2008; HRW 2008; KNCHR 2008; Republic of Kenya 2008b; Mkangi and Githaiga 2012). The widespread violence that ensued precipitated a near civil war,<sup>57</sup> which necessitated international intervention to broker a power-sharing agreement and the formation of a coalition government composed of leaders from the two main political factions. Political violence and unrest were mitigated in 2013 largely due to the opposition's decision to pursue their grievances in court and because judicial reforms following promulgation of the 2010 Constitution improved the public image of the judiciary as the appropriate channel for election dispute resolution (Long et al. 2013; Cheeseman et al. 2014; Ngenge 2013).

In 2017, lives already had been lost prior to and following the August elections<sup>58</sup> – many injuries and deaths were attributed to excessive force and brutality by state security agencies against supporters of the opposition who were participating in street demonstrations to protest the election results (Ndung'u 2017; Kisika 2017; KNCHR 2018a, 2018b; HRW 2017). There was

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<sup>57</sup> Kagwanja and Southall (2009), among others, noted the 2007 post-election violence was initially spontaneous, then became organized and retaliatory. Following the return of multiparty politics in 1991, electoral violence has been a perennial feature of national elections in Kenya, particularly in 1992, 1997, 2007 and 2017. The genesis of Kenya's history of electoral violence originated as a counterstrategy of Moi and the KANU government to frustrate democratic reforms (Barkan 1993:90; Kabiri 2014:522). Despite capitulating to pressure emanating domestically and from international donors to legalize opposition parties, during the 1992 and 1997 elections the KANU regime attempted to discredit the viability of democratic reforms by orchestrated various forms of violence – state-sponsored, extra-state and informal (Githigaro 2017:90; Kagwanja and Southall 2009:261). State authorities then deceptively described the violence as ethnic or tribal clashes that were an inevitable outcome of multiparty politics (Kagwanja 2009:370). Following the 2017 elections, Gondi (2017:xii) noted, “[a] culture of violence and brutality... has become synonymous with elections in Kenya, particularly with regard to state security agencies and political elites who use violence as a means of [voter] mobilization during electoral cycles.”

<sup>58</sup> Between August 8 to 14, 2017, at least 24 people were killed and over 100 people sustained injuries across the country during protests against the presidential election results (Ombati 2017a; Achuka 2017a).



immense fear – internationally, domestically and within the opposition party itself – that if NASA called for further protests the death rate likely would have increased as mass action would be met with massive violence. A moderate faction within NASA convinced Odinga that this was not a viable option (Standard Team 2017c; Owino and Oruko 2017a). Considering the state’s monopoly on the use of force combined with the high likelihood of conflict with supporters of the ruling Jubilee party, if NASA’s call for peaceful demonstrations escalated into violence and destruction, Odinga could be implicated.

The second option was driven by NASA’s hope and belief that the opposition could fight the election in court indirectly through a petition by proxy. NASA adviser Salim Lone stated, “We always knew that even though we would not go to court, some serious group or individual would petition the results” (Standard Team 2017c). Unfortunately, the government swiftly neutralized this option by shutting down two prominent NGOs that were most able and likely to file a petition in support of the opposition to contest the election results (Cherono and Mwere 2017; Asamba 2017a). The timing and force of the state’s crackdown on civil society organizations, coupled with threats to arrest their staff, were particularly perplexing.

In the tense days following the IEBC’s declaration of Kenyatta’s victory, Kenyatta addressed the nation and urged those seeking to contest the election to pursue recourse in court and not in the streets (Thiong'o 2017a): “I continue to appeal to those who have for one reason or another rejected the outcome of the elections... We have extended our arm and hand of peace, friendship and for [NASA] to use whatever legal mechanisms that have been created by our wonderful constitution to express their dissatisfaction. I am sure there is no single Kenyan who wants to

see violence, looting and demonstrations that end up destroying property.” He shrugged off claims that the government was using the police to intimidate NASA supporters, stating: “We wish to thank the police men and women for the good work that they are doing and continue to encourage them to use restraint in exercising their duties” (Wanga 2017b; Maosa 2017).

On the same day that Kenyatta was appealing to the public for peace, the government NGOs Coordination Board<sup>59</sup> deregistered the Africa Centre for Open Governance (AfriCOG) and the Kenya Human Rights Commission (KHRC) due to alleged tax evasion among other charges (Cherono 2017a; Cherono 2017b). AfriCOG had worked with the opposition on the 2013 presidential election petition, and both NGOs were likely to file petitions to contest the August 2017 presidential election (Cherono and Mwere 2017).<sup>60</sup> Civil society leaders were quick to point out hypocrisy on the part of the state: on the one hand, to ask the opposition party and supporters to desist from protests in the streets and to take the fight to court; then on the other hand, to shut down the organizations most likely to represent the opposition in court. Thus, the state appeared to block both avenues available. Civil society groups that had consistently identified flaws in the conduct and outcome of the election now accused the government of preventing recourse for peaceful

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<sup>59</sup> Established in 1990, the NGOs Coordination Board is a state agency that regulates and monitors all local, national and international NGOs operating in Kenya and ensures their compliance with the NGO Coordination Act of 1990 and NGO Coordination Regulations of 1992. NGOs are required to submit annual reports to the board detailing their financing, personnel, projects and activities.

<sup>60</sup> Any suggestions that the timing of the closure of the two NGOs, just days before the deadline to file petitions contesting the August 2017 presidential election, was mere coincidence were laid to rest in November when the NGOs Coordination Board suspended five additional NGOs just days before the deadline to file petitions contesting the October 2017 repeat presidential election. These five NGOs had been highly vocal in their criticism of the conduct of the repeat presidential election. Many observers believed the state crackdown on these NGOs – which was based on allegations of operating illegal bank accounts among other charges – was a preemptive move by the executive to block the NGOs from challenging the repeat presidential election before the Supreme Court (Wambu 2017; Omulo 2017).

legal redress for those dissatisfied with the election. AfriCOG board member Maina Kiai stated: “You tell us to go to court but deregister the people who can go to court. Government needs to decide if it wants non-violent redress... Once you close the avenue for legal and peaceful nonviolent redress, you open a can of worms, and the state needs to be very clear on what it wants to do, and this is state’s decision not ours” (Kajilwa and Ondenyo 2017).

Rather than deter the opposition, closure of these two avenues – mass action and petition by proxy – motivated NASA’s new resolve to pursue a third contingency – to take the direct route to court. Odinga stated, “We had said we will not go to court. But with the raid on civil society and determination to silence all voices that could seek legal redress like AfriCOG and the Kenya Human Rights Commission, we have now decided to move to the Supreme Court and lay before the world the making of a computer-generated leadership” (Otieno and Obala 2017).<sup>61</sup> NASA argued that in addition to fighting for electoral justice, it was also fighting for those whose lives had already been lost to political violence, to defend against the assault on civil society, and for the very survival of democracy itself not only in Kenya, but in Africa and beyond (Nguta 2017).

Odinga went a step further by delivering a thinly-veiled attack on the credibility of the Supreme Court: “Our decision to go to court constitutes a second chance for the Supreme Court. The court can use this chance to redeem itself, or, like in 2013, it can compound the problems we face as a country” (Ng’etich and Obala 2017). Mathenge (2017) argued that Odinga’s statement was a clear indicator that the shadow of the Supreme Court’s judgement on the 2013 presiden-

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<sup>61</sup> “Computer generated” referred to NASA’s claims that the IEBC servers had been hacked and an algorithm inserted to ensure that Kenyatta continued to lead over Odinga by a consistent percentage of votes (Nation Reporter 2017b; Achuka 2017c).

tial election petition still loomed large five years later, and that Odinga’s challenge effectively thrust the court into a Cicero moment,<sup>62</sup> which both pressured and invited the court to seize the opportunity to “cleanse” itself from perceived shortcomings of the past. Odinga’s challenge for the court to redeem itself was not without merit. The credibility of the judiciary had seriously waned since the Supreme Court’s judgement to uphold the 2013 presidential election, which had come under immense criticism,<sup>63</sup> and was further eroded due to a number of scandals within the judiciary (Wairuri 2017). These scandals included, among others, a prominent bribery case involving a judge who presided over the 2013 Nairobi gubernatorial election petition (Muthoni 2016a), corruption and financial mismanagement related to the Judicial Service Commission and Chief Registrar (Nation Reporter 2013; Kairu 2016), wrangles over to the retirement of judges (Muthoni 2016b; Musau 2015), and accusations of partisanship and misconduct among some judges (Ogemba 2016).

By challenging the Judiciary to demonstrate the fruits of reform and evidence of redemption, Odinga was not only calling on the court to depart from its approach to the 2013 presidential petition when considering the August 2017 petition, he was also calling on the court to prove it had embraced its own role in advancing the transformative principles of the 2010 Constitution as the shield and defender of a progressive constitutionalism, and that it had in fact achieved its own mission and commitment to transform the judiciary (Judiciary 2012b). Odinga was calling

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<sup>62</sup> re. In Verrem (Against Verres). I.I.2. Cicero had argued that the reputation of the Senate had declined, but the Verres case presented the Senate with an opportunity to improve its image. Cicero reminded the Senate that just as they would deliver judgement on Verres, their verdict would be subject to public review – thus, so too would the public deliver judgement on the Senate.

<sup>63</sup> Kegoro (2013b), among others, also urged the Supreme Court was in need of redemption “after disappointing so many people” with its judgement in the 2013 presidential election petition.

on the court to not only reverse its thinking from the 2013 case, but also to reverse the decades of harm inflicted on Kenyans. Moreover, Odinga was inviting the judiciary to come into its own, to shine as an exemplar of a progressive and transformative jurisprudence that may guide the future of judicial practice in Kenya and as a standard bearer for international law.<sup>64</sup>

### Judicial Subservience, Transformation and Redemption

The notion that Kenya's judiciary was in need of redemption stems from the historical role of the judiciary in subverting constitutionalism, the rule of law, fundamental freedoms and human rights. A number of commentators have argued that judiciaries in common law African countries bear substantial responsibility for the collapse of constitutional government, desecration of bills of rights and denial of fundamental freedoms over several decades following independence (Oloka-Onyango 2017; Days et al. 1992). According to Odinkalu (1996:124), in the immediate aftermath of independence, the constitutions and bills of rights in common law Africa were destroyed by authoritarian executives, but also by judiciaries and their deliberate abdication of judicial responsibility to uphold constitutional rule and protect human rights. Prempeh (2001: 264) notes African judiciaries have paid longstanding homage and fidelity to a jurisprudence of executive supremacy, which has had regrettable consequences for civil liberties and personal freedoms across the continent.

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<sup>64</sup> Former Chief Justice Mutunga (2013:21, 23; 2017:40, 41) repeatedly emphasized the need for the post-2010 judiciary to develop a "new, robust, indigenous and patriotic jurisprudence as decreed by the constitution" and "to be not only the users of international law, but also its producers, developers and shapers." Supreme Court Act of 2011, Section 3(c) mandates the judiciary to "develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth." Also, Constitution of Kenya 2010 Articles 20 and 259(1)(c).

Kenya's independence constitution formally altered the structure of governance by introducing, among other features, a new bill of rights<sup>65</sup> and an independent judiciary with powers to ensure protection of fundamental rights<sup>66</sup> and for judicial review of constitutional interpretation<sup>67</sup> (Ghai and McAuslan 1970). Yet limiting factors to the entrenchment of constitutionalism and judicial independence in the postcolonial state were the persistence of a colonial mindset and reversion to a repressive authoritarianism that was reminiscent of the colonial era. This led to the implementation of a number of constitutional amendments that resulted in negation of a liberal constitutional order.<sup>68</sup> The problem of judicial subservience to the executive and elite interests (Mutua 2001), which was rooted during colonialism and flourished in post-independence, was conditioned by three interrelated factors: structural constraints, cooption and coercion.

In much of postcolonial Africa, the state exhibited both incongruence and continuity between the new dispensation under independence constitutions and the existing structures of power from the colonial period. These independence constitutions introduced numerous democratic principles and liberal values in emerging states that had not existed in any institutional form and were entirely contrary to the conditions and practices of colonialism (Lumumba and Franceschi

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<sup>65</sup> Constitution of Kenya (Repealed), Chapter 5 Protection of Fundamental Rights and Freedoms of the Individual.

<sup>66</sup> Constitution of Kenya (Repealed), Sections 77(1,9), 68(2).

<sup>67</sup> Constitution of Kenya (Repealed), Sections 60, 67.

<sup>68</sup> The previous constitution had been amended roughly 30 times, including 10 amendments between 1963 to 1968 and another 16 between 1969 to 1991 (Ojwang and Otieno-Odek 1988; Lumumba 2011), which centralized power in the executive and weakened other state institutions including parliament and the judiciary (Muigai 1991).

2014; Ghai and McAuslan 1970). Thus, the nature of the state envisioned by independence constitutions was fundamentally different from the design of the colonial state (Okoth-Ogendo 1993).

Law in colonial Africa was primarily a mechanism for asserting, enabling and legitimizing state power with the objective of controlling and exploiting the material, cultural and human resources of colonized populations (Prempeh 2006).<sup>69</sup> The purpose of colonial law was not for constraining or limiting state power, but to enhance it for the purpose of maintaining order in the pursuit of colonial interests; it was not concerned with protecting rights (e.g. freedoms of speech, assembly or association) or administering to the broader socioeconomic needs of colonized populations. The colonial judiciary was created to facilitate the colonial project and was instrumental in its execution. Under the colonial regime there was little separation of powers between the judiciary and the executive within the single column of power in which the governor occupied the apex of a monolithic bureaucratic state (Kuria and Ojwang 1979).

Under the new dispensation of independence constitutions, courts were cast into key positions of substantial political significance within national governments that were structured on the principle of the separation of powers. The incongruence between the colonial and postcolonial roles of the judiciary was expressed in Pfeiffer's (1978:37) assessment that courts were commissioned to perform a function within the new governments which they had not performed in any analogous sense during the colonial period. Kuria and Ojwang (1979:280) note independence constitutions superimposed abstract concepts of the rule of law over an active political scene,

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<sup>69</sup> Opolot (2002) notes it would be inaccurate to suggest that the colonial experience was exclusively characterized by exploitation, victimization and degradation of indigenous peoples, because there were certainly groups of people who benefitted from colonial rule.

which clashed with unchanging jural dogmas and the realities in which judges worked. This contradiction between the role of courts during colonialism and new post-independence expectations was expressed by Ghana's first postcolonial Attorney General, a British expatriate, who questioned why it was wrong for the state under African rule to deny access to justice through the courts when the same practices had been justified during colonial rule (Bing 1968:222).

Prempeh (2006:1244) notably urges caution over the widely held view that African judiciaries bear substantial blame for the demise of constitutionalism and failure of judicial review of executive and legislative actions in the early decades of African independence. Prempeh (2006:1244) argues that an overemphasis on a judge-centered explanation is far too limited and simplistic because it views the judiciary and judicial power as self-contained legal phenomena detached from the historical, political, social and economic forces that define the institutional context in which courts must operate. While independence constitutions in Africa empowered judiciaries to enforce bills of rights and perform judicial review, they did little to reconfigure, horizontally or vertically, the distribution of power and authority within the postcolonial state. Rather, these constitutions tended to preserve centralizing tendencies in which the executive and elites continued to wield disproportionate power and resources over functionally weak parliaments and judiciaries. Thus, the post-independence period was inauspicious for the development of independent courts and judicial empowerment (Prempeh 2006), because the structural relationship between the judiciary and the rest of the government inevitably made judges vulnerable to interference (Mbondenyi and Ambani 2013).



As a case in point, a number of commentators have advanced the view that at the onset of independence the Kenyan judiciary had already been handicapped in relation to the executive and legislative branches (Ojwang 1990; Mitullah et al. 2005; Mbote and Akech 2011; Visram 2011). This is because the structural separations in the 1963 Constitution expressly vested executive authority in the president<sup>70</sup> and legislative power in parliament,<sup>71</sup> but did not include a corresponding provision that explicitly defined judicial power as a function exclusively vested in the judiciary.<sup>72</sup> Because the 1963 Constitution did not properly address judicial authority or clearly establish the judiciary as a coequal arm of government, judicial independence was only implied, which opened the possibility for the executive and legislature to usurp and control the exercise of judicial power. This created conditions for judicial subservience and the elusiveness of judicial independence in both law and practice.

This incongruence between the preexisting structure of power and the post-independence constitutional order was rectified through the embrace of continuity, which was evident in the persistence of a colonial mindset after independence in the executive, legislature and judiciary

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<sup>70</sup> Constitution of Kenya (Repealed), Section 23(1).

<sup>71</sup> Constitution of Kenya (Repealed), Section 30.

<sup>72</sup> Constitutional provisions pertaining to the judiciary included: Section 60, which stated the High Court, as a superior court of record, shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by the constitution or any other law; Section 67, which established the jurisdiction of the High Court to address questions of constitutional interpretation; Section 68(2) which stated the judiciary shall not be subject to the direction or control of any other person or authority; and Section 77, which stated the exercise of judicial authority by courts shall be independent, impartial, fair and timely. A contrasting perspective would suggest that these sections of the constitution – particularly reference to unlimited jurisdiction and powers conferred by the constitution – constitute corresponding provisions for the judiciary on par with provisions for the executive and legislature. However, as per the argument outlined above, the absence of language that specifically states judicial power is vested in the judiciary meant that judicial authority could only be inferred.

(Mutunga 2013).<sup>73</sup> Despite the establishment of post-independence constitutions and the transfer of power from colonial rulers to African elites, the existing structures and ideologies of governance, such as those pertaining to the separation of powers and the rule of law, remained largely unchanged (Nyanjong and Dudley 2016; Oloka-Onyango 2017). The new constitutional precepts of emerging African states were overlaid upon, and in contradiction to, an existing institutional framework and authoritarian legal order, which was composed of a panoply of legislative acts, executive decrees and judicial precedents that had formed the basis of colonial authority (Prempeh 2006).

Independence did not result in the dismantling of the authoritarian laws that supported colonialism; rather, the oppressive legal and administrative structures of the colonial regime were preserved by the successor postcolonial governments (Odinkalu 1996; Kiai 1994). The institutional framework of the authoritarian state model that had been established under colonialism became foundational and key to the development of governance in the postcolonial state. This is because successor African elites understood that the cumbersome reinvention called for under the new constitutional order was inconvenient and unnecessary as real power already

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<sup>73</sup> This was evident in the judiciary's perpetuation of a legacy of common law practice that circumscribed the power of courts to engage in judicial review of executive and parliamentary authority (Gathii 2016). An exemplar case from the colonial period was *Ole Njogo v Republic East African Court of Appeal Civil Case 91 of 1912* in which the court ruled sovereign prerogatives were not subject to review by courts under British common law. This approach to judicial review continued to be affirmed in the decades following independence, for example, in cases such as *Muriithi v Attorney General High Court Civil Case 1170 of 1981* where the court determined it had no power to review presidential decisions because the president enjoyed the same powers and prerogatives as the British Crown prior to Kenya's independence, and in *Republic v Chief Justice High Court Miscellaneous Application 764 of 2004* where the court ruled the exercise of presidential powers could not be challenged by judicial review because judicial jurisdiction was not entrenched in the constitution but derived from a statutory act of parliament (e.g. Law Reform Act of 1956) and because judicial review of presidential actions would violate the separation of powers principle.

emanated from the existing legal order and bureaucratic machinery that departing colonial authorities had bequeathed (Okoth-Ogendo 1993; Prempeh 2007; Odinkalu 1996).

The evolving post-independence judiciary was deeply compromised by expectations to embrace the lofty values of constitutionalism, which were inconsistent with the heavy baggage of an existing jurisprudence established under colonialism (Okoth-Ogendo 1993). Where the judiciary previously served to further the objectives of British political and economic interests, it shifted to accommodating the executive and elite interests of the new African states. The alignment of the judiciary to elite interests was facilitated by both cooption and coercion. Because Africa's postcolonial judiciaries had been socialized within the colonial system, they inherited a colonial attitude towards the law and their judicial function, and their judicial ideologies were apt to be consonant with the authoritarian ideals of colonialism in which support for the government was deeply engrained (Seidman 1974). Moreover, members of the judiciary were drawn from and part of the same social strata as the political elite, whose interests were tied to preserving a status quo that favored government stability. Prempeh (2001) notes that judges habituated by custom, training and experience to be excessively deferential to the state and public authority were naturally inclined to reckon their primary institutional role was to maintain law and order, and not to protect political freedoms or restrain government.

The cooption of the judiciary was aimed at securing continued deference to the executive and loyalty to elite interest. This was orchestrated and incentivized through a system of patronage whereby the most compliant judges were rewarded with the allocation of preferred judicial

posts, promotion, financial gain or political favor (Mutua 2001; Days et al. 1992).<sup>74</sup> Noncompliance and disloyalty were disciplined through coercion using threats, punishments and personal attacks (Gathii 1994; VonDoepp and Ellett 2011). Although the independence constitution formally required security of tenure for judges and judicial independence and impartiality, in practice judges were not ensured immunity from executive and elite interference (Gathii 1994; Kameri-Mbote and Akech 2011). Moreover, the independence constitution was subsequently amended to increase executive control over the judiciary (Lumumba 2011). Judges were keenly aware of the fact that they held their positions at the will of the government, and any demise of the ruling regime could lead to inevitable loss of the privileges, prestige and powers of judicial office. As a result, judges were likely to perceive their self-interests as contingent on defending the interests of the political regime that appointed them (Odinkalu 1996; Akech and Kameri-Mbote 2012). According to Gathii (1994), inadequacy of security of tenure and fear of the ruling regime were significant factors for why the judiciary failed its constitutionally mandated task of protecting fundamental freedoms and human rights as guaranteed in the constitution.

The potential for judicial enforcement of human rights and fundamental freedoms was further encumbered not only by incompatibility with the existing legal order carried over from the colo-

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<sup>74</sup> E.g. Judge Tuiyot, a loyalist of the ruling KANU regime, was promoted from the Magistrate Court to the High Court, which many observers viewed was a reward for his numerous pro-government judgements in cases such as *Republic v Wamwere* Magistrate Court Criminal Case 2273 of 1993 (Kameri-Mbote and Akech 2011; Wahiu 2005).

nial era,<sup>75</sup> but also by constitutional limitations on basic rights,<sup>76</sup> subsequent amendments to the constitution,<sup>77</sup> and enactment of new laws.<sup>78</sup> Hansungule (2003:43) notes that despite including provisions for a bill of rights, the independence constitution was not exactly “human rights friendly,” and in practice it was utilized to advance the parochial interests of the ruling class rather than protect the interests of ordinary citizens. Mbondenyi and Ambani (2013:170) argue the bill of rights was replete with limitations and clawback clauses that often defeated the very essence of protecting rights to the extent that more rights were taken away than guaranteed. Other commentators have noted nearly every article on rights in the independence constitution was qualified by a clawback clause which modified or restricted the right to the extent that the bill of rights was more accurately a bill of exceptions (Ngugi 2007; Mutakha-Kangu 2008).

In general, most formulations of bills of rights contain limitations as a framework for balancing the interests of the individual or group and the community or public at large. Such limitations are not usual and generally allow for the suspension or derogation of some or all rights under certain, specific circumstances such as the need to maintain public order and national security (Ghai 1999:211). Unfortunately, all too often powerholders, who are the authorities with

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<sup>75</sup> E.g. Chief’s Authority Act, Cap. 128, and Public Order Act, Cap. 56, Laws of Kenya (restricted rights of assembly, movement, speech); Penal Code, Cap. 63, Laws of Kenya (treason, sedition).

<sup>76</sup> Constitution of Kenya (Repealed), Chapter 5 outlines the fundamental rights and freedoms of individuals, but many of the provisions include limitations that qualify constitutional protections.

<sup>77</sup> E.g. Constitution of Kenya (Amendment) Act 38 of 1964 (authority for judicial appointment vested in president); Constitution of Kenya (Amendment) Act 18 of 1966 (broadened emergency powers of the executive, allowed detention without trial); Constitution of Kenya (Amendment) Act 4 of 1988 (extended pretrial detention for capital offenses from 24 hours to 14 days, removed security of tenure for judges).

<sup>78</sup> E.g. Preservation of Public Security Act of 1966 (preventative detention without trial); Constitution Public Security Order of 1978 (broadened executive state of emergency powers).

discretion to activate restrictions on rights, conflate the interest of the community with the objectives of the state and deploy the rhetoric of threats to national stability and security to mask what are really threats to their political dominance and economic self-interests.

Because such limitations can be perverted to illegitimately deny legitimate rights, it is imperative to establish the permissible scope of limitations and a proper approach to their interpretation. This is largely the responsibility of the judiciary and necessitates independent and competent judges. Yet Kenya's experience has shown how easily the executive can negate rights with the aid of a judiciary that grants an aura of plausibility. Ghai (1999:234) argues that courts historically have not supported the cause of human rights; instead, they have accorded higher privilege to limitations on rights than the substantive rights themselves and aided in massive abuses of the legal process. They have failed to exercise appropriate balance between the protection and limitation of rights to the extent that restrictions become so extensive and broad they extinguish freedom. Ghai (1999:233) cautions against overgeneralization, noting that judges occasionally have upheld the constitution, but mainly in cases where no political issue is contested; however, decisions against upholding rights and freedoms have been far more numerous.

Clawback clauses<sup>79</sup> alone would not have undermined the constitution and fundamental freedoms without a judiciary inclined to interpret them in a manner that denied citizens the ability

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<sup>79</sup> E.g. Constitution of Kenya (Repealed), Article 74 Protection from inhuman treatment. Subsection (1) contains the protected right: "No person shall be subject to torture or to inhuman or degrading punishment or other treatment." Subsection (2) contains the limitation or clawback: "(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963." December 11, 1963 was the last day of colonial rule. On December 12, 1963, Kenya became an independent state.

to use the constitution as a source of enforceable rights (Ngugi 2007). Mbondenyi and Ambani (2013:173) argue that the infrequent occasions where courts acknowledged the realization of rights remained a coincidence rather than a guarantee. Courts generally adopted an openly hostile posture towards petitioners who dared to challenge the status quo through constitutional litigation (Oloka-Onyang'o 2017; Days et al. 1992).<sup>80</sup> According to Thiankolu (2007:189), "an unprincipled, eclectic, vague, pedantic, inconsistent and conservative approach to constitutional interpretation... has haunted Kenyan courts" since independence.

From the start of the independence era, courts exhibited a culture of judicial restraint and reluctance to check the abuse of public powers or to judicially review executive and legislative action that offended the constitution (Oloka-Onyang'o 2017; Ngugi 2007). The judicial philosophy of the post-independence era, particularly in the 1980s and early 1990s, was predominated by a conservative judicial decision-making and restrictive constitutional interpretation that prioritized the protection and defense of the interests of a small political and economic elite at the expense of the fundamental rights, freedoms and individual liberties of the general public (Gathii 2016; Akech and Kameri-Mbote 2012). According to Days et al. (1992:22), the Kenyan judiciary "ratified an intolerable undermining of the principle of judicial independence" through the individual silence and collective inaction of judges in the face of such executive and legislative interfer-

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<sup>80</sup> E.g. In *Ndamwe v Attorney General and Registrar* High Court Civil Application 253 of 1991, while ruling that the Registrar of Societies was right to refuse to register an opposition party as doing so would have incited "very real danger to public order and security," Justice Dugdale castigated the litigants for daring to bring a case against the government and the ruling party.

ence, and stood by as the Kenyan government enacted repressive laws that allowed for the derogation of constitutionality protected rights and liberties.<sup>81</sup>

This judicial approach was most evident in political prosecutions for treason and sedition, which often raised questions regarding the legality of detention without trial and the use of torture. Courts generally treated such cases with the utmost deference by refusing to review, rarely investigating or withholding judgement.<sup>82</sup> Pre-trial detention, treason and sedition laws trace their origins back to colonial rule, and postcolonial regimes have employed them for the same purposes to legitimize repression. Courts have been used as a weapon by the powerful and wealthy to dispose of political opponents, silence critics, quell dissent and settle personal vendetta (Kiai 1994; Days et al. 1992; Ghai 2016).

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<sup>81</sup> E.g. Preservation of the Public Security Act of 1966 introduced preventative detention without trial.

<sup>82</sup> E.g. In *Ooko v Republic* High Court Civil Case 1159 of 1965, the court ruled that questions of whether a detainee posed a threat to security and the necessity of continued detention were matters ultimately for the Minister of Home Affairs rather than the court. In *Republic v Oloo* High Court Criminal Case 25 of 1981, a university student was charged with possession of a seditious document, which was an unfinished handwritten essay. His sentence of five years imprisonment was upheld in *Oloo v Attorney General* Court of Appeal Civil Appeal 152 of 1986. In *Republic v Imunde* Magistrates Court Criminal Case 150 of 1990, the court ordered a sentence of six years imprisonment after determining a personal diary was a seditious publication on the basis of the defendant's own admission and guilty plea, despite the defendant's assertion that his confessions had been made under duress of torture. Courts abstained from addressing the lawfulness and constitutionality of pretrial detentions in *Kihoro v Attorney General* High Court Civil Case 1793 of 1987 (74 days detention without charge), *Ng'ang'a v Attorney General* High Court Civil Case 2715 of 1987 (90 days detention before service of detention order), and *Kariuki v Attorney General* High Court Civil Case 1295 of 1987 (11 days detention before service of detention order). In a number of cases courts refused to review allegations of torture: *Wamwere v Attorney General* High Court Miscellaneous Application 574 of 1990; *Republic v Anyona* High Court Criminal Application 358 of 1990; *Republic v Commissioner of Prisons* High Court Civil Case 60 of 1984. According to Justice Schofield (1992), courts tended to ignore complaints about the use of police brutality to elicit confessions and the excessive periods suspects were held in police custody before being brought to court.



As a caveat, it is pertinent to acknowledge that there were a number of exceptions to the general propensity of executive subservience by the judiciary.<sup>83</sup> Several commentators have noted that there have been occasions, although infrequent, in which courts exhibited judicial independence with “unusual courage” (Gathii 1994:12) as exemplified by a few “heroic judges” (Oloka-Onyango 2017:60) who defied the dictates of the executive to enforce the rights of individuals (Akech and Kameri-Mbote 2012; Pfeiffer 1978; M’Inoti 1998). Particularly from the 1990s onward, the predominant tendency for conservative constitutional interpretation began to be more frequently challenged by more progressive, liberal-minded judges (Odinkalu 1996; Mbondenyei and Ambani 2013). But on such occasions when individual judges exercised

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<sup>83</sup> Judge Shields, who had consistently demonstrated judicial independence, was eventually transferred to hearing insurance claims before his contract renewal was declined in 1994 (Gathii 1994). In a ruling against the state, Shields famously declared, “The Constitution of the Republic is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth.” After determining a plaintiff had been subjected to inhumane and degrading treatment by the government, Shields awarded damages for violation of constitutional rights (Marete v Attorney General High Court Civil Case 668 of 1986; Muigai.2004). Shields effectively lifted a ban on the Nairobi Law Monthly by granting a stay on Legal Notice 420 of 1990, which the Attorney General had imposed using the Penal Code to prohibit the publication due to alleged “subversive” and “seditious” content (High Court Civil Cause 647 of 1990; Imanyara 1992; Gathii 1993). Shields granted leave to stay Gazette Notice 977 of 1992 in which the Speaker of the National Assembly had declared the Kiambaa Parliamentary seat vacant after James Njenga Karume defected from the ruling party to join an opposition party; the judgement allowed Karume to continue sitting in Parliament (High Court Miscellaneous Application 388 of 1992), but was subsequently reversed by the Court of Appeal (Speaker of the National Assembly v Karume Civil Application 92 of 1992; Gathii 1993). In Githunguri v Republic High Court Criminal Applications 279 of 1985 and 271 of 1986, eight years after publicly announcing that it had terminated criminal prosecution, the Attorney General resurrected four of the original charges. The court ruled in favor of the applicant after determining the powers of the Attorney General were not absolute and the applicant’s fundamental right to a fair hearing within a reasonable time had been contravened. The court stated: “The people will lose faith in the Constitution if it fails to give effective protection to their fundamental rights.” In closing, Chief Justice Madan addressed the applicant directly stating: “When you leave here raise your eyes up unto the hills. Utter a prayer of thankfulness that your fundamental rights are protected under the juridical system of Kenya.” In a similar case just a few years prior, the High Court came to the opposite conclusion that the power to terminate and reopen cases was fully at the discretion of Attorney General and not a violation of constitutional rights (Mwau v Attorney General High Court Criminal Application 128 of 1983). Also notable were cases in which judges awarded damages to victims of state torture, particularly in the 1980s and 1990s: Kihoro v Attorney General Court of Appeal Civil Appeal 151/155 of 1988; Imunde v Attorney General High Court Miscellaneous Application 180 of 1990; Kariuki v Commissioner of Police High Court Civil Case 2450 of 1993; Ndede v Attorney General High Court Civil Case 284 of 1994. Such cases became more frequent into the 2000s (Malombe et al. 2009).

independence, the executive and officers of the state often responded with open defiance and total disregard of the decisions of courts (Gathii 2016; Odote and Musumba 2016). For example, Days et al. (1992) note an incident where the prosecution simply ignored a court order to produce a detainee in court. When Judge Tank pursued the matter, he was shouted down by the state's counsel. Upon return from adjournment, and after consultation with the Chief Justice, the judge corrected himself by refusing to entertain further questions on the matter.<sup>84</sup>

On other occasions the executive and legislature enacted new laws to bypass and subvert judicial decisions. For example, in 1974 the High Court found Paul Ngei guilty of electoral offenses, nullified his election and disqualified him from contesting for a parliamentary seat for five years.<sup>85</sup> The executive swiftly responded: President Jomo Kenyatta ordered the Attorney General to draft a constitutional amendment within twelve hours that would extend the president's prerogative of mercy to include power to pardon persons found guilty of election offences with retroactive effect. Parliament introduced, debated and unanimously passed the amendment in a single afternoon, during which Vice President Daniel arap Moi opined, "I support this amendment because we know that the President is above the law. If we say that the President is above the law, why should we say that he should be denied these new powers which rightfully belong to him?" The following day, Kenyatta signed the amendment into law and Ngei was the first beneficiary (Gathii 1994; Mugo 2013).<sup>86</sup> Odote and Musumba (2016:10)

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<sup>84</sup> Kariuki v Republic Magistrate Court Criminal Application 540 of 1986; Kariuki v Attorney General High Court Civil Case 1795 of 1987.

<sup>85</sup> Mondo v Galgalo and Ngei High Court Election Petition 16 of 1974.

<sup>86</sup> Constitution of Kenya (Amendment) Act 17 of 1975.

note the “Ngei Amendment” reflected the nonauthoritative nature of judicial authority and that the power of the judiciary was clearly subordinate to the power of the executive.

Historically, Kenyan courts exercised a propensity to use legal and procedural technicalities as grounds to dismiss politically charged cases without delving into their substantive merits (Juma and Okpaluba 2012). Mutunga (2013:20) defines this form of judicial reasoning as mechanical jurisprudence in which courts deliver seemingly technically sound decisions that nonetheless eschew substantive justice, purposive interpretation and issues of logic and substance (Kuria and Ojwang 1979). By dismissing cases on the basis of minor technical details, Kenyan courts upheld detentions that were patently illegal, deprived themselves of the authority to enforce the rule of law, abdicated their duty to vindicate the fundamental rights of citizens, and endorsed fraudulent elections in favor of incumbents and the status quo (Oloka-Onyango 2017; Kibet and Fombad 2017; Ndunguru and Njowoka 2008).

For example, when Kenneth Matiba contested his continued detention without trial in 1991, the court dismissed the case and divested itself of jurisdiction to enforce the bill of rights on technical grounds that Matiba had not sufficiently cited which specific provisions of the constitution had been violated (Days et al. 1992; Kuria and Vazquez 1991).<sup>87</sup> In two highly controversial cases from the late 1980s,<sup>88</sup> the court ruled that Section 84 of the Constitution (repealed), which

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<sup>87</sup> Matiba v Attorney General High Court Civil Application 666 of 1991.

<sup>88</sup> In Kuria v Attorney General High Court Civil Application 500/551 of 1988, the applicant challenged the state’s confiscation of his passport as a violation of fundamental freedom of movement under Section 81 of the Constitution. In Mbacha v Attorney General High Court Civil Application 356 of 1989, the applicant argued against state violation of voting rights and freedom of expression under Sections 72, 77, 79 and 82

grants the High Court original jurisdiction to enforce fundamental rights provided under Sections 70 to 86 of the Constitution (repealed), was inoperative because the Chief Justice had not promulgated rules of procedure to facilitate the filing of human rights and constitutional cases. Thus, the cases were dismissed for lack of jurisdiction (Kuria and Vazquez 1991; Days et al. 1992; Gathii 1994). Muigai (2004:9) argues that courts manipulated technical rules to achieve their perceived objectives of maintaining the status quo and advancing the political goals of the ruling class, and avoided hearing the substance and merits of cases by devising technical reasons to dismiss them (Ochola and Ndolo 1991).

Justice Dugdale's<sup>89</sup> declaration that rights in Kenya were "as dead as a dodo" in respect to the two cases above was a shocking denial of the court's jurisdiction and ignored almost two decades of constitutional litigation under Section 84 of the Constitution – just two years earlier Judge Shields<sup>90</sup> had ruled the bill of rights was enforceable and the "teeth" of the constitution were "found in Section 84" (Hannan 1991; Gathii 1994, 2016; Nation Reporter 2003). A number of commentators observed that these two cases marked a radical departure from the historical role of the post-independence judiciary in the realm of fundamental rights jurisprudence, and that the particular technical situation highlighted in the two cases had not previously hindered

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of the Constitution stemming from his arrest on breach of peace charges for issuing a press release that alleged rigging in the Kiharu District byelections.

<sup>89</sup> Dugdale was notorious for his effectiveness in suppressing all challenges to the government. When James Orengo, as counsel for an opposition party, requested Dugdale to recuse himself on grounds of bias, the judge responded by summoning police brandishing handcuffs and threatened Orengo with arrest for contempt (Ndamwe v Attorney General and Registrar High Court Civil Application 253 of 1991).

<sup>90</sup> Marete v Attorney General High Court Civil Case 668 of 1986.

courts from ruling on rights issues – although generally in favor of the state and against litigants (Muigai 1991; Kuria and Vazquez 1991; Kibet and Fombad 2017).<sup>91</sup>

The adjudication of presidential election disputes has been problematic and controversial throughout Kenya’s post-independence history. Prior to 2010, no presidential election petition was ever conclusively determined on merit, and each was eventually dismissed in a manner that defeated the overall ends of justice.<sup>92</sup> Judges generally failed to address the factual allegations or pertinent issues raised by the petitioners and constrained themselves from adjudicating on the critical question of whether elections were free and fair (Kabaa 2015; Majanja 2016; Oloka-Onyango 2017; Kanyinga and Odote 2019). Instead, courts exercised a proclivity for summarily dismissing election petitions by resorting to purely legal and procedural technicalities as opposed to consideration of substantive matters.<sup>93</sup>

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<sup>91</sup> E.g. *Kioko v Attorney General* High Court Criminal Case 663 of 1964; *Muhuri v Attorney General* High Court Civil Case 1021 of 1964; *Madhwa v Nairobi City Council* EA 406 of 1968; *Republic v El Mann* EA 357 of 1969; *Republic v Kadhi ex parte Nasreen* EA 153 of 1973; *Njeru v Republic* High Court Criminal Case 4 of 1979; *Njeru v Republic* Court of Appeal Criminal Appeal 4 of 1979; *Ngui v Republic* High Court Criminal Case 59 of 1985; *Odinga v Attorney General and Detainees’ Review Tribunal* High Court Civil Application 104 of 1986; *Mzirai v Attorney-General* High Court Miscellaneous Application 444 of 1986.

<sup>92</sup> The low success rate of judicial challenges to presidential elections is not exclusive to Kenya, the same has been evident in nations across Africa and beyond (Azu 2015; Kaaba 2015; Awuor and Achode 2013).

<sup>93</sup> E.g.: In *Nyamai v Moi* High Court Election Petition 70 of 1993 and *Kibaki v Moi* High Court Election Petition 1 of 1998, petitions were struck out for want of personal service to the respondent, President Moi. *Kibaki v Moi* Court of Appeal Civil Appeal 172 and 173 of 1999 was dismissed on grounds that publishing notice of the appeal in the official gazette was not an effective means of service nor a substitute for personal service. *Moi v Matiba* Court of Appeal Civil Appeal 176 of 1993 was struck out as invalid because the applicant’s wife had signed the petition on his behalf due to his physical incapacity and despite having granted her power of attorney to do so. *Moi v Mwau* Court of Appeal Civil Application 131 of 1994 was struck out on the basis that the Court of Appeal had no jurisdiction as a judgment of the High Court on an election petition was final – this ruling seemed contrary the Court of Appeal’s position in *Kibaki v Moi* and *Moi v Matiba* Civil Appeals where it had assumed and never questioned its rightful jurisdiction.

According to Thiankolu (2013) and Sihanya (2013), the pre-2010 jurisprudence on elections was inconsistent with the letter and spirit of Kenya's constitutional and legal provisions on elections, which required election courts to decide all matters before them without undue regard to technicalities.<sup>94</sup> Yet the judicial approach to election petitions in Kenya comprises a body of case law that is riddled with contradictions. Historically, courts have done little to enforce a culture of constitutionalism in the conduct of elections. Instead, courts have actively undermined the timely resolution of electoral disputes and the realization of electoral justice. Thiankolu (2013: 94) argues that courts have evinced a tacit willingness to expand the law for the purpose of summarily dismissing or striking out election petitions on the basis of technicalities and an unflinching hesitation to expand the law to consider the substantive merits of election disputes.<sup>95</sup>

Often courts were complicit in the lengthy duration of months and years to conclude petitions. In some cases, election petitions outlived the tenure of the incumbent whose election was challenged (Majanja 2016). This history of adjudication on elections demonstrated the judicial system and legal regimes in place were particularly unsuited for resolving election disputes (Oloka-Onyango 2017). The unsatisfactory manner in which courts disposed of presidential

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<sup>94</sup> Although not explicitly stated in the repealed constitution, the principle of undue regard to technicalities was well established in Kenyan law and common law tradition – e.g. East African Order in Council of 1902, Section 20; Kenya Judicature Act of 1967, Section 3(2).

<sup>95</sup> There were a small number of cases in which courts ruled in favor of petitioners: In *Imanyara v Moi High Court Election Petition 4 of 1993*, the court dismissed Moi's application to have the petition struck out for want of personal service and allowed the petition to proceed on grounds that late publishing of the petition in the official gazette was still sufficient service. In *Matiba v Moi High Court Election Petition 27 of 1993*, the court ruled that a petition signed by the applicant's wife was valid as the applicant was physically unable to append his signature having suffered a stroke while in detention; however, the Court of Appeal overturned the High Court ruling (*Moi v Matiba Court of Appeal Civil Appeal 176 of 1993*). Judicial contracts of service were subsequently terminated for High Court Judges Torgbor and Couldrey who had presided over these two cases.

election petitions entrenched a dangerous precedent that rewarded electoral malpractice, eroded public confidence in the electoral and judicial systems, and negated the advancement of constitutional and democratic consolidation (Kaaba 2015).

### Multiparty Democracy and Constitutional Reform

The problems of executive interference with the judiciary and judicial subservience to the interests of ruling elites were not exclusive to the KANU governments that had ruled Kenya as a de facto single-party state from 1964 to 1982, as a de jure single-party state from 1982 to 1991, and as a multiparty democracy from 1991 to 2002 (Oloka-Onyango 2017). The 2002 presidential election marked a watershed moment in Kenya's history. For the first time an opposition party, the National Rainbow Coalition (NARC), had come to power in a smooth transition via electoral process, which ended the nearly 40-year reign of the KANU regime. Kenyans had high expectations for the new NARC government, but the euphoria following the 2002 elections soon faded (Murunga and Nasongo 2006).

The 2002 presidential election was unique for a number of reasons of which three are notable. One reason was that for the first time in Kenya's history there was no incumbent presidential candidate. Democratic reforms enacted in 1991 reintroduced multiparty democracy and presidential term limits. This meant that Daniel arap Moi, Kenya's second president, was only eligible to run for two new terms in the 1992 and 1997 presidential elections, which he won, but was barred from contending in 2002. Because he could not run for a third consecutive term, Moi

personally designated Uhuru Kenyatta to run the successor candidate for the KANU party in the 2002 presidential election.<sup>96</sup>

A second reason was that opposition parties adopted a new strategy in 2002. In Kenya's first two multiparty elections following democratic reforms in 1991, Moi's victories were greatly aided by the fact that multiple opposition parties each fielded their own candidates, which collectively fractured the vote. In the 1992 presidential election, Oginga Odinga<sup>97</sup> and Mwai Kibaki<sup>98</sup> were among a number of opposition candidates who vied against Moi, but Moi won with only 36 percent of the votes. Following Oginga Odinga's death in 1994, Raila Odinga<sup>99</sup> made his first bid for the presidency in the 1997 election, along with Mwai Kibaki and a number of other opposition candidates. Again, Moi won with only 40 percent of the votes. The 2002 election was different because instead of competing against each other and the KANU candidate, multiple opposition parties merged to form one new party, the National Rainbow Coalition (NARC), and rallied behind a single president candidate, Mwai Kibaki, to represent a unified opposition. While campaigning for the 2002 election, Raila Odinga epitomized this unity among opposition

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<sup>96</sup> Moi was president from 1978 to 2002. He succeeded Jomo Kenyatta, who was Kenya's first president from independence in 1964 until his death in 1978. Uhuru Kenyatta is the son of Jomo Kenyatta. The 2002 election was Uhuru Kenyatta's first bid for the presidency. Uhuru did not compete in the 2007 election, instead he supported Mwai Kibaki's reelection. Uhuru Kenyatta won his second and third bids for the presidency in the 2013 and 2017 elections under the newly formed Jubilee party.

<sup>97</sup> Oginga Odinga was briefly Kenya's first vice president from 1964 to 1966. He resigned due to ideological and policy disagreements with president Jomo Kenyatta and became a prominent opposition figure.

<sup>98</sup> Mwai Kibaki was Kenya's fourth vice president under Moi from 1978 until 1988 when he fell out of favor with Moi. Kibaki became an opposition member of parliament from 1992 until 2002.

<sup>99</sup> Raila Odinga is Oginga Odinga's son. Raila Odinga unsuccessfully ran for the presidency in 1997, 2007, 2013 and 2017.



parties by famously declaring, “Kibaki Tosha,” meaning Kibaki was “enough” or “sufficient.” Kibaki won the election with 60 percent of the vote against Kenyatta who garnered 30 percent.

A third reason was that unlike previous elections in 1992 and 1997, the 2002 presidential election was generally peaceful and widely considered to be free and fair by domestic and international observers. Electoral violence has been a perennial feature of national elections in Kenya, particularly in 1992, 1997, 2007 and 2017. The genesis of Kenya’s history of electoral violence originated as a counterstrategy of Moi and the KANU government to frustrate democratic reforms that were introduced in 1991. Despite capitulating to pressure emanating domestically and from international donors to legalize opposition parties, Moi warned that multiparty politics would destroy national unity. Moi argued that because political parties lacked cohesive political ideologies, they would instead divide the country along ethnic lines leading to tribal balkanization and ethnic animosity (Barkan 1993:90; Kagwanja and Southall 2009:261; Kabiri 2014:522).

To prove that multipartyism would unleash conflict and violence, Moi and the KANU regime adopted a two-part strategy to foment division both among opposition parties and within the populace by propagating an extreme form of ethno-nationalism (Klopp 2002:270). During the 1992 and 1997 elections, the KANU regime attempted to discredit the viability of democratic reforms by orchestrated various forms of violence – state-sponsored, extra-state and informal (Githigaro 2017:90). State authorities then deceptively described the violence as ethnic or tribal clashes that were an inevitable outcome of multiparty politics (Kagwanja 2009: 370). The use of autochthonous discourse and ethnic mobilization demonstrated the dangerous measures the

KANU regime would utilize to ensure electoral victories and retain power at all costs (Cheeseman et al. 2014:5; Githigaro 2017:84).

The relative peacefulness of the 2002 election was due to a number of factors. One of these factors was that Uhuru Kenyatta conceded defeat and did not contest the victory of Kibaki and the NARC party.<sup>100</sup> A second factor was that while some KANU stalwarts maintained their allegiance to the party by supporting Uhuru Kenyatta as the KANU candidate, others defected to join NARC in support of Mwai Kibaki. These realignments within the KANU party, coupled with Moi's ineligibility to run as an incumbent candidate, reduced the incentive for Moi and KANU to reuse divisive politics and violence as a means to win the election and retain power.

A third factor was that the unification of the multiple opposition parties that comprised NARC also constituted a multi-ethnic alliance, which reduced the utility and likelihood of ethno-political conflict and violence. The previous KANU regime was blamed for perpetuating a politics of exclusion in which the distribution of resources favored a small number of ethno-regional groups that supported or were aligned with the ruling regime, while neglecting a larger number of other ethno-regional groups, particularly those that supported the opposition. For example, Jomo Kenyatta and Daniel arap Moi were perceived as disproportionately benefiting their respective ethnic groups, the Kikuyu and Kalenjin, during their presidencies. This unequal access to resources on the basis of ethnicity fueled intercommunal conflict and animosity.

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<sup>100</sup> Following both presidential elections in 1992 and 1997, opposition candidates filed election petitions to contest the results, which courts predominately dismissed on the basis of procedural technicalities without evaluating the substantive merits of the cases.

NARC offset ethnic tension by highlighting the multi-ethnic character of the party, which was reflected in the party's multi-ethnic leadership (Lynch 2006:235). NARC also promised to institute a more inclusive government once Kibaki was elected, which would include expanding the executive to accommodate the leaders of the ethno-regional alliance that constituted the party (this accommodation would also provide for former KANU stalwarts who had joined NARC). Cooperation among the various opposition parties was formalized in a pre-election memorandum of understanding, which detailed how senior positions within the new NARC government would be distributed among party leaders (Oloo 2015:49). For example, Raila Odinga's support for Kibaki and NARC was largely contingent on assurances in the memorandum that Odinga would become Prime Minister.

Kibaki and the NARC party campaigned on a reform agenda that included promises to institute far-reaching constitutional reforms once in power. This promise, coupled with a unified opposition and a broad-based multi-ethnic alliance, positioned NARC as a viable break and a highly attractive change from nearly 40 years of KANU rule. Moreover, the leadership of NARC included some of the nation's most preeminent icons with long records of championing political, socioeconomic and human rights (Ambani 2009). However, despite promises to enact a new constitution within its first one hundred days in office, once in power the Kibaki government began to sabotage the constitutional review process (Juma and Okpaluba 2012; Nowrojee 2014).<sup>101</sup>

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<sup>101</sup> Contrary to his campaign rhetoric of change, Kibaki seemed to be a repeat of the KANU regimes (Nowrojee 2014). Throughout his tenure, Moi had consistently blocked the constitutional review process. Leading up to the 2002 elections Moi put a number of hurdles in the way of the Constitution of Kenya Review Commission and then abruptly dissolved Parliament in October 2002 to prevent the opportunity for the draft constitution to be debated (Juma and Okpaluba 2012).

As a presidential candidate, Kibaki had expressed enthusiastic support for the Bomas Draft Constitution.<sup>102</sup> But as president, he vehemently opposed a number of its signature provisions such as the creation of the position of prime minister, which was an essential stipulation of the pre-election memorandum of understanding among NARC leaders. Kibaki also opposed other key provisions of the draft constitution that would introduce limitations on presidential powers and institute the devolution of power from the central government to newly created subnational county governments, which were envisioned to reduce ethno-regional inequalities (Kameri-Mbote and Akech 2011; Wamai 2014; Murunga and Nasong 2006). The regime's failure to nurture the coalition politics that had brought it to power, particularly Kibaki's renegeing on the memorandum, led to the effective disintegration of the NARC government within months. The constitutional review process was hampered further by persistent infighting within NARC, which was animated by divisive politics, political differences and sectarian interests among the various factions and personalities within the coalition (Lumumba 2011; Kameri-Mbote and Akech 2011; Oloka-Onyango 2017).

The reform agenda that NARC campaigned on included a promise to root out corruption within the judiciary. For decades, dozens of official reviews, including some commissioned by the judiciary itself, had identified persistent problems in the judiciary. These problems pertained to capacity (e.g. case management, conditions of service, physical infrastructure, financial insecurity) and integrity (e.g. political servitude, executive interference, standards of professionalism,

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<sup>102</sup> The Bomas Draft Constitution was based on the product of the Constitution of Kenya Review Commission (Ghai Draft), which was organized prior to the 2002 election, and the National Constitutional Conference, which was organized after the 2002 election; it was named after the venue where the conference was held, Bomas of Kenya.

corruption), among other issues.<sup>103</sup> In response, Kibaki set up the Integrity and Anti-Corruption Committee of the Judiciary and appointed Justice Ringera as director. The objective ostensibly was to execute a “radical surgery” of the judiciary; but both the committee and the director aroused controversy. For many observers, Ringera lacked the requisite moral authority to head such a committee: he had served previously in the discredited judiciary under Moi; he had not been independently vetted for his new position as director; and he had been accused of hampering the fight against corruption. There were allegations that when John Githongo, who Kibaki had appointed by as Permanent Secretary for Governance and Ethics (aka Kenya’s anti-corruption czar), confided in Ringera his intention to go public with evidence of grand corruption within the Kibaki regime, Ringera replied with a death threat. Shortly after, Githongo resigned and went into exile (Wrong 2009; Nation Team 2009; Shilaho 2018).

On the strength of the Ringera Report (Republic of Kenya 2003), and under the guise of cleaning up corrupt and incompetent elements, Kibaki purged and reorganized the judiciary. But both the dismissal of old judges and the appointment of new ones aroused further controversy. The government was criticized for failing to respect basic rules of due process for judges who had been implicated. Instead, the government ordered publication of their names in the national press even before they were informed of the accusations against them (Akech 2011; Were 2017; Shilaho 2018). Yet few if any of the accused judges were prosecuted. Some were reinstated after successfully challenging their dismissal before a tribunal. Others were reappointed and even promoted to higher rank by Kibaki (Oucho 2010; Kanyinga and Odote 2019; Thuku 2006).

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<sup>103</sup> E.g. Republic of Kenya (1992, 1998, 2005); Constitution of Kenya Review Commission (2002); ICJ-Kenya (2002, 2005); World Bank (2012).

Thus, “radical surgery” of the judiciary created vacancies and justification for the appointment of a large number of judicial officers to replace those who had been dismissed. Within the first two years of his presidency, Kibaki appointed roughly 30 new judges, which pushed the maximum statutory capacity the judiciary could accommodate (Mitullah et al. 2005; Mbondenyi and Ambani 2013). By the end of his five-year term, Kibaki had effectively appointed 40 judges, including 10 in 2007 prior to election, who would be tasked with resolving election disputes.

The new judicial appointments raised three problems. First, Kibaki did not consult the Judicial Service Commission or other relevant stakeholders in making these appointments. Instead, Kibaki’s approach to judicial appointments reflected continuity with previous KANU regimes rather than change. Kibaki’s high number of judicial appointments demonstrated how over half of the entire judiciary could be altered at a whim by a single individual. Second, because the constitutional review process was still underway, the old constitutional order remained in force; therefore, Kibaki’s unilateral appointments were neither entirely illegal nor unconstitutional. However, the fact that the president chose to appoint new judges using the outmoded legislation and obsolete procedures of the old KANU regime struck many observers as unethical, immoral and quite contrary to the reformist platform and spirit of national renewal upon which NARC rode to power (Mitullah et al. 2005). The Draft Constitution of Kenya, which the president was widely expected to implement, general consensus among Kenyans, and conventional wisdom all required that judicial appointments should be subject to a thorough vetting process so as to have a judicial branch constituted by competent and clean judicial officers (Ambani 2009).

Third, many observers saw dismissed judges as merely scapegoats to bolster Kibaki's promise of cleaning up corruption in the judiciary. Instead, the real objective was to remove judges the government disliked and replace them with judges who would owe loyalty to their appointing authority and deliver favorable judgements (Ghai 2016; Oucho 2010; Shilaho 2018). The lack of transparency and casual manner of the appointments raised serious concerns that the criteria used was based on political, sectarian and ethnic considerations rather than merit (Were 2017; Cussac 2008). Many suspected the appointments were influenced by political patronage and political allies who sought to benefit from Kibaki's presidency and a more pliable judiciary (Kanyinga and Odote 2019; Kanyinga 2011). Much like the KANU regimes, NARC exhibited defiance of court orders, and attempts to foster judicial independence failed due to lack of political commitment on the part of the executive and the political class. The Chief Justice remained silent to such abuse, and the judiciary continued to appear subservient in its relations with the executive and likely to deliver rulings that favored the status quo (Mitullah et al. 2005; Kanyinga 2011).

The judiciary itself had been a formidable obstacle to constitutional reform and the realization of a new constitution.<sup>104</sup> In 2002, a section of judges was outraged that the constitutional review

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<sup>104</sup> Although there are some caveats. Juma and Okpaluba (2012) note in the twenty-year period of constitutional review, courts confronted problems generated by the process in a conflicting and contradictory fashion. In *Njoya v Attorney General High Court Civil Application 2 of 2004*, the court ruled the Constitution of Kenya Review Commission (CKRC) was unconstitutional, but also affirmed the sovereignty of the people in the constitution-making process and their entitlement to a referendum on any new constitution (also later in *Onyango v Attorney General High Court Civil Application 677 of 2005*). The authors suggest the *Njoya* case was a remarkable milestone in Kenya's constitutional jurisprudence for a number of reasons: The court was confronted with contemporary political questions of great significance and made a serious attempt to engage them through systematic delineation of principles of law, consultation with a wide range of jurisprudence, and a depth of legal reasoning that was open to consideration of extrajudicial issues. The court also asserted itself as key player in the political process of constitutional reform, and in a manner that opened avenues for judicial intervention and activism. This demonstration of judicial assertiveness signaled to politicians and members of civil society that their actions had to be anchored on a firm constitutional and legal framework and were not beyond the reproach of courts.

commission was considering a number of recommendations that pertained to the judiciary. The judges sought court orders to stop the commission on the basis that the judges would be adversely affected.<sup>105</sup> The commission had called for urgent reform of the judiciary and argued that failure to do so would jeopardize the whole future of constitutionalism in Kenya (Juma and Okpaluba 2012:296). The commission proposed that following enactment of the new constitution all judges would be retired, judges who wished to be reinstated would be required to reapply and undergo vetting by the Judicial Service Commission to determine their fitness for service. The judges' antagonistic position towards the commission reinforced public perceptions that the judiciary was unable to fulfill its role as a fair, impartial and effective arbiter in the process of constitution making or to facilitate the political transformation the people of Kenya desired (Republic of Kenya 2010).

The Kibaki regime took a similarly casual and cavalier approach to reorganizing the Electoral Commission of Kenya (ECK). Just before the 2007 election, Kibaki single-handedly appointed 19 of the 22 commissioners, including making his former lawyer vice-chair of the commission. Although his actions were in line with the old constitution, the president violated an earlier agreement to consult with the opposition and disregarded an Inter Parliamentary Parties Group agreement in which commissioners were to be nominated by political parties proportionally to their parliamentary strength (Republic of Kenya 2008a; Cussac 2008; Osogo 2009). The ECK was

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<sup>105</sup> Keiuwa and Juma v Ghai High Court Miscellaneous Application 1110 of 2002. Two lawyers filed a second suit on similar grounds seeking court order to stop the commission (K'Opere and Njongoro v Ghai and CKRC High Court Miscellaneous Application 994 of 2002). The court ruled in favor of the lawyers and ordered the commission to exclude consideration of matters pertaining to the judiciary and refrain from continuing the constitutional review process (Chepkemei 2002a). However, the High Court ruling was later overturned by the Court of Appeal on consent of both parties (Chepkemei 2002b). The judges' case lost momentum after the two judges were suspended on corruption allegations (Nation Team 2003).



inadvertently, or perhaps deliberately, weakened, because the majority of the commissioners were perceived as being inexperienced and lacking independence and autonomy, which undermined the confidence of election stakeholders and the public (Mueller 2008; Ambani 2009).

Kibaki's unilateral approach to the appointment of judges and ECK commissioners, the anti-corruption operations and the failure of the NARC regime to provide leadership in realizing a new constitution, were widely interpreted as components of a broader strategy. The objective of this strategy was to maintain executive dominance over the judiciary and other the arms of government and to use state institutions as a means to stay in power (Mitullah et al. 2005; Cussac 2008; Ogola 2009). Although Kibaki was commended for improving the economy, he was criticized for failing to respond to the political aspirations of Kenyans by delivering a new constitution, particularly one that would limit executive powers. He was also criticized for failing to curb grand-scale corruption, which many believed had been the Moi government's exclusive monopoly, but was elevated to new heights under NARC (Wamai 2014; Oloka-Onyango 2017). Despite a shift in power from KANU to NARC, many Kenyans began to realize that nothing had changed. The Kibaki regime had become merely a repeat of Moi regime, and the NARC leaders who had been icons of human rights and reform during the Moi days had become ardent supporters of a political system bent on frustrating the constitutional review process and constricting human rights (Nowrojee 2014; Juma and Okpaluba 2012; Murunga and Nasongo 2006).

Going into the 2007 elections, the public had become frustrated with Kibaki's politics and the state of affairs was ripe for conflict (Kanyinga et al. 2010). Kibaki's unilateral appointment of commissioners so close to the election date fed public perception that the electoral commission

lacked experience, impartiality and integrity. This eroded public confidence in the commission's ability to conduct free and fair elections. The public had been skeptical of the judiciary since the colonial era and remained so throughout Kibaki's reign. A long history of controversial jurisprudence that favored of the status quo and ruling elite, coupled with Kibaki's flawed judicial reforms and arbitrary appointment of new judges just prior to the elections, reinforced the perception that the judiciary lacked the critical independence and objectivity. This eroded public confidence in the ability of courts to resolve a political dispute between an opposition candidate and an incumbent executive to whom they owed appointment and allegiance. And without constitutional reform or enactment of the promised new constitution, the rules of the game that had governed all the flawed elections of the past remained in place.

As a result, when disputes inevitably arose over Kibaki's victory in the 2007 presidential election, the electoral commission lacked the requisite respect and credibility to fend off allegations of election rigging and fraud. The failure of courts to be seen as legitimate, neutral and honest arbiters meant they could not be relied on to mediate in the election dispute, which was quickly intensifying and unraveling into a political crisis (Ambani 2009; Mbondenyi and Ambani 2013). Matters were made worse when Chief Justice Gicheru rushed to State House to preside over a hurried, clandestine swearing in of the incumbent president while the outcome of the election and the ensuing dispute were still in the early inchoate stages. This seemed to confirm judicial partiality toward the incumbent executive and total disregard for the concerns of the opposition candidate and a large section of the electorate (Abuya 2010; Akech and Kameri-Mbote 2012; Oloka-Onyango 2017).

For these reasons, opposition candidate Raila Odinga and his party, Orange Democratic Movement (ODM), categorically rejected the courts as a viable avenue to challenge the disputed 2007 presidential election. Instead, Odinga urged his supporters to participate in public protests against what he believed was a stolen election and to engage in mass action as a path to electoral justice (Republic of Kenya 2008b; KNCHR 2008; Gathii 2017; Kanyinga and Odote 2019). For nearly two months, widespread violence erupted in many regions of the country leading to loss of life (over 1000), displacement of people (over 500,000) and destruction of property. The ensuing post-election crisis necessitated international intervention to restore peace and to resolve the conflict through a power-sharing agreement between the two main political factions.

The 2007 post-election crisis gave new impetus and urgency to the decades-long quest for comprehensive constitutional reforms (Kameri-Mbote and Akech 2011). Under the Kenya National Dialogue and Reconciliation Accord, an agreement was reached to stop violence, restore human rights,<sup>106</sup> establish a coalition government composed of leaders from both political factions,<sup>107</sup> and implement a wide range of legal and institutional reforms. These reforms included a review of the election laws, overhaul of the electoral system, strengthening separation of powers among coequal branches of government and reform of the judiciary (Judiciary 2010).

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<sup>106</sup> Human rights violations during the 2007 post-election crisis included forced evictions and massive displacements of people, excessive force and extrajudicial killings by state security officers, gender-based violence, violence by non-state actors, and intercommunal violence (HRW 2008; KNCHR 2008).

<sup>107</sup> The new government was branded as the “Grand Coalition Government” and the “Government of National Unity.” Mwai Kibaki retained the presidency, Raila Odinga became prime minister, and Uhuru Kenyatta was deputy prime minister.

Popular support for these initiatives, which already had been identified by the Constitution of Kenya Review Commission during its nationwide consultations in 2002, was greatly bolstered by the recommendations of the Kriegler and Waki Commissions (Republic of Kenya 2008a, 2008b),<sup>108</sup> which both concluded that the subordination of the judiciary and the electoral commission to the executive had significantly contributed to the crisis (Harrington and Manji 2015). It is against this background that the 2010 Constitution was enacted to institute social and political transformation in Kenya (Kibet and Fombad 2017), and for these reasons that the judiciary and electoral agency were key institutions targeted for reform (Odote and Musumba 2016).

The new constitution represented a radical departure from the previous constitution (Ghai 2014a). It placed considerable restrictions on how government exercises power. It also firmly instituted judicial independence and empowered the judiciary with the most crucial role and highest responsibility of safeguarding the constitution. The institutional reforms ushered in by the new constitution began to show returns in the form of increased public confidence in key institutions, most notably the judiciary (KNDR 2013; Cheeseman et al. 2014; Odote and Musumba 2016). Judicial reform began with a new vetting process to remove judicial officers found to be unsuitable and an open and transparent process for large scale recruitment of judicial officers to meet the needs of a greatly expanded judiciary (Hope 2015; Ghai 2016).

According to Gathii (2013), a fundamental transformation of the judiciary became evident in the discernable retreat of the conservative judicial philosophy and rejection of the strict legal posi-

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<sup>108</sup> The Kriegler Commission was tasked with investigating the conduct of the flawed 2007 presidential election. The Waki commission was tasked with investigating the 2007 post-election crisis.

tivism of the past. There was a significant decline in extreme judicial deference to the executive and in the tendency of courts to support and protect the repressive and corrupt apparatuses of the state. Instead, courts began to embrace a new judicial philosophy by making bold decisions that vigorously defended individual human rights and checked executive and parliamentary power (Kanyinga and Odote 2019). However, this project of transformation in a new post-2010 constitutional era is not complete; it is a slow and ongoing process that is marked by both departure from and reversion to the status quo of a pre-2010 constitutional order. As Gathii (2016:24) notes, “Although the shift is as definitive as it is fundamental, it is uneven and contested.” This “unevenness” is particularly evident in the emerging jurisprudence on election disputes, which is the focus of the next chapters.

The new provisions of 2010 Constitution were immediately and repeatedly tested. Within months of its promulgation, Kibaki attempted to make unilateral appointments to key public offices of the Chief Justice, Attorney General and Director of Public Prosecutions, which many observers perceived as a brazen move to stack the justice system with personnel who would benefit the president and his allies (Hope 2015). The president’s efforts were quickly opposed by civil society organizations and the public. When the matter was raised before the National Assembly and the High Court, both determined the president had disregarded the constitution and that the nominations were therefore unconstitutional and void (Akech et al. 2011). Kibaki was forced to revoke and withdraw the appointments.

According to Gathii (2017:4), the question of whether the 2010 Constitution succeeded in inaugurating a new electoral environment and reformed judiciary would be put to the greatest test

in the 2013 presidential election and whether or not the losing candidate would opt to pursue legal redress in court as required by the 2010 Constitution. One of the core objectives of the 2010 Constitution and the judicial independence it empowered was to help moderate the winner-takes-all dynamics of Kenyan politics and prevent a recurrence of electoral violence (Long et al. 2013; Cheeseman et al. 2016; Kanyinga and Odote 2019). Many commentators concluded that the newfound public confidence in Kenya's judiciary, which was a result of reforms made under the 2010 Constitution, contributed to the peaceful outcome of the 2013 elections (Cheeseman et al. 2014; Harrington and Manji 2015).

In the 2013 presidential election, the main contenders were Uhuru Kenyatta of the newly formed Jubilee party and Raila Odinga who was the main opposition candidate under a newly formed party called the Coalition for Reforms and Democracy (CORD).<sup>109</sup> When Kenyatta was declared the winner, Odinga disputed the results and refused to concede defeat. But instead of contesting his electoral loss in the streets, he petitioned the Supreme Court. The Supreme Court ruled in favor of Kenyatta and upheld his election. Although Odinga disagreed with the judgment, he accepted it and exhorted his supporters to avoid protest.

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<sup>109</sup> Mwai Kibaki, having served two terms as president in 2002 and 2007, was ineligible to run for a third term in 2013. The 2013 election was Uhuru Kenyatta's second run for the presidency. He previously competed for the presidency in 2002 as the KANU candidate against Kibaki who was the candidate for NARC, the main opposition party. During the 2007 presidential election Kenyatta did not run; instead, he supported Kibaki's reelection. The 2013 election was Raila Odinga's third attempt at the presidency. He previously competed in the 1997 presidential election as one of many opposition candidates, including Kibaki, against Moi as the incumbent candidate for KANU. Odinga did not compete in the 2002 election; instead, he supported Kibaki's presidential bid. In the 2007 election, the primary contenders were Kibaki as the incumbent candidate and Odinga as the main opposition candidate representing a new opposition party, Orange Democratic Movement (ODM).

This demonstrated that constitutional reforms had transformed the judiciary into a viable avenue for the resolution of election disputes. As a result, the involvement of the Supreme Court helped prevent a repeat of the chaos that followed the 2007 election. Although popular opinion supported the involvement of the Supreme Court in 2013, it did not necessarily agree with the reasoning behind the judgement (Long et al. 2013:150). The Supreme Court was criticized for prioritizing procedural technicalities over substantive justice and for failing to strongly enforce compliance with the constitution in the conduct and adjudication of elections. This suggested that the Supreme Court evinced fidelity to a pre-2010 jurisprudence and continuation of the status quo of flawed elections and electoral injustice rather than embrace a new post-2010 jurisprudence that advanced the principles of transformative constitutionalism and electoral justice.

The second great test for the judiciary was the August 2017 presidential election. The primary contenders were Uhuru Kenyatta as the incumbent candidate for the ruling Jubilee party and Raila Odinga as the main opposition candidate for the newly formed National Super Alliance party (NASA). When the IEBC declared Kenyatta as the winner, Odinga again disputed the results and refused to concede defeat. Odinga initially declined to file a presidential election petition citing lack of faith in the Supreme Court stemming from its decision to uphold Kenyatta's 2013 election. Instead, Odinga seemed poised to call for mass action in the form of street protests. However, Odinga eventually heeded calls emanating domestically and internationally to contest the election in court.

In a surprising and unprecedented judgement, the Supreme Court ruled in favor of Odinga and nullified the August 2017 presidential election. The Supreme Court's decision suggests the court

rose to Odinga's challenge to demonstrate redemption, reform and transformation; however, it also prompted harsh retaliatory attacks by Kenyatta and the ruling Jubilee regime.<sup>110</sup> The August 2017 presidential election petition was evidence of the increasing judicialization of politics in Kenya. The judgement was a positive indicator of the Supreme Court fully exercising its mandate under Kenya's transformative 2010 constitution – to adopt a more assertive role in the resolution of political disputes and to enforce compliance with the constitution and the rule of law in the conduct and adjudication of elections. But Kenya's experience from the 2017 elections also highlights how the increasing involvement of courts in political disputes can increase the likelihood of negative effects such as the politicization of the judiciary.

The Supreme Court's nullification of the August 2017 presidential election may evidence a changed judiciary that more strongly embraces an active role in affirming transformative constitutionalism and electoral justice; however, subsequent rulings that upheld other elections in 2017 present a more nuanced perspective. The following chapters provide a detailed analysis of presidential and gubernatorial election petitions from 2013 and 2017. These chapters examine how the Supreme Court's judgement to nullify the August 2017 presidential election broke the precedent it established in upholding elections from 2013, and whether it established a new precedent in the adjudication petitions contesting the results of other elective seats in 2017, particularly gubernatorial elections.

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<sup>110</sup> E.g. Kenyatta and Jubilee supporters accused the Supreme Court of making a political decision and executing a "judicial coup" that violated the will of voters. These criticisms were consistent with two problems that are commonly linked to the increasing judicialization of politics as per the law-politics divide (separation of powers) and the counter-majoritarian dilemma (these were discussed in Chapter 3).



## Chapter 5. Adjudication of Presidential Elections – 2013 and 2017

Kenya's post-2010 judiciary confronted the ultimate test of its mettle in the adjudication of the 2013 presidential election. Uhuru Kenyatta, the candidate for the establishment party – Jubilee, was declared the winner by the Independent Electoral and Boundaries Commission (IEBC). Raila Odinga, the main opposition candidate, disputed the results and petitioned the Supreme Court. The Supreme Court upheld Kenyatta's election in verdict that provoked harsh criticism. Maina (2013) called the judgement "a giant jurisprudential step backwards." Shah (2013) stated, "Unfortunately, for those expecting an in-depth analysis of the evidence presented and an explanation of the judges' reasoning, the judgment was a disappointing read." Sanga (2013) observed that legal scholars and practitioners "have punched holes" in the Supreme Court ruling, saying it "set a bad precedent for other courts in Commonwealth countries" and "did not establish jurisprudence that can be emulated by law students," largely because the court delivered a unanimous judgement without elaboration of the reasons and methods that lead to its decision.

Murunga (2013) concurred with the above criticisms: "the Supreme Court ruling fails to blaze the intellectual trail. The ruling is devoid of broad or engaged learning. I do not find anything memorable to cite. This is embarrassing given the presumed intellectual profile of Court."

Ongoya (2013) opined, "It is a sad commentary on how not to evolve jurisprudence. It is a sad commentary on how not to entrench a culture of constitutional accountability in governance. It is a bad example to subordinate courts. It is a sad commentary on how not to enhance the confidence of the citizens in the electoral system." Shah (2013) concluded, "Sadly, this judgment implies that it is acceptable to run a deeply flawed election. The precedent has now officially been

set, and the judgment provides little motivation or incentive for the IEBC to improve its conduct in the future. Can Kenyans expect this to be the template for all future elections? Only time will tell, but if so, it is a sorry fate for Kenyan democracy.”

This last observation on lack of judicial enforcement of election laws was accurately foreboding of the IEBC’s conduct of the August 2017 elections. The record number of petitions contesting these elections, roughly 300 across all six categories of elective seats,<sup>111</sup> was evidence of widespread lack of confidence in the IEBC and a serious indictment of its inability to conduct credible elections. Achuka (2017b) described the August 2017 presidential election as a “sequel” to the 2013 election with the “same old actors” – it could be argued that both elections suffered from the “some old” problems as well. The two main contenders in August 2017 were incumbent candidate Uhuru Kenyatta and opposition leader Raila Odinga. After the IEBC declared Kenyatta had won, Odinga alleged the election had been marred by irregularities and filed a Supreme Court petition to contest the results. But unlike its decision in 2013, the Supreme Court ruled in favor of Odinga and nullified Kenyatta’s victory in the August 2017 election.

The harsh criticism of the Supreme Court’s 2013 judgement was in stark contrast to the glowing reviews of its 2017 judgement. Commentators praised the Supreme Court’s nullification of the

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<sup>111</sup> The six categories of elective seats include: president (national executive office), senator, member of parliament, woman representative (national legislative offices), governor (county executive office) and member of county assembly (county legislative offices). To win a presidential election, a candidate must receive more than 50 percent of the votes cast nationwide and at least 25 percent of votes cast in more than half of the 47 counties. Voters in each of the 47 countries elect one senator, woman representative and governor. Members of parliament are elected to represent constituencies, which are electoral districts within counties. Members of county assemblies are elected to represent wards, which are electoral districts within constituencies in counties.

election of a sitting president as signifying a “new era” of the Kenyan judiciary characterized by independence, impartiality, incorruptibility and courage (Awele and Murumba 2017; Editorial 2017d). Other commentators referred to the ruling as inspiring, trailblazing and a “judicial masterpiece” (Mutua 2017b; Warah 2017). Foreign envoys proclaimed that the Supreme Court’s decision was “an example for Africa and the world” as it demonstrated Kenya’s resilient democracy and commitment to the rule of law (Kwalimwa 2017; Ngetich 2017c). Of course, there were criticisms as well (Nyamori and Obala 2017; Wayua 2017; Anami 2017a). Kenyatta and Jubilee supporters accused the Supreme Court of making a partisan political judgement that lacked any basis in law. They also argued that the court should have exercised judicial restraint rather than overturn the will of voters (Mungai 2017b; Abdullahi 2017).

The following sections of this chapter examine discontinuities and ambiguities in the adjudication of the 2013 and August 2017 presidential election petitions. This chapter begins by focusing on two major points of contention raised by critics regarding the Supreme Court’s judgement on the 2013 petition, which the court went to great lengths to remedy in its judgement on the August 2017 petition – the prioritization of procedural technicalities over substantive merits and sparse references to constitutional principles. Next, the chapter examines how the court approached the question of threshold for nullification and irregularities pertaining to technology and statutory results forms. The objective of this chapter is to assess the extent to which the adjudication of the 2013 and August 2017 presidential election petitions evinces continuity with the status quo of a pre-2010 jurisprudence or a shift to a new post-2010 jurisprudence that more strongly affirms transformative constitutionalism and electoral justice.

The following points are provided for clarification: The 2013 Supreme Court presidential election petition was a consolidation of three cases, which were originally designated as Petitions 5, 4 and 3. These three cases were filed separately by three different petitioners. In Petition 5, the petitioner was Raila Odinga, who was the losing candidate for the main opposition party – the Coalition for Reforms and Democracy (CORD). In Petition 4, the petitioners were affiliated with AfriCOG, a civil society organization that was aligned with the opposition. In Petition 3, the petitioners were individuals aligned with the winning candidate, Uhuru Kenyatta, and the Jubilee party. The three cases were consolidated into one petition with Petition 5 designated as the lead case. Throughout the following discussion, all references to petitioners in the 2013 case refer to Odinga and AfriCOG, and not to the third petitioners aligned with Kenyatta/Jubilee. In the August 2017 presidential election petition, the petitioner was Raila Odinga, the losing candidate for the main opposition party – National Super Alliance (NASA). Throughout the following discussion, all references to the 2017 case refer to the August 2017 presidential election, and not to the October 2017 repeat presidential election, which is the focus of Chapter 7.

In both the 2013 and August 2017 presidential election petitions, the respondents were Uhuru Kenyatta, the winning presidential candidate (and his running mate William Ruto) and the IEBC. It is germane to note that in most election petitions for all elective seats, the petitioner is usually the losing candidate (or occasionally voters or proxies acting on behalf of the losing candidate), and the respondents are usually the winning candidate and the IEBC. Thus, petitioners generally are at a disadvantage when they constitute a single party in an election case compared to respondents who typically constitute two parties and can combine legal resources and strategies (i.e. one petitioner against two respondents).

## Technicalities

Prior to enactment of the 2010 Constitution, procedural technicalities were used to narrow the space for judicial remedy and circumscribe access to the courts. This was particularly evident in judicial determinations on election petitions where procedural technicalities, such as incorrect case filings, were prioritized over the substantive merits of the cases. This judicial approach resulted in the cursory dismissal of election petitions. It is this history of electoral injustice that electoral and judicial reforms under the new constitution were designed to remedy. Following the promulgation of the 2010 Constitution, there were high hopes that the judiciary would embrace a more purposive and progressive judicial philosophy, particularly through the application of such provisions as Article 159(2)(d), which mandates that “justice shall be administered without undue regard to procedural technicalities.” However, there has been significant variance in how this provision is interpreted and applied.

One of the greatest controversies of the 2013 presidential election case was that the Supreme Court disallowed a late submission from petitioners.<sup>112</sup> The court was confronted with the challenge of balancing two constitution provisions: Article 159(2)(d) as cited above and Article 140(1)(2), which stipulates the rigid timeframe for presidential election petitions. A petitioner who seeks to contest a presidential election must file a petition within seven days of the declaration of the results. Thenceforth, the constitution provides for a fourteen-day period for the hearing and determination of the petition. The IEBC had declared the results of the presidential

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<sup>112</sup> Odinga v IEBC Supreme Court Presidential Election Petition 5 of 2013, Ruling; Odinga v IEBC Supreme Court Presidential Election Petition 5 of 2013, para. 214, 215, 217, 218.

election on March 9, 2013. Petitioners filed their case at the end of the seven-day period on March 16, 2013. Six days later, on March 23, 2013, just two days before the pre-trial conference, petitioners filed an additional affidavit.

In the additional affidavit, petitioners sought to introduce evidence of manipulation of votes garnered by Kenyatta and Odinga based on discrepancies between the contents of statutory results Forms 34 and 36.<sup>113</sup> Petitioners argued there was an expectation of the admissibility of any further affidavit or additional evidence on the basis of Rule 10(1)(f),<sup>114</sup> which granted the court discretion to allow such material, and that departure from the strict timelines would be allowed based on Article 159(2)(d). Respondents argued inclusion of the affidavit would be prejudicial to their right to a fair trial as it would be “scientifically impossible” for them to reply to the “inordinately lengthy” affidavit of nearly 900 pages within the limited timeframe of the trial. They argued that the affidavit was “filed at the eleventh hour, raising fresh issues through the backdoor,” which “amounted to a flooding of evidence and was a flagrant abuse of the rules.”<sup>115</sup>

To justify its decision to exclude the petitioners’ additional affidavit, the court made note of its careful consideration of both the latitude of discretion granted to the court under Rule 10, the principle of justice without undue regard to procedural technicalities under Article 159, and the

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<sup>113</sup> Odinga v IEBC 2013, para. 142, 246. Forms 34 were used to tally results at individual polling stations. Results from Forms 34 from all polling stations within a constituency were aggregated into Forms 36.

<sup>114</sup> Supreme Court (Presidential Election Petition) Rules of 2013, Section 10(1f): The Court shall, at the pre-trial conference— give directions in regard to filing and service of any further affidavits or additional evidence.

<sup>115</sup> Odinga v IEBC 2013, Ruling. Notably, petitioners blamed the late submission on the IEBC, which was the official custodian of election documents, but failed to provide them to petitioners in a timely manner.

requirements of a disciplined timeframe under Article 140. With regard to Rule 10, the court stated it could only exercise its powers of discretion to allow or refuse further affidavits or additional evidence if a party to the case specifically applied for such a request. The court noted petitioners had not applied for direction from the court before filing the additional affidavit, but instead filed it without leave of court on the basis of an expectation its admissibility. The court stated its discretion to allow a further affidavit was conditioned on the nature, context and extent of the new material, whether it was small and limited or so massive as to make it impossible for other parties to respond effectively.

The court concluded that the additional affidavit would introduce new matters that would change the character and nature of the petition and lead to a serious departure from the original case. In order to ensure a fair and level playing field and that no extra burden would be imposed on any party, the court ruled that allowing the new material would be prejudicial to respondents. Moreover, the court cautioned that the consequences of allowing the petitioners' further affidavit would have not only resulted in subverting the constitution itself (as per adherence to strict timelines), but also would risk "precipitating a crisis in the operation of the executive branch" and "present a state of anticipation and uncertainty which would not serve the public interest."<sup>116</sup>

The Supreme Court was sharply rebuked because of this decision. Harrington and Manji (2015: 181) argue "by privileging speed here, the court restricted the scope for deliberation during the hearing and dramatically limited the factual basis of its final ruling." The authors suggest the

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<sup>116</sup> Odinga v IEBC 2013, Ruling; Odinga v IEBC 2013, para. 213, 214, 216, 217, 218.

court prioritized evidential and procedural rules over a more principled analysis in a manner that was inconsistent with the transformative principles of the new constitution. According to Musila (2013:11), the court's refuge behind lack of time in refusing the additional evidence was unconvincing, and it confirmed a broader propensity of courts to revert to a "conservative, formalistic and non-consequentialist approach of the past thus failing to respond to the call of the new constitution that sets out to transform the electoral system, laws and procedures relating to handling of petitions and evidence." Similarly, Murunga (2013) urges that by appearing "overly concerned about 'national stability,'" the court evinced a "status quo mindset."<sup>117</sup>

In the August 2017 presidential election petition, the Supreme Court adopted a more flexible approach to procedural technicalities. Kanyinga and Odote (2019:245) suggest this was indication that the judges were conscious of the criticisms lodged against the 2013 decision and more concerned about accountability and how their subsequent decisions would be reviewed. Wainaina proposed the court's approach in 2017 marked a clear departure from the past and indicated the court was moving away from undue attention to technicalities to hear cases based on substance and merit (Onyango 2017b).

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<sup>117</sup> As a caveat, Cheeseman et al. (2014:15) note the court was always likely to take a conservative position due to cautious awareness that nullification could pose "an unnecessarily expensive and potentially destabilizing risk," and because "annulling the election based on procedural failures would set a dangerous precedent, as Kenyan elections are typically procedurally faulty." The authors suggest the case "reflected a degree of naivety" on the part of petitioners because "it was always going to take strong evidence of systematic rigging" to convince the court, which petitioners failed to provide. Irrespective of whether there was "naivety" on the part of petitioners, a counter perspective is that they did in fact provide "strong evidence of systematic rigging" in their further affidavit, and while they may have erred by submitting it late, it was the court that failed allow the evidence. Azu (2015) suggests the eventual outcome of the case was not unusual as election petitions in Africa and elsewhere are typically unsuccessful.



Evidence of the court taking a more liberal approach to technical and procedural matters in the August 2017 petition started with the judiciary's announcement that the office of the court registrar would remain open past normal business hours to afford NASA more time to file its petition. The opposition took advantage of the extended midnight deadline and officially submitted its petition along with a 25,000-page affidavit at 11:42pm (Okuoro 2017; Mosoku 2017a). Next the Supreme Court exhibited greater flexibility with regard to issues of strict adherence to timeframe and late submission of documents, which were raised during the preliminary phase of the petition. Both petitioners and respondents called on the court to expunge various documents submitted by opposing parties on grounds they were filed late, were not served to parties on time, and contained new evidence that changed the nature and character of the petition. Both parties also referenced the Supreme Court's 2013 ruling on late submissions and strict adherence to timelines.

The court's treatment of such matters in 2017 was in stark contrast to its position in 2013. Whereas in 2013 the court determined that allowing additional affidavits would have not only forced a lapse in the rigid fourteen-day timeframe for determining the petition, but also would have subverted the constitution and precipitated a national crisis; in 2017 the court found that allowing additional submissions would not "jeopardize or seriously undermine the ability of this Court to hear and determine the petition within the Constitutional time limit of 14 days." Whereas in 2013 the court expunged the additional affidavits on the grounds that they would have changed the character and nature of the petition by introducing new matters thereby leading to a serious departure from the original case; in 2017 the court ruled that the question of whether respective affidavits introduced new evidence or changed the character of the case

would be determined through the course of hearing the petition. Whereas in the 2013, despite acknowledging that the additional affidavits could possibly reveal significant facts or evidence, the court still proceeded to disallow the documents at the preliminary stage of the trial, which disposed of a substantial portion of the petitioners' evidence of alleged manipulation of votes; yet in 2017, the court determined that to disallow affidavits would have resulted in the "drastic consequence" of disposing of the entire case of the respondents at a preliminary stage, which could not be justified "if the scales of justice were weighed in favor of all the parties to this petition." Lastly, whereas in 2013 the court ruled that allowing additional affidavits would have been prejudicial to respondents by imposing an extra burden upon them and amount to a miscarriage of justice; in 2017 the court proposed that safeguarding the right to a fair hearing and the interests of justice for all parties would be best achieved by invoking its inherent jurisdiction to retain all the documents.<sup>118</sup>

### Constitution

Many commentators considered the 2013 Supreme Court judgement to be shallow in substance and delivery. Problems with the style of delivery of what came to be referred to as the "five-minute judgement" were that it was too casual in manner, presented two days after the fourteen-day timeframe, and amounted to a signing ceremony as the judges simply announced the verdict instead of the traditional practice of reading the full judgement or at least a summary of the

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<sup>118</sup> Odinga v IEBC 2013, Ruling.; Odinga v IEBC 2013, para. 142, 216, 264; Odinga v IEBC Supreme Court Presidential Election Petition 1 of 2017, Preliminary Applications 1, 2, 3.

judgement (Kegoro 2013; Ongoya 2013; Kelly 2013).<sup>119</sup> After filing the August 2017 petition, Odinga stated, “Kenyan’s are still trying to understand what exactly happened in the Supreme Court in 2013 when a decision about their votes was delivered in minutes and a paragraph.” NASA leaders vowed they would accept nothing short of detailed reasoning from each of the seven Supreme Court judges in their judgement on the August 2017 petition (Lungai 2017; Sanga 2017a). Problems with substance of reasoning were captured by Musau (2017a) who described the Supreme Court’s 2013 judgement as lacking depth and philosophically weak. Other observers noted the court made only vague and sparse references to constitutional values and principles, without elaboration or meaningful analysis of how they should be applied in resolving the election dispute, nor in a manner that would advance the transformative objectives of the 2010 Constitution (Wanyoike 2013; Harrington and Manji 2015; Evelyn and Wanyoike 2016).

Following the enactment of the 2010 Constitution and a raft of electoral and judicial reforms, the 2013 presidential election petition was the greatest test of the newly established Supreme Court, and public expectations were high.<sup>120</sup> The new constitution mandated the judiciary with

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<sup>119</sup> Other commentators suggested, “The decision by the court not [to] read out [the] judgement in the open, as is required by law and the usual practice, gave the impression that the court was embarrassed by its own judgement which it was not prepared to publicly stand up for” (Nation Team 2014). Supreme Court Judge Ibrahim later conceded the court should have read its judgment in the open (Kegoro 2013). On September 1, 2017, before announcing the Supreme Court’s verdict on Odinga v IEBC 2017, Chief Justice Maraga noted the criticism aroused by the manner in which the court had delivered its verdict on Odinga v IEBC 2013: “The 2013 decision was not received very well. The court read the decision without a full judgement. The expectations [for the August 2017 petition] were that this morning we should read a full judgement.” However, Maraga apologized that the court would only read a summary of its ruling due to time constraints, but promised the full judgment would be read within 21 days as per the Supreme Court (Presidential Election Petition) Rules of 2017 (Odinga v IEBC 2017, Determination of Petition Without Reasons; Mathenge 2017).

<sup>120</sup> The court noted as much stating: “it is the first landmark case bearing on the early steps to consolidate and set in motion the gains of a progressive and unique Constitution... this is the first test of the scope available to this Supreme Court, to administer law and justice in relation to a matter of the expression of the popular will – election of the President. This Judgment, therefore, may be viewed as a baseline for the

protecting and promoting the purpose and principles of the constitution.<sup>121</sup> Yet the 2013 Supreme Court judgement seemed to be devoid of detailed analysis of how the constitutional principles invoked by petitioners were used by the court to assess the conduct of the election by the IEBC,<sup>122</sup> despite the court expressly noting “The Petitioner also avers that the first respondent [IEBC] failed to carry out a transparent, verifiable, accurate and accountable election as required by Articles 81, 83 and 88 of the Constitution.”<sup>123</sup> Murunga (2013) argued that the court completely “ducks” the most pertinent issues raised in the petition by “simply referring to a notion of ‘fidelity to the Constitution’ without really elaborating the interpreted content of that fidelity.”<sup>124</sup> Where the court had urged it would be guided fundamentally by the terms, intent and purpose of the constitution, the constitutional provisions the court drew on were rather generic and weighted far more towards provisions on procedures (e.g. Articles 83, 138, 140 and 163), which were cited more frequently and in greater number, rather than provisions on principles (e.g. Articles 10 and 38).<sup>125</sup>

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Supreme Court’s perception of matters political, as these interplay with the progressive terms of the new Constitution” (Odinga v IEBC 2013, para. 177).

<sup>121</sup> E.g. Constitution of Kenya 2010, Article 159 Judicial authority (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles— (e) the purpose and principles of this Constitution shall be protected and promoted; Article 259 Construing this Constitution (1) This Constitution shall be interpreted in a manner that— (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.

<sup>122</sup> Particularly in Odinga v IEBC 2013, Section J. Guiding Principles, para. 177-294, and Section K. Determination of Petitions, para. 295-310.

<sup>123</sup> Odinga v IEBC 2013, para. 17.

<sup>124</sup> Odinga v IEBC 2013, para. 230. Interestingly, the subheading for this section is (iv) Judicial Restraint.

<sup>125</sup> Examples of provisions on procedures include: Article 83 on procedures for voter registration; Article 138 on procedures for calculating majority votes for a winning candidate; Article 140 on procedures for filing a presidential election petition; and Article 163 on procedures for the Supreme Court’s exclusive jurisdiction to determine presidential election petitions. Examples of provisions on principles include:

Wanyoike (2013) faulted the court for focusing on the IEBC's arithmetic for calculating the results (quantitative aspects) instead of using constitutional principles to assess the integrity of the electoral process (qualitative aspects). However, such a critique of the court's approach (i.e. court-centric analysis) is limited without consideration of how the case was argued on the part of petitioners (i.e. petitioners-centric analysis). The 2013 case was a consolidation of three petitions in which the primary petitioners were Odinga and AfriCOG, and tertiary petitioners were aligned with Kenyatta/Jubilee. The case by the primary petitioners was weighted more toward constitutional provisions on principles rather than procedures.

Many observers correctly noted the primary petitioners had argued that because the IEBC failed to comply with its constitutional duty, the election was not conducted in a free, fair, transparent, accurate and verifiable manner, which meant it was impossible to determine the lawfulness of the results that indicated Kenyatta had received more than 50 percent of the votes cast (Long et al. 2013; Harrington and Manji 2015; Aywa 2016). Clearly there was emphases on constitutional principles in the primary petitioners' claims (qualitative aspects). However, an important nuance in analysis of how the petition was argued was that there was also an emphasis on results, the number of votes garnered and how they were calculated (quantitative aspects).<sup>126</sup>

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Articles 4 and 10 on national values and principles of good governance, transparency, integrity and accountability; and Articles 81, 86 and 88 on principles of the electoral system – free, fair, simple, secure, accurate, transparent, verifiable and accountable (Table 1b).

<sup>126</sup> Shah (2015), for example, makes a clearer distinction that Odinga's petition alleged Kenyatta did not garner the required number of votes, and AfriCOG argued the electoral process did not fulfil constitutional and legal standards of transparency and verifiability. Kegoro (2017) goes a step further to suggest the basis of Odinga's petition was focused on numbers and "an attempt to demonstrate that the wafer-

Arguments regarding the procedural and quantitative aspects of results were also the basis of the case presented by the third petitioners (Kenyatta/Jubilee-aligned)<sup>127</sup> and the focus of rebuttals by the respondents (IEBC and Kenya). Thus, whereas the primary petitioners focused on both constitutional provisions on procedures and election results (quantitative aspects), in addition to constitutional provisions on principles and the electoral process (qualitative aspects), the third petitioners and the respondents focused more on the former. This emphasis on the former was more pronounced in the Supreme Court judgement, and while the above analysis does not suggest the court was correct in its approach, it does explain why the court may have adopted such an approach.

Muluka (2017a) noted, “It is surprising that when in 2013 the same court reached a different verdict, they did not raise the kinds of questions they are now raising” in the August 2017 petition. In other words, whereas in 2013 the court tended to focus on the results of the election and how they were calculated, and with less attention to constitutional principles, in 2017 the court focused on questions pertaining to the conduct of the electoral process by the IEBC, with far greater attention to constitutional principles. Moreover, compared to the 2013 petition, petitioners in 2017 focused greater emphasis on how the electoral process was flawed and lacked compliance with principles of the constitution (Kegoro 2017). Mungai (2017a) suggested

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thin majority of votes” garnered by Kenya was inaccurately tabulated, and that a more accurate tabulation would have reduced this majority thereby necessitating a runoff election.

<sup>127</sup> The third petitioners argued the IEBC miscalculated the votes, particularly rejected votes and/or spoilt ballots, in a manner that disadvantaged Kenya. Their aim was to demonstrate that if the votes were recalculated following their preferred formula, Kenya would have won by a larger margin of votes.

that Odinga's 2017 petition employed a "hybrid" approach that questioned both the legitimacy of Kenyatta's victory in terms of numbers and results, but also the constitutional validity of the electoral process. According to Mungai (2017a), Odinga's 2017 petition was "fairly weak" on the first argument, and if numbers or results alone were the basis of the petition it likely would have been dismissed as in 2013; however, Odinga's argument challenging the electoral process on constitutional grounds was remarkably strong for the court to overturn the election.

Comparative analysis of the 2013 and August 2017 presidential election petitions reveals different approaches to constitutional references by both the Supreme Court and petitioners. A court-centric analysis suggests the Supreme Court's 2013 judgement was weighted significantly towards procedural provisions with Articles 138 and 140 most frequently cited, followed by provisions on principles in Articles 10 and 38, and lastly procedural provisions in Articles 83 and 163. In 2017, the Supreme Court's judgement was much more focused on constitutional principles; although procedural provision in Article 138 was again the most frequently cited, it was balanced with an equal number of references to provisions on principles in Article 86, and a similarly high number of references to Article 38, followed by Articles 81 and 10 covering principles. Whereas constitutional references in the 2013 judgement focused primarily on two procedural provisions, the 2017 judgement included significant references to procedural provisions, but these mainly centered on a single article, which was counterbalanced by an equally high frequency of references to a provision on principles, references to a greater number of articles covering principles, and an overall higher frequency of constitutional references (Table 1a, Table 1b, *supra* note 125).

A petitioner-centric analysis suggests that the primary petitioners' case in 2013 was weighted more toward provisions on principles. Although the frequency of citations for provisions on both procedures and principles were fairly even, petitioners cited a greater number of provisions on principles, totaling five – Articles 38, 86, 10, 81 and 88, compared to two procedural provisions cited – Articles 138 and 83. In 2017, the petitioner's case was significantly weighted more toward provisions on principles with Articles 81, 86 and 10 cited most frequently, followed by Articles 2, 38, and 88, and lastly procedural provision Article 138. Petitioners cited mostly the same articles in both petitions, but with significantly higher frequency of citations, particularly provisions on principles, in the 2017 petition. Other differences between articles cited by petitioners in the 2013 and 2017 petitions were that the former included procedural provision Article 83 whereas the latter did not, and the latter included provision on principles Article 2 whereas the former did not (Table 1a, Table 1b, supra note 125).

In the 2013 presidential election petition, the Supreme Court's approach was that "judicial practice must not make it burdensome to enforce the principles of properly-conducted elections."<sup>128</sup> This judicial approach effectively reduced and diminished the centrality of constitutional principles in the conduct of elections by the IEBC and in the adjudication of elections by courts. In contrast, in the August 2017 presidential election petition, the centrality of constitutional principles was a constant refrain in the pleadings of petitioners, which were roundly echoed by the Supreme Court in formulating the reasoning underlying its final determination. The Supreme Court stated, "the constitutional mandate placed upon [the IEBC] is a heavy yet, noble one. In conducting the fresh election consequent upon our Orders, and indeed in conducting any future

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<sup>128</sup> Odinga v IEBC 2013, para. 203.



election, IEBC must do so in conformity with the Constitution, and the law. For, what is the need of having a constitution, if it is not respected... Therefore, however burdensome... to those, who bear the responsibility of leadership, let it be a constant irritant."<sup>129</sup> Thus, whereas in 2013 the Supreme Court proposed constitutional principles should not be burdensome, in 2017 the Supreme Court argued constitutional principles were rightfully burdensome in demanding a higher standard of accountability and responsibility in both the conduct and adjudication of elections.

### Section 83

Kenya's electoral system is structured by a highly prescriptive and complex legal and institutional framework, which includes the constitution, legislative acts and regulations, and institutional procedures established by the IEBC. The adjudication of petitions from the 2013 and 2017 elections has inspired great debate over what criteria should be used to establish the threshold for invalidation of an election. This debate centers on two questions: the first is how the constitution should be interpreted and applied in relation to other laws on elections (i.e. subsidiary legislation), particularly Section 83 of the Elections Act; the second is how Section 83 should be interpreted. Because the 2010 Constitution addresses the conduct of elections in great detail,<sup>130</sup> there were high expectations that constitutional principles and provisions would form the basis of assessing both the conduct of electoral processes and the adjudication of election petitions. Instead, in 2013 and 2017, courts largely exhibited conformity with a longstanding practice of

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<sup>129</sup> Odinga v IEBC 2017, para. 391, 399.

<sup>130</sup> E.g. Articles 81 and 86.

assessing the validity of elections on the basis of Section 83, which is a statute adopted from English common law.

In its ruling on the August 2017 presidential election, the Supreme Court stated that the fulcrum of the petition turned on Section 83.<sup>131</sup> The same can be said of the majority of petitions contesting various elective seats in both 2013 and 2017.<sup>132</sup> However, a number of commentators have found the judicial interpretation and application of Section 83 to be problematic. According to Evelyn and Wanyoike (2016:80, 97), the continued reliance by courts on Section 83 as a legal test for the validity of elections has “distracted the courts from the development of a true constitutional threshold for valid elections” and “undermined” the aims and standards of the 2010 Constitution. Although the authors argue that the mandatory language used in the articles of the constitution clearly establish a threshold for assessing the validity of elections, which is to be based on the standard of compliance with constitutional provisions and principles, they also acknowledge there may not yet exist a “succinct and strict test in these early days of the 2010 constitution... for valid elections.” This raises the question of how compliance with constitutional principles and the validity of elections are to be measured and proven, and the answer, circuitously, seems to be on the basis of Section 83.

Section 83 establishes the threshold for proving whether an election is valid based on two conditions or limbs: (i) if an election was not conducted in accordance with the principles of the con-

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<sup>131</sup> Odinga v IEBC 2017, para. 171.

<sup>132</sup> The six categories of elective seats include: president, senator, member of parliament, woman representative, governor and member of county assembly.

stitution and election laws; (ii) if noncompliance affected the results of an election. Kenya's Section 83 finds its precursors in Section 37 of the English Representation of the People Act of 1949 and earlier in Section 13 of the English Parliamentary and Municipal Elections Act of 1872 (aka Ballot Act). Three observations can be made of Section 83: First, to many observers, this common law statute, in all its permutations (both Kenyan and English), is problematic because it presents challenges for interpretation. Maina's (2013) criticism that the statute is "not a model of clarity," along with Evelyn and Wanyoike's (2016:110) critique that the statute is a "vague" and "convoluted" provision "that is open to numerous possible interpretations or even no intelligible interpretation at all," are assessments of this common law statute that have been echoed over generations by legal scholars and practitioners.

For example, regarding the English Ballot Act circa the 1800s, Holdsworth (1880:55) observed: "This clause invests the election judge to whom a petition is referred with an almost unlimited discretion as to what violation of rules or mistake in the use of forms he will hold sufficient or insufficient to invalidate an election. No doubt the exercise of this discretion must be judicial and not merely capricious, but, considering that his only guide will be 'the principles laid down in the body of this Act,' or his own opinion as to the extent to which the non-compliance or mistake affected the result of the election, it is evident that his judgement will be but slightly fettered. It is, at all events, quite impossible to predict what variations from the rules or forms will be considered harmless or the reverse by any particular judge or under varying circumstances of different cases. For even an approximate construction of this clause, we must wait until a series of judicial decisions shall have indicated, at any rate in a general way, the limit of the deviations from strict practice which will be held admissible." Fitzgerald (1876:75) similarly

noted: “Whether an election was conducted in accordance with the principles of the Act may, of course, be sometimes a question of extreme difficulty.” This difficulty was captured by Judge Grove in the 1874 Hackney parliamentary election petition: “Now, no doubt nothing can be more difficult than for a judge, or a metaphysician, or for anybody, to say what are the principles of a statute comprehending... I am somehow or other I suppose by this section required to form an opinion of what is the principle, or what are the principles of the Act, for doubtless there are more than one.”<sup>133</sup>

The second observation is that there are contradictions, discontinuities and ambiguities in how the statute was written, interpreted and applied. This raises two questions: first, whether the two limbs are joined conjunctively with an “and” or disjunctively with an “or”; second, whether both limbs are equal or if one is more important. As per the first question, the widely cited foundational case on the matter, *Morgan v Simpson*,<sup>134</sup> is insightful because it specifically shows variation in how the law was written and interpreted. Judge Denning quoted Section 37 of the English Representation of the People Act of 1949: “No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local elections rules *if it appears to the tribunal having cognisance of the question that the election was so conducted as to be substantially in accordance with the law as to elections and that the act or omission did not affect its result.*”<sup>135</sup> This law was written conjunctively in which the first limb,

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<sup>133</sup> *Gill v Reed* English Court of Common Pleas 2 O'M & H 77, 31 Lt 69 of 1874.

<sup>134</sup> *Morgan v Simpson* English Court of Appeal QB 151 of 1975.

<sup>135</sup> All italicized emphasis added.

beginning with the word “if,” was joined with the second limb by use of the word “and.” Noting that the law was written in the negative, Denning preceded to interpret the law by transforming it into the positive as follows: “A local government election shall be declared invalid (by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local election rules) *if* it appears to the tribunal having cognisance of the question that the election was not so conducted as to be substantially in accordance with the law as to elections *or* that the act or omission did affect the result.” Thus, Denning cited the statute as it was written with a conjunctive “and,” but then interpreted the statute disjunctively by substituting “and” with “or.”

The Kenyan statute, Section 83, was written as: “No election shall be declared to be void by reason of non-compliance with any written law relating to that election *if* it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law *or* that the non-compliance did not affect the result of the election.” Unlike the English version, which used a conjunctive “and,” the Kenyan version differs slightly but significantly by use of a disjunctive “or.” In the 2013 presidential election petition, the Supreme Court, along with petitioners and respondents, only made tangential reference to Section 83, as it was not in direct focus in the case. The statute was raised mainly in the context of questions regarding burden and standard of proof. Citing *Morgan v Simpson*, petitioners argued that despite the conjunctive wording of the English statute, the English court’s disjunctive interpretation was standard precedent for common law countries, and therefore part and parcel of Kenyan jurisprudence as pertains to Section 83.<sup>136</sup> However, the Attorney-General, as *amicus curiae*, cited

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<sup>136</sup> *Odinga v IEBC* 2013, para. 178, 179.

several cases from Nigeria in support of a conjunctive interpretation of Section 83.<sup>137</sup> The Supreme Court found merit in a judicial approach exemplified by Nigerian courts<sup>138</sup> and stated: “Where a party alleges non-conformity with the electoral law, the petitioner must *not only* prove that there has been non-compliance with the law, *but that* such failure of compliance did affect the validity of the elections.”<sup>139</sup> Although the Supreme Court did not render an authoritative or conclusive interpretation of Section 83 in the 2013 case, a conjunctive approach was clearly evident in its judgment.<sup>140</sup>

In the August 2017 presidential election petition, the Supreme Court stated, “Never has the word ‘OR’ been given such a powerful meaning”<sup>141</sup> – the same can be said of the word “and.” This is because interpreting the statute conjunctively (and) would require that both limbs must be proven for nullification of an election, thereby increasing the burden of proof for petitioners

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<sup>137</sup> Odinga v IEBC 2013, para. 184.

<sup>138</sup> Odinga v IEBC 2013, para. 193, 194. Nigerian cases cited included: Abubakar v Yar’Adua 2008 1 SC 77; Buhari v Obasanjo 2005 13 NWLR 1; Ibrahim v Shagari 1985 LRC Const. 1. Murunga (2013) noted, “Few doubt that the elections that saw Umar Yar’Adua win the presidency might have been the worst ever conducted in Nigeria. But the Supreme Court of Kenya... approvingly quotes the Nigerian Supreme Court.” Simekha argued, “By looking up to Nigeria and Uganda as pace setters in upholding justice and development of jurisprudence, the [Kenyan] Supreme Court fell on the worst possible precedence [stet]” (Sunday Nation 2013). Maina (2013) stated, “That we have taken the nastiest Nigerian case law and embedded it in our new Constitution would shock the Nigerians themselves. Indeed a Nigerian colleague who has read the [Kenyan Supreme Court] judgment is aghast: ‘It is tragic that the [Kenyan] Court has relied on some of the most awful and questionable jurisprudence from the Nigerian Supreme Court on elections.’”

<sup>139</sup> Odinga v IEBC 2013, para. 196. Note that the first limb of Section 83 specifically states an election should be conducted in accordance with the constitution and election laws, yet the Supreme Court’s interpretation of the statute conspicuously omits any reference to the constitution.

<sup>140</sup> Despite not using the words “and/or,” the particular phrasing of “not only/but that” indicates a conjunctive interpretation in which both limbs must be proven (*italicized emphasis added*).

<sup>141</sup> Odinga v IEBC 2017, para. 389.

while lowering standards of conduct on the part of the IEBC; whereas interpreting the statute disjunctively (or) would require that only one of either limb must be proven, thereby decreasing the burden of proof for petitioners while holding the IEBC to a higher standard of conduct more attuned to the spirit and principles of the constitution and laws on elections.

The Supreme Court's interpretation of Section 83 in the 2013 case aroused much criticism.

Maina (2013) argued the Kenyan judiciary took a "giant step backwards" by relying on a "mean-spirited, cramped reading" of Nigerian precedent. He questioned which interpretation – disjunctive or conjunctive – would promote the open, accountable and democratic ethos of the 2010 Constitution. From Maina's perspective, rather than vindicate the principles of the new constitution, the Supreme Court's conjunctive interpretation of the law effectively shielded a winning candidate from any legal challenge in an election petition because the standard of proof (on both limbs) established by the court was so onerous to discharge it would be incredibly difficult for a petitioner to ever succeed. Otieno-Odek (2017:43) argued that Kenyan courts have erred by maintaining a pre-2010 interpretation of Section 83 that fails to reflect the letter, spirit and historical context of the 2010 Constitution, whereas a post-2010 jurisprudence compels courts to embrace a progressive and indigenous interpretation of Section 83 that incorporates, applies and gives preeminence to the values and principles enshrined in the 2010 Constitution.

In the 2017 presidential election petition, Section 83 was a major point of reference. Respondents contended the Supreme Court had already established the correct interpretation of Section 83 in the 2013 case – a petitioner must prove, conjunctively, that there was noncompliance with the constitution and laws, and that the electoral process or the results had been materially or

fundamentally affected.<sup>142</sup> Respondents urged the Supreme Court to strictly adhere to the doctrine of precedent and stare decisis for consistency of its jurisprudence, and because the court’s interpretation of Section 83 in the 2013 case had been adopted, applied and reaffirmed by the Supreme Court and lower courts in subsequent election cases such as the 2013 Migori and Meru gubernatorial election petitions.<sup>143</sup>

Petitioners urged the Supreme Court to depart from its 2013 interpretation of Section 83. They argued the use of the word “or” in Section 83 meant the correct interpretation was disjunctive; moreover, despite the conjunctive nature of the English version of the statute, the English court correctly adopted a disjunctive interpretation in *Morgan v Simpson*. Petitioners submitted that the court’s conjunctive interpretation of Section 83 in the 2013 case, particularly its approving reference to Nigerian cases,<sup>144</sup> not only made it nearly impossible for a petitioner to successfully challenge an election, but also effectively undermined and devalued the supremacy of the constitution by suggesting an election can remain valid despite transgressions against the constitution and law, so long as there was no substantial effect on the result. The petitioners further urged the court to adopt a disjunctive interpretation of Section 83 so as to give purposive and progressive effect to the letter, spirit and principles of the constitution.<sup>145</sup>

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<sup>142</sup> Odinga v IEBC 2017, para. 81, 82, 83, 84, 128, 178, 180.

<sup>143</sup> Obado v Oyugi Supreme Court Election Petition 4 of 2014; Munya v Githinji Supreme Court Election Petition 2B of 2014.

<sup>144</sup> Curiously, in Odinga v IEBC 2017, para. 193, the Supreme Court proposed that references to foreign jurisprudence, such as Nigeria and other commonwealth countries, “may not be useful” as their provisions “are not in sync with or exact *pari materia* with ours” – this was stated by the Supreme Court despite its own prior reference with approval of Nigerian cases in Odinga v IEBC 2013.

<sup>145</sup> Odinga v IEBC 2013, para. 44, 173, 174, 175.



The court disagreed with the respondents by affirming that the use the term “or” instead of “and” in the wording of Section 83 clearly meant the two limbs were disjunctive.<sup>146</sup> Despite noting the controversy over its interpretation of Section 83 in the 2013 case, the court stated it “was never in any doubt as to the disjunctive character of Section 83,” which it had already authoritatively and categorically settled in a number of cases such as the 2013 Meru gubernatorial election petition.<sup>147</sup> Yet, this stance was not reflected in the Supreme Court’s ruling in the Meru case; instead, the court affirmed its position in 2013 presidential case: “Where a party alleges non-conformity with the electoral law, the petitioner must *not only* prove that there has been non-compliance with the law, *but that* such failure of compliance did affect the validity of the elections.”<sup>148</sup> Note also that in this quote the Supreme Court makes no reference to constitutional principles. The Court of Appeal had overturned the election after determining there had been violations to constitutional principles, and that errors and irregularities during the tallying of results rendered the election inaccurate, unverifiable and unaccountable.<sup>149</sup>

The Supreme Court disagreed with the appellate court on both counts, and then established the following two contradictory parameters: first, “The crisp issue is: how do irregularities and related malfunctions affect the integrity of an election”; second, there is “no basis for invalidating such an election, unless such errors and irregularities had demonstrably reversed the result

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<sup>146</sup> Odinga v IEBC 2017, para. 193, 210, 211.

<sup>147</sup> Odinga v IEBC 2017, para. 201, 207, 208.

<sup>148</sup> Munya v Githinji 2014, para. 178, 179. Italicized emphasis added.

<sup>149</sup> Munya v Githinji Court of Appeal Civil Appeal 38 of 2013, para. 216, 220.

against the appellant herein.”<sup>150</sup> In the first instance the baseline is expanded from “affect” as pertains to “the result of an election” (quantitative aspect) to a broader question of “affect” as pertains to “the integrity of an election” (qualitative aspect); the second is a far narrower question of whether correcting irregularities would have “reversed” the results in favor of a different candidate (quantitative aspect). Lastly, the Supreme Court found the Court of Appeal had erred most fundamentally by overlooking the “time-hallowed common law doctrine of stare decisis. It holds that the precedents set by this [Supreme] Court are binding on all other Courts in the land.”<sup>151</sup> In other words, the appellate court should have followed the lead of the Supreme Court in the 2013 presidential election and upheld the 2013 Meru gubernatorial election.

The Supreme Court adopted a similar position in upholding the 2013 Migori gubernatorial election. The Court of Appeal had nullified the election on the grounds that it “failed to meet the constitutional and legal requirements of a free and fair election; and that the irregularities affected the results.”<sup>152</sup> The Supreme Court affirmed its ruling in 2013 presidential case by reiterating a conjunctive interpretation of Section 83, that an election should not be annulled “where the election substantially complied with the applicable law, *and* the results of the election are unaffected.”<sup>153</sup> The Supreme Court stated the appellate court asked the “wrong

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<sup>150</sup> Munya v Githinji 2014, para. 210B, 224.

<sup>151</sup> Munya v Githinji 2014, para. 196, 225.

<sup>152</sup> Obado v Oyugi Court of Appeal Civil Appeal 39 of 2013; Obado v Oyugi 2014, para. 11.

<sup>153</sup> Obado v Oyugi 2014, para. 139. Use of the word “and” is clear indication of a conjunctive interpretation (*italicized emphasis added*). The Supreme Court’s prioritization on the second limb of Section 83 (quantitative aspect) was evident where it stated in para. 126: “a Court is to consider the effect of the alleged irregularities on the election result, before nullifying an election. It is only upon a finding that the irregularities proven affected the declared election results, that a Court will nullify an election.”

question” and the “right question should have been: ‘Did these errors/discrepancies affect the result and/or the integrity of the election? If so, in what particulars?’” The appellate court had asked these questions and identified the “particulars,” but the Supreme Court disagreed. The Supreme Court argued that the appellate court had erred further “by not applying the binding precedent” of the Supreme Court in 2013 presidential case, which contravened Article 163(7) of the Constitution.”<sup>154</sup>

As per the second question on interpretation of Section 83 – whether both limbs are equal or if one is more important – the dominant jurisprudence on elections in Kenya, and elsewhere, has generally prioritized the second limb, which is also referred to as the substantial effect rule (Kaaba 2015; Azu 2015). This interpretation tends to emphasize the quantitative aspects of the outcome of an election – did irregularities substantially effect the results of an election, and to deemphasize the qualitative aspects of the conduct of an election – was an election conducted in accordance with the constitution and laws. The Supreme Court’s fidelity to this interpretation was evident in 2013 presidential case. For example, the court’s sparse references to constitutional principles indicates a deemphasis on the first limb; and prioritization of the second limb is expressed where the court stated: “Although, as we find, there were many irregularities... these were not so substantial as to affect the credibility of the electoral process; and besides, no credible evidence was adduced to show that such irregularities were... for the purpose of causing prejudice to any particular candidate.”<sup>155</sup> The Supreme Court’s rulings on the 2013 Meru and

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<sup>154</sup> Obado v Oyugi 2014, para. 126 141. Article 163(7): All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.

<sup>155</sup> Odinga v IEBC 2013, para. 256. I.e. irregularities did not substantially affect the results in favor of any particular candidate.

Migori gubernatorial petitions affirmed that this interpretation constituted precedent. However, in 2017 presidential case, the Supreme Court surprisingly broke from this interpretation by prioritizing the first limb over the second limb: “a concise reading of Section 83 of the Elections Act would show that the results of the election need not be an issue where the principles of the Constitution and electoral law have been violated...”<sup>156</sup>

The third observation of Section 83 is that despite an implied premise of separateness between the two limbs, both are deeply intertwined with the linchpin between the two being allegations of irregularities and illegalities.<sup>157</sup> This is due to a general tendency among petitioners to attempt to prove, and for courts to assess, violations of either/both limbs on the basis that irregularities and illegalities were evidence of noncompliance with the constitution and laws and/or affected the results. Irregularities refer to violations of the constitution, election laws, regulations and procedures; illegalities pertain to criminal election offenses such as voter intimidation, bribery and misuse of public resources.

This intertwining of the two limbs is expressed in the Supreme Court’s summation of the petitioners’ case in the 2017 presidential petition: “the petitioners filed several affidavits setting out what, in their view, were egregious irregularities and illegalities, which, taken together, establish

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<sup>156</sup> Odinga v IEBC 2017, para. 384.

<sup>157</sup> Otieno-Odek (2017:4) makes a related observation that election petitions typically address three categories of allegations – administrative errors (irregularities), criminal electoral malpractice (illegalities), and noncompliance with constitutional principles (irregularities) – and that these categories sometimes overlap. Similarly, Biegon and Okubasu (2013:32) note that Section 83 pertains to whether irregularities affected the result of an election, which is not a constitutional principle, yet courts have applied the statute where provisions of the constitution have been contravened.

an impregnable case on both limbs of the section to wit: non-compliance with constitutional principles and the written law on election [stet], as well as commission of irregularities which affected the results of the elections.”<sup>158</sup> Elsewhere, the Supreme Court states: “The petitioners in that context claim that the 8th August, 2017 presidential election, was conducted in an environment characterized by many systematic and systemic illegalities and irregularities that fundamentally compromised the integrity of the election, contrary to the principles laid down in the Constitution.”<sup>159</sup> Lastly, the Supreme Court’s own determination – “that IEBC did not conduct the 8th August 2017 presidential election in conformity with the Constitution and electoral law. Irregularities and illegalities were also committed in a manner inconsistent with the requirement that the electoral system ought to be inter alia simple, verifiable, efficient, accurate and accountable”<sup>160</sup> – is further evidence that both limbs of Section 83 are interlinked on the basis that irregularities can prove either/both noncompliance with the constitution and laws on elections and/or effect on results.

Although Section 83 makes no direct reference to irregularities or illegalities, they are implied, particularly through common reference to *Morgan v Simpson*, which petitioners in the 2013 presidential case paraphrased: “an election court was required to declare an election invalid (a) if irregularities in the conduct of elections had been such that it could not be said that the election had been conducted as to be substantially in accordance with the law as to elections, or (b) if the irregularities had affected the results. Accordingly, where breaches of the election rules,

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<sup>158</sup> *Odinga v IEBC 2017*, para. 215.

<sup>159</sup> *Odinga v IEBC 2017*, para. 305.

<sup>160</sup> *Odinga v IEBC 2017*, para. 386. As per Articles 81 and 86 of the 2010 Constitution.

although trivial, had affected the results, that by itself was enough to compel the Court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election had been affected.”<sup>161</sup> The following discussion examines how petitioners and respondents argued and how courts assessed irregularities pertaining to election technology and statutory results forms.

### Technology

One of the most significant differences between the Supreme Court rulings in the 2013 and 2017 presidential election petitions was regarding the use of election technology. In preparation for the 2013 elections, the IEBC spent nearly Ksh9 billion (US\$90 million) for the procurement of electronic equipment, which was to be used to biometrically register and identify voters and to electronically transmit results of the presidential election from polling stations to constituency and national tallying centers. But this technology failed on voting day, which necessitated the IEBC to fall back on manual processes for voter identification and transmission of election results. Petitioners argued the IEBC’s use of election technology was a legally<sup>162</sup> and constitu-

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<sup>161</sup> Odinga v IEBC 2013, para. 178.

<sup>162</sup> Elections (General) Regulations of 2012, Section 5.1A The functions of a presiding officer shall be— (d) electronically transmitting presidential results to the constituency, counties and national tallying centers; Section 82 Provisional results to be transmitted electronically (1) The presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such manner as the Commission may direct; Section 87(2) The returning officer shall after tallying of votes at the constituency level— (c) electronically transmit the provisional results to the Commission; Section 87(10) The county returning officer shall on

tionally<sup>163</sup> mandatory requirement, and that reversion to a manual system exposed the election to manipulation and corruption.<sup>164</sup> The IEBC countered that the use of technology was discretionary, not a mandatory requirement,<sup>165</sup> that there was no legitimate public expectation that any technology would be used,<sup>166</sup> and that technology failure had no effect on the processes of the election or the validity of election results.<sup>167</sup>

The Supreme Court found the petitioners' argument – that the election should be nullified because of technology failure – was not tenable. The court's rationale was that the IEBC had "rightly argued" that an objective reading of the election laws and regulations did not reveal that elections should be conducted solely by electronic means, but rather that the voting system

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completion of the tallying of the results at the county level, electronically submit the tallied provisional results to the Commission.

<sup>163</sup> Constitution of Kenya 2010, Article 81 The electoral system shall comply with the following principles— (e) free and fair elections, which are— transparent, impartial, neutral, efficient, accurate and accountable; Article 86 the Independent Electoral and Boundaries Commission shall ensure that— (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.

<sup>164</sup> Odinga v IEBC 2013, para. 12, 18, 105, 107.

<sup>165</sup> Elections Act 24 of 2011, Section 44 The Commission *may use such technology as it considers appropriate* in the electoral process; Elections (General) Regulations of 2012, Section 82(1) The presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, *in such manner as the Commission may direct*. (Italicized emphasis added).

<sup>166</sup> Commentators (e.g. Away 2016; Maina 2013; Muindi 2013) argued that the IEBC had created a "legitimate expectation" that election technology would be used because there had been extensive media coverage of the IEBC's procurement, testing and deployment of election technology. In addition, the IEBC had conducted voter education and awareness campaigns, which included an opinion article by IEBC Chairperson Ahmed Hassan (2012) that was published in newspapers just weeks before the election. Furthermore, the IEBC had complied with Elections (General) Regulations of 2012, Section 60 Electronic voting: Where the Commission intends to conduct an election by electronic means, it shall, not later than three months before such election, publish in the Gazette and publicise through electronic and print media of national circulation and other easily accessible medium, guidelines that shall apply in such voting.

<sup>167</sup> Odinga v IEBC 2013, para. 114, 113, 116, 118,

envisioned appeared to be manual. The court noted the discretion provided for by law to the IEBC in the use of election technology was warranted because technology was inherently undependable and unreliable, and because most polling stations in rural areas were in “dilapidated” primary schools where the supply of electricity remained a “distant dream.” The court’s conclusion was to “take judicial notice that, as with all technologies, so it is with electoral technology: it is rarely perfect.”<sup>168</sup>

The Supreme Court’s disposal of the matter on the basis that technology failures were a fact of life was considered flippant by many observers who questioned why the IEBC had traveled the globe in search of the best election technology and then purchased electronic voting equipment with a huge sum of taxpayer money, only for the system to fail at the most crucial time. Maina (2013) argued it was “bizarre logic” for the court to agree with the IEBC that state-of-the-art election technology was not intended to be used as the primary voting system but instead as a mere backup for a “stone-age” manual system that had historically proven to be inefficient, inaccurate and prone to electoral manipulation, fraud and corruption. The Supreme Court only referenced, without any further consideration, the petitioners’ argument that the whole objective of shifting to an electronic voting system was on the basis of recommendations by the IREC/Kriegler Committee (Republic of Kenya 2008a) in order to prevent the kind of electoral malpractice that occurred during the flawed 2007 presidential election, which precipitated a post-election crisis.<sup>169</sup>

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<sup>168</sup> Odinga v IEBC 2013, para. 131, 133, 233, 237.

<sup>169</sup> Odinga v IEBC 2013, para 147. The Kriegler Committee was tasked with investigating the conduct of the flawed 2007 presidential election. The findings of the commission were instrumental in shaping subsequent electoral, judicial and constitutional reforms.



In the 2017 presidential election petition, the Supreme Court’s approach to IEBC technology failures was starkly more critical. Unlike the 2013 case when the court made only brief mention of the recommendations of the IREC/Kriegler Committee, in the 2017 case the court quoted and contemplated them at length.<sup>170</sup> Whereas the court in 2013 cited laws that entrusted the IEBC with discretion in the use of election technology, in 2017 the court cited laws that required the IEBC to use election technology. The court did so by noting that, having learned from the problems encountered during the 2013 election, the IEBC and Parliament had worked together to make extensive amendments to the laws on the use of election technology in preparation for the 2017 election<sup>171</sup> – namely Election Laws (Amendment) Act 36 of 2016,<sup>172</sup> Election Laws (Amendment) Act 1 of 2017,<sup>173</sup> and Elections (Technology) Regulations of 2017.<sup>174</sup> The court noted that the new legislation on election technology was enacted with the objective of

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<sup>170</sup> Odinga v IEBC 2017, para. 228, 229

<sup>171</sup> Odinga v IEBC 2017, para. 230

<sup>172</sup> Section 39(1C) For purposes of a presidential election the Commission shall— (a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre; Section 44(1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results; (3) The Commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent; (4) The Commission shall, in an open and transparent manner— (b) test, verify and deploy such technology at least sixty days before a general election; (5) The Commission shall...make regulations for— (b) testing and certification of the system; (h) telecommunication network for voter validation and result transmission.

<sup>173</sup> Section 44A Notwithstanding the provisions of Section 39 and Section 44, the Commission shall put in place a complementary mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution.

<sup>174</sup> Section 22 The Commission in collaboration with a telecommunication network service provider or providers shall put in place the appropriate telecommunication network infrastructure to facilitate the use of election technology for voter validation and results transmission and shall publish the network coverage at least forty-five days before the date of a general election.

ensuring conformity with the principles of the constitution and to align with the electoral jurisprudence that had been developed by the courts.<sup>175</sup> However, rather than cite its own precedent on the matter of election technology from its judgement on the 2013 presidential case, the Supreme Court found much more fitting reference in a more recent case from the Court of Appeal – IEBC v Kiai Civil Appeal 105 of 2017.<sup>176</sup>

Petitioners in the 2017 presidential case argued that the new laws – which required the IEBC to obtain and operationalize election technology for voter registration, voter identification and electronic transmission of results – had been enacted specifically to ensure that the kinds of electoral malpractices that had historically plagued the country would not be committed during the 2017 election. Petitioners claimed the IEBC’s technology failures were deliberate, systemic, systematic, and grossly affected the integrity, credibility and validity of the election.<sup>177</sup>

Respondents countered on two fronts: First, the IEBC argued that electronic transmission was dependent on availability of 3G/4G network coverage provided by the nation’s three largest mobile network operators – Safaricom, Airtel and Telkom Orange. After completing a mapping exercise, in consultation with the three telecoms, the IEBC discovered roughly 11,155 out of 40,833 polling stations across the country did not have adequate network coverage. The IEBC

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<sup>175</sup> Odinga v IEBC 2017, para. 231, 236.

<sup>176</sup> Odinga v IEBC 2017, para. 261, 263, 265, 283. The Court of Appeal stated: “The electronic transmission of results was intended to cure the mischief that all returning officers... troop to Nairobi by whatever means of transport, carrying in hard copy the presidential results... would in the process tamper with the announced result.”

<sup>177</sup> Odinga v IEBC 2017, para. 23, 219.

reminded the court that it had communicated this information to the public vide a notice dated August 6, two days before the election. Moreover, the IEBC noted that it had established a complementary system where IEBC officers in areas with no network coverage would input results data into electronic devices (Kenya Integrated Elections Management System – KIEMS kits), then move to areas or tallying centers with network coverage and transmit results from there.<sup>178</sup>

Second, respondents argued that there was neither legitimate expectation nor legal obligation to electronically transmit election data; therefore, there should be no legal sanction for failure to do so. According to respondents, the IEBC had statutory discretion to use a complementary manual system where technology either failed to work or was “unable to meet the constitutional threshold of what a free and fair election should constitute.”<sup>179</sup> Respondents argued that the method of transmission, whether electronic or physical delivery, was much like a matatu (public transport minibus) in that whether one walked or drove was irrelevant, what was important was what was contained within (results) and that they arrived at the final destination (National Tallying Centre). Moreover, since the final results were declared on the basis of physical Forms 34A and 34B, any error due to electronic transmission could not affect the results.<sup>180</sup> The IEBC seemed to echo, near verbatim, the Supreme Court’s own determination in the 2013

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<sup>178</sup> Odinga v IEBC 2017, para. 58, 59.

<sup>179</sup> Odinga v IEBC 2017, para. 60.

<sup>180</sup> Odinga v IEBC 2017, para. 241. Forms 34A were used to tally presidential election results from each polling station; Forms 34B were used to aggregate polling station results contained in all Forms 34A within each constituency (see Appendices).

presidential case<sup>181</sup> by arguing that “flaws in the electronic transmission of results, if any, could not be the basis of voiding a presidential election.”<sup>182</sup>

The court was not convinced by respondents’ arguments on either count. Rather, the court questioned why the IEBC had not disclosed when the mapping exercise was undertaken and why the IEBC waited until just two days before the election to publicly reveal problems with network coverage.<sup>183</sup> Contrary to the IEBC’s assertion that there was no “legitimate expectation” for use of election technology, the court took “judicial notice” of the fact that in numerous press briefings preceding the election<sup>184</sup> the “IEBC assured the country that it had carefully considered every conceivable eventuality regarding the issue of the electronic transmission of the presidential election results, and categorically stated that technology was not going to fail them.”<sup>185</sup> The judges noted with suspicion that many of the areas the IEBC had identified as lacking 3G/4G network coverage were commonly known to have fairly good road and network infrastructure to the extent that it would take at most a few hours for election officials to travel to areas with functioning network service to electronically transmit results; yet nine days after the close of the elections and three days after declaring Kenyatta as the winner, IEBC CEO Ezra Chiloba had

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<sup>181</sup> Odinga v IEBC 2013, para. 237: “It follows that the Petitioner’s case, insofar as it attributes nullity to the Presidential election on grounds of failed technological devices, is not sustainable.”

<sup>182</sup> Odinga v IEBC 2017, para 223.

<sup>183</sup> Odinga v IEBC 2017, para. 221, 269.

<sup>184</sup> E.g. Standard Reporter 2017b; Otieno 2017a; Nation Team 2017a.

<sup>185</sup> Odinga v IEBC 2017, para. 270.

admitted on record that he either did not have or was unable to provide all Forms 34A and 34B (Okumu 2017; Ngirachu 2017a).<sup>186</sup>

The court found the respondents' explanations unacceptable. The IEBC's failure to electronically transmit election results could not be excused due to failure of technology or failure of the nation's 3G/4G network, rather these failures could only be attributed to the IEBC's disregard of election laws and regulations.<sup>187</sup> In contrast to its position in 2013 that excused the IEBC's failure to transmit election results on the basis that election technology, as with all technologies, is rarely perfect,<sup>188</sup> in the 2017 case,<sup>189</sup> the court determined that because "no election is perfect and technology is not perfect either" the court could not "close its eyes to an obvious near total negation" of responsibility on the part of the IEBC to follow the technological roadmap for the conduct of elections that two houses of parliament had jointly prepared with the sole aim of ensuring a verifiable system for the transmission and declaration of results so as to protect against the potential for electoral malpractice, fraud and human intermeddling.<sup>190</sup>

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<sup>186</sup> Odinga v IEBC 2017, para. 24, 219, 250, 266, 273.

<sup>187</sup> Odinga v IEBC 2017, para. 282, 292, 300.

<sup>188</sup> Odinga v IEBC 2013, para. 233.

<sup>189</sup> In contrast to the Supreme Court's majority ruling in 2017, Ojwang's dissenting opinion showed a close affinity with the 2013 ruling on the role of technology: "Whereas the substance of the case founded on illegality and irregularity rests on the voting-results electronic transmission process, there is substantial information showing that, by law, the conduct of the election should have been mainly manual, and only partially electronic. Hardly any conclusive evidence has been adduced in this regard, which demonstrates such a manifestation of irregularity as to justify the invalidation of the election results." Odinga v IEBC 2017, Summarized Dissenting Opinion of Ojwang, para 3.

<sup>190</sup> Odinga v IEBC 2017, para. 400, 288.

From above discussion it is evident that the Supreme Court adopted different reasoning and approaches in consideration of the IEBC's use of technology in the 2013 and 2017 presidential elections. The court attempted to justify this difference by noting that new legislation on election technology had been enacted prior to the 2017 elections with the objective of ensuring conformity with the principles of the constitution and to align with the electoral jurisprudence that had been developed by the courts.<sup>191</sup> However, a few points are notable: First, the Supreme Court in the 2017 presidential case did not reference its judgement from the 2013 presidential case on the use of election technology. This was likely because the court failed to develop electoral jurisprudence in 2013 that would ensure that the use of technology in 2017 conformed with the principles of the constitution.

Second, although parliament did revise some of the laws on the use of election technology prior to the 2017 elections, many of the provisions remained unchanged. For example, Section 44 of the Elections Act of 2011,<sup>192</sup> which provided the IEBC with discretion in the use of election technology, was replaced by Section 17 of Election Laws (Amendment) Act 36 of 2016, which provided greater detail on how technology was to be used in elections (e.g. Sections 44.1, 3, 7). But these the new provisions still allowed the IEBC have some latitude in how to implement the use of election technology (e.g. Sections 44.2, 5, 8). Furthermore, there were no changes to Section 82(1) of the Elections (General) Regulations of 2012, which allowed the IEBC to use technology "in such manner as the Commission may direct."

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<sup>191</sup> Odinga v IEBC 2017, para. 231, 236.

<sup>192</sup> Section 44 The Commission may use such technology as it considers appropriate in the electoral process.

Thus, while there were some changes in the legislation as per election technology, the laws as they were in 2013 and 2017 still granted the IEBC some discretion in how technology was to be used in elections. In both presidential election petitions, the Supreme Court was tasked with the same core mandate of ensuring that the use of technology conformed with the principles of the constitution, which also remained constant for both elections. However, whereas the Supreme Court in 2013 viewed the IEBC's use of election technology as discretionary, and thereby lowered the standards of conduct for elections by the IEBC and minimized the court's role in ensuring compliance with the principles of the constitution, in 2017 the Supreme Court interpreted the IEBC's use of technology as a mandatory requirement, and thereby raised the standards of conduct for the IEBC and elevated the court's role in ensuring compliance with the constitution.

### Statutory Forms

In the 2013 presidential election case, the petitioners argued that the conduct of the election had been marred and the final results seriously affected by a number of irregularities, particularly during the vote tallying process. These irregularities included: material alterations in Forms 34 and 36, which were the primary documents used in the tallying and verification of election results; discrepancies between the election results tallied and the total number of registered voters; inflation and deflation of votes for particular candidates in certain polling stations based on comparison of entries in Forms 34 with the corresponding entries in Forms 36; and a number of unsigned Forms 36.<sup>193</sup>

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<sup>193</sup> Odinga v IEBC 2013, para. 17, 54, 134, 135, 136, 137, 139, 140, 141. Forms 34 were used to tally presidential election results from each polling station; Forms 36 were used to aggregate polling station results contained in all Forms 34 within each constituency.

To assess these allegations, the Supreme Court ordered a retallying of votes from a sample of 22 polling stations chosen by the petitioners, which revealed that 5 (23%) had discrepancies as to the number of votes contained in Forms 34 and Forms 36. Despite ordering scrutiny of Forms 34 from all 33,400 polling stations, only 18,000 polling stations (54%) were scrutinized, and the court never questioned why its orders were not complied with. From the scrutiny exercise, the court gleaned only two findings: first, Forms 34 were missing from “some” polling stations – although the court did not specify how many, it listed four examples; second, aggregate results were missing in Forms 36 from 75 (26%) out of 291 constituencies.<sup>194</sup> But aside from a few brief comments, the court made very little use of the retallying and scrutiny exercise.<sup>195</sup>

Petitioners argued that these findings, particularly that a number of forms were missing, confirmed their allegations. Moreover, because the IEBC did not provide the court or petitioners with all Forms 34, the petitioners argued there was no evidence that the IEBC had verified all the results as required by law, and therefore the results declared were unreliable.<sup>196</sup> Respondents maintained that the petitioners’ allegations were unsubstantiated and denied any constitutional or statutory violations, or widespread irregularities and malpractices. Respondents contended that any discrepancies between Forms 34 and 36 were due to clerical errors, not mischief or to

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<sup>194</sup> Odinga v IEBC 2013, para. 171, 172

<sup>195</sup> As noted by the Court of Appeal in the 2017 Homa Bay gubernatorial election petition, “one of the key criticisms of the judgment of the Supreme Court [in Odinga v IEBC 2013] is that it ordered a suo motu judicial scrutiny and not only failed to make reference to the Report but also totally ignored the findings in the Report” (Awiti v IEBC Court of Appeal Election Petition 5 of 2018, para 98).

<sup>196</sup> Odinga v IEBC 2013, para. 174.



advantage any particular candidate. Respondents noted that delivery of Forms 34 to the court and the petitioners was done voluntarily and not in response to any request. Although respondents admitted that not all Forms 34 were provided, they stated this was due to mere oversight, given the limited period to deliver documents and time constraints for the election petition. Moreover, despite evidence that some documents were missing, respondents assured the court that all Forms 34 were used to declare final results.<sup>197</sup> Regarding missing documents, it is germane to note that petitioners had filed two preliminary applications seeking court order for the IEBC to produce election documents; however, the court dismissed these applications.<sup>198</sup>

Despite acknowledging that the petitioners had sought to introduce additional evidence of manipulation of votes and discrepancies between the contents of Forms 34 and 36, which the Supreme Court had disallowed due to late filing, and with little reference to the findings of its own retallying and scrutiny exercise, the Supreme Court ruled that “Hardly any matter of significance, at this stage, came before the Court such as would alter the thrust of the overall evidence and the submissions on law; and we must hold that no challenge to the tallying process has been made such as to lead to an order of annulment.”<sup>199</sup> The court stated “by no means can the conduct of this election be said to have been perfect,” and although “there were many irregularities,” no credible evidence was adduced to show such irregularities were so substantial or profound to affect the credibility of the electoral process, or premeditated by the IEBC to

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<sup>197</sup> Odinga v IEBC 2013, para. 152, 161, 175.

<sup>198</sup> Odinga v IEBC 2013, para. 214.

<sup>199</sup> Odinga v IEBC 2013, para. 142, 246.

cause prejudice or advantage to any particular candidate.<sup>200</sup> Therefore, the Supreme Court dismissed the petition and upheld the election.<sup>201</sup>

In the August 2017 presidential case, petitioners asserted the election was marred by numerous irregularities, which were not only contrary to the principles of the constitution, but also substantially and significantly affected the results. Petitioners argued that because the irregularities were so pervasive, the election had been fundamentally and negatively compromised to the extent that the IEBC could not accurately and verifiably determine who had won.<sup>202</sup> The basis of petitioners' allegations of irregularities largely centered on statutory results forms. These irregularities included: inconsistencies, variances and discrepancies between results in Forms 34A and 34B; incomplete handover/takeover sections in many Forms 34A and 34B; and lack of signatures by IEBC officials and party agents, official stamps and security features (watermarks, serial numbers, etc.) in many Forms 34A, 34B and 34C. The petitioners argued there was a reasonable expectation that all statutory forms ought to be in standard form and format, and that the IEBC had provided no plausible explanation for such discrepancies.<sup>203</sup> Petitioners also contended the IEBC had publicly admitted that it had not received all results forms before declaring the final results of the election (Okumu 2017; Ngirachu 2017a).<sup>204</sup> Lastly, the petitioners urged the court

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<sup>200</sup> Odinga v IEBC 2013, para. 256, 303, 306.

<sup>201</sup> Odinga v IEBC 2013, para. 307, 312.

<sup>202</sup> Odinga v IEBC 2017, para. 14, 18, 32, 50, 305, 334, 340.

<sup>203</sup> Odinga v IEBC 2017, para. 26, 29, 33, 37, 41, 244, 335, 336, 337, 339, 362.

<sup>204</sup> Odinga v IEBC 2017, para. 26, 28, 39, 216, 219, 247, 248, 249, 250. Petitioners cited varying numbers for missing forms ranging from 5,015 to 11,883 Forms 34A and 17 to 187 Forms 34B.

to examine not only the results of the election (quantitative aspects), but also the entire conduct of the election and the totality of processes leading to the declaration of the final results (qualitative aspects).<sup>205</sup>

Respondents affirmed the integrity and validity of results contained in Forms 34A and 34B, and argued that petitioners had not proven any fatal or irredeemable irregularities. Although conceding that there were some discrepancies in the forms, respondents attributed any alleged inaccuracies and inconsistencies to administrative, clerical and human errors due to fatigue of IEBC officials, which the court should excuse because such irregularities were minor, inadvertent, not pre-meditated and did not affect the result of the election.<sup>206</sup> Respondents argued all Forms 34A and 34B were signed and stamped by IEBC officials and included security features. Moreover, respondents contended there were no legal requirements for official stamps, hand-over/takeover notes, and security features, as these were institutional procedures devised by the IEBC on its own accord, therefore, no breach of any law was committed where such features were found missing. Respondents questioned how petitioners could impugn forms for such irregularities when the petitioners' own party agents had authenticated many of the forms by appending their signatures.<sup>207</sup> Lastly, respondents noted that petitioners had not demonstrated that the results contained in the forms were incorrect; on the contrary, respondents argued that any quantitative discrepancies were so negligible they could not affect the election – thus, the

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<sup>205</sup> Odinga v IEBC 2017, para. 30, 370.

<sup>206</sup> Odinga v IEBC 2017, para. 74, 75, 91, 98, 245, 339.

<sup>207</sup> Odinga v IEBC 2017, para. 89, 91, 92, 93, 94, 336, 353, 354, 375.

final results as declared by the IEBC represented the will of the Kenyan people, and, therefore, the court should dismiss the petition and uphold the election.<sup>208</sup>

To assess these allegations, the court ordered scrutiny of 1 Form 34C, 291 Forms 34B, and a random sample of 4,299 Forms 34A.<sup>209</sup> The scrutiny report revealed that a number of Forms 34A, 34B and 34C: were not original documents, but duplicates, carbon copies (481 34A, some 34B) or photocopies (58 34A, some 34B); had not been signed by IEBC officers (≈472 34A, ≈2-5 34B) or party agents (15 34A, 32 34B); did not have official stamps (≈269-315 34A) or security features such as watermarks (11 34A, 56 34B, 1 34C) and serial numbers (31 34B, 1 34C); and had incomplete sections on notes for handover (189 34A/34B) and takeover (287 34A/34B).<sup>210</sup> The court was critical of a number of findings from the scrutiny exercise and found the respondents' arguments unconvincing.

The following discussion examines six observations of the Supreme Court's reasoning and approach in the adjudication of the August 2017 presidential election petition. The first

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<sup>208</sup> Odinga v IEBC 2017, para. 353, 355, 369.

<sup>209</sup> Forms 34A were used to tally presidential election results from each polling station; Forms 34B were used to aggregate polling station results contained in all Forms 34A within each constituency; Form 34C was used to collate results from all constituencies based on Forms 34B and to declare final results of the election (see Appendices).

<sup>210</sup> Odinga v IEBC 2017, para. 343, 345, 347, 348, 350, 359, 363, 367, 368, 376, 377. Some of the figures in parentheses are approximations due to a lack of clarity and discrepancies in the court's own account of the scrutiny findings – e.g. para. 350 states 269 original Forms 34A were not signed, while para. 368 states 269 carbon copy Forms 34A were not stamped, para. 368 also gives a figure of 257 carbon copy Forms 34A not stamped and a figure of 58 Forms 34A not stamped without specifying originals or photocopies, para. 350 states 58 as the number of Forms 34A that were photocopies; para. 347 states figures for incomplete handover/takeover sections for Forms 34B, but para. 367 gives the same figures for Forms 34A, and para. 363 states differently that 103 forms lacked handover sections, without specifying if the figure pertains to Forms 34A or 34B.

observation is that the court noted approvingly that the IEBC had produced a majority of the original forms, but then repeatedly reproached the IEBC for having submitted some of the forms as duplicates, carbon copies or photocopies of the originals.<sup>211</sup> Particularly with regard to Form 34C, the court denigrated the IEBC for failing to provide the original as “required” and for having no forthcoming explanation to account for its whereabouts; instead, the IEBC had provided a certified copy of the original, which the court determined was of questionable authenticity as the crucial document was not the original and bore neither a watermark nor serial number.<sup>212</sup> On one hand, it is curious that the IEBC did not provide all documents in their original form in the context of an election petition before the Supreme Court, as one of the core purposes of retaining election documents is to assist in the resolution of election disputes.

On the other hand, the court’s strong stance on the matter was curious because it had not actually “required” the IEBC to provide original documents;<sup>213</sup> on the contrary the court quoted, without noticing the contradiction, its own “Order for scrutiny and access in the following relevant terms: ... the petitioners, as well as the 3rd respondent [Kenyatta] shall be granted a read

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<sup>211</sup> Odinga v IEBC 2017, para. 366, 343, 349, 350, 359, 368, 377.

<sup>212</sup> Odinga v IEBC 2017, para. 356, 357, 377.

<sup>213</sup> Other commentators have taken the court’s statement that original forms were “required” at face value without checking the veracity of the claim. For example, Thuo (2019:26) states, “The original form [was] never availed despite court directive.” Whereas in standard English, “to avail” means to be of use or advantage, in Kenyan English, “to avail” means to make available or to provide: e.g. Odinga v IEBC 2017, para. 356, 357: “A number of conclusions/observations may be made from this exercise: Firstly, the Form 34C, that was availed for scrutiny was not original. Whereas the copy availed for scrutiny was certified as a copy original, no explanation was forthcoming to account for the whereabouts of the original Form. Regulation 87(3) obligates the 2nd respondent to tally and complete Form 34C and to sign and date the forms and make available a copy to any candidate or chief agent present. This regulation presupposes that the Chairman retains the original. The Court is mindful that the 2nd respondent was required to avail the original Form 34C for purposes of access and to this extent the 2nd respondent did not.”

only access, which includes copying (if necessary) to – (q) Certified photocopies of the original Forms 34A 34B and 34C.” These instructions were reiterated by the court: “Consequent upon the said Orders, we hereby make the following further Orders: (i) The Registrar of this court... shall supervise access to the certified copies of original Forms 34A and Forms 34B by the petitioners and 3rd Respondents...” This was in line with the petitioners’ own request that “The 1st Respondent [IEBC] be compelled to give access to and supply to the court and to the Petitioners for scrutiny, certified photocopies of the original Forms 34A’s 34B’s and 34Cs [stet];” which the court repeated: “we note that as framed and argued, the application seeks three kinds of prayers: (ii) access to and scrutiny of certified copies of Forms 34A, 34B and 34C.”<sup>214</sup>

Second, despite respondents’ claim that there were no legal requirements for various features on statutory forms and that the IEBC had implemented and publicized such features on the basis of its own institutional discretion, the court determined that handover/takeover sections and security features were intended to ensure accountability and transparency.<sup>215</sup> The court concluded that the absence of such features constituted glaring irregularities, which raised questions as to whether the documents were genuine or forgeries and cast doubt as to the kind of verification done, if at all, by the IEBC. In summation, the court stated: “We were disturbed by the fact that after an investment of tax payers money running into billions of shillings for the

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<sup>214</sup> Odinga v IEBC 2017, para. 340.; Odinga v IEBC 2017, Ruling (Application for Scrutiny).

<sup>215</sup> Odinga v IEBC 2017, para. 364, 365, 367. The court cited Elections (General) Regulations of 2012, Section 87(1) The constituency returning officer shall, as soon as practicable– (b) deliver to the National tallying centre all the Forms 34B from the respective polling stations and the summary collation forms. The court proposed that the words “summary collation forms” pertained to mandatory completion of handover/takeover sections.

printing of election materials, the Court would be left to ask itself basic fundamental questions regarding the security of voter tabulation forms.”<sup>216</sup>

However, because many of the irregularities cited by the petitioners and the court pertained to noncompliance with the IEBC’s own internally established institutional procedures, which were not mandated by law or legal regulation, it is unclear how such irregularities could have constituted violations to Section 83, which specifically refers to noncompliance with the constitution and laws on elections. Elsewhere in the petition, the petitioners and the court cited lack of official stamps on forms as an irregularity;<sup>217</sup> however, as noted by respondents, this was not an irregularity under any law or regulation.<sup>218</sup> Rather, the regulation states all ballot papers must be stamped, and failure to do so by an election official is an offence;<sup>219</sup> there is no stipulation for stamping results forms or offence listed for failure to stamp them.

Third, despite promising to ensure the utmost integrity in the conduct of the elections, the IEBC clearly fell short of the high standards and expectations by failing to comply with the many

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<sup>216</sup> Odinga v IEBC 2017, para. 367, 375, 376.

<sup>217</sup> Odinga v IEBC 2017, para. 37, 335, 336, 346, 348, 349, 350, 359, 368, 377.

<sup>218</sup> Yet witnesses for the respondents seemed confused on this matter as well: in para. 336, respondents stated official stamps were not a legal requirement; but in para. 89, respondents stated all Forms 34A and 34B were stamped as required under law. Both dissenting judges, Ojwang (para. 135) and Ndungu (para. 608), addressed this issue with greater clarity, precision and definitiveness by noting that a witness for the respondents “deponed that neither the Elections Act nor the Elections (General) Regulations requires that Forms 34A should bear the 1st respondent’s stamp.” Thuo (2019:399) makes a similar observation.

<sup>219</sup> Odinga v IEBC 2017, para. 360. Elections (General) Regulations of 2012, Section 61(4) The returning officer shall provide each polling station with— (c) instruments for stamping the official mark on ballot papers; Section 69(4) An election officer who deliberately refuses to stamp any ballot paper commits an offence.

provisions on elections established in the constitution, the various laws and regulations, and the intricate series of procedures the IEBC had instituted and publicized on its own volition. The Supreme Court rightly reprimanded the IEBC for these failures and demanded better of the agency in future elections. However, the August 2017 presidential election petition also revealed that there is vagueness in the laws and regulations on elections and how they are interpreted and applied. For example, the Elections (General) Regulations of 2012 requires that both IEBC officials and candidates' party agents must sign results forms.<sup>220</sup> Respondents had questioned how party agents could sign forms, thus affirming both the results contained in the forms and the proper execution of the forms themselves, only for candidates to later contest the forms in court.<sup>221</sup> Moreover, respondents argued lack of signatures from party agents did not invalidate the results or impugn the forms as per the regulations.<sup>222</sup> But the court was far more concerned with why IEBC officials had failed to sign a number of forms.<sup>223</sup>

Questions pertaining to signatures on results forms reveal unevenness and vagueness in the regulations on these matters. Elections (General) Regulations, Section 79(1) simply states, "The presiding officer, the candidates or agents shall sign" the results declaration forms. Regulation 79(2A/3) states, "The presiding officer shall— (b) request each of the candidates or agents present to append his or her signature." Sections 79(7) and (8) provide greater detail on procedures

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<sup>220</sup> Agents are representatives of candidates and/or political parties who are tasked with observing all aspects of the election and obtaining copies of election results forms.

<sup>221</sup> Odinga v IEBC 2017, para. 94.

<sup>222</sup> Odinga v IEBC 2017, para. 77, 89

<sup>223</sup> Odinga v IEBC 2017, para. 377.



and consequences stemming from failure of agents to sign, mainly that absence, refusal or failure of a candidate or agent to sign forms “shall not by itself invalidate the results announced.” Thus, curiously the law as pertains to candidates and agents includes a stipulation that their signatures are mandatory and a stipulation that there is no consequence for failure to sign; whereas the law as pertains to IEBC officials includes a stipulation that their signatures are mandatory, but it is entirely silent on a corresponding stipulation specifying consequences for their failure to sign. Whereas the court was clear in its interpretation that signatures of IEBC officials are a far more paramount concern than signatures of candidates and agents, the law is contrastingly far more detailed and explicit on stipulations pertaining to signatures of candidates and agents and far more vague on stipulations pertaining to signatures of IEBC officials.

Another example of vagueness in how laws are written, interpreted and applied pertains to allegations of missing results forms. The court determined that the IEBC had declared the final results of the presidential election on the basis of Forms 34B before receiving and verifying results from all Forms 34A, which was perceived as proof of the IEBC’s noncompliance with the constitution and laws on elections.<sup>224</sup> The court cited Section 39(1C) of the Elections Act and Article 138 of the Constitution, which specify the process for tabulating, transmitting and announcing results based on results forms, and Article 38 of the Constitution on citizens’ right to vote. Curiously, neither the court nor respondents referenced the Election (General) Regulations of 2012, which states that the IEBC may declare final results without having received all results if the missing results will not affect the final result of the election.<sup>225</sup>

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<sup>224</sup> Odinga v IEBC 2017, para. 238, 289, 290, 292, 300, 303.

<sup>225</sup> Election (General) Regulations of 2012, Section 64A(3) The Commission may declare the results if satisfied that the result of the elections will not be affected by the votes yet to be received and tallied

Fourth, the court articulated a fluid reading and interpretation of Section 83 in terms of how irregularities should be assessed in relation to constitutional principles and laws and effects on results. Whereas Section 83 invites courts to specifically assess whether irregularities “affected the results,” the court demonstrated fluidity by expanding the scope of the question and augmenting how the question was framed. In one instance, the court states, “The main issues for determination as crystallized from the petition... are as follows: ... (iii) If there were irregularities and illegalities, what was their impact, if any, on the integrity of the election?”<sup>226</sup> In another instance the court states, “The correct approach therefore, is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.”<sup>227</sup> Although observers such as Ombati (2017:119) suggest the court gave “fresh meaning” to Section 83 by introducing the “new concept” of “integrity,” the court’s attention to integrity in the August 2017 presidential election case was by no means new as the court had already referenced integrity in a number of other election cases including the 2013 presidential election petition.<sup>228</sup> However, the court undoubtedly gave significantly greater em-

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from the affected polling stations; Section 87(3)(g) The Chairperson of the Commission may declare a candidate elected as the President before all the Constituencies have delivered their results if in the opinion of the Commission the results that have not been received will not make a difference with regards to the winner on the basis of Article 138(4)(a) and (b) of the Constitution.

<sup>226</sup> Odinga v IEBC 2017, para. 125.

<sup>227</sup> Odinga v IEBC 2017, para. 373.

<sup>228</sup> Odinga v IEBC 2013, para. 177: “it is only now that it [Supreme Court] has the first opportunity to consider the vital question as to the integrity of a Presidential election”; *Munya v Kithinji* 2013, para. 210B, 221: “The crisp issue is: how do irregularities and related malfunctions affect the integrity of an

phasis to the concept of electoral integrity in the August 2017 presidential case and new meaning to its interpretation of Section 83.

The Supreme Court ruled, “whatever the eventual results in terms of votes,” the election was invalid, null and void due to noncompliance with constitutional principles and applicable law, coupled with the irregularities and illegalities that affected the process in a very substantial and significant manner.<sup>229</sup> Notably, the court’s reference to irregularities pertained to effect on process, not results. Elsewhere the court stated, “this Court has the mandate, to invalidate a presidential election under Article 140(3) of the Constitution as read with Section 83 of the Elections Act, inter alia, for reasons that there has been non-compliance with the principles in Articles 10, 38, 81 and 86 of the Constitution as well as in the electoral laws.”<sup>230</sup> Again, the court referenced the first limb of Section 83, but was silent on the second regarding “effect on results.”

This judicial approach was in line with the Supreme Court’s repeated emphasis of the importance of process (qualitative aspects) in addition to or above results (quantitative aspects). The court stated that contrary to respondents’ contentions, “elections are not only about numbers as many... believe... Elections are not events but processes;” that “whether or not the 3rd respondent [Kenya] received a large number of votes becomes irrelevant” on the basis of Sections 83; that “contrary to popular view, the results of an election in terms of numbers can

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election?”; *Obado v Oyugi* 2013, para. 140: “The right question should have been: ‘Did these errors/discrepancies affect the result and/or the integrity of the election? If so, in what particulars?’”

<sup>229</sup> *Odinga v IEBC* 2017, para. 303, 304, 359, 368, 379, 383, 385, 386

<sup>230</sup> *Odinga v IEBC* 2017, para. 381.

be overturned if a petitioner can prove that the election was not conducted in compliance with the principles laid down in the Constitution and the applicable electoral law.”<sup>231</sup> The court noted, “It is true that where the quantitative difference in numbers is negligible, the Court, as we were urged, should not disturb an election;” however, the court posed, “In such a critical process as the election of the President, isn’t quality just as important as quantity?”<sup>232</sup>

The issue of the quality of the electoral process versus the quantitative results of the election was a pivotal matter in the case. Observers such as Wairuri (2017) noted that the IEBC faltered in the 2017 case by relying on the same strategy it used in the 2013 case, by focusing on results of the election rather than defending its conduct in terms of the process of the election, which is what the petitioners were attacking in 2017. Likewise, Wairuri proposed that petitioners realized that by focusing on the quantitative question of numbers their case would likely have failed, which is why they urged the court to focus on the qualitative process of the election to assess compliance with constitutional principles.

Fifth, this fluidity in how the court read and interpreted Section 83 revealed inconsistencies and discontinuities in how it assessed irregularities. At one point, the court advised “it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.”<sup>233</sup> Additionally, such inquiries by the apex court could prove

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<sup>231</sup> Odinga v IEBC 2017, para. 224, 301, 371, 389, 398.

<sup>232</sup> Odinga v IEBC 2017, para. 378.

<sup>233</sup> Odinga v IEBC 2017, para. 374.

insightful and instructive for lower courts in the adjudication of petitions contesting elections for the five other categories of elective seats. The Supreme Court’s inquiry found that “the illegalities and irregularities committed by the [IEBC] were of such a substantial nature that no Court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can, in good conscience, declare that they do not matter, and that the will of the people was expressed nonetheless.”

The Supreme Court ruled the presidential election did not meet the constitutional test, which requires that the electoral process and results declaration must be simple, accurate and verifiable; thus the court was “unable to validate it, the results notwithstanding.”<sup>234</sup> The court reiterated its position stating, “the irregularities and illegalities in the Presidential election of 8th August, 2017 were substantial and significant that they affected the integrity of the election, the results notwithstanding.”<sup>235</sup> But the phrase “results notwithstanding” seemed peculiar, which the court proceeded to justify by stating, “the evidence before us cannot lead to a certain and firm decision regarding the specific number of votes affected by the irregularities and illegalities and it is our position that a concise reading of Section 83 of the Elections Act would show that the results of the election need not be an issue where the principles of the Constitution and electoral law have been violated in the manner that we have shown above.”<sup>236</sup>

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<sup>234</sup> Odinga v IEBC 2017, para. 379.

<sup>235</sup> Odinga v IEBC 2017, para. 405.

<sup>236</sup> Odinga v IEBC 2017, para. 384.

To reiterate, the Supreme Court affirmed its interpretation of Section 83 as establishing the threshold for the in/validity of an election based on two limbs: the first pertains to compliance with the constitution and election laws, the second to effects on results.<sup>237</sup> The court applied Section 83 by devising a three-part question: “(i) Whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the Constitution and the law relating to elections. (ii) Whether there were irregularities and illegalities committed in the conduct of the 2017 Presidential Election. (iii) If there were irregularities and illegalities, what was their impact, if any, on the integrity of the election?”<sup>238</sup> The framing of the third question already expands the scope of the question from a more specific assessment of effect on results to a broader assessment on the integrity of the election. The court determined that irregularities constituted evidence of noncompliance with the constitution and laws, thus applying evidence of irregularities as a violation of the first limb; the court then determined that whether irregularities affected results, thereby violating the second limb, was basically irrelevant. This demonstrates that the first and second limbs of Section 83 are deeply intertwined and that irregularities are the lynchpin for proving either limb. It also demonstrates that in the August 2017 presidential election petition, the Supreme Court broke from the longstanding practice of prioritizing the substantial effect rule, which the court had affirmed in its judgement on the 2013 presidential election petition, by placing less emphasis on the second limb – quantitative aspects of effect on results, and greater emphasis on the first limb – qualitative aspects of compliance with the constitution and laws.

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<sup>237</sup> Odinga v IEBC 2017, para. 192.

<sup>238</sup> Odinga v IEBC 2017, para. 125.

Basis on a disjunctive interpretation of Section 83, the Supreme Court rightly determined that if either limb can be proven the other is irrelevant. The court's reasoning and rational regarding irregularities in the August 2017 presidential petition was proof that the court had adopted a disjunctive interpretation of Section 83, and exhibited a departure from its interpretation of the provision as applied in the 2013 presidential petition and other cases from the 2013 elections. For example, the 2013 gubernatorial elections for Migori, Meru and Garissa were nullified by the Court of Appeal, but subsequently upheld by the Supreme Court. In the Migori case, the Supreme Court stated the Court of Appeal asked the "wrong question" and the "right question" for courts to ask regarding irregularities was: "Did these errors/discrepancies affect the result and/or the integrity of the election? If so, in what particulars?"<sup>239</sup> In the Meru case, the Supreme Court went as far as to say that the Court of Appeal "had no basis for invalidating such an election, unless such errors and irregularities had demonstrably reversed the result."<sup>240</sup>

In the 2013 Garissa gubernatorial election petition, the petitioner identified and the respondent admitted to a number of irregularities pertaining to results Forms 35 and 36, including: absence of official IEBC stamps and signatures, alterations without countersignatures, discrepancies between the two sets of forms, and missing forms. The Court of Appeal determined that such irregularities rendered the forms unverifiable, that the results contained within should have been excluded, and that recalculating the final tally accordingly would have "significantly narrowed, if not altogether obliterated," the margin between the candidates. The appellate court nullified the election having found that it was not conducted in accordance with the constitution

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<sup>239</sup> Obado v Oyugi Supreme Court Petition 4 of 2014, para. 140.

<sup>240</sup> Munya v Githinji Supreme Court Petition 2B of 2014, para 224.

and that the irregularities “not only dented the integrity of the election but also affected its result” to the extent that the election was “indeterminate.”<sup>241</sup>

But the appellate ruling was reversed by the Supreme Court, which found the election was conducted in compliance with the constitution and the irregularities cited did not affect the result. The Supreme Court ruled that failure of IEBC officials to sign and stamp forms was immaterial and did not impugn their authenticity. Whereas the Court of Appeal had provided detailed reasoning that irregularities affected the result to the extent that excluding the impugned results forms rendered the election indeterminate, the Supreme Court found the appellate court’s reasoning “lacks anchorage in facts and statistics” and that irregularities must be “of such a gravity as to vitiate the results, and the winner is no longer, in real terms, the winner,” not in “indeterminate” terms. The Supreme Court proposed that to determine whether irregularities affected the outcome of an election, courts must undertake an “analysis of the identity and import of that effect” and “demonstrate how the final statistical outcome has been compromised.”<sup>242</sup> Thus, whereas the Court of Appeal had nullified these three elections on the basis of both limbs, the Supreme Court upheld the elections largely on the basis of the second limb.

The observations and findings in this discussion are evidence of inconsistencies and discontinuities in how the Supreme Court framed questions pertaining to Section 83 and whether irregularities affected election results and processes. The Supreme Court’s reasoning on the matter was internally inconsistent in its judgement on the August 2017 presidential election and incon-

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<sup>241</sup> Mohammed v IEBC Court of Appeal 293 of 2013, para. 26, 28, 29, 30, 34, 40.

<sup>242</sup> Adam v Mohamed Supreme Court Petition 13 of 2014, para. 87, 88, 90, 92, 96.



sistent with the jurisprudence and precedent it had established in a number of cases including the 2013 presidential and gubernatorial election petitions. In its judgement on the 2017 presidential election, the court had, on one hand, advised that it was necessary and valuable for courts to “inquire into the potential effect of any irregularities;” on the other hand, the court seemed dismissive of irregularities with regard to effects on results “notwithstanding,” because “the evidence before us cannot lead to a certain and firm decision regarding the specific number of votes affected by the irregularities.”<sup>243</sup> This same lack of certainty and specificity as per the effect of irregularities on results was the basis of the Supreme Court’s criticism of lower court rulings in the 2013 gubernatorial election petitions.

A final observation is that the Supreme Court’s analysis of irregularities was primarily presented in the form of rhetorical interrogatives rather than definitive exposition.<sup>244</sup> In the concluding remarks of the judgement, the court asked nearly twenty questions in the space of three paragraphs, but provided concrete answers to few of them. Despite the court’s determination that irregularities constituted noncompliance with the constitution and election laws and affected the integrity of the election, results notwithstanding, it remains unclear how the IEBC’s noncompliance with its own institutional procedures, which are not anchored in law or legal regulations, can constitute a violation as envisioned under Section 83.

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<sup>243</sup> Odinga v IEBC 2017, para. 384.

<sup>244</sup> Odinga v IEBC 2017, para. 376, 377, 378. E.g. “Why would a returning officer, or for that matter a presiding officer, fail or neglect to append his signature to a document whose contents, he/she has generated? Isn’t the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the ‘numbers’ on that form?”

Moreover, many of the laws on elections are themselves vague and unclear. For example, as noted above, Elections (General) Regulations of 2012 as pertains to signatures of candidate's agents includes two provisions – agents must sign results forms and failure to do so does not invalidate result; the law as pertains to IEBC officials includes one provision that officials must sign results forms, but there is no parallel second provision on consequences for failure to do so. These provisions effectively mean that whether agents do or do not sign forms is irrelevant because such an irregularity does not affect the results, and whether IEBC officials do or do not sign forms is also irrelevant because the provision does not address the issue. This raises the question as to whether such provisions can be considered mandatory, particularly if they provide no sanction for noncompliance, or whether such provisions are only advisory, and if so, how could noncompliance be construed as offending Section 83?

The Supreme Court's judgement on the August 2017 presidential election petition did not provide definitive answers to these questions or provide clarity to the interpretation of vague election laws. This is a significant problem because many of the same irregularities, such as failure to properly execute statutory results forms, were issues raised in many petitions contesting elections for the five other categories of elective seats. The Supreme Court's failure to fully address these questions, beyond accusatory eyebrow raising, provides little guidance to lower courts on how to address and answer such questions. Moreover, this lack of definitive answers and guidance by the Supreme Court has contributed to ambiguities and inconsistencies in the evolving jurisprudence on the adjudication of elections.

An important caveat is that the above discussion on the August 2017 presidential election petition pertains to the majority judgement of four of the six Supreme Court judges.<sup>245</sup> Notably, the two dissenting judges, Ndungu and Ojwang, reached entirely opposite conclusions in their dissenting opinions. Ojwang determined that the evidence in support of the petitioners' arguments was weak compared to the respondents' on the basis that there were only limited cases of irregularities, which did not affect the results.<sup>246</sup> Ndungu found the petitioners "did not present material evidence, to the standard required, to upset the results" on the basis of the impugned forms and because the actual results in the forms "were not challenged."<sup>247</sup>

The dissenting judges argued that the majority judges should have tested the constitutional validity of the election on the basis of a numerical assessment of the physical evidence contained in the results forms that had been timeously provided to the court, which the court could have recounted and ought to have checked for the alleged irregularities. Ndungu undertook her own examination all 291 Forms 34B and 1349 Forms 34A. She found "all the Forms met the required threshold," were proper in form and content, and bore all the relevant features.<sup>248</sup> She upbraided her colleagues stating, "By subjecting the integrity of the election to

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<sup>245</sup> The seventh judge, Mohammed Ibrahim, did not participate due to illness and hospitalization (Ngirachu 2017b)

<sup>246</sup> Odinga v IEBC 2017, Dissenting Judgement of Ojwang, para. 158, 195, 197, 213.

<sup>247</sup> Odinga v IEBC 2017, Dissenting Judgement of Ndungu, para. 3.5.

<sup>248</sup> Odinga v IEBC 2017, Dissenting Judgement of Ndungu, para. 656, 668, 669. Ndungu's dissenting opinion, which was hundreds of pages long and more than double the length of the majority judgement, included a table, running over one hundred pages in length, which tabulated whether the each form contained various irregularities. It should be noted that the table indicated out of 291 Forms 34B at least 6 were unstamped and 1 unsigned, and out of 1349 Forms 34A, at least 166 were unstamped, 14 were unsigned. Some observers questioned whether Ndungu really had examined all the forms considering the

considerations of design, that are neither statutory nor regulatory, the Majority... negated the electorate's right to franchise."<sup>249</sup>

Ndungu also noted with disapproval that the majority judges had reversed an interpretation of Section 83 that the Supreme Court had established and affirmed in numerous cases, which in "practice has been to check any errors (which are to be expected) against their effect on the declared result of the elections."<sup>250</sup> Ndungu was not referring specifically to the majority's use of a disjunctive rather than conjunctive interpretation, but rather to the fluidity in how irregularities were assessed not only in terms of specific effects on results, but also in relation to broader considerations of the integrity of the election and compliance with constitutional principles and laws – results notwithstanding. Ndungu argued that the majority's interpretation of Section 83 had upturned the Supreme Court's established jurisprudence on elections, which would "unleash jurisprudential confusion never before witnessed," encumber lower courts with a "crisis of jurisprudence" in the law on elections, and require action from parliament to bring further clarity to the meaning of Section 83.<sup>251</sup>

Ndungu's predictions were astutely accurate on two counts: First, in the weeks following the Supreme Court's judgement on the August 2017 presidential election and prior to the October re-

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limited time constraints for hearing the petition (Nation Reporter 2017c; Onjoro 2017); other observers wondered if she had shared her findings with the majority judges (Sigei 2017; Waiganjo 2017).

<sup>249</sup> Odinga v IEBC 2017, Dissenting Judgement of Ndungu, para. 700.

<sup>250</sup> Odinga v IEBC 2017, Dissenting Judgement of Ndungu, para. 678, 682, 683.

<sup>251</sup> Odinga v IEBC 2017, Dissenting Judgement of Ndungu, para. 697.

peat presidential election, parliament did revise the Elections Act of 2011, particularly Section 83. The amended law effectively increased the burden of proof for petitioners and the threshold for nullification by courts, and thereby reduced the likelihood that any future election would be overturned (the new legislation is discussed in detail in Chapter 8). Second, “jurisprudential confusion” was evident in the conflicting and contradictory reasoning and approaches applied by different levels of courts (Magistrate, High, Appeal, Supreme) in their determinations on petitions contesting other elections from 2017, which could well be taken as evidence of a “crisis of jurisprudence” in the adjudication of election disputes.

Comparative analysis of the presidential election petitions from 2013 and August 2017 reveals inconsistencies and ambiguities in emerging jurisprudence and laws on elections. In 2013, the Supreme Court held the IEBC to far lower standards for the conduct of elections in terms of the use of technology, proper execution of statutory results forms, and other irregularities. In 2013, the Supreme Court interpreted and applied the two limbs of Section 83 conjunctively, but prioritized the second limb pertaining to effect on results (i.e. substantial effect rule) and minimized compliance with the first limb – this was evident in the court’s sparse references to the constitutional provisions. In contrast, the Supreme Court adopted a different approach in August 2017 case. The court demanded higher and more exacting standards for the conduct of the presidential election by the IEBC. The Supreme Court departed from the longstanding practice of focusing more narrowly on the effects on results to consider more broadly, and disjunctively, how irregularities affected the integrity, processes and conduct of the election. The court also commendably emphasized the centrality of constitutional principles in the conduct and adjudication of the presidential election.

Thus, whereas the Supreme Court's approach to 2013 presidential and gubernatorial election petitions evinced continuity with the status quo of a pre-2010 jurisprudence and a propensity to uphold flawed elections, the Supreme Court's approach to the August 2017 presidential election petition suggested a shift to a new post-2010 jurisprudence that more strongly affirms the values and objectives of transformative constitutionalism and electoral justice. The Supreme Court's nullification of the August 2017 presidential election marked a significant break from the precedent it had established in upholding the 2013 presidential and gubernatorial elections. However, the question of whether the Supreme Court establish a new precedent to guide lower courts in the adjudication of subsequent petitions contesting the outcomes of other elections from 2017 is the focus of the next chapter. Chapter 6 examines the adjudication of gubernatorial election petitions and the emerging jurisprudence on elections from the High, Appeal and Supreme Courts.

## Chapter 6. Adjudication of Gubernatorial Elections – 2013 and 2017

Even before the August 2017 presidential election petition had been filed, the judiciary was already anticipating a larger number of election petitions in 2017 compared to the 188 filed in 2013 (Kakah 2017a; Kiplagat 2017a). Commentators suggested this was to be expected because Kenyans in general and Kenyan politicians in particular are litigious (Muthoni 2017g; Lang’at 2017f), and due to the highly contentious nature of Kenyan politics and unwillingness among candidates to concede defeat (Mutambo 2017c). Another factor was the substantial increase ( $\approx 14\%$ ) in the number of candidates vying for the 1,882 elective seats across six levels of government – 12,776 in 2013 compared to 14,542 in 2017 (IEBC 2013, 2018).<sup>252</sup>

But it was the unexpected and unprecedented Supreme Court nullification of the August 2017 presidential election that would “fuel renewed sense of litigation from losers who would have otherwise not filed a case” and “open the floodgates for an avalanche of similar suits for the other five elective seats” (Lang’at 2017f). Muthoni (2019) noted, “A majority of those who had filed petitions hoped that the Supreme Court’s decision [to nullify the presidential election] had created a fertile ground to have various wins [for other elective seats] declared null and void.” Even judges<sup>253</sup> noted that most of the roughly 300 election petitions<sup>254</sup> filed were motivated by

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<sup>252</sup> Different figures were reported for the total number of candidates in 2017: IEBC (2018) also states the total was 15,082 (18% increase) (also cited in Ngetich 2017a, Chome 2017, Lang’at 2017b); other reports quoted an IEBC total of 16,259 (27% increase) (East African 2017, Lang’at 2017a, Thuo 2019).

<sup>253</sup> E.g. Judge Sitati in *Kevogo v IEBC High Court Election Petition 11 of 2017*, para. 2.

<sup>254</sup> 300 is a close approximation of the total number of election petitions filed for all six categories of elective seats. Different sources cite varying figures: 338 petitions, including 49 filed against political party nominations (Anami 2017b); 375 cases (Kwamboka 2018b); 308 election and party list petitions (Oudia 2017); 388 election petitions of which 89 pertained to party lists (Thuo 2019); the IEBC (2018) cites 299

the Supreme Court's nullification of the August 2017 presidential election and largely driven by the assumption that the judgement of the apex court had established a precedent that would be binding for subordinate courts in the adjudication of other election petitions.<sup>255</sup>

Martha Karua, who lost the Kirinyaga gubernatorial election, was one of the most outspoken proponents of the extreme position that the Supreme Court's nullification of the August 2017 presidential election should apply unequivocally to all other elective seats (Munene 2017).<sup>256</sup> Her rationale was twofold: because all elections were conducted by the same electoral management body and all were marred by the same irregularities that warranted nullification of the presidential election, and because lower courts were obligated to follow the precedent set by the Supreme Court on the basis of the doctrine of stare decisis and Article 163(7) of the Consti-

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election petitions; and the Judiciary (2017b) cites 302 election petitions and 391 petitions including pre-election party list disputes. Some estimates include pre-election disputes contesting party nominations and qualifications of candidates, and some of these pre-election disputes were carried over or subsequently raised in post-election petitions. In some cases, multiple petitions were filed for the same elective seat. The most comprehensive archive for election petitions is the National Council for Law Reporting (aka Kenya Law); however, even this collection is incomplete. The Judiciary (2014a, 2014b, 2017a, 2017b) has consistently identified a need to increase capacity for law reporting (i.e. to record, transcribe, collect, archive, upload and disseminate judicial decisions).

<sup>255</sup> According to Kiplagat (2017h), "It is the expectation of many that most of the petitions will go through because lower courts are guided by the precedence [stet] set by the courts above them. The Supreme Court set the way with the nullification of the August 8 presidential election." Ogemba (2017b) quoted legal experts: "There is no doubt that the [Supreme Court] decision is going to have legal implications on other cases challenging various elective positions... It has made the work easier for the petitioners since judges in lower courts must follow precedence [stet] of whether the election complied with applicable laws [and] will be bound by the [Supreme Court's] finding that the elections were not conducted in accordance with the Constitution." Obala and Mosoku (2017b), also quoting legal experts, suggested the "country should prepare for several by-elections ... [because] ... the Supreme Court has set a precedent that will be binding to the subordinate courts," meaning other courts would likely follow suit resulting in massive nullification of elections.

<sup>256</sup> In Kisii County, petitioners similarly argued that because the Supreme Court ruled irregularities in the August 2017 presidential election "go to the very heart of electoral integrity," and the same were evident in the gubernatorial election, the High Court "must make a similar pronouncement" for nullification (Onsando v IEBC High Court Election Petition 3 of 2017, para. 166).



tution,<sup>257</sup> all elections should be voided and fresh ones ordered.<sup>258</sup> Other commentators also wondered how it could be possible that the Supreme Court's decision, which had impugned the IEBC in the conduct of the presidential election, would not be applied to all other elections, since all had been held on the same day and managed by the same IEBC officials (Kimaiyo 2017).

However, other observers were more cautious (Muthoni 2017d). Despite the Supreme Court's nullification of the August 2017 presidential election being the catalyst for many of the petitions contesting other elective seats, Ogondi (ibid.) argued that it was misleading to assume all petitions would automatically succeed because each would have to be determined on its own merits. Similarly, Kanjama (ibid.) noted the presidential petition would have little to no effect on other election petitions as individual petitioners would still bear the burden of proving their respective cases and each court would make its determination on a case-by-case basis. In the Kirinyaga gubernatorial petition, the High Court replied to Karua's assertion on judicial precedent by quoting respondents in stating her interpretation of the doctrine of stare decisis was "absurd." The court stated that Karua was wrong to suggest that the Supreme Court's decision in the presidential election should have blanket application for all election petitions or that all courts were bound by it.<sup>259</sup>

The Supreme Court majority judgement on the August 2017 presidential election petition did not address the matter of precedent or how it would affect lower courts in the adjudication of

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<sup>257</sup> Article 163(7) All courts, other than the Supreme Court, are bound by decisions of the Supreme Court.

<sup>258</sup> Karua v IEBC High Court Election Petition 2 of 2017, Ruling 1, para. 3, 5, 8.

<sup>259</sup> Karua v IEBC High Court Election Petition 2 of 2017, Ruling 1, para. 26, 29.

petitions contesting other elective seats.<sup>260</sup> However, in her dissenting opinion, Supreme Court judge Ndungu stated, “lower Courts are not without an option. The decision by the Majority is one given in a presidential election and which does not usurp the jurisdiction of the lower Courts in electoral disputes.”<sup>261</sup> She then quoted the Supreme Court’s judgment on the 2013 presidential election petition, which specifically addressed the issue of precedent or doctrine of stare decisis: “The Supreme Court cannot roll over the defined range of the electoral process like a colossus. The Court must take care not to usurp the jurisdiction of the lower Courts in electoral disputes. It follows that the annulment of a Presidential election will not necessarily vitiate the entire general election. And the annulment of a Presidential election need not occasion a constitutional crisis, as the authority to declare a Presidential election invalid is granted by the Constitution itself.”<sup>262</sup>

Elsewhere in the 2013 judgement, the Supreme Court stated, “This Court will not, as already stated, make such orders or grant such reliefs as would have the effect of precipitating conflicts between its jurisdiction and that of other Courts.”<sup>263</sup> Despite the Supreme Court’s seemingly cordial disposition towards lower courts, there were disagreements between different levels of courts and conflicting approaches to the adjudication of election petitions in 2013 and 2017;

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<sup>260</sup> The Supreme Court majority only addressed the matter of jurisdictional hierarchy among different levels of courts with regard to illegalities alleged to have been committed by Kenyatta. Kenyatta was accused of improper use of public resources for campaigning in two cases that were already pending in the High Court. When petitioners raised the allegations in the August 2017 presidential petition, the Supreme Court stated: “we cannot adjudicate on an issue which is still the subject of judicial determination at the High Court” (Odinga v IBC 2017, para. 310).

<sup>261</sup> Odinga v IEBC 2017, Dissenting Opinion of Ndungu, para. 697A.

<sup>262</sup> Odinga v IEBC 2013, para. 207.

<sup>263</sup> Odinga v IEBC 2013, para. 247.

and in many cases the Supreme Court did assert its judicial supremacy by overturning judgements of lower courts on the basis of stare decisis and the bind power of its decisions.

Whereas the Supreme Court has exclusive and final jurisdiction for presidential election petitions (meaning there is no option for appeal), the High Court has original jurisdiction for gubernatorial election petitions. Parties to gubernatorial cases have right of appeal to the Court of Appeal and final appeal to the Supreme Court.<sup>264</sup> In 2013, 19 gubernatorial election petitions were filed at the High Court of which 17 were dismissed and 2 elections nullified; 13 petitions were filed at the Court of Appeal of which 5 elections were nullified; 7 petitions were filed at the Supreme Court and all elections were upheld (Table 2). In three of the gubernatorial cases that came before the Supreme Court (Meru, Migori, Nairobi),<sup>265</sup> the Supreme Court faulted appellate courts for nullifying elections without applying due regard to the doctrine of stare decisis and the binding power of the apex court's precedent-setting authority. A number of commentators suggested the Supreme Court was motivated to uphold elections as a means of defending, reinforcing and justifying its judgement to uphold the 2013 presidential election, and due to fear that nullifying elections could be interpreted as vindication of Odinga and CORD's contentions that the 2013 elections were not free, fair or credible (Ondieki 2014; Gondi and Basant 2015).

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<sup>264</sup> The same applies for election petitions for senators, woman representatives and members of parliament. For members of county assembly, Magistrate Court has original jurisdiction and parties have right of appeal to higher level courts.

<sup>265</sup> *Munya v Kithinji* Supreme Court Petition 2B of 2014, para. 195, 196.; *Obado v Oyugi* Supreme Court Petition 4 of 2014, para. 122, 123, 126, 141.; *Kidero v Waititu* Supreme Court Petition 18 and 20 of 2014, para. 180. The Court of Appeal nullified two other gubernatorial elections in Garissa (*Mohammed v IEBC* Court of Appeal Civil Appeal 293 of 2013) and Siaya (*Amoth v Oduol* Court of Appeal Civil Appeal 32 of 2013). Respondents in the Garissa case filed an appeal before the Supreme Court, which upheld the election (*Adam v Mohamed* Supreme Court Election Petition 13 of 2014). Respondents in the Siaya case opted to contend in a byelection and were reelected.

Following the 2013 elections, the propensity of the Supreme Court to reverse seemingly sound judgements of the Court of Appeal – particularly where the former upheld apparently flawed elections that the latter had nullified – created palpable dissonance between the two levels of courts, which many observers suggested was evidence of jurisprudential conflict or an ideological war within the judiciary (Ondieki 2014; Biegon and Okubasu 2013; Kiplagat 2018b). The Court of Appeal was perceived as exhibiting a more progressive jurisprudence, or judicial activism, that was more attuned with the progressive and transformative spirit of the 2010 Constitution. This was in contrast to the restrained and conservative rulings of the High Court and Supreme Court, which seemed to be more consonant with a pre-2010 jurisprudence. Gondi and Basan (2015:74) argued that such continued fidelity to the conservative judicial philosophy of the past is detrimental to advancing the transformative vision of the 2010 Constitution, which calls for a progressive jurisprudence, and it negates the push for electoral reform and improvement of electoral management. Similarly, Thiankolu (2016:118) proposed that many of the Supreme Court’s judgements were difficult to reconcile with the transformative vision of the 2010 Constitution, which was designed to end Kenya’s long political experience characterized by high incidence of electoral malpractices and injustice.

Mutua (Ondieki 2014) argued that the Supreme Court was adhering to rather than breaking from the “draconian” jurisprudence of Kenya’s past, and that it was inconceivable that 26 appellate judges could be consistently wrong and seven judges of the Supreme Court consistently right. Other critics were uneasy with the Supreme Court’s insistence on using the 2013 presidential case as the baseline for the adjudication of election petitions because the

judgement was perceived as setting bad precedent by lowering the standard for the conduct of elections by the IEBC and raising the standard for the burden of proof required to nullify elections by petitioners and courts. Maina (2013) argued that the Supreme Court's judgement in the 2013 presidential case not only failed to vindicate the principles of the new constitution, it also effectively shielded an elected leader from judicial challenge by establishing an onerous standard of proof that severely reduced the likelihood that a petitioner would ever succeed.

In 2017, the Supreme Court's nullification of the presidential election was lauded for emphasizing the salience of constitutional principles in the conduct of elections and in the adjudication of election petitions. The judgement seemingly raised the standard for the conduct of elections on the part of the IEBC and lowered the burden of proof required to nullify an election, thereby increasing the likelihood that petitioners would succeed in subsequent election petitions. The Supreme Court evinced cognizance of the potential ramifications of its judgement by stating: "Have we in executing our mandate lowered the threshold for proof in presidential elections? Have we made it easy to overturn the popular will of the people? We do not think so."<sup>266</sup>

Contrary to expectations, the Supreme Court's judgement on the 2017 presidential election did not result in broad scale nullification of elections across the country; in fact, of the roughly 300 petitions filed, very few succeeded in overturning elections (Nyamori 2018; Kiplagat 2018d).<sup>267</sup>

The outcomes of gubernatorial election petitions across three levels of courts in 2017 largely

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<sup>266</sup> Odinga v IEBC 2017, para. 400.

<sup>267</sup> Muthoni (2019, 2018b, 2017d) notes approximately 90 percent of petitions from the 2017 elections were dismissed; this was similar to outcomes for petitions from the 2013 elections of which approximately 90 percent were dismissed.

mirrored those of 2013, although a significantly higher number of cases were filed in 2017: 31 gubernatorial election petitions were filed at the High Court of which only 2 elections were nullified; 19 petitions were filed at the Court of Appeal of which 3 elections were nullified; and at the Supreme Court, 9 petitions were filed and all elections were upheld (Table 2).

The propensity of the Supreme Court to reverse the nullification of elections by lower courts in 2013 was repeated in the adjudication of petitions disputing the 2017 elections. Each of the three gubernatorial elections that were nullified by the Court of Appeal were upheld by the Supreme Court. However, a notable difference was that unlike the 2013 gubernatorial elections, which the Supreme Court upheld by citing precedent and *stare decisis* stemming from its decision to uphold the 2013 presidential election, in 2017 the Supreme Court, having nullified the presidential election, could not cite *stare decisis* or precedent in any of its judgements on petitions for other elective seats. Instead, the Supreme Court upheld gubernatorial elections that the appellate court had nullified by faulting the lower court on other grounds.

The outcomes of election petitions in 2013 and 2017 reveal three notable observations: first, the majority of election petitions were dismissed and elections were upheld; second, the High Court and Court of Appeal demonstrated slightly greater willingness to nullify elections; third, the Supreme Court exhibited greater reluctance to nullify elections and propensity to uphold them. The following discussion provides a comparative analysis of gubernatorial election petitions in terms of technicalities, irregularities pertaining to technology, statutory forms and party agents, illegalities, and qualitative aspects of electoral processes and conduct versus quantitative aspects of election results. By identifying variances in the approaches of petitioners and in

the determinations of various levels of courts, this analysis reveals discontinuities and inconsistencies in the adjudication of elections. Findings from this analysis are instructive for assessing whether the emerging jurisprudence on elections evinces continuation of the status quo of a pre-2010 jurisprudence or a shift to a post-2010 jurisprudence that more strongly affirms the principles of transformative constitutionalism and electoral justice.

### Technicalities

Following the 2013 elections, courts faulted many election petitions on technical and procedural grounds – for example, where petitioners failed to include specific details such as correctly naming respondents and specifying the date and results of elections.<sup>268</sup> Courts were divided on whether these were mere technical flaws that could be amended or ignored, or substantive failures that warranted dismissal. Thuo (2019), among others, noted the divergent approaches courts adopted on these matters fit into two schools of thought: the first was that inclusion of such details was mandatory and failure to do so rendered a petition fatally defective,<sup>269</sup> the second was that inclusion of such details were technical, procedural matters and failure to include them should not stand in the way of substantive justice.<sup>270</sup>

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<sup>268</sup> Elections (Parliamentary and County Elections) Petition Rules of 2013, Section 2 “Respondent” in relation to an election petition, means— (a) the person whose election is complained of; Section 10(1) An election petition filed under rule 8, shall state— (b) the date when the election in dispute was conducted; (c) the results of the election, if any, and the manner in which it has been declared; (d) the date of the declaration of the results of the election.

<sup>269</sup> Examples of election petitions that were dismissed/struck out for being fatally defective due to failure to include election results and/or dates include: Ahmed v Returning Officer High Court Election Petition 4 of 2013 (Woman Representative Mandera) and Chedotum v IEBC High Court Election Petition 11 of 2013 (MP Kapenguria, West Pokot).

<sup>270</sup> Examples of courts ruling that failure to include election results was a matter of form rather than substance and did not occasion any prejudice or injustice include: Mwandiku v Musimba High Court

In the 2013 gubernatorial election petitions for Embu and Tharaka Nithi, courts found that failure to include deputy governors as respondents was a non-issue and not fatal to the petition.<sup>271</sup> In the Isiolo gubernatorial election petition, the court found the petition was incurably defective due to a number of technical infractions, including failure to correctly name the respondents and the results of the election; however, the judge proceeded to hear the case on merit, “in case I am faulted on my findings” that the case could have been struck out for technical failures.<sup>272</sup> In the gubernatorial petitions for Kilifi and Machakos, courts found that failure of petitioners to include results of the elections was not fatal to the petitions and could be overlooked as no injustice was occasions by the omission.<sup>273</sup>

Clearly courts adopted a lenient approach to such technical infractions in the 2013 gubernatorial elections petitions. However, considering that these issues were matters of contestation in 2013, it would have behooved petitioners in 2017 to include all such details out of an abundance of caution. Instead, many petitioners disputing gubernatorial elections in 2017 again neglected to include deputy governors, dates and results; they were again faulted for such omissions; and courts again demonstrated great variance in their determinations on these matters.

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Election Petition 7 of 2013 (MP Kibwezi West, Machakos), Kai v Salim High Court Election Petition 8 of 2013 (MP Kilifi South, Kilifi) and Mutegi v Nyaga High Court Election Petition 5 of 2013 (Woman Representative Tharaka Nithi).

<sup>271</sup> Kiragu v Wambora High Court Election Petition 1 of 2013, pg. 12; Miriti v Mbae High Court Election Petition 4 of 2013, Ruling 1, para. 57, 58.

<sup>272</sup> Suleman v Returning Officer High Court Election Petition 2 of 2013, pg. 10.

<sup>273</sup> Mbaga v IEBC High Court Election Petitions 1 and 3 of 2013, para. 81; Ndeti v IEBC High Court Election Petition 4 of 2013, Ruling 1, para. 23, 28.



Examples of lenience included: Machakos and Tana River gubernatorial election petitions, where courts ruled Article 159(2)(d) allowed for partially defective petitions to be saved and heard on their merits to ensure substantive justice rather than cursory dismissal due to procedural technicalities.<sup>274</sup> In the Kilifi case, respondents complained that petitioners failed to include the date and results of the election; the court did not address the first issue, but ruled the second issue was a minor, nonfatal defect that could be overlooked in view of Article 159(2)(d) and in the interests of substantive justice.<sup>275</sup> In Migori case, the court also determined that failure to include results was not fatal to the petition.<sup>276</sup>

In the Kwale and Kirinyaga gubernatorial election petitions, courts adopted a contrasting approach to these matters. In the Kwale case, respondents had only cited petitioners for failure to include the date of the election; but the court noted petitioners also failed to include the results, and although not pleaded by respondents, the court found it could not ignore such an omission; thus, the court ruled the petition was incompetent.<sup>277</sup> When the case came before the Supreme Court, aside from briefly mentioning in its review of the case history that the issue of failure to include date and results was raised during a preliminary objection before the High Court, the Supreme Court did not address the matter.<sup>278</sup> In the Kirinyaga case, the High Court

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<sup>274</sup> Ndeti v IEBC High Court Election Petition 1 of 2017, Ruling 2; Hatu v Godhana High Court Election Petitions 1 and 2 of 2017, Ruling 2.

<sup>275</sup> Kambi v IEBC High Court Election Petition 4 and 5 of 2017.

<sup>276</sup> Ayako v IEBC High Court Election Petition 13 of 2017, Ruling 2.

<sup>277</sup> Mbwana v IEBC, High Court Election Petition 5 of 2017, Ruling 1.

<sup>278</sup> Warrakah v Mbwana, Supreme Court Election Petition 12 of 2018, para. 5.

ruled such omissions were not mere violations of technical requirements, but substantive defects that could not be salvaged by Article 159(2)(d); rather the only recourse was to strike out the petition.<sup>279</sup> On appeal, the appellate court acknowledged the conflicting jurisprudence and the two schools of thought on these matters; however, having concluded the ruling of the High Court was far too “draconian, drastic and unjustified,” the Court of Appeal ordered the case to be returned to the High Court and heard again on merit.<sup>280</sup>

In gubernatorial election petitions for Machakos, Migori, Mombasa, Nairobi, Nyamira and Samburu, courts ruled that inclusion of the deputy governor was not mandatory and non-inclusion was not fatal.<sup>281</sup> But in the Kisii, Kilifi and Kwale gubernatorial election petitions, courts ruled that failure to include the deputy governor rendered the petitions fundamentally incompetent, incurably defective, and warranted striking out.<sup>282</sup> However, in the Kilifi case, the judge stated, “considering the distance travelled in this matter, I find it fair and just to consider the merits of the petition.” In the Kwale case, the court highlighted deficits in existing legislation on the position of deputy governor in relation of gubernatorial election petitions and called on parliament

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<sup>279</sup> Karua v IEBC, High Court Election Petition 2 of 2017, Ruling 3.

<sup>280</sup> Karua v IEBC, Court of Appeal Election Petition Appeal 1 of 2017, Judgement 1.

<sup>281</sup> Ndeti v IEBC High Court Election Petition 1 of 2017, Ruling 1, para. 14; Ayako v IEBC High Court Election Petition 13 of 2017, Ruling 2, para. 33, 38; Hassan v IEBC High Court Election Petition 10 of 2017, Ruling 1, para. 36; Muroko v IEBC High Court Election Petition 23 of 2017, Ruling 2, para. 40; Osebe v IEBC High Court Election Petition 1 of 2017, para. 129; Saimanga v IEBC High Court Petition 1 of 2017, Ruling 2, pg. 4.

<sup>282</sup> Nyaberi v IEBC High Court Election Petition 7 of 2017, Ruling 4, para. 65, 71, 72; Kambi v IEBC High Court Election Petition 4 of 2017, para. 82, 98, 104, 107; Mbwana v IEBC High Court Election Petition 5 of 2017, para. 66, 67, 69, 70.

to “plug the gaps.”<sup>283</sup> Courts in the Kilifi and Kwale cases acknowledged that although the question of whether joinder of the deputy governor was mandatory had been raised before in a number of petitions, there was no unanimity in the determinations of the High Court, and neither the Court of Appeal nor the Supreme Court had pronounced themselves on the matter.

The Supreme Court did have two opportunities to address the questions of whether inclusion of deputy governors was mandatory and the consequences of non-inclusion. When the Kwale case came before the Supreme Court, aside from briefly noting in its review of the case history that respondents had cited failure to include the deputy governor in a preliminary objection before the High Court, the Supreme Court made no further mention of the matter.<sup>284</sup> In the Wajir case, the petition curiously had been heard before the High Court and the Court of Appeal with neither respondents nor the courts taking notice that petitioners had made no reference to the deputy governor. It was not until the case was before the Supreme Court that the deputy governor requested to be joined in the petition as an interested party. The deputy governor then argued that the High Court and Court of Appeal decisions to nullify the election should be voided because the deputy governor was not included as a respondent. In a rather convoluted judgement, the Supreme Court did not address the question of whether inclusion of the deputy governor was mandatory; instead, the court determined that the nullification of the election of a governor also nullified the election of a deputy governor.<sup>285</sup>

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<sup>283</sup> This was a keen observation – whereas other courts had focused on the divergent schools of judicial thought on such matters, the High Court in the Kwale case astutely noted that the entire reason for the conflicting determinations of various courts was precisely the result of a lack of clarity in the laws.

<sup>284</sup> *Warrakah v Mbwana*, Supreme Court Election Petition 12 of 2018, para. 6.

<sup>285</sup> *Mahamud v Mohamad*, Supreme Court Election Petition 7 of 2018, para. 23, 24, 27, 164, 165.

The conflicting judicial approaches to the above matters, divergent schools of thought, lack of unanimity in the High Court and Court of Appeal, and absence of definitive guidance from the Supreme Court all suggest that the conflict over prioritization of procedural technicality in relation to substantive merit is far from resolved. Following the 2013 election cycle, commentators such as Ongoya (2016:242) noted that the judiciary was still “technically minded... despite the clear constitutional dictate that courts should focus on substantive and not procedural justice.” Similarly, Thiankolu (2016:114) proposed that the “transformative dream of the 2010 constitution remains elusive” with regard to election disputes because “legal and procedural technicalities of the pre-2010 constitutional era still rein in the courts.”

Thiankolu (2013:94) argued the jurisprudence on election disputes from 1963 to 2013 exhibited consistency rather than change. Despite the new dispensation under the 2010 Constitution, courts continued to exercise a tacit willingness to expand the law for the purpose of summarily dismissing or striking out election petitions on technicalities and an unflinching hesitation to expand the law for the purpose of determining election disputes on their substantive merits and the factual grounds raised by petitioners. Following the 2017 elections, Thuo (2019:340), among other observers, argued little had changed: “an analysis of the rulings of the courts indicates that a great deal of weight was attached to compliance with the procedural imperatives. Many petitions were struck out for not complying with procedural guidelines.”

This prioritization of technicality over merit was particularly pronounced in the Kirinyaga and Kwale gubernatorial election petitions. After the High Court struck out the Kwale case on tech-

nical grounds of failure to include the deputy governor,<sup>286</sup> the Court of Appeal struck out the petition on technical grounds that a new party seeking to replace the original petitioner, who had withdrawn from the case, did not follow the proper process for substitution.<sup>287</sup> When the case was brought before the Supreme Court, the petition was struck out on technical grounds for failure to specifically indicate under which constitutional provision it was attempting to invoke the jurisdiction of the Supreme Court – Article 163(4)(a) as a right pertaining to matters of constitutional interpretation and application, or Article 163(4)(b) on certification pertaining to matters of general public importance. When petitioners submitted that in the absence of certification the petition was to be regarded as anchored on matters of right, the Supreme Court replied that it does not “assume jurisdiction by way of elimination.”<sup>288</sup>

After the High Court had struck out the Kirinyaga case on technical grounds for failure to specify the date and results of the election,<sup>289</sup> the Court of Appeal ruled the case should have been heard on merit and returned the case to the lower court.<sup>290</sup> On its second hearing of the case, the High Court dismissed the petition on substantive grounds for lack of evidence.<sup>291</sup> When the case was appealed a second time, the Court of Appeal considered the substantive merits of the petition and affirmed the High Court ruling before dismissing the case on the technical grounds

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<sup>286</sup> Mbwana v IEBC High Court Election Petition 5 of 2017, Ruling 1.

<sup>287</sup> Mbwana v IEBC Court of Appeal Election Petition Appeal 4 of 2017.

<sup>288</sup> Warrakah v Mbwana Supreme Court Election Petition 12 of 2018, para. 34, 51, 53.

<sup>289</sup> Karua v IEBC, High Court Election Petition 2 of 2017, Ruling 3

<sup>290</sup> Karua v IEBC, Court of Appeal Election Petition Appeal 1 of 2017.

<sup>291</sup> Karua v IEBC, High Court Election Petition 2 of 2017, Judgement.

that the statute of limitations for hearing election petitions had elapsed.<sup>292</sup> On final appeal before the Supreme Court, having concurred with the appellate court's ruling on timelines, the apex court determined that it was barred from considering the substantive issues of the case, at best the court could only offer solace: "We sympathise with the Petitioner who, without any fault of her own, has been locked out of the seat of justice."<sup>293</sup>

A court-centric analysis of the adjudication of gubernatorial election petitions indicates that although courts have exercised some lenience in terms of making allowances for procedural and technical infractions, the continued prioritization of procedural technicalities, particularly over the substantive merits of cases, remains problematic. This judicial approach suggests resilience of a pre-2010 jurisprudence rather than affirmation of a post-2010 jurisprudence that advances the principles of transformative constitutionalism and electoral justice. However, from a petitioner-centric perspective, issues pertaining to technical and procedural infractions could have been entirely avoided if petitioners had complied with procedural and technical rules in drafting their petitions – it would have behooved petitioners in 2017 to learn from and improve upon the mistakes of petitioners in 2013. Commentators (Ngirachu and Ochieng 2018) have similarly noted that petitioners' overreliance on Article 159(2) as a cure-all for procedural and technical defects in their case filings and the high frequency of lost cases could have been avoided "if only the petitioners had acted more meticulously" in drafting their petitions.

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<sup>292</sup> Karua v IEBC, Court of Appeal Election Petition Appeal 12 of 2018.

<sup>293</sup> Karua v IEBC Supreme Court Election Petition 3 of 2019, para. 58.

## Statutory Forms – Prescribed Format

In the 2017 Machakos gubernatorial election case, petitioners argued the results declared by the IEBC were invalid due to a number of irregularities: several Forms 37A were missing, there were inconsistencies in the information contained in Forms 37A, 37B and 37C, several Forms 37B and 37C used an excel spreadsheet format rather than the official statutory forms, and Form 37C did not include mandatory information from Forms 37A on results from polling stations. Petitioners argued these irregularities constituted violations of the constitution and election laws, and that without Forms 37A, the results declared in Forms 37B and 37C could not be verified, and the authenticity and integrity of the results declared could not be ascertained.<sup>294</sup>

The High Court dismissed the case and faulted the petitioners for a number of reasons of which three are notable: First, the court determined that because agents from the petitioners' party signed Form 37C, the petitioners could not later contest results their agents had already authenticated; the court either failed to notice or was unmoved by the petitioners' claim that the party agent for the position of Woman Representative had signed Form 37C and that their own agent for the gubernatorial position had refused to sign.<sup>295</sup> Second, the court faulted petitioners for

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<sup>294</sup> Ndeti v IEBC High Court Election Petition 1 of 2017, para. 3, 38, 42, 43. Forms 37A record results for gubernatorial elections in each polling station within a county. Forms 37B aggregate polling station data from all Forms 37A within a constituency. Constituencies are electoral districts within counties. Forms 37C aggregate data from all Forms 37A and 37B within a county and are used to declare final results for gubernatorial elections (see Appendices).

<sup>295</sup> This is a pertinent matter that relates to broader problems with the use of party agent by candidates and petitioners, which are discussed later in this chapter. Party agents are appointed by candidates and political parties to observe the conduct of elections, to document irregularities and illegalities and report them to relevant authorities (e.g. IEBC, police), to obtain copies of results forms, and to testify as witnesses in election petitions. The role of party agents is provided for in Elections (General) Regulations of 2012, Section 79(3) The presiding officer shall—(b) request each of the candidates or agents then present to append his or her signature; (4) Where any candidate or agent refuses or otherwise fails to sign the declara-

failing to provide sufficient evidence on which specific polling stations were affected by irregularities, and proposed such claims could have been substantiated only through an application for scrutiny, which petitioners had failed to pursue. Third, the court ruled that the county returning officer was not required to verify results from polling stations as contained in Forms 37A, and that only Forms 37B from constituencies were required to complete Form 37C.<sup>296</sup>

The Court of Appeal reached an entirely different conclusion, mainly regarding Form 37C. The core of the petitioners' argument was that the county returning officer had admitted in her testimony before the High Court that she used an excel spreadsheet in place of the officially prescribed Form 37C and did not make reference to polling station data from Forms 37A when she declared the final results in Form 37C. Petitioners argued failure to comply with these mandatory requirements meant the election was not verifiable and in violation of Article 86 of the Constitution, Section 39(1B) of the Elections Act, and Section 87(2) of the Elections (General) Regulations.<sup>297</sup> Respondents proposed only Forms 37A were required to be in the prescribed format and Form 37C was allowed to be in excel format, and that the role of a county returning officer in a gubernatorial election was distinct from that of a national returning officer in a presidential election, because only the latter was required to verify and include results from the A series of forms in the C series of forms whereas the same did not apply in gubernatorial elections.<sup>298</sup>

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tion form, the candidate or agent shall be required to record the reasons for the refusal or failure to sign. Petitioners in the Machakos gubernatorial petition would have been in a better position to contest Form 37C had their agent indicated reasons for refusing to sign in the space provided for on the form.

<sup>296</sup> Ndeti v IEBC High Court Election Petition 1 of 2017, para. 35, 36, 37, 39, 44, 45, 48.

<sup>297</sup> Ndeti v IEBC Court of Appeal Election Appeal 8 of 2018, para. 75, 80.

<sup>298</sup> Ndeti v IEBC Court of Appeal Election Appeal 8 of 2018, para. 82, 83. For presidential elections, results from polling stations are recorded in Forms 34A. Forms 34B aggregate polling station data from all Forms



The Court of Appeal was perplexed that respondents had provided no explanation for why IEBC officials used an excel format for Form 37C and not the official form specifically prescribed by law, particularly considering that such forms constitute an integral part of the election process. This is because the outcome of an election depended largely on the information contained in such forms, and because many election disputes were based on irregularities in the execution of these forms. To support its conclusion that Form 37C was required to be in a prescribed format, the Court of Appeal cited another appellate court ruling in *IEBC v Kiai*, which the Supreme Court had cited with approval in *Odinga v IEBC 2017*: “We are satisfied that with this elaborate system, the electronic transmission of the already tabulated results from the polling stations, *contained in the prescribed forms*, is a critical way of safeguarding the accuracy of the outcome of elections.”<sup>299</sup> Further, the Court of Appeal observed that the “need for propriety in the prescribed Forms” was expressed in *Odinga v IEBC 2017* where the Supreme Court stated, “expectations of transparency, accountability, simplicity, security, accuracy, efficiency and especially, verifiability of the electoral process... should be understood to refer to... an election with a proper and verifiable record made *on the prescribed forms*, executed by authorized election officials...”<sup>300</sup>

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34A within a constituency. Constituencies are electoral districts within counties. Form 34C aggregates data from Forms 34A and 34B from all 47 counties and is used to declare final results for the presidential election (see Appendices).

<sup>299</sup> *Ndeti v IEBC Court of Appeal Election Appeal 8 of 2018*, para. 104, 105; *IEBC v Kiai Court of Appeal Civil Appeal 105 of 2017*, pg. 33; *Odinga v IEBC 2017*, para. 263. Italicized emphasis added.

<sup>300</sup> *Ndeti v IEBC Court of Appeal Election Appeal 8 of 2018*, para. 100, 106; *Odinga v IEBC 2017*, para. 282.

The Court of Appeal determined that Form 37C, in its prescribed format, included a column for recording information from polling stations, meaning it was designed specifically to capture results from Forms 37A; thus, there was a clear duty to verify results from polling stations, and it was “inconceivable” for the county returning officer to “declare results in Form 37C without linking those results to the source in Forms 37A.”<sup>301</sup> To support its position on the centrality of primary documents (A series Forms), the Court of Appeal again referenced the appellate court ruling in *IEBC v Kiai*, which had been affirmed by the Supreme Court in *Odinga v IEBC 2017*: “Accuracy of the count is fundamental in any election... Numbers are therefore not only unimpeachable, but they are everything in an election. The lowest voting unit and the first level of declaration of presidential election results is the polling station. The declaration form containing those results is a primary document [A series forms] and all other forms subsequent to it [B and C series forms] are only tallies of the original and final results recorded at the polling station.”<sup>302</sup>

The appellate court also quoted the Supreme Court’s determination in the presidential petition: “The said verification could only have been possible if, before declaring the results, the [IEBC] had checked the aggregated tallies in Forms 34B against the scanned Forms 34A... Given the fact that all Forms 34B were generated from the aggregates of Forms 34A, there can be no logical explanation as to why, in tallying the Forms 34B into the Form 34C, this primary document (Form 34A), was completely disregarded.”<sup>303</sup> Thus, the Court of Appeal was proposing that just

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<sup>301</sup> *Ndeti v IEBC Court of Appeal Election Appeal 8 of 2018*, para. 97, 99.

<sup>302</sup> *Ndeti v IEBC Court of Appeal Election Appeal 8 of 2018*, para. 98; *IEBC v Kiai Court of Appeal Civil Appeal 105 of 2017*, pg. 40; *Odinga v IEBC 2017*, para. 283.

<sup>303</sup> *Ndeti v IEBC Court of Appeal Election Appeal 8 of 2018*, para. 100; *Odinga v IEBC 2017*, para. 290.

as the Supreme Court had impugned the IEBC for failing to include results from Forms 34A in Form 34C in its decisions to nullify the presidential election, the Court of Appeal was applying the same reasoning in determining that the IEBC also should be impugned for failing to include results from Forms 37A in Form 37C in the Machakos gubernatorial election.

Contrary to the respondents' claim that the verification role of a national returning officer in a presidential election was different than a county returning officer in a gubernatorial election, the Court of Appeal determined that returning officers in both elections were enjoined to verify results as declared at polling stations, and that the underlying provisions contained in the laws and regulations on elections, the principles in Articles 81 and 86 of the Constitution, and the determinations of the Supreme Court in the presidential election, all applied with equal force to gubernatorial elections.<sup>304</sup> The Court of Appeal concluded that the Machakos gubernatorial election failed the constitutional test of verifiability, and was therefore invalid and void. The court ordered the IEBC to organize a fresh gubernatorial election and to ensure its conduct was in full compliance with the Constitution, the Elections Act and the Regulations.<sup>305</sup>

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<sup>304</sup> Ndeti v IEBC Court of Appeal Election Appeal 8 of 2018, para. 96, 98, 99, 100.

<sup>305</sup> Ndeti v IEBC Court of Appeal Election Appeal 8 of 2018, para. 53, 110, 115.

For clarity, the specific provisions of laws, regulations and the constitution that are germane to this discussion are: Articles 81 and 86 of the Constitution,<sup>306</sup> Elections Act Section 39,<sup>307</sup> and Elections (General) Regulations Section 87.<sup>308</sup> Clearly there are some gaps and inconsistencies in these provisions: Article 86(c) refers to returning officers and polling stations but does not specify which returning officers (constituency, county and/or national), which could suggest the provision applies equally to returning officers at all levels of elections. Section 39(1B) of the Act refers to county returning officers and constituencies, whereas Section 87(2b) of the Regulations refers to county returning officers and polling stations. Both the Act and the Regulations require county returning officers to use prescribed forms (set out in the Schedule), but the former refers to constituencies (B series forms) and the latter to polling stations (A series forms). Such inconsistencies and lack of clarity in the legal provisions on elections may account, in part, for the inconsistencies and discrepancies in the emerging jurisprudence on election disputes, which were evident in the conflicting judgments of the High, Appeal and Supreme Courts in the Machakos

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<sup>306</sup> Constitution of Kenya 2010, Article 81 General principles for the electoral system: The electoral system shall comply with the following principles— (e) free and fair elections, which are— (iv) transparent; and (v) administered in an impartial, neutral, efficient, accurate and accountable manner; Article 86 Voting: At every election, the Independent Electoral and Boundaries Commission shall ensure that— (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer.

<sup>307</sup> Elections Act of 2011, Section 39(1B) The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the Governor, Senator and Women Representative. Section 39(1C) For purposes of a presidential election the Commission shall— (a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre.

<sup>308</sup> Elections (General) Regulations of 2012, Section 87(2) The county returning officer shall upon receipt of the results from the constituency returning officers as contemplated under regulation (1)(a) tally and announce the results... (b) complete Forms 37C, 38C and 39C set out in the Schedule in which the county returning officer shall declare... (iii) votes cast for each candidate ... in each polling station.

gubernatorial petition. A pertinent question to ask is whether the conflicting judicial determinations of various levels of courts raise or lower the standards for the conduct of elections by the IEBC and the adjudication of elections by courts?

On final appeal, the Supreme Court noted that respondents had admitted the impugned Form 37C was not in the prescribed form and did not include a column for results from the polling stations as required by Regulation 87(2b); but the court took at face value the county returning officer's testimony that she had received all Forms 37A before declaring the final results and that all were "deposited in court pursuant to an order of the" High Court.<sup>309</sup> The Supreme Court did not interrogate the county returning officer's contradictory statement in which "she conceded that she did not produce those forms in court," nor how forms "deposited in court" proved that she had all Forms 37A at the time of declaring the final results or disproved the petitioners' claims that a number of Forms 37A were missing when the results were declared.

The Supreme Court also did not acknowledge that the petitioners had testified before the High Court that Form 37C contained the signature of the agent for Woman Representative of the same party and that their gubernatorial agent had refused to sign the document. Instead, the Supreme Court determined the document included signatures of IEBC officials and "candidates' agents including those of the [petitioners]," and that the "countersigning of the result forms by the candidates and/or their agents is a declaration that they have verified and are satisfied that the data therein contained is correct." Curiously, the Supreme Court determined "It is not claimed in this case that the [petitioners or their agents] disputed the results on any of those

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<sup>309</sup> Mutua v Ndeti Supreme Court Election Petition 11 and 14 of 2018, para. 48, 49, 51, 74.

forms and refused to countersign it” – yet these claims were the entire basis of the petitioner’s case before the High Court. The Supreme Court agreed with the High Court in finding that because “the respondents having abandoned their application for scrutiny which would have cast doubt, if any, on the results in those forms, we have no basis to find that the Machakos County gubernatorial election was unverifiable” as was the conclusion of the Court of Appeal.<sup>310</sup>

The Supreme Court focused on three questions: whether the county returning officer was required to include polling station data in Form 37C, whether Section 87(2b) of the Elections (General) Regulations was ultra vires Section 39(1B) of the Elections Act, and whether deviation from use of Form 37C in the prescribed format was consequential or immaterial.<sup>311</sup> Contrary to the Court of Appeal, the Supreme Court ruled the county returning officer was only required to record in Form 37C results from the constituencies contained in Forms 37B as per Section 39(1B) of the Act and was not required to include polling station data contained in Forms 37A as per Section 87(2b) of the Regulations. The Supreme Court’s rationale was that because inclusion of polling station data from Forms 37A in Form 37C was an additional requirement in the Regulations, which was subsidiary legislation, and was not a requirement contained in the Act, which was the parent legislation, Section 87(2b) of the Regulations was ultra vires Section 39(1B) of the Act, and therefore “null and void ab initio.” The Supreme Court stated, “It follows that we should assume it never existed and the [county returning officer] was right in ignoring it and omitting from the impugned Form 37C ... a column with results from the polling stations.”<sup>312</sup>

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<sup>310</sup> Mutua v Ndeti Supreme Court Election Petition 11 and 14 of 2018, para. 50, 72, 73, 74.

<sup>311</sup> Mutua v Ndeti Supreme Court Election Petition 11 and 14 of 2018, para. 53, 55, 56.

<sup>312</sup> Mutua v Ndeti Supreme Court Election Petition 11 and 14 of 2018, para. 64, 67, 68.

Regarding the last question, the Supreme Court faulted the appellate court for failing to ask “whether or not the deviation on the impugned Form 37C in this case affected its ‘substance’ or was in any way ‘calculated to mislead’ and if so, how” – yet the Supreme Court had neither asked nor answered such questions in the August 2017 presidential petition. The Supreme Court determined that deviation from the prescribed format in the impugned Form 37C was minor, immaterial and inconsequential. The Supreme Court ruled the Court of Appeal was wrong to conclude that the Machakos gubernatorial election was unverifiable on the basis of the impugned Form 37C, because “unverifiability cannot be pegged only on failure to transpose the polling station results on Form 37C” without evidence from scrutiny, which the petitioners’ had failed to pursue. It was on these grounds that the Supreme Court struck out the ruling of the Court of Appeal and upheld the election.<sup>313</sup>

Many of the Supreme Court’s determinations in the Machakos gubernatorial election petition contradicted its determinations on similar issues raised in the August 2017 presidential election petition. For example, in the gubernatorial petition, the Court of Appeal found that “beyond the statement that Form 37C was provided in excel form, no explanation appears to have been offered why the prescribed form was not used” and that “it is inconceivable to declare results in Form 37C without linking those results to the source, Forms 37A”; therefore, the election had “failed the constitutional test of verifiability.”<sup>314</sup> The appellate court’s findings seemed to mirror those of the Supreme Court in the presidential petition, which faulted the IEBC for its “reconfiguration of Form 34C so as to render Forms 34A irrelevant in the final computation of the

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<sup>313</sup> Mutua v Ndeti Supreme Court Election Petition 11 and 14 of 2018, para. 69, 71, 75, 92.

<sup>314</sup> Ndeti v IEBC Court of Appeal Election Appeal 8 of 2018, para. 104, 99.

results,” and for not “electronically transmitting in the prescribed form, the tabulated results of an election for the president from a polling station.”<sup>315</sup> The Supreme Court in presidential case noted, “there is a reasonable expectation that all the forms ought to be in a standard form and format,” and considering that the IEBC provided “no plausible explanation for this discrepancy,” how “could these critical documents be still considered genuine?” The Supreme Court concluded such irregularities “are incidences where the accountability and transparency of the forms are in question,” which “go to the very heart of electoral integrity.”<sup>316</sup>

It is important to note that the specific irregularity the Supreme Court had cited regarding Form 34C in the presidential petition was that the IEBC had provided for scrutiny a certified copy of the original form and “no explanation was forthcoming to account for the whereabouts of the original Form”,<sup>317</sup> yet this was not a violation of any provision of the constitution, law or regulation, nor court order as the court had explicitly allowed for certified copies of original documents.<sup>318</sup> Thus, the IEBC had used the original form in the presidential election, but was faulted for providing the court with a copy of the original in the presidential election petition; whereas the irregularity the Court of Appeal had cited regarding Form 37C in the gubernatorial election was that the original form was never used, rather an excel spreadsheet was used instead.

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<sup>315</sup> Odinga v IEBC 2017 para. 254, 300.

<sup>316</sup> Odinga v IEBC 2017, para. 359, 362, 367, 378.

<sup>317</sup> Odinga v IEBC 2017, para. 365, 377.

<sup>318</sup> Odinga v IEBC 2017, para. 340.



Although the Supreme Court in the gubernatorial case determined that inclusion of polling station data in Form 37C was not required because Section 87(2b) of the Regulations was ultra vires Section 39(1B) of the Elections Act, the court failed to acknowledge that failure to use prescribed forms (set out in the Schedule) was a violation of a requirement mandated in both the Regulations and the Act; instead, the court ruled that such deviation from the prescribed Form 37C was minor, immaterial and inconsequential. This was contrary to the Supreme Court's position in the presidential case where it observed that verification of Forms 34A from all polling stations was a mandatory requirement because Articles 81 and 86 of the Constitution demand "transparency, accountability, simplicity, security, accuracy, efficiency and especially, verifiability of the electoral process," which "should be understood to refer to... an election with a proper and verifiable record made on the prescribed forms, executed by authorized election officials." Contrary to its finding that such irregularities cited in the gubernatorial petition were minor, immaterial and inconsequential, in the presidential case, the Supreme Court stated, "we find it difficult to categorize these violations of the law as 'minor inadvertent errors'... IEBC failed to observe the mandatory provisions of Article 86 of the Constitution requiring it to conduct the elections in a simple, accurate, verifiable, secure, accountable and transparent manner."<sup>319</sup>

Also of note is how the Supreme Court established a fluctuating prioritization of the various legal provisions on elections stemming from the constitution, legislative acts and regulations, and institutional procedures established by the IEBC. In the Machakos gubernatorial petition, the Supreme Court minimized the importance of the Elections Regulations in relation the Elections Act by ruling that any requirement in the Regulations that was not included in the Act

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<sup>319</sup> Odinga v IEBC 2017, para. 282, 299

was ultra vires, null and void. Yet in the August 2017 presidential petition, the Supreme Court stated, “The appellate Court had earlier made a pronouncement [in IEBC v Kiai] with which we are in total agreement, to the effect that: ‘It is clear... that the polling station is the true locus for the free exercise of the voters’ will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion.’”<sup>320</sup> In this quote, the Court of Appeal established the mandatory requirement and equal importance of adherence to both the Act and Regulations, and by citing the quote with approval the Supreme Court affirmed the same in the presidential petition.

Elsewhere in the presidential petition, the Supreme Court stated, “The verification process at all these levels is elaborately provided for in the Elections Act and the Regulations thereunder,”<sup>321</sup> which again affirmed the two provisions were complementary and equally important. In the Machakos gubernatorial petition, the Court of Appeal cited IEBC v Kiai and the Supreme Court in Odinga v IEBC 2017 to support its interpretation of the Act and the Regulations as being complementary provisions bearing equal weight;<sup>322</sup> but the Supreme Court gave a contradictory ruling in finding the two provisions were not equal – that compliance with the Act was mandatory, whereas noncompliance with the Regulations was inconsequential. The Supreme Court’s reasoning in the 2017 Machakos gubernatorial case was also a departure from its reasoning in

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<sup>320</sup> Odinga v IEBC 2017, para. 264.

<sup>321</sup> Odinga v IEBC 2017, para. 288.

<sup>322</sup> Ndeti v IEBC Court of Appeal Election Appeal 8 of 2018, para. 52, 115, 117.

the 2013 Meru gubernatorial case wherein the court established an equal footing of the Act and the Regulations as constituting “the substantive and procedural law for the conduct of elections,” and that “the Elections Act and the Regulations are normative derivatives of the Constitution and, in interpreting them, a Court of law cannot disengage from the Constitution.”<sup>323</sup>

Many of the irregularities cited by the Supreme Court in the August 2017 presidential petition were violations of requirements in the Regulations that were not specified in the Act.<sup>324</sup> For example, Elections Regulations Section 87 required verification of results in Forms 34A and 34B before completion of Form 34C, which is then signed and dated; whereas Elections Act Section 39 includes none of these requirements. The court stated, “one of the most glaring irregularities... was the deployment... of prescribed forms that either lacked or had different security features.” This was despite the court’s repeated acknowledgement that inclusion of security features was an institutional provision the IEBC had established on its own accord “out of abundant caution,” which was “not a requirement by the law” or any “specific [legal] provision.”<sup>325</sup> In the presidential petition, the Supreme Court ruled irregularities pertaining to noncompliance with the Regulations and the IEBC’s institutional procedures constituted violations of the constitution that were grave enough to warrant nullification of the election. In the Machakos gubernatorial petition, the Supreme Court faulted the Court of Appeal and reversed its judgement by ruling that irregularities pertaining to noncompliance with the Elections Regulations and Elections Act did not constitute violations of the constitution or warrant nullification of the election.

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<sup>323</sup> *Munya v Kithinji* Supreme Court Election Petition 2B of 2014, para. 216, 244.

<sup>324</sup> *Odinga v IEBC* 2017, para. 357, 365.

<sup>325</sup> *Odinga v IEBC* 2017, para. 362, 375.

Perhaps cognizant of criticisms likely to ensue because its reasoning in the gubernatorial petition could be perceived as contradicting its reasoning in the presidential petition, the Supreme Court attempted to justify the application of different standards for the conduct of elections for different elective seats. The court stated, “It is common knowledge that the position of the President is different from those of other elective positions. The President is not only the head of the Executive Arm of Government; he is also the head of State and the Commander in Chief of the Defence Forces of the Republic of Kenya. Because of the importance of that office, it is clear to us that Section 39 of the Elections Act demands for a more rigorous process in the tally, collation and verification of the presidential election results than those of the other elections.”<sup>326</sup>

Be that as it may, and irrespective of the Elections Act, the Elections Regulations establish a far more “rigorous process” for elections, and many of the irregularities the Supreme Court cited as the basis for its nullification of the presidential election were violations that contravened not only the Elections Regulations but also the Constitution. In the Machakos gubernatorial case, the Supreme Court stated, “The distinction we have found between the handling of presidential election results and those of others does not in any way affect the verification demanded by Article 86 of the Constitution.”<sup>327</sup> But the court’s ruling in the gubernatorial case did affect the verification demanded by the Elections Regulations, which the court found were valid requirements for the presidential election but null and void for gubernatorial elections. The Supreme Court’s rulings in the presidential and gubernatorial cases raised the question: if deviation from

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<sup>326</sup> Mutua v Ndeti Supreme Court Election Petition 11 and 14 of 2018, para. 65.

<sup>327</sup> Mutua v Ndeti Supreme Court Election Petition 11 and 14 of 2018, para. 72.

Form 34C in the presidential election violated Article 86, how was it possible the same did not apply for deviation from Form 37C in the gubernatorial election?

The Supreme Court attempted to establish a “clear distinction between the handling of results in the presidential election and other elections” on the basis of Section 39 of the Elections Act. This logic was problematic for a number of reasons. First, the court noted “it is important to remember the historical background giving rise to” the Act. The court then recounted that following the fraudulent 2007 presidential election and post-election violence, the government established the Independent Review Commission (IREC/Kriegler), which made recommendations for improving the “integrity of vote counting, tallying and announcement of presidential election results,” including “use of technology in the electoral process,” which were enacted in the Elections Act.<sup>328</sup> It is important to note here that neither the Elections Act nor electoral violence apply exclusively to presidential elections. Violence also has accompanied nonpresidential elections throughout Kenya’s history and more so since promulgation of the 2010 Constitution and the advent of the devolved system of government, which established a multiplicity of new elective seats and new centers of power. Governorships have become hotly contested battlegrounds rife with violence as attested to in many counties before and after the 2017 gubernatorial elections (Mutisya 2017; Owino 2017b; Nyamori 2017a; Anderson 2017).<sup>329</sup> Furthermore, the Elections Act includes provisions on the integrity of vote counting, tallying and announcement of results that apply to all six categories of elective seats, not just presidential elections.

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<sup>328</sup> Mutua v Ndeti Supreme Court Election Petition 11 and 14 of 2018, para. 59, 60.

<sup>329</sup> E.g. Electoral violence over the gubernatorial election in Marsabit Country was addressed in detail in Kanacho v IEBC High Court Election Petition 2 of 2017, Ruling 1.

Second, the court attempted buttress its position that the Elections Act established a “clear distinction between the handling of results in the presidential election and other elections” by stating: “Before we analyze the new subsection (1B), we would like to deal with the new subsection (1C) ... Unlike subsection (1B), subsection (1C) requires ... electronic transmission” of presidential results, whereas there was no similar provision for results of other elective seats.<sup>330</sup> The problem with this line of reasoning was that neither petitioners nor the Court of Appeal had raised any question regarding the electronic transmission of any results whether presidential or gubernatorial; thus, highlighting Section 39(1C) was irrelevant in the context of the Machakos gubernatorial petition. The issues before the Court of Appeal, and subsequently the Supreme Court, were Section 39(1B) of the Elections Act in relation to Section 87(2b) of the Elections Regulations, and as pertained to use of prescribed forms, verification of results, and the inclusion all results from polling stations in Form 37C – these issues were a near exact replica of petitioners’ arguments in the August 2017 presidential petition. By focusing on the irrelevant matter of electronic transmission of results in the presidential election as per Section 39(1C), the Supreme Court seemed to be attempting redirect attention away from how the irregularities cited by petitioners in the gubernatorial and presidential election cases were similar with regard to failure to use prescribed forms as per Sections 39(1A), (1B) and (1C) of the Act.

Third, the Supreme Court’s judgement in the Machakos gubernatorial election petition, which was dated December 21, 2018, quoted the wrong version of Section 39 of the Elections Act. Parliament, with a Kenyatta-aligned Jubilee party majority, rushed enactment of Election Laws

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<sup>330</sup> Mutua v Ndeti Supreme Court Election Petition 11 and 14 of 2018, para. 62, 63.

(Amendment) Act 34 of 2017, which became law on November 2, 2017. The newly amended version of Section 39(1C) stated: For purposes of a presidential election, the Commission shall— (a) electronically transmit and physically deliver the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre. The version of Section 39(1C) that was in force during the August 8, 2017 elections was Election Laws (Amendment) Act 36 of 2016, enacted on September 20, 2016, which stated: For purposes of a presidential election the Commission shall— (a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre. The primary difference between the two versions is that the older one states “in the prescribed form,” which is omitted and replaced with “and physically deliver” in the newer version. Clearly the previous version of the law that was in force during the disputed election, which stipulates “in the prescribed form,” was far more germane in a gubernatorial election petition that was specifically contesting the IEBC’s failure to record election results “in the prescribed form”; whereas the Supreme Court’s reference to a new provision of a law pertaining to electronic transmission of presidential results when the same does not apply to gubernatorial results was not at all germane in a gubernatorial election petition.

Fourth, the court’s use of the newer version of the law was curious for a number of reason: (A) In its December 11, 2017 judgement to uphold the second (repeat) presidential election held on October 26, 2017, the Supreme Court (majority) noted regarding Election Laws (Amendment) Act 34 of 2017, “the common practice is that legislation should be effected prospectively and not retrospectively; that is, laws should be forward-looking and should not apply backwards in

time”; thus the law should not be applied retroactively to any election prior to the date of enactment of the law.<sup>331</sup> (B) Also in its December 11, 2017 judgement, despite acknowledging that the “unconstitutionality or invalidity, or otherwise” of the amended law was currently pending determination by the High Court, the Supreme Court proceeded to “find that the applicable election law, in respect of the conduct of the 26th October, 2017 election was the Elections Act, 2011 [i.e. older version], the Elections Laws (Amendments) Act, 2017 (Act No. 34 of 2017) [i.e. newer version] not having come into effect as at the time of that election, and the same not having had retrospective application.”<sup>332</sup>

Thus, over a year prior to delivering its judgement on the Machakos gubernatorial election petition, the Supreme Court had already affirmed the older version of the law was to be correctly applied to petitions contesting the August 8, 2017 elections, and that the constitutionality of the newer version was in doubt. (C) On April 6, 2018, the High Court declared a number of provisions in the amended law, including Section 39(1C), were invalid and unconstitutional.<sup>333</sup> The High Court determined the newer version was problematic specifically because it deleted the requirement for results to be in “prescribed form,” which was “an essential safeguard that guaranteed verifiability, transparency and accountability of the election results.” The High Court found that deleting the words “prescribed form... not only opens the results to possible adulteration and manipulation but also mischief. The amendment obviously reverses the gains the

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<sup>331</sup> Mwau v IEBC Supreme Court Election Petition 2 and 4 of 2017, para. 379.

<sup>332</sup> Mwau v IEBC Supreme Court Election Petition 2 and 4 of 2017, para. 188, 384, 385, 389.

<sup>333</sup> Katiba Institute v Attorney General High Court Constitutional Petition 548 of 2017, para. 125.



country had made in electoral reforms including results transmitted in a particular form.”<sup>334</sup> Moreover, the High Court found support for its position by citing the Supreme Court’s judgement in the August 2017 presidential election petition. Thus, in its judgement on the Machakos gubernatorial election, the Supreme Court acknowledged it was quoting the new version of the law,<sup>335</sup> yet it failed to acknowledge that the High Court had already declared the amended sections invalid and unconstitutional nine months earlier.

In the Wajir gubernatorial petition, the High Court nullified the election mainly for two reasons. First, the court found petitioners had succeeded in challenging the authenticity of the respondent’s academic credentials, and because the respondent failed to present himself in court to disprove the allegations, the court determined he did not possess prerequisite qualifications to vie for governor.<sup>336</sup> Second, the court found the IEBC had committed a number of irregularities including: failure to append official stamps and signatures on statutory forms, use of nonstandard statutory forms that lacked security features, failure to countersign alterations on results forms, and missing, blank and photocopied forms submitted in place of originals for scrutiny.<sup>337</sup>

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<sup>334</sup> Katiba Institute v Attorney General High Court Constitutional Petition 548 of 2017, para. 82, 84, 85.

<sup>335</sup> Mutua v Ndeti Supreme Court Election Petition 11 and 14 of 2018, para. 62, 63, 64.

<sup>336</sup> Mohamad v Mohamed High Court Election Petition 14 of 2017, para. 192, 201.

<sup>337</sup> Mohamad v Mohamed High Court Election Petition 14 of 2017, para. 87, 92, 93, 100, 109, 153.

To support its determinations, the High Court cited *Odinga v IEBC 2017* wherein the Supreme Court stated such irregularities “go to the very heart of electoral integrity.”<sup>338</sup> However, whereas the Supreme Court in its judgement on the presidential election limited itself to posing, rather than definitively answering, rhetorical questions,<sup>339</sup> the High Court in the *Wajir* case went further by definitively declaring that statutory forms not signed by IEBC officials were “worthless pieces of paper” containing results that were not authenticated and could not be counted in the final results. The High Court found such an irregularity was not a “mere error,” but a serious violation of a mandatory requirement under Section 79(6) of the Elections Regulations, and a criminal offence under Section 6(j) of the Election Offences Act (punishable by a two million shilling fine and/or five years imprisonment).<sup>340</sup>

The High Court was particularly critical of irregularities pertaining to use of prescribed forms. Three observations are noteworthy: First, the court noted the IEBC had provided no explanation for why information from some Forms 37A was missing in Form 37C. The court determined such an irregularity was a serious breach of the mandatory requirement for inclusion of results from each polling station as per Section 87(2) of the Elections Regulations, which rendered the final results “unaccountable and unverifiable.”<sup>341</sup> The Court of Appeal in the *Machakos gubernatorial*

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<sup>338</sup> *Mohamad v Mohamed High Court Election Petition 14 of 2017*, para. 87; *Odinga v IEBC 2017*, para. 378.

<sup>339</sup> E.g. *Odinga v IEBC 2017*, para. 377: “Isn’t the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the ‘numbers’ on that form?”

<sup>340</sup> *Mohamad v Mohamed High Court Election Petition 14 of 2017*, para. 88, 91.

<sup>341</sup> *Mohamad v Mohamed High Court Election Petition 14 of 2017*, para. 103, 104.

petition had actually cited the High Court ruling in the Wajir case when it reached the same conclusion on this matter,<sup>342</sup> which the Supreme Court later reversed by ruling Section 87(2) of the Elections Regulations was ultra vires Section 39(1B) of the Elections Act. It is pertinent to note that both the High Court and the Court of Appeal in two different election petitions adopted similar reasoning to arrive at the same conclusion on the matter, yet the Supreme Court adopted different reasoning to arrive at the opposite conclusion. This is clear evidence of lack of uniformity and inconsistency in the emerging jurisprudence on election petitions.

Second, without directly referencing the Supreme Court in the presidential election petition, the High Court made a near verbatim statement: “The principles set out in Articles 81 and 86 of the Constitution are to the effect that; the electoral process must be accurately and competently conducted; the election should have a proper and verifiable record made on prescribed forms and executed by the relevant authorized election officials; an accountable election whose record is capable of being audited.”<sup>343</sup> Third, the High Court was exceptionally critical of the IEBC for employing “election officials who were incompetent or negligent,” and “shocked” that the IEBC would blame failure to use prescribed forms on “paper eating printers.” The court noted it was a “tragedy” that an “institution which gobbled over KShs.49 billion for the said election would not be expected to supply its officers with faulty equipment for use in such an important exercise.”<sup>344</sup> The High Court seemed to mirror the sentiments expressed by the Supreme Court

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<sup>342</sup> Ndeti v IEBC Court of Appeal Election Petition 8 of 2018, para. 97.

<sup>343</sup> Mohamad v Mohamed High Court Election Petition 14 of 2017, para. 202; Odinga v IEBC 2017, para. 282.

<sup>344</sup> Mohamad v Mohamed High Court Election Petition 14 of 2017, para. 106, 109.

in the presidential election petition: “We were disturbed by the fact that after an investment of tax payers money running into billions of shillings for the printing of election materials, the Court would be left to ask itself basic fundamental questions regarding the security of voter tabulation forms.”<sup>345</sup> The High Court nullified the Wajir gubernatorial election because it was not conducted in accordance with the constitution and election laws, and because the totality of the irregularities affected the results and the credibility of the election.<sup>346</sup>

On appeal, despite the fact that High Court had nullified the Wajir gubernatorial election mainly on the basis of two grounds – the winning candidate lacked the prerequisite qualifications to vie in the election; and the IEBC committed irregularities that constituted noncompliance with the constitution and laws, and affected the results – the Court of Appeal determined that “in view of the centrality that the appellant’s educational qualifications have assumed in this appeal,” this was the only matter it would evaluate.<sup>347</sup> The appellate court found that the High Court was correct in nullifying the election on the basis of that the appellant was not validly elected because he was not qualified to vie. Based on the strength of the first ground alone, the appellate court concluded that further analysis of the second ground – whether the election was properly conducted or fraught with irregularities – was unnecessary and immaterial. The appellate court stated, “That being the inescapable adjudicative result... renders our examination of the other grounds of appeal quite superfluous... we do not see any utility in embarking on a forensic

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<sup>345</sup> Odinga v IEBC 2017, para. 376.

<sup>346</sup> Mohamad v Mohamed High Court Election Petition 14 of 2017, para. 208

<sup>347</sup> Mahamud v Mohamad Court of Appeal Election Petition 2 of 2018, pg. 2.

examination of the other grounds in pursuit of a merely didactic of academic aim.”<sup>348</sup> By choosing to focus exclusively on a single ground of the petition – the qualifications of a candidate, which was a pre-election matter – and deeming the other grounds of the petition “superfluous,” the Court of Appeal inadvertently foreclosed further consideration other substantive issues raised in the petition – whether the election was conducting in accordance with the constitution and laws, and whether irregularities affected the integrity and results of the election.

On final appeal, the Supreme Court framed three questions for determination in its majority judgement: (a) whether the High Court, sitting as an election court, had jurisdiction to entertain a pre-election matter; (b) whether the Supreme Court had jurisdiction to determine issues that were never addressed by the Court of Appeal; and (c) whether the appellant had the requisite academic qualification to vie for the position of governor.<sup>349</sup> On the first question, the Supreme Court majority determined that both the High Court, sitting as an election court, and the Court of Appeal wrongly assumed jurisdiction to determine a pre-election matter regarding the academic qualifications of a candidate. The Supreme Court majority’s rationale was that the proper timeframe to resolve pre-election disputes was before the election and the proper venues were the Political Parties Disputes Tribunal, the IEBC Dispute Resolution Committee, and the High Court, sitting as a judicial review court; however, under certain, limited circumstances, a High Court, sitting as an election court, could consider pre-election matters (e.g. if such matters “go to the root of the election” or if the matter was unknown before the election).<sup>350</sup> On the

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<sup>348</sup> Mahamud v Mohamad Court of Appeal Election Petition 2 of 2018, pg. 20.

<sup>349</sup> Mahamud v Mohamad Supreme Court Election Petition 7 of 2018, para. 57.

<sup>350</sup> Mahamud v Mohamad Supreme Court Election Petition 7 of 2018, para. 68, 80.

second question, because the Court of Appeal had declared all other grounds of the petition to be moot, the Supreme Court majority concluded “in the absence of a determination by the Court of Appeal on an issue, no appeal can properly fall before the Supreme Court... the Court has to down its tools at this stage.”<sup>351</sup> The majority left the third question unanswered.

Justices Maraga and Lenaola offered separate dissenting opinions. Maraga found the first question was far less conclusive than the answer provided by the majority. He noted, “A survey through the judgments of this [Supreme] Court and other Superior Courts reveal a divided opinion on the election courts’ jurisdiction to entertain pre-election day nomination disputes.”<sup>352</sup> In fact, the Supreme Court delivered a judgement on the same issue a week prior in the Laikipia gubernatorial case, wherein the majority noted that the conflicting opinions on the matter “cannot be resolved by either, out-rightly discounting one school of thought or wholly embracing the other,” and wherein Maraga delivered a similar dissenting opinion.<sup>353</sup> Contrary to the majority in the Wajir case, both dissenting judges found that because a candidate’s academic qualification was a mandatory prerequisite for eligibility grounded in the constitution and went to the root of the validity of an election, it was a pre-election matter to which a petitioner had a right to challenge and the High Court, sitting as an election court, had jurisdiction to determine.<sup>354</sup>

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<sup>351</sup> Mahamud v Mohamad Supreme Court Election Petition 7 of 2018, para. 82, 83, 85.

<sup>352</sup> Mahamud v Mohamad Supreme Court Election Petition 7 of 2018, para. 138. Superior Courts include the High Court, Court of Appeal and Supreme Court.

<sup>353</sup> Waity v IEBC Supreme Court Election Petition 33 of 2018, para. 67, 95.

<sup>354</sup> Mahamud v Mohamad Supreme Court Election Petition 7 of 2018, para. 147, 158, 161, 163, 201.

Maraga was divided on the second question. On one hand, he concurred with the appellate court's reasoning. Because its judgement was grounded on the doctrine of mootness, once the court determined the fulcrum of the appeal was the appellant's academic qualification and disposed of the matter, it was within reason that the appellate court "found it futile and a waste of its precious time to go into the merits of the other grounds for voiding the election."<sup>355</sup> On the other hand, Maraga argued, "even when a matter is clearly moot, the court handling it should nonetheless determine it for ease and expeditious disposal of the matter in even[t] of appeal. The court should also determine such matter if it is of jurisprudential moment and national importance."<sup>356</sup> Contrary to the majority, Maraga found the Supreme Court was obliged to determine issues the Court of Appeal had omitted or left undecided, notwithstanding their mootness, particularly in cases such as the one presently before the court, because the parties to the petition had specifically raised the matters before the appellate court and again before the apex court.<sup>357</sup> Maraga concluded, "upon evaluation of this evidence as the Court of Appeal should have done," regarding the second ground on irregularities, he would have upheld the High Court's ruling that the conduct of the Wajir gubernatorial election violated the principles of the constitution, affected the result of the election and warranted nullification.

Lenaola sided with the majority by agreeing the Supreme Court could not adjudicate on issues that were not decided by the Court of Appeal. However, he also agreed with Maraga, "it is imperative that the Court of Appeal, and any other Court whose decisions are subject to appeal,

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<sup>355</sup> Mahamud v Mohamad Supreme Court Election Petition 7 of 2018, para. 171, 176.

<sup>356</sup> Mahamud v Mohamad Supreme Court Election Petition 7 of 2018, para. 178.

<sup>357</sup> Mahamud v Mohamad Supreme Court Election Petition 7 of 2018, para. 179, 180.

must always determine all issues placed before them. To decline the obligation to do so would only lead to a situation such as the one explained above [i.e. the Wajir case] which does not augur well for the administration of justice.”<sup>358</sup> The dissenting opinions of Maraga and Lenaola were in line with the Supreme Court majority judgement in the August 2017 presidential election petition, which stated: “even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.”<sup>359</sup>

On the third question, Maraga concluded, “I have no option but to affirm the concurrent Superior Courts’ findings that the appellant did not possess the requisite academic qualification to contest in the election and that his election was therefore null and void.”<sup>360</sup> Lenaola concluded, “I concur with the decision of the Chief Justice [Maraga] and I am in agreement with the Orders he has proposed. However, as the Majority is of a contrary opinion, the final Orders shall be as proposed by the said Majority.”<sup>361</sup> Thus, the Supreme Court majority reversed the judgements of the High Court and the Court of Appeal and upheld the Wajir gubernatorial election, not on the basis of substantive issues as to whether it was conducted in accordance with the constitution and laws on elections or whether irregularities affected the integrity or results of the elec-

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<sup>358</sup> Mahamud v Mohamad Supreme Court Election Petition 7 of 2018, para. 208.

<sup>359</sup> Odinga v IEBC 2017, para. 374.

<sup>360</sup> Mahamud v Mohamad, Supreme Court Election Petition 7 of 2018, para. 132.

<sup>361</sup> Mahamud v Mohamad Supreme Court Election Petition 7 of 2018, para. 209.



tion, but on the rather technical basis that the lower courts had erroneously determined a pre-election matter that was outside of their proper jurisdiction.

In the Homa Bay gubernatorial election petition, the High Court determined that IEBC officials committed “serious infractions” and “completely abdicated from their roles” by failing to sign, stamp and countersign alterations on statutory forms, and for using statutory forms that lacked security features. The High Court noted that many of the forms were blank or photocopies, and the original documents were never provided to disprove suspicions of forgery.<sup>362</sup> To the extent that irregularities may have “affected the results” or had an “effect on the results,” the court noted that the results of an election in terms of numbers or figures were worthless if the process of the election was flawed. The court concluded that the entire process of counting, tallying and declaring the results was a “sham,” and that the statutory forms contained significant and “utterly shocking” irregularities that substantially affected the results to the extent that the gubernatorial election was indeterminant and warranted nullification.<sup>363</sup>

Many of the determinations of the High Court in the Homa Bay gubernatorial election petition mirrored those of the Supreme Court in the August 2017 presidential election petition. For example, regarding the IEBC’s submission of photocopies and carbon copies of statutory results forms, failure to provide originals, and lack of security features on a number of forms, the Supreme Court rhetorically posed, “Could these critical documents be still considered genuine? If not, then could they have been forgeries introduced into the vote tabulation process? If so,

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<sup>362</sup> Magwanga v IEBC High Court Election Petition 1 of 2017, para. 158, 159, 160, 174, 176, 178, 180.

<sup>363</sup> Magwanga v IEBC High Court Election Petition 1 of 2017, para. 173, 179, 183.

with what impact to the ‘numbers’? If they were forgeries, who introduced them into the system? If they were genuine, why were they different from the others?”<sup>364</sup>

Elsewhere, the Supreme Court stated, “It is true that where the quantitative difference in numbers is negligible, the Court, as we were urged, should not disturb an election. But what if the numbers are themselves a product, not of the expression of the free and sovereign will of the people, but of the many unanswered questions with which we are faced? In such a critical process as the election of the President, isn’t quality just as important as quantity? ... We have shown that contrary to popular view, the results of an election in terms of numbers can be overturned if a petitioner can prove that the election was not conducted in compliance with the principles laid down in the Constitution and the applicable electoral law.”<sup>365</sup> The Supreme Court concluded that noncompliance with constitutional and legal provisions, coupled with irregularities, affected the process of the election in such a substantial and significant manner that whatever the eventual results in terms of votes, the election was rendered invalid, null and void.<sup>366</sup>

The Court of Appeal upheld the High Court’s nullification of the Homa Bay gubernatorial election, but faulted it for failing to determine how irregularities such as unsigned, unstamped and photocopied statutory forms quantitatively affected the results of the election.<sup>367</sup> This seemed to be a departure from the Supreme Court’s ruling in the presidential petition where it stated,

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<sup>364</sup> Odinga v IEBC 2017, para. 345, 356, 359, 368, 376.

<sup>365</sup> Odinga v IEBC 2017, para. 378, 389.

<sup>366</sup> Odinga v IEBC 2017, para. 383.

<sup>367</sup> Awiti v IEBC Court of Appeal Election Petition of 2018, para. 182, 183, 185, 186, 224.

“the evidence before us cannot lead to a certain and firm decision regarding the specific number of votes affected by the irregularities and illegalities and it is our position that a concise reading of Section 83 of the Elections Act would show that the results of the election need not be an issue where the principles of the Constitution and electoral law have been violated in the manner that we have shown above.”<sup>368</sup>

The appellate court also faulted the High Court for ordering two scrutiny reports but only referencing one in its judgement. To buttress its position on scrutiny, the appellate court stated, “It is noteworthy that in the 2013 Presidential election petition, one of the key criticisms of the judgement of the Supreme Court is that it ordered a suo motu judicial scrutiny and not only failed to make reference to the Report but also totally ignored the findings in the Report.”<sup>369</sup> Perhaps owing in part to cognizance and vigilance of the criticisms cited by the Court of Appeal, when the case was appealed to the Supreme Court, the apex court overturned the rulings of both lower courts and upheld the Homa Bay gubernatorial election, not on the basis of substantive issues as to whether it was conducted in accordance with the constitution and laws or whether irregularities affected the integrity or results of the election, but on the rather technical basis that the High Court had erred by failing to reference both scrutiny reports in its judgement.<sup>370</sup>

The above discussion reveals conflicting approaches and reasoning of various courts in the adjudication of gubernatorial and presidential election petitions regarding the proper use of

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<sup>368</sup> Odinga v IEBC 2017, para. 384. Thuo (2019: 402) makes a similar observation.

<sup>369</sup> Awiti v IEBC Court of Appeal Election Petition 5 of 2018, para. 98, 102, 103.

<sup>370</sup> Awiti v IEBC Supreme Court Election Petition 17 of 2018, para. 92, 94, 104, 106.

official statutory results forms. In the small number of gubernatorial election petitions that were nullified by the High Court and Court of Appeal, petitioners adopted similar arguments and reasoning as petitioners in the August 2017 presidential election case, and lower courts adopted approaches and reasoning in their decisions to nullify gubernatorial elections that mirrored the Supreme Court's decision to nullify the presidential election. But the Supreme Court then overturned the lower court rulings and upheld the gubernatorial elections – typically on the basis of technical grounds rather than substantive issues.

One of the most disconcerting aspects of the judicial approaches in these petitions were the inconsistent interpretations and fluctuating application by courts of the legal provisions on the conduct of elections as per the Constitution, the Elections Act, the Elections Regulations and the IEBC's own institutional guidelines. The above analysis indicates that whereas the Supreme Court demanded a high standard for the conduct and adjudication of the August 2017 presidential election in which compliance with the totality of all legal provisions was mandatory, lower courts attempted to replicate and apply the high standards demanded by the Supreme Court in the presidential election to the conduct and adjudication of gubernatorial elections. However, rather than uphold high standards for the conduct of all elections, the Supreme Court reversed lower court rulings, and in doing so lowered the standards for the conduct and adjudication of gubernatorial elections by determining that compliance with the legal provisions for these elections was unnecessary and inconsequential. Such judicial reasoning does little to inculcate a culture of accountability to the rule of law in terms of how candidates engage in the electoral process and how the IEBC conducts elections.

## Technology

In many gubernatorial election petitions, petitioners accused respondents of alleged irregularities that were either not contained in law or had no consequence in law. For example, the IEBC's failure to use technology in elections other than the presidency was cited by petitioners in a number of gubernatorial election cases (Nyamori 2018); yet this alleged irregularity was not explicitly contained in law, and courts demonstrated great variance in how they addressed this matter. In gubernatorial cases for Homa Bay, Kajiado, Kirinyaga, Kisumu, Marsabit, Nyamira, Siaya, Vihiga and Wajir,<sup>371</sup> petitioners argued the IEBC contravened the laws on elections and the constitution by failing to electronically transmit gubernatorial election results and due to various problems with the IEBC's online results portal. However, in each of these cases courts found there was no provision in law that required the IEBC to electronically transmit gubernatorial results, and any results transmitted and/or posted on the portal were provisional, because the actual results were contained in physical statutory results forms.

In other gubernatorial petitions that alleged irregularities related to electronic transmission of results, courts completely sidestepped interpretation of relevant legal provisions and instead gave cursory assessments on whether petitioners had sufficiently discharged the evidential bur-

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<sup>371</sup> Magwanga v IEBC High Court Election Petition 1 of 2017, para.18, 140; Kores v Lenku High Court Election Petition 2 of 2017, para. 3, 70, 72; Karua v IEBC High Court Election Petition 2 of 2017, para. 19, 203, and Ruling 2, para. 5, 19; Ranguma v IEBC High Court Election Petition 3 of 2017, para. 25, 27, 38, 39; Wario v IEBC High Court Election Petition 2 of 2017, pg. 8, 92; Kanacho v IEBC High Court Election Petition 2 of 2017, Ruling 2, pg. 3, 10; Osebe v IEBC High Court Election Petition 1 of 2017, para. 64, 70; Gumbo v IEBC High Court Election Petition 3 of 2017, para. 1, 23; Kevogo v IEBC High Court Election Petition 11 of 2017, para. 71, 82; Mohamad v Mohamed High Court Election Petition 14 of 2017, para. 5, 7, 144, 147.

den of proof (e.g. Kilifi, Mombasa, Mandera<sup>372</sup>); or courts simply did not address allegations raised by petitioners, perhaps because the matters were not sufficiently pleaded (e.g. Kitui, Machakos, Embu<sup>373</sup>). The manner in which courts dealt with petitioners' allegations in the above cases – faulting petitioners for failing to prove how IEBC's failure to electronically transmit results affected the outcome of the elections, noting there was no provision in law for the alleged irregularity, or simply ignoring the allegation altogether – suggests the allegation was a weak claim that was difficult to substantiate.

Petitioners in gubernatorial election cases most likely chose to prosecute this alleged irregularity for two reasons. First, the application of this ground by petitioners in the August 2017 presidential petition was immensely influential in the Supreme Court's decision to nullify the presidential election, which strongly motivated petitioners contesting other elections to include this ground in their petitions. However, these petitioners wrongly assumed the Supreme Court's determination on the IEBC's failure to electronically transmit results in the presidential election would apply to other election disputes including those contesting gubernatorial seats. For example, Nicholas Gumbo, who lost the Siaya gubernatorial election and filed his petition just two days following the Supreme Court judgement on the presidential election, stated: "My team of experts have unearthed discrepancies that are unimaginable to say the least and we shall lay bare the shenanigans that occurred during the tallying. Kenya's father of democracy Raila

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<sup>372</sup> Kambi v Ilongo High Court Election Petition 4 of 2017, para. 173, 174; Hassan v IEBC High Court Election Petition 10 of 2017, para. 7, 89; Hassan v IEBC High Court Election Petition 1 of 2017, para. 102, 128.

<sup>373</sup> Malombe v Ngilu High Court Election Petition 4 of 2017, para 116, 128; Ndeti v IEBC High Court Election Petition 1 of 2017, para. 3, 39, 45; Kivuti v IEBC High Court Election Petition 1 of 2017, para. 4.

Odinga has led by example and we shall also be on course to expose yet another kifaranga ya kompyuta [computer generated election]” (Lang’at 2017f).<sup>374</sup>

In gubernatorial election petitions for Machakos,<sup>375</sup> Wajir,<sup>376</sup> Kajiado and Marsabit, petitioners submitted supporting affidavits from Noah Akala Oduwo, a consultant who provided “expert analysis.” Oduwo attempted to link irregularities revealed in the Supreme Court’s scrutiny report from the presidential election to irregularities in results posted on the IEBC’s online portal for various gubernatorial elections. Yet, in the first three cases, courts faulted petitioners for failing to call the expert witness for testimony and cross-examination. In the Marsabit case, petitioners referred to the Supreme Court’s ruling on the use of technology in *Odinga v IEBC 2017* and proposed that the electronic transmission of election results was not limited to the presidential election. Oduwo did testify as a petitioner in the Marsabit case, but the court

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<sup>374</sup> Odinga coined the phrase “vifaranga vya kompyuta,” which loosely translates as “computer chicks,” to imply that Kenyatta’s electoral victory was “computer generated” (Kipng’enh 2017). NASA claimed the IEBC servers had been hacked and an algorithm inserted to ensure that Kenyatta continued to lead over Odinga by a consistent percentage of votes (Nation Reporter 2017a; Achuka 2017c). The IEBC acknowledged there had been attempts to hack their servers, but none had succeeded (Owino 2017d). NASA released documents that allegedly proved its hacking claims; but the IEBC argued that NASA’s documents were counterfeit because they were from a Microsoft system, whereas the IEBC used an Oracle system (Mbugua et al. 2017). An independent audit revealed the documents released by NASA did not substantiate any of the claims they were purported to prove or provide any evidence of hacking (Muthuri 2017). A forensic audit by the firm that supplied the electronic election system confirmed there was no evidence of hacking (AFP 2017b). Despite the sensational nature of the claims, they were scarcely referenced in *Odinga v IEBC 2017* (Chege 2018). In the Supreme Court judgement, the phrase “constant percentages” appears only twice in para. 36 and 243. The word “hacking” appears twice in the majority judgement: in para. 278, “The Court appointed ICT Experts... said it was difficult to ascertain whether or not there were any hacking activities”; and in para. 279, “It is clear from the above that IEBC in particular failed to allow access to two critical areas of their servers: its logs which would have proved or disproved the petitioners’ claim of hacking into the system and altering the presidential election results.”

<sup>375</sup> *Ndeti v IEBC High Court Election Petition 1 of 2017*, para 41.

<sup>376</sup> *Mohamad v Mohamed High Court Election Petition 14 of 2017*, para. 144.

questioned how Oduwo's evidence could be admissible when it was not disclosed how he had accessed data from IEBC servers that were granted "read only" access for scrutiny by the Supreme Court in the presidential election.<sup>377</sup>

In the Kajiado case, petitioners argued that the Supreme Court's order for scrutiny of IEBC servers in the presidential election "had revealed shocking, disturbing and numerous irregularities and illegalities affecting Kajiado County Governor's election."<sup>378</sup> However, the High Court noted any findings revealed by Oduwo's analysis of the scrutiny ordered by the Supreme Court in the presidential election petition was not applicable to the Kajiado gubernatorial election because the petitioners had abandoned their application for court order scrutiny. In dismissing the petition, the High Court stated, "During the hearing of this petition, one unfortunate thing that came out clearly was, the petitioners purely attempted to prove their case dependent on the Supreme Court's petition finding on scrutiny exercise [for the presidential election] which was totally irrelevant in this petition [for the gubernatorial election]."<sup>379</sup>

In the Kirinyaga case, petitioners had faulted the IEBC for failure to electronically transmit results and argued the Supreme Court's nullification of the presidential election was binding on all other election petitions. The High Court replied by noting that the presidential election was "differentiated" from gubernatorial elections and that the petitioner would have to discharge

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<sup>377</sup> Kanacho v IEBC High Court Election Petition 2 of 2017, Ruling 2, pg. 4; Wario v IEBC High Court Election Petition 2 of 2017, pg. 13.

<sup>378</sup> Kores v Lenku High Court Election Petition 2 of 2017, para. 14, 55.

<sup>379</sup> Kores v Lenku High Court Election Petition 2 of 2017, para. 58, 127.



the legal burden of proof by adducing specific evidence relating to the election of the County Governor of Kirinyaga.<sup>380</sup> The assumption of petitioners in all these gubernatorial election cases was that, because petitioners in *Odinga v IEBC 2017* had successfully persuaded the Supreme Court that irregularities revealed through court ordered scrutiny of IEBC's use of election technology warranted nullification of the presidential election, if petitioners in gubernatorial petitions could link their cases to technology-related failures disclosed in the presidential petition, their petitions could also result in nullifications.

The second reason was that petitioners in gubernatorial election cases either misapplied or misunderstood the legal provisions on electronic transmission of results and the online results portal. For example, a number of petitioners argued such irregularities were a violation of Section 39(1C) of the Elections Act, which is untenable in the context of a gubernatorial election because the law exclusively refers to electronic transmission of results “for purposes of a presidential election,” and contains provisions for no other elections. Courts also exhibited variance in how they interpreted and applied legal provisions related to electronic transmission of gubernatorial election results. In the *Samburu* and *Siaya* gubernatorial cases, courts came to the contrary conclusion that failure to electronically transmit gubernatorial results was an irregularity that contravened the mandatory requirements of Section 82(1) of the Elections Regulations. In the *Samburu* case, the court also cited Section 44 of the Elections Act; however, the matter only arose during a preliminary ruling and was not revisited during the hearing of the petition.<sup>381</sup> In the *Siaya* case, the court determined the IEBC did not comply with the regulations,

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<sup>380</sup> *Karua v IEBC High Court Election Petition 2 of 2017*, para. 5, 204.

<sup>381</sup> *Saimanga v IEBC High Court Election Petition 1 of 2017*, Ruling 5, pg. 5

but the absence of electronic transmission did not provide sufficient grounds to vitiate the election because petitioners failed to prove that the irregularity affected the results.<sup>382</sup>

This misapplication and misunderstanding of the law on the part of petitioners and variance in interpretation and application of the law on the part of courts was likely due to the fact that there are a number of legal provisions on the electronic transmission of election results, and while some are very precise others are very vague. Three pieces of legislation were most often referenced in regard to this matter: the Elections Act,<sup>383</sup> the Elections (General) Regulations<sup>384</sup> and the Elections (Technology) Regulations.<sup>385</sup> Section 39(1C) of the Act and Section 5(1A) of the General Regulations state electronic transmission of results is mandatory for presidential elections; however, Sections 44(1) and (7) of the Act and Section 2 of the Technology Regulations state election technology is for electronic transmission of results, and Section 82 of the General

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<sup>382</sup> *Gumbo v IEBC High Court Election Petition 3 of 2017*, para. 18, 23, 27.

<sup>383</sup> Elections Act 24 of 2011 (version as of September 2016), Section 39(1C) For purposes of a presidential election, the Commission shall— (a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre; Section 44(1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results; Section 44(7) The technology used for the purpose of the first general elections upon the commencement of this section shall— (a) be restricted to the process of voter registration, identification and results transmission.

<sup>384</sup> Elections (General) Regulations of 2012, (version as of April 2017), Section 5(1A) The functions of a presiding officer shall be— (d) electronically transmitting presidential results to the constituency, counties and national tallying centers; Section 82 Provisional results to be transmitted electronically— (1) The presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such manner as the Commission may direct.

<sup>385</sup> Election (Technology) Regulations of 2017 (version as of April 2017), Section 2 “election technology” means a system that includes a biometric voter registration system, a biometric voter identification system... and electronic results transmission system.

Regulations states provisional results are to be electronically transmitted, but none of the above provisions state to which elections they apply. Thus, the specificity of the first two provisions, which directly refer to presidential elections, is in stark contrast to the lack of specificity of the other four provisions, which do not directly reference any particular election. Noting the variance in the laws and believing technology was meant to be central in the 2017 elections, the High Court in the Wajir case went a step further to propose that the IEBC should endeavor to fully operationalize electronic transmission of results for all elections, and parliament should amend the laws accordingly to embrace technology in all elections to ensure that in the future results declared at polling stations will achieve the highest standards of accountability, credibility, transparency and verifiability mandated in Articles 81 and 86 of the Constitution.<sup>386</sup>

A court-centric analysis suggests that the legal provisions on the use of technology in elections other than the presidency are unclear. This lack of clarity is evident in the judicial determinations of courts in gubernatorial petitions. The judicial approach in the Wajir gubernatorial case stands out because the High Court explicitly noted that the main objective of the use of technology was to raise the standards of conduct for all elections and that there was a need for parliament to clarify and amend the laws accordingly. A petitioner-centric analysis suggests that irregularities pertaining to the use of technology in gubernatorial elections was a weak allegation that was difficult to substantiate because it is not clearly supported in law. Moreover, petitioners in gubernatorial election cases mistakenly believed that by merely pointing to the IEBC's failure to use technology in the presidential election as one of the core grounds for the Supreme Court's nullification, other courts somehow would be persuaded that the same reasoning should

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<sup>386</sup> Mohamad v Mohamed High Court Election Petition 14 of 2017, para. 145, 146.

apply in petitions for gubernatorial elections. Yet, courts faulted gubernatorial petitioners for making generalized claims regarding the IEBC's failure to use technology without adducing cogent evidence or citing particular instances of how such irregularities specifically affected the results or integrity of gubernatorial elections.

#### Statutory Forms – Stamps and Security Features

Other examples of alleged irregularities cited by petitioners that were not contained in law pertained to statutory forms that lacked official IEBC stamps and security features. Courts were divided in their approach to these matters in gubernatorial election petitions. This was likely due to two factors: the first was that the laws on elections contain no provisions for these alleged irregularities; the second may have been due to the inconclusive manner in which the Supreme Court dealt with such irregularities in the August 2017 presidential election petition. The Supreme Court noted missing stamps and security features on statutory forms, among a number of other irregularities, went “to the very heart of electoral integrity” and were “incidences where the accountability and transparency of the forms are in question” in terms of both quantitative effects on the results of the election and qualitative effects on the electoral process.<sup>387</sup>

In the Wajir gubernatorial case, the High Court noted that a number of forms were not stamped and cited the above passages from the Supreme Court in *Odinga v IEBC 2017*, but offered little elaboration on the matter before concluding that this, among other irregularities, “not only

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<sup>387</sup> *Odinga v IEBC 2017*, para. 359, 368, 375, 377, 378.

affected the credibility of the election but they affected the results of the election itself.”<sup>388</sup>

Whereas the Supreme Court in the presidential election and the High Court in the Wajir gubernatorial election considered irregularities, such as failure to stamp forms, in terms of both qualitative and quantitative effects; in the Kitui gubernatorial election case, the Court of Appeal focused exclusively on quantitative effects, and determined that IEBC’s failure to stamp forms was immaterial because petitioners provided “no quantitative demonstration how absence of stamps affected the integrity of the declared results of the election” or “affected the result.”<sup>389</sup>

In gubernatorial cases for Kajiado, Samburu and Vihiga, High Courts noted stamping was an administrative guideline the IEBC had introduced to safeguard and authenticate the forms, but the same was not a mandatory legal requirement.<sup>390</sup> In the Marsabit, Mombasa and Nyamira cases, High Courts also concluded there was no legal requirement for stamping of statutory forms.<sup>391</sup> In contrast, the High Court in the Homa Bay case found failure to stamp statutory forms was a “serious infraction,” which combined with other irregularities warranted nullification of the election.<sup>392</sup> The Court of Appeal upheld the High Court’s judgement, but also evinced prioritization of quantitative over qualitative effects by noting the lower court “erred in failure to determine the specific number of Form 37As that were not stamped and further erred in not

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<sup>388</sup> Mohamad v Mohamed High Court Election Petition 14 of 2017, para. 208.

<sup>389</sup> Malombe v Ngilu Court of Appeal Election Petition 24 of 2018, para. 44, 45.

<sup>390</sup> Kores v Lenku High Court Election Petition 2 of 2017, para. 112; Saimanga v IEBC High Court Election Petition 1 of 2017, pg. 10; Kevogo v IEBC High Court Election Petition 11 of 2017, para. 99.

<sup>391</sup> Wario v IEBC High Court Election Petition 2 of 2017, pg. 20; Hassan v IEBC High Court Election Petition 1 of 2017, para. 96; Osebe v IEBC High Court Election Petition 1 of 2017, para. 106, 108.

<sup>392</sup> Magwanga v IEBC High Court Election Petition 1 of 2017, para. 176.

determining how failure to stamp Form 37As affected the result.”<sup>393</sup> This was a notable departure from the Supreme Court’s conclusion in the presidential election petition that specific findings on the quantitative effects of irregularities on the results need not be an issue where qualitative effects have been proven.<sup>394</sup>

Courts also exhibited varying perspectives regarding security features. In the Machakos gubernatorial case the High Court was not bothered by lack of security features on statutory forms.<sup>395</sup> In the Marsabit case, the issue was raised repeatedly by petitioners, but not addressed by the High Court.<sup>396</sup> In Kisumu and Samburu cases, High Courts found petitioners failed to provide sufficient evidence on the matter.<sup>397</sup> In the Kisii case, petitioners argued Form 37C among other forms lacked security features, and the same irregularity regarding Form 34C in the presidential election was “a great concern to the Supreme Court”; but the High Court did not specifically address the matter aside from noting the petitioners’ agents had signed the form, “thus acquiescing and accepting” its authenticity.<sup>398</sup>

In the Kajiado case, the High Court quoted the Supreme Court in *Odinga v IEBC* 2017: “there is a reasonable expectation that all the forms ought to be in a standard form and format; and

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<sup>393</sup> *Awiti v IEBC* Court of Appeal Election Petition Appeal 5 of 2018, para. 185.

<sup>394</sup> *Odinga v IEBC* 2017, para. 378, 384.

<sup>395</sup> *Ndeti v IEBC* High Court Election Petition 1 of 2017, para. 43.

<sup>396</sup> *Wario v IEBC* High Court Election Petition 2 of 2017, pg. 3.

<sup>397</sup> *Ranguma v IEBC* High Court Election Petition 3 of 2017, para. 26, 30; *Saimanga v IEBC* High Court Election Petition 1 of 2017, pg. 2, 14.

<sup>398</sup> *Onsando v IEBC* High Court Election Petition 3 of 2017, para. 161, 165.

though there is no specific [legal] provision requiring the forms to have watermarks and serial numbers as security features, there is no plausible explanation for this discrepancy.” However, the High Court departed from the Supreme Court’s reasoning by accepting the IEBC’s excuse that the use of nonstandard forms was due to faulty printers that “chewed” the original forms; moreover, the court found the “omission was not of a substantial nature to invalidate the results” and “there is no mandatory legal requirement” that forms must have security features.<sup>399</sup> In contrast, the High Court in the Wajir case determined missing security features rendered the results unaccountable and unverifiable, and found the IEBC’s excuse regarding faulty printers to be both shocking and tragic. Without specifically referencing the above cited quote from *Odinga v IEBC 2017*, the High Court echoed the Supreme Court’s finding on the matter by stating that the IEBC was expected to conform to prescribed standards for statutory forms.<sup>400</sup> Similarly, the High Court in the Homa Bay case found lack of security features and failure to provide original results forms, along with other factors, cast serious doubt on the authenticity of the statutory documents and the credibility of the final results declared by the IEBC.<sup>401</sup>

The above analysis indicates that courts applied different approaches and reasoning to assess irregularities pertaining to official stamps and security features on statutory results forms in presidential and gubernatorial election petitions. A petitioner-centric perspective suggests that this variance was partially due to the inability of petitioners in some gubernatorial cases to provide sufficient evidence or to persuasively prove that such irregularities affected the integrity

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<sup>399</sup> *Kores v Lenku High Court Election Petition 2 of 2017*, para. 106, 107; *Odinga v IEBC 2017*, para. 362.

<sup>400</sup> *Mohamad v Mohamed High Court Election Petition 14 of 2017*, para. 95, 106, 109, 208.

<sup>401</sup> *Magwanga v IEBC High Court Election Petition 1 of 2017*, para. 178, 180.

or results of the elections (e.g. Kisumu and Samburu cases). A court-centric perspective indicates inconsistencies and discontinuities in how courts assessed such infractions.

Despite the fact that the law contains no requirements for official stamps and security features, as these were institutional procedures established by the IEBC on its own accord, the Supreme Court found such irregularities seriously affected both quantitative and qualitative aspects of the August 2017 presidential election, which combined with other irregularities warranted nullification. The Supreme Court also prioritized consideration of qualitative effects while minimizing quantitative effects. The Supreme Court's approach to assessing such irregularities in the presidential petition was mirrored by High Courts in some gubernatorial petitions (Wajir and Homa Bay). However, in other gubernatorial election petitions courts adopted contrary approaches to these matters. Some courts did not address petitioners' allegations regarding these irregularities (High Court in Marsabit and Kisii); other courts found they were not serious infractions (High Court in Machakos); a number of courts noted such irregularities were not contained in law (High Court in Kajiado, Marsabit, Mombasa, Nyamira, Samburu and Vihiga); and some courts focused on quantitative aspects, rather than qualitative aspects, in finding that petitioners failed to prove how these irregularities affected the results of elections (High Court in Kajiado, Court of Appeal in Homa Bay and Kitui).

Although it would have been expected that the Supreme Court's approach to such irregularities in the August 2017 presidential election petition would have established precedent that would guide lower courts in the adjudication of petitions for other elective seats, this was not the case. Whereas the Supreme Court seemed to adopt a broader approach that looked beyond what was



specifically contained in law to link the IEBC's noncompliance with its own internal procedures to violations of constitutional principles and to prioritize qualitative effects over quantitative effects; in many gubernatorial petitions, courts adopted a narrower approach that focused on what was explicitly contained in law and prioritized consideration of quantitative effects on results (i.e. substantial effect rule) over qualitative aspects. Thus, this variance in the approaches of courts in presidential and gubernatorial petitions was likely because the Supreme Court felt greater liberty to expand the scope of its reasoning beyond the law in the presidential petition, whereas many lower courts in gubernatorial petitions seemed more inclined to confine themselves to judicial reasoning that was fully grounded in the explicit provisions of law. The absence of specific provisions in the law for such irregularities explains why the Supreme Court could only buttress its conclusions in the presidential petition with rhetorical interrogatives, rather than declarative statements. The Supreme Court's reliance on rhetorical interrogatives combined with the absence of specific legal provisions provided a weak foundation for precedent, which likely contributed to variance in the judicial reasoning of lower courts in gubernatorial election petitions.

#### Statutory Forms – IEBC and Agent Signatures

In addition to accusing respondents of alleged irregularities that were not contained in law, petitioners in gubernatorial election cases also accused respondents of alleged irregularities that had no consequence in law. This was mainly a concern with regard to whether statutory results forms were signed by IEBC officers and party agents. In Samburu, Siaya and Mandera gubernatorial cases, High Courts determined signatures of IEBC officials were a mandatory requirement,

but the irregularity was immaterial because it did not affect the results of the elections.<sup>402</sup> In the Laikipia case, the High Court concurred with the above rulings and stated, “to echo the Supreme Court’s finding in Raila 2017, ‘No election is perfect. Even the law recognizes this reality.’”<sup>403</sup>

In contrast, High Courts in gubernatorial election cases for Homa Bay, Kajiado and Wajir found failure of IEBC officials to sign statutory forms was a serious irregularity.<sup>404</sup> High Courts in the Kajiado and Wajir cases both cited *Odinga v IEBC 2017* where the Supreme Court posed, “why would a returning officer, or for that matter a presiding officer fail or neglect to append his signature to a document whose contents he/she has generated? Isn’t the appending of signature to a form bearing the tabulated results the last solemn act of assurance to the voter by such officer, that he stands by the ‘numbers’ on that form?”<sup>405</sup> It is important to note that the Supreme Court only posed rhetorical interrogatives and never produced definitively answers. In the paragraph following the above quote from *Odinga v IEBC 2017*, the Supreme Court responded with another question: “Where do all these inexplicable irregularities, that go to the very heart of electoral integrity, leave this election?”<sup>406</sup> From the above it can be deduced that the Supreme Court found such irregularities affected the integrity of the election. The Supreme Court concluded that the totality of irregularities affected the process of the election in a “very substantial

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<sup>402</sup> *Saimanga v IEBC High Court Election Petition 1 of 2017*, pg. 13; *Gumbo v IEBC High Court Election Petition 3 of 2017*, para. 32; *Hassan v IEBC High Court Election Petition 1 of 2017*, para. 88, 90.

<sup>403</sup> *Waity v IEBC High Court Election Petition 2 of 2017*, paras. 72, 84; *Odinga v IEBC 2017*, para 299.

<sup>404</sup> The High Court in the Nyamira gubernatorial case also ruled that forms unsigned by IEBC officials were invalid (*Osebe v IEBC High Court Election Petition 1 of 2017*, para. 108).

<sup>405</sup> *Kores v Lenku*, High Court Election Petition No. 2 of 2017, para. 100; *Mohamad v Mohamed*, High Court Election Petition No. 14 of 2017, para. 87; *Odinga v IEBC 2017*, para. 377.

<sup>406</sup> *Odinga v IEBC*, para. 378.

and significant manner” to warrant nullification. The Supreme Court also concluded it was unable to impute any criminal intent or culpability regarding illegalities or electoral offenses.<sup>407</sup>

Curiously, High Courts reached far more definitive conclusions regarding IEBC officials’ failure to sign documents. In the Homa Bay case, the court stated such documents “are worthless and their results should be excluded from the final tally.”<sup>408</sup> In the Kajiado case, the court stated: “the document[s] shall be deemed to be worthless and ownerless hence not of any probative value”; “It is therefore clear from the Supreme Court decision [in *Odinga v IEBC 2017*] that, failure to sign the requisite statutory forms by a returning or presiding officer will render them null and void ab initio”; and it was a criminal “offence for any of the IEBC officers who omits or fails to perform his or her duties.”<sup>409</sup>

In the Wajir case, the High Court stated: “Statutory Forms that are not signed by the said officers are but worthless pieces of paper whose contents would not count in the final tally of results”; “Failure to sign a statutory form is not a mere error, it is a grave irregularity that destroys the credibility and authenticity of the results contained therein”; and “From the foregoing [Supreme Court judgement in *Odinga v IEBC 2017*], it is clear that... It is a criminal offence for any of those officers to fail to sign the statutory forms.”<sup>410</sup> But the Supreme Court judgement in the presidential petition did not provide for any degree of the level of specificity found in the rulings of the

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<sup>407</sup> *Odinga v IEBC*, para. 405, 383.

<sup>408</sup> *Magwanga v IEBC High Court Election Petition 1 of 2017*, para. 177.

<sup>409</sup> *Kores v Lenku High Court Election Petition 2 of 2017*, para. 100, 101,103.

<sup>410</sup> *Mohamad v Mohamed High Court Election Petition 14 of 2017*, para. 88.

High Courts in gubernatorial petitions, and none of the findings of the High Courts were “clear” in the Supreme Court judgement. This was particularly evident with regard to the Supreme Court’s finding that it could not link any irregularities to criminal offences, whereas High Courts specifically found that failure to sign forms by IEBC officials was a criminal offense.<sup>411</sup>

The Supreme Court judgement in *Odinga v IEBC 2017* would have been far more beneficial for the developing jurisprudence on election disputes and provided greater clarity and guidance for lower courts if the Supreme Court had given definitive answers to the many rhetorical questions it posed. For example, if the Supreme Court had, instead of making inquisitive statements that began with “where, what, why, how,”<sup>412</sup> offered statements with definitive answers, such as: stamping forms is not a legal requirement, but because the IEBC instituted stamping as a mandatory requirement, forms without a stamp are invalid; security features on forms is not a legal requirement, but because the IEBC instituted security features as a mandatory requirement, forms without security features are invalid; signatures of IEBC officials is a mandatory legal requirement, forms without IEBC signatures are invalid; forms in the prescribed standard format is a mandatory legal requirement, forms not in the prescribed standard format are invalid.

This lack of clarity and the use of rhetorical interrogatives in place of declarative answers in the Supreme Court judgement in *Odinga v IEBC 2017* explains, to some extent, the inconsistencies and discontinuities in the emerging jurisprudence on election disputes. Another difficulty for the

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<sup>411</sup> Election Offences Act of 2016, Section 6: Offences by members and staff of the Commission— (j) without reasonable cause does or omits to do anything in breach of his official duty.

<sup>412</sup> *Odinga v IEBC 2017*, para. 376, 377, 378.

emerging jurisprudence on election disputes and a core reason for inconsistencies and discontinuities in the reasoning and approaches of courts is that many of the irregularities cited were not defined in law (e.g. stamps, security features) or vaguely and inconsistently defined in law (e.g. prescribed format, IEBC/agent signatures). For example, irregularities pertaining to failure to sign statutory forms by IEBC officials and party agents are addressed in the Section 79 of the Elections (General) Regulations,<sup>413</sup> but the regulations are inconsistent and vague, which in turn has resulted in inconsistencies and discontinuities in the jurisprudence on elections disputes.

Section 79 of the Elections (General) Regulations stipulates two mandatory requirements for candidates or their agents: to sign forms or to record reasons for not signing. The regulation stipulates four mandatory requirements for IEBC officials: to sign forms, to request candidates or agents to sign forms, to record candidates or agents' refusal to sign forms, or to record absence of candidates or agents from signing forms. The regulation stipulates a consequence for failure of candidates or agents to comply with the mandatory requirements – the consequence is that such failure will not invalidate the results. The regulation does not stipulate a conse-

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<sup>413</sup> Elections (General) Regulations, Section 79. Candidates, etc. to sign declaration (1) The presiding officer, the candidates or agents shall sign the declaration in respect of the elections. (2) For purposes of sub regulation (1), the declaration for— (a) Presidential election results shall be in Form 34A set out in the Schedule; and (b) National Assembly, County women representatives, Senator, Governor and county assembly elections shall be in Forms 35A, 36A, 37A, 38A, and 39A set out in the Schedule. (2A) The presiding officer shall—(b) request each of the candidates or agents then present to append his or her signature; (3) [duplicates verbatim (2A)]. (4) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign. (5) Where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form. (6) Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence. (7) The refusal or failure of a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation (2)(a). (8) The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under subregulation (2) shall not by itself invalidate the results announced.

quence for failure of IEBC officials to comply with the mandatory requirements – there is no consequence that such failure will or will not invalidate the results.

In essence, the mandatory requirements for both IEBC officials and candidates/agents are inconsequential because the regulation states failure of the latter has no consequence on the results and the regulation states no consequence at all for failure of the former. It is likely the Supreme Court framed its reasoning on the matter in the interrogative because the declarative is not defined by law – the regulation states no legal consequence for failure of IEBC officers to sign forms. Where High Courts in Homa Bay, Kajiado and Wajir cases determined that forms unsigned by IEBC officials were worthless, null, void and should be excluded from the final tally, the same was not provided for in law – the regulation states none of these consequences, it states no consequences at all.

In nearly all gubernatorial election cases, petitioners cited lack of candidates/agents' signatures on results forms as an irregularity, and argued IEBC officials either failed to ensure that candidates/agents signed forms or actively prevented candidates/agents from signing. Petitioners made these arguments despite the fact that the regulation provides no consequence for this omission. It begs reason why petitioners would argue a nugatory point that is weakly backed in law. In the majority of these cases, courts found the allegations unsustainable because petitioners failed to adduce evidence by specifying which polling stations were affected and the names of agents assigned to those polling stations, or proof that candidates had agents who were present to sign forms during the declaration of results. In the majority of these cases, courts were adamant in finding that it was the sole responsibility of candidates to ensure their agents signed

forms or recorded reasons for refusal to sign, and not the responsibility of IEBC officials. However, courts were silent on the mandatory requirements in the regulations that IEBC officials “shall request” candidates/agents to sign or record their failure to sign or absence from signing. In response to such allegations from petitioners, respondents and courts consistently replied with near unanimity to the extent that “failure of candidates/agents to sign forms will not invalidate the results” became a refrain in the judgements on petitions from the 2017 elections.

The regulations could be read as complete where a mandatory requirement is paired with a mandatory consequence and incomplete where a mandatory requirement is not paired with a mandatory consequence or where the consequence is simply blank. This incompleteness of the regulations is expressed in the jurisprudence on election petitions where many courts were silent when confronted with the mandatory requirements that IEBC officials must record candidate/agent refusal to sign or absence from signing forms. In gubernatorial election petitions for Kajjado, Kitui, Machakos, Marsabit, Mombasa, Samburu and Wajir, petitioners cited failure of IEBC officials to record reasons for agents not signing or their absence from signing as an irregularity that violated Section 79 of the Regulations.

In all these cases, courts quoted Section 79 in its entirety. In Machakos, Mombasa and Kitui cases, courts found petitioners had provided insufficient evidence to prove their allegations, mainly because no agents had been called to testify that they were denied access to sign forms

or why they refused to sign. In Machakos,<sup>414</sup> Marsabit,<sup>415</sup> Mombasa,<sup>416</sup> Kitui and Samburu cases, courts only noted the regulations state that failure of candidates/agents to sign or their absence from signing did not invalidate the results. These courts did not address petitioners' complaints that the failure of IEBC officials to record candidates/agent refusal to sign or their absence from signing violated the mandatory requirements of the regulations. In the Kitui case, the court found petitioners' complaints on the basis of Section 79 were "not applicable and cannot be brought to bear," mainly because the regulations state candidate/agent refusal to sign or absence "shall not of itself invalidate the results."<sup>417</sup> In the Samburu case, the court determined "it is therefore not mandatory for either the candidate or agent to sign the declaration," mainly because their failure to do so "shall not invalidate the proceedings."<sup>418</sup>

Kajiado and Wajir were the only cases in which courts specifically addressed petitioner's claims regarding the mandatory requirement for IEBC officials to record candidate/agent refusal to sign or their absence. In Kajiado, the court stated, "It is true that, it is not mandatory for a candidate or an agent to sign... failure by an agent or candidate to sign such forms does not invalidate the results... but it is a requirement that a presiding officer must make remarks for such failure... What is the effect of failure by a presiding officer in making those statutory remarks?" The court answered by stating, "it is no excuse for the presiding officer not to indicate reasons for the

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<sup>414</sup> Ndeti v IEBC High Court Election Petition 1 of 2017, para. 50.

<sup>415</sup> Wario v IEBC High Court Election Petition 2 of 2017, pg. 18, 20, 27, 29.

<sup>416</sup> Hassan v IEBC High Court Election Petition 10 of 2017, paras. 8, 50, 69, 78, 93, 94, 98.

<sup>417</sup> Malombe v Ngilu High Court Election Petition 4 of 2017, para. 49, 81, 82, 83

<sup>418</sup> Saimanga v IEBC High Court Election Petition 1 of 2017, pg. 10, 11, 12.



absence or failure for an agent not to sign. However... failure by candidates or agents not to sign declaration statutory forms should not alone be applied to vitiate a validly conducted election.”<sup>419</sup> The problem with the court’s reasoning is that it only reiterates the consequence for candidate/agent refusal or absence, it does not answer the question it poses regarding the consequence for the failure of IEBC officials to record the same as per the regulations.

The court in the Wajir case provided the most comprehensive ruling on the matter by stating that although refusal or absence of candidates/agents does not invalidate the results, IEBC officials must record the same as a mandatory requirement under Section 79. The court determined “The recording of the fact is for purposes of accountability, credibility and verifiability of the results in the declaration Form... Where such forms are not signed by agents and the presiding officers fail to note or record that fact, a question of credibility of the results therein arises.” The court ruled that this among other irregularities warranted nullification of the election.<sup>420</sup>

A petitioner-centric analysis of gubernatorial election petitions indicates that allegations of irregularities related to failure of IEBC officials or candidates/agents to sign results forms were weak claims that were difficult to substantiate because the legal provisions either provide no consequence or are unclear on consequences for such infractions, and because many gubernatorial petitioners were unable to prove how such infractions affected the validity of the results or the integrity of the elections – for example, by explicitly stating at which polling stations did irregularities occur, which specific results forms and which agents witnessed the irregularities.

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<sup>419</sup> Kores v Lenku High Court Election Petition 2 of 2017, paras. 96, 110, 111

<sup>420</sup> Mohamad v Mohamed High Court Election Petition 14 of 2017, paras. 88, 89, 90.

Although the Supreme Court in the presidential petition addressed these matters by posing rhetorical questions rather than providing definitive answers, the court found these infractions, combined with other irregularities warranted nullification. The Supreme Court's framing of these matters in the interrogative rather than the declarative was likely because the legal provisions are unclear, inconsistent and incomplete. The Supreme Court seemed to expand the scope of its reasoning beyond the provisions contained in law, specifically the Elections (General) Regulations, and to link these irregularities to broader issues of compliance with the principles of the constitution. The Supreme Court also assessed these irregularities in terms of both qualitative and quantitative effects, but prioritized the former over the latter. The Supreme Court's approach in the presidential petition demanded high standards for the conduct of the election.

The arguments of petitioners and the reasoning of the High Court in the Wajir gubernatorial petition stand out because they closely mirrored those of petitioners and the Supreme Court in the presidential case. But in the majority of gubernatorial petitions, lower courts departed from the Supreme Court's approach in the presidential petition by restricting themselves to a narrower assessment of such irregularities in relation to specific provisions of law, particularly the Elections (General) Regulations, without linking them to broader consideration of compliance with constitutional principles, and by prioritizing quantitative effects over qualitative effects. Lower courts set lower standards for the conduct of elections. Variance in judicial approaches to these irregularities among different courts was likely due to deficiencies in how the legal provisions are written, and the Supreme Court's use of interrogative rather than declarative reasoning did not provide a firm foundation for precedent that lower courts could rely on for guidance.

## Illegalities

Illegalities refer to criminal election offenses such as voter intimidation and bribery. In the 2013 presidential election petition, petitioners alleged a number of illegalities, one of which pertained to voter registration and the voter registry. However, the Supreme Court dismissed the claims because “no credible evidence was adduced [by petitioners] to show that such irregularities were premeditated and introduced by the 1st Respondent [IEBC], for the purpose of causing prejudice to any particular candidate.”<sup>421</sup> A second allegation of illegality pertained to procurement and use of election technology – petitioners alleged faulty equipment was deliberately purchased and intended to fail on election day in order to necessitate fallback on a manual system that could be more easily manipulated to favor a particular candidate. The court dismissed the allegation on the grounds that the IEBC’s use of technology was discretionary and its failure was not an illegality or irregularity; however, the court did suspect there may have been impropriety or even criminality in the procurement of election technology and recommend further investigation and possible prosecution by relevant state agencies.<sup>422</sup>

In the 2017 presidential election petition, petitioners cited a number of illegalities, including allegations of undue influence, bribery and voter intimidation. Petitioners argued that the incumbent presidential candidate, Uhuru Kenyatta, had contravened the constitution and election laws<sup>423</sup> on the basis of four accusations: that he used a government website to adver-

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<sup>421</sup> Odinga v IEBC 2013, para. 256.

<sup>422</sup> Odinga v IEBC 2017, para. 108, 234, 237.

<sup>423</sup> Constitution of Kenya 2010, Article 81(e)(ii) improper influence and corruption during elections; Article 232(1)(b) values and principles of public service include – impartiality; Public Officer Ethics Act 4 of 2003,

tise achievements, deployed cabinet secretaries for election campaigning, threatened county chiefs with consequences for improper use of public resources for campaigning, and corruptly influenced voters by paying reparations to victims of 2007 post-election violence, which was effectively voter bribery.<sup>424</sup> The Supreme Court determined it was unable to rule on the first allegation because petitioners had provided little evidence on the matter, and because it was already the subject of two cases pending determination at the High Court.<sup>425</sup> The Supreme Court determined the second allegation raised an issue of the unconstitutionality of a legal provision; however, because petitioners had introduced the matter only during oral submissions and had not formally included it in their petition, the court ruled it was unable to consider the issue as parties must be bound by their pleadings.<sup>426</sup>

On the third allegation, the court determined that petitioners did not provide sufficient evidence to prove their claims that Kenyatta had threatened county chiefs.<sup>427</sup> On the final allega-

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Section 16 political neutrality; Election Offences Act of 2016, Section 14(1)(2) misuse of public resources for election campaigns; Political Parties Act 11 of 2011, Section 12 restrictions on public officers in political party.

<sup>424</sup> Odinga v IEBC 2017, para. 306, 326, 314, 323.

<sup>425</sup> Odinga v IEBC 2017, para. 310, 313; Mboya v Attorney General High Court Petition 162 of 2017; Munialo v Attorney General High Court Petition 182 of 2017. In both cases the High Court determined use of public resources, such as a government website, to advertise a political candidate or party's achievements during an election period was illegal and unlawful.

<sup>426</sup> Odinga v IEBC 2017, para. 331, 332. Leadership and Integrity Act 19 of 2012, Section 23 exempts cabinet secretaries from the requirement of political neutrality, which seemed contrary to the provisions established by the constitution and laws cited above. Petitioners had urged the Supreme Court to declare the inconsistencies in these legal provisions to be unconstitutional. The Election Offences Act 37 of 2016, Section 15 does not include any reference to cabinet secretaries, instead it refers broadly to "public officers" who are prohibited from participating in an election on behalf of a political party or a candidate.

<sup>427</sup> Odinga v IEBC 2017, para. 314, 315, 322.

tion, respondents argued any such funds were approved by parliament and released by the National Consultative Coordination Committee, which managed the affairs of Internally Displaced Persons on behalf of the state – thus the president had no involvement in the matter. The court found petitioners had submitted no convincing evidence to substantiate the claim.<sup>428</sup> The court concluded it was unable to identify any individual who committed illegalities and could not find any evidence of misconduct, criminal intent or culpability among the respondents.<sup>429</sup>

The difficulty with allegations of illegalities is that they are hard to prove. In election petitions the standard of proof for alleged irregularities is an intermediate threshold that is higher than above balance of probability as in a civil case, but not as high as beyond reasonable doubt as in a criminal case; however, where illegalities are alleged, they must be proven to the standard of a criminal case, that is beyond reasonable doubt.<sup>430</sup> Thus, short of being caught red-handed with a smoking gun, these allegations are nearly impossible to substantiate and rather futile to argue.

Despite the inherent challenges and unlikelihood of success in proving allegations of illegalities, petitioners in many gubernatorial election cases remained undeterred. Nearly always, courts dismissed such allegations on the basis of petitioners' lack of evidence and failure to prove allegations to the standard required for criminal offences – beyond reasonable doubt. In many

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<sup>428</sup> Odinga v IEBC 2017, para. 323, 324, 325. Although an independent state agency may have been tasked with coordinating payments to IDPs, the court did not interrogate the issues raised by petitioners that Kenyatta had personally promised IDPs would be compensated and distributed payments while campaigning for the August election, which was widely reported in the press (PSCU 2017, Mutambo 2017b).

<sup>429</sup> Odinga v IEBC 2017, para. 386.

<sup>430</sup> Odinga v IEBC 2013, para. 203.; Odinga v IEBC 2017, para. 134, 145, 146, 148, 149, 152.

cases, petitioners demonstrated a total inability to provide cogent answers to the most basic questions that would arise with such serious allegations of criminal offences: Who committed the crime? Where and when was it committed? In the case of bribery, what was the amount paid, who paid and who were the intended recipients? In the case of violence, who was the assailant and who were the victims? In all cases of illegalities, what was the effect on the election? Were witnesses called to testify? Did witnesses notify relevant authorities such as IEBC officials or police? And were allegations sufficiently pleaded in petitions? The constant refrain in many cases alleging illegalities was that petitioners failed to adduce cogent, firm and credible evidence to the required standard of proof beyond reasonable doubt.

In gubernatorial petitions for Busia,<sup>431</sup> Kisumu, Marsabit, Turkana, and Wajir,<sup>432</sup> courts faulted petitioners for raising allegations of bribery and violence during the course of hearing the petition, without having made any reference to such illegalities within their petitions. In the Kisumu case, the court observed that petitioners verbally referred to illegalities that were absent from their petition and had no foundation in their pleadings. The court urged “the petitioner case is confined within the four corners of the petition. Any evidence that falls outside these confines must be disregarded.”<sup>433</sup> To allow petitioners to raise issues not formally pleaded would be tantamount to widening the scope of the petition and impinge on respondents’ right to fair trial by calling upon them to answer to allegations that had no basis in the petition.

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<sup>431</sup> Khasamule v IEBC High Court Election Petition 4 of 2017, para. 56.

<sup>432</sup> Mohamad v Mohamed High Court Election Petition 14 of 2017, para. 148.

<sup>433</sup> Ranguma v IEBC High Court Election Petition 3 of 2017, para. 52, 53, 55.

In the Marsabit case, the court noted petitioners had raise allegations of violence that were not contained in their petition, but allowed latitude for petitioners to proceed because respondents expressed readiness to address the matter.<sup>434</sup> In the Turkana case, the court stated allegations of election offences must not only be pleaded, but also particularized with specificity in the petition.<sup>435</sup> Courts in Homa Bay, Marsabit and Nyamira cases faulted petitioners for failing to disclose when bribery had occurred; the names, descriptions or number of voters bribed; the amount of the bribe; and on behalf of which candidate was bribery committed.<sup>436</sup> In Busia, the court faulted the petitioner for accusing another candidate of perpetrating violence against him, yet he did not know the identity of his attacker.<sup>437</sup>

Courts faulted petitioners for failing to call witnesses to support their allegations<sup>438</sup> and for calling unreliable witnesses who could not provide firsthand accounts of alleged offences and only contributed secondhand hearsay.<sup>439</sup> Courts were especially critical and suspicious of petitioners and witnesses for petitioners who testified as having seen respondents or persons acting on their behalf commit alleged offences, but did not notify relevant authorities such as IEBC officials or police. The court in the Busia case noted neither petitioners nor their witnesses

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<sup>434</sup> Wario v IEBC High Court Election Petition 2 of 2017, pg. 87.

<sup>435</sup> Kiyonga v Nanok High Court Election Petition 1 of 2017, pg. 16.

<sup>436</sup> Magwanga v IEBC High Court Election Petition 1 of 2017, para. 110; Wario v IEBC High Court Election Petition 2 of 2017, pg. 86; Osebe v IEBC High Court Election Petition 1 of 2017, para. 59.

<sup>437</sup> Khasamule v IEBC High Court Election Petition 4 of 2017, para. 27.

<sup>438</sup> Khasamule v IEBC High Court Election Petition 4 of 2017, para. 21; Ndeti v IEBC High Court Election Petition 1 of 2017, para. 27; Kiyonga v Nanok High Court Election Petition 1 of 2017, pg. 17.

<sup>439</sup> Magwanga v IEBC High Court Election Petition 1 of 2017, para. 110; Karua v IEBC High Court Election Petition 2 of 2017, para. 206; Hassan v IEBC High Court Election Petition 10 of 2017, para. 102.

provided proof that they reported the alleged offences to police or any other authority, yet such proof would have constituted strong evidence to support the veracity of such serious allegations. Moreover, the court noted the law enjoins every citizen who observes criminal acts to notify authorities. The court stated it was “baffling” and “unbelievable” that petitioners and their witnesses observed criminal activity and did nothing about it, which could only lead the court to draw one conclusion – that such offences never occurred.<sup>440</sup>

Courts were not amused by the casual and cavalier manner in which petitioners alleged criminal offences – without specifying basic particulars of the allegations (who, what, where, when, why, how), based on unsubstantiated claims from unreliable witnesses, uncorroborated by independent evidence, and without notifying authorities. Courts in Busia, Homa Bay and Marsabit cases suggested petitioners’ allegations seemed like “afterthoughts,” “outright lies” and “sensational” claims that were hastily cobbled together in an attempt to strengthen petitions.<sup>441</sup> In Mombasa and Tana River cases, courts found petitioners’ allegations amounted to mere suspicion without an iota of cogent evidence.<sup>442</sup>

Courts in Busia and Kutui cases noted that even if petitioners succeeded in proving criminal offences had occurred, this alone would not be sufficient to vitiate an election. Petitioners would still need to adduce evidence that criminal offences, such as bribery, intimidation and violence,

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<sup>440</sup> Khasamule v IEBC High Court Election Petition 4 of 2017, para. 23, 32, 42, 51, 55.

<sup>441</sup> Khasamule v IEBC High Court Election Petition 4 of 2017, para. 39; Magwanga v IEBC High Court Election Petition 1 of 2017, para. 113; Wario v IEBC High Court Election Petition 2 of 2017, pg. 88.

<sup>442</sup> Hassan v IEBC High Court Election Petition 10 of 2017, para. 100; Hatu v Godhana High Court Election Petition 1 of 2017, para. xvii.



were traceable or attributed, directly or indirectly, to respondents. Petitioners would also have to prove that such incidents were widespread and significantly affected the conduct or results of an election by disrupting the voting exercise or disenfranchising a substantial number of voters.<sup>443</sup> For example, the court in the Turkana case noted incidents of violence were isolated and occurred far from the polling stations, thus they had no effect on voters or the election.<sup>444</sup>

It is noteworthy to recall that in gubernatorial petitions for Wajir and Kajiado,<sup>445</sup> both High Courts determined failure of IEBC officials to sign results forms was a criminal offense.<sup>446</sup> The court in the Kajiado case made two interesting observations: first, the court stated, “petitioners had the liberty under Section 6(j) of the Election Offences Act No. 37 of 2016 to lodge a complaint that an offence had been committed by an officer of the IEBC ... for prosecution which if proved would attract a fine not exceeding 1 million shillings or to imprisonment of a term not exceeding three years or both”; second, the court stated, “I am aware that Section 6(j) of the Election Offences Act makes it an offence for any of the IEBC officers who omits or fails to perform his or her duties... Unfortunately, that Section has not been utilized sufficiently to deter such criminal acts which would deprive a genuine winner victory. It is high time the Director of Public Prosecution and other investigative agencies preferred [stet] such charges so as to deter

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<sup>443</sup> Khasamule v IEBC High Court Election Petition 4 of 2017, para. 28; Malombe v Ngilu High Court Election Petition 4 of 2017, para. 103, 105; Malombe v Ngilu Court of Appeal Election Petition Appeal 24 of 2018, para. 48, 50, 51.

<sup>444</sup> Kiyonga v Nanok High Court Election Petition 1 of 2017, pg. 19.

<sup>445</sup> Mohamad v Mohamed High Court Election Petition 14 of 2017, para. 88; Kores v Lenku High Court Election Petition 2 of 2017, para. 100, 101, 103.

<sup>446</sup> Election Offences Act 2016, Section 6 Offences by members and staff of the Commission— (j) without reasonable cause does or omits to do anything in breach of his official duty.

officers who are indolent from subverting the natural course of electoral justice.”<sup>447</sup> Taken together, these two statements effectively amounted to passing the buck onto petitioners and the state prosecutor. Really the most sufficient way, perhaps the only way, to deter such electoral offences and to enforce compliance with election laws would be for a court of law to find an offender guilty of such an act and to convict that offender accordingly.

However, there is a legal caveat with regard to election offences that both removes significant responsibility from courts, but also places substantial responsibility upon them. As noted by the High Court in the Kutiu gubernatorial petition: “The Election Laws (Amendment) Act, 2017 took away the power of this Court to find a person guilty of an election offence. Instead, the Court is now only empowered to make a finding that an electoral malpractice of a criminal nature may have occurred and report the matter to the Director of Public Prosecutions (DPP).”<sup>448</sup> Thus, whereas election courts no longer have responsibility to find individuals guilty of election offences, they still have responsibility to report election offences to the DPP.<sup>449</sup> Courts in the

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<sup>447</sup> Kores v Lenku High Court Election Petition 2 of 2017, para. 73, 103.

<sup>448</sup> Malombe v Ngilu High Court Election Petition 4 of 2017, para. 166, 170, 171.

<sup>449</sup> “Election Laws (Amendment) Act, 2017” was an erroneous reference as no such law exists. Although there were two amendments to the Elections Act in 2017 – Amendment 1 of 2017 enacted on January 6, 2017 and in effect for the 2017 elections, and Amendment 34 of 2017 enacted on November 2, 2017 after the 2017 elections – neither makes any reference to the role of election courts in dealing with election offences. The court was likely referring to Election Laws (Amendment) Act 36 of 2016, which changed the language of Section 87 of the Elections Act 24 of 2011. In the 2011 version, election courts were empowered to find individuals guilty of election offences. In the 2016 version, courts were to refer criminal offences to the DPP for further investigation. Below the two versions are provided for comparison.

Elections Act 24 of 2011, Section 87 Report of court on election offences: (1) An election court shall, at the conclusion of the hearing of a petition, in addition to any other orders, send to the Director of Public Prosecutions, the Commission and the relevant Speaker a report in writing indicating whether an election offence has been committed by any person in connection with the election, and the names and descriptions of the persons, if any, who have been proved at the hearing to have been guilty of an election offence. (2) Before a person, not being a party to an election petition or a candidate on whose behalf the seat is

Wajir and Kajiado cases did not do so,<sup>450</sup> which obviates the potential for the Elections Offences Act to serve as a deterrent for the commission of election offences, and deprives the DPP of reason to investigate and prosecute election-related crimes. In contrast, the High Court in the Kitui case did find evidence of electoral malpractices and did forward the matter to the DPP for investigation and further action.

The above analysis indicates that allegations of illegalities are difficult to prove because they require a higher standard of proof. A petitioner-centric analysis of gubernatorial petitions indicates that in many cases such allegations were unsubstantiated as petitioners failed to adduce cogent evidence to prove their claims. However, a court-centric analysis suggests that in the small number of cases where courts found election offences and illegalities had occurred, courts were reluctant to impugn specific individuals or to forward their findings to relevant state agencies for further investigation and prosecution. Thus, courts in these cases did not fulfil their institutional role of enforcing compliance with election laws or deterring criminal offences and ille-

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claimed by an election petition, is reported by an election court, the elections court shall give that person an opportunity to be heard and to give and call evidence to show why he should not be reported.

Election Laws (Amendment) Act 36 of 2016, Section 87 Report of court on election offences: (1) An election court may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred. (2) Where the election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions. (3) Upon receipt of the order under subsection (2), the Director of Public Prosecutions shall— (a) direct an investigation to be carried out by such State agency as it considers appropriate; and (b) based on the outcome of the investigations, commence prosecution or close the matter.

<sup>450</sup> The High Court in the Kajiado case seemed to prefer a benefit of the doubt approach on the basis that failure or omission of an IEBC officer to perform a duty may have been due to genuine fatigue or negligence and not a criminal offence (Kores v Lenku High Court Election Petition 2 of 2017, para. 103).

galities. Clearly, as courts noted in many of gubernatorial petitions, petitioners also have a responsibility to report illegalities to relevant authorities such as the IEBC and police.

### Party Agents

During the 2013 presidential election, the IEBC ejected party agents and accredited election observers from the vote tallying area at the National Tallying Centre. This was a highly controversial move,<sup>451</sup> which petitioners raised as a major point of contention in their election petition before the Supreme Court. Petitioners argued party agents were relocated to an adjacent boardroom where they were given access only to Forms 36, and not Forms 34, and only allowed twenty minutes to review the forms, which was insufficient time, before the IEBC announced the results to the public.<sup>452</sup> Petitioners claimed the limitations the IEBC imposed on party agents, combined with other irregularities, proved the entire tallying and verification process was conducted unilaterally and without transparency by the IEBC, which was contrary to the constitu-

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<sup>451</sup> The Carter Center (2013) observer group noted the IEBC decision to confine party agents and observers to the gallery of the national tally center was regrettable and unfortunate, because it made meaningful observation impossible and effectively eliminated access to IEBC personnel and the tally of results forms, which seriously marred the transparency and integrity of the final stages of the election. The observer group for the European Union (EUEOM 2013) stated, “The processing of official results lacked the necessary transparency. Party agents and election observers were not given adequate access to the tallying processes in the constituency, county and national tallying centres.” The Commonwealth Observer Group (COG 2013) noted, “there was some tension between the IEBC and party agents at the National Tally Centre regarding access to the process [which] represented an untidy end to a critical part of the process.”

<sup>452</sup> Notably, the Supreme Court acknowledged the IREC/Kriegler Commission Report included recommendations to allow sufficient time before the declaration of final results so as to allow all parties opportunity to evaluate election results, raise complaints or express objections (Odinga v IEBC 2013, para. 148; Republic of Kenya 2008a). Forms 34 contained results from individual polling stations. Forms 36 contained results from all Forms 34 within each constituency.

tion and election laws.<sup>453</sup> Respondents countered the IEBC's ejection and relocation of party agents was warranted because they had become rowdy and precipitated altercations and paralyzing confrontations with IEBC staff, and in some instances threatened to assault IEBC staff, and because the law granted the IEBC full discretion in the management of elections.<sup>454</sup>

The Supreme Court noted that the constitution provides the IEBC with exclusive authority to count, tally and verify the voting results, and that subsidiary legislation "allows" party agents to observe these processes.<sup>455</sup> The court prosed the legal and public standing of agents "is all about the public perception, and legitimacy, which are of the essence in a distinctly political process such as a Presidential election." The court noted the IEBC was expected to operate in conformity with "national values and principles of governance," namely "integrity, transparency and accountability" as declared in the constitution,<sup>456</sup> "without retreating from the public forum of visibility and without disengaging from stakeholders of the electoral process." However, the court elaborated "there is no sharp definition of the mode of such engagement," and because "Such values, in the context of a large-scale exercise such as the Presidential election, will operate optimally only in conditions of good order, peace and security," the IEBC has responsibility to ensure that such conditions prevail and full discretion in the exercise of such responsibility.<sup>457</sup>

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<sup>453</sup> Odinga v IEBC 2013, para. 143.

<sup>454</sup> Odinga v IEBC 2013, para. 159, 239.

<sup>455</sup> Constitution of Kenya 2010, Article 138(3)(c); Elections (General) Regulations 2012, Section 85(1)(e).

<sup>456</sup> Constitution of Kenya 2010, Article 10(2)(c).

<sup>457</sup> Odinga v IEBC 2013, para. 241, 242, 243.

It is apropos to note that whereas the court included an exact constitutional citation for “national values and principles of governance” and “integrity, transparency and accountability,” the court made no reference as to which constitutional article, law or regulation corresponded with conditions and values of “good order, peace and security” or the exercise of “discretion.”<sup>458</sup> Instead the court referenced case law, specifically an advisory opinion,<sup>459</sup> to establish that “discretion” is entailed in the “independence” of various independent agencies established under the constitution, which is essential to their proper functioning and provided as a safeguard against undue interference or control by any other person, institution or authority.<sup>460</sup> The Court concluded the IEBC had an obligation to resolve any kind of impasse at the National Tallying Centre and discretion to do so as it saw fit, tallying was indeed conducted in accordance with the law, the relocation of party agents did not undermine the credibility of the tallying, nor provide a basis for annulling the presidential election.<sup>461</sup>

Harrington and Manji (2015) argue the Supreme Court’s interpretation of Article 249 on the autonomy of independent commissions was an unexpected departure from the intended aims of the constitutional provision. The court’s reasoning seemed to neglect awareness that the provision was drafted as a direct response to a particular historical context and specifically

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<sup>458</sup> Harrington and Manji (2015) similarly note, not only did the court fail to link these objectives to a textual basis in the constitution, laws or regulations, it also failed to provide guidance on a structured, principled means of resolving conflicts between the principle of transparency and the need for order.

<sup>459</sup> In Matter of the Interim Independent Electoral Commission Supreme Court Constitutional Application 2 of 2011.

<sup>460</sup> Constitution of Kenya 2010, Article 249.

<sup>461</sup> Odinga v IEBC 2013, para. 244, 245.

designed to protect agencies, such as the IEBC, from executive interference and the overbearing influence of the central government that was commonplace in the past. Instead, the court took the view that the provision was intended to protect state agencies from the argumentative intrusions of party agents and from scrutiny of citizens and other non-state actors. To construe constitutional provisions as intending to shield state agencies from scrutiny of party agents and election observers acting on behalf of the public at large is the very antithesis of constitutional principles of integrity, transparency and accountability. Harrington and Manji (2015) argue the court's prioritization of order and stability over vigorous political debate was evidence of a normative "pull" in judicial reasoning that remained caught in the inertia of a pre-2010 model of the state dominated by an executive whose sovereignty was prior to and above the constitution and beyond the reach of the law; it was a reasoning that evoked Atieno-Odhiambo's (1987) notion of an "ideology of order" in which a highly centralized state championed national unity, security and peace as sacrosanct and inviolate values to warrant hypervigilance against any perceived or potential threats to its power and authority.

By validating the IEBC's characterization of party agents' demands for careful scrutiny as mere rowdiness and legitimizing its undefined latitude and discretion to deal with the matter as a public order problem, the court significantly devalued the role of party agents in the electoral process. While party agents most directly serve at the behest of political parties and particular candidates, Harrington and Manji (2015) argue party agents also serve the wider interest of the broader public, that their active participation is integral to actualizing the new constitutional order and vital for vindicating the constitutional rights of all citizens to free and fair elections. Undoubtedly the need for public order is essential for an electoral process and the operation of

an electoral management agency, but its prioritization over the robust exchange of opinions and explicit constitutional values of transparency and fairness in elections is untenable. Harrington and Manji (2015) propose the court's ruling served to insulate the IEBC from scrutiny and shielded the winning candidate from challenge. Quite at odds with doctrine of separation of powers and the transformative ambitions of the 2010 Constitution, the Supreme Court delivered a judgement that maintained a historical disposition and partiality that favored protection of state agencies and preservation of executive incumbency.

The IEBC's ejection of party agents from scrutiny of election results and the electoral process at the National Tallying Centre in the 2013 presidential election was part of a larger problem with access to information. Election petitions that alleged irregularities concerning results tabulation and forms faced an uphill challenge. This is because petitioners are required to present as the basis of their evidence the impugned forms, and in the majority of cases, petitioners did not have these forms. Petitioners and observers (Harrington and Manji 2015; Thiankolu 2019) have noted with dismay that there is an asymmetry of power and information between petitioners and the IEBC. This assertion is both true and false. It is true the IEBC maintains a near monopoly on election data and information as the originator and statutory custodian of election materials.

Prior to 2010, elections were characterized by long delays before election forms and results were made publicly available, which opened the doors for speculation of electoral fraud, and quite often results did "change" on the road while being physically transported from polling stations and tallying centers across to country to Nairobi. The 2010 Constitution, laws subsequently enacted and the IEBC's own institutional operating procedures sought to remedy this problem



by mandating the use of election technology to improve the transparency, verification and integrity of elections. The most pertinent requirements were for instantaneous electronic transmission of results and statutory forms from polling stations to the constituency and national tallying centers and publication on a publicly accessible online results portal. Thus, there should be little to no delay between the declaration, transmission and public availability of election results and forms. To the extent that the above requirements are followed, the notion of an IEBC monopoly on information is false.

Yet, the IEBC's monopoly on information remains true because the agency did not readily or timeously electronically transmit election results or make all results data available on its online public portal in the 2013 or 2017 elections. There were delays of hours, days and in some cases weeks between when the IEBC announced results contained in forms and when the forms were published on the IEBC online portal. Moreover, not all forms were published (Cheeseman 2017a; Ngirachu 2017a), and where a portion of results forms were made available on the IEBC public portal, such availability was occasionally temporary as some forms were posted and then removed. For example, forms from the August 2017 election were removed prior to the October 2017 repeat election. It is entirely unclear what logic would warrant the removal of the forms from public view on the IEBC portal.

The notion of an IEBC monopoly on information is also false because of the role envisioned for party agents, whose purpose is to ensure transparency, accountability and integrity in the conduct of elections. Party agents are appointed by candidates and political parties to serve as their representatives and to observe all aspects of an election. Party agents are then accredited

by the IEBC and granted access to polling stations and tally centers to witness voting, tallying and declaration processes. The IEBC is obligated to provide agents with duplicates of results declaration forms that have been signed and fully executed. Thus, because party agents have the ability to directly observe results tallying and secure their own copies of results forms, they have the potential to offset the information asymmetry between candidates and the IEBC.

However, the IEBC monopoly on information also remains true because party agents often fail to observe the conduct of elections and to secure copies of forms. This is evident in that most election petitions begin with preliminary applications from petitioners that call upon courts to order the IEBC to provide these documents. Petitioners in the 2013 presidential petition submitted two applications to the Supreme Court seeking orders for the IEBC to produce various election materials. The court dismissed both applications citing time constraints and noted petitioners should have filed the applications earlier on in the preliminary phase of the petition. The court also disallowed the petitioners' further affidavit and additional evidence – which included alleged proof of results manipulation and discrepancies between results electronically transmitted and those contained in Forms 34 and 36 – again citing strict timeframe and faulting petitioners for late filing.<sup>462</sup> Notably, petitioners blamed late submission on the IEBC because the agency was the custodian of election documents and failed to provide them to petitioners in a timely manner, and the court provided no recourse having denied petitioners' request for the IEBC to release the materials.<sup>463</sup>

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<sup>462</sup> Odinga v IEBC 2013, para. 142, 214, 216, 246.

<sup>463</sup> Odinga v IEBC 2013, Ruling.

A number of commentators faulted the Supreme Court for seemingly exhibiting restraint in its investigation of electoral conduct and shielding the IEBC from having to explain itself or disclose all the voting data and details of the electoral process. Musila (2013:13) noted, "It can be argued that forms in which results are recorded are not deposited in vain or for archival purposes: it is to facilitate an audit of a particular election with the active participation of the court." Wanyoike (2016:101) urged this "goes against the 2010 Constitution's clear purpose of making the election verifiable and all electoral officials accountable" and positioning courts "as a purposeful safeguard against fixing elections which has tainted a large part of Kenya's history as a democracy." Wanyoike noted the court required an elevated standard of proof on the part of petitioners, yet the IEBC as a respondent in the petition controlled all the evidence.

Aywa (2016) also faulted the court for not requiring the IEBC to produce all election materials on demand for two reasons: first, the IEBC's failure to provide information in a timely manner affected petitioners' ability to effectively argue their case; second, a weak judicial stance on the IEBC's obligations as custodian of public records on elections is a disincentive for the IEBC's responsibility to improve transparency and accountability in the management of elections. Aywa argues all relevant materials in the possession of the IEBC should be made available automatically to all parties to a petition. However, Aywa (2016:76) also faults candidates/petitioners in equal measure: "it beggars belief that political parties do not seem prepared to put in place adequate measures to ensure they have copies of statutory forms for all the polling stations in which they have agents." Thus, ending electoral fraud and strengthening electoral justice and democracy requires improving data availability on both the supply side, where the IEBC readily

makes public records publicly available, and the demand side, where party agents take advantage of legal provisions that grant them direct access to election documents.

Ongoya (2016) posed similar questions regarding petitioners and candidates – why did petitioners have to approach the respondent for data or file applications for court orders to access information held by the IEBC, why didn't candidates have agents collect data directly from polling stations and tallying centers? The core objective of appointing credible people, who are committed to the candidate or party, as agents and tasking them with collecting election data is for evidentiary purposes in anticipation of the possibility that an election may be disputed in court. Mwenesi (2013) argued, because the Elections (General) Regulations Act of 2012 allowed presidential candidates to post agents in all 33,400 polling stations and entitled agents to receive copies of results declaration forms from each polling station, every presidential candidate ought to have had 33,400 results declaration forms and the concrete evidence to support their petitions; thus, it should not have been necessary for petitioners to seek court orders to compel the IEBC to release documents that the petitioners could then use in their petitions.

The problems for petitioners in the 2013 presidential case were not only the IEBC's ejection of party agents from the National Tallying Centre, the IEBC's failure to release election documents in a timely manner, or the various rulings of the Supreme Court; problems with the information asymmetry between petitioners and the IEBC started before the polls even opened. An official for Odinga's CORD party admitted, "We had no agents in many parts of the country – particu-

larly in Jubilee strongholds. Even in the CORD friendly zones” (Obonyo 2013).<sup>464</sup> The problem of inadequate deployment of party agents was again a challenge for Odinga and his NASA party in the 2017 elections, and as Lynch (2017b) noted, “by the time that Nasa brought its petition, thousands of forms 34A were still not available, which produced an information black hole.”

Taking inspiration from Ghana’s opposition candidate, Nana Akufo-Addo, who successfully unseated an incumbent president, John Mahama, the year before, Odinga announced a new “adopt-a-polling-station” strategy a few months before the August 2017 election (Oloo 2017). Two Ghanaian campaign consultants were hired to train the opposition on how to implement the strategy,<sup>465</sup> which involved a massive recruitment and deployment of thousands of volunteers across the country as part of NASA’s plan to have five agents posted at each of the nation’s 41,000 polling stations. Yet, less than three weeks to the August 8 election date, NASA was still heavily promoting the party’s adopt-a-polling-station website to solicit help from supporters to volunteer as polling station agents (Owino 2017a; Ondieki 2017a; Mbaka 2017).

A closer look at Ghana’s lengthier experience with the adopt-a-polling-station strategy reveals the system is expensive and logistically demanding, prone to shortfalls, and requires extensive training and high levels of loyalty, discipline and vigilance among party agents to succeed (Lynch

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<sup>464</sup> CORD (Coalition of Reforms and Democracy) was the official opposition party for the 2013 elections, it was dissolved and succeeded by NASA (National Super Alliance) for the 2017 elections. Jubilee was the party of the ruling regime.

<sup>465</sup> Just days before the election, the two Ghanaians were arrested and deported. Government sources accused the two of overstaying their tourist visas, working in the country without proper work permits and “assisting the opposition to engineer a regime change,” aka working for presidential election campaign (Wanga 2017a; Otieno, K. 2017).

2017a). These were lessons NASA would realize far too late and with much chagrin. On election night as results were streaming into the National Tallying Centre from across the nation, NASA principals Musalia Mudavadi and James Orengo openly complained about their party agents' laxity and failure to verify and authenticate that results announced at the polling stations matched with those recorded on official results forms before they were scanned and sent to the National Tallying Centre. Orengo stated, "Some of the people [party agents] we put here [at polling stations] are very useless. When they were looking for jobs they were really good but now they have turned out to be a real let-down to us" (Nation Team 2017b).

In the aftermath of the August election, Odinga demanded that party officials explain why they had hired party agents who failed to fulfill their roles, lacked commitment to the party and were only out to collect paychecks (Otieno 2017b). Although NASA continued to maintain its claims of electoral injustice and rigging, the party also acknowledged its own internal efforts had not paid off (Ngetich 2017b). According to a senior party official, "[NASA] had a huge team of researchers and policy makers who worked tirelessly," but most of their "brilliant boardroom ideas" were never implemented. Despite being exhaustively discussed and approved internally and consistently making headline news weeks to the polls, the adopt-a-polling-station strategy was one of the ideas that simply fell flat and failed to materialize. A NASA campaign official explained, "Although the constituency agents across the country were trained, those at the polling stations were not despite the fact that those in charge were paid millions in allowances and consultancy fees," and despite having a "group of well-paid" foreign experts "they failed to set-up the infrastructure we required."

Moreover, whereas NASA was using online platforms to solicit volunteers from among the wananchi or ordinary public, Jubilee was using online platforms to recruit professional campaign officers and manning polling stations in opposition strongholds with agents who were fully licensed lawyers (Onyando 2018). Jubilee vice-chair David Murathe boasted the party's voter mobilization initiative had already enlisted "a total of 500,000 party volunteers from every village... in addition to the 45,000 agents in polling centres" (Wanga and Ochieng 2017). Despite all its efforts, on voting day NASA agents were largely absent from polling stations, particularly in Jubilee strongholds (Onyando 2018; Pkalya 2017). As acknowledged by NASA (Gisesa 2017), and as per long established historical practice (Masime and Otieno 2010), the opposition party was also at a disadvantage compared to the incumbent candidate who could benefit from access to state machinery and resources in terms of human and financial capital.<sup>466</sup>

Whereas the Supreme Court in the 2013 presidential petition was seen as shielding the IEBC from providing election materials and preventing petitioners from accessing such information, in the August 2017 presidential petition the court, perhaps cognizant of criticism from the earlier case, allowed all of the petitioners' requests for the IEBC to release information (Onyango 2017b). However, a notable caveat is that the IEBC was accused of refusing the follow court orders to allow access to its servers for scrutiny. The court found that by failing to comply with court orders, the IEBC had squandered a "golden opportunity" to disprove the petitioner's allegations, which left the court with no option but to draw an adverse inference against the

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<sup>466</sup> This was one of the grounds raised by petitioners in *Odinga v IEBC 2017* (para. 306, 326, 314, 323) who accused President Kenyatta of violating the constitution and election laws by illegally using a government website to advertise achievements, deploying cabinet secretaries for election campaigning and corruptly influencing voters with bribery in the form of reparations for victims of 2007 post-election violence.

respondents and to accept the petitioners' claims that the election technology had been hacked, that the results were altered and unverifiable, and that the IEBC had bungled the election.<sup>467</sup>

Notably, Judge Ndung'u disagreed with the majority judgement and urged, "The court did not give orders for the petitioner to access the [IEBC's] servers but only access the read-only copy information since the commission's integrity had to be protected" (Kimanthi 2017a; Sigei 2017). In her dissenting judgement, Ndung'u expressed surprise that the judges and parties to the petition differed on their interpretation of the court orders, which she found to be "very clear and free from misconstruction" and "very distinct from the prayers originally sought" by petitioners.<sup>468</sup> Differences in how the court order was interpreted were evident in commentary from observers with some stating the court had granted parties "unfettered access" (Mosoku 2017b) and others stating the court had "denied unfettered access" (Onyango 2017b).

Many observers mistakenly believed that by refusing to comply with court orders the IEBC was in contempt of court (Michira 2017; Menya 2017d; Mutua 2017b). Others misquoted the court as stating the IEBC had "contemptuously disobeyed" court orders (Ogemba and Muthoni 2017; Gaitho 2017a; Mwangi 2017; AFP 2017c). But the words "contempt" and "contemptuously" never appeared in the majority judgement, perhaps quite purposefully, which instead used the wording "contumaciously disobeyed" and "contumacious disobedience."<sup>469</sup> Rather it was Judge

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<sup>467</sup> Odinga v IEBC 2017, para. 279, 280, 299.

<sup>468</sup> Odinga v IEBC 2017, Dissenting Judgement of Ndung'u, para. 658, 659. Ndung'u proposed petitioners had prayed for "unfettered access," but the court granted "only limited specific orders" for access.

<sup>469</sup> Odinga v IEBC 2017, para. 279, 280, 299.



Ndung'u who used the word "contempt" in her dissenting opinion: "I do not find the [IEBC] in contempt of this Court's Orders and also find no basis to nullify the presidential election on the basis of any information revealed or otherwise in the Report [on scrutiny]."<sup>470</sup> Although the majority judgement did reprimand the IEBC for refusing to comply with court orders on access to its servers and did include IEBC's refusal as a contributing factor in its decision to nullify the election, some observers believed the court should have taken stronger action against the IEBC. For example, Kiai (2017a, 2017b) argued the court should have "ordered the servers to be seized and brought to the court,"<sup>471</sup> and charged the IEBC with "contempt of court to get to the bottom of this defiance" otherwise the "IEBC will certainly repeat the mess" in future elections.

At the gubernatorial level, petitioners' ability to prove various irregularities and illegalities pertaining to results forms and party agents were complicated by a number of interrelated factors. One of these factors was that petitioners are required to draft their petitions with specificity, for example, by explicitly stating which forms contained irregularities, at which polling stations did irregularities occur, and which individuals perpetrated irregularities. Thus, even if petitioners succeeded in convincing a court to grant orders for the IEBC to release election data, this would have happened during the preliminary phase of the trial, well after their petitions had been filed, meaning petitioners would not have already had the information they needed to draft their petitions – particularly if they failed to deploy agents to collect results forms from polling stations. Moreover, based on the principle that petitioners are bound by the particular plead-

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<sup>470</sup> Odinga v IEBC 2017, Dissenting Judgement of Ndung'u, para. 660.

<sup>471</sup> This was complicated by the fact that many of the servers were located in Europe as the IEBC had contracted French firm Safran Morpho for ICT services (Agutu 2017).

ings contained in their petitions, even if petitioners discovered new evidence in data released by the IEBC under court order, they would encounter difficulty in utilizing it because courts are reluctant to allow additional evidence as doing so would unfairly enable petitioners to expand the scope of their petitions and jeopardize respondents' right to a fair trial (e.g. Kitui, Machakos, Nyamira, Samburu, Siaya, Turkana,<sup>472</sup> Kirinyaga<sup>473</sup>).<sup>474</sup>

In such instances, lack of information was not due solely to failure of courts to grant access or failure of the IEBC to comply with court orders for access, it was due also to petitioners' failure to utilize party agents for their primary functions – to observe the conduct of elections at polling stations and tallying centers, to document irregularities and illegalities, and to collect election results forms in anticipation of the possibility for an election dispute before the courts.<sup>475</sup> But

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<sup>472</sup> Malombe v Ngilu High Court Election Petition 4 of 2017, para. 107, 110, 145; Ndeti v IEBC High Court Election Petition 1 of 2017, para. 44; Osebe v IEBC High Court Election Petition 1 of 2017, para. 113, 114, 117, 118; Saimanga v IEBC High Court Election Petition 1 of 2017, pg. 7, 8; Gumbo v IEBC High Court Election Petition 3 of 2017, para. 30, 31; Kiyonga v Nanok High Court Election Petition 1 of 2017, pg. 20.

<sup>473</sup> The High Court stated: "scrutiny is not a fishing expedition to introduce new evidence... [which] would give undue advantage and violate the rights of [respondents] on fair trial [as] envisaged under Article 50 of the Constitution" (Karua v IEBC High Court Election Petition 2 of 2017, para. 170, 171, 178, 181, 182).

<sup>474</sup> Maraga (2016:262) concurs with the view that as petitioners are bound by their pleadings, any irregularities or malpractices that may warrant scrutiny should be concisely pleaded in the petition to ensure procedural fairness to all parties to the case; however, he also makes the counterargument: "any irregularities revealed by scrutiny of election materials pursuant to a court order, whether pleaded or not should be taken into account in the final determination of a petition. To ignore any such irregularities or malpractices will be condoning illegalities, an act that will undermine public confidence in court determinations. The parties should, however, be accorded an opportunity of commenting on any such irregularities before they are taken into consideration."

<sup>475</sup> A notable caveat is that at many polling stations IEBC officials did not have enough copies of results forms to provide to all party agents (IEBC 2018; KNCHR 2018a); however, this would not have precluded agents from taking photographs of the results forms. IEBC officials noted: "some areas have more than 35 candidates and therefore allowing each parties to have an agent will not be feasible [stet]" (Owino 2017c); and that one of the commission's "greatest challenges" was "struggling" to deal with hundreds of agents in tallying centres (Standard Team 2017b).

such inability on the part of party agents was itself often alleged by petitioners to be the result of irregularities or illegalities committed by IEBC officials who were accused of barring party agents from entering or ejecting them from polling stations and tallying centers, preventing them from signing results forms or refusing to provide them with copies, or subjecting them to various forms of harassment. Such allegations were often pleaded by petitioners, but rarely proven to the standard required to convince courts to overturn elections.

In a number of gubernatorial election cases, petitioners argued problems pertaining to party agents, among other irregularities, constituted violations of the constitution and laws on elections, and directly and negatively affected the transparency, accuracy, accountability, credibility and fairness of elections.<sup>476</sup> In the majority of these cases, courts dismissed such allegations mainly for two reasons: first, petitioners failed to provide specific details of the allegations – when did the incidents occur, at which polling stations, who were the party agents that were denied access, who were the IEBC officials who denied access;<sup>477</sup> second, petitioners failed to call agents to testify as witnesses who could corroborate the veracity of the allegations.<sup>478</sup>

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<sup>476</sup> Kores v Lenku High Court Election Petition 2 of 2017, para. 4; Ranguma v IEBC High Court Election Petition 3 of 2017, para. 45; Hassan v IEBC High Court Election Petition 1 of 2017, para. 203; Wario v IEBC High Court Election Petition 2 of 2017, pg. 18; Mohamad v Mohamed High Court Election Petition 14 of 2017, para. 149.

<sup>477</sup> Kores v Lenku High Court Election Petition 2 of 2017, para. 121; Ranguma v IEBC High Court Election Petition 3 of 2017, para. 47; Malombe v Ngilu High Court Election Petition 4 of 2017, para. 33; Hassan v IEBC High Court Election Petition 10 of 2017, para. 15; Mohamad v Mohamed High Court Election Petition 14 of 2017, para. 119.

<sup>478</sup> Kores v Lenku High Court Election Petition 2 of 2017, para. 121; Malombe v Ngilu High Court Election Petition 4 of 2017, para. 77; Waity v IEBC High Court Election Petition 2 of 2017, para. 65; Ndeti v IEBC High Court Election Petition 1 of 2017, para. 42; Wario v IEBC High Court Election Petition 2 of 2017, pg. 30; Hassan v IEBC High Court Election Petition 10 of 2017, para. 94; Saimanga v IEBC High Court Election Petition 1 of 2017, pg. 9; Mohamad v Mohamed High Court Election Petition 14 of 2017, para. 119, 150.

In some cases, it became apparent that problems with party agents were the result of petitioners' own failures to ensure party agents obtained official accreditation from parties and the IEBC, presented proper documentation for admission into polling stations and tallying centers, and fulfilled their responsibilities to observe the conduct of elections, sign forms or record reasons for refusal, and receive copies. In many cases, petitioners could not adduce evidence that they actually had appointed agents to particular polling stations or that their agents were present at their assigned locations.<sup>479</sup> Without more explicit evidence of how such irregularities specifically affected the results or integrity of elections, courts found petitioners' allegations pertaining to party agents to be largely immaterial, particularly considering that Section 79 of the Elections (General) Regulations states refusal or failure of party agents to sign results forms or their absence from results declaration shall not invalidate election results.<sup>480</sup>

The IEBC's monopoly on election information remains intact for a number of reasons: the IEBC continues to inhibit the release of election data on demand to candidates and petitioners or to facilitate public accessibility of such information (e.g. via its online results portal); courts have either shielded the IEBC from obligations to provide such information or weakly sanctioned the agency for failing to do so; and existing laws, such as the Elections (General) Regulations, render

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<sup>479</sup> Kores v Lenku High Court Election Petition 2 of 2017, para. 121; Karua v IEBC High Court Election Petition 2 of 2017, para. 206; Ranguma v IEBC High Court Election Petition 3 of 2017, para.47; Malombe v Ngilu High Court Election Petition 4 of 2017, para. 33; Hassan v IEBC High Court Election Petition 10 of 2017, para. 48; Saimanga v IEBC High Court Election Petition 1 of 2017, pg. 9.

<sup>480</sup> Ranguma v IEBC High Court Election Petition 3 of 2017, para. 47; Malombe v Ngilu High Court Election Petition 4 of 2017, para. 83; Ndeti v IEBC High Court Election Petition 1 of 2017, para. 50; Hassan v IEBC High Court Election Petition 10 of 2017, para. 94; Saimanga v IEBC High Court Election Petition 1 of 2017, pg. 12.

the role of party agents immaterial because their participation or nonparticipation has no consequence in law. But the information asymmetry also remains intact because candidates and parties themselves have not fully realized or harnessed the potential for party agents to offset the information imbalance.

In summation, this chapter has provided an analysis of the arguments of petitioners and the reasoning of courts in different gubernatorial election petitions, and in comparison to presidential election petitions, with regard to technicalities, irregularities pertaining to technology, statutory forms and party agents, illegalities, and qualitative aspects of electoral processes and conduct versus quantitative aspects of election results. Although the Supreme Court's nullification of the August 2017 presidential election motivated a significant increase in the number of petitions contesting the outcomes of the five other elective seats in the 2017 elections, the vast majority of these election petitions were dismissed and the elections upheld.

From a petitioner-centric perspective, a recurring theme among courts in the adjudication of election petitions was that petitioners are bound by their pleadings, and in the majority gubernatorial cases courts found that petitioners failed to adduce sufficient evidence to prove their claims. The low success rate of gubernatorial petitions was largely due to a number of challenges that encumbered petitioners. For example, many of the legal provisions on elections are still relatively new, including the 2010 Constitution, many of the laws and regulations are inconsistent and unclear, and petitioners frequently presented arguments for irregularities that were either not contained in law or had no consequence in law. Gubernatorial petitioners also failed

to fully utilize party agents to observe the conduct of elections, document evidence of irregularities, receive copies of results forms and to testify as witnesses in election petitions.

A notable feature of the August 2017 presidential election petition was that petitioners augmented their approach and improved on their arguments in comparison to the 2013 presidential election petition. For example, petitioners in the 2017 case presented stronger arguments that linked irregularities to both noncompliance with the constitution and election laws (qualitative aspects), and effects on results (quantitative aspects). They also made stronger arguments on the first limb of Section 83 by citing a greater number of constitutional references, and particularly constitutional provisions on principles.

In contrast, many petitioners in gubernatorial cases from 2017 did not improve upon or learn from petitioners in gubernatorial cases from 2013. Instead, gubernatorial petitioners in 2017 repeated similar mistakes made by petitioners in 2013 – for example, with regard to technical and procedural errors such as not including correct names of respondents (e.g. deputy governors) and dates and results of elections. Although gubernatorial petitioners in 2017 frequently referenced the August 2017 presidential petition to buttress their claims that other elections also should be nullified, many gubernatorial petitioners did not utilize or replicate the arguments and approaches used by petitioners in presidential case that had succeeded in persuading the Supreme Court to nullify the presidential election, such as linking irregularities to violations of constitutional principles. These factors contributed to the low success rate of gubernatorial election petitions.

Among the many gubernatorial petitions from 2017, there were a small number of exceptional cases that did result in nullifications. These cases were unique because petitioners did present arguments and lower courts did adopt reasoning that mirrored those of petitioners and the Supreme Court in the August 2017 presidential case. However, the Supreme Court then overturned the lower court rulings and upheld the elections in subsequent rulings. The divergent outcomes of election petitions indicate variances in the approaches of petitioners and courts.

From a court-centric perspective, although the majority of gubernatorial petitions from the 2013 and 2017 elections were dismissed, in a small number of cases the High Court and Court of Appeal demonstrated greater willingness to nullify elections, whereas the Supreme Court exhibited greater reluctance to nullify elections and propensity to uphold them. A court-centric analysis of the adjudication of election petitions indicates that while courts have exercised some lenience in terms of making allowances for procedural and technical infractions, the continued emphasis on procedural technicalities, particularly over the substantive merits of cases, remains problematic. Perhaps most perplexing were the inconsistent interpretations and fluctuating application by courts of the legal provisions on the conduct of elections as per the Constitution, the Elections Act, the Elections Regulations and the IEBC's own institutional guidelines.

These inconsistencies and ambiguities in judicial determinations foster confusion, rather than clarity, among courts, petitioners, respondents, candidates, the election management agency and the public regarding expectations for the proper conduct and adjudication of elections.

Despite the low success rate of election petitions, many of the cases did reveal irregularities, malpractices and problems with the conduct of elections by the IEBC. Although such irregulari-

ties may not have been substantial enough to warranted nullification of elections, it would have been far more beneficial for raising the standards of the conduct and adjudication of future elections if courts had more strongly censured the IEBC for such violations and infractions.

The Supreme Court's nullification of the August 2017 presidential election marked a departure from the precedent it had established in upholding the presidential election and other elections from 2013. In the August 2017 presidential case, the Supreme Court adopted an approach that elevated consideration of qualitative effects on electoral processes while minimizing quantitative effects on election results. The Supreme Court emphasized the centrality of constitutional principles and demanded a higher standard for the conduct and adjudication of the presidential election in which compliance with the totality of all legal provisions was mandatory.

In gubernatorial petitions, the high number of cases that were dismissed indicates that different courts applied different reasoning and approaches in comparison to the Supreme Court in August 2017 presidential petition. In the majority of gubernatorial cases, courts assessed electoral irregularities with greater emphasis on quantitative effects on results (i.e. substantial effect rule), minimized consideration of qualitative effects on electoral processes and conduct, and made fewer references to constitutional principles (although this judicial approach may have been in response to how petitioners framed their pleadings). However, in the small number of gubernatorial elections that were nullified, lower courts seemed to replicate and apply the high standards demanded by the Supreme Court in the August 2017 presidential election to the conduct and adjudication of gubernatorial elections. But the Supreme Court reversed these lower court rulings and in doing so lowered the standards for the conduct and



adjudication of gubernatorial elections by determining that total compliance with the legal provisions for these elections was unnecessary and inconsequential.

Although it would have been expected that the Supreme Court's approach in the August 2017 presidential petition would have establish precedent that would guide lower courts in the adjudication of petitions for other elective seats, this was not the case. Variances in judicial reasoning and approaches among different courts in the adjudication of election petitions can be attributed to two key factors: One was due to deficiencies and lack of clarity in how the legal provisions on elections are written. The other was that the Supreme Court's use of rhetorical interrogatives rather than declarative reasoning in the August 2017 presidential petition did not provide a firm foundation for precedent to guide lower courts in the adjudication of petitions contesting other elective seats.

The Supreme Court's nullification of the August 2017 presidential election broke its 2013 precedent, but it did not establish a new precedent as was evident in the outcomes of the 2017 gubernatorial election petitions and petitions for other elective seats. This suggests that the Supreme Court's decision to nullify the August 2017 presidential election appears to be an anomaly, and subsequent court rulings to uphold other elections appears to be the norm. The above analysis of variances in the approaches of petitioners and the determinations of various levels of courts reveals discontinuities, inconsistencies and ambiguities the adjudication of elections. This analysis suggests that the resilience of the status quo of a pre-2010 jurisprudence remains a challenge for the emergence of a post-2010 jurisprudence that more strongly affirms and advances the principles of transformative constitutionalism and electoral justice.

## **Chapter 7. Adjudication of the Repeat Presidential Election – October 2017**

Following Kenya's general elections on August 8, 2017, the Independent Electoral and Boundaries Commission (IEBC) announced the victory of incumbent presidential candidate Uhuru Kenyatta of the ruling Jubilee party. Raila Odinga, the presidential candidate for the main opposition party, the National Super Alliance, alleged the election had been fraught with irregularities and filled a petition before the Supreme Court to challenge the results. On September 1, 2017, the Supreme Court announced its judgement to nullify the August 2017 presidential election and ordered a repeat presidential election to be held within 60 days. The IEBC scheduled October 26, 2017 as the date for the repeat presidential election.

The period between the Supreme Court's verdict on September 1, 2017 and the repeat presidential election on October 26, 2017, was highly volatile and marked by heightened political tensions and civil unrest. There were ongoing street protests and large-scale demonstrations across the country, and particularly in Nairobi, the nation's capital city. Supporters of Kenyatta and Jubilee protested against the Supreme Court for overturning Kenyatta's electoral victory (Muthoni 2017b; Standard Team 2017f). Supporters of Odinga and NASA protested against the IEBC for irregularities committed by the agency during the August election (Nation Team 2017k). There were incidents of intercommunal violence perpetrated by non-state actors, use of brutality, excessive force and extrajudicial killing by state security forces, and allegations of violent state suppression that disproportionately targeted opposition supporters and opposition strongholds (KNCHR 2018a, 2018b).

During this period the two main political factions engaged in various tactics to ensure that the outcome of the October repeat election would favor their interests. Kenyatta and Jubilee, with a parliamentary majority, tried to amend the election laws (Chapter 8 provides a detailed discussion). Their objectives were perceived as an attempt to weaken the ability of the IEBC to conduct a credible repeat election (Musau 2017d; Mosoku 2017f), and to erode the power of the Supreme Court to nullify a presidential election (Obala 2017a; Githae 2017).

Odinga and NASA boycotted parliamentary processes and instead organized nationwide street protests under the slogan of “No reforms, No election.” NASA wanted the IEBC to institute a number of reforms prior to the repeat election, which the opposition defined as “irreducible minimums.” These included demands for the IEBC to dismiss election officials who NASA accused of perpetrating irregularities during the August election, and to replace companies that had supplied ballots, voting materials and ICT services for the August election with new vendors for the October repeat election (Otieno 2017c; Lang’at 2017g). NASA’s efforts were perceived as an attempt to frustrate the IEBC’s preparations for the repeat election in order to force its postponement or cancelation. This would precipitate a constitutional crisis and open the possibility for the conflict to be resolved through a power-sharing agreement in which members of the opposition party and the ruling regime would form a coalition government (Chemuigut 2017; Jelimo 2017; Titus 2017b).<sup>481</sup>

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<sup>481</sup> The 2007 post-election crisis was resolved through a power-sharing agreement between the main opposition party and the ruling regime. This resulted in the formation of a coalition government in which Mwai Kibaki retained the presidency and the new position of prime minister was created for Raila Odinga. Odinga was the presidential candidate for the main opposition party. He lost the election to Kibaki, who was the incumbent presidential candidate for the ruling party.

On October 10, 2017, Odinga and NASA announced their official withdrawal from the repeat presidential election scheduled for October 26, 2017. They argued that the IEBC's failure to implement institutional reforms, coupled with the attempts by a Jubilee-majority parliament to change the election laws, meant that the October election would be less credible and fraught with more irregularities than the August election (Odinga 2017b). Despite Odinga's withdrawal, the opposition vowed to continue its anti-IEBC demonstrations and changed its protest slogan from "No reforms, No election" to simply "No elections in October" (Nation Team 2017; Otieno 2017d). As part of its strategy to frustrate the repeat election, in addition to urging supporters to boycott the polls, NASA also devised a plan to block IEBC officials and voters from accessing polling stations in opposition strongholds. NASA could then argue that the repeat presidential election was invalid because Article 139 of the 2010 Constitution stipulates that a presidential election must be held in each constituency (Omoro and Nyarangi 2017).<sup>482</sup>

Odinga's withdrawal from the October repeat election meant that Kenyatta essentially ran unopposed.<sup>483</sup> In the August election, Kenyatta won 54 percent of the votes against Odinga's 45 percent with a voter turnout of 78 percent. In the October election, Kenyatta won 98 percent of the votes, but voter turnout was less than 40 percent. Following the IEBC's declaration of

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<sup>482</sup> This strategy was flawed because Article 136 of the 2010 Constitution states presidential elections shall be conducted in accordance with the constitution and any act of parliament regulating presidential elections. Parliament enacted Section 55B of the Elections Act of 2011 and Sections 64A and 87 of the Elections (General) Regulations of 2012, which grant the IEBC discretion to postpone an election in specific areas under certain circumstances and to declare a candidate elected as president before all constituencies have returned their results.

<sup>483</sup> Although there were a number of minor presidential candidates on the ballot along with Kenyatta, they garnered less than 1 percent of votes in the October election. In the August election these candidates accounted for slightly over 1 percent of votes.

Kenyatta's victory in the repeat election, three individuals filed a petition before the Supreme Court to dispute the election results on the basis of allegations of widespread irregularities. The Supreme Court dismissed the petition and upheld Kenya's election.

A number of commentators have noted, with criticism, that the Supreme Court adopted a much different approach in its adjudication of petitions contesting the August presidential election (nullified) and the October repeat presidential election (upheld), both in terms of the reasoning it applied in the two cases and its treatment of petitioners. However, it is important to note that there were also significant differences between both the petitioners and the arguments they presented in the two cases.<sup>484</sup> Whereas the petitioners contesting the August presidential election were Raila Odinga, the candidate for the main opposition party – National Super Alliance (NASA), and his running mate; in the petition for the October repeat election, the petitioners described themselves as voters and patriotic citizens; however, the first petitioner, John Harun Mwau, was a former MP, and the second and third petitioners, Njonjo Mue and Khelef Khalifa, were leaders of prominent NGOs. Whether petitioners were approaching the court as voters and ordinary citizens or as political proxies for the opposition became a significant factor in the case.

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<sup>484</sup> Chief Justice Maraga acknowledged some of these differences in a press interview (Menya and Muyanga 2018): "if you take time and read through the decisions of the two petitions, you will see why we decided each the way we decided. Some people have said some things about the second petition (after the October 26 election). That 'why did you decide this way and not that way?' The two petitions were completely different. Not many people realise this. The scenarios had changed. The contestants, some of them [Odinga], had withdrawn and so the scenario was completely different. The facts that were placed before us, in our view, did not merit overturning the election."

The third respondent, Uhuru Kenyatta, who won both elections as the incumbent candidate for the ruling Jubilee party, argued the Supreme Court should not grant audience to the petitioners because they lacked the right to contest the repeat election (*locus standi*) as a matter of public interest litigation on the basis that: (a) none of the candidates who participated in the repeat election had filed petitions contesting the results (Ogemba and Muthoni 2017d); (b) despite the petitioners' assertion that they were voters, it was unlikely they had participated in the repeat election by voting since the opposition had urged supporters to boycott the polls; (c) petitioners were serving as proxies for an opposition candidate who had withdrawn his candidacy and, therefore, did not participate in the repeat election; and (d) petitioners falsely presented themselves as aggrieved voters and "bona fide defenders of the public interest," when in reality they were "surrogates, agents, and mouth-pieces" of the opposition candidate and their sole objectives were to advance his personal political interests, not the interests of the general public.<sup>485</sup>

The petitioners had originally included NASA as a party to the case (4th Respondent), which respondents (Kenyatta and IEBC) took as proof that the petitioners were acting at the behest of the opposition (Ogemba and Muthoni 2017b). Although Kenyatta succeeded in convincing the court to removed NASA from the petition on the basis that they withdrew from the election and therefore had no grounds to contest the results,<sup>486</sup> the court ruled in favor of the petitioners by finding that they did have legal standing and right to contest the repeat election, because the

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<sup>485</sup> Mwau v IEBC Supreme Court Presidential Election Petition 2 and 4 of 2017, para. 141, 208, 209, 213.

<sup>486</sup> Mue v IEBC Supreme Court Presidential Election Petition 4 of 2017, Ruling.

constitution states “a person,” meaning any person, can file a petition contesting a presidential election,<sup>487</sup> and that the issues raised in the petition were of broad public interest.<sup>488</sup>

However, the total absence of Odinga or any other top opposition politicians, leaders and lawyers as petitioners profoundly altered the character of the petition for the repeat election, which observers remarked “lacked the vigour and fanfare... passion, hope, excitement and tension” in comparison to the petition contesting the August election (Ogamba 2017d). Lawyers for the IEBC stated they felt far less pressure in the second petition because “The petitioners’ legal teams are not as formidable as the ones we encountered in August.” Other commentators (ICJ 2019) suggested Odinga’s withdrawal from the repeat election and absence from the petition blunted the court’s appetite to reenter the political dispute and deeply influenced its approach to the petition and the petitioners, which many observers perceived as hostile.

Ochieng (2017) characterized the court’s approach to the October petition as mean-spirited and formalistic, and expressed shock that the same court could shift its stance so dramatically from the charitable and emancipatory approach it adopted in the August petition. Mutua (2017d) also criticized the court for embracing an antiquated jurisprudential formalism that was based on “a rigid, dry, and unappetising interpretation of legal code and precedent” and accused the judges of being “legal pagans” who strictly construe the law as an “atomistic artifact that’s autonomous and independent from society” and “disembodied from the body politic.” This was a judicial

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<sup>487</sup> Constitution of Kenya 2010, Article 38 establishes the political rights of citizens, including the right to vote and the right to be a candidate for political office; Article 140 establishes the right of “a person” to challenge the results of a presidential election by filing a petition with the Supreme Court.

<sup>488</sup> Mwau v IEBC 2017, para. 210, 211, 212, 219.

approach that contradicted the principles of transformative constitutionalism, which advocate for a progressive interpretation of the law that obligates consideration of political, historical and extralegal contexts (Mutunga 2017).

A case in point was the Supreme Court's approach to the admissibility and evaluation of evidence. In the August presidential election petition, the court embraced a more flexible approach by allowing late submission of documents from both petitioners and respondents.<sup>489</sup> In the October petition, the court exhibited some flexibility by allowing late submissions from petitioners;<sup>490</sup> but then exhibited greater inflexibility towards petitioners. Two examples are illustrative: The first pertains to the court's approach to scrutiny, and the second pertains to the court's approach to admission of evidence by petitioners.

### Scrutiny

The court's approach to scrutiny in the petition for the October repeat election was starkly more restrained compared to its more accommodating approach to the August election petition, wherein petitioners sought 26 prayers in their application for scrutiny of which the court granted 19. In the October petition, out of 20 prayers contained in the petitioners' application for scrutiny, the court allowed only two (ICJ 2019). The court urged it had declined the majority of the prayers on "the basis of very clear grounds," but only offered vague rationale for its decision – that some of the prayers were declined "due to the sheer impracticability of their

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<sup>489</sup> Odinga v IEBC Supreme Court Presidential Election Petition 1 of 2017, Preliminary Applications 1, 2, 3.

<sup>490</sup> Mue v IEBC Supreme Court Presidential Petition 4 of 2017, Ruling 2.



implementation given the short time left for the determination of the petitions,” “because they were not pleaded with sufficient particularity in the Petition” or “couched in such general terms as to be no more than fishing expeditions.”<sup>491</sup> The court cited time constraints as reason for the brevity of its thin two-page ruling on the matter and promised its reasoning “will be elaborated in a detailed version of this ruling to be issued by the Court at a later date” – yet the court never revisited the matter and there was no mention of it in the final judgement. Despite confronting the exact same timeframe for determining the August petition, the court was able to produce a highly detailed summation of its reasoning for granting the majority of petitioners’ prayers on scrutiny in a lengthy 20-page ruling.<sup>492</sup>

Following the court ordered scrutiny exercise in the October petition, petitioners attempted to submit a report of their findings, which the court rejected. Some observers suggested this was evidence of the court’s prejudicial treatment of petitioners and hostile approach to the petition (ICJ 2019); others contended the court’s refusal to allow the petitioners’ report on scrutiny substantially weakened their case, but the ruling was warranted because the petitioners did not include in their application for scrutiny a specific request to submit a report on their findings (Muthoni and Ogemba 2017c). But the court’s rejection of the petitioners’ scrutiny report in the repeat election petition actually was not a departure from its approach to the August petition; on the contrary, the court made the same determination – when James Orengo, as counsel for the petitioners, began to read from a report of their own findings on the scrutiny exercise, Chief

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<sup>491</sup> Mue v IEBC Supreme Court Presidential Petition 4 of 2017, Ruling 4.

<sup>492</sup> Odinga v IEBC 2017, Ruling.

Justice Maraga issued a firm reprimand: “We [the court] did not give parties liberty to file their own reports... take back your report” (Nation Team 2017c).

The most consequential difference between the court’s stance on scrutiny in the August and October petitions was not whether petitioners were allowed to submit reports of their findings; it was whether the scrutiny exercises actually produced official findings and whether the court utilized the official scrutiny reports in its determinations on the petitions. Notably, in the 2013 presidential election petition the court was criticized harshly because it ordered scrutiny but then underutilized the scrutiny report and sparsely referenced any of the findings its judgement (Shah 2013; Ongoya 2013; Musila 2013; Ongoya 2016; Maina 2017; Menya 2017b)<sup>493</sup> – the word scrutiny only appeared six times in the final judgement.<sup>494</sup> In the August 2017 petition, the court seemed keen not to expose itself to further criticism regarding scrutiny and adopted a more active role in managing the process by ordering that the scrutiny exercise would be supervised by the Registrar of the Court, who would then produce an official report for the court. But the same did not occur in the October petition.

In the judgement for the August petition, the registrar was mentioned 10 times and scrutiny nearly 30 times. The court made the following observations regarding the court ordered scrutiny

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<sup>493</sup> The Court of Appeal noted the same in its judgement on the 2017 Homa Bay gubernatorial election petition: “It is noteworthy that in the 2013 Presidential election petition, one of the key criticisms of the judgment of the Supreme Court is that it ordered a suo motu judicial scrutiny and not only failed to make reference to the Report but also totally ignored the findings in the Report” (Awiti v IEBC Court of Appeal Election Petition 5 of 2018, para. 98).

<sup>494</sup> Odinga v IEBC Supreme Court Presidential Election Petition 5 of 2013, para. 20, 118, 169, 172, 175. Only four of these instances referred to court ordered scrutiny.

report: it was “endorsed by the petitioners and all the respondents as being a fairly accurate reflection of what the partial scrutiny had unearthed” and it “brought to the fore, momentous disclosures” regarding irregularities pertaining to statutory results forms.<sup>495</sup> The court determined the registrar’s scrutiny report constituted independent findings that corroborated petitioners’ allegations, which necessarily shifted the burden of proof to respondents “to raise substantial doubt with regard to the petitioners’ case.”<sup>496</sup> But in the judgment for the October petition there were no references to the registrar and the word scrutiny appeared only twice in the context of the court recounting of the petitioners’ request for scrutiny.<sup>497</sup> The court treated petitioners’ claims of irregularities pertaining to statutory results forms as mere allegations that were uncorroborated and determined it was incumbent upon petitioners to discharge the burden of proof “by addressing the respondents’ written submissions.”<sup>498</sup> The court effectively repositioned the petitioners as respondents to the case and charged them with rebutting respondents’ counterclaims.

Evidence of the court exerting less control over the scrutiny process was apparent in where the exercises took place and how the court responded to petitioners’ complaints of the IEBC’s noncompliance with court orders. In the August petition, scrutiny was undertaken in the neutral location of the Milimani Court. When petitioners complained the IEBC was not complying with court orders on scrutiny and blocking access to various items, the court intervened on behalf of

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<sup>495</sup> Odinga v IEBC 2017, para. 342, 376

<sup>496</sup> Odinga v IEBC 2017, para 401.

<sup>497</sup> Mwau v IEBC 2017, para. 46.

<sup>498</sup> Mwau v IEBC 2017, para. 375.

the petitioners and reprimanded the IEBC (Obura 2017a): Chief Justice Maraga stated, “Tell your clients [IEBC] to observe the court order... anyone who fails to comply shall be dealt with...”

Despite the court’s warning, the IEBC refused to fully comply, which not only provoked a harsh rebuke from the court, it also tilted the outcome of the case. In its final judgement, the court stated: “our Order of scrutiny was a golden opportunity for IEBC to place before Court evidence to debunk the petitioners’ said claims... But what did IEBC do with it? It contumaciously disobeyed the Order in the critical areas... In this case, IEBC’s contumacious disobedience of this Court’s Order of 28th August, 2017 in critical areas leaves us with no option but to accept the petitioners’ claims.”<sup>499</sup> In the October petition, scrutiny took place in a conference room at the IEBC’s headquarters at Anniversary Towers. Despite the short timeframe for scrutiny, petitioners complained that IEBC staff purposefully delayed the process, and when they were finally given access, IEBC staff barred them from using phones and notetaking implements, which plainclothes police officers were present to enforce. When petitioners returned to court to complain that the IEBC was frustrating the scrutiny exercise, the only relief provided by the court was that petitioners would be allowed to make handwritten notes of their observations (ICJ 2019).

In the August petition, petitioners pursued official court ordered scrutiny as a core strategy for proving their claims, and their plan succeeded. Pete Kaluma, NASA MP for Homa Bay, remarked, “The Registrar’s report saved the day. The report was damning and it was difficult for the Bench [Supreme Court] to ignore it given that it emanated from an order they had issued” (Kwamboka 2017a). When the official scrutiny report was presented in court, James Orengo, as counsel for the petitioners, stated, “I can barely talk, I can’t believe what am seeing. The two reports that

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<sup>499</sup> Odinga v IEBC 2017, para 279, 280.

you [the Supreme Court] have accepted are two smoking guns” (Muthoni and Ogemba 2017a).

Petitioners in the October case believed a properly executed scrutiny exercise would have revealed far greater irregularities in the October election than those that resulted in nullification of the August election. However, commentators suggested that the court’s lax approach to the scrutiny exercise and sparse references to scrutiny during the hearing of the petition were early indicators that the case would be dismissed (ICJ 2019).

This really was the crux of the difference between the court’s approach to scrutiny in the August and October petitions — because no official scrutiny report was produced in the October petition, there were no independent findings to definitively prove or disprove either party’s claims. Instead, there were really three sets of results forms – those deposited in court by the IEBC, those gathered by petitioners from a third party<sup>500</sup> and those posted on the IEBC’s online results portal. Petitioners argued there were irregularities (missing signatures, handover/takeover notes, security features, etc.) and discrepancies in the data contained in the various sets of forms (34A and 34B), the data entered into electronic results transmission devices (Kenya Integrated Electoral Management System – KIEMS kits) and the data posted on the IEBC’s public online results portal.<sup>501</sup> Instead of interrogating these claims or referring to findings of the scrutiny exercise, the court simply reiterated the responses of respondents. For example, in one instance the court stated, “he avers that the disputed Forms 34A are not fake, but only blurry, and invisible in the web-portal; and he annexes [presented in court] the same copies which are

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<sup>500</sup> NGO Kura Yangu Sauti Yangu (KYSY, “My Voice My Vote”) provided petitioners with 1167 Forms 34A of which 55 had no agent signatures, and 266 Forms 34B of which 3 had no agent signatures, 6 were missing serial numbers, 198 had incomplete handover sections, and 266 had incomplete takeover sections.

<sup>501</sup> Mwau v IEBC 2017, para. 37, 38, 341, 346, 347, 414.

now visible.”<sup>502</sup> Ironically, the “he” in this quote was not counsel for the IEBC, but for Kenyatta – how was it possible that Kenyatta’s legal team would be in a position to explain that “blurry” images of results forms posted on the IEBC’s online portal were due to the IEBC’s use of faulty cameras and/or poor photography skills on the part of IEBC staff?

The court acknowledged the existence of at least two sets of results forms by stating: “Our examination of sample materials submitted to the Court by the 1st and 2nd respondents [IEBC] (Forms 34A, 34B and Form 34 C), as against the ones attached to the petitioners’ pleadings, lends credence to the explanations given to the Court by the respondents.”<sup>503</sup> But the court’s reasoning begs question – on what basis was there credence? The court attempted to buttress its conclusion by stating: “We have taken note of the fact that while the petition makes far-reaching allegations of irregularities, the same have been effectively rebutted, or explained away in replying affidavits, and submissions of [respondents’] counsel.”<sup>504</sup> Yet the respondents’ rebuttals were more akin to unsubstantiated denials – the vast bulk of the judgment was a simple recount of respondents’ denials<sup>505</sup> – which the court took at face value. What would have

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<sup>502</sup> Mwau v IEBC 2017, para. 139

<sup>503</sup> Mwau v IEBC 2017, para. 375

<sup>504</sup> Mwau v IEBC 2017, para. 374

<sup>505</sup> E.g. Mwau v IEBC 2017, para. 123, 127, 128, 135, 136, 138, 147, 147, 159, 161, 162, 164, 165, 179, 180, 181, 183, 184, 199, 200, 201, 205. In the August petition, the majority judgement was 90 pages in length and composed of 405 paragraphs of which roughly 41 paragraphs (para. 51-100) or 10 pages (pg. 10-20) were allotted to respondents’ arguments, which was fairly proportionate to the 36 paragraphs (para. 14-50) or 7 pages (pg. 3-10) allotted to petitioners’ arguments; in the October petition, the judgement was 97 pages in length and composed of 499 paragraphs of which roughly 160 paragraphs (para. 47-206) or 20 pages (pg. 13-34) were allotted to respondents’ arguments, which was substantially greater than the 37 paragraphs (para. 9-46) or 10 pages (pg. 3-13) allotted to petitioners’ arguments.

lent credence to the arguments of the opposing parties, and to the conclusions of the court, would have been corroborating findings from an official court ordered scrutiny report.

The absence of any reference to an official scrutiny report by the court or either party was confirmation that the court ordered scrutiny was of no probative or evidential value. This was glaringly apparent when the court referred not to an official scrutiny report but to a “voter analysis report,” which petitioners submitted as evidence of irregularities pertaining to statutory results forms. The report was not based on forms produced by the IEBC for court ordered scrutiny, but on forms provided to petitioners by KYSY, an NGO that observed the repeat election.<sup>506</sup> Rather than take note of the fact that court ordered scrutiny served no real purpose or seek to remedy petitioners’ evidentiary disadvantage due to the IEBC’s monopoly on election related data as the official custodian of election materials,<sup>507</sup> the court simply acknowledged that the difficulty petitioners encountered in proving their allegations was because “not being candidates or agents” they “may not really be privy to the nitty gritty of the operations of the electoral process.”<sup>508</sup>

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<sup>506</sup> Mwau v IEBC 2017, para. 38, 346, 413.

<sup>507</sup> Prior to be his appointment to the Supreme Court as Chief Justice, Maraga (2016: 245, 262, 273) acknowledged that a petitioner’s ability to prove allegations of irregularities and malpractices was largely disadvantaged due to the IEBC’s monopoly on election information, data and documents, but this could be remedied through court ordered scrutiny. Maraga defined the scrutiny process as a “supervised forensic investigation” and “at the conclusion of the scrutiny exercise, the Registrar makes a report of his or her findings. Such report is taken into consideration [by the court] in the determination of the petition in question.” However, Maraga noted, this “does not seem to have happened in the Raila Odinga case [Odinga v IEBC 2013] ... the Supreme Court never addressed the objective and result of court supervised scrutiny.” Ironically, Maraga’s observations of the Supreme Court’s approach to scrutiny in the 2013 presidential election petition were equally descriptive of the Supreme Court’s approach to scrutiny in the October 2017 repeat election petition, which he presided over as Chief Justice.

<sup>508</sup> Mwau v IEBC 2017, para. 349

The court determined, “It is undisputed that the [IEBC] developed a compliance and a legal matrix to guide it in the [repeat election] process. The petitioners, however, make general allegations, but without specifying in which manner transparency was not achieved, and in what aspect.”<sup>509</sup> While it may be indisputable that the IEBC developed the said “matrix,” whether the IEBC actually followed the “matrix” was precisely what was in dispute in the petition. What was also indisputable was that statutory results forms that appear “blurry” or “invisible” on the IEBC’s public online portal was the exact antithesis of transparency.

It was additionally indisputable that whereas the petitioners, being neither candidates nor agents, were not “privy to the nitty gritty” of the electoral process, neither was the entirety of electorate. The court had already established that petitioners had rightful legal standing (*locus standi*) to challenge a presidential election as a matter of public interests, because the constitution decrees “a person,” meaning any person, has a fundamental right to do so; thus, whether petitioners were candidates or agents or voters was entirely immaterial. Moreover, the mere suggestion that petitioners, or anyone, “may not really be privy to the nitty gritty of the operations of the electoral process” was perhaps the clearest admission, coming from the Supreme Court no less, that the repeat election absolutely lacked transparency and violated Articles 81 and 86 of the Constitution, which demand that elections must be conducted in a manner that is simple, efficient, accurate, verifiable, secure, accountable, open and transparent.

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<sup>509</sup> Mwau v IEBC 2017, para. 349



### Admission of Evidence

A second example of the court exhibiting a constrained approach to the October repeat election petition pertained to the admissibility of evidence presented by petitioners. Respondents had submitted an application to strike out a substantial portion of the petitioners' evidence, which were internal documents – “leaked memos” – of the IEBC. The court granted the application, but stated that due to “the very limited time this court has to consider and deliver a detailed and reasoned decision... The reasons for this decision shall be given on notice.”<sup>510</sup> But again, the court never provided the reasons. Petitioners had planned to present the internal documents as evidence of partisan division, institutional dysfunction and external political interference within the IEBC, which would prove that the agency was compromised and incapable for managing a credible repeat election. Interestingly, it was Kenyatta who submitted the application to expunge of the IEBC documents, not the IEBC. Respondents challenged the authenticity of the documents by arguing petitioners had acquired them “unlawfully and illegally.” It is pertinent to note that the petitioners' application for scrutiny included a request for the IEBC to provide its internal documents, which the court declined (Ogemba and Muthoni 2017c). Petitioners argued the respondents' attempt to challenge the admissibility of the documents was meant to “cripple the case out of a technicality” and that the alleged “leaked documents” had already been in the public domain – on social media and in mainstream news – and the IEBC had never denied their authenticity (Muthoni and Ogemba 2017c).

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<sup>510</sup> Mue v IEBC Supreme Court Presidential Petition 4 of 2017, Ruling 3.

Partisan division, institutional dysfunction and political interference at the IEBC were no secrets. For months, internal documents had been leaking out of the IEBC (Owino 2017g; Musau 2017c; Obala and Mosoku 2017a), and fighting within the agency was an ongoing topic of coverage in the press and openly discussed in public dialogue (Standard Team 2017e; Mosoku 2017d, 2017g; Mosoku and Munuhe 2017). Accusations of political interference and partisanship were publicly alleged by both sides of the political divide (Mosoku 2017c; Titus 2017a; Sanga 2017c), and IEBC staff publicly voiced their frustration with pressure and threats from politicians (Obura 2017b).

But the greatest indicators of dysfunction within the IEBC were public statements by its top officials. Barely a week before the repeat election, IEBC Chairman Wafula Chebukati organized a press conference to tell the nation (Onyango 2017c): “Under such conditions, it is difficult to guarantee free, fair and credible elections.” Chebukati wanted IEBC staff who were adversely mentioned regarding electoral irregularities in the August election to step down. He also complained of a commission divided along partisan lines, accused politicians of attempting to influence and intimidate staff, and criticized presidential candidates for prioritizing their personal political interests while ignoring the best interest of the country (Lang’at 2017i).

By far the incident that was most damaging to the agency was the dramatic departure of IEBC Commissioner Roselyn Akombe (2017), who secretly fled the country before publicly releasing her resignation announcement from New York City,<sup>511</sup> in which she stated: “we cannot proceed

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<sup>511</sup> Akombe was working as an IEBC Commissioner while on temporary leave from her position as Under-Secretary for the Department of Political Affairs at the United Nations headquarters in New York City (Lang’at and Kelley 2017). There was speculation following the August election that Akombe, who holds both Kenyan and US passports, wanted to flee the country, and alarm when state security officers pulled her off a NYC-bound flight and detained her at JKIA overnight before releasing her the next morning following intervention from US diplomats (Menya 2017a). Back in September, after the Supreme Court’s

with the election on 26 October 2017 as currently planned... Not when Commissioners and staff are intimidated by political actors and protestors and fear for their lives. Not when senior Secretariat staff and Commissioners are serving partisan political interests... The Commission in its current state can surely not guarantee a credible election on 26 October 2017. I do not want to be party to such a mockery to electoral integrity.”

During the hearing of the petition for the repeat election, respondents argued any references to the IEBC’s internal discussions were “confidential, privileged information” to which petitioners were “not entitled in law,” and that Akombe’s statements were her own “purely personal” opinions, which were uttered outside of her official capacity as an IEBC commissioner, particularly because she had already resigned from her post at the agency before releasing her statement.<sup>512</sup> In the final judgement on the repeat election, aside from briefly recounting petitioners’ claims regarding internal documents and public statements in which Chebukati and Akombe stated the IEBC could not guarantee a credible repeat election, the court only addressed the matter in a short cursory dismissal, without providing any elaboration of how it had considered the issues or the rationale behind its determination, by stating that these were examples of instances where petitioners made claims “of such a generic order as to lend only feeble grounds for the Court to depart from prima facie perceptions of legitimacy and credibility” in the IEBC’s conduct of the repeat presidential election.<sup>513</sup>

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nullification of the August election, Akombe publicly stated she feared for her life having received threatening messages, which she alleged were part of a wider plot to intimidate IEBC staff (Wanga 2017c).

<sup>512</sup> Mwau v IEBC 2017, para. 144.

<sup>513</sup> Mwau v IEBC 2017, para. 409.

Commentators noted the IEBC's internal documents were vital evidence in the petitioners' case, but once the court refused to grant the petitioners' application for the IEBC to provide official copies of these documents, and then expunged petitioners' reference to the same documents that were already within the public domain, the petitioners' case was effectively "doomed" (Muthoni and Ogemba 2017c). The court's position on this matter in the repeat election petition was in many ways similar to its approach to the 2013 presidential election petition when it rejected petitioners' nearly 900-page affidavit due to late submission, which disposed of a substantial portion of the petitioners' evidence of alleged electoral rigging and malpractices. Mboya (Ogemba 2017a), among others (Fayo 2013; Leftie 2013), argued the Supreme Court's ruling in 2013 was "undoubtedly controversial" and that the court "made a big mistake" as allowing the additional evidence would likely have changed the court's reasoning in its final verdict. Ochieng (2017) criticized the Supreme Court for expunging the IEBC's internal documents from the repeat election petition and argued the court erred by ascribing to the IEBC specific rights to privacy and private property, which wrongly positioned the IEBC as a rights holder and discounted its obligation as a duty bearer – as a public state agency, the IEBC's constitutional, statutory and ethical duties include transparency and accountability to the public, which the judiciary was mandated to enforce, but failed to do so.

Where the Supreme Court was applauded following its nullification of the August 2017 presidential election for departing from its controversial approach in the 2013 presidential petition and for adopting a progressive jurisprudence that more closely aligned with the transformative principles of the 2010 Constitution, many observers viewed the Supreme Court's judgment of

the October repeat election as evidence that the court had reverted to the conservative stance it exhibited in 2013 (Mutua 2017d; ICJ 2019). Although there is truth to this assertion – particularly in light of analysis of the court’s rulings in petitions contesting other seats from the 2017 elections, including gubernatorial petitions – it is important to note that petitioners in the October repeat presidential election case presented very different arguments and evidence to support those arguments compared to petitioners in the August presidential election case. In a number of instances, petitioners in the repeat election case disadvantaged themselves by arguing claims that had already proven to be ineffective in other petitions and had already been determined by or were currently before other courts.

#### Voter Register

An example of claims that had already proven to be ineffective in other election petitions were petitioners’ various allegations in the October repeat election case regarding the voter register, variation in the official total number of registered voters and the identification of voters.<sup>514</sup> The problem with allegations pertaining to the voter register was that such arguments had not been successful or persuasive in previous election petitions. In the 2013 presidential election petition, petitioners made similar arguments: that the IEBC failed to establish and maintain a publicly available and verifiable voter register; that the IEBC repeatedly changed its official tally of registered voters; that the votes cast at various polling stations exceeded the number of registered voters; and that the absence of a credible voter register vitiated the validity of the presidential

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<sup>514</sup> Mwau v IEBC 2017, para. 36, 37, 340, 351.

election.<sup>515</sup> The Supreme Court determined: “The legal burden of showing that the voters’ register as compiled and used, was in any way in breach of the law, or compromised the voters’ electoral rights, was not, in our opinion, discharged by the Petitioners.” Most significantly, the court concluded that the voter register “is not a single document, but is an amalgam of several parts” and that “the multiplicity of registers is a reality of Kenya’s voter registration system which is recognized in law and widely acknowledged in practice.”<sup>516</sup> This conclusion has become foundational to subsequent election petitions.

Although irregularities related to the voter register were not raised by parties in the August 2017 presidential election petition, the Supreme Court still found it germane to reaffirm the stance it had established in the 2013 case: “Regarding the voter register, this Court in the 2013 Raila Odinga decision had observed that there was no single voter register but an aggregation of several parts into one register.”<sup>517</sup> In the October petition, the court reiterated its position on the matter: “When this Court determined the Raila 2013 case, the conclusion was that the Register was a product of several components.” Similar to its determinations in the 2013 case, in the October petition, the court ruled the petitioners did not prove how “changes in the number of registered voters” affected the outcome of the October repeat election.<sup>518</sup> Instead, the court found that the voter register was a “living document” subject to ongoing changes as voter registration was a “continuous exercise.” Because the IEBC’s institutional practice does not produce

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<sup>515</sup> Odinga v IEBC 2013, para. 10, 11, 16, 17, 47.

<sup>516</sup> Odinga v IEBC 2013, para. 247, 249, 252.

<sup>517</sup> Odinga v IEBC 2017, para. 234.

<sup>518</sup> Mwau v IEBC 2017, para. 358, 364, 365, 368, 369.

an official consolidated voter register and neither the courts nor the legislature have obligated the agency to do so, it is nearly impossible for petitioners to substantiate any claims of irregularities stemming from the voter register, number of registered voters or identification of voters.

#### Statutory Forms – Agent Signatures

Another claim alleged by petitioners in the repeat election case pertained to agents' signatures on statutory results forms. The grounds of this claim were mainly that the majority of results forms only bore the signatures of agents from Kenyatta's Jubilee party and a small portion of forms bore no signatures of agents from any party.<sup>519</sup> This was a flawed argument for two reasons: First, the claim was easily rebuffed by respondents on the basis that most forms only had signatures from Jubilee agents because NASA had withdrawn from the election and urged its supporters to boycott the polls, therefore, the opposition party had deployed no agents to observe the election process or sign results forms.<sup>520</sup> Second, this claim already had proven to be ineffective in numerous election petitions. As noted by respondents in the repeat election case, the IEBC was not responsible for ensuring that party agents were present to observe the election or sign results forms, rather candidates and parties were responsible for their agents; moreover, the Elections (General) Regulations, Section 79 established that the absence of

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<sup>519</sup> Mwau v IEBC 2017, para. 19, 346.

<sup>520</sup> Aside from Kenyatta and Odinga, the six other presidential candidates were minor contenders who barely accounted for 1 percent of the votes in the August election and less than 2 percent in the October election (IEBC. 2017. Form 34C: Declaration of Results for Election of the President of the Republic of Kenya; IEBC. 2017. Fresh Presidential Election Results County Summary).

agents or their failure to sign results forms does not invalidate the results.<sup>521</sup> Thus, the claim was an entirely nugatory point from the start.

### Misuse of Public Resources

Petitioners in the repeat election case also disadvantaged themselves by attempting to raise afresh issues that had already been determined by or were currently pending before other courts. For example, petitioners accused Kenyatta of misuse of public resources through the deployment of cabinet secretaries for election campaigning and the use of a government website to advertise achievements.<sup>522</sup> These accusations were a rehash of allegations made by petitioners in the August election petition,<sup>523</sup> which the court found entirely unpersuasive: the court determined it was unable to consider the allegations regarding cabinet secretaries because petitioners had not sufficiently pleaded the matter in their petition;<sup>524</sup> the court declined to consider the allegation regarding advertisements because petitioners failed to provide material evidence on the “particulars” of the allegation and because the matter was already pending determination in two cases before the High Court.<sup>525</sup>

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<sup>521</sup> Mwau v IEBC 2017, para. 130, 137, 171.

<sup>522</sup> Mwau v IEBC 2017, para. 24.

<sup>523</sup> Odinga v IEBC 2017, para. 20, 21, 22, 306, 326, 327, 329.

<sup>524</sup> Odinga v IEBC 2017, para. 331, 332 – i.e. petitioners are bound by their pleadings.

<sup>525</sup> Odinga v IEBC 2017, para. 310, 313; Mboya v Attorney General High Court Petition 162 of 2017; Muniyo v Attorney General High Court Petition 182 of 2017.



It begs reason why petitioners in the repeat election petition would argue claims that had already proven to be ineffective and were so easily dismissed by the court in the August petition. In its judgement on the October petition, the court noted the petitioners had cited the names of specific cabinet secretaries who were involved in campaigning for Kenyatta, but faulted petitioners for failing to specify how their involvement constituted abuse of public resources or negatively impacted the election. Moreover, the court determined the allegation was without merit because the role of cabinet secretaries in elections was subject to regulation under Section 23 of the Leadership and Integrity Act of 2012, which exempts cabinet secretaries from requirements of political neutrality for public officials.<sup>526</sup>

On the matter of improper use of public resources for advertising, the Supreme Court made the following observations in the October case: the same allegation was raised by petitioners in the August petition, but the Supreme Court had declined to delve into the matter as it was pending in two cases before the High Court; and days prior to the repeat election on October 26, 2017, the High Court issued judgements for both cases that the use of public resources, such as a government website, to advertise achievements of a political candidate or party during an election period was illegal, unlawful and forbidden. However, the Supreme Court faulted petitioners in the repeat election case for failing to provide sufficient evidence by indicating specific instances where Kenyatta, or state officers acting on his behalf, improperly used public resources for advertising during the campaign period for the October repeat election. Thus, the court concluded, “we have no option but to dismiss the petitioners’ claims, in that regard.”<sup>527</sup>

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<sup>526</sup> Mwau v IEBC 2017, para. 303, 304.

<sup>527</sup> Mwau v IEBC 2017, para. 306, 307.

## Candidates

Two other examples of allegations made by petitioners in the repeat election case that had already been determined by other courts pertained to the manner in which the IEBC listed candidates for inclusion on the ballot and appointed election officers for the repeat election. The main contention running through petitioners' various claims regarding the IEBC's gazette-ment of candidates for the repeat election was that its treatment of Shakhhalaga Jirongo was irregular and discriminatory. To begin with, Jirongo's candidacy for the repeat election was a highly convoluted affair, so it was no surprise that petitioners' arguments regarding Jirongo were also fairly convoluted. On September 5, following the Supreme Court's nullification of the August election, the IEBC announced the ballot for the repeat election would include only the names of Kenyatta and Odinga,<sup>528</sup> the two leading contenders who had garnered the most votes in August.<sup>529</sup> However, Ekuru Aukot, who was a presidential candidate in the August election,<sup>530</sup> filed a petition to be included as a candidate in the repeat election, which the High Court granted on October 11.<sup>531</sup> This prompted the IEBC to issue a new announcement on October 13 that all candidates from the August election would be included on the ballot for the October re-

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<sup>528</sup> Special Gazette Notice No. 8751, Vol. CXIX, No. 130.

<sup>529</sup> In the August election, out of approximately 15.1 million valid votes, 8.2 million (54%) were for Kenyatta and 6.7 million (45%) for Odinga. There were approximately 19.6 million registered voters.

<sup>530</sup> Aukot came in fifth place out of eight candidates with 27,311 votes (0.18%).

<sup>531</sup> Aukot v IEBC High Court Constitutional Petition 471 of 2017.

peat election<sup>532</sup> – except Jirongo, who was legally disqualified under Articles 137 and 99 of the Constitution because he was declared bankrupt on October 4.<sup>533</sup> On October 16, Jirongo filed an application before the High Court for a stay on the bankruptcy order pending further hearing. On October 18, the IEBC proceeded to include Jirongo’s name on the basis that there was limited time for preparing ballot papers and in anticipation of the likelihood that the court would rule in his favor.<sup>534</sup> On October 24, the High Court granted Jirongo’s application,<sup>535</sup> and the IEBC then issued a new announcement that Jirongo was reinstated as a candidate for the repeat election.<sup>536</sup>

In the repeat election case, the petitioners’ primary complaints were that the IEBC exhibited a lack of clarity in its oscillating position on Jirongo’s candidacy, that the IEBC had included his name on the ballot (on October 18) despite his disqualification (on October 4) and prior to his reinstatement by the High Court (on October 24), and that his reinstatement barely 24 hours before the repeat election (on October 26) was unfair and discriminatory because he was not afforded the same period of time to campaign as other candidates.<sup>537</sup> However, the Supreme

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<sup>532</sup> Special Gazette Notice No. 10152, Vol. CXIX, No. 153.

<sup>533</sup> Constitution of Kenya 2010, Article 137 Qualifications and disqualifications for election as President (1) A person qualifies for nomination as a presidential candidate if the person— (b) is qualified to stand for election as a member of Parliament; Article 99 Qualifications and disqualifications for election as member of Parliament (2) A person is disqualified from being elected a member of Parliament if the person— (f) is an undischarged bankrupt.

<sup>534</sup> *Mwau v IEBC* 2017, para. 59.

<sup>535</sup> *In re Jirongo High Court Insolvency Petition 3 of 2017*; also *Masole v Jirongo High Court Civil Case 228 of 2014*.

<sup>536</sup> Special Gazette Notice No. 10562, Vol. CXIX, No 160.

<sup>537</sup> *Mwau v IEBC* 2017, para. 35, 36, 45.

Court determined it could find no fault in the IEBC as it was quite apparent that all of the agency's decisions were made not on the arbitrary whims of its own discretion, but in direct response to subsequent orders of the High Court and evolving circumstances that were beyond its control. Instead, the Supreme Court found the petitioners' arguments regarding Jirongo not only lacked merit, but were hard to follow: "We are unable to understand why the petitioners did not appreciate such a development of definite legal consequence [i.e. High Court orders]."<sup>538</sup>

The Supreme Court noted that although the "petitioners made serious allegations of widespread malpractices," they presented "only a limited set of meritorious issues," but "instead of laying evidence, and discharging the burden of proof" for those claims, they "spent most of their allocated time addressing us on collateral issues."<sup>539</sup> Petitioners' claims regarding Jirongo could be considered one of these "collateral issues." It was entirely unclear why petitioners believed that any reference to Jirongo would have helped their petition. Jirongo himself was not party to the petition and had not criticized the conduct of the repeat election; instead, he had publicly accused opposition leaders of preventing a peaceful repeat election by instigating a "systematic plot" to incite electoral violence (Psirmoi 2017d). Just as Jirongo was considered a "fringe" candidate (Nyamori 2017f), whose candidacy was quite inconsequential on the basis that he garnered the least number of votes in both the August and October elections,<sup>540</sup> petitioners'

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<sup>538</sup> Mwau v IEBC 2017, para. 93, 246, 247.

<sup>539</sup> Mwau v IEBC 2017, para. 375, 431

<sup>540</sup> Among the eight candidates in the August 2017 presidential election, Jirongo received the least number of votes with less than 12,000 (<0.1%) out of approximately 15.1 million valid votes, and again in the October election with less than 4,000 (<0.05%) out of approximately 7.6 million valid votes. There were approximately 19.6 million registered voters (IEBC. 2017. Form 34C: Declaration of Results for Election of the President of the Republic of Kenya; IEBC. 2017. Fresh Presidential Election Results County Summary).

arguments regarding Jirongo were equally “fringe” concerns, which the court found entirely inconsequential in its determination of the repeat election petition.

Two other arguments posed by petitioners regarding the IEBC’s gazettement of candidates pertained to party nominations and inclusion of Odinga on the ballot – both of which were hotly contested matters on the part of the opposition and staunchly held by its supporters. The basis of the arguments was that the nullification of the August election coupled with Odinga’s withdrawal from the repeat election should have automatically triggered a new round of fresh nominations (i.e. repeat primary elections) or cancellation of the repeat election, and that Odinga’s inclusion on the ballot subsequent to his withdrawal was irregular (Waweru 2017; Otieno and Mosoku 2017; Anami 2017d). Mwau, the 1st Petitioner in the repeat election case, had already raised the matter of nominations in a previous petition filed on October 16 before the High Court, which delivered a ruling on October 25 that declined to hear the case citing lack of jurisdiction on two counts: First, the court ruled that Mwau’s request to have the repeat election canceled was inviting the court to assume “a jurisdiction this Court does not have,” because “the effect of the Petition is to circumvent the Supreme Court decision [in Odinga v IEBC 2017],” which ordered the IEBC to conduct a fresh election within sixty days of the nullification of the August election.<sup>541</sup>

Second, the High Court cited lacked jurisdiction to entertain Mwau’s case because the particular issue raised pertained to a presidential election, which meant it necessarily fell within the exclusive domain of the Supreme Court. The High Court’s rationale was seemingly contradictory

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<sup>541</sup> Mwau v IEBC High Court Constitutional Petition 514 of 2017, para 41, 42.

because the High Court had already assumed jurisdiction to hear and determine the Aukot case, which similarly directly related to the repeat presidential election. The court in the Mwau case stated: “I must also point out that this petition does not seek to enforce an individual’s fundamental rights and freedoms under the Constitution but rather to determine the issue on nomination of Presidential Candidates and the processes leading to that election.”<sup>542</sup> By establishing this distinction, the High Court was able to justify its jurisdiction in the Aukot case, which contested violation of a candidate’s right to participate in an election, and its lack of jurisdiction in the Mwau case, which contested the validity of the repeat election on the basis of nominations. When petitioners in the repeat election case raised the issue of nominations, the Supreme Court found fresh “nominations would be pointless,”<sup>543</sup> because the nominations prior to the August election were never contested or impugned in the August petition, and therefore remained valid for the October election.

A number of cases were brought before the High Court regarding Odinga’s withdraw from the repeat election, which he announced on October 10 (Titus 2017c; Ogemba 2017c; Kiplagat 2017e). One of these cases was filed by David Pkosing, Jubilee MP for Pokot South, who attempted to sue NASA on the following grounds: candidates gazetted on the ballot were bound by order of the Supreme Court to participate in the repeat election; failure to participate as a candidate, threats to boycott and attempts to impede the repeat election amounted to contempt of the orders of the Supreme Court and constituted acts of treason; and the above offences should not be used to affect or compromise the validity of the repeat election. The

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<sup>542</sup> Mwau v IEBC High Court Constitutional Petition 514 of 2017, para 43.

<sup>543</sup> Mwau v IEBC 2017, para. 238, 243, 245.

High Court made the following determinations: no court can force or coerce anyone to exercise their right to run for an election; the petition was placed before a constitutional court, whereas treason was a criminal allegation that needed to be brought before a criminal court; if there was contempt or disobedience of the Supreme Court, then the Supreme Court could deal with enforcing its own orders; and any questions regarding the validity of a presidential election fell within the exclusive jurisdiction of the Supreme Court and were not within the mandate of the High Court. On the basis of the above, the High Court dismissed the petition.<sup>544</sup>

In the petition for the October election, petitioners argued the IEBC should have canceled the repeat election following Odinga's withdrawal and including his name on the ballot was irregular.<sup>545</sup> Respondents argued although Odinga had sent a letter purporting to withdraw his candidacy, the IEBC had replied by requesting that Odinga follow proper withdrawal procedure by completing Form 24A as per Section 52 of the Elections (General) Regulations, which Odinga failed to do – thus, his “attempted withdrawal from candidature had no legal effect.”<sup>546</sup> The Supreme Court reached the following conclusions: it concurred with the High Court that a person cannot be forced to participate in an election; Section 52 was inapplicable in the context of the current petition;<sup>547</sup> therefore, the court found Odinga's withdrawal letter “constituted a substantive, and legally-effective withdrawal from the elections.” However, Odinga's withdrawal

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<sup>544</sup> Pkosing v NASA High Court Constitutional Petition 490 of 2017, para. 28, 54, 55, 56, 59, 62.

<sup>545</sup> Mwau v IEBC 2017, para. 32, 36

<sup>546</sup> Mwau v IEBC 2017, para. 83, 98, 254, 255.

<sup>547</sup> The date of Odinga's withdrawal was well beyond the timeframe stipulated in Section 52, which states a candidate may withdraw by completing Form 24A no later than three days after nomination.

“could not, in law, have occasioned the cancellation of the elections” and the retention of his name on the ballot was not an irregularity that could vitiate the election as “it would be quite impossible to remove his or her name from the ballot” so close to the date of the election.<sup>548</sup>

### Appointments

Another allegation made by petitioners in the repeat election case that had already been raised in previous petitions before other courts pertained to the appointment of IEBC staff. This was a contentious and controversial issue that prompted contradictory determinations by various courts, but was never fully resolved by any court. The allegation was initially the subject of a separate case before the High Court. On October 19, Khelef Khalifa and Hassan Abdi Abdille submitted an application requesting the High Court to quash the IEBC’s appointment of returning officers for the repeat presidential election,<sup>549</sup> which the agency announced on October 12.<sup>550</sup> The basis of the applicants’ claim was that the IEBC violated the Section 3 of the Elections (General) Regulations of 2012 and Article 81 of the Constitution of 2010 (transparency and accountability in the conduct of elections). Section 3 required the IEBC to “provide the list of persons proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them to make any representations.” The applicants argued the IEBC did not provide a list of the officers to candidates or

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<sup>548</sup> Mwau v IEBC 2017, para. 279, 280.

<sup>549</sup> Republic v IEBC ex parte Khalifa High Court Judicial Review Miscellaneous Application 628 of 2017 (aka Khalifa v IEBC), para 2, 3, 4, 6, 10, 11, 18.

<sup>550</sup> Kenya Gazette Notice 9977 Vol. CXIX, No. 150— Appointment of Constituency and Deputy Constituency Returning Officers.



parities, which “denied all the stakeholders an opportunity to vet the appointed officers, and to satisfy themselves of their fitness or otherwise for the job, and whether they meet the requirements of chapter six of the Constitution [Leadership and Integrity]” – thus, the appointments were illegal and unconstitutional.

The IEBC, as the respondent, argued it was not obligated to provide a list of returning officers proposed for appointments to “third parties” for the purposes of scrutiny and representations on the basis of the following reasons: (a) returning officers were exempt from such requirements by virtue of being permanent employees of the IEBC; (b) because the returning officers listed in the appointment announcement were the same individuals who presided over the August election and the IEBC had already complied with Section 3 prior to that election, there was no need to repeat the exercise prior to the October election; (c) aside from some officers being transferred to different posts, there were no changes to the list of officers and no new appointments; and (d) it would be impracticable and impossible to carry out such an exercise within the short time period before the repeat election on October 26. The IEBC warned the court that any interference with the IEBC’s preparations for the repeat election would be adverse to the public interest, cause “great administrative chaos and public inconvenience,” and risk delaying the repeat election.<sup>551</sup>

Regarding the IEBC’s counterclaim that there were no changes and no new appointments to the list of returning officers, the High Court determined the respondents did not adduce any evidence to disprove the applicants’ contention that the list of officers for the repeat election

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<sup>551</sup> Ex parte Khalifa 2017, para. 36, 38, 39, 42, 43, 44, 45, 47, 51.

contained different names than the list for the August election.<sup>552</sup> Although neither the applicants nor the court made any reference to press reports, the IEBC had on numerous occasions publicly stated that following the nullification of the August election some returning officers were dismissed and new replacements would be recruited from within the IEBC for the October election (Mosoku 2017e; Menya 2017f; Ngirachu and Lang’at 2017). Contrary to the respondents’ assertion that the IEBC’s compliance with Section 3 from the August election applied to the October election because there were no changes to the list of officers aside from some transfers, the court found the IEBC was wrong to presume that an officer who was deemed to be qualified and eligible to serve at one post was automatically qualified and eligible to be transferred to another post. According to the court, the suitability of an officer to serve at a particular post could “only be determined when the list is provided to the political parties for the purposes of representations as required by the law... fourteen days prior to the proposed appointments.”<sup>553</sup> Moreover, the court perceived the IEBC’s explanations regarding returning officers to be disconcertingly contradictory and unconvincing – if the IEBC believed it was under no obligation to comply with Section 3 as the employment of officers for the October election was a continuation from the August election, why did the agency feel the need to make a new announcement on appointments barely a week before the repeat election?

Despite the respondents’ counterclaim that the IEBC’s compliance with Section 3 for the August election removed the need for an additional demonstration of compliance for the October election, the High Court noted that Section 89 of the Elections (General) Regulations stated the ex-

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<sup>552</sup> I.e. the respondents could have produced both lists to prove they contained the same names.

<sup>553</sup> Ex parte Khalifa 2017, para. 30, 85, 90, 93.

act opposite: “These Regulations shall, with the necessary modifications and adaptations, apply to a fresh election.” The court determined the “inescapable conclusion” was that the IEBC had a mandatory constitutional and statutory obligation to comply with the Elections Regulations in the context of the repeat election so as to “to achieve the principles of transparency, impartiality, neutrality and accountability which are entrenched in Article 81 of the Constitution.” The court found the applicants succeeded in proving that the IEBC did not comply with the relevant legal provisions and in doing so violated the Elections Regulations and Article 81 of the Constitution, which meant that “such appointments ought, all things being equal, to be set aside.”<sup>554</sup>

But this caveat of “all things being equal” signaled the conundrum the High Court was confronted with in balancing conflicting claims of “public interest,” which were at the core of the arguments presented by both parties to the case: the applicants argued it was in the public interest for the IEBC to comply with all laws as the election of the president was of relevance to all people; the respondents argued it was in the public interest for the repeat election to proceed as scheduled and that any delay would be adverse to public interest.<sup>555</sup> But the urgency of respondents’ appeals to strict timelines and risk of chaos struck a nerve with the court, which found the IEBC’s excuse of time constraints wholly untenable: “With due respect the Respond-

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<sup>554</sup> Ex parte Khalifa 2017, para. 82, 83, 87, 94, 114. The High Court’s finding that the appointments warranted nullification due to noncompliance paralleled the reasoning of the Supreme Court in the August election petition, which ruled that the consequence for noncompliance with the constitution and election laws in the conduct of an election is nullification: “In conducting the fresh election consequent upon our Orders, and indeed in conducting any future election, IEBC must do so in conformity with the Constitution, and the law... If not, this Court, whenever called upon to adjudicate on a similar dispute will reach the same decision... Consistency and fidelity to the Constitution is a non-wavering commitment this court makes” (Odinga v IEBC 2017 para 391, 402).

<sup>555</sup> Ex parte Khalifa 2017, para. 32, 43, 47, 98, 109.

ent’s conduct in this regard can only be termed as being mischievous. The Respondent cannot in my view be permitted to rely on its own mischief as a ground for not complying with its legal obligations.”<sup>556</sup> The court’s reasoning was that the IEBC announced the date for the repeat election on September 21, five weeks before the October 26 election day, when there was plenty of time to allow candidates and parties to review the list of proposed appointments, but then waited until October 13, less than two weeks before the election, to announce the appointments, which foreclosed any opportunity for parties and candidates to review the appointments within the fourteen-day period provided by law.

Moreover, it was not lost on the High Court that it was delivering its judgement on the case on October 25, a day before the repeat election, which happened to be a public holiday, and that the court was only sitting pursuant to the authority Chief Justice Maraga.<sup>557</sup> On October 24, Maraga had issued a judicial notice granting special permission for select courts to hear cases that were already scheduled for October 25<sup>558</sup> – many of the pending cases were in direct relation to the repeat election, including one to be heard by the Supreme Court (Muthoni 2017e; Kiplagat 2017g). Maraga’s notice was in response to a surprise announcement by Interior Cabinet Secretary Fred Matiang’i on the same day, who suddenly declared October 25 was a public holiday ostensibly as a courtesy “to enable Kenyans the opportunity to travel to their respective voting centres so as to participate in the fresh election” on October 26 (Mukinda 2017b). Many

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<sup>556</sup> Ex parte Khalifa 2017, para. 89.

<sup>557</sup> Ex parte Khalifa 2017, para. 110, 117.

<sup>558</sup> In his judicial notice, Maraga stated: “It has come to my notice that tomorrow, October 25, has been declared a public holiday... The judges of the above mentioned [Judicial and Constitutional] divisions have my authority to sit on the said date to dispose of those matters” (Kakah 2017b).

observers questioned why Matiang’i waited until the last minute to make the announcement of October 25 as a new public holiday when he had already declared October 26 would be a public holiday to allow Kenyans to participate in the repeat election back on October 19.<sup>559</sup>

The High Court took issue with the fact that it was being called up to remedy problems that had been largely manufactured by the IEBC and that the thrust of the IEBC’s rebuttal was “to warn the Court that administrative chaos will ensue, that the heavens will shatter, and that the sky will fall down if the orders sought [by the applicants] are granted.” The court urged it was fundamentally wrong for a party “to rely on this doctrine of public interest to inoculate its otherwise unlawful actions against Judicial Review,” just as it was wrong for a party to “transgress the law with impunity and then tell the Court that public interest dictates the action should not be reversed,” because any “contravention of the Constitution or a Statute cannot be justified on the plea of public interest.” On the contrary, the court affirmed that “public interest is best served by enforcing the Constitution and Statute.”<sup>560</sup>

However, the High Court posed that the challenge of “deciding where the scales of justice tilt” and the balance between conflicting claims of public interest required judicious consideration of whether “there is an avenue for redress available to the victim” and whether “the harm likely to be occasioned to the public by granting the reliefs sought instantly outweighs the benefits to be

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<sup>559</sup> Several commentators, including lawyers affiliated with NASA, suggested Matiang’i spontaneous declaration of October 25 as a new public holiday was a calculated maneuver by the ruling Jubilee regime to prevent the hearing of any cases that could potentially derail the scheduled repeat election (Standard Reporter 2017g; Muthoni 2017f; Wambua 2017).

<sup>560</sup> Ex parte Khalifa 2017, para. 98, 99.

achieved by granting the same.” Despite finding the IEBC was guilty of the aforesaid transgressions, the court stated: “without sanitising the said process, I decline to issue the reliefs sought herein in the exercise of my discretion not based on lack of merit, but on public interest.”

Despite having affirmed that “public interest is best served by enforcing the Constitution and Statute,” which was the argument presented by applicants, the court found the scales of justice necessarily tilted in favor of the respondents’ claims of public interest. Its rationale was: “If the Court grants the prayers sought herein... For the said elections to proceed in the absence of the said officers would in my view constitute a crisis of unimaginable magnitude. Simply put, it would be a recipe for chaos” – meaning it would likely result in cancellation of the election.<sup>561</sup>

The court dedicated a paragraph to expounding on the values and principles of the 2010 Constitution and observed the following:<sup>562</sup> the people of Kenya very purposefully promulgated the constitution by a majority referendum with the very clear desire “of cleaning up our politics, governance and electoral structures;” the people did not intend for the provisions of the constitution to be “treated as lofty aspirations” that are “merely suggestions, superfluous or ornamental;” rather the people intended the constitutional provisions to have “substantive bite,” to be “enforced and implemented” and “put into practice.” The court stated, “I associate myself with the views of [Justice Shields] ... that the Constitution of this Republic is not a toothless bulldog nor is it a collection of pious platitudes or aspirations. It has teeth.”<sup>563</sup> The question is – did the

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<sup>561</sup> Ex parte Khalifa 2017, para. 105, 110, 112, 115.

<sup>562</sup> Ex parte Khalifa 2017, para. 79.

<sup>563</sup> Marete v Attorney General High Court Civil Case 668 of 1986.

High Court's judgement in the Khalifa case have "bite," did it "put into practice" the principles of the constitution, did it "enforce" the IEBC's compliance with the law?

On one hand, the ruling was commendable for censuring the IEBC's violation of the constitution and laws on elections; on the other hand, the answer to the above question could be fittingly no. Undoubtedly the High Court was confronted with an extremely difficult, delicate and divisive case. The court was being asked to review the IEBC's appointment of returning officers, but how the court ruled had the potential to interfere with the repeat election. As admitted by the court, the scales applied in its determination tilted away from the merits of the case; but whether they were calibrated to weigh electoral justice is debatable. What is not debatable is that courts are obliged to formulate their judgements on the basis of the arguments and evidence parties present in court. The idiom that the devil is in the details is apropos to the trite principle of law that parties are bound by their pleadings.

Notably, the High Court qualified its final judgement on two counts. The first was on the basis of a technicality: the applicants had approached the court seeking a specific order to quash the IEBC's appointment of returning officers. This rather circumscribed quality of the applicants' request created an egress for the court to extricate itself, which the court expressed in finding that because the applicants had included "no prayer seeking either the cancellation of the fresh elections due for 26th October, 2017 or their postponement, it would not be efficacious to grant the orders herein in the manner sought."<sup>564</sup> It is clear that the aforesaid was not pleaded by the applicants, which may have been a strategic move as asking a court to cancel the appointment

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<sup>564</sup> Ex parte Khalifa 2017, para. 110, 114.

of election officers is far less drastic than asking a court to cancel an election, although granting either request would occasion the same result. By determining that the IEBC's appointment of officials was illegal and unconstitutional, but then declining to cancel the appointments, the court seemingly sidestepped the main issue of the application, but in doing so it revealed that it was attuned to the real objective of the application, which was to cancel the election.

The second qualification was on the availability of avenues of redress: although the High Court declined to grant the orders sought by applicants, it acknowledged the IEBC's failure to comply with the Elections Regulations, and by extension the Constitution, could still be raised at a "later stage" as a "ground in a subsequent petition," wherein "It will be upon the Court before which such an issue is raised to determine the weight to be attached to it."<sup>565</sup> But this precise issue had already been raised and its determination was exactly the task that the High Court was charged with in the present case. This was a curious admission by the court that it was effectively deferring judgement on the main issue of the case. Earlier in its judgement, the court stated: "I... dare add that when any of the State Organ or State Officer [stet] steps outside its mandate, this Court will not hesitate to intervene. It is therefore my view that this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions... has the duty and obligation to intervene in actions of other State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation."<sup>566</sup> The court had established that the IEBC, as a state organ, committed violations, yet the court declined to inter-

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<sup>565</sup> Ex parte Khalifa 2017, para. 112, 113

<sup>566</sup> Ex parte Khalifa 2017, para. 73



venue; instead it invited parties to seek redress through another court venue. In this regard the High Court was effectively passing the buck – which landed at the Court of Appeal.

Aggrieved by the judgement of the High Court, the IEBC immediately filed an application before the Court of Appeal under a certificate of urgency. The IEBC argued the High Court’s declaration that the IEBC violated the Elections Regulations and Article 81 of the Constitution rendered the returning officers as being illegally appointed, which would occasion a constitutional crisis because Article 140 of the Constitution stipulates that a fresh election must be held within sixty days following the nullification of the previous election by Supreme Court.<sup>567</sup> The appellate court observed that the constitution does not grant courts the power to alter the election date and Article 140 is sacrosanct; thus, any court decision having the effect of altering the stipulated date of an election would not only be unconstitutional and invalid, it would also likely “plunge the country into a constitutional crisis leading to anarchy.” On the basis of the forgoing, the appellate court determined the impugned decision of the High Court risked the potential of prematurely rendering the repeat presidential election irregular, which would precipitate the need for another election outside of the stipulated timeframe and contravene Article 140. Therefore, the appellate court ordered “that the declaration of the High Court... is hereby suspended and/or put in abeyance.” And for firm emphasis, the court added: “For avoidance of doubt, this order means that the Constitutional and Statutory functions of Returning Officers and their Deputies related to the Presidential Elections slated for 26th October, 2017 are not invalid.”<sup>568</sup>

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<sup>567</sup> IEBC v Khalifa Court of Appeal Civil Application 246 of 2017, para. 2.

<sup>568</sup> IEBC v Khalifa Court of Appeal Civil Application 246 of 2017, para. 6, 7, 8, 9.

From an administrative perspective, what is remarkable about the case before the appellate court was that the Court of Appeal managed to receive the appeal, assemble a three-judge bench, review the appeal, hear the case and issue orders, after official hours, on a public holiday, and on the same day the High Court read its judgement. From a substantive or jurisprudential perspective, what is remarkable about the case was that at the High Court level the initial complaint by applicants was that the IEBC had violated the laws and the constitution, which respondents countered by cautioning the court that ruling in favor of the applicants to enforce the IEBC's compliance with the constitution and election laws could occasion "chaos," at the appellate level, the matter under consideration was that the High Court's finding that the IEBC violated the constitution and laws on elections risked a "constitutional crisis" that could "plunge the country into anarchy," but the original complaint of the IEBC's noncompliance, which was the core matter before the High Court, was never considered by the Court of Appeal.

Moreover, it seemed paradoxical that the Court of Appeal could find that a decision of the High Court to enforce the principles and values of the constitution actually was itself a contravention of the provisions of the constitution. The entire approach to constitutional interpretation between the two courts was starkly divergent, particularly regarding references to the sovereign will of the people. The High Court invoked the sovereign will of the people, through their promulgation of the 2010 Constitution, as being best expressed in their desire "of cleaning up our politics, governance and electoral structures by insisting on certain minimum values and principles to be met in constitutional, legal and policy framework and therefore intended that Article 81 be enforced in the spirit in which they included it in the Constitution."<sup>569</sup> The Court of

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<sup>569</sup> Ex parte Khalifa 2017, para. 79.

Appeal invoked the sovereign will of the people, “who voted for the Constitution at a Referendum,” as being best expressed in the binding provision that a fresh presidential election must be held within sixty days as stipulated in Article 140.<sup>570</sup> Whereas the High Court prioritized accordance with the constitutional provisions on the principles of a properly conducted election (i.e. transparency and accountability), the Court of Appeal prioritized accordance with the constitutional provisions on the procedures of an election (i.e. scheduling).

The Court of Appeal urged its order to suspend the declaration of the High Court was “in deference to the sovereignty of the people and the supremacy of the constitution.” Yet it was precisely the IEBC’s violation the supremacy of the constitution that was the basis of the High Court’s determination. The careful wording used by the appellate court was telling: by suspending the declaration of the High Court, the Court of Appeal was not contradicting the conclusions reached by the lower court nor suggesting that the IEBC was not in violation of the constitution and law – the appellate court was entirely silent on these matters. This was evident again in the appellate court’s concluding statement wherein it stated that the constitutional and statutory “functions” of returning officers for the repeat election “are not invalid.” The issue before both the High Court and the Court of Appeal was never a question of the validity of the functions (i.e. duties or tasks) of returning officers, the matter in question was whether the IEBC’s appointment of the officers was invalid.

Although allegations regarding the IEBC’s appointment of returning officers had failed to achieve the objectives of the initial applicants (i.e. Khalifa et al.) in cases at the High Court and the Court

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<sup>570</sup> IEBC v Khalifa Court of Appeal Civil Application 246 of 2017, para. 5.

of Appeal, petitioners in the October repeat election case took the High Court's suggestion to pursue another avenue for redress by raising the issue before the Supreme Court. Petitioners argued the High Court held that the IEBC's appointment of the officers was illegal;<sup>571</sup> respondents countered that the High Court did not invalidate the appointments and the Court of Appeal suspended the High Court's declaration that the appointments constituted a violation and stated the functions of the officers were not invalid.<sup>572</sup> The Supreme Court determined: "we now hold that the officers in question lawfully held their positions, and duly discharged the constitutional mandate devolving to them. This is also because on the election date, the stay Orders granted by the Court of Appeal were firmly in place, and to state otherwise would be to negate the value of the validity of Court decisions... The decision of the High Court, to that extent, cannot be the basis for invalidating the 26th October election... Accordingly, we find no validity in the petitioners' claim that the said Returning Officers and their deputies, lacked authority."<sup>573</sup>

The Supreme Court's rationale was notable for a number of reasons: The Supreme Court referred to the mandate and authority of returning officers, which seemed analogous to the Court of Appeal's reference to functions, but these issues were never really in question,<sup>574</sup> rather the contentious issue was on the validity and legality of the IEBC's appointment of the officers. When the Supreme Court determined that the officers held their positions lawfully, it did not

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<sup>571</sup> Mwau v IEBC 2017, para. 36, 326, 330.

<sup>572</sup> Mwau v IEBC 2017, para. 96, 97, 327, 331.

<sup>573</sup> Mwau v IEBC 2017, para. 332, 333.

<sup>574</sup> The arguments of petitioners and the counterarguments of respondents made no reference to mandate and authority.

formulate its decision on the basis of an assessment of whether the IEBC complied with the constitution and law in making the appointments, rather the decision was grounded on the basis of an assessment of the validity and legality of “the stay Orders of the Court of Appeal.” The Supreme Court did not address the core issue of the validity of the IEBC’s appointments or measure the merits of the petitioners’ allegations against the requirements stipulated in the constitution and law; instead the apex court addressed the validity of the decisions of courts and posed that the validity of court decisions should not be negated – on the basis of the forgoing, the Supreme Court affirmed the decision of the Court of Appeal, but then proceeded to negate the decision of the High Court.

#### Violence and Intimidation

Both the High Court and the Court of Appeal approached enforcement of compliance with the constitution and laws as being secondary, overshadowed and outweighed by the need to forestall the threat of a constitutional crisis and the potential for chaos and anarchy should the repeat election be cancelled or delayed. But throughout Kenya’s electoral history,<sup>575</sup> it was often precisely the failure of election management bodies to comply with the constitution and laws and the failure of courts to enforce compliance that had instigated perceptions of electoral

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<sup>575</sup> Particularly following the reintroduction of multiparty politics in 1991. Kenya became a de facto one-party state in 1964 when the ruling party, Kenya African National Union (KANU) absorbed the opposition party, Kenya African Democratic Union (KADU), and again in 1969 when the government banned a new opposition party, Kenya People’s Union (KPU). Kenya became a de jure one-party state through Constitution of Kenya (Amendment) Act of 1982, which introduced Section 2A—There shall be in Kenya only one political party, the Kenya African National Union. Constitution of Kenya (Amendment 2) Act of 1991 repealed Section 2A. Constitution of Kenya (Amendment) Act of 1997 introduced Section 1A— The Republic of Kenya shall be a multiparty democratic state.

injustice and provoked electoral violence (Harrington and Manji 2015; Musila 2013; Muli 2011; Republic of Kenya 2008a, 2008b). Moreover, the period before and after the repeat election was marred by violence, chaos and anarchy in the form of street protests, police brutality and violent state suppression (Thiong'o 2017b; Standard Reporter 2017f; Odenyo 2017; Achuka 2017d; Ng'ethe 2017b; HRW 2017), and the months long political stalemate (Ng'etich and Psirmoi 2018),<sup>576</sup> calls for secession to split the country in half (Lang'at 2017j; Psirmoi 2017b), and plans to inaugurate Odinga as the People's President (Standard Team 2018) and to form People's Assemblies (Obala 2017c) were all indicative that the rulings of courts had done little to forestall a looming constitutional crisis.

At the Supreme Court, petitioners argued the repeat election should be ruled invalid because the IEBC's failure to comply with the constitution and law in its preparations for the repeat election occasioned a tense and polarized political environment that was not conducive for the proper conduct of an election and prompted violence to occur resulting in low voter turnout.<sup>577</sup> Whereas the two lower courts were preoccupied with the potential for electoral violence to occur, the Supreme Court was dismissive of the fact that violence did occur. The Supreme Court urged that if it were to invalidate an election on the basis of violence, "the authority of the Constitution would be surrendered to cynical acts of violence: all that one would need to do, is to instigate violence in any corner of the Republic during a Presidential election, and thereafter petition this Court to nullify the election." Yet an instigating factor that prompted violence to

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<sup>576</sup> Lasting roughly between the IEBC's declaration of Kenyatta's victory in the August 2017 elections until the handshake agreement between Kenyatta and Odinga on March 2018.

<sup>577</sup> *Mwau v IEBC* 2017, para. 17, 19, 20, 21, 26, 41, 44, 312, 390, 400, 405, 411.

occur during the repeat election was the perception, whether real or imagined, that the IEBC had disregarded the authority of the constitution.

The court continued, “Those who intentionally instigate and perpetrate violence must not plead the same violence as a ground for nullifying an election.” The court’s choice of wording was particularly curious – to whom was the court referring? Earlier in the judgement, the court took “judicial notice” that violence was more pronounced in areas that were opposition strongholds and that NASA had rallied supporters to protest and boycott the elections under the slogan of “No Reforms, No Elections.”<sup>578</sup> Elsewhere the court posed that violence was “politically-instigated,” that “neither the State nor the IEBC bears responsibility for failure of voting in certain regions of the country,” and that “such failure ought to be attributed to unidentified private citizens and political actors, who actively caused the offending situations, directly or indirectly.”<sup>579</sup> The court seemed to be blaming the petitioners for the violence, which various commentators (ICJ 2019) suggested was evidence that the court was treating the petitioners not as self-described voters and patriotic citizens, but “as if they had brought the petition as proxies of NASA.”

It was likely that the court was aware of the observations made by other commentators that NASA had organized broadscale protests against the repeat election as a strategy to prevent the IEBC from conducting elections in opposition strongholds, which the opposition could then use

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<sup>578</sup> Following the Supreme Court’s nullification on the August presidential election, NASA issued an ultimatum in the form of a list of “irreducible minimums,” which demanded that there would be no repeat election unless various reforms were undertaken at the IEBC, including the resignation of key officials who the opposition blamed for irregularities that marred the August election (Lang’at 2017g; Nation Team 2017k).

<sup>579</sup> Mwau v IEBC 2017, para. 279, 311, 315, 321.

to argue that the election was invalid because it violated the mandatory requirement that voting for a presidential election must take place in all 290 constituencies as per Article 138 of the Constitution (Chemuigut 2017; Omoro and Nyarangi 2017). The strategy was brought to fruition when the IEBC announced that the elections would be postponed and then cancelled in 25 constituencies located in opposition areas due to high incidence of violence and intimidation, which petitioners then argued was proof of the IEBC's violation of Articles 138 and 38 of the Constitution, which guarantee universal suffrage and require elections to be free of violence and intimidation.<sup>580</sup> The petitioners' arguments appeared to advance the objectives of the opposition, which lent credence to the view that they were proxies serving the interests of NASA.

The court stated, "We take judicial notice of the fact that, in those constituencies... officials of the [IEBC] were physically prevented from accessing the polling stations... because of the threat of insecurity caused by violent demonstrations." However, the court noted there is a "non-obstante proviso" that the particular Articles of the Constitution cited above must be "read in proper context" with Section 55B of the Elections Act of 2011<sup>581</sup> and Sections 64A and 87 of the Elections (General) Regulations of 2012, which confer upon the IEBC discretion to postpone an election in specific areas under certain circumstances such as natural disaster or likelihood of a serious breach of the peace, and further discretion to declare a candidate elected as president before all constituencies have returned their results if the commission is satisfied the results that have not been received will not affect the outcome of the election. The court concluded, "It is clear that the Commission made its declaration pursuant to Article 138 of the Constitution,

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<sup>580</sup> Mwau v IEBC 2017, para. 15, 40, 282, 390, 397.

<sup>581</sup> As per Election Laws (Amendment) Act of 2016, Section 18.



Section 55B of the Elections Act, 2011 and Regulation 87 of the Elections (General) Regulations, 2012. On that basis, even though voters in 25 constituencies had not voted, the declaration of results by the Commission was in perfect accord with the terms of the Constitution.”<sup>582</sup>

The court’s conclusion on the matter was a marked departure from the reasoning it applied in the petition contesting the August election. In the previous case, petitioners argued that when the IEBC declared the results of the election, nine days after the close of polling, the agency publicly admitted it had not received all Forms 34A and 34B – therefore, incomplete results could not be the basis for a valid declaration.<sup>583</sup> On the basis of the foregoing, the court stated, “we find and hold, that, the petitioners herein have discharged the legal burden of proving that the [IEBC], declared the final results for the election of the president, before the [IEBC] had received all the results... contrary to the Constitution and the applicable electoral law... The [IEBC] cannot therefore be said to have verified the results before declaring them.”<sup>584</sup> Notably, neither respondents nor the court made any reference to Section 55B of the Elections Act or Sections 64A and 87 of the Elections Regulations as justification for the IEBC’s declaration of

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<sup>582</sup> Mwau v IEBC 2017, para. 311, 315, 318, 319, 320, 322. Notably, the Supreme Court treated the Constitution, the Elections Act and the Elections Regulations as complementary provisions to the effect that “it follows, that Section 55B of the Elections Act is a normative constitutional derivative, annexed to Article 82 of the Constitution [and] pursuant to Articles 81 and 86 of the Constitution [and] extended by Regulation 87 of the Elections (General) Regulations, 2012.” In her concurring opinion (para. 496), Ndungu affirmed this interpretation: “As determined by this [Supreme] Court in [other cases, the] Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution and that in interpreting them, a Court of law cannot disengage from the Constitution.” In contrast, in the Machakos gubernatorial election petition, the Supreme Court not only disengaged sections of the Elections Regulations from the Constitution and the Elections Act, it ruled they were ultra vires, null and void (Mutua v Ndeti Supreme Court Election Petition 11 and 14 of 2018, para. 68).

<sup>583</sup> Odinga v IEBC 2017, para. 24, 39, 219, 247, 250, 251, 266, 273.

<sup>584</sup> Odinga v IEBC 2017, para. 289, 300.

final results prior to receiving results from all areas. Moreover, whereas the court in the August election petition determined that the IEBC was required to receive and verify results from all areas before declaring the final results, in the October election petition the court determined that the IEBC had discretion to declare final results prior to receiving results from all areas.

The court was unmoved by the petitioners' assertion of low voter turnout (38.8%) was evidence that the political environment was not conducive for an election, that many voters were disenfranchised, and that the repeat election lacked legitimacy and credibility.<sup>585</sup> On the contrary, the court stated: "It is clear to us, however, that such low voter turn-out was due to an amalgam of factors – including in particular, the active call for boycott, and the violent demonstrations, as well as voter-fatigue." The court concluded that voter turnout "has no direct connection to the validity of the declaration of a President-elect" and "is not an unassailable indicator of the want of credibility of an election."<sup>586</sup>

All three levels of courts seemed more concerned with ensuring that the repeat election took place as scheduled, less concerned with the quality of the conduct of the election and fixated on the respondents' warnings of a looming threat of chaos. This was evident in the Supreme Court's assertion that "Only the failure of the conduct of such election would constitute lack of legitimacy – as it would occasion such uncertainty and appearance of crisis as would afflict the whole population in its social, economic and political engagement."<sup>587</sup> Whereas the petitioners

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<sup>585</sup> Mwau v IEBC 2017, para. 390, 411, 412.

<sup>586</sup> Mwau v IEBC 2017, para. 423, 424, 429.

<sup>587</sup> Mwau v IEBC 2017, para. 406.

argued the election lacked legitimacy, credibility and validity because the IEBC violated the constitution and law in the conduct of the repeat election, the court replied with a sharp rebuke against the petitioners and urged that the bare allegations raised in the petition “implicitly denigrates the very constitutional and legal process which has entrusted the conduct of election to but one, duly appointed agency – the IEBC... [and] argues against the very concept of legality under the constitutional process, thus negating the essential democratic values of constitutionalism and legal process” and that “Such a stand is negative, retrogressive, and invites disapproval by this Court.”<sup>588</sup> The takeaway from the judgement essentially was that it was an affront to democracy and constitutionalism for a petitioner to challenge the IEBC’s compliance with the constitution in the conduct of a democratic election.

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<sup>588</sup> *Mwau v IEBC 2017*, para. 310. Although not explicitly cited in its judgement on the October repeat election, the Supreme Court’s reasoning was suggestive of the maxim of law on the presumption of regularity (*omnia praesumuntur rite esse acta*), which the court referenced with regard to the burden of proof in *Odinga v IEBC 2017* (para. 130) by quoting its judgement in *Odinga v IEBC 2013* (para. 196): “... a long-standing common law approach in respect of alleged irregularity in the acts of public bodies [is] *Omnia praesumuntur rite et solemniter esse acta*: all acts are presumed to have been done rightly and regularly” (also as per Kenya Evidence Act, Section 107). Though seemingly analogous to other legal maxims of the presumption of innocence and the party that alleges must prove (*onus probandi*; *ei qui affirmat, non ei qui negat, incumbit probatio*), a fine distinction is that state institutions, such as the IEBC, have a clearly defined constitutional and statutory obligation of transparency and accountability to the public. Thus, whereas election courts in Kenya have predominantly affirmed that only once a party has proven allegations only then does the burden of proof shift to respondents to disprove, the task for petitioners becomes onerous due to the information asymmetry in which the IEBC is the primary originator and custodian of election data; a counterview is that the IEBC, as a public institution, must always bear the burden of proving compliance with the principles of transparency and accountability. Considering Kenya’s lengthy history of flawed elections and electoral injustice, a presumption of regularity for public institutions may not be the best starting point in the adjudication of election disputes. Evelyn and Wanyoike (2016) argue: “Applying this presumption ignores Kenya’s electoral history where malpractice has been rampant and is therefore inappropriate to use in the circumstances. It also flies in the face of Article 86, which creates an obligation on the IEBC to demonstrate the election complied with the standards set out therein.” Similarly, Thiankolu (2019) notes, “The lived reality in Kenya is that elections are seldom ‘rightly and regularly’ done. The maxim ... therefore, is irrelevant to the prevailing political culture in Kenya – except arguably when turned on its head.”

## Legitimacy

Two reactions to the Supreme Court's judgement to uphold the October repeat election are notable. The first was a question of legitimacy. Generally, courts not only perform a checking function, but also serve as a powerful legitimizing force (Nwabueze 1973; Bickel 1986). Historically in Kenya the judiciary has functioned to legitimize an authoritarian executive and less as a check to uphold constitutionalism and the rule of law. The 2010 Constitution was enacted to reverse this history, and the Supreme Court's nullification of the August election was viewed as a positive step towards entrenching constitutionalism and the rule of law, and proof of judicial independence and the ability of courts to check other branches of the state, including a powerful executive. But the Supreme Court's decision to uphold the October repeat election was perceived by many as a significant step backwards and a return to the conservative jurisprudence of the past.

Contrary to the Supreme Court's finding that the October election "met the threshold of credibility and legitimacy under the Constitution,"<sup>589</sup> critics drew a distinction between legality and legitimacy. From their perspective, the judgement had only conferred a stamp of legality on the repeat election, but the court could not grant legitimacy to Kenyatta's victory (Muluka 2017b; Kibwana 2018). Rather, by upholding the repeat election the court was legitimizing "electoral theft" by an "illegitimate regime" and "entrenching electoral injustice" (Munabi 2017; Nation Team 2017m). Gaitho (2017c) proposed the hubris that comes with winning 98% of the vote fit within "the best tradition of the old-fashioned African dictators," but garnering the majority of

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<sup>589</sup> Mwau v IEBC 2017, para. 410.

votes in the repeat election was meaningless when the majority of voters refused to vote and the main opposition candidate boycotted the election. Mututa (2017) urged a key component of a free and fair election is that it must be competitive, thus Odinga's withdrawal rendered the repeat election nugatory as Kenyatta essentially ran unopposed. As many observers noted, low voter turnout coupled with the absence of any real competition left the impression that Kenyatta's reelection lacked a true democratic mandate and legitimacy (Wesangula and Mosoku 2017; Mbutia 2017; Warah 2018).

Critics argued the Supreme Court's judgement on the repeat election also eroded the credibility and legitimacy of the court as the final arbiter of presidential elections and the constitution (Mutua 2017c, 2017d). Cheeseman (2017b) posed, Kenya's experience in the 2017 elections "demonstrates that more independent judiciaries can have a major impact on democracy, but also that this impact is constrained by weaknesses elsewhere in the political system... this means that the same problems that have been identified in electoral commissions, legislatures, and political parties ultimately hamper the ability of judges to enforce the rule of law." The fragility and vulnerability of the political and electoral systems to risks of violence and civil unrest may have prompted the court to choose the lesser of evils by upholding the repeat election, despite its flaws, and thereby bring closure to the volatile election period – but the decision came at a great cost. Munabi (2017:68) suggested "the greatest loser was arguably the Court itself, because it had not only undone the legacy and reputation it developed when it annulled the 8 August election but also showed its impotence in the face of the trials and tribulations of democracy."

If the Supreme Court's nullification of the August election marked judicial independence at its zenith, the court's decision to uphold the October election might mark its nadir (ICJ 2019:46). For many observers, the court's judgement in August was evidence that the judiciary had embraced the role envisioned for it in the 2010 Constitution as an instrument for substantive justice that promoted a people-oriented jurisprudence and as a tool for dynamic social change and transformation of the state – but these perceptions were shattered following the October judgement. As Mutua (2017c) stated, “I incorrectly thought the Supreme Court had turned the corner on September 1. I was dead wrong. My celebrations – like the rest of the world – were premature. The September 1 ruling nullifying Mr Kenyatta's August 8 election was an aberration. It's Monday's ruling [on the October election] that restores Kenya's legal order and jurisprudential status quo that is the norm. It conformed to the court's opinion in the 2013 petition” – it was a judgement that suggested a return to the jurisprudence of the pre-2010 constitutional era. Ombati (2017:122) proposed that whereas the court's judgement in August increased the standard for quality and integrity in the conduct of elections, by upholding the October election, despite incidents of irregularities and illegalities including violence, the court adopted a more restrictive approach that focused on the quality of evidence and burden of proof for petitioners at the expense of delving into the substantive issues in the petition.

The second notable reaction to the Supreme Court judgement on the October repeat election was recognition of the precarious position of courts within “the continuing struggle to entrench democratic institutions” (ICJ 2019:48). The Supreme Court had already made history with its nullification of the August election, but in doing so it became the target of harsh vilification by Kenyatta, a Kenyatta/Jubilee party-aligned majority parliament and pro-Kenyatta/Jubilee

supporters. To nullify the October repeat election would likely “expose its institutional security to greater danger,” which observers suggested probably contributed to the court’s swing back to its more conservative 2013 stance (Munabi 2017:68). In response to the judgement on the October election, Odinga stated: “We do not condemn the court, we sympathise with it.”

Odinga proposed that the court’s decision was not a surprise as the court was under severe “duress” because Kenyatta “had publicly accused the court of having carried out a ‘coup’ by annulling his election and threatened to ‘fix’ the justices once he was back in power” (Mosoku 2017h). The next chapter examines various assaults against the judiciary.

This chapter has identified variances in the arguments of petitioners and the reasoning of courts in presidential petitions from the August and October elections. A petitioner-centric analysis suggests that petitioners in the repeat election case confronted significant challenges. For example, the position of petitioners as voters and ordinary citizens placed them at a disadvantage in terms of lack of access to evidence in the form of election results forms – as they were not candidates, they did not have party agents to deploy to polling stations and tallying centers to observe the conduct of the election, document irregularities, collect evidence and testify as witnesses. The court did not attempt to offset petitioners’ disadvantaged position or the IEBC’s monopoly on election data and documents. Instead, the court declined petitioners’ requests for access to materials held by the IEBC and was perceived as exhibiting a hostile attitude towards petitioners. Petitioners also disadvantaged themselves by arguing claims that had already proven to be ineffective in previous court cases.

A court-centric analysis indicates that the court adopted strongly divergent approaches in the two petitions. In the August petition, the Supreme Court prioritized consideration of the quality of the conduct of the election and emphasized the centrality of constitutional principles; whereas in the October petition, the court seemed preoccupied with procedural aspects of the election, particularly with respect to the singular concern of whether the election took place as scheduled and with far less regard to the quality of the election and compliance with constitutional principles. Whereas the Supreme Court's judgement on the August petition suggested evidence of a post-2010 jurisprudence that more strongly advanced the principles of transformative constitutionalism and electoral justice, the judgement on the October petition suggested continuation of the status quo of a pre-2010 jurisprudence on elections.

There are a number of possible explanations for the divergent approaches of the court in the two petitions. Just as petitioners are bound by their pleadings, to a large extent courts too are bound to consideration of the evidence and arguments presented by petitioners and respondents. Thus, the different outcomes of the two petitions may be attributed to differences in the arguments and approaches of the respective petitioners. Other explanations were that Odinga's withdrawn from the repeat election and absence from the petition blunted the court's willingness to reenter the political fray; that having already made history by nullifying the August election, there was little incentive to repeat the feat; or that when confronted with upholding a flawed repeat election and bringing closure to a tumultuous election period, the Supreme Court choose the lesser of evils. Another possibility is that court was motivated to uphold the repeat election to reduce its exposure to further attacks from the ruling regime and its supports



following the court's decision to nullify the August election. Attacks on the judiciary are the focus on the next chapter.

Many observers viewed the October 2017 repeat presidential election as being more flawed than the first presidential election in August 2017. This is because the IEBC had made few institutional reforms to remedy problems that had impugned their conduct of the first presidential election, which the opposition referred to as "irreducible minimums," and because the second election was boycotted by the opposition and its supporters, had low voter turnout, and occurred in a climate of violence and civil unrest. Many observers expressed dissatisfaction with the Supreme Court's decision to uphold the October repeat election on the basis that if the first election was invalidated for particular reasons that were not corrected, the second election could not be considered valid. These factors bolstered perceptions that the Supreme Court's judgments on the two presidential election petitions were based on political rather than judicial considerations. Whereas the Supreme Court was seen as advancing democratic and constitutional gains in its nullification of the first presidential election, these were negated in its decision to uphold the second election. While the Supreme Court could grant a stamp of legality on the repeat election, it could not convey legitimacy to the appeasement of all parties.

Despite the objectives of Kenya's 2010 Constitution to entrench the rule of law and to institutionalize formal rules, Kenya's experience from the 2017 election period also highlights the limitations of formal institutions and the continued salience of informal rules and processes to resolve political conflicts. This was evident in that protracted political stalemate, which lasted from August 2017 until March 2018, was not resolved through formal institutions, such as the

Supreme Court, or formal processes, such as the two presidential election petitions. Instead, it was resolved through informal processes on the basis of a “handshake agreement” between Kenyatta and Odinga – the terms of which remained undisclosed. Thus, it was not formal processes within the judiciary that granted legitimacy and finality to the 2017 elections, but rather informal processes – although Odinga did not condone the electoral process as legitimate, his compromise with the Kenyatta signaled that the issue of legitimacy had been resolved.

## **Chapter 8: Judicial Assault in an Era of transformative Constitutionalism**

Since independence, Kenya has been beleaguered by two interrelated problems – the overcentralization of power in the executive and state institutions that are too weak to check the executive. The 2010 Constitution was designed to remedy these problems by restructuring the balance of power within the state: executive power was reduced and redistributed both horizontally and vertically. On the horizontal axis, the new constitution strengthened the power, independence and autonomy of the legislature and judiciary, and affirmed their coequal status vis-à-vis the executive; and the constitution also strengthened the power and autonomy of independent state agencies such as the Independent Electoral and Boundaries Commission (IEBC) and the Ethics and Anti-Corruption Commission (EACC). On the vertical axis, the new constitution devolved power from the national level of government to 47 newly created subnational level county governments. Thus, the objectives of new constitution are both to reduce executive power through horizontal and vertical decentralization, and to empower other state agencies to perform horizontal and vertical accountability functions to check the abuse of power.

This chapter examines the exercise of power among various bodies of the state in the context of the 2017 election cycle – particularly the executive, parliament, the judiciary and the IEBC. It begins with detailing a variety of attacks on the judiciary by the executive and collaborations between the executive and the legislature to curb powers of the judiciary and the IEBC. The chapter then applies two analytical frames to evaluate how these attacks are indicative of the balance of power within the state: the extent to which power has been dispersed from the executive is assessed through the frame of horizontal decentralization – i.e. does the executive

exercise power differently in pre- and post-2010 constitutional eras; the extent to which other state bodies have been empowered is assessed through the lens of horizontal accountability – i.e. do other state agencies, particularly the legislature and judiciary, exercise power differently in pre- and post-2010 constitutional eras, do they exhibit independence from and perform checks on the executive?

Two caveats are noteworthy: first, the executive and an executive-aligned majority parliament do not have an exclusive monopoly on assaults on the judiciary and the IEBC, the opposition has targeted these two institutions as well. For example, prior to the August 2017 elections, Odinga and the opposition party organized mass protests to force the ouster of IEBC officials who were blamed for bungling the 2013 presidential election (Oudia and Okwach 2016; Maosa and Muinde 2016); but once a new team was installed the opposition was unrelenting in challenging the IEBC's preparations for the 2017 elections in courts, in the press and on the campaign trail (e.g. IEBC's procurement process for ballot papers) (Lang'at 2017c). The opposition's efforts were viewed by some as intimidating the IEBC and eroding its credibility, and by others as legitimate demands to ensure transparency and accountability in the IEBC's conduct of elections. Regarding the judiciary, Odinga's assertion that the Supreme Court was in need of redemption was viewed by some as an attempt to intimidate the judiciary and a thinly veiled threat against the Supreme Court judges, and by others as an accurate appraisal considering the Supreme Court's controversial decision to uphold the flawed 2013 presidential election, despite evidence of malpractices, and considering the judiciary's historical role in perpetuating electoral injustice (Otieno and Obala 2017; Njagih 2017a; Ng'etich and Obala 2017).

The second caveat is that in addition to external assaults, state agencies also are under attack from within. For example, the IEBC exposed itself to criticism by failing to ensure transparency in its procurement of ballot materials, which prompted a reprimand by the High Court (Ochieng 2017). Weeks prior to the August elections, there were hints that the IEBC was experiencing a leadership deficit (Editorial 2017c); and following the Supreme Court's nullification of the August presidential election, it became highly evident that the IEBC was deeply divided and growing increasingly dysfunctional (Asamba 2017c; Standard Reporter 2017c; Owuor 2017). Regarding the judiciary, corruption within the institution has eroded its credibility for decades, and despite a raft of institutional reforms in the post-2010 era, the problem remains endemic (Raballa 2018; Mutunga 2011; Were 2017).

#### Personal Attacks on Judges

Following the Supreme Court's announcement of its judgement to nullify the August presidential election on September 1, 2017, President Kenyatta's response was initially diplomatic and conciliatory. In a televised address to the nation from State House, Kenyatta stated: "I respect the Supreme Court's decision but I don't agree with it... Millions of Kenyans queued and voted, but six people [Supreme Court judges] have decided that they will go against the will of Kenyans... Again, I say, the Court has made its decision and we respect it but we do not agree with it" (Okumu and Okuoro 2017). But hours later during a campaign rally for the October repeat election at Burma Market in Nairobi, Kenyatta's tone changed dramatically when he launched a scathing attack on the Supreme Court and referred to the judges as "wakora" (variously translated as tricksters, crooks, scoundrels, thugs, criminals). Kenyatta warned, "I am no longer a

president-elect; do you understand me? I am now firmly in power. Let [Chief Justice] Maraga know that he is now dealing with a sitting president” (Ondieki 2017d).

The next day at a campaign rally in Nakuru County, a visibly angry Kenyatta continued his tirade: “When we finish [the October repeat election], we will revisit this thing... We clearly have a problem... Every time we do things, the Judiciary puts an injunction. Kwani wewe umechaguliwa na nani? [Just who do you think elected you?] No, no, no. There is a problem, and we must fix it. We must fix it... The Supreme Court sat and decided that they are the ones with a bigger power than the 15 million Kenyans who woke up, queued in lines, and voted for their preferred presidential candidate. As a Supreme Court, they cannot annul the wishes of the people. And we will revisit this thing” (Lang’at 2017e).<sup>590</sup> Deputy President William Ruto accused the Supreme Court judges of colluding with the opposition to nullify the election. He urged, “That a decision was made to overturn the will of 15 million Kenyans, so that the will of a few people [Odinga] in court can prevail, we want to tell them: It is not the Supreme Court that is supreme. It is the Kenyan people that are supreme... When this [October repeat election] is done, we shall interrogate everything, how a Supreme Court overturned the will of Kenyans on the basis of things that have nothing to do with how they voted, on some technicality... Hiyo ni upuzi [That is stupidity] ... we want Justice Maraga to hear us clearly: He has had his day, he has done his game, and ours is coming. And by the way, that is not a threat” (Nation Team 2017e).

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<sup>590</sup> Kenyatta’s reference to the Supreme Court judges as nonelected state officers who wrongly overturned the electoral preferences of citizens, is an example of the countermajoritarian criticism and the politicization of the judiciary that courts can be subjected to when they intervene in political disputes or perform their checking function on other branches of the state.

Despite Ruto's insistence that his and Kenyatta's statements were "not a threat," many commentators urged the remarks could only be interpreted as threats and attacks against the Supreme Court (Asamba 2017b; Kwamboka, L. 2017). Days later, Kenyatta softened his tone, seemingly to arouse empathy for his criticisms of the Supreme Court: "The Supreme Court committed a crime against me. They meted out an injustice against me. Who would one not be angry when he is openly robbed as I and Kenyans were?... They stole my victory in broad daylight... It is true some of us were really pained... we were hurt... just imagine someone snatching your victory from you just like that... I cannot lie to you that I was happy with the decision by the Supreme Court led by Maraga. I was very angry with Maraga and his court" (Wafula and Mureithi 2017a; Njagih 2017b).

Kenyatta's change of tack was not necessarily in response to criticism from the opposition, civil society or the international community, but rather a reaction to outrage from the Kisii community, because Maraga was a "native son." NASA-aligned Woman Representative for Kisii County Janet Ong'era stated, "This is clear vendetta on the CJ, as members of the community we shall not allow it." Even Jubilee-aligned parliamentarians from Kisii County were prompted to break ranks with Kenyatta and the party (Psirmoi 2017c): Kitutu Chache North MP Jimmy Angw-enyi stated, "As leaders from Kisii community where Maraga hails... We will not allow people to threaten the Chief Justice..." It would have been unwise for Kenyatta to alienate the Kisii community since Kisii County was considered a swing vote – Kenyatta had lost the county to Odinga in August, and thus needed to turn up his charm offensive to win their votes in October (Nation Team 2017j). Kenyatta was forced to qualify his previous assertions (Mwere and Oruko 2017; Wafula and Mureithi 2017b): "I was very angry with Maraga and his court, but that does not

mean I have a problem with the Kisii community.” But already the assault on the judiciary had gained momentum. If it became impolitic for Kenyatta to vilify the court, his surrogates from Jubilee party could continue the onslaught. These assaults took two forms: attacks on individual judges and judicial officers, and attacks on the judiciary as an institution.

Personal attacks mainly targeted three Supreme Court judges: Chief Justice Maraga, Deputy Chief Justice Mwilu and Justice Lenaola were all new to the Supreme Court and were seen as forming the bulwark for upsetting the precedent set by the Supreme Court’s judgement to uphold the 2013 presidential election petition. Inside sources revealed that from the onset of the deliberations, Maraga and Mwilu were already determined to nullify the August 2017 election on the basis that the process of the election was more important than the results, because if the process was flawed then the results could not be valid. Mwilu was allegedly extremely adamant and animated in pushing for nullification – accounts emerged of her banging furniture, pounding her fists and jumping on tables (ICJ 2019). Lenoala and Wanjala were initially undecided. But Wanjala, who was part of the bench that upheld Kenyatta’s election in 2013 and wary not to relive the criticism leveled against the court for that decision, moved to join Maraga and Mwilu, which brought the bench to a 3:3 deadlock. Then Lenaola broke the tie (Menya 2017c; Standard Team 2017d). There were allegations that Maraga pressured other judges to form a 4:2 majority in favor of nullification (Abong’o 2017b).

The attacks on individual judges were meted out through social media, verbal utterances of Jubilee leaders and supporters, and through a number of petitions and official complaints to the Judicial Services Commission (JSC), which is the independent governing body of the judiciary,



and the Ethics and Anti-Corruption Commission (EACC). Menya (2017c) noted, “there seems to have been a full-blown character assassination campaign targeting” the Supreme Court judges with the spread of “malicious information.” Kenyatta’s characterization of the Supreme Court as “wakora” became the preferred pejorative for the four majority judges who were branded as “judicial dictators” that had mounted a “judicial coup” by annulling Kenyatta’s victory. Observers noted that a viral social media campaign called #WakoraNetwork was linked to the Presidential Strategic Communications Unit and appeared to be the brainchild of Kenyatta’s official social media guru, Senior Director for Digital Innovations and Diaspora Communications Dennis Itumbi. The “dirty tricks propaganda offensive” purportedly was crafted by State House to discredit the judiciary as corrupt and under the control of a “civil society cartel” (Gaitho 2017b). Itumbi gained notoriety during the 2013 election cycle when he created the #Evil Society campaign to demonize civil society groups, which Jubilee blamed for assisting the International Criminal Court with its investigations of Kenyatta and Ruto for alleged crimes against humanity stemming from the 2007 post-election violence. Lenaola threatened to sue for defamation and demanded that Itumbi immediately delete all tweets and online posts and issue an unqualified apology (Kiplagat 2017d).

An unnamed Member of Parliament leaked to the press that Jubilee party had hatched a plot to frame certain judges and officers of the Supreme Court with “non-existent” and “false” charges in order to initiate investigations before the JSC and the EACC, not because the accusations were real, but to “smear” and “besmirch” their character (Mwere and Oruko 2017). Three petitions were submitted to the JSC and a fourth was sent to the EACC. The first petition to the JSC was filed by Nyeri Town MP Ngunjiri Wambugu, which called for Chief Justice Maraga to be removed

from office due to “gross misconduct.” Wambugu claimed Maraga intimidated and pressured other judges to nullify Kenyatta’s August election, which was part of a “pre-determined and illegal scheme” to orchestrate regime change through “judicial intervention” (Muthoni 2017a). Wambugu argued Maraga had conspired with Odinga’s legal team through secret phone calls while the petition was being heard before the Supreme Court, and that Maraga was under the control of civil society NGOs that were embedded within the judiciary and had provided funding for technical support, research and training programs (Abong’o 2017a; Kiplagat 2017b).<sup>591</sup>

NASA and other commentators suggested Wambugu’s petition was clearly part of Kenyatta’s plan to “fix” the Supreme Court; however, Jubilee members quickly distanced themselves from Wambugu. Jubilee Leaders of Majority for the National Assembly, Aden Duale, and the Senate, Kipchumba Murkomen, and Jubilee Secretary-General Raphael Tuju all urged Wambugu had acted on his own accord and not on behalf of the party (Gitau and Mwere 2017; Nation Team 2017f). Even Kenyatta stepped in to personally ask Wambugu to withdraw his petition: “I understand your pain and action. But we have an [October repeat] election to win.... That has to be our focus. Leave the court alone.” However, commentators noted that these calls for Wambugu to drop his petition were not based on matters of principle – i.e. that politicians should refrain from attacks on judges – but instead were for political exigency and public relations (Gaiho 2017b). This was evident because Kenyatta’s comments that the party should be focused on the repeat election, not filing petitions against judges, was in response to outrage

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<sup>591</sup> It was no secret that the Kenyan Judiciary had engaged the International Development Law Organization (IDLO), an NGO, for capacity building and training for election dispute resolution prior to the 2017 elections. The Judiciary (2017c) even published a Bench Book on Election Disputes Resolution, a reference guide for judges and judicial staff tasked with election petitions, which clearly acknowledged technical support from IDLO, which itself was funded by a number of foreign governments (e.g. Denmark, UK, US).

expressed by the Kisii community over attacks on Maraga, and Kenyatta needed their votes. But despite criticisms by Jubilee leaders that Wambugu’s petition “against Maraga is in bad taste” and should be withdrawn, the petition remained before the JSC pending determination (Psirmoi 2017c; Kiplagat 2017c).

Two more petitions were filed before the JSC by Derick Ngumu, a self-styled whistleblower and executive director of a previously unknown Mombasa-based NGO called Angaza Empowerment Network. Ngumu wanted Supreme Court Judges Mwilu and Lenaola removed from office based on accusations of gross misconduct (Editorial 2017e). Ngumu accused the two judges of having ongoing communications and interactions through lengthy phone calls and in-person meetings with several individuals linked to the petitioners outside of the precincts of the judiciary while the August presidential election petition was being heard before the Supreme Court, which constituted a conflict of interest and impugned the impartiality, integrity and independence of the judges. Mwilu was accused of being in contact with: James Orgeno, who was Senator of Siaya County and lead council representing petitioner Odinga in the case; Moses Wetangula, who was Senator of Bungoma County and a co-principal of Odinga’s NASA party; and Amos Wako, who was Senator of Busia County and part of Odinga’s legal counsel.<sup>592</sup> Lenaola was accused of communicating with: Steve Mwenesi, the legal representative of the Law Society of Kenya (LSK), which was listed as *amicus curiae* in the petition; Ekuru Aukot, an independent presidential candidate, who was listed as an interested party in the petition; and Moses Wetangula.

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<sup>592</sup> There were reports that Mwilu and Wako were either married or had been in a years-long relationship, which both failed to publicly disclose (Nairobi Reporter 2017; Waithera 2017; Kamau 2018) Mwilu never refuted the claims, but she did sue Standard Media Group for defamation and was granted a temporary injunction (Mwilu v Standard High Court Civil Case 226 of 2018).

The most shocking aspect of Ngumu’s petition was that he attached detailed extracts of mobile phone data records that appeared to have been obtained from a telephone service provider including customer account holder names, ID numbers and phone numbers; specific dates, times and duration of calls, text messages and meetings; and exact locations where calls and meetings took place using triangulation from cellular network masts (Munuhe 2017a). Commentators questioned how Ngumu acquired the mobile phone data, which only could have come from a telephone service provider or from the National Intelligence Service or the Director of Criminal Investigations. However, it would have been illegal for a phone company or a state agency to release the private, confidential data of a customer to a third party without a court order. There was immense speculation of high-level collusion between state security agencies, telephone companies and the petitioner (Chagemu 2017; Gaitho 2017b).

Unlike Wambugu’s petition against Maraga, which Jubilee leaders opposed, they strongly supported Ngumu’s petitions against Mwilu and Leneola. Kiambu County Governor Ferdinand Waititu stated, “out of respect for the Judiciary, we painfully respected the verdict and we agree to go back to the ballot... But it’s a different case when details emerge that Nasa influenced judges in order to get a favourable ruling. We will not stomach that, it’s too much.” Nakuru Town East MP David Gikaria urged, “The two judges must also step down as they were bribed by Nasa to rule in favour of the opposition” – although Ngumu’s petition did not include allegations of bribery. Jubilee’s different approaches to the three petitions may have been prompted by the different reactions from the respective ethnic communities of the three judges – whereas Jubilee likely backed away from the petition against Maraga fearing that outrage from his Kisii

community would translate to loss of votes for the October repeat election, the petitions against Mwilu and Lenaola did not provoke a strong reaction from their respective ethnic communities (Kamba and Samburu), which Jubilee likely perceived as an indicator that votes from these communities were not in jeopardy.

Rashid Mohammed, who self-identified simply as a “voter,” filed a fourth petition to the EACC and sent copies to the Directorate of Public Prosecutions, the Directorate of Criminal Investigations (DCI) and the Inspector General of Police (Muthoni 2017c). The petition demanded that Supreme Court Registrar Esther Nyaiyaki should be investigated, prosecuted and punished. Nyaiyaki had prepared the court-ordered scrutiny report for the August presidential election petition. The scrutiny report recorded numerous irregularities in statutory results forms (34A, 34B and 34C), which became instrumental in convincing the majority judges to nullify the election. However, in her dissenting opinion, Supreme Court Judge Njoki Ndung’u argued she had personally undertaken her own scrutiny of the disputed forms and found all “met the required threshold in form and content.”<sup>593</sup> Mohammed proposed that the discrepancy between Nyaiyaki’s scrutiny report and Ndung’u dissenting opinion was proof that Nyaiyaki had “doctored” the results forms and submitted a “falsified report.”

Upon receiving the petition, the EACC and DCI immediately organized a joint team of investigators who sent a notice requesting the judiciary to provide several documents and for Nyaiyaki to present herself for questioning and dispatched a group of ten officers to the Supreme Court. However, the judiciary refused to entertain the request and sent the officers away on the basis

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<sup>593</sup> Odinga v IEBC, Dissenting Judgement of Ndung’u, para. 669.

that investigators were required to “follow the right procedure,” which included obtaining a court order (Mosoku and Ombati 2017). Many observers saw the petition against Nyaiyaki, and the suspiciously quick response by state investigative agencies, as evidence of the ruling regime’s well-coordinated effort to punish the judiciary for the Supreme Court’s nullification of Kenyatta’s August election. These suspicions were seemingly confirmed when Jubilee party leaders openly welcomed the investigation – Jubilee Secretary-General Raphael Tuju enthusiastically urged, “That is criminal and should be investigated... We associate ourselves fully with the petition” (Kimanthi 2017b). The Law Society of Kenya (LSK) publicly denounced the criminal investigation of Nyaiyaki as illegal, unconstitutional and “tantamount to an attack on the independence of the Judiciary.” LSK insisted the correct venue for complaints and investigations against Nyaiyaki, or any member of the judiciary, was the Judicial Service Commission, not the EACC nor the police, which had “no authority whatsoever to intervene and purport to conduct an inquiry” (Mosoku and Wakhisi 2017).

Other commentators (Editorial 2017g) posed, “Under the circumstances, it is easy to read malice in the probe ordered on the Registrar of the Supreme Court... EACC could easily be overreaching itself, for the Judiciary is an independent institution with its own internal disciplinary mechanism [i.e. JSC] that should be employed whenever need arises... The wanton targeting of public servants is objectionable. It is immoral and unlawful. Bullying civil servants is not the right way to assert EACC's authority.” Kegero (2018) suggested, the “inquisition against the Registrar of the Supreme Court, Esther Nyaiyaki... had nothing to do with her as a person, and was always a way of weakening targeted judges, with a view to going after them.” Gaitho (2017b) urged, “The speed with which the investigations were launched might not be surprising considering that DCI

[boss Ndegwa] Muhoro and EACC boss Halakhe Waqo both have well-earned reputations for pursuing the Jubilee Party line in a myriad of criminal and corruption investigations.”

Commentators noted all four petitions had the “hallmark of State backing” and were clearly part of a “ploy to disgrace and demean the judges and courts and cause them to genuflect and succumb to the whims of the Executive and distract Kenyans from the substance of the ruling [on the August election]” (Editorial 2017e; Nation Reporter 2017c). The JSC’s immediate reaction was to publicly condemn the petitions and other attacks on the judicial officers as “mindless acts of aggression against the Judiciary.” Months later, the JSC dismissed the three petitions it had received citing lack of merit (Kwamboka 2018a): “The commission considered the allegations [to be] a pure threat that was intended to intimidate the judges. The allegations were thrown out because they were malicious and were not supported with any facts.” The effects of EACC’s investigation of Nyaiyaki were clearly evident in the Supreme Court’s judgment on the October repeat election, which made sparse reference to court ordered scrutiny and no mention of the registrar (Kiplagat 2017i).

Nearly two years later, the EACC investigation of Nyaiyaki remained active. EACC Spokesperson Yassin Amarrow accused Chief Justice Maraga of blocking the investigation by issuing “unachievable conditions... The file is still open but we failed to proceed after the Chief Justice asked us to obtain a court order from the Supreme Court, which is impractical” (Maina 2019). Yet far from being “unachievable” or “impractical,” filing a request for a court order to release documents generally would be considered a fairly routine task for a state investigative agency such as the EACC. Amarrow would have had a legitimate complaint if the EACC actually had filed for a court

order and if the court had declined to grant the order. The EACC's lack of commitment and follow-through seemed to confirm suspicions that the investigation was never intended to produce any conclusive findings; rather the existence of an ongoing investigation and the allegations alone were part of a strategy to "sufficiently malign the [August 2017] verdict and the judges as a prelude to a concerted push for their ouster at the appropriate time" (Gaitho 2017b).

The attacks on individual judges of the Supreme Court climaxed the day before the court's highly anticipated delivery of its full judgement on the August presidential election petition, which was scheduled for September 20.<sup>594</sup> Well-organized and choreographed demonstrations were mounted simultaneously in Jubilee strongholds across the country including Nairobi, Nakuru, Nyeri, Nyandarua, Kiambu and Uasin Gishu counties (Editorial 2017e). Jubilee politicians and leaders led thousands of Jubilee supporters into the streets and ordered police to stand down while protesters unleashed chaos, blocked roadways with barricades and bonfires, paralyzed towns and cities, and forced businesses to shutter. Protesters demanded the immediate swearing-in of Kenyatta as the duly elected president and the immediate resignation of the majority Supreme Court judges on the basis of the allegations of misconduct, bias and collusion cited in the JSC petitions (Standard Team 2017f). In some areas, protesters carried mock caskets with pictures of Odinga and Maraga and chanted "Raila and Maraga must go" (Nation Team 2017g).

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<sup>594</sup> The Constitution of Kenya 2010, Article 140 stipulates a 14-day period for the Supreme Court to hear, determine and announce its decision on a presidential election petition. The Supreme Court (Presidential Elections) Rules of 2017, Section 23(1) provides the Supreme Court with an additional 21 days to draft its full judgement. The Supreme Court read its summary judgement on September 1 and its full judgement on September 20.



Chief Justice Maraga was livid during a press briefing as he upbraided politicians and their supporters for the unrelenting attacks on the judiciary, which had become increasingly frequent and aggressive (Standard Reporter 2017d). He said the lengthy, uninterrupted demonstrations outside of the Supreme Court building were intended to interfere with the work of the judiciary. While the judiciary recognized and respected the constitutional rights of citizens to protest, the demonstrations were bordering on violence. Moreover, he noted that individual judges, particularly of the Supreme Court, as well as other judicial officers and staff, were being negatively profiled on social media. He said the attacks, which were clearly intended to intimidate the judiciary and individual judges, were “not only unlawful but also savage in nature.” Maraga warned, “the JSC would like to state we unreservedly condemn these mindless acts of aggression against the Judiciary and reiterate that if anything happens to the individual judges, staff, or their families, those making inciting statements will personally be held responsible.”

Maraga condemned political leaders, particularly Jubilee MPs, for threatening “to cut the Judiciary down to size” and “teach us a lesson” in retaliation to the Supreme Court’s nullification of the August election (Muthoni 2017b). He said, “If leaders are tired of having a strong and independent Judiciary... if they feel there is no need of having the Judiciary... they should call a referendum and abolish it altogether... Before that happens, the Judiciary will continue to discharge its mandate in accordance with the Constitution and individual oaths of office... But we will never agree to work in accordance with the whims and desires of the Executive and Parliament.”<sup>595</sup>

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<sup>595</sup> Months later, Kenyatta issued a response stating the Judiciary should accept criticism from other arms of the government and from citizens, and that Maraga should “grow a thick skin” (Muthoni 2017g).

Maraga also accused Inspector General of Police Joseph Boinnet of repeatedly ignoring requests from the JSC to increase security at the judiciary, which was exposing judicial officers, property, and litigants to danger. However, Assistant Inspector General of Police George Kinoti refuted Maraga's claims and urged security was entirely adequate as each judge was assigned a police officer in court and at their residence: "The truth is borne out of facts and they are plain for any citizen to check and confirm. The CJ's assertions are not founded on facts." Irrespective of the denials of security officials, an undeniable fact that was plain for any citizen to see was that protesters led by politicians had converged at the Supreme Court, nearby businesses were forced to close, pedestrian and vehicular traffic was halted near the Supreme Court, teargas filled the air, and supporters of both Jubilee and NASA engaged each other and police in running battles – for days the environment around the Supreme Court was dangerous and volatile, not safe and secure (Nation Team 2017g; Odenyo 2017).

By far, Deputy Chief Justice Philomena Mwili bore the brunt of the assaults on the judiciary. Attacks against her were the most violent, severe and sustained. On Tuesday evening, October 24, Police Constable Titus Musyoka, dressed in his official uniform, stopped along Ngong Road in Nairobi for a quick shopping errand when a group of unknown individuals pulled up on a motorcycle, beat him, shot him and stole his gun. Police investigators said the motive of the attack was unknown, but they were treating the incident as a robbery (Nation Reporter 2017d; Ombati 2017b). Viewed in isolation of the broader political context within the country, the attack could have been written off as a random act of violence, which considering the levels of crime in Nairobi was within the realm of statistical probability. Days later, two other police officers were shot dead and their guns stolen in Kayole, Nairobi (Ombati 2017d). Similar attacks on police

occurred in the early months of 2018 (Ombati 2018b, 2018d). But considering the circumstances of the attack on Musyoka, it was difficult to write off the incident as random coincidence. This is because Musyoka was the personal security guard and official driver of Judge Mwilu – he had just dropped her off at her home and was picking up flowers for her when he was attacked.

The timing of the attack was suspicious because earlier on Tuesday Interior Cabinet Secretary Fred Matiang'i announced Wednesday, October 25 was officially declared a public holiday to provide the public with more time to travel to their voting areas before the repeat election (Mukinda 2017b). However, also on Tuesday, Chief Justice Maraga announced the Supreme Court had received an urgent case, which would be heard the following morning – despite the newly announced public holiday. The case was an application to stop the repeat presidential election scheduled for October 26 (Kiplagat 2017f; Muthoni 2017e). Many observers viewed Matiang'i's surprise declaration of the new holiday as an attempt by the ruling regime to prevent the court from hearing the case. When Maraga announced the case would proceed regardless, it was clear that Matiang'i's approach had failed, which prompted more drastic measures – and the shooting of Mwilu's driver had the desired effect.

The following morning, an hour after the hearing was scheduled to begin, Maraga appeared in court alone and proceeded to explain why the case would not be heard: Judge Mwilu was not in a position to attend court due to the events of the previous evening, Judge Ibrahim was unwell and out of the country, Judge Ndung'u was not in Nairobi and unable to return, and Judges Ojwang and Wanjala could not appear for unknown reasons; the only other available judge was Lenaola, but the two by themselves could not form quorum (Wambua 2017). Within minutes of

Maraga's announcement, streets in Kisumu were flooded with hundreds of angry NASA supporters, riot police, tear gas and bonfire smoke (Reuters 2017). Commentators remarked it was the most brief session since the inception of the Supreme Court (Oruko and Kiplagat 2017b).

The international community, through diplomats and election observers, criticized the judges for failing to appear and raised concerns of possible scheming among judges and politicians in an attempt to obstruct justice and subvert the will of the Kenyan people (Obala and Nyamori 2017). James Orengo of NASA claimed the absence of the judges was not an accident, but a result of sabotage (Muthoni 2017f; Wambua 2017): "Lack of quorum in the Supreme Court is not by coincidence. The gazettement of October 25 as a public holiday was part of a plot to ensure that the case will not be heard... but when the CJ [Maraga] insisted the matter will be heard there was an attempt on DCJ's [Mwilu] life... It was an attempt to traumatise her." Orengo argued the events were part of a grand scheme and a continuation of attacks to undermine the authority of constitutional institutions (Oruko and Kiplagat 2017a).

Petitioners contesting the October repeat presidential election referenced these attacks against judges. They argued that Kenyatta and Jubilee leaders had on numerous occasions threatened to "fix" the judiciary, and that these threats were "calculated to intimidate the Judiciary, and this [Supreme] Court in particular." Petitioners urged the threats were "intended to send a message to the voters that [Kenyatta] would not allow the Court to freely determine disputes arising from a fresh Presidential petition, should a petition be filed again," which "had the consequence of keeping off voters" and dissuading citizens from voting.<sup>596</sup> The Supreme Court acknowledged

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<sup>596</sup> Mwau v IEBC Supreme Court Presidential Election Petition 2 and 4 of 2017, para. 22, 298.

that Kenyatta had “on various occasions expressed his dissatisfaction with the Judgment delivered by this Court on 1st September, 2017”; however, the court urged, “we note, contrary to the... petitioners’ position, that there is no evidence of any Judge of the Supreme Court being intimidated by the choice of words by [Kenyatta], or of any voter being discouraged from voting on that account... In our view, it is not enough to reproduce [Kenyatta’s] political statements, attribute an effect upon Judges to them, and invoke the scenario of unidentified voters, then reach the conclusion that such statements had an intimidating effect.” The court concluded: “generalised claims, without evidence that meets clear threshold, are of no value. Consequently, we find no basis for the petitioners’ claim in this regard, and we dismiss the same.”<sup>597</sup>

Months later during a press interview, Chief Justice Maraga was asked if he and the other Supreme Court judges felt political pressure during their determinations of the August and October presidential election petitions (Menya and Muyanga 2018). He replied emphatically, “There was no political pressure at all... None whatsoever.” Although he did acknowledge that attacks on the judiciary by politicians and members of the public were “unfair and unfortunate as they endangered the lives of judges and other staff [and] caused grave apprehension to me and my family.” In a separate interview (Oruko 2018), Deputy Chief Justice Mwilu offered a slightly different perspective: “We were threatened, that is for sure. I must confess because I don’t know how to clothe a lie... I am not sure whether the threats cowed the judges as to affect our subsequent decisions. But the threats never entered my soul and I thank God it never did.”

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<sup>597</sup> Mwau v IEBC Supreme Court Presidential Election Petition 2 and 4 of 2017, para. 299.

On August 27, 2018, a news report indicated a Supreme Court judge faced imminent arrest over corruption charges (Mathiu and Kamau 2018). The next day, Mwilu was dramatically arrested at the Supreme Court compound in full view of awaiting news reporters and charged with thirteen counts relating to fraud, tax evasion and abuse of office stemming from suspicious bank loans between 2013 and 2015 when she was a Court of Appeal judge (Kiplagat and Wasuna 2018). Mwilu argued the allegations pertained to “purely commercial transactions,” meaning the case against her was a civil matter and had “nothing to do with the pursuit of criminal justice.” She urged the charges were motivated by malice and ulterior motives, which were part of a larger scheme by Kenyatta and Jubilee to embarrass her and enact revenge for her strong stance on nullifying the August presidential election (Kiplagat 2018c; Wasuna 2018).

For many observers the timing of Mwilu’s arrest was suspicious: First, the charges pertained to incidents that happened between 2013 and 2015, yet in 2016, the same agencies that were now accusing her of illegalities – the Directorate of Criminal Investigations and the Kenya Revenue Authority – had issued clearance letters for her to be nominated to the Supreme Court, which could only mean that the state agencies had done a poor job of vetting Mwilu in 2016 or that the charges in 2018 were part of Kenyatta’s threat to “revisit” and “fix” the judiciary (Kamau 2018; Wanga 2018). Second, Mwilu’s legal team noted the timing of her arrest was a clear indicator that the charges were politically motivated and “well planned to coincide with this first anniversary” of the Supreme Court’s nullification of the August 2017 presidential election (Menya 2018). A year later, with the case still pending, Mwilu maintained her innocence and claimed her highly publicized arrest was calculated to inflict maximum damage to her reputation

and directly related to her decision in the August 2017 presidential petition (Musau 2019). She urged, “I feel very, very scared these days... I have never been this scared in my life.”

#### Legislative Assaults on the Judiciary and IEBC

Barely a week after the Supreme Court released its full judgement of the August 8, 2017 presidential election petition on September 20 and barely a month before the repeat election on October 26, Jubilee parliamentarians emerged from a meeting at State House, chaired by President Kenyatta, on September 26 and announced their plan to amend three pieces of law – the Elections Law (Amendment) Act of 2016, the Election Offences Act of 2016 and the Independent Electoral and Boundaries Commission Act of 2011 (Njagi and Nyamori 2017). The next day, the ruling party used its numerical strength in the National Assembly to push through the first reading of the proposed laws.<sup>598</sup> Opposition MPs staged a walkout after losing a vote on fast-tracking the amendment bill and vowed they would boycott the legislative process. This meant that the ad hoc committee created to review the bill and organize public hearings was composed only of Jubilee members (Ngirachu and Owino 2017). The Senate, with its own Jubilee majority, determined it would be advantageous to work with the National Assembly’s ad hoc committee as a joint parliamentary group and for both houses to simultaneously debate and pass the bill.

To further the fast-tracking, National Assembly Majority Leader Aden Duale announced the normal 14-day publication period for new bills would be reduced to one day, which he justified as necessary in order to allow more time to hold public hearings (Ngirachu 2017c; Standard

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<sup>598</sup> Election Laws (Amendment) Act 34 of 2017.

Reporter 2017e). However, despite promising to allocate 10 days for public input, the public hearings were scheduled only for Tuesday, Wednesday and Thursday the following week, and anyone who planned to submit input was required to delivered written memoranda to the offices of the clerks of the two houses within that three-day period. This meant that members of the public and other stakeholders had the weekend to review the bill and less than a week to draft and submit their memoranda.

The public hearings elicited mixed views on the proposed legislation (Nyamori 2017d), but a recurring theme was concern over the timing of the bill – that it was too close to the date of the repeat election, the political environment in country was too polarized, and changes should be postponed until after the repeat election. However, at the close of the hearings, members of the joint parliamentary committee were noncommittal on whether concerns raised during the public hearings would have any bearing on the proposed legislation. Baringo North MP William Cheptumo, who was a committee cochair, stated: “Being emotional about the timing without isolating points... solid reasons... and how they will affect the [repeat] election cannot be relied on by this committee in making its report,” which was to be tabled before parliament the following Tuesday, October 10 (Nyamori 2017e).

Initially, Mutula Kilonzo Junior, the NASA-aligned Senator for Makueni County, submitted a counterproposal to delete certain controversial provisions from the proposed legislation (Kwamboka 2017b), but he soon abandoned the effort as futile considering Jubilee’s parliamentary strength and the absurdity that both houses were jointly reviewing and simultaneously debating the same bill. NASA vowed to boycott all subsequent sessions on the bill in both houses to avoid



lending legitimacy to a “flawed process” (Mwere 2017). Jubilee parliamentarians were unmoved (Ndunda 2017; Githae 2017; Nation Team 2017i): National Assembly Speaker Justin Muturi posed, “When the law says parliament businesses will be transacted when there is quorum, it does not mean that opposition members must be present”; Senate Deputy Chief Whip Irungu Kangata urged, “Kenyans in their wisdom elected Jubilee as majority in Parliament. As long as the laws are passed as per the laid down procedures there is nothing wrong”; and Baringo North MP William Cheptumo stated, “The absence of Nasa does not make this process illegal.”

However, NASA argued the bill was not only unconstitutional but also a “dangerous” piece of legislation, and the entire parliamentary process behind it was equally unconstitutional and illegal – the ad hoc committee was not inclusive as it lacked members from the opposition and was formed in total disregard to the procedures of Parliamentary Standing Orders, and the public hearings, particularly the short timeframe, did not invite any meaningful public participation or broad-based consultations as required by the constitution (Nyamori 2017e; Nation Team 2017i; Odinga 2017b). Critics of the Jubilee bill cautioned that the proposed legislation would reverse the democratic gains made in the 2010 Constitution and the electoral reforms introduced after the 2007 post-election crisis (Kwamboka 2017b; Githae 2017; Njagih 2017c). Odinga claimed Jubilee’s parliamentary onslaught was pushing the country back to the dark days of KANU rule, and that what was happening in 2017 was reminiscent of the 1980s when parliament, the ruling party and even the judiciary were consolidated under the executive, which resulted in the enactment of constitutional amendments which made Kenya a de jure single-party system, granted the president unrestricted powers to dismiss judges, expanded powers of detention for police and entrenched dictatorship (Odinga 2017a).

In addition to the opposition, the IEBC, civil society organizations and members of the international community all raised questions over the timing and content of the amendments (Owino and Oruko 2017b; Apollo 2017; Ngirachu 2017d). Concerns regarding timing were that the rush to enact the proposed legislation was suspicious, changing the rules of an election so close to the date of the election was contrary to international best practices, and there would be insufficient opportunity for public input, to gain broad consensus or to retrain IEBC officers before the repeat election. Concerns regarding the content of the proposed legislation were that the amendments would weaken the IEBC and expose it to political interference, weaken safeguards for the electoral process, undermine the integrity and credibility of the election, and weaken judicial oversight on the conduct of elections.

Jubilee parliamentarians argued there was an urgent need to for the proposed amendments because NASA's petition against the August presidential election and the Supreme Court's judgment to nullify the election both pointed to "glaring challenges," "shortcomings," "loopholes" and "ambiguities" in the electoral laws, which parliament had a duty to correct before the repeat election (Kibet 2017; Njagih 2017c). However, commentators noted Jubilee's justifications for the proposed amendments were misleading because the Supreme Court did not find any fault in the election laws, rather the court faulted the IEBC for failure to comply with the election laws. IEBC Chairperson Wafula Chebukati also concurred that there was no need for parliament to review or revise the election laws (Lang'at 2017h; Ngirachu and Odhiambo 2017).

The proposed legislation touched on three areas: irregularities cited by the Supreme Court, the composition of the IEBC and the judicial threshold for nullification of a presidential election. According to Jubilee parliamentarians, the Supreme Court was persuaded to overturn the August election on the basis of a number of irregularities including IEBC's lack of signatures on statutory results forms and failure to electronically transmit election results; therefore, it was incumbent upon parliament to amend the laws so as to prevent the recurrence of such irregularities in the repeat election (Namwamba 2017).

On transmission of results, the proposed legislation required the IEBC to both electronically transmit results and manually deliver physical results forms from polling stations to constituency and national tallying centers, but if there were any discrepancies between the two sets of results, physical results would prevail over electronic results; the IEBC was allowed to declare the winner before all results were transmitted; failure to electronically transmit results would not constitute basis to invalidate the results; any live-streaming results on the IEBC's public results portal were "for purposes of public information only and shall not be the basis for a declaration by the commission"; and lastly, results forms could not be declared invalid if they were not in the prescribed format "as long as the deviation is not designed to mislead."<sup>599</sup>

Critics argued the proposed amendments on results transmission effectively killed the electronic system, which was specifically designed "as a check against commonly known fraudulent activities around physical forms" (Walubengo 2017). Other commentators questioned why the government had spent billions of shillings on election technology, specifically for the purpose of

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<sup>599</sup> Election Laws (Amendment) Act 34 of 2017

electronically transmitting results, only for parliament to propose legislation that the use of such equipment was “basically irrelevant in legal terms” (Kwamboka 2017b).<sup>600</sup>

Regarding irregularities pertaining to unsigned and incomplete statutory results forms, Jubilee parliamentarians urged the new legislation would hold IEBC officials accountable and liable by imposing stiffer penalties for any IEBC officer who knowingly or deliberately failed to sign, failed to complete or falsified results forms (Namwamba 2017; Mutambo 2017d). Yet, this was a mischaracterization of the proposed law. The amendment did increase the penalty for election offences committed by IEBC officials from a fine of one million shillings (US\$10,000) and/or imprisonment of three years to a fine of two million shillings (US\$20,000) and/or imprisonment of five years, but the amendment did not make any specific reference to failure to sign and complete forms. The closest provision – which remained unchanged in the original and amended versions of the law – that could loosely be construed to encompass the above irregularities was Section 6(j) of the Elections Offences Act 37 of 2016, which states, an IEBC official who “without reasonable cause does or omits to do anything in breach of his official duty... commits an offence.”

Notably, among the many petitions contesting 2017 gubernatorial elections that cited irregularities pertaining to unsigned and incomplete results forms, the High Court in only two cases linked such irregularities to election offences. In the Wajir case, the High Court determined that failure of an IEBC official to sign results forms was a criminal offence under the Elections Offences Act,

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<sup>600</sup> The same argument can be applied to statutory results forms – if they are not required to be in a proscribed format, meaning an excel spreadsheet printed on standard paper would suffice, why should the IEBC bother to spend billions of shillings on printing official results forms with security features.

but the only remedy the court imposed was to exclude the results of the impugned forms from the final tally.<sup>601</sup> The High Court in the Kajiado case reached the same conclusion; however, the court noted: “Unfortunately, that Section [6(j)] has not been utilized sufficiently to deter such criminal acts which would deprive a genuine winner victory. It is high time the Director of Public Prosecution and other investigative agencies preferred [stet] such charges so as to deter officers who are indolent from subverting the natural course of electoral justice.”<sup>602</sup>

Yet this was a specious argument on the part of the High Court: if Section 6(j) had “not been utilized sufficiently” to deter election offences it was largely because courts failed to sufficiently utilize it. The Election Laws (Amendment) Act 36 of 2016, Section 87(2) states: “Where the election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions.”

Despite concluding that election offences had occurred in both the above cases, the High Court declined to refer the cases for criminal prosecution.

The High Court in both the above cases cited the Supreme Court in *Odinga v IEBC* 2017, which determined that the totality of irregularities, including unsigned and incomplete results forms, affected the process of the election in a “very substantial and significant manner” to warrant nullification. However, unlike the High Court in the above cases, the Supreme Court also con-

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<sup>601</sup> *Mohamad v Mohamed* High Court Election Petition 14 of 2017, para. 88, 91.

<sup>602</sup> *Kores v Lenku* High Court Election Petition 2 of 2017, para. 103.

cluded it was unable to impute any criminal intent or culpability regarding illegalities or electoral offences.<sup>603</sup> Thus the Supreme Court did not link such irregularities to election offences.

What these three cases indicate is that Jubilee's proposed amendment would likely have no effect on imposing greater accountability or liability on IEBC officials in the proper execution of results forms, mainly because (a) the legislators made no changes to the wording of offences listed under Section 6 of the Elections Offences Act, such as specifically listing unsigned and incomplete forms as an offence; (b) because the legislators made no changes to the wording between the original and amended versions of the law, aside from increasing penalties, courts will likely not change their interpretation of the law, which has been either to not utilize the law or not link such irregularities to election offences; and (c) the provision in the proposed amendment that results forms do not need to be in the statutory prescribed format entirely negates any requirements for proper execution.

Whereas Jubilee claimed the proposed amendments were intended to correct problems identified by the Supreme Court in its nullification of the August presidential election, and that parliament was fulfilling its constitutional mandate to amend and enact laws to ensure that the conduct of the repeat election conformed to the constitution, critics saw these justifications as a poor guise to cover Jubilee's underlying intention to weaken the electoral process by "watering down" the election laws (Mosoku 2017f). Many observers perceived the real motivation for parliament's push to amend the election laws before the repeat election was a direct response to the "Executive's displeasure with laws deemed to have been used to deny it an election victory

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<sup>603</sup> Odinga v IEBC, para. 383.

[in the August]” and to “insulate its anticipated victory [in the October repeat election] from legal ambush” (Musau 2017d; Editorial 2017f). NASA-aligned Siaya County Senator James Orenge urged, “They want to amend everything that was the basis of the Supreme Court verdict. Everything that went wrong in the last elections is being sanitised by the amendments.”

Similarly, Odinga posed, “it is clear that the amendments are intended to legalize and regularize the illegalities that led to the invalidation of the August 8 election. It stands to reason that the motive for these amendments is to use the same tactics to rig the scheduled [repeat] election.” The opposition argued that the irregularities that had warranted the Supreme Court’s nullification of the August election would no longer be irregular or illegal if the proposed legislation was enacted and applied to the October repeat election (Mosoku 2017f; Odinga 2017b). Thus, whereas the Supreme Court had impugned the IEBC for failure to electronically transmit election results and properly execute statutory results forms in the August election, the new amendment attempted to remove the requirements for electronic transmission and proper execution of results forms for the October repeat election.

The provisions in the proposed amendment that touched on the composition of the IEBC were much harder for Jubilee to justify on the basis of the Supreme Court’s judgement on the August election. It was abundantly clear that infighting within the IEBC that had spilled out into the public domain: IEBC Chairman Wafula Chebukati’s public admission that he could not guarantee a credible repeat election, and IEBC Commissioner Roselyn Akombe’s dramatic resignation on the grounds that the IEBC was politically compromised and lacked independence, all fueled Jubilee’s apprehensions about the IEBC and particularly its distrust of Chebukati. Fearing the

possibility that Chebukati or other commissioners could unexpectedly resign, become ill or die at a critical moment during a presidential election, and thereby occasion a constitutional crisis, Jubilee developed a four-part contingency (Musau 2017d).

First, the proposed amendment diluted the power, authority and standing of the chairperson as the national returning officer of presidential elections by changing the definition of the chairperson: in the original law the chairperson was defined as only the person who was specifically appointed chairperson as per Article 250(2) of the Constitution, and only the chairperson was granted exclusive powers to declare the results of a presidential election as per Article 138(10) of the Constitution, Section 39(1)(d) of the Elections Act and Section 87(4) of the Elections (General) Regulations; the proposed legislation retained the meaning the chairperson as defined above, but also expanded the definition to include “the vice chairperson or such other person acting as chairperson.”

The second task of the proposed legislation was to streamline the process of replacing the chairperson should the need arise. The original law included the strict requirement that the chairperson must be a lawyer “who is qualified to hold the office of judge of the Supreme Court under the Constitution” and have 15 years of experience in a related legal field. The problem for Jubilee legislators was that Chebukati was the only commissioner who qualified to be chair, none of the other commissioners were trained lawyers with 15 years of legal experience, and the academic qualifications of vicechair Connie Maina had aroused suspicions at the time of her appointment. The solution was to lower the required qualifications for the position of chairperson in the proposed legislation, which stipulated that a person appointed as chair must have a



degree from a recognized university and 15 years of experience in public administration, public finance, governance, electoral management, social sciences or law (Musau 2017d).

Third, the proposed legislation provided that in the absence of the chairperson, for whatever reason, the vicechair will automatically become the head of the commission and assume the duties, powers and responsibilities of the chairperson, including declaration of presidential results, until such time that another chairperson shall be appointed. If both the chairperson and the vicechair are absent, the commissioners present can elect one of themselves to act as chair. Lastly, the proposed legislation reduced quorum for the seven-person commission from five to three members and stipulated that decisions that cannot be made unanimously will be decided by the majority vote of commissioners present. Critics alleged that the provisions pertaining to the IEBC were designed to weaken the agency, to sabotage its independence, to ensure a regime-friendly commission, to expose it to further political interference, and any attempt to strip or dilute the powers of the IEBC chairperson was unconstitutional (Oparanya 2017; Nation Team 2017i; Mosoku 2017f).

The proposed legislation also addressed the judiciary and the threshold for nullification of a presidential election. There were three provisions under consideration. The first attempted to stipulate that the nullification of a presidential election by the Supreme Court could no longer be based on a simple majority decision, but instead would require a supermajority or unanimous decision. Senate Majority Leader Kipchumba Murkomen (2017) urged, "We also need to consider subjecting critical decisions at the Supreme Court such as those impacting upon a presidential election to a higher threshold such as a full bench or a two-thirds majority." Adding a re-

quirement for a two-thirds majority judgement was odd because the Supreme Court had already nullified the August election on the basis of a two-thirds majority of four judges and two dissenting, and the math doesn't quite work with a seven-judge bench;<sup>604</sup> requiring a unanimous judgement of the full bench would have better suited Jubilee's objectives of increasing the threshold for nullification to the extent that no petition would likely succeed.

The second provision was a mandatory requirement for the Supreme Court to order a ballot recount for presidential election petitions (Njagi and Nyamori 2017). This provision seemed to be a direct response to the Supreme Court's position on the August petition that the conduct and quality of an electoral process (qualitative aspect) may be more important than the results of an election (quantitative aspect).<sup>605</sup> Critics of the judgement argued the court should have made its final determination on the basis of a numerical assessment of the votes (Wayua 2017; Mungai 2017b; Njagih 2017b). Jubilee parliamentarians eventually dropped these two provisions from the proposed legislation, but the third was retained.

The third provision was to change the wording of Section 83 of the Elections Act of 2011 by replacing the original disjunctive "or" with a conjunctive "and." In its judgement to nullify the August presidential election, the Supreme Court stated: "Section 83 of the Elections Act is the fulcrum of this petition."<sup>606</sup> The court determined that the correct interpretation of Section 83

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<sup>604</sup> The seventh Supreme Court judge, Mohammed Ibrahim, had fallen ill during the course of the petition and did not take part in the final judgment (Ngirachu 2017b; Nation Team 2017d).

<sup>605</sup> Odinga v IEBC 2017, para. 378.

<sup>606</sup> Odinga v IEBC 2017, para. 171, 208, 211.

was disjunctive, meaning an election could be nullified if a petitioner could prove either one of two limbs: (i) if the election was not conducted in accordance with the constitution and laws on elections (qualitative test); (ii) if noncompliance substantially affected the result of the election (quantitative test). The Supreme Court determined that the August election warranted nullification because petitioners had proven the first limb and that proof of the second limb was unnecessary on the basis of a disjunctive interpretation of Section 83.<sup>607</sup> The Supreme Court's disjunctive interpretation of Section 83 was applauded for affirming the progressive and transformative spirit of the 2010 Constitution and enforcing the centrality of constitutional principles in both the conduct and adjudication of elections. Whereas a disjunctive interpretation of Section 83 was likely to increase the standard of conduct for an election by the IEBC, decrease the burden of proof for petitioners disputing an election and decrease the threshold for nullification on the part courts, Jubilee's proposal to revise Section 83 by joining the two limbs conjunctively was perceived as an attempt by the ruling regime to lower the standards of conduct for the repeat election and make it more difficult for petitioners to challenge the repeat election in court and for the court to nullify it.

President Kenyatta welcomed the proposed bill and promised to sign it forthwith (Kibet 2017). He urged, "Members of Parliament should speed up the [amendment] process that will ensure all the issues [raised by the Supreme Court] are addressed so that we can hold an [October] election where there will be no doubt who the winner will be." Parliament followed suit – the National Assembly passed the bill on Tuesday, October 11, and the Senate on Wednesday – and the bill was presented to Kenyatta on Friday (Oruko 2017). Kenyatta acknowledge he had

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<sup>607</sup> Odinga v IEBC 2017, para. 363, 384.

received the bill and was “perusing it as required by law.” Despite his earlier assurances that he would immediately sign the bill, weeks went by with no action from the president (Njagih 2017d). It seemed that stern warnings from foreign diplomats and harsh criticism from other commentators zapped Kenyatta’s enthusiasm for the proposed legislation (Obura 2017c).

The constitution stipulated the president had two options: either sign the bill into law or refer it back to parliament for revision.<sup>608</sup> But whether Kenyatta signed or did not sign the bill was immaterial because either option would have the same effect – the constitution states if the president took no action after 14 days, the bill would automatically become law, which it did on October 28. Days later, Kenyatta stated he was persuaded by the broad chorus of criticisms, and “because law must be founded on reasoned national consensus, I listened to these voices. I did not sign the new Bill into Law” (Ngirachu 2017e). But these were shallow scruples coming from a president who chose to pontificate to the press instead of vetoing the bill. Kenyatta’s attempt to stake the moral high ground was hollow and unconvincing – it was too little done too late.

Despite espousing noble objectives of improving the electoral process and curing the mischiefs cited by the Supreme Court and the opposition in the August presidential election petition (Sanga 2017b; Namwamba 2017), Jubilee parliamentarians had made a number of public assertions that contradicted the good intentions they professed and revealed their true ambitions – to reduce the powers of the judiciary in general, and particularly the powers of the Supreme Court to annual a presidential election. When the bill was first introduced in parliament, Senate Majority Leader Kipchumba Murkomen stated, “Taking President Kenyatta’s advice... We shall

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<sup>608</sup> Constitution of Kenya 2010, Article 115.

pass laws that protect the decision of the voter to stop some institutions from making decisions that annul the decision of a voter... the law will clarify the foundations of our democracy because the decision of the Supreme Court is unacceptable” (Obala 2017a).

The opposition and other critics of the proposed legislation urged the amended law was solely “designed to give President Uhuru Kenyatta an edge at the polls” (Obala 2017b). Several commentators remarked that amending the laws weeks before the repeat election amounted to “changing the rules of the game at half time” and “shifting the goals posts,” which Munabi (2017:66) urged was “characteristic of authoritarian regimes.” Opalo (2017) stated, “There is no other way to view this than as a bad faith effort by a ruling party to further entrench its dominance,” and that Jubilee’s penchant for “jamming such controversial laws through Parliament in an effort to signal loyalty to Messrs Kenyatta and Ruto” is not only “dangerous for our democracy” but a sure fast-track to “autocracy.” Criticisms that the new legislation was unlawful, unconstitutional and against international best practices (Mwere 2017; Odinga 2017b) were soon put to the test when activist Okiya Omtatah and two NGOs filed a petition before the High Court seeking to quash the amended law (Kakah 2017c). On April 6, 2018, the High Court declared a number of provisions in the amended law were unconstitutional and therefore invalid.<sup>609</sup>

An important caveat is that the deep division between the opposition and the Jubilee majority in parliament over the proposed amendments should not imply that staunch partisanship was the dominant characteristic of the Kenyan legislature. On the contrary, even before taking the oath of office after the August 2017 elections, MPs announced they would unite across party lines to

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<sup>609</sup> Katiba v Attorney General High Court Constitutional Petition 548 of 2017.

increase their salaries (Owino 2017e). In July, Sarah Serem, chair of the Salaries and Remuneration Commission, determined the MPs were overpaid and announced their salaries would be reduced.<sup>610</sup> Even as opposition MPs were boycotting parliamentary sittings, they still showed up to sign in before leaving to ensure they did not lose their salaries. As Suba South MP and ODM Chairperson John Mbadi acknowledged, “I will just come to sign and do my own things until everything is sorted out” (Owino 2017f).

One observer noted, “It should raise eyebrows when two men who hardly see eye to eye unite to push an agenda. Quite surprisingly, the Leader of Majority in the National Assembly Aden Duale and his minority counterpart John Mbadi have had a union of minds. And not for anything that promotes the common good like healing the tribal rifts after a bitterly fought general election. No, it is for lining the pockets of their colleagues. And therein lies the rub” (Editorial 2017h). Even as Kenyatta and Odinga were fighting over the results of the August election in the Supreme Court, they both agreed that MPs should not attempt to increase their salaries (Wanzala and Owino 2017). The fact that the MPs disregarded Kenyatta and Odinga on the matter also indicates that parliamentarians do not always act at the behest of the executive or party leadership – or that Kenyatta and Odinga were only paying lip service to the public while winking and nodding to parliamentarians that party loyalty will surely be rewarded.

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<sup>610</sup> Kenya ranks in the 60s in GDP estimates of countries by the IMF, WB and UN, yet its parliamentarians are paid salaries on par with the US and UK, which rank in the top five countries with highest GDP.

## Fiscal Assaults on the Judiciary

In September 2017, after the Supreme Court nullified the August presidential election and ordered a repeat election to be held in October, Cabinet Secretary for the Treasury Henry Rotich, announced new austerity measures would be put in place and budgets for many government agencies would be reduced in order to cover the unanticipated costs of the repeat election, estimated at Ksh15 billion (US\$150 million) (Guguyu 2017). Moreover, the government was facing a number of fiscal challenges, including delivering on campaign promises such as free secondary education and dealing with an economic recession. The prolonged electioneering period and heightened political uncertainty occasioned a sharp decrease in consumer spending, diminished foreign and domestic investments, and a drop in tourism due to foreign travel advisories on risks of civil unrest and political insecurity. These factors, coupled with severe droughts, limited the government's ability to generate much needed revenue and compounded longstanding problems of a rising public wage bill and huge public debt (Mkawale 2017; Wafula 2017).

Weeks later, the treasury submitted a supplementary budget to parliament for approval. The government agencies targeted for budget cuts included the Director of Public Prosecutions, Kenya National Commission on Human Rights, National Land Commission, Auditor General, Controller of Budget, Commission on Administrative of Justice (Ombudsperson), National Police Service Commission and the Independent Policing Oversight Authority. Many of these agencies were independent state institutions established under Chapter 15 of the 2010 Constitution for the express purposes of ensuring the fundamental rights and freedoms of the people, providing

oversight on various government bodies, reversing the overcentralization of power in the executive and protecting against human rights abuses that had marred the nation for decades.

Many observers read malice in the government's selection of these particular agencies for reduced funding, which was perceived as evidence of ulterior motives and a more sinister plot to tame independent institutions and erode their powers. The executive and parliament have long used budget allocations to reward, intimidate or incapacitate state institutions and officers. Menya (2017e) proposed, "in just seven years since the promulgation of the Constitution, the space for the independent commissions has steadily been shrinking" as the executive and the legislature have "succeeded in clawing back some of the powers that they lost" through reforms introduced by the 2010 Constitution. A case in point was Auditor-General Edward Ouko who provoked the ire of the Jubilee regime by boldly issuing numerous reports that incriminated the government for loss and wastage of public funds. In early 2017, Jubilee party, through parliament and proxies, attempted to remove Ouko by accusing him of misuse of public funds stemming from procurement irregularities and incurring excessive mobile phone charges while traveling abroad. However, both the Director of Public Prosecutions and the High Court found the allegations had no basis to (Menya 2017g). The subsequent budget cuts by the treasury and parliament were viewed as a continuation of the ruling regime's assault on the Auditor-General.

Another state institution targeted for budget reductions was the judiciary, which lost nearly Ksh2 billion (US\$20 million). The budget of the Judicial Service Commission was slashed even further by over 60 percent. For many observers, this was evidence of President Kenyatta following through with his vow to "fix" the judiciary for nullifying his August election. According



to Opanga (2017), “The message to Chief Justice David Maraga could not be clearer: Your court ordered this [repeat] poll, now pay for it.” Notably, there were some observers (Kalonzo 2018) who urged the budget cuts were not instigated by the Jubilee regime as retribution to punish the judiciary, but instead were prudent austerity measures prompted by the urgent need for fiscal discipline among state agencies – but this was a minority opinion. The austerity argument was unconvincing because few offices within the executive were subjected to budget reductions and because parliament, which employs far fewer people than the judiciary, actually increased its own allocations (Muthoni 2018a; Kiplagat 2018a; Editorial 2018). This lent credence to the view that the Jubilee regime was targeting particular state agencies, including the judiciary.

The integrity of a judicial system is largely dependent on being properly funded. In 2018, the judiciary submitted a budget of Ksh31.2 billion, of which the treasury approved only Ksh17.3 billion, but then parliament reduced it further to Ksh14.5 billion (Editorial 2018). The judiciary was forced to announce that medical insurance for all judges and staff would be suspended due to insufficient funds, and many new and ongoing projects would be postponed including construction of new courthouses and digitization of court processes, which were intended to increase accessibility to justice and improve service delivery for the public (Muthoni 2018a; Obura 2018). Again, in 2019, the judiciary requested Ksh33.3 billion, but was allocated only Ksh18.9 billion, which was later reduced by an additional Ksh2.8 billion (Mutai 2019).

A number of commentators suggested the repeated budget cuts were evidence of a “a clear and systematic pattern to frustrate the work of the Judiciary,” whereby parliament and the executive conspired to “get back” at the judiciary for exercising its constitutional independence by

starving it of funds (Muthoni 2018a; Karanja 2018; Opalo 2018). Kegoro (2018) argued the financial cutbacks were “hardly surprising... as forming part of a strategy of hollowing out the Judiciary... and represent a continuation, by other means, of the cold relationship between the Judiciary and the government.” Even Chief Justice Maraga publicly complained the budget reductions purposefully intended to severely cripple “critical processes in the courts;” he urged, “Some of the incidents that we encounter are deliberate attempts to undermine the Judiciary... I am not serving at the pleasure of a few people in the Executive who are bent on subjugating the Judiciary” (Mutai 2019).

Prior to promulgation of the 2010 Constitution, the judiciary’s annual budget allocation averaged under Ksh3 billion. In 2011, the allocation increased to 7.5 billion (Judiciary 2012a). By 2015, the allocation had nearly doubled to 15.2 billion. And in 2016 it was around 17.1 billion. Subsequent to 2017, the budget allocations remained largely stagnant. Although the overall national budget has increased steadily from Ksh1.5 trillion in 2015 to Ksh1.7 trillion in 2016 and Ksh2 trillion in 2017, the judiciary’s budget has not grown in tandem. Among the three branches of the national government, the judiciary’s share of the national budget has remained at less 1 percent, which is far below the internationally recommended standard of at least 2.5 percent, whereas parliament averages 1.5-2 percent, and the executive accounts for an average of 97 percent (Judiciary 2017a). The budgetary allocations approved by parliament have consistently fallen far short of the amount request by the judiciary, which has deprived it of the resources needed to fulfill its constitutional functions while public demand for judicial services continues to increase. Even when allocations are approved by parliament, the treasury often has delayed the release of funds (Muthoni and Rahiu 2018).

A substantial portion of the judiciary's budget comes from external donors via foreign governments and international development partners such as the World Bank and the UN Development Program (Judiciary 2014a, 2017a). Following the Supreme Court's nullification of the August 2017 presidential election, these funding streams became a focus of the Jubilee regimes attempts to "fix" the judiciary. Ngunjiri Wambugu, the Nyeri Town MP who petitioned the JSC seeking to have Chief Justice Maraga removed from office due to "gross misconduct," claimed there was a sinister conspiracy between the judiciary and a number of civil society organizations, including the International Development Law Organisation (IDLO), which were vehemently opposed to the Kenyatta/Ruto administration (Muthoni 2017a). This was another iteration of Jubilee's #Evil Society anti-NGO trope. Wambugu alleged, "The Chief Justice invited, facilitated, and supported the embedding of technical support and financing by IDLO to entities within the Judiciary with full knowledge that the IDLO organisation is associated with the known anti-government partisan protagonists... that participated in prosecuting the President and Deputy President at the ICC" in relation to the 2007 post-election crisis.

Shortly after, Fazul Mahamed, the highly controversial Executive Director of the NGOs Coordination Board,<sup>611</sup> ordered the immediate shutdown of all IDLO operations and froze the organization's financial accounts. IDLO opened a permanent office in Nairobi in 2011 and had provided substantial funding to the judiciary in support of a number of programs on judicial reforms and

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<sup>611</sup> Fazul Mahamed was infamously referred to as "Jubilee's hatchet man" and "the dream automaton for the dictator" (Mutua 2017a). Established in 1990, the NGOs Coordination Board is a state agency that regulates and monitors all local, national and international NGOs operating in Kenya and ensures their compliance with the NGO Coordination Act of 1990 and NGO Coordination Regulations of 1992. NGOs are required to submit annual reports to the board detailing their financing, personnel, projects and activities.

capacity building, including trainings on election dispute resolution in preparation for the August polls. Mahamed accused IDLO of improper registration as a charitable organization, engaging in “nefarious operations,” funding criminal activities in the country and “radicalising the Kenyan Judiciary” (Munuhe 2017b). The Jubilee government considered organizations such as IDLO to be sources of negative foreign influence that had emboldened the Judiciary to make the historic ruling to nullify Kenyatta’s August election. Foreign Affairs Cabinet Secretary Amina Mohammed promised to marshal support from other African countries hosting IDLO offices to oust the organization from the continent.

Efforts by the executive and a Jubilee-aligned majority parliament to tame the judiciary through fiscal discipline are a continuation of a longstanding problem. Historically, the judiciary lacked control over its financial resources, which were left to the discretion of the political branches of government. This exposed the judiciary to executive control and external interference. The 2010 Constitution sought to insulate the judiciary by establishing provisions to guarantee its autonomy<sup>612</sup> and instituting measures for financial independence through the establishment of the Judiciary Fund.<sup>613</sup> However, as noted by Ochieng (A. 2017), “The slashing of the funds after the annulment of the 8 August 2017 elections shows that the Judiciary continues to be deliberately neglected in terms of resource allocation even in the post-2010 era. The intentional withholding

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<sup>612</sup> Constitution of Kenya 2010, Article 160 Independence of the Judiciary (1) In the exercise of judicial authority, the Judiciary shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.

<sup>613</sup> Constitution of Kenya 2010, Article 173 Judiciary Fund (1) There is established a fund to be known as the Judiciary Fund which shall be administered by the Chief Registrar of the Judiciary.

of funds from the Judiciary shows that the institution continues to be under-resourced thus compromising its ability to deliver justice effectively.”

Despite the constitutional provisions, the financial independence of the judiciary has not been sufficiently safeguarded and remains a constant struggle – mainly for two reasons. First, the establishment of the Judiciary Fund has been a slow process, which required parliament to draft legislation providing for the fund (enacted through the Judiciary Fund Act of 2016), then the judiciary was required to draft regulations for the proper management of the fund (Judicial Fund Regulations of 2018), which were then submitted to parliament for approval. As of 2019, the Judiciary Fund was yet to be operationalized (Judiciary 2019).

Second, parliamentary control over the approval of budgetary allocations continues to expose the judiciary to unreasonable pressure from the legislature. Gathii (2016) notes, “parliament uses the power of the purse to undermine the judiciary’s independence and operational autonomy by denying or reducing appropriations.” Similarly, other commentators have noted that parliament has increasingly politicized the budgeting process and uses monetary allocations as a mechanism to reward or punish the judiciary, depending on the stance courts take in political disputes (Ochieng 2017; KHRC 2017). Various commentators have suggested that a possible solution for ensuring judicial autonomy and financial independence would be to enact legislation requiring that a fixed percentage (e.g. 2.5%) of the national budget should be automatically reserved and allocated to the Judiciary Fund (Karanja 2018; Ochieng 2017).

## Balance of Power – Horizontal Decentralization and Accountability

Kenya's experience with the 2017 elections highlights the problems attendant in the judicialization of politics such as the politicization of the judiciary and the challenges the nation faces in overcoming the inertia of a pre-2010 status quo to advance the transformative vision of a post-2010 constitutional era. Two key problems the 2010 Constitution was designed to address are the overcentralization of power in the executive and the weakening of state institutions that would normally balance power within the state and check the abuse of power. Since independence in 1964, successive Kenyan presidents have consolidated power in the executive and deliberately weakened other institutions of the state.

These two problems were precipitating factors that contributed to the flawed 2007 presidential election and the violent conflict that followed – the overcentralization of power in the executive heightened the stakes for competition over the office of the president and its monopoly control of vast patronage resources; the deliberate weakening of state institutions meant that the election management agency lacked credibility to conduct free and fair elections, and the courts lacked credibility to resolve election disputes; and the inability of the state to control violence by state and nonstate actors (Mueller 2008). The post-election crisis that ensued resulted in loss of life (over 1000), displacement of people (over 500,000) and destruction of property, which necessitated international intervention to restore peace and mediation to resolve the conflict through a power-sharing agreement between the two leading political factions. But the post-election crisis also gave new impetus and urgency to the decades-long quest for comprehensive constitutional reforms (Kameri-Mbote and Akech 2011).

Africa's earlier experiences with the wave of democratic and constitutional reforms that were introduced in a number of countries in the 1990s serves as a cautionary tale (Prempeh 2006, 2007, 2008; Fombad and Nwauche 2012; Gyimah-Boadi 2015). These reforms included term limits on presidential tenure, multiparty politics and legalized opposition parties, democratic elections, guarantees for civil and political liberties such as press and civil society freedoms, and independent courts with authority for constitutional review and enforcement of rights. Despite the implementation of significant reforms, Prempeh points to a key feature of the postcolonial authoritarian state that remained firmly in tact – presidential hegemony over highly centralized unitary states with control over vast patronage resources. This is because constitutional reforms did little to reconfigure the structure and distribution of power within the state through the horizontal dispersion of power between the different institutions of the national government or vertical dispersion through decentralization or devolution of power to lower levels of government. Parliaments remained functionally weak in the absence of a tradition of legislative autonomy and owing to lengthy histories of operating under single-party regimes in which their primary roles were to facilitate rather than restrain the executive. This meant that the burden of checking and countervailing the authoritarian abuse of power disproportionately fell on equally weak judiciaries.

Kenya's 2010 Constitution thoroughly addressed the problems of overcentralization of power in the executive and weak institutions by dramatically restructuring the state both horizontally and vertically. The new constitution reduced executive power and redistributed power horizontally by strengthening the power and autonomy of coequal branches of government – a newly bicam-

eral parliament (National Assembly and a reintroduced Senate) and the judiciary (with a new Supreme Court), and through the establishment of independent and autonomous state agencies, such as the Independent Electoral and Boundaries Commission (IEBC) and the Ethics and Anti-Corruption Commission (EACC), which were designed to provide checking and accountability functions (Akech 2010; Glinz 2011; Hope 2015). Power was distributed vertically through the introduction of a devolved system of government, which transferred authority downward from the national government to 47 newly created subnational county governments (Hope 2015; Shilaho 2013; Sihanya 2011; Githinji and Holmquist 2012). However, shortly after promulgation of the new constitution, commentators cautioned that significant challenges would likely encumber its implementation. Kanyinga (2014) noted that those who had prospered under the old constitutional order had vested interests in maintaining the status quo, and many of the most outspoken voices that opposed the new constitution during the 2010 referendum, including Deputy President William Ruto who led the “No” campaign, won elective seats in the 2013 general election and would oversee the implementation of the new constitution.

Much of the research on decentralization in Kenya (Hope 2014; Cornell and D’Arcy 2014; D’Arcy and Cornell 2016; Chome 2015; Steeves 2015; Kanyinga 2016; Cheeseman et al. 2016; Dyzenhaus 2018) and elsewhere (Treisman 2002; Ribot 2002; Rodriguez-Pose and Gill 2003; Romeo 2003; Smoke 2003; Ndegwa and Levy 2003; Olowu 2003; Crook 2003; Conyers 2007; Grossman and Lewis 2014) has focused on the vertical dimension of the downward transfer of power from central, or national, levels of government to subnational levels of government. However, the horizontal dimension of decentralization is sparsely referenced in the literature (also noted in Ranis 2012, 2019). Horizontal decentralization is an important factor in a country such as Kenya,



where the overcentralization of power in the executive has remained a salient problem, and because the 2010 Constitution attempts to resolve this problem by reducing executive power and redistributing power horizontally to coequal branches of the national government – parliament and judiciary, and by establishing and strengthening the power and autonomy of independent state agencies that provide accountability and checking functions – i.e. IEBC and EACC.

Examples of references to horizontal decentralization in the literature are infrequent, whereas references to the related concept of horizontal accountability are abundant. A number of scholars have noted that there are both vertical and horizontal dimensions in relation to decentralization and the distribution of power within the state. For example, Azfar et al. (1999) state the “quality of governance in decentralized settings” can vary “since power is not only divided vertically between central and local authorities, but also horizontally among the executive, legislative and judicial branches of government.” Ellett (2008) poses: “As far as the horizontal distribution of power was concerned, the main issue was the prevention of a power monopoly in the executive.” Similarly, Juma (2004) suggests government abuse of power can be checked and limited by distributing both political and economic authority vertically and horizontally, and institutionalizing control devices among various organs of government. Nyanjom (2011) proposes political decentralization separates powers and responsibilities horizontally between or among state agencies of comparable status, such as the executive, legislature and judiciary, or vertically to state agencies that relate hierarchically, such as local authorities.

An earlier reference that explicitly refers to and defines both vertical and horizontal decentralization is Mintzberg (1979, 1980) in the context of organizational management and structure. In

terms of structures of governance, Kauzya (2003, 2005) defines horizontal decentralization as a process through which the local communities and community-based civil society organizations are empowered and build capacity to participate the planning and implementation of socio-economic development; as a structural arrangement that integrates community socio-economic actors into local government structures; and a necessary precondition or corollary to vertical decentralization. This formulation seems conceptually unclear because participation of communities in the decision-making processes for socio-economic development and local government is generally understood to be a component and core objective of vertical decentralization from national to subnational levels of government (Litvack et al. 1998; Agrawal and Ribot 1999; Azfar et al. 1999; Ribot 2002; Crook 2003). Mewes (2011) defines vertical decentralization as the division or redistribution of political power between different governmental or administrative levels; however, the definition she applies to horizontal decentralization – checks and balance structures between institutions of the same level – more accurately describes a related concept of horizontal accountability. Hamilton et al. (2004) devise a more nuanced typology in which governance structures can be centralized or decentralized both vertically or horizontally.

Ranis (2012, 2019) standouts for astutely observing that “Kenya’s constitution of 2010 involved substantial decentralisation, both horizontal and vertical.” He defines vertical decentralization as “the relinquishing of control over public resources and decision-making by the central government and extending both towards lower levels of government.” He offers two formulations of horizontal decentralization: the first (which resembles Mintzberg 1978, 1980) involves the shift of decision-making power from an executive ministry towards the line ministries concerned with human development-oriented fields, including health and education; the second entails a shift

of power from the executive branch of government towards strengthened and independent legislative and judicial branches. The question Ranis poses, which is germane to the present research is “to what extent [do] these democratic forces exert themselves at different levels of the decentralised hierarchy.”

The present research uses horizontal decentralization as a lens to assess the extent to which power has been dispersed from the executive – i.e. does the executive exercise power differently in pre- and post-2010 constitutional eras? This research applies the related concept of horizontal accountability to assess the extent to which other state bodies have been empowered – i.e. do other state agencies, particularly the legislature and judiciary, exercise power differently in pre- and post-2010 constitutional eras, do they exhibit independence from and perform checks and accountability on the executive? O’Donnell (1996) defines horizontal accountability as controls that state agencies, endowed with legally defined authority, are supposed to exercise to sanction unlawful or otherwise inappropriate actions of other state agencies that trespass the legally established boundaries of the proper exercise of their authority. O’Donnell (1998) notes that the effectiveness of horizontal accountability and the ability of state agencies to perform their oversight and accountability functions is contingent on three factors: whether they are legally authorized and empowered (i.e. do they have formal, constitutional, legal, statutory power); do they have sufficient de facto autonomy (i.e. do formal rules of law take precedence over informal rules); and are they factually willing and able (i.e. do they perform checking and accountability functions).

Kenya's 2017 election cycle reveals that despite the new dispensation under the 2010 Constitution, independent agencies such as the IEBC lack institutional autonomy from external interference – by both the ruling regime and the opposition. The hundreds of election petitions filed following the 2017 elections suggests the IEBC continues to lack credibility to conduct free and fair elections. The Supreme Court's nullification of the August presidential election highlighted many failures of the IEBC. Although courts upheld the majority of gubernatorial elections, these petitions nonetheless revealed significant problems with the IEBC's conduct of elections for other elective seats. In the leadup to the October repeat presidential election, top officials of the IEBC, including IEBC Chairman Wafula Chebukati and IEBC Commissioner Roselyn Akombe, publicly warned that external political interference was encumbering the agency's ability to conduct a credible repeat election. When petitioners raised these issues in the petition contesting the repeat election, the Supreme Court adopted a dismissive disposition, and in doing so it missed a critical opportunity to castigate political interference with a constitutionally independent state agency or to affirm the constitutional principle of institutional autonomy.

The process of the drafting of amendments to the elections laws in the period following the Supreme Court's nullification of the August 2017 election and prior to the October repeat election indicates that executive influence and control over parliament remains strong. The fact that Jubilee-aligned parliamentarians emerged from State House, the official seat of the president, with a nearly completed draft of the amendment in hand indicates that the executive maintains a firm grasp over the legislative process. The speed with which the legislation was passed into law suggests that parliament, with a Jubilee majority, could be relied on to carry

out Kenyatta's promise to "fix" the electoral process to ensure his victory and to "fix" the judiciary by reducing its power to nullify future presidential elections and cutting its budget. These factors suggest that despite the new dispensation of the 2010 Constitution, executive power has not been reduced or horizontally decentralized. These factors suggest that despite its constitutional empowerment, parliament is not factually willing to exercise its horizontal accountability function to restrain executive power, which itself is largely because executive hegemony over patronage networks remains intact. These factors also suggest that although the judiciary did exercise its horizontal accountability functions through the Supreme Court's nullification of the flawed August 2017 election and the High Court's nullification of the amended election laws, the judiciary remains disadvantaged in the balance of power among the executive and legislature. This may explain the Supreme Court's reticence to find any fault in the October repeat election, despite an abundance of evidence of serious irregularities and numerous flaws.

Kenya's 2017 election cycle reveals that constitutional provisions on horizontal decentralization have not reduced executive power vis-a-vis the legislature, judiciary or other independent state agencies.<sup>614</sup> It suggests that constitutional provisions on horizontal accountability have not

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<sup>614</sup> In terms of vertical axis, constitutional provisions for the devolved system of governance have succeeded in the vertical decentralization of power from the national, or central, government to 47 subnational county governments, and county governments have provided a new check against the central government as a function of vertical accountability (Cheeseman et al. 2016). However, the empowerment of county governments does not mean that executive power has been reduced at the subnational level – this is because a parallel structure of governance exists at the subnational level that links directly to the executive known as the county administration, which is a continuation of the provincial administration. The provincial administration was instituted in the colonial era for the primary functions of centralizing power under the colonial governor, maintaining law and order, and radiating state authority from the central capital outward to the peripheral countryside (Branch and Cheeseman 2006). In the postcolonial era, the provincial administration was retained under the executive branch and used as a personal network by successive presidents to bypass the legislature and political parties, suppress political opposition and dissent, distribute patronage resources and rig elections (Menon et al. 2008; Murunga et al. 2014; Steeves 2016). The 2010 Constitution (Sixth Schedule, Section 17) instructed that the old provincial administration would be restructured to accord with the new devolved system of county govern-

empowered state agencies such as the legislature to check or restrain executive power. It also suggests that constitutional provisions on horizontal decentralization and accountability have not sufficiently insulated agencies such as the judiciary and the IEBC from external influences, which diminishes their ability to effectively perform checking and accountability functions on the abuse of power by the executive and other state agencies.

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ments; however, aside from rebranding the provincial administration as the county administration, its size, structure and functions have undergone little change (Hassan 2015; Kiai 2018).

## Chapter 9. Conclusions

The record number of petitions, roughly 300, contesting Kenya's 2017 elections is clear evidence of the increasing judicialization of politics, and more specifically elections. The increase in election petitions has inspired much conjecture. Some commentators have argued that the high volume of election petitions was an expression of the litigious inclinations of Kenyan politicians and their unwillingness to concede defeat (Muthoni 2017g; Lang'at 2017f; Mutambo 2017c). Thus, election petitions are an extension of the fiercely competitive, high stakes nature of Kenyan politics in which the outcome of elections can bring either great rewards or significant losses in terms of generous salaries, perks and benefits, access to patronage resources and social status.

Other factors were that the 2010 Constitution created more elective seats, and there was a significant increase ( $\approx 14\%$ ) in the number of candidates vying for the 1,882 elective seats across six levels of government between the 2013 and 2017 elections.<sup>615</sup> The 2010 Constitution, and subsequent judicial reforms, also improved the image and accessibility of courts as appropriate avenues for election dispute resolution. Otieno-Odek (2017:4) takes the positive view that the hundreds of petitions contesting the 2017 elections "should not be perceived as a reflection of weakness... but proof of the strength, vitality and openness of the political system [as] the right to vote would be merely abstract if the right to sue to enforce it was not guaranteed in law."

Thus, the increasing judicialization of elections in Kenya can be viewed as a positive indicator of

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<sup>615</sup> Six elective seats include: president, senator, member of parliament, woman representative, governor and member of county assembly.

democratic expression, that the judicial system is accessible, that aggrieved parties have avenues of legal recourse, and that constitutional rights are being exercised.

Other commentators perceived the high number of election petitions as evidence of a lack of confidence and credibility in the IEBC and as an indictment of its failure to manage elections. Owuor (2017:149) argues that “Elections Management in Kenya remains the weakest link in the consolidation of electoral democracy and the realisation of quality elections envisaged under the 2010 Constitution.” On the other hand, Chege (2018:170) takes the contrary view that “Whatever the Supreme Court thought [in its decision to nullify the August 2017 presidential election], the IEBC is really not the problem. Almost all the court petitions filed against electoral outcomes below the presidential level... have been dismissed on evidentiary grounds, thereby vindicating the IEBC.” However, the propensity of courts to dismiss election petitions should not be interpreted as vindication of the IEBC. Rather, the low success rate of election petitions was likely far more indicative of the inability of petitioners to prove their cases and the fluctuating standards courts apply to the conduct and adjudication of various elections.

The objective of this dissertation was to examine the adjudication of elections in Kenya as framework for understanding advancements towards electoral justice, transformative constitutionalism, and the rebalancing of power within the state. This dissertation investigated two sets of research questions. The first focused on the divergent outcomes of election petitions: why was the outcome of the petition for August 2017 presidential election (nullified) different than the outcomes of petitions for the 2013 presidential election and gubernatorial elections from 2013 and 2017 (upheld), and does the emerging jurisprudence on elections exhibit fidelity to a



pre-2010 jurisprudence or a shift to a new post-2010 jurisprudence? The second set of questions focused on the balance of power within a state that has undergone significant reform and restructuring following promulgation of the 2010 Constitution: has executive power been reduced, have other state institutions been empowered, do state institutions exercise power differently in pre- and post-2010 eras, and do they exhibit independence and perform accountability and checking functions?

The preceding chapters have provided a comparative analysis of the adjudication of presidential and gubernatorial elections from 2013 and 2017. These chapters have examined the pleadings of petitioners, the counterarguments of respondents and the reasoning of courts in terms of constitutional principles, technicalities and irregularities pertaining to technology and statutory results forms, the involvement of party agents and illegalities. This analysis has highlighted inconsistencies, discontinuities and ambiguities in the emerging jurisprudence on elections, gaps and vagueness in the laws on elections, deficiencies in how petitioners plead and argue their cases and problems with the conduct of elections by the IEBC. It has also identified a number of problems attendant in the judicialization of politics, more specifically elections – mainly the politicization of the judiciary, and how despite the objectives of the 2010 Constitution towards rebalancing power within the state to correct executive hegemony and strengthen state institutions, these problems remain salient challenges in the post-2010 constitutional era.

This concluding chapter summarizes some key findings. First, it argues that deficiencies in the arguments and approaches of petitioners are a major contributing factor to the low success rate of election petitions. Second, it argues that inconsistencies and discontinuities in the adjudica-

tion of elections by courts is highly problematic for a number of reasons. Third, it argues that the emerging jurisprudence on elections evinces continuity with a pre-2010 jurisprudence rather than change to a post-2010 jurisprudence, and it identifies a number of factors that explain why. Fourth, it focuses on the role of parliament and argues that many of the difficulties petitioners encounter in pleading their petitions and inconsistencies in the adjudication of elections by courts can be attributed to deficiencies in the laws on elections. Fifth, it examines what Kenya's experience from the 2017 election period indicates regarding the exercise and balance of power within the state and in terms of Kenya's democratic trajectory. Lastly, the chapter concludes by discussing some core challenges for the future of elections in Kenya.

#### Petitioner-centric perspective

In much of the existing scholarship of the adjudication of elections there is a general tendency to focus greater attention on the rationale and reasoning courts apply in drafting their judgments. This is rightfully so because courts have a prime mandate to interpret and enforce the constitution and laws of the land. Moreover, such analysis is necessary and valuable because how courts interpret and apply constitutional principles and enforce compliance with the rule of law in their judgments on electoral processes and election disputes can serve as an indicator of the extent to which the goals and objectives of electoral reform, electoral justice and transformative constitutionalism have been achieved. However, progress towards increased democratization and constitutionalization requires more than transformation of judiciaries and judicial culture, it requires a broader transformation of the legal practice, practitioners, litigants, political culture, the electoral process and the public at large. As Ghai (2014:1) argues, "too much atten-

tion has been paid to studies of the judiciary and its mandate at the expense of other personnel who also play an important role in the legal and judicial system – particularly advocates.”

The development of jurisprudence on election disputes is contingent not only on courts but also on advocates and parties to cases. According to Seidman (1974:834), “Courts cannot fulfil their function as watchdogs of constitutional processes unless cases come before them raising constitutional issues” – thus courts are dependent upon litigants to raise such issues. Ghai (2014:7) argues that advocates play a major role in the proper interpretation of the constitution and in the protection and development of the law. Mutunga (Ghai 2014:4) notes the efforts of advocates are closely connected to the performance of judiciaries because the arguments presented by advocates become the basis of the decisions of courts, or as Seidman (1974:836) states, “The data admitted into the decision-making process [by advocates and parties] control pro tanto the decisional output [of courts].” In many petitions from the 2017 elections, a near constant refrain from courts was that petitioners are bound by their pleadings. To a very large extent, courts too are bound by the pleadings of petitioners and the responses of respondents – courts can only draft judgements on the basis of what parties present in court. For this reason, this research proposes a greater need for a petitioner-centric focus in the analysis of the adjudication of election disputes.

A significant factor that contributed to the different outcomes of presidential election petitions from 2013 (upheld) and August 2017 (nullified) is that petitioners adopted different arguments and approaches in the two cases. In the 2013 case, petitioners made arguments on both limbs of Section 83 of the Elections Act, but they may have erred by focusing on how irregularities

affected the results of the election without greater emphasis of how irregularities constituted noncompliance with the constitution and laws on elections. To a large extent, petitioners in the August 2017 case succeeded because they made stronger arguments that linked both limbs of Section 38 – that the IEBC committed irregularities that violated the principles of the constitution and election laws (qualitative aspect), and that these irregularities affected the results of the election (quantitative aspect) and the integrity of the processes or conduct of the election (qualitative aspect) – thus enabling the Supreme Court to determine that the presidential election warranted nullification on both limbs of Section 83. Petitioners in the 2017 case also cited a significantly higher number of constitutional references, particularly constitutional principles, in comparison to petitioners in 2013. This change in approach by petitioners in 2017 was reflected in the Supreme Court’s judgment, which also included a significantly higher number of references to constitutional principles in comparison to its judgement in 2013.

There was a general perception among petitioners contesting gubernatorial elections and other elective seats that the petitioners in the August 2017 presidential election case had done much of the work for them, and that the reasoning the Supreme Court applied in nullifying the presidential election would trickle down to lower courts (Ngirachu and Ochieng 2018). This was not the case – as courts noted in many petitions, each petition must be heard and determined on its own merits. Although petitioners in many gubernatorial cases may have presented similar arguments to those presented by petitioners in the 2017 presidential election petition, the reasoning behind those arguments and the evidence put forth to support them differed.

Gubernatorial petitioners seemed inspired by the fact that petitioners in the presidential case had successfully argued that irregularities warranted nullification of the election. But despite making numerous allegations regarding irregularities and illegalities in the conduct of elections, petitioners in many gubernatorial cases failed to understand that it was not sufficient to merely allege irregularities without explicitly stating how they constituted violations to the constitution and election laws (e.g. by specifically citing which exact constitutional and legal provisions were offended) or adversely affected results. Unlike petitioners in the presidential case, gubernatorial petitioners made far fewer references to constitutional principles (Table 3). In many cases, petitioners made wild and sensational accusations of illegalities committed by respondents, which were particularly onerous to substantiate because they were criminal offences that required a higher standard of proof beyond reasonable doubt. Courts dismissed the majority of these petitions because petitioners failed to provide sufficient evidence to prove their claims (Ngirachu and Ochieng 2018; Nyamori 2018).

The low success rate of election petitions highlights a criticism that Former Chief Justice Mutunga (2014:22, 2017:15) has repeatedly argued: “Standards of advocacy need to improve; the overall quality of written and oral submissions needs to improve.” This need for improvement explains why so many election petitions fail. There are various constraints on the ability of petitioners to succeed. These constraints include improper case filings, lack of adequate evidence, and relatedly poor use of party agents, failure to prove claims, and the high threshold for nullification of elections established by the law and courts. In many regards, gubernatorial petitioners in 2017 failed to learn from or improve upon the mistakes made by petitioners in 2013 – such as failure to deploy party agents and technical or procedural errors in case filings.

The problem of insufficient evidence could have been remedied to a large extent if petitioners had utilized party agents more effectively: First, to collect evidence during the various phases of elections, including at polling stations and tallying centers on election day, such as obtaining copies of results forms and photographing and documenting any irregularities or illegalities, and then reporting those offences to relevant authorities (e.g. IEBC officials, police) and collecting documentation of those reports. Second, to testify in court as witnesses who could provide firsthand accounts to corroborate allegations of irregularities or illegalities. The core purpose of legislation that allows for party agents is to increase transparency, accountability and integrity in the conduct of elections. The primary role of party agents is to observe the conduct of elections and to collect evidence, including official results forms, specifically in anticipation of the potential for an election to be disputed in court. The deployment of party agents can offset the IEBC's monopoly on information as the official custodian of election documents and materials. However, as was evident in many election petitions, petitioners failed to fully utilize party agents.<sup>616</sup>

In many election petitions, courts faulted petitioners on procedural technicalities. These infractions included: failure to adhere to timelines (e.g. late filing of petitions and affidavits), failure to serve respondents with court documents, failure to attend court proceedings, failure to deposit security, failure to include appropriate parties (e.g. deputy governors), failure to include required details (e.g. election results and dates), failure to draft pleadings as required by law, and

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<sup>616</sup> Ongoya (2016:242) similarly observes: "The level of preparedness by political parties and candidate in terms of collection and storage of evidence in the course of the electoral practice is also very poor. There is need for capacity building. Political Parties have to take their responsibility in the electoral process more seriously moving forward."

subsequent introduction of new pleadings not originally included in petitions (e.g. petitioners are bound by their pleadings). Petitioners sought refuge under Article 159(2)<sup>617</sup> as a remedy for noncompliance with procedural and technical rules; however, courts expressed great variance in their interpretation and application of this constitutional provision. Commentators (Ngirachu and Ochieng 2018) noted that petitioners' reliance on Article 159(2) and the high frequency of lost cases could have been avoided "if only the petitioners had acted more meticulously" in drafting their petitions. Such failures were generally due to incompetence of petitioners and their legal counsel, oversight resulting from the rush to file documents within strict time constraints, and lack of familiarity or misapplication of the law.

The last point above is complicated by three additional factors (these are discussed in greater detail below). First, much of the legal framework that structures Kenya's electoral system is relatively new, including the 2010 Constitution itself, and many election laws and regulations were introduced shortly before the August 2017 elections.<sup>618</sup> Second, many of the laws on elections are inconsistent and unclear, which points to deficiencies in how the laws were drafted by

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<sup>617</sup> Constitution of Kenya 2010 Article 159(2)(d) states justice shall be administered without undue regard to procedural technicalities. A notable observation on the issue of technicalities is that whereas the Supreme Court was criticized for prioritizing procedural technicalities over substantive matters in the 2013 presidential election case when it refused to allow late submission of an affidavit by petitioners, the court was commended in the August 2017 presidential petition for adopting a more flexible approach by allowing late submissions. Commentators suggested this was a positive indicator that the court had shifted its approach in the 2017 case to elevate consideration of the substantive matters in the petition over technical issues. However, analysis of the 2017 gubernatorial election petitions indicates courts still exhibit a high propensity to fault petitions on the basis of technicalities (e.g. Wajir, Homa Bay, Kirinyaga and Kwale).

<sup>618</sup> E.g. Election Laws (Amendment) Act enacted in September 2016; Election Laws (Amendment) Act enacted in January 2017; Elections (Technology) Regulations and Elections (General) (Amendment) Regulations enacted in April 2017; Court of Appeal (Election Petition) Rules enacted in June 2017; Elections (Parliamentary and County Elections) Petitions Rules enacted in July 2017.

parliament. Third, there is great variance in how courts interpret and apply the laws in the adjudication of election petitions. There is also a lack of specificity and unanimity among courts as to what constitutes noncompliance and what are the consequences of noncompliance.

A petitioner-centric analysis that focuses on the pleadings and arguments of petitioners contributes to understanding why courts adopted the approaches and reasoning behind their decisions to nullify the August 2017 presidential election and to uphold the 2013 presidential election and the majority of gubernatorial elections from 2013 and 2017. However, it does not explain discontinuities and inconsistencies in the emerging jurisprudence on elections. A small number of gubernatorial cases from 2013<sup>619</sup> and 2017<sup>620</sup> stand out as outliers. In these cases, lower courts (High and Appeal) determined that petitioners had succeeded in proving that elections warranted nullification on both limbs of Section 83. But the Supreme Court then overturned the lower court rulings and upheld the elections, largely on the basis of technicalities and with greater consideration of substantial effect on results.<sup>621</sup> A court-centric analysis may be more useful for explaining such inconsistencies and discontinuities in the adjudication of elections.

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<sup>619</sup> E.g. Meru (Munya v Githinji Supreme Court Petition 2B of 2014), Migori (Obado v Oyugi Supreme Court Election Petition 4 of 2014), Garissa (Adam v Mohamed Supreme Court Petition 13 of 2014).

<sup>620</sup> E.g. Homa Bay (Awiti v IEBC Supreme Court Election Petition 17 of 2018), Machakos (Mutua v Ndeti Supreme Court Election Petition 11 and 14 of 2018), Wajir (Mahamud v Mohamad Supreme Court Election Petition 7 of 2018)

<sup>621</sup> In 2013, the Supreme Court ruled lower courts should have upheld gubernatorial elections on the basis of the principle of stare decisis and the precedent the Supreme Court established in upholding the 2013 presidential election. In 2017, the Supreme Court rule lower courts had erred in the Wajir case by assuming jurisdiction on pre-election matter, in the Homa Bay case by referencing only one of two scrutiny reports, and in Machakos on the basis that the Elections Regulations were ultra vires, null and void.



### Court-centric perspective

The Supreme Court's judgement to uphold the 2013 presidential election prompted harsh criticism. Particularly contentious aspects of the judgement were the court's emphasis on procedural technicalities over the substantive merits of the case and its conjunctive interpretation of Section 83, which required petitioners to prove both limbs – that there was noncompliance with the constitution and election laws, and that there was an effect on results. A conjunctive interpretation of the statute increased the burden of proof for petitioners and lowered the standards of conduct for the IEBC. The court was criticized also for prioritized the second limb over the first, which elevated consideration of the quantitative aspects of the election (results) over the qualitative aspects (processes), thereby diminishing the centrality of constitutional principles in the conduct of elections by the IEBC and adjudication of elections by courts. The Supreme Court's approach to the 2013 presidential election petition suggested fidelity to a pre-2010 jurisprudence on elections and continuation of the status quo of judicial affirmation of flawed elections and electoral injustice. This restrained judicial approach was applied by various levels of courts (High, Appeal and Supreme) in the majority of petitions contesting the outcomes of the 2013 elections for the five other elective seats.

In contrast, the Supreme Court's judgement to nullify the August 2017 presidential election prompted praise for departing from the judicial reasoning that courts had applied in the majority of election petitions from 2013. The Supreme Court was commended for adopting a more flexible approach to procedural technicalities and for its disjunctive interpretation of Section 83, which required petitioners to prove only one of either limb. A disjunctive interpretation decreas-

ed the burden of proof for petitioners and raised the standards of conduct for the IEBC. The court also was lauded for prioritizing the second limb over the first, which elevated consideration of the qualitative aspects (processes) over the quantitative aspects of the election (results), thereby enforcing the centrality of constitutional principles in the conduct of elections by the IEBC and adjudication of elections by courts. The Supreme Court's approach to the August 2017 presidential election petition suggested a shift to a post-2010 jurisprudence on elections and that the court had embraced a more assertive role in advancing the objectives of transformative constitutionalism and electoral justice. However, in the majority of petitions contesting the outcomes of the 2017 elections for the five other elective seats, this judicial approach was not applied by various levels of courts (High, Appeal and Supreme). Instead, courts reverted to, or continued to, apply the same judicial approach from 2013 (factors that explain this "reversion" are discussed below).

In the majority of 2017 gubernatorial election petitions, courts predominantly held that irregularities that affected electoral conduct and processes were irrelevant if they did not substantially affect election results. Courts prioritized the quantitative aspects of the elections (effects on results) over qualitative aspects (effects on process and integrity) and placed less emphasis on constitutional principles. Differences in the reasoning and approaches of courts and in the outcomes of petitions for the August 2017 presidential election (nullified) and the majority of 2017 gubernatorial elections (upheld) could be explained as simply a reflection of, or response to, differences in the arguments and approaches of petitioners in these cases.<sup>622</sup> However, this expla-

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<sup>622</sup> E.g. This argument would suggest that the Supreme Court's shift in its judicial approach in the August 2017 presidential election petition to heightened prioritization of constitutional principles over effect on results was prompted by, or in response to, a shift in the approach of petitions, which placed greater emphasis on the IEBC's noncompliance with constitutional principles and election laws in the 2017

nation does not account for a number of gubernatorial cases from 2017 in which petitioners made nearly identical arguments as petitioners in the August 2017 presidential case. In the August 2017 presidential petition, the Supreme Court found that irregularities identified by petitioners were significant enough to warrant nullification of the election, yet when petitioners in gubernatorial cases identified the same irregularities, courts (High, Appeal and Supreme) generally found these were not substantial enough to warrant nullification.<sup>623</sup>

Inconsistencies and discontinuities in the reasoning and approaches of different levels of courts were most pronounced in cases such as the 2017 gubernatorial petitions for Wajir, Homa Bay and Machakos.<sup>624</sup> In these cases, lower courts (High and Appeal) determined that petitioners succeeded in proving the elections warranted nullification based on both limbs of Section 83. These gubernatorial cases are unique because the arguments of petitioners and the reasoning of lower of courts closely mirrored those of petitioners and the Supreme Court in the August 2017 presidential election petition. Yet, the Supreme Court upheld these gubernatorial elections largely on the basis of quantitative aspects (i.e. that irregularities did not substantially affect results to warrant nullification), rather than qualitative aspects (compliance with the constitution

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petition compared to 2013. This argument would suggest that courts in 2017 gubernatorial cases, the judicial approach used by courts, which focused on effects on results rather than effects on integrity and process, and placed less emphasis on constitutional principles, was simply a reflection of, or reaction to, the approaches of petitioners, which made far few references to constitutional principles and failed to link irregularities to violations of constitutional principles.

<sup>623</sup> E.g. Kajiado (Kores v Lenku High Court Election Petition 2 of 2017), Siaya (Gumbo v IEBC High Court Election Petition 3 of 2017), Mombasa (Hassan v IEBC High Court Election Petition 10 of 2017), and Samburu (Saimanga v IEBC High Court Election Petition 1 of 2017).

<sup>624</sup> *Supra* note 619.

and election laws), and on the basis of technicalities.<sup>625</sup> Commentators, such as Ngirachu and Ochieng (2018), noted that this prioritization of effect on results in petitions for other elective seats “appears to be a deviation from the position taken by the Supreme Court [in the August 2017 presidential petition] that the process in an election is more important than the results.”

The Machakos gubernatorial election petition is arguably one of the most controversial cases of the 2017 elections.<sup>626</sup> It is a case that potentially could have profound ramifications on both the conduct and adjudication of future elections. The Machakos gubernatorial election was nullified by the Court of Appeal on the basis that the irregularities cited by petitioners substantially affected the conduct, integrity and results of the election. Many of these irregularities were violations of the Elections Regulations. The arguments of petitioners and the reasoning of the appellate court in the Machakos gubernatorial petition mirrored those of petitioners and the Supreme Court in the August 2017 presidential petition.

However, the Supreme Court overturned the appellate court ruling and upheld the election on the basis that any provisions in the Elections Regulations that were not included in the Elections Act were ultra vires, and, therefore, “null and void ab initio.” The Supreme Court minimized the importance of the Elections Regulations in relation the Elections Act and ruled that compliance with the Act was mandatory, whereas compliance with the Regulations was inconsequential. The Supreme Court’s determinations in the Machakos gubernatorial petition contradicted its determinations on nearly identical issues raised in the August 2017 presidential petition. Many

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<sup>625</sup> Supra note 620.

<sup>626</sup> Mutua v Ndeti Supreme Court Petition 11 of 2018, para. 69, 71, 73.

of the irregularities cited by petitioners in the presidential case were violations of the Regulations and the IEBC's institutional procedures, which were not specified in the Act or the Constitution,<sup>627</sup> yet the Supreme Court ruled such irregularities were grave enough to warrant nullification of the presidential election.<sup>628</sup> Comparison of the Machakos gubernatorial petition and the August 2017 presidential petition demonstrates how the Supreme Court in particular, and other courts more broadly, established two sets of standards for the conduct and adjudication of elections: one for the presidential election for which the standards are highest and another for all other elections for which the standards are far lower.

Inconsistencies and discontinuities in the emerging jurisprudence on elections and the application of fluctuation standards by courts to the conduct and adjudication of elections for different elective seats are problematic for a number of reasons. Three particular problems are identified and discussed as follows: The first pertains to the need for judicial guidance that fosters clarity rather than confusion. The second pertains to inculcating a culture of accountability, constitutionalism and the rule of law. The third pertains to the objectives of reducing executive hegemony and strengthening devolution.

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<sup>627</sup> E.g. It is the Elections Regulations that required results forms to be signed and dated, whereas the Elections Act includes no such requirements; security features on results forms were instituted by the IEBC, not a requirement under law.

<sup>628</sup> *Odinga v IEBC 2017*, para. 357,359, 362, 365, 367, 368, 375, 378.

### *Judicial guidance*

The 2013 general elections, which were the first to be held under the 2010 Constitution, prompted nearly 200 election petitions. Commentators noted that courts were developing a jurisprudence on elections that was replete with contradictions and inconsistencies, which suggested a jurisprudential conflict or an ideological war within the judiciary (Ondieki 2014; Biegon and Okubasu 2013; Kiplagat 2018b). This was most evident in that the Court of Appeal evinced a slightly greater propensity to nullify elections, whereas the Supreme Court evinced a greater propensity to reverse lower court nullifications and to uphold elections.<sup>629</sup> The Court of Appeal was perceived as exhibiting a more progressive jurisprudence, or judicial activism, that was more attuned with the progressive and transformative spirit of the 2010 Constitution. This was in contrast to the restrained and conservative rulings of the High Court and Supreme Court, which seemed to be more consonant with a pre-2010 jurisprudence. Thus, if a new jurisprudence on elections is emerging, it is more strongly evident in the Court of Appeal.

Gondi and Basan (2015:74) urged such continued fidelity to the conservative judicial philosophy of the past was detrimental to advancing the transformative vision of the 2010 Constitution, which calls for a progressive jurisprudence, and it negated the objectives of electoral reform and improvement of electoral management. Similarly, Thiankolu (2016:118) noted that many of the Supreme Court's judgements were difficult to reconcile with the transformative vision of the

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<sup>629</sup> E.g. In 2013, the High Court nullified two gubernatorial elections and the Court of Appeal nullified five, whereas the Supreme Court reversed the lower court decisions and upheld the elections (Table 2).

2010 Constitution, which was designed to end Kenya's long political experience characterized by high incidence of electoral malpractices and injustice. Aywa (2016:75) proposed that the adjudication of elections from 2013 did not resolve the question of whether different standards of conduct and adjudication applied to different elective seats or if one standard applied to all elections; and furthermore, that courts should take a more active role in adopting a progressive interpretation of electoral law that promoted higher standards for elections. Aywa (2016:64) cautioned that the "Supreme Court should be careful not to engender a state of affairs, arising from its jurisprudence, where electoral authorities aim for lower than the best standards in the administration and management of elections."<sup>630</sup>

Lowering the standards of the conduct and adjudication of elections is precisely what critics accused the Supreme Court of doing in its judgement to uphold the 2013 presidential election. Shah (2013) argued, "Sadly, this judgment [on the 2013 presidential election] implies that it is acceptable to run a deeply flawed election. The precedent has now officially been set, and the judgment provides little motivation or incentive for the IEBC to improve its conduct in the future. Can Kenyans expect this to be the template for all future elections? Only time will tell, but if so, it is a sorry fate for Kenyan democracy." These observations were accurately foreboding of the 2017 elections and the record number of roughly 300 election petitions that followed. Owuor (2017:139) proposed that the IEBC's conduct of the 2017 elections were in many respects a repeat of the 2013 elections, because rather than taking the opportunity to learn lessons from the challenges revealed during the 2013 elections to improve the standards

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<sup>630</sup> E.g. The poor quality of electoral management during the 2007 elections, coupled with lack of credibility and public trust in the IEBC and courts, triggered the post-election crisis that followed.

of conduct for future elections, the IEBC “seemed to have been hardened by a narrow view of formal legal validity and endorsement by the Supreme Court in 2013.”

Thus, a key conclusion drawn from analysis of the adjudication of election petitions from 2013 and 2017 is that the rulings of courts can serve either as incentive or disincentive for the IEBC to improve the standards of conduct for elections. A case in point is the use of election technology, particularly for the electronic transmission of election results. In the 2013 presidential election petition, the Supreme Court ruled the IEBC’s failure to use election technology was inconsequential to the proper conduct of the election and did not constitute a ground for nullification. This judicial determination served as a disincentive for the IEBC to improve its use of technology in future elections. As a consequence, the IEBC did not improve its use of election technology in the 2017 presidential election. When this issue was again cited as an irregularity by petitioners in the 2017 presidential election petition, the IEBC defended itself by echoing, near verbatim, the Supreme Court’s determination from 2013 – that failure to use technology could not be the basis of voiding an election. However, in the 2017 case, the Supreme Court rule the IEBC’s failure to use technology did constitute a ground for nullification of the election. Thus, the Supreme Court’s ruling in 2017 could potentially serve as an incentive for the IEBC to improve its use of technology in future elections.

This same pattern of conflicting judicial determinations among various levels of courts in 2013 was repeated in the adjudication of election disputes from 2017. Again, lower courts exhibited a slightly higher propensity to nullify elections, whereas the Supreme Court exhibited greater



reluctance to nullify elections and a stronger propensity to uphold them.<sup>631</sup> Thuo (2019:281) noted, “it would appear that rather than provide clarity and jurisprudential guidance to the lower courts, the decisions of the Supreme Court have caused much disquiet and may need to be reconsidered in the next EDR [election dispute resolution] cycle.” Ombati (2017:122) argued that the jurisprudence on elections in Kenya’s “appears to be in total confusion,” and that the “genesis of the confusion” is that the Supreme Court departed from its “restrictive approach” from 2013 by elevating consideration of how irregularities affected electoral conduct and integrity in its nullification of the August 2017 presidential election, but then reaffirmed a “restrictive approach” in subsequent rulings on other elections by focusing more narrowly on whether irregularities substantially affected the results of elections.

In the August 2017 presidential election petition, Supreme Court Judge Ndung’u argued that judicial interpretation of the law must endeavor to guarantee continuity, consistency and certainty, because “Judicial guidance is an integral part of directing people’s relations. It follows that this critical aspect is wasted if it becomes impossible to direct actions appropriately when similar facts and circumstances are subjected to different standards of the law.” Furthermore, she warned that the “Majority [judgement] will unleash jurisprudential confusion never before witnessed [and] a crisis of jurisprudence in such a sensitive area of law, as elections,” which would require action from parliament to bring further clarity to the legislation on elections.<sup>632</sup> Ndung’u accurately predicted that the high standards the Supreme Court applied in nullifying

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<sup>631</sup> E.g. In 2017, the High Court and the Court of Appeal each nullified three gubernatorial elections, whereas the Supreme Court reversed the lower court decisions and upheld the elections (Table 2).

<sup>632</sup> Odinga v IEBC 2017, Dissenting Opinion of Ndung’u, para. 690, 697.

the August 2017 presidential election were unlikely to constitute a new precedent that would be applied by the Supreme Court or any other court in the adjudication of other elections.<sup>633</sup> Her prediction of “judicial confusion” is clearly evident in the emerging jurisprudence on elections. The need for parliament to bring clarity to election laws is discussed further below.

Inconsistent and contradictory judicial determinations are problematic because they render the adjudication of elections unpredictable. This is a jurisprudence on elections that fosters confusion rather than clarity among courts and for the IEBC, petitioners, respondents, candidates, political parties and voters. Moreover, by affirming fluctuating standards for the acceptable conduct of elections for various elective seats, the Supreme Court, in particular, establishes a bad precedent that offers little guidance to lower courts and reduces incentive for the IEBC to improve the standards of conduct for all elections.<sup>634</sup>

In terms of gubernatorial election cases, while petitioners may not have succeeded in proving that irregularities committed by the IEBC were substantial enough to warrant nullification of elections, they did succeed in highlighting clear instances where the IEBC failed to comply with the legal framework and standards for the conduct of elections. Although courts may have rightfully dismissed petitions on the basis that petitioners failed to prove their allegations, it would have been far more beneficial for the conduct of future elections if courts would have

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<sup>633</sup> There is of course a caveat in the small number of election petitions from both 2013 and 2017 that resulted in nullifications by lower courts.

<sup>634</sup> The Supreme Court’s use of rhetorical interrogatives rather than declarative statements in its judgement on the August 2017 presidential election petition also provided little guidance to lower courts.

more strongly reprimanded the IEBC for irregularities and noncompliance – even in cases where irregularities did not substantially affect results.

In its judgement on the August 2017 presidential election, the Supreme Court acknowledged that the role of courts is to provide guidance. The Supreme Court advised, “it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.” The Supreme Court further stated, “in conducting any future election, IEBC must do so in conformity with the Constitution, and the law. For, what is the need of having a constitution, if it is not respected.”<sup>635</sup> Thus, all courts should not only adopt the “good judicial practice” of giving “notice,” but go further by censuring the IEBC for irregularities and noncompliance, and by demanding a higher standard of conduct for the IEBC in future elections for the presidency and all the other elective seats. Failure to do so on the part of courts is a missed opportunity to entrench the objectives of electoral reform, electoral justice and transformative constitutionalism.

#### *Culture of Accountability*

Inconsistencies and contradictions in the emerging jurisprudence on elections and the application of fluctuating standards for the conduct of elections by courts are problematic for constitutionalism, the rule of law and electoral democracy. Kenya’s electoral system is based on a highly prescriptive and complex legal and institutional framework. This framework includes the pro-

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<sup>635</sup> Odinga v IEBC 2017, para. 374, 391.

gressive 2010 Constitution, which contains detailed provisions on elections, legislative acts and regulations, and the IEBC's own internal procedures. The totality of these provisions collectively establish an elaborate system of checks and redundancies with the singular objective of guaranteeing the highest standards of integrity, credibility, transparency and accountability for all elections. Many of the provisions and procedures for the conduct and management of elections are the same for all six elective seats.

Yet, after two cycles of elections and election disputes in 2013 and 2017 under the new dispensation of the 2010 Constitution, there is an unyielding sense of rampant noncompliance with the legal framework in the conduct and adjudication of elections. This is because those charged with ensuring compliance fail to enforce it – i.e. the IEBC and courts. A prime example is improper execution of statutory election results forms, which is an irregularity raised in many election petitions.<sup>636</sup> In a small number of cases, including the August 2017 presidential election petition, courts ruled that proper execution of results forms was a mandatory requirement – but these were exceptional, atypical judicial determinations. In the vast majority of election petitions, courts, including the Supreme Court, ruled that proper execution of results forms was inconsequential. This raises the question – what is the purpose of instituting legislative and institutional provisions for the conduct of elections if they are not adhered to and if there is no consequence for noncompliance?

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<sup>636</sup> E.g. That statutory results forms for presidential elections must be properly executed, but the same is not mandatory for other elections, despite the fact that the legal framework on elections establishes nearly identical procedures for the execution of results forms for all elective seats, with the main difference being that results forms for presidential elections are to be electronically transmitted.

What must be imperatively remembered is that the rules and statutes contained in the constitution and in law, as well as the IEBC's self-imposed institutional procedures, are all in direct response to a long history of electoral malpractice, electoral injustice and electoral violence. This history bears heavily on the national consciousness. It is a history that the nation has painstakingly fought for decades to break from and to chart a new path to a transformative future guided by a progressive constitutionalism. These constitutional provisions, legislative statutes and regulations and institutional procedures are evidence of an endeavor to not only change course from the status quo of the past, but most critically, to inspire a sense of security and trust in an electoral system, to raise the bar for the performance of state actors and institutions – to create ever more perfect systems. Thus, when policies and procedures are not adhered to, when there is evidence of institutional interference and failure, rather than independence and autonomy, the course change has not occurred and the status quo remains, which feeds a sense of insecurity and distrust in state institutions and elections.

Because elections for all six elective seats are conducted on the same day, by the same election management agency and at the same polling stations, it is hard to countenance that the Supreme Court could rule in favor of petitioners in finding that the IEBC failed so miserably in the conduct of the August 2017 presidential election so as to warrant nullification, yet find little to fault in the conduct of other elections by the same IEBC staff, despite petitioners in gubernatorial cases citing the same irregularities as petitioners in the presidential case (Kimaiyo 2017). Where there were systematic and systemic failures in the IEBC's conduct of the August 2017 presidential election, the Supreme Court demanded that the IEBC must do better and rise to the highest expectations of a much deserving nation – but in subsequent judgments on other elec-

tive seats the courts ruled that the IEBC was doing just fine and that there was little reason to expect more. The Supreme Court, in particular, effectively ruled that the presidential election demands a higher standard and all legal provisions on elections are mandatory, but for all other elections compliance is discretionary and a lower standard will suffice.

The Supreme Court attempted to justify the application of different standards for the conduct of elections for different elective seats on the basis that the president was not only the head of state for the entire nation, but also the commander in chief of the nation's armed forces.<sup>637</sup> The court stated, "Because of the importance of that office, it is clear to us that Section 39 of the Elections Act demands for a more rigorous process in the tally, collation and verification of the presidential election results than those of the other elections." The court cautioned, "The distinction we have found between the handling of presidential election results and those of others does not in any way affect the verification demanded by Article 86 of the Constitution."

Be that as it may, and irrespective of the Elections Act, the Elections Regulations establish a far more "rigorous process" for elections. The Supreme Court's contradictory rulings on these two legal provisions in subsequent petitions for various elective seats did "affect the verification demanded" by the constitution. In the August 2017 presidential petition, many of the irregularities that the Supreme Court found warranted nullification were violations of the Regulations, which were not contained in the Act, yet the court determined the Regulations were normative derivatives of the Constitution and, therefore, mandatory requirements. When petitioners in

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<sup>637</sup> Mutua v Ndeti Supreme Court Election Petition 11 and 14 of 2018, para. 65, 72.

the Machakos gubernatorial petition cited the same irregularities, the Supreme Court ruled any Regulations not contained in the Act were ultra vires, null and void.

In the same way that Maina (2013) questioned which interpretation of Section 83 of the Elections Act (conjunctive or disjunctive) better served the objectives of transformative constitutionalism and electoral justice following the Supreme Court's judgement to uphold the flawed 2013 presidential election, the same question must be asked of the Supreme Court's interpretation of the Elections Regulations in the 2017 Machakos gubernatorial petition. The Supreme Court's judgement in the Machakos case has potentially profound ramifications. If the case is applied as precedent, many of the irregularities that the Supreme Court found warranted nullification of the August 21017 presidential election will no longer be of consequence in the conduct and adjudication of future elections.

By legitimizing fluctuating standards and a sliding scale for compliance in the conduct of elections for various elective seats, such judicial reasoning does little to inculcate a culture of electoral accountability. Instead, it sends the wrong message that rules are flexible, sometimes they need to be followed (e.g. for presidential elections), but more often they don't (e.g. for all other elections). Despite the conflicting standards courts apply in the adjudication of petitions for various elective seats, it is clear that the Constitution, the Elections Act, the Elections Regulations and the IEBC's own institutional procedures all constitute a hierarchy of provisions in which each successive layer adds greater detail and additional requirements. The core purpose of the combined legal framework on elections is to achieve the objectives of electoral reform and electoral justice by increasing the number of checks and redundancies throughout the en-

tire electoral process and for all elective seats. By ruling that one statutory provision was ultra vires, null and void, the Supreme Court negated one of the checks and redundancies, and thereby weakened the electoral process and defied the objectives of electoral reform and electoral justice. The entire purpose of electoral reforms since the introduction of the 2010 Constitution has been to align the conduct and adjudication of elections with the constitutional principles on elections – any court judgement that works against that objective is detrimental to transformative constitutionalism and electoral justice.

### *Devolution*

The application of different standards in the conduct and adjudication of elections for different elective seats is also problematic because it reinforces the centrality of the presidency and diminishes the constitutional objectives of devolution. Part of the core rationale of devolution and the creation of bicameral parliamentary and subnational elective positions was to reverse overcentralization of power in the executive and to diffuse competition over the presidency by increasing the number of elective seats. Under the previous constitutional order, overcentralization of power in an executive president resulted in the weakening of institutions that could demand accountability and check the abuse of power, rampant corruption and impunity among powerholders, and the politicization of ethnicity through which certain ethnic groups dominated the state and access to state resources was linked to ethnicity. These conditions heightened the political stakes for controlling the state, fostered widespread perceptions of marginalization and inequality based on ethnicity, and increased the potential for political violence (Mueller 2011; Cornell and D’Arcy 2014).



The new constitution was designed to remedy these problems by restructuring the state and redistributing power away from the executive. The new constitution introduced a more robust system of checks and balances, including establishment of the Supreme Court and a new election management agency, the IEBC. The new constitution strengthened the legislature by creating a bicameral parliament with a national assembly and the reintroduction of the senate. The constitution also devolved authority to 47 new subnational county governments, each with its own executive (governor) and legislature (county assembly). By creating new centers of power, the new constitution sought to reduce competition over the presidency, diffuse ethnic and political tensions, ensure more equitable distribution of resources, increase political inclusivity and lower the risk of political violence (Akech 2010; Ghai 2008). Part of the logic of creating a larger number of elective seats was to provide more electoral opportunities for candidates and parties and more electoral choices for voters, and thereby increase the likelihood that candidates and supporters would be more willing to accept the results of controversial presidential elections, because those who lost at the presidential level could still win at the parliamentary and county levels (Cheeseman et al. 2016; Kramon and Posner 2011).

If an objective of devolution is to diffuse conflicts that revolve around the presidency by creating multiple centers of competition and more chances to “win,” holding elections for other seats to lower electoral and judicial standards does little to advance this goal. By proposing that the rules apply less, or are less consequential, for other elective seats, courts were effectively affirming the centrality of the presidency and that other elective positions are of far less significance. Yet, parliamentary and subnational seats have become important sites of competition as indicated by the volume of candidates vying for these positions and the large number of court petitions

contesting the results of these elections. Moreover, the high share of voter turnout for these elections suggests that voters care about these positions and that what happens at the county (governors, senators and woman representatives), constituency (members of parliament) and ward (members of county assembly/ward representative) levels of electoral politics matters in the lives of citizens. A two-tiered system of electoral jurisprudence that holds the conduct and adjudication of other elective seats to a lower standard not only diminishes the value of these elective positions, it also devalues the electoral choices of citizens.

#### Accounting for Continuation of the Status Quo

The Supreme Court's nullification of the August 2017 presidential election, and the consequential reprimand of a constitutionally mandated institution – the IEBC, was a significant indicator of judicial ascendance in exercising its accountability function by checking executive incumbency and other state institutions. The judgment suggested the court had embraced a more assertive role in advancing democratic gains and entrenching transformative constitutionalism and electoral justice. The profound value of the Supreme Court's judgement on the August 2017 presidential election petition was its affirmation of the centrality of constitutional principles in the conduct and adjudication of an election. The court was also deservedly applauded for prioritizing consideration of the qualitative aspects of electoral integrity and processes while deemphasizing quantitative aspects of effects on results (i.e. substantial effect rule). Where the constitution, laws, regulations and the IEBC's own institutional procedures all prescribe specific standards for the conduct of elections, the Supreme Court demanded that the IEBC must adhere to these high standards.

However, commitment to the high standards the Supreme Court applied in the August 2017 presidential election petition has come under question in the wake of subsequent judgements on other election petitions by the Supreme Court and lower courts (Ombati 2017:120). In the majority of the roughly 300 petitions for other elective seats that were dismissed,<sup>638</sup> courts demanded far lower standards for the conduct and adjudication of elections – despite evidence in some cases that the IEBC had committed the same kinds of irregularities and noncompliance that had warranted nullification of the presidential election. This lower standard indicates judicial acceptance of the status quo of flawed elections and that the prevailing dispositions of courts in the adjudication of elections has done little to encourage improvement in the conduct of future elections. The Supreme Court’s nullification of the August 2017 presidential election broke its 2013 precedent, but it did not establish a new precedent as was evident in the outcomes of the 2017 gubernatorial election petitions. In other words, the Supreme Court’s decision to nullify the August 2017 presidential election appears to be an anomaly, and subsequent court rulings to uphold other elections appears to be the norm.

Thuo (2019:282) proposed that “whereas the Supreme Court may have faltered in the 2013 [presidential election] case by not appreciating the constitutional standards for valid elections, then appeared to regain its footing in the 2017 [presidential election] case by restoring the Constitution to its rightful place as the benchmark for valid elections, it may have inadvertently reverted to the 2013 position in recent cases.” Commentators have proposed a number of factors that may have contributed to this “reversion” in the emerging jurisprudence on elections.

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<sup>638</sup> Notably, the low success rate of election petitions is not exclusive to Kenya, but rather is characteristic of many counties (Azu 2015; Kaaba 2015).

One of these factors was that the Supreme Court's approach to the August 2017 presidential petition was prompted by cognizance of, and caution not to provoke, the harsh criticisms of its judgement to uphold the 2013 presidential election, and by awareness of how its judgement in 2017 might be reviewed in posterity (Kanyinga and Odote 2019:245; Kanyinga 2017).

This wariness of criticism may explain why the Supreme Court shifted its approach in the 2013 and 2017 presidential election petitions, but it does not explain reversion to a 2013 approach in subsequent rulings on other election petitions from 2017, which were also harshly criticized. For example, the Supreme Court's decisions to uphold the October 2017 repeat presidential election, and a number of gubernatorial elections that lower courts had determined warranted nullification, were widely perceived as eroding much of the esteem and reverence the judiciary had garnered and as negating many of the democratic and constitutional gains achieved by the Supreme Court's nullification of the August 2017 presidential election. Another explanation, which borders on cynicism, was that the Supreme Court's decision to nullify the presidential election was politically motivated with the objectives of asserting judicial independence and making history (Wairuri 2017; Munene 2017b; Abdullahi 2017). These sentiments also were expressed in the dissenting opinions of Supreme Court Judges Ojwang and Ndung'u.<sup>639</sup>

A more probable explanation is that courts dismissed the majority of petitions for other elective seats, and the petition for the October repeat presidential election, to avoid further political

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<sup>639</sup> Odinga v IEBC 2017, Dissenting Opinion of Ojwang, para. 218, 225; Odinga v IEBC 2017, Dissenting Opinion of Ndung'u, para. 22.

assault and direct confrontations with the political branches of government.<sup>640</sup> This perspective suggests that the judiciary was strategically motivated by pragmatic concerns for political survival and institutional security. It was also motivated by necessity to maintain perceptions of apolitical legitimacy and to deflect accusations of judicial activism (Ochieng 2017). This perspective is discussed in further detail below.

A final explanation, which this concluding chapter finds highly plausible, is that the emerging jurisprudence on elections in the post-2010 constitutional era is still nascent and continues to evolve. Many laws on elections, including the 2010 Constitution, are relatively new. Many of the courts, including the Supreme Court, are also relatively new. And the 2017 elections were only the second to be held under the new dispensation of the 2010 Constitution. Although expectations for consistency and predictability in the jurisprudence on elections are desirable, this may be impossible at the current juncture and in the foreseeable future. The difficulties and challenges of developing a jurisprudence on elections likely will take time to resolve.

Back in England circa the 1800s, Holdsworth (1880:55) proposed that to overcome the challenges of the adjudication of elections, “we must wait until a series of judicial decisions shall have indicated, at any rate in a general way, the limit of the deviations from strict practice which will be held admissible.” This assessment is apropos for the emerging jurisprudence on elections

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<sup>640</sup> Following the Supreme Court’s nullification of the August 2017 presidential election, Kenyatta (the incumbent candidate) and Parliament (with a Kenyatta/Jubilee party majority) launched attacks on individual Supreme Court judges (calling them “wakora,” meaning scoundrels, thugs, crooks, criminals, who perpetrated a “judicial coup”), and assaults on the judiciary as an institution by enacting legislation to limit its powers to nullify future presidential elections and by reducing its budgetary allocations (Psirmoi 2017d; Mwere and Oruko 2017; Menya 2017e).

in contemporary Kenya. Following the 2013 elections, Evelyn and Wanyoike (2016:97) noted, there may not yet exist a “succinct and strict test in these early days of the 2010 Constitution... for valid elections.” Similarly, Waitara (2017:41) observed of the 2017 elections that “the jurisprudence has seemed at times internally contradictory as may be expected in a regime of emerging jurisprudence with the expectation that the law will settle with the passage of time.” A constructive upshot of the adjudication of the 2017 elections is that candidates, the public and the IEBC are more aware of how elections ought to be conducted, and petitioners aggrieved with the outcome of elections more knowledgeable of how to bring petitions before the courts. The question that remains is which standards will the IEBC apply in the conduct of elections and which standards will courts enforce in the adjudication of election disputes.

#### Parliamentary Responsibility

Kenya’s experience from the 2017 election cycle reveals two problems with parliament. The first pertains to deficiencies in the laws on elections. The second pertains to the balance of power within the state. After two cycles of elections and election disputes in the post-2010 constitutional era, gaps in the existing legislation on elections have been made clearly evident. Undoubtedly, the IEBC should comply unequivocally with all laws and regulations pertaining to elections, including those established by the constitution, parliament and its own self-imposed institutional procedures; but there is also a necessity for courts to determine with far greater specificity and unanimity both what constitutes noncompliance and what are the consequences of noncompliance.<sup>641</sup> Thus far, the judicial assessment of noncompliance remains inconsistent; this

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<sup>641</sup> Mungai (2017b) astutely noted that “courts are not free from blame for making it virtually impossible for IEBC and its lawyers to know with certainty what the law is and how to comply with it... it is not easy to

is perhaps a reflection of the inconsistent nature of the legislation on which IEBC procedures and judicial determinations are based.<sup>642</sup> Such discrepancies in the legal provisions on elections may account, in part, for the inconsistencies in the emerging jurisprudence on election disputes as evident in the judgments of the High, Appeal and Supreme Courts.<sup>643</sup>

Petitioners also exhibited lack of awareness of the law or misapplication of the law by accusing respondents of alleged irregularities that either were not contained in law or had no consequence in law. Examples of alleged irregularities cited by petitioners that were not contained in law pertained to use of technology in elections other than the president and statutory forms without official IEBC stamps and security features. Examples of alleged irregularities that had no consequence in law pertained whether statutory forms were signed by IEBC officers and party agents. Apart from use of technology, which was an explicit legal requirement only for presidential elections,<sup>644</sup> the other allegations on official stamps, security features and signatures had far less backing in law; yet the Supreme Court still found such irregularities to be immensely influential in its decision to nullify the August 2017 presidential election. This was clearly a motivation for petitioners to argue these grounds in petitions for the five other elective seats.

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hit a moving target and since the judges kept changing the meaning of laws and regulations until a few weeks to the General Election they cannot take the moral high ground in regard to IEBC's predicament."

<sup>642</sup> E.g. There are inconsistencies and discrepancies pertaining to the duties of elections officials in the Constitution, the Elections Act and the Elections (General) Regulations; and on the use technology in elections as per the Elections Act, the Elections (General) Regulations and the Elections (Technology) Regulations.

<sup>643</sup> E.g. Machakos gubernatorial petition: Ndeti v IEBC High Court Election Petition 1 of 2017; Ndeti v IEBC Court of Appeal Election Appeal 8 of 2018; Mutua v Ndeti Supreme Court Election Petition 11 of 2018.

<sup>644</sup> Although there also is some ambiguity in the various laws on election technology and in the interpretation of those laws by courts.

However, analysis of gubernatorial petitions shows that courts, including the Supreme Court, generally found such irregularities to be largely unconvincing and inconsequential to the validity of elections, which rendered these arguments nugatory on the part of petitioners. Even the Supreme Court could only muster rhetorical interrogatives rather than declarative statements to impugn the IEBC for these irregularities in the August 2017 presidential petition, most likely because the law was fairly silent on such matters.<sup>645</sup> Although courts frequently noted in detail that there was a lack of consensus among courts regarding these alleged irregularities, courts rarely linked the problem of conflicting judicial determinations to the root cause, which was inconsistencies and deficiencies in the laws on elections.<sup>646</sup> Thus, allegations of noncompliance with these procedural requirements were largely irrelevant as legislation provides no sanction for noncompliance and generally neither do courts. This raises the question as to why these measures are legislated and included in election procedures if not applying them has no effect on the conduct or validity of elections.

The difficulties petitioners and courts confront in the application and interpretation of electoral laws are complicated by the fact that many laws and regulations were introduced shortly before the August 2017 elections.<sup>647</sup> Parliament faced broad criticism for enacting election laws so close

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<sup>645</sup> Odinga v IEBC 2017, para. 377.

<sup>646</sup> Another example is whether petitioners are required to include deputy governors among respondents. In the majority of cases that raised this issue, courts generally focused on disagreements among courts as to whether failure to include deputy governors was a forgivable error or a fatal defect. Only one High Court judge pinpointed the source of the problem, which was not to be found in the conflicting rulings of courts, but in parliament: "Before I conclude, I wish to state that from the foregoing, it is evident that there are gaps in the provisions relating to the deputy governor in the Constitution, and even in the County Governments Act. Perhaps it is time that Parliament considers amending the County Governments Act to plug the gaps identified herein" (Mbwana v IEBC High Court Election Petition 5 of 2017, para. 70).

<sup>647</sup> E.g. Election Laws (Amendment) Act enacted in September 2016; Election Laws (Amendment) Act enacted in January 2017; Elections (Technology) Regulations and Elections (General) (Amendment)



to the date of the elections. The IEBC (2018) argued that the timing of these changes not only created serious impediments for the agency – which was forced to revise existing procedures, retrain staff, delay procurement of election materials and adjust timetables for election preparations – but also increased the likelihood of noncompliance due to lack of familiarity among IEBC staff. Election observer groups cautioned that parliament’s legislative practices were contrary to international good practice standards – especially in the absence of political consensus and inclusive public consultation (Carter 2018). The Judiciary (2017b) also criticized parliament for imposing challenges on election dispute resolution processes as stakeholders would be disadvantaged due to inadequate time to familiarize themselves with new rules and procedures, and petitioners would be more likely to falter due to noncompliance (Thuo 2019).<sup>648</sup>

A related factor is that parliament is not always motivated by altruistic aims of improving the electoral system. Rather, laws are often enacted to advantage particular political parties and factions.<sup>649</sup> Moreover, many of the new laws, which were highly contentious at the time of their enactment, were pushed through parliament by a Jubilee-aligned majority, despite protesta-

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Regulations enacted in April 2017; Court of Appeal (Election Petition) Rules enacted in June 2017; Elections (Parliamentary and County Elections) Petitions Rules enacted in July 2017.

<sup>648</sup> E.g. The Election Appeal Rules shortened the deadline for filing an appeal from 14 to 7 days.

<sup>649</sup> A case in point is the Election Laws (Amendment) Act 34 of 2017. Parliamentarians aligned with Kenyatta and Jubilee attempted to use their majority strength to rush enactment of this legislation prior to the October repeat presidential election amid walkouts by the opposition, with little time for public participation, and despite concerns raised by civil society organizations and the international community. Many of the amendments were subsequently ruled unconstitutional and overturned by the High Court (Katiba v AG Constitutional Petition 548 of 2017).

tions by opposition party members and with little time for public input (Standard Team 2016; Kamau 2016). These factors are discussed in further detail in the next section of this chapter.<sup>650</sup>

Analysis of the adjudication of elections reveals that many of the laws on elections are deficient, inconsistent and unclear; they circumvent rather than enhance constitutional principles and values; and often they are enacted shortly before elections with little time for stakeholder engagement and public consultation. Without greater clarity in how the laws on elections are legislated by parliament, how such laws are interpreted by courts, including specificity and unanimity as to what constitutes an infraction and what are the consequences, the IEBC will likely continue to fail in its mandate, petitioners will continue to file and argue flawed petitions, and courts will continue to deliver conflicting judgements contributing to further ambiguity and discontinuity in the jurisprudence on elections. The cumulative effect of the foresaid is either advancement or retreat of the quality of elections, electoral justice, constitutionalism and democracy. The question of whether Kenya is an example of democratic progress or retreat is the focus of the next section.

#### Balance of Power within the State

The Supreme Court's nullification of the August 2017 presidential election represented a bold judicial intervention in the political realm. It was a strong demonstration of the judiciary exercising its oversight role in a democratic process by enforcing compliance with the constitution and election laws and sanctioning violations (Ochieng 2017:8). Although it can be argued that the

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<sup>650</sup> E.g. *Katiba v Attorney General Constitutional Petition 548 of 2017*.

Supreme Court's judgement on August 2017 presidential election was evidence of a progressive jurisprudence, the same cannot be said of its rulings on the October repeat election or petitions for other elective seats. The outcomes of gubernatorial election petitions – that none succeeded despite convincing evidence in some cases that the elections were deeply flawed – adds credence to the notion that courts are reluctant to nullify elections.

On one hand, such reluctance may be well warranted as courts are rightfully cautious of overturning the will of the electorate. On the other hand, Gondi and Basan (2015) argue that whereas progressive jurisprudence, or judicial activism, may be indicative of judicial strength, autonomy and independence, judicial restraint may be indicative of judicial vulnerability to external interference and the negation of electoral and judicial reforms. Thus, such caution and reluctance among courts may evince a disconcerting trend in the emerging jurisprudence on elections and in terms of the balance of power within the state.

The increasing judicialization of politics in Kenya, and more specifically elections, has been accompanied by the negative corollary of the increasing politicization of the judiciary. Ochieng (2017:32) argues that "Once the Courts intervened aggressively in the 2017 political contest, the Judiciary lost, to some degree, its apolitical image... [this] judicial intervention in the political process has unfortunately led to the Judiciary being politicised." President Kenyatta, along with supporters of the ruling Jubilee regime, retaliated by vilifying and attacking the judiciary.

This retaliation was viewed as a contributing factor that explains why the Supreme Court reverted to "its conservative 2013 stance" in the October 2017 repeat election petition (ICJ

2019:48), and why the Supreme Court “retreated” from the “majestic position,” “legacy and reputation” it had garnered following its nullification of the first presidential election in August 2017 (Ochieng 2017:22; Munabi 2017:68). Ochieng (2017:22) argues that the judiciary seemed “determined to make peace with the ruling party” and motivated by the need to “distribute legal victories evenly to the various sides of the political divide” in order to preserve its legitimacy. Munabi (2017:68) proposes that if the Supreme Court had asserted its authority further by overturning the October repeat presidential election, “it would expose its institutional security to greater danger.”

Retaliatory attacks on the judiciary by the executive and an executive-aligned parliament took three forms: attacks on individual judicial officers, changes to election laws, and reduction of budgetary allocations for the judiciary.<sup>651</sup> Following the Supreme Court’s nullification of the August 2017 presidential election, individual judicial officers were subjected to various forms of attack. These included verbal assaults, negative viral social media campaigns, physical attacks (i.e. shooting of Supreme Court Judge Mwilu’s security guard), criminal investigations, and various attempts to remove them from office through other means. These kinds of attacks not only damage the reputation of individual judges, they can have debilitating effects in terms of the immense amount resources (time, energy, finances) that individuals must invest in defense. These attacks can undermine the decisional independence of courts and instill a climate a fear within the judiciary as an institution.

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<sup>651</sup> As noted in the preceding chapter, the judiciary is also under attack from within the institution. A notable example is corruption, which has eroded the credibility of the judiciary for decades and remains an endemic problem. Similarly, Munabi (2017:68) argues that “courts in Kenya have exhibited self-destructive attributes that have undermined their moral and social authority to make final statements about political contestations or not. In so doing, they have become particularly vulnerable to political opprobrium.”

Changes to election laws were perceived as an attempt by the ruling regime to weaken both the ability of the IEBC to conduct credible elections and the ability of the Supreme Court to nullify future presidential elections. The High Court subsequently overturned these amendments having found that they were unconstitutional. This was a positive indicator of the effectiveness of judicial review and the horizontal accountability and checking function of courts. However, it was also indicative of an ongoing struggle to entrench democratic gains and the transformative vision of the 2010 Constitution. In the post-2010 constitutional era, parliament has exhibited a propensity to resist judicial interventions into its legislative prerogative by simply enacting new laws that include the same offensive provisions as laws that were previously struck down by courts.<sup>652</sup> Moreover, the ability of courts to review and check other branches of government is not an automatic process, rather it is largely contingent of the ability of litigants to bring cases before courts, which requires access to necessary resources such as legal representation, time and finances.

Historically, ruling regimes in Kenya have used budgetary allocations as punishments and rewards. This has not changed in the post-2010 constitutional era. Prior to 2017 the judiciary's budgetary allocations had increased, but in 2017 the allocations were reduced. This was viewed as part of the ruling Jubilee regime's promise to "fix" the judiciary for nullifying Kenyatta's elec-

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<sup>652</sup> A case in point are laws on criminal libel. In 2016, the High Court overturned the Kenya Information and Communication Act (KICA) of 2013 on the basis that provisions on criminal libel were unconstitutional (*Andare v Attorney General High Court Petition 149 of 2015*). In the few years when the law was in force, it was used to punish citizens who criticized government officials, despite constitutional protections for free speech. However, in 2018, parliament enacted the Computer Misuse and Cybercrimes Act (CMCA), which again included provisions on criminal libel.

tion in August 2017. Unfortunately, the judiciary has no avenues for recourse against this form of attack. Although the 2010 Constitution includes provisions for ensuring judicial autonomy and financial independence, parliament and the ruling Jubilee regime have expressed little commitment to protecting these values.<sup>653</sup>

Kenya's experience from the 2017 election period demonstrates that the objectives of the 2010 Constitution towards rebalancing the distribution of power within the state remain salient challenges. Despite constitutional provisions to reduce executive power and to increase the power and independence of other state institutions, executive hegemony remains strong and the ability of other state institutions to perform checking and accountability functions remains weak. In the post-2010 constitutional era, the executive, and an executive-aligned parliament, have attempted to reconsolidate and recentralize powers that were dispersed and decentralized by the 2010 Constitution, to disempower independent agencies of the state that are charged with safeguarding fundamental rights and preventing abuse of power (such as the judiciary), and to reverse the gains of the 2010 Constitution. Members of the opposition have often been complicit in these efforts. The opposition has often failed to demonstrate that it represents a viable alternative form of leadership. Instead, opposition leaders have frequently bypassed parliamentary processes, and they have contributed to the weakening of other state institutions by directing their own attacks on state agencies such as the judiciary and the IEBC.

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<sup>653</sup> Constitution of Kenya 2010, Article 160 Independence of the Judiciary and Article 173 Judiciary Fund. For example, parliament could enact legislation that would automatically reserve and allocate a fixed percentage (e.g. 2.5%) of the national budget for the Judiciary Fund.

As noted by commentators such as Ochieng (2017:10), Kenya's ruling elites have been cultured in a pre-2010 dispensation and the "habits" of that era, which means they do not believe that public power should be accountable or limited. These are elected leaders and appointed officials who eschew the principles of transformative constitutionalism and democratic values. Thus, without significant changes to the political culture, the reforms envisioned under the 2010 Constitution will have little effect. Kenya's experience from the 2017 election period suggests that the nation remains a deeply authoritarian state (Ochieng 2017; Gathii 2017) and that democratic progress has slowed or is in retreat (Chege 2018:159; Owuor 2017:131; Diamond 2015; Mattes and Bratton 2016).

However, the potential for democratic progress is strong, and both courts and citizens have a significant role. Although the judiciary remains precariously positioned in the balance of power within the state, and despite the institutional limitations and vulnerabilities described above, courts have embraced a more active role in engaging political questions and controversies in the post-2010 constitutional era. Thus, Munabi (2017:68) argues that courts can be useful instruments for entrenching constitutionalism and the rule of law, for enforcing horizontal accountability, and for countering the authoritarian tendencies of the political branches of government. Citizens, on their part, have the ability to demand vertical accountability from elected officials by voting. The outcomes of the 2017 elections for the five elective seats below the president revealed that voters expressed their discontent with incumbent candidates by voting them out of office.<sup>654</sup>

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<sup>654</sup> Those who lost seats included roughly two-thirds of members of county assemblies and members of parliament, approximately half of senators and governors, and over three-quarters of woman representatives (Ng'etich and Psirmoi 2017; Psirmoi 2017a; Chege 2018).

## Future Challenges

Despite hope that the 2010 Constitution would usher in a new era of transformative constitutionalism, judicial transformation and electoral justice, changing judicial culture and the broader political culture is a slow process. There are five challenges for the future of elections in Kenya and the advancement of transformative constitutionalism and electoral justice. First, the IEBC must rise to the highest standards in the conduct of all elections and comply unequivocally with all laws and regulations pertaining to elections, including those established by the constitution, parliament and its own self-imposed institutional procedures. However, the ability of the IEBC to improve the quality elections will continue to be encumbered without further action by parliament to correct deficiencies in election laws and without greater consistency in the rulings of courts as to what constitutes noncompliance and what are the consequences of noncompliance. The IEBC should strengthen institutional accountability and transparency by increasing the accessibility and availability of election results forms, data and materials for political parties, candidates, petitioners and the public.

Second, lack of clarity in election laws that are legislated by parliament is reflected in the misunderstanding and misapplication of the laws by petitioners and in the conflicting judgements of courts in election petitions. Therefore, it is incumbent upon parliament to amend and enact election laws accordingly to close gaps and address deficiencies, inconsistencies and ambiguities in existing legislation. However, parliament must do so in a manner that improves the quality of elections and advances the principles of transformative constitutionalism – not the reverse. Par-



liament should also enable a legislative process that encourages broad stakeholder engagement, provides sufficient time for public consultation, and occurs well in advance of elections.

Third, courts must interpret and apply the constitution and laws in a manner that advances the principles and values of transformative constitutionalism and electoral justice, in a manner that inculcates a culture of accountability and transparency among state institutions, and in a manner that resolves ambiguities and inconsistencies and brings clarity and predictability to the emerging jurisprudence on elections. Courts should discourage a judicial approach that applies fluctuating standards to the conduct and adjudication of elections where compliance with the constitution and laws is assessed on a sliding scale for various elective seats. Because the legal framework on elections establishes high standards that apply to all elections, courts should enforce the highest standards in the conduct of all elections by the IEBC and in the adjudication of all elections by courts.

Fourth, petitioners must do better work of pleading their petitions. They can do so by adhering to procedural and technical rules for filing petitions and by improving their understanding and application of the constitution and election laws. Petitioners must buttress their allegations of irregularities and illegalities by providing sufficient evidence to prove their claims, by explicitly stating which exact constitutional and legal provisions were violated, and by explaining how violations affected the conduct, integrity and results of elections. Petitioners should fully utilize party agents to observe the conduct of elections, document irregularities and illegalities, secure evidence (e.g. results forms), and testify in election petitions as witnesses with material evidence to corroborate allegations raised by petitioners. If there are deficiencies in the rulings of

courts, they may be reflective of deficiencies in the pleadings of petitioners. If the constitution is to be a tool for transformative constitutionalism and electoral justice it must be used not only by courts, but also by petitioners.

Lastly, the electorate must choose their candidates wisely. If the prevailing political culture is an impediment to strengthening democracy, constitutionalism and the rule of law, voters have the means to reshape the political culture and to further progress towards the transformative vision of Kenya's 2010 Constitution. Thus, it is incumbent upon the electorate to choose a different kind of candidate (hopefully, the options will be better than the lesser of evils).

Tables

Party Petitioners 2013*	Para	Article	Count	Party Court 2013	Para	Article	Count	Party Petitioners 2017	Para	Article	Count	Party Court 2017	Para	Article	Count
	15	2			227	1			6	1			399	1	
	15	6			2	10			16	1			1	10	
	15	10			203	10			6	2			210	10	
	45	10	3		242	10	4		15	2	4		237	10	5
	176	10			285	10			16	2			381	10	
	176	35			129	38			172	2			383	10	
	10	38			197	38	3		6	4			299	35	
	15	38	4		248	38			15	4			2	38	
	46	38			279	82			16	4			151	38	
	176	38			60	83			176	4	7		197	38	
	176	47			129	83	3		6	10			210	38	
	15	73			248	83			16	10			237	38	
	176	75			3	88			196	10			292	38	12
	10	81			6	138			16	35			297	38	
	17	81	3		22	138			6	38			318	38	
	176	81			203	138			15	38			369	38	
	15	82			241	138			16	38	5		372	38	
	10	83			259	138			175	38			381	38	
	16	83	3		269	138	12		196	38			383	38	
	17	83			285	138			6	81			298	39	
	10	86			286	138			15	81			299	47	
	15	86	4		287	138			16	81			197	81	
	132	86			288	138			26	81			208	81	
	176	86			290	138			175	81	9		210	81	
	10	88			291	138			196	81			212	81	
	17	88	3		208	140			214	81			237	81	
	176	88			209	140			238	81			261	81	11
	34	138			210	140			314	81			282	81	
	38	138			215	140			6	82			307	81	
	48	138	6		217	140	9		16	82			372	81	
	134	138			218	140			6	86			381	81	
	150	138			287	140			15	86			383	81	
	176	138			289	140			16	86			198	86	
	15	259			291	140			17	86	9		199	86	
	15	260			2	159			24	86			208	86	
Total			36		218	159			175	86			210	86	
					205	163			196	86			212	86	
					208	163	3		214	86			237	86	
					210	163			238	86			261	86	14
					284	259			6	88			282	86	
							41		16	88	4		295	86	
									17	88			297	86	
									196	88			299	86	
									6	138			372	86	
									16	138	4		381	86	
									40	138			383	86	
									196	138			7	88	
									6	140			299	88	
									16	140			346	97	
									326	152			2	101	
									6	163			4	138	
									16	163			8	138	
									22	232			157	138	
									16	249			158	138	
									6	249			159	138	
													161	138	
													162	138	14
													170	138	
													199	138	
													212	138	
													261	138	
													285	138	
													287	138	
													292	138	
													381	140	
													405	140	
													7	248	
													7	249	
													170	259	
													Total		70

Notes

In Odinga v IEBC 2013, three petitions were consolidated. Petitioners refer Petition 5 (Odinga) and Petition 4 (AfriCOG), not to Petition 3 (Jubilee-aligned).  
 The data listed are a close approximation. There are omissions where the same article was cited multiple times in a single paragraph (para). There may be some overlap where parties cross-reference each other.  
 Articles referenced three or more times are bracketed. Counts for procedural provisions are underlined, provisions on principles are normal typeface.  
 Articles 4 and 10 are grouped because the former refers to the latter.

Table 1b. Constitutional Articles

Provision Type	Constitutional Article	Relevant Section
Provisions on principles	Article 4. Declaration of the Republic	(2) The Republic of Kenya shall be a multiparty democratic State founded on the national values and principles of governance referred to in Article 10
	Article 10. National values and principles of governance	(2)(c) good governance, integrity, transparency and accountability
	Article 38. Political Rights	(2) every citizen has the right to free, fair and regular elections.
	Article 81. General principles for the electoral system	(e) free and fair elections, which are— (ii) free from violence, intimidation, improper influence or corruption; (iii) conducted by an independent body; (iv) transparent; and (v) administered in an impartial, neutral, efficient, accurate and accountable manner
	Article 86. Voting	At every election, the Independent Electoral and Boundaries Commission shall ensure that— (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent
	Article 88. Independent Electoral and Boundaries Commission	(5) The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation
Provisions on procedures	Article 83. Registration as a voter	(1) qualifications for registration as a voter
	Article 138. Procedure at presidential election	(4) A candidate shall be declared elected as President if the candidate receives— (a) more than half of all the votes cast in the election; and (b) at least twenty-five per cent of the votes cast in each of more than half of the counties, (5) If no candidate is elected, a fresh election shall be held within thirty days
	Article 140. Questions as to validity of presidential election	(1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election. (2) Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final. (3) If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination
	Article 163. Supreme Court	(3) The Supreme Court shall have— (a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140

Table 2: Gubernatorial Election Petition Outcomes – 2013 and 2017

2013				2017			
County	High Court	Court of Appeal	Supreme Court	County	High Court	Court of Appeal	Supreme Court
Embu	dismissed			Garissa	withdrawn		
Trans Nzoia	dismissed			Meru	withdrawn		
Kilifi	dismissed			Narok	withdrawn		
Isiolo	dismissed			Kilifi	dismissed		
Taveta	dismissed			Tana-River	dismissed		
Kajiado	dismissed			Taita-Taveta	dismissed		
Tharaka Nithi	dismissed	dismissed		Turkana	dismissed		
Wajir	dismissed	dismissed		Trans-Nzoia	dismissed		
Kakamega	dismissed	dismissed		Kajiado	dismissed		
Nyeri	dismissed	dismissed		Bomet	dismissed		
Mombasa*	dismissed	struck out		Vihiga	dismissed		
Machakos	dismissed	struck out	dismissed	Siaya	dismissed		
Narok	dismissed	dismissed	dismissed	Mandera	dismissed	withdrawn	
Garissa	dismissed	nullified	upheld	Mombasa	dismissed	withdrawn	
Migori	dismissed	nullified	upheld	Samburu	dismissed	struck out	
Meru	dismissed	nullified	upheld	Busia	dismissed	struck out	
Nairobi	dismissed	nullified	upheld	Marsabit	dismissed	dismissed	
Lamu	nullified	upheld	dismissed	Kisumu	dismissed	dismissed	
Siaya	nullified	nullified	(re-elected)	Migori	dismissed	dismissed	
				Kisii	dismissed	dismissed	
				Kitui	dismissed	dismissed	
				Nairobi	struck out	dismissed	
				Kwale	struck out	dismissed	struck out
				Kirinyaga	dismissed	dismissed	dismissed
				Lamu	dismissed	dismissed	dismissed
				Laikipia	dismissed	dismissed	dismissed
				Nyamira	dismissed	dismissed	dismissed
				Machakos	dismissed	nullified	upheld
				Wajir	nullified	nullified	upheld
				Homa Bay	nullified	nullified	upheld
				Embu	nullified	upheld	upheld
Sub-Total	struck out 0 dismissed 17 nullified 2	struck out 2 dismissed 5 nullified 5 upheld 1	struck out 0 dismissed 3 nullified 0 upheld 4 (re-elected) 1	Sub-Total	withdrawn 3 struck out 2 dismissed 23 nullified 3	withdrawn 2 struck out 3 dismissed 10 nullified 3 upheld 1	withdrawn 0 struck out 1 dismissed 4 nullified 0 upheld 4
Total	19	13	7	Total	31	19	9

Table 3: High Court Gubernatorial Election Petitions 2017 – Constitutional References

Petitioners	# Cases	# Articles	# Cases	# Paras	Courts	#Cases	# Articles	# Cases	# Paras
	11	0	11	0		4	0	4	0
	11	1-3	14	1-3		6	1-3	9	1-3
	7	4-6	5	4-6		11	4-6	7	4-6
	2	7-9	1	7-9		10	7-9	4	7-9
Average		2		2			5		5
Presidential		16		16			16		37

Appendices

Elections (General) Regulations, 2012, Presidential and Gubernatorial Results Forms A Templates

No. 24 of 2011 [Rev. 2017] *Elections*

[Subsidiary]  
FORM 34A [Reg. 79(2)(a).]

**PRESIDENTIAL ELECTION RESULTS AT THE POLLING STATION**

S/Number .....  
Name of Polling Station ..... Code .....  
Ward ..... Code .....  
Constituency ..... Code .....  
County ..... Code .....

Number of votes cast in favour of each candidate:

Name of Candidate	No. of Valid Votes Obtained
<b>Total number of valid votes cast</b>	

Polling Station Counts

1. Total Number of Registered Voters in the Polling Station;	
2. Total Number of Rejected Ballot Papers;	
3. Total Number of Rejection Objected To Ballot Papers;	
4. Total Number of Disputed Votes;	
5. Total Number of Valid Votes Cast;	

Decision(s) on disputed votes if any

Serial Number of Ballot Paper(s) with disputed vote	Name of Candidate assigned the vote

Declaration  
We, the undersigned, being present when the results of the count were announced, do hereby declare that the results shown above are true and accurate count of the ballots in ..... Polling Station ..... Constituency.  
Presiding Officer ..... Signature ..... Date .....  
Deputy Presiding Officer: ..... Signature ..... Date .....  
Agents or Candidates (if present)

No.	Name of Candidate or Agent	ID/Passport No.	Party Name/Tei. Independent Candidate	Contact	Signature	Date
1.						
2.						
3.						

Reasons for Refusal to Sign (if any)  
.....  
.....  
Presiding Officer's Comments:  
.....  
.....

No. 24 of 2011 [Rev. 2017] *Elections*

[Subsidiary]  
FORM 37 A [Reg. 79(2)(b).]

**COUNTY GOVERNOR ELECTION RESULTS AT THE POLLING STATION**

S/Number .....  
Name of Polling Station: ..... Code .....  
Ward ..... Code .....  
Constituency ..... Code .....  
County ..... Code .....

Number of votes cast in favour of each candidate:

Name of Candidate	No. of Valid Votes Obtained
<b>Total valid votes cast</b>	

Polling Station Counts

1. Total Number of Registered Voters in the Polling Station;	
2. Total Number of Rejected Ballot Papers;	
3. Total Number of Rejection Objected To Ballot Papers;	
4. Total Number of Disputed Votes;	
5. Total Number of Valid Votes Cast;	

Decision(s) on disputed votes if any

Serial Number of Ballot Paper (s) with disputed vote	Name of Candidate assigned the vote

Declaration  
We, the undersigned, being present when the results of the count were announced, do hereby declare that the results shown above are true and accurate count of the ballots in ..... Polling Station ..... Constituency.  
Presiding officer: ..... Signature ..... Date .....  
Deputy Presiding Officer: ..... Signature ..... Date .....  
Agents or Candidates (if present)

No.	Name of Candidate or Agent	ID/Passport No.	Party Name/Tei. Independent Candidate	Contact	Signature	Date
1.						
2.						
3.						

Reasons for refusal to sign (if any)  
.....  
.....  
Presiding Officer's Comments:  
.....  
.....

Elections (General) Regulations, 2012, Presidential and Gubernatorial Results Forms B Templates

[Rev. 2017] *Elections* **No. 24 of 2011**  
[Subsidiary]

FORM 34B [Reg. 87(1)(a).]

**COLLATION OF PRESIDENTIAL ELECTION RESULTS AT THE CONSTITUENCY TALLYING CENTRE**

S/Number .....  
Constituency ..... Code .....  
County ..... Code .....

Polling Station Code	Name of Polling Station	Registered Voters	Candidate 1	Candidate 2	Candidate 3	Total Valid Votes	Rejected Ballots

Agents or Candidates (if present)

No.	Name of Candidate or Agent	ID/Passport No.	Party Name/Tel. Independent Candidate	Contact Signature	Date
1.					
2.					
3.					

Name of the Constituency Returning Officer .....  
ID Number .....  
Signature: .....  
Date: .....

Handing over - Taking Over at the National Presidential Tallying Centre

HANDING OVER	TAKING OVER
Number of FORM 34 A submitted: .....	Number of FORM 34 A received .....
Name of the Constituency Returning Officer: .....	Commission Chairperson: .....
ID Number: .....	ID Number: .....
Signature: .....	Signature: .....
Date: .....	Date: .....
Time: .....	Time: .....

[Rev. 2017] *Elections* **No. 24 of 2011**  
[Subsidiary]

FORM 37 B [Reg. 87(1)(a).]

**COLLATION OF COUNTY GOVERNOR ELECTION RESULTS AT THE CONSTITUENCY TALLYING CENTRE**

S/Number .....  
Constituency ..... Code .....  
County ..... Code .....  
Name of constituency Tallying Center .....

Polling Station Code	Name of Polling Station	Reg. Voters	Candidate 1	Candidate 3	Candidate 3	Total Valid Votes	Rejected Ballots

Signatures of Candidates or Agents

No.	Name of Candidate or Agent	ID/Passport No.	Party Name/Tel. Independent Candidate	Contact Signature	Date
1.					
2.					
3.					

Name of the Constituency Returning Officer .....  
ID Number: .....  
Signature: .....  
Date: .....

Handing Over — Taking Over at the County Tallying Centre

HANDING OVER	TAKING OVER
Number of FORM 37 A Submitted: .....	Number of FORM 37 A received: .....
Name of the Constituency Returning Officer: .....	County Returning Officer: .....
ID Number: .....	ID Number: .....
Signature: .....	Signature: .....
Date: .....	Date: .....
Time: .....	Time: .....

Elections (General) Regulations, 2012, Presidential and Gubernatorial Results Forms C Templates

No. 24 of 2011 [Rev. 2017] Elections

[Subsidiary]  
FORM 34C [Reg. 87(3)(b).]

**DECLARATION OF RESULTS FOR ELECTION OF THE PRESIDENT OF THE REPUBLIC OF KENYA AT THE NATIONAL TALLYING CENTRE**

S/Number: .....  
Name of National Tallying Centre: .....

County Code	County Name	Const. Code	Const. Name	Polling Station Code	Polling Station Name	Candidate 1	Candidate 2	Candidate 3	Total Valid Votes	Rejected Ballots
	County Sub-Total									
	% age									
	County Sub-total									
	% age									
	County Sub-Total									
	% age									
	NATIONAL TOTAL									
	% AGE									

No.	Name of Candidate	Valid Votes in Figures	Percentage of votes cast	Number of Counties the Candidate has attained at least 25% of Total Valid Votes Cast

Aggregate Results

Signatures of Candidates or Agents

No.	Name of Candidate or Agent	ID/Passport No.	Party Name/Independent Candidate	Tel. Contact	Signature	Date
1.						
2.						
3.						

Commission Chairperson: .....  
ID Number: .....  
Signature: .....  
Date: .....

No. 24 of 2011 [Rev. 2017] Elections

[Subsidiary]  
FORM 37 C [Reg. 87(2)(b).]

**DECLARATION OF THE COUNTY GOVERNOR ELECTION RESULTS AT THE COUNTY TALLYING CENTRE**

S/Number .....  
County ..... Code .....

Name of County Tallying Centre .....

Constituency Code	Constituency Name	Polling Station Code	Name of Polling Station	Name of Candidate	Name of Candidate	Name of Candidate	Votes Cast	Rejected Votes	Valid Votes
	Constituency Sub-Total								
	Constituency Sub-Total								
	County Total								

Aggregate Results

No.	Name of Candidate	Valid Votes in Figure	Valid Votes in Words

Signatures of Agents or/and Candidates

No.	Name of Candidate or Agent	ID/Passport No.	Party Name/Independent Candidate	Tel. Contact	Signature	Date
1.						
2.						
3.						

County Returning Officer: .....  
ID Number: .....  
Signature: .....  
Date: .....



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