Reflections on the 2017 Elections in Kenya

Paper Series on Emerging Judicial Philosophy in Kenya

Edited by

James Gondi

ELECTION
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PAPER SERIES

REFLECTIONS ON THE 2017 ELECTIONS IN KENYA

Paper Series on Emerging Judicial Philosophy in Kenya

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International Commission of Jurists
KENYAN SECTION | Since 1959

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Kelvin Mogeni
Chairman - ICJ Kenya Council
ICJ Kenya

Contents

Acronyms and Abbreviations

ACDEG	African Charter on Democracy, Elections and Governance
ANC	African National Congress
AU	African Union
BVR	Biometric Voter Registration
CIPEV	Commission of Inquiry into the Post-Election Violence
CKRC	Constitutional of Kenya Review Commission
CSO	Civil Society Organisations
EAC	East Africa Community
EACC	Ethics and Anti-Corruption Commission
ECG	Electoral Commission of Ghana
ECK	Electoral Commission of Kenya
EDR	Electoral Dispute Resolution
ELAA	Election Laws (Amendment) Act
EMB	Election Management Body
EU	European Union
EVID	Electronic Voter Identification Device
FDR	Franklin Delano Roosevelt
FTPT	First Past The Post
IAU	Internal Affairs Unit
ICT	Information Communication Technology
IEBC	Independent Electoral and Boundaries Commission
IEC	Independent Electoral Commission (South Africa)
IFES	International Foundations for Electoral System
IIBRC	Interim Independent Boundaries Review Commission
IIEC	Interim Independent Electoral Commission
IMLU	Independent Medico-Legal Unit
INEC	Independent National Electoral Commission
IPAC	Inter Parties Advisory Committee

IPOA	Independent Policing Oversight Authority
IPPG	Inter Parties Parliamentary Group
IREC	Independent Review Electoral Commission
JSC	Judicial Service Commission
KIEMS	Kenya Integrated Election Technology System
KNCHR	Kenya National Commission on Human Rights
MMPR	Mixed Member Proportional Representation
MPLC	Multi-Party Liaison Committee
NASA	National Super Alliance Coalition
NDC	National Democratic Congress
NGO	Non-Governmental Organisation
NPP	New Patriotic Party
NPS	National Police Service
NPSC	National Police Service Commission
OMR	Optical Marker Reader
ORPP	Office of the Registrar of Political Parties
PGC	Police Reforms Programme Governance Committee
PPADT	Public Procurement and Asset Disposal Tribunal
PPLC	Political Parties Liaison Committee
PR	Proportional Representation
PRIC	Police Reforms Implementation Committee
SCOK	Supreme Court of Kenya
TJRC	Truth Justice and Reconciliation Commission
TNA	The National Party
UNODC	United Nations Office on Drugs and Crime
URP	United Republican Party

About ICJ Kenya

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a non-governmental, non-profit and a member based organization. ICJ Kenya is the only African national section of the International Commission of Jurists (ICJ), Geneva, but operates autonomously. ICJ Kenya is registered as a Society under the Societies Act, Chapter 108, Laws of Kenya.

Founded in 1959, ICJ Kenya is the oldest human rights organization in Kenya. Its membership is drawn from the Bar as well as the Bench and currently constitutes of over 600 jurists as members. ICJ Kenya is dedicated to the legal protection of human rights in Kenya, and the African region. ICJ Kenya is governed under a constitution through an elected Council of 7 members that serves for two-year fixed terms. ICJ Kenya has its head office in Nairobi, which houses its secretariat that currently comprises of 24 members of staff.

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ICJ Kenya is implementing its 2016 – 2020 Strategic plan and has set out to achieve five main strategic objectives namely;

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2. To support the strengthening of democratic governance in Kenya and across Africa;
3. To improve access to justice in Kenya and the African region;
4. To promote justice for international crimes and gross human rights violations in Kenya and across Africa, and;
5. To protect and promote civic space in order to enhance enjoyment of human rights and participation in governance in Kenya and the region.

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Editor's Note

James Gondi

On 1 September 2017, the Supreme Court of Kenya annulled the 8 August 2017 Presidential elections citing illegalities and irregularities in the electoral process, particularly on the part of the Independent Electoral and Boundaries Commission (IEBC). The Supreme Court annulled the 8 August 2017 presidential elections on the basis that they were fraught with many illegalities and irregularities which negatively impacted the integrity of the elections. It held that that no reasonable tribunal could uphold the 8 August presidential election. Given that the election was closely contested, the annulment was followed by attacks on the Judiciary from the incumbent executive, with the latter accusing the Supreme Court of instigating a 'judicial coup'.

The Supreme Court ordered a repeat election within sixty days. The IEBC initially scheduled the repeat poll for 17 October 2017 and later rescheduled the election to 26th October 2017. In the period between the annulment and the repeat poll, the opposition stated that it would not take part in the repeat poll because the illegalities and irregularities highlighted by the Supreme Court on 1 September 2017 had not been addressed. The opposition indicated that it had no faith in the electoral management body to carry out a credible repeat poll. A political crisis ensued in this period with widespread protests which were met with the use of lethal force by state security agencies. Nevertheless, the Independent Electoral and Boundaries Commission (IEBC) conducted fresh Presidential election on 26th October 2017 which the opposition boycotted, furthering the political crisis.

This paper series seeks to assess human rights, rule of law and governance concerns arising from the 2017 election cycle. It focuses on the state of judicial independence in Kenya following the annulment of the August 2017 elections and subsequent onslaught by the Executive; assesses the jurisprudence developed in both Presidential election petitions heard by the Supreme Court in 2017 as well as related case law; the potential judicialisation of politics in Kenya; burdens on the Judiciary; and its effect on the relationship between the three arms of government. The paper series also reflects on the excesses of state security agencies during the 2017 electoral cycle.

The first part of the paper series speaks to the state of the independence of the Judiciary in light of the attacks it received from different quarters including the incumbent executive after it annulled the 8 August presidential election. It contends that the Judiciary has an oversight role on democratic processes, including elections, by sanctioning the violation of election rules and constitutional principles. Attacks on the Judiciary by the Executive for performing its legitimate function undercut the premise of the judicial system and the doctrine of separation of powers.

This part also examines the judicialisation of 'mega politics' in Kenya, regionally and globally where political decisions take on an increasingly judicial nature thus increasing the reliance on courts and judicial means for addressing some of the most fundamental moral predicaments, public policy questions, and political controversies. It examines this trend in the context of the 'political question doctrine', an American legal innovation which holds that courts ought to distance themselves from decisions on politically charged issues contrasting it with countries such as Hungary where the courts have rejected this doctrine and regularly pronounce themselves on nationalisation and welfare policy among other policy and political questions. It considers this phenomenon in light of developments within the Judiciary in Kenya in the context the political censure of courts by elites following the 2017 electoral cycle. It argues that with the right approach, courts can be useful instruments in countering totalitarian tendencies of representative organs of government while cautioning that this may be undone by predatory political elites who can launch campaigns to destabilize the institution of the Judiciary.

The second part analyses the culture of violence and brutality that has become synonymous with elections in Kenya, particularly with regard to state security agencies and political elites who use violence as a means of mobilization during electoral cycles. The section takes stock of the environment of fear, violence and intimidation that befell the country during the 2017 elections with particular focus on the use of force against civilians targeting particular communities. It argues that even though the police did not kill and injure as many people in 2017 as they did in 2007/2008, the high levels of violence they exhibited – and the dozens of deaths and injuries they caused – evoke similar questions asked during the 2007-2008 Post Election Violence, a vicious cycle that ought to be stopped through processes leading to accountability, vetting, reforms and reparations for victims of police brutality. This part also analyses the jurisprudence on violence in elections as a ground for nullification of an election, the evidentiary burden required for such nullification to take place on the basis of the use of violence and intimidation in elections in the context of both Presidential petitions 1 and 2 heard by the Supreme Court as well as emerging jurisprudence from petitions at parliamentary, gubernatorial and civic elections.

Part three analyses electoral management in Kenya with a sharp focus on the 2017 electoral cycle while providing the context of previous electoral malpractices in Kenya and other countries in Africa where voters have mixed experiences with electoral management bodies. This section contends that the inability to hold credible and accountable elections remain the weakest link in consolidating democratic governance in Kenya and other countries in Africa while critiquing the perturbing trend of interference with electoral management bodies by political elites while proposing key recommendations for electoral reform borrowing from comparative best practices.

“In the end, that’s what this election is about. Do we participate in a politics of cynicism or a politics of hope?”

Barack Hussein Obama II,
44th President of the United States of America
2009 - 2017


A brief history of "MOVE ON"
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BLOODY WHAT REPARATION, ...? MOVE ON!!
GOVERNOR
#@* KINYANGARIKA! MOVE ON...
FUATA NYAYO AND MOVE ON...
82 COUP
TRIBA CLASH
M#@☆ YA KUKU.... PUMBAFU! MOVE ON
STOLEN ELECTION
ICC
ACCEPT AND MOVE ON!
#☆@*☆ MOVE ON!!

A Poetic Short Story Reflective of this Paper Series

Violence From My Eyes

Crème Brulee. It is a French dessert with sugar and vanilla and caramel. I first heard of it in a romantic movie starring Julia Roberts and as you can imagine, she was having a romantic dinner with a handsome man and when the waiter showed up to take the dessert order, she asked for *crème brulee*. So after my Court attachment when the Judge graciously took all five of us to some high-end restaurant in the Karen suburbs of Nairobi to treat us to some good lunch, I knew my moment to *shine* had arrived. My opportunity to order *crème brulee*. I felt high-end myself just asking for it, you should have seen me. But I guess it is the *lawyer* thing to do. Confidence even in cluelessness. I ate it. It was too sugary, almost made me throw up. I have eaten it again and again when I have had to show off at important meetings. I don't like it for sure, but who is going to eat a *mere* fruit salad or worse, another *complicated* dessert that I might not like? Better the devil you know- or is it?

Elections in Kenya are closely contested and deeply polarizing. They are characterized by violence before, during and after Polling Day. We have seen it, we have lived it. ICJ Kenya observed the 8 August and 26 October 2017 elections, and held various forms of discussion with the public in different parts of the country. A representative account of their views on electoral violence emerges:

> We know the violence is coming. It starts when my neighbour starts looking at me differently. When my neighbour starts saying in the middle of a conversation "*watu wetu*" and "*watu wenyu*" to refer to our different tribes. Then I begin to set some money aside to ferry me and my family back to the village where my tribesmen are the majority. Better to be safe than start *talking nicely* to my neighbour who may not even listen. I heard on the radio the President and some politicians telling us to remain on our land as the elections would be peaceful, but I know better.

Violence sets in when political party primaries are marred with chaos. When politicians from the same party cannot agree on who should be the flag bearer. When the ones who lose begin slating the party and telling us that the party lacks ideologies - whatever that means - and ask us to support them in the new parties they run to. I hear these days they don't even need parties, they can be independent - but what do I know - let them fight and agree and tell us what they have decided!

Violence is when we see *men in uniform* come around to remind us that we should *behave* during the day of elections. They have guns, my sister's son was shot last year in the city so I don't want trouble with them. But my son is still angry about it. About that and about being jobless and without money. I hear he and the youngsters around are getting ready to *protect* this area from these *gun men*. There is no reasoning with them, and besides, what do I say?

Violence on elections day is when I plan to be on the queue bright and early, so that I can vote before the queue becomes long and the sun is hot - but mostly before there is any chaos. I wouldn't want to be caught in it. It is when I plan to buy plenty of supplies just in case this is not the *normal violence* and I can't leave the house for a while. When I want to go home and watch the news so that I know which areas have been affected the most so that I keep away from those areas for a while. I live close to a slum and you know how those young men are misused by politicians to cause chaos all over! Poor children.

Didn't they say that they would use my fingerprint to determine if I am registered to vote, or did I hear wrong? But they just looked at my name and ID in some *book* and allowed me to go and vote. A guy I met outside even told me that when they couldn't find his name in the *book*, and he insisted he registered there, they allowed him to vote before he could cause unnecessary commotion. I knew that *thing* would bring trouble, even the Court said it in *that case*, but what do I know?

Yes I voted for him. Yes we had elected him before. No he didn't help *us*, look at *our* roads and hospitals and schools. Even the primary school that he went to here is lying in ruins and yet we saw him giving big money in burials and *harambees* on TV. And yes, I know he is the one encouraging our children to take matters into their own hands in the event the other candidate steals the elections from him. But he is *our son*, what else can we do? Better *our son* than some other person who we don't even know if they will remember *us* when they go to *Nairobi*.

> Who protects us when the *government* is *killing* us? Who do we run to when *gun men in uniform* come to our homes to look for our children to *kill* them? Did you see how many they were outside Court and even how they were preventing people from going near the Court when there was that case? If that was in Court where there are *big people*, a *small* person like me best stay away.
>
> And talking about that case, it just brought trouble. Did you see how the politicians were angry? I know the Court was just trying to help but they should have let things be. You know these politicians do what they want, and no one can do anything about it. We just hope that this violence ends and we *go back to normal*.
>
> Yes of course I would like things to be different. I would like for violence to end. For women not to be raped. For our men not to be killed and injured. For me not to have to relocate to the village because I'm afraid of my neighbours from another tribe. For my sons not to take part in violence often instigated by politicians. For my vote not to be *stolen*. For me not to be angry every five years. My youngest son still has nightmares of gunshots ringing the air and armed men gang raping women in the village. But this is Kenya!"

Crème brulee. My *crème brulee*.

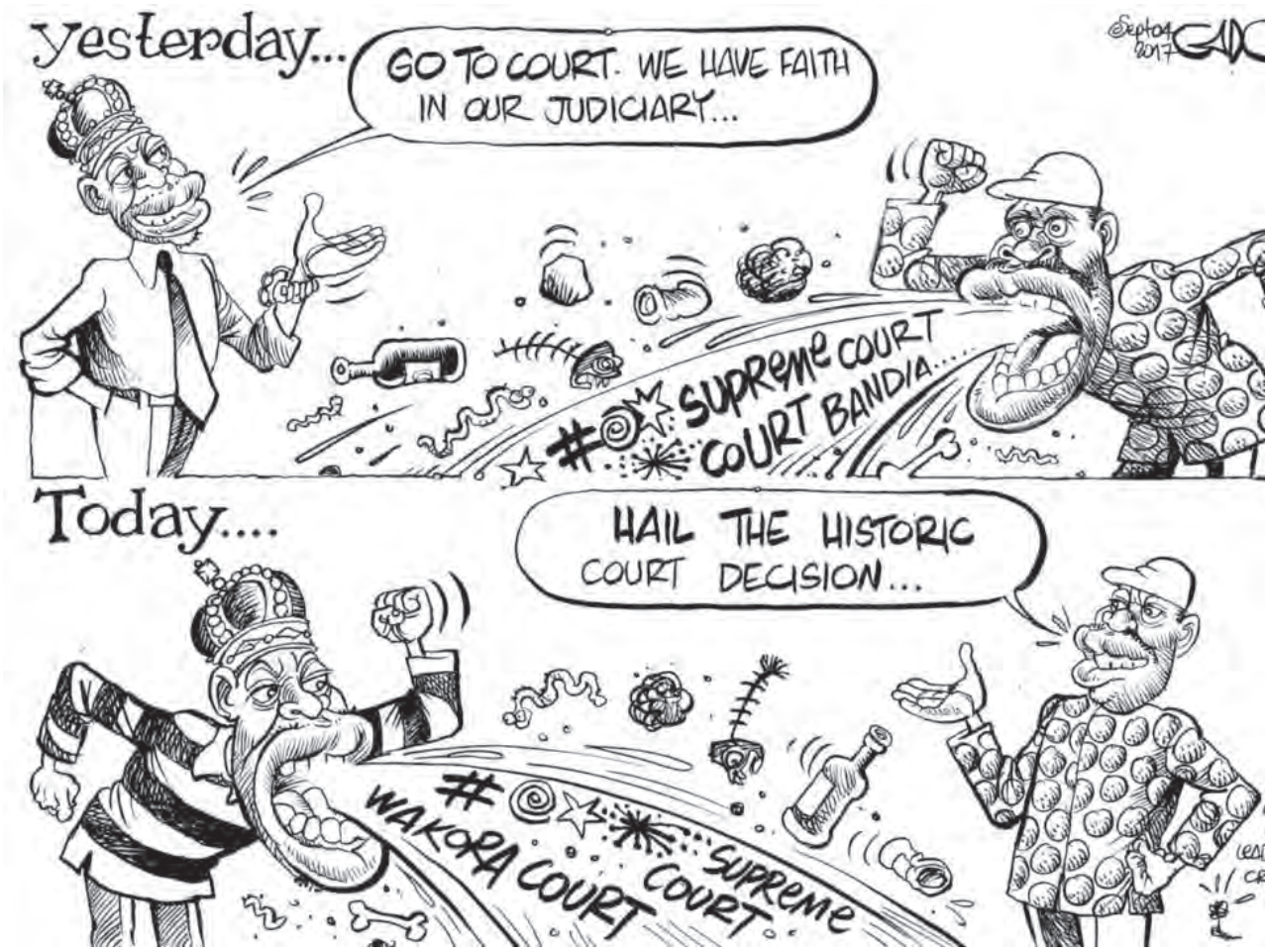
It makes me sick when I eat it, but it is a sickness I am comfortable with. One I expect. One I would rather have for fear of whatever else the dessert menu has to offer.

Violence, like my crème brulee, sickens the public. But for the fear of change - and out of the ignorance of the law and the requirement for elections to abide by principles of the rule of law and democracy - we stand it. Even accept it. Over and over. But I guess it is the *Kenyan* thing to do - or is it?

Story from many by Teresa Mutua,
Programme Manager - Access to Justice Programme,
ICJ Kenya.

Part One

The State of the Independence of the Judiciary & the Judicialisation of Politics



The State of Judicial Independence in Kenya - Reflections from the 2017 Presidential Elections

Walter Khobe Ochieng[1*]

1. Introduction

When Kenya enacted a new constitution in 2010, many believed that the new dispensation would transform the country into a more democratic, accountable, and just society. Kenyans viewed the 2010 Constitution as a powerful tool through which a set of norms would be produced which would provide checks and balances on the exercise of power while empowering citizens through a broad range of rights and freedoms. This is due to the commonly held understanding that a Constitution, not only sets out the legal rules according to which a country must be governed, but also creates a normative framework, which helps to shape the way in which democratic politics function.[2] It is in this sense that Kenya's 2010 Constitution creates a multi-party democratic state founded on the values and principles of governance articulated in *Article 10* of the Constitution.[3]

The Constitution imposes an obligation on judges to interpret, enforce, and apply its provisions in a manner that would help alter Kenya's political culture, by facilitating a move towards democratic and accountable governance.[4] To achieve this objective, the Constitution provides for an elaborate institutional and normative framework that guarantees *de jure* judicial independence and functional autonomy to the judicial branch of government.[5]

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2 P. de Vos, 'The Constitution Made Us Queer: The Sexual Orientation Clause in the South African Constitution and the Emergence of Gay and Lesbian Identity', in D. Herman, and C. Stychin (eds.), *Sexuality in the Legal Arena* (London: Athlone Press, 2000), pp. 199–200.

3 See articles 4 and 10 of the Constitution of Kenya, 2010 (hereafter: Constitution). These constitutionally entrenched values and principles of governance include: human dignity, social justice, the rule of law, democracy, human rights, good governance, transparency, and accountability, among others.

4 See articles 10, 20(4), 159, and 259 of the Constitution.

5 See generally Chapter 10 of the Constitution. For an elaborate critique of the legal and institutional framework for judicial independence in the 2010 Constitution, see W.O. Khobe, 'The Judicial-Executive Relations in Post-2010 Kenya: Emerging Judicial Supremacy?', in C.M. Fombad (ed.), *Separation of Powers in African Constitutionalism* (Oxford: Oxford University Press, 2016), pp. 286-299.

This has been done to ensure that the Judiciary operates optimally and is not captured and hollowed out. However, a great deal of research has found that formal constitutional protections do not guarantee a truly independent Judiciary.[6] This has been the experience of Kenyans following the 2017 elections with the re-invigorated post-2010 Judiciary facing challenges, including attacks by other state organs, in enforcing its constitutionally vested mandate. The 8 August and 26 October 2017 Presidential elections and adjudication of the disputes surrounding those elections brought to the fore institutional challenges that the Judiciary faces and its capacity to resist attacks on its independence.

This paper proceeds on the understanding that judicial independence and impartiality are central elements of any conception of the rule of law. As the 'Venice Commission' of the Council of Europe made clear a few years ago, the Judiciary must be:[7]

> ... free from external pressure, and is not controlled by the other branches of government, especially the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Courts should not be subject to political influence or manipulation. 'Impartial' means that the Judiciary is not – even in appearance – prejudiced as to the outcome of the case.

On this account, a judge is independent when he or she can take decisions based on his or her own legal philosophy and interpretation of law. Thus, judicial independence refers to independence of the judicial system from external political, economic and social influence, and to the ability of individual judges to make independent decisions based on their own interpretation of law. On this reading, a Judiciary that is insulated from legislative and executive influence as well as from other private interests is not only a fundamental principle of the rule of law but also the central precondition for good governance and consolidation of democracy. Independent courts serve as an effective mechanism that controls and constrains the operation and power of the Legislature and Executive.

This study interrogates the state of judicial independence in Kenya, in the context of the 2017 elections and the reaction by the political class to the adjudication of disputes around the conduct of the 2017 elections. The overall aim of the paper is to call into question whether the norms contained in the Constitution have had the effect of guaranteeing judicial independence taking into account the context of judicialisation of politics in Kenya.

The paper shows that the Judiciary is, arguably, not as institutionally secure as it appears on paper and this challenges our notion of its potential impact on Kenyan life. It is divided into six parts. Part 1 lays the basis for the ensuing critique. Part 2 examines how the climate of violence, fear and intimidation may have affected the independence and impartiality of the Judiciary in the period between the 8 August presidential election and the repeat election held on 26th October 2017.

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6 See R. S. Keith, 'The Protection of Judicial Independence in Latin America', (1987) 19 *University of Miami Inter-American Law Review*, 1–35; V. Yash, 'The Independence of the Judiciary: A Third World Perspective', (1992) *Third World Legal Studies,* 127–77; J. A. Widner, 'Building Judicial Independence in Common Law Africa', in A. Schedler, *et al*, (eds.), *The Self-Restraining State: Power and Accountability in New Democracies,'* (Boulder, Colorado: Lynne Rienner Publishers, 1999), Pp. 177–95.

7 European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law, Strasbourg, CDL-AD (2011) 003 Rev, April 2011, 12.

Part 3 interrogates the implications of the failure of the Supreme Court of Kenya to raise a quorum, in unclear circumstances, to hear a petition filed on 25th October 2017 seeking to halt the 26th October Presidential election, particularly on public confidence in the Judiciary. Part 4 analyses the perceived hostility from the Supreme Court bench against a section of Petitioners (civil society actors) during the hearing of a petition challenging the credibility of the October 26th repeat poll given the environment of violence, fear and intimidation which prevailed in the country and permeated the electoral management body at the time the repeat election was being held. Part 5 examines comparative global experiences and international best practices on judicial independence in times of crisis and contrasts these with the position Kenya's Judiciary, particularly the Supreme Court, found itself in following its annulment of the 8 August 2017 presidential election. This part also offers policy recommendations that can be adopted to strengthen judicial independence in Kenya. Part 6 concludes with the lessons from the study for strengthening judicial independence in Kenya in light of the lessons from adjudication of the 2017 electoral disputes.

2. The Climate of Violence, Fear and Intimidation After the Nullification of the 8 August 2017 Elections and its Implication for the Independence and Impartiality of the Judiciary

During the 2017 electoral process, the courts were in many ways the epicentre of politics. The courts provided an important arena for the battle between the two major protagonists: the Jubilee Party and the National Super Alliance Coalition (NASA). The opposition, NASA, used the law and the courts to fight the ruling Jubilee Party and the Independent Electoral and Boundaries Commission (Electoral Commission) over the fairness of the rules and systems put in place for the conduct of the elections. The cases filed by NASA included: a petition for the 8 August elections to be halted should the Electoral Commission fail to put in place a back-up system for the electronic transmission of results system, and a challenge to the procurement and award of the ballot printing tender to Al Ghurair company for lack of public participation.[8] The cases filed by NASA followed the success by a group of human rights activists who got a declaration by the courts that the results declared by presiding officers at the polling stations could not be altered by the Electoral Commission after declaration at the polling stations.[9]

Subsequent to the 8 August 2017 election, the NASA presidential candidate and his running-mate, Raila Odinga and Kalonzo Musyoka respectively, moved to the Supreme Court of Kenya (the Court) challenging the declaration of Uhuru Kenyatta as President-Elect by the Electoral Commission.

The Court, on 1 September 2017, by a majority of four judges to two dissenting judges, annulled the 8 August 2017 presidential election.[10]

8 See W. Mwangi, 'Nasa loses another polls suit, court says IEBC has KIEMS back-ups' Available at: https://www.the-star.co.ke/news/2017/07/21/nasa-loses-another-polls-suit-court-says-iebc-has-kiems-back-ups_c1601547 (accessed on 15 April 2018).

9 *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR.

10 *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & another*, Election Petition 1 of 2017, [2017] eKLR.

The Court made a declaration that the presidential election held on 8 August 2017 was not conducted in accordance with the Constitution and the applicable law rendering the results invalid. Further, the Court issued an order directing the Independent Electoral and Boundaries Commission to organize and conduct a fresh presidential election in strict conformity with the Constitution and applicable election laws within 60 days of the Court's determination.[11] It can be argued that the courts took up the challenge and made bold interventions to ensure that the electoral process complied with electoral rules and standards embodied in the Constitution and electoral laws.

The intervention by the Judiciary in enforcing the electoral rules and standards during the 2017 electoral process was normatively justified given that in a democratic system, courts are vested with the mandate to 'clear the channels of political change'[12] and to ensure protection of minorities as envisaged in the Bill of Rights. John H. Ely famously developed the argument that the constitutional role of judges is defined by what he calls "representative –reinforcing" meaning that judges should try to ensure that the democratic process functions as envisaged in the Constitution. Malfunctions occur, Ely says, when: "the elected representatives are choking off the channels of political change to ensure that they will stay in and the outs will stay out". [13] Thus, the Judiciary played an oversight role over the democratic process with respect to the 8 August 2017 elections, by sanctioning violations of electoral rules and broader democratic principles.

Further, by intervening in several instances before the day of the elections, the courts acted to hinder self-serving alterations of the legal and institutional framework for the elections and preserved space for actors in political and civil society to perform a meaningful role in the electoral process. This role of the Judiciary is particularly important in the context of a democracy that is still in transition from an authoritarian legacy like Kenya. Judges should in this regard be viewed as the guardians of the democratic process.[14]

Following the landmark judgment by the Supreme Court, President Uhuru Kenyatta whose re-election had been nullified, was conciliatory in his immediate reaction to the Court verdict. In a press conference from State House, Nairobi, he declared:[15]

> Let me …say that it is important for us as Kenyans to be respecters of the rule of law. I personally disagree with the ruling that has been made today, but I respect it as much as I disagree with it……My primary message today to every single Kenyan is peace. Let us be people of peace.

11 This is a constitutional imperative provided for in Article 143 of the Constitution.

12 By "clearing the channels of political change", I mean: to fend off attempts to acquire/hold power by illegitimate means such as through opportunistic amendment of the constitution, amendment and replacement of electoral laws, gerrymandering, censorship, restriction of political rights, rigging of votes, etc.

13 J.H. Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980); See also S. Issacharoff, and R.H. Pildes, 'Politics as Markets: Partisan Lockups of the Democratic Process,' (1998) 50 *Stanford Law Review* 643, 668.

14 See in this regard: C. Nino, *The Constitution of Deliberative Democracy* (New Haven: Yale University Press, 1997).

15 See President's Uhuru Kenyatta's statement on the Supreme Court's decision. Available at: http://www.president.go.ke/2017/09/01/transcript-of-president-uhuru-kenyattas-statement-on-the-supreme-court-decision/ (Accessed on 15 April 2018).

However, subsequent utterances and actions by President Kenyatta and members of his Jubilee Party were not as magnanimous as his initial reaction to the Court's decision. In effect, the ruling Jubilee Party has identified the Judiciary as an impediment to its hold on power and has decided to engage "constitutional hardball"[16] tactics to ensure that the Judiciary becomes subservient to the executive branch of government. It is these initiatives by the Jubilee Party that will be the focus of the rest of this section.

2.1. Rhetorical Attacks on the Judiciary and Social Media Propaganda

After President Uhuru Kenyatta's magnanimous speech at State House, he held an impromptu rally in Nairobi on the afternoon of 1 September 2017 and accused the Court of ignoring the will of the people and dismissed the judges as *Wakora* (Swahili for thug). At another meeting on 2 September 2017, with elected officials from his Jubilee Party at State House, he issued worrisome veiled threats to the Judiciary. The President is reported to have said in words directed to the Judiciary:[17]

> Who even elected you?...We have a problem and we must fix it… We shall revisit this thing. We clearly have a problem.

Taking cue from the President, the Cabinet Secretary for Internal Security, Dr. Fred Matiang'i, has continued the trend of unjustified rhetorical attacks on the Judiciary. While appearing before the Administration and National Security Committee of the National Assembly, to explain the circumstances leading to the cancellation of the citizenship and purported deportation of the opposition activist, Miguna Miguna- a process which violated and defied several court orders issued by the High Court, the Cabinet Secretary accused judges of being in unholy alliance with the opposition and opposition activists.

He is reported to have said:[18]

> There is a clique in the Judiciary that has been captured by the civil society and activist lawyers who want to embarrass the government …It is an evil clique of judicial officers who want to drag us by the collar through trial by the public court.

Concurrent with the harsh rhetorical attacks on the Judiciary, there has been well-choreographed propaganda using social media and other platforms aimed at tarnishing the reputation of judges who were part of the majority in the 1 September 2017 decision.[19]

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16 M. Tushnet 'Constitutional Hardball' (2004) 37 *The John Marshall Law Review*, pp. 523-553 coined the notion of "constitutional hardball" to refer to political (either legislative or executive) initiatives that politicians adopt when politicians in a dominant party see the possibility that they may be displaced from power. These politicians adopt tactics that are in tension with the ethos of the constitution to preserve their status.

17 See 'Uhuru Kenyatta to Court: "We Shall Revisit This"' Available at: https://www.aljazeera.com/news/2017/09/uhuru-kenyatta-court-revisit-170902130212736.html (Accessed on 15 April 2018).

18 See J. Ngirachu, 'Biased Judges Soiling Judiciary, Says CS Matiang'i' Available at: https://www.nation.co.ke/news/Biased-judges-soiling-Judiciary--says-Fred-Matiang-i-/1056-4370962-s934pmz/index.html (accessed on 15 April 2018).

19 See M. Gaitho '#WakoraNetwork Linked State House to Top Court's Problems' Available at: https://www.nation.co.ke/news/politics/WakoraNetwork-linked-State-House-to-top-court-s-problems-/1064-4119304-ah8qk7/index.html (accessed on 18 April 2018).

Individuals linked to the President's communication team created the #WakoraNetwork hashtag, and tried to depict judges as corrupt and acting under the influence and direction of a civil society cartel that they allege have illegitimately taken control of the Judiciary.

These harsh rhetorical attacks and social media propaganda directly undermine the central tenets of rule of law and judicial independence. This kind of attack undercuts more than the reputation of an individual judge; it undercuts the premise of Kenya's judicial system: judicial independence and respect for the rule of law. Even if judges rose above the relentless hostile rhetoric, the long term effects are damaging in terms of politicization of the courts. As Issacharoff points out, such attacks alert us to the precarious position of the courts and their limited power to narrow the gap between constitutional tenets and practice because in "repeated engagements with entrenched political power, a confrontational Judiciary is at grave risk of emerging as the loser".[20]

Furthermore, the rhetorical attacks and social media propaganda on judges, is evidence that Kenya's constitutional experiment has not (yet) fully delivered on its promise. Kenya remains a deeply authoritarian state. Respect for the values and principles of rule of law, constitutionalism, human rights, openness, and transparency is not apparent among state functionaries or in the actions or attitudes of organs of state. The tension that arises within the governance system whenever the Judiciary holds the other arms of government accountable is proof that the system of checks and balances is not as effective as intended by the drafters of the 2010 Constitution.

The political branches of government see the Judiciary as an intrusive and unnecessary irritant whenever their actions are questioned. They do not believe that public power should be accountable or limited.

However, it should be noted that the intervention by the courts in the political process has been in the interest of protecting and expanding democratic rights, not in order to establish courts as an unaccountable judicial superpower as alleged by critics. Against the background of democratic stagnation (and probably even recession), judicial intervention is exactly what Kenya's young democracy needs in order to consolidate. It should be pointed out that Kenya's post-2010 constitutional democracy was established to replace the deeply authoritarian pre-2010 system. The ruling elite and the state bureaucrats who govern the country were cultured in the pre-2010 dispensation thus the 'habits' of that era – including absolute and unchecked exercise of power have not entirely dissipated.[21]

This informs the discomfort expressed by the ruling elite and state bureaucrats to the new reality that the courts refuse to bend to their desire for unaccountable governance.

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20 S. Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge: Cambridge University Press, 2015), p. 264.

21 The late historian E.S. Atieno Odhiambo, in 'Democracy and the *Ideology of Order* in Kenya, 1888—1987' in M. Schatzberg (ed.), *The Political Economy of Kenya* (New York: Praeger Publishers, 1987), pp. 177-201 described post-independence Kenya as governed by an "ideology of order" where lack of accountability was the hallmark of governance processes. See also E. Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* pp.31-48, who uses the phrase "culture of authority" to describe a similar phenomenon in pre-1994 apartheid South Africa.

It is true that these rhetorical attacks and social media propaganda against the Judiciary have not, or have not yet, materialized into laws or constitutional amendments. Thus, one may arguably claim that this study gives them "too much weight" in the discourse. To this, Ilan Saban provides a strong answer. Counter-reaction is not fulfilled in crystallizing an explicit and formal legal change. Condemnatory and threat expressions by powerful political elites carry great influence both on judges and the society within which they act.[22] Moreover, the influence of such manoeuvres is strong because the threats become not only more frequent but more real. The explicit threat in a severe counter-political backlash towards the Judiciary carries with it credibility, in light of the governing Jubilee Party's clear control over the legislative process. An additional purpose of the various attacks directed at the Judiciary is not only to deter the courts, but to carry symbolic and rhetorical means in the struggle over the legitimacy of the role of the Judiciary in resolving political controversies.

2.2 Unjustified Attempted Removal of Judges and Registrar of the Supreme Court

Following the nullification of the 8 August 2017 presidential elections, a Jubilee Party parliamentarian – Ngunjiri Wambugu- and activists associated with the Jubilee Party lodged unsubstantiated petitions with the Judicial Service Commission (JSC) to have three of the judges who were part of the majority decision in the 1 September 2017 decision removed from office for alleged gross misconduct. The judges targeted for removal were: Chief Justice David Maraga, Deputy Chief Justice Philomena Mwilu, and Justice Isaac Lenaola.[23] In the petitions filed with the JSC, the Chief Justice was accused of being held captive by a group of non-governmental organisations, who were alleged to be funding a number of the Judiciary's programmes, including technical support and training at the Judiciary Training Institute. On the other hand, Justices Mwilu and Lenaola were accused of being in contact with individuals associated with the opposition during the hearing of the presidential petition.

In another affront directed at the independence of the Judiciary, the executive branch roped in the Ethics and Anti-Corruption Commission (EACC) and the police to probe the Registrar of the Supreme Court, Esther Nyaiyaki.[24] The Registrar was to be probed over alleged doctoring of a scrutiny report of the presidential electoral results which formed the basis of the majority's finding that there were irregularities in the presidential results leading to nullification of the results. It should be noted that it is the JSC that has a disciplinary oversight over registrars and other judicial officers.[25]

The use of criminal investigative agencies to harass the Registrar of the Supreme Court is an attempt by the Executive to bypass the constitutionally provided disciplinary authority in the scheme to harass those perceived to have played a role in the nullification of the 8 August 2017 elections.

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22 I. Saban, 'Israel: The Political Counter-Reaction to the Constitutional Revolution,' (2017) 13 *The Public Sphere* 13, 21-23.

23 See N. Agutu, 'JSC Receives Petitions against Maraga, Mwilu, and Lenaola' Available at: https://www.the-star.co.ke/news/2017/09/19/jsc-receives-petitions-against-maraga-mwilu-and-lenaola_c1638405 (Accessed on 15 April 2018).

24 D. Mwere, 'EACC Lacks Authority to Probe Supreme Court Registrar, LSK Says' Available at: https://www.businessdailyafrica.com/news/LSK-faults-move-probe-Esther-Nyaiyaki/539546-4124550-22p5rpz/index.html (Accessed on 15 April 2018).

25 Article 172(1) (c) of the Constitution.

The attempt at removal of the judges of the Supreme Court and criminal investigations against the Registrar of the Court are a direct attack against the decisional independence of the Supreme Court. The petitions for removal of the judges can be argued to have been cautionary, intended to scare the Judiciary into submission. While individual judges were singled out, it can be seen as a warning or threat to the institution as a whole. The damage it does to judicial independence is on multiple levels: symbolically, to the outside world it perpetuates the image of a court struggling against politicization. Within the institution itself it breeds a climate of fear amongst judges.

2.3 Amendment of Electoral Laws

In what the Jubilee Party argued to be aimed at preventing the nullification of another election, the party embarked on amendment of electoral laws to raise the legal threshold for judicial invalidation of elections.[26] The process of amendment of electoral laws was carried out unilaterally by the ruling party with the opposition boycotting the parliamentary process.

The ruling party also defied protests and pleas by the civil society, religious groups, and the diplomatic community that it was not an opportune moment for electoral amendments given the then impending repeat elections. It should be noted that the High Court, later on 6 April 2018, ruled that most of the provisions contained in the amendments to the electoral laws were unconstitutional.[27]

The practice of legislative override of judicial decisions affects judicial independence. To the extent that the legislative branch can easily override judicial decisions, we would expect to see fewer instances of the Court acting independently. An indication that a court is acting independently is that it is willing to overrule the government's actions. One potential downside to legislative override is that courts will anticipate government reprisals; and to the extent that the Court knows that the government will respond to and perhaps even override the Court, the Court will not take actions that invite such reprisals. Put differently, we might expect to find that the Court never rules against the government. It therefore ensures that the Court mirrors the preferences of the incumbent government. This kind of judicial manipulation negates the principles of judicial independence, limited government, and the rule of law.

2.4 Ignoring/Defying Court Orders

The question of compliance with court orders is not new. One of the worse areas of non-compliance with court judgments by the government is with respect to monetary orders,[28] as one lawyer noted: "*to get paid on a monetary judgment you must have connections or friends in the treasury. There is no way of enforcing the monetary judgment*."[29]

26 See J. Ngirachu, 'Election Law Changes: The Summary' Available at: https://www.nation.co.ke/news/Kenya-election-law-change-controversy/1056-4117120-3yhl2dz/index.html (Accessed on 15 April 2018).

27 See *Katiba Institute & 3 others v Attorney General & 2 others*, Constitutional Petition 548 of 2017, [2018] eKLR.

28 See P.O. Ogemba 'Matiba's Death Epitomize Frustration Former Detainees go Through to get Compensated' Available at: https://www.standardmedia.co.ke/article/2001277150/matiba-s-death-epitomize-frustration-former-detainees-go-through-to-get-compensated (Accessed on 19 April 2018).

29 Interview with a senior Advocate of the High Court of Kenya, Nakuru Town on 16 April 2018.

However, the bad blood between the executive branch of government and the Judiciary following the 2017 elections has escalated the problem.

The list of cases where the government has defied the courts includes a number of game-changing political judgments, including orders for the release of the detained and subsequequently deported opposition politician Miguna Miguna, and orders to switch on spectrum for several television stations that remained switched off by the Communication Authority of Kenya for airing the mock swearing in of the leader of opposition Raila Odinga as the "People's President" on 30 January 2018.[30]

If court orders in the most high profile of cases are not adhered to at the very highest levels of government, the trickle down effects are significant.[31]

Rule of law means both citizens and politicians respect the law and its institutions. Furthermore, judicial independence cannot be secured if the impression given by the government is one where judgments are only adhered to when it is politically expedient to do so. If the decisions of the courts are not obeyed and their orders are not effectively implemented, the force of the Constitution will wane and it will become largely a semantic document.[32] This follows from the truism that courts are in fact unable to bring about significant policy change without the political will to enforce their decisions. For example, Gerald Rosenberg[33] showed that lack of political will – the willingness of political actors to take action to carry into effect judicial decisions – was the cause of delayed enforcement of the United States' Supreme Court's order to desegregate public schools in *Brown v. Board of Education*. However, non-compliance with judicial orders need not be a motivation for judicial subservience. Indeed, to have an impact on the governance process, judges must be willing to risk being ignored.

2.5 Attempted Co-option of the Judicial Service Commission

The Constitution in an attempt to safeguard the institutional independence of the Judiciary establishes the JSC to promote and facilitate the independence and accountability of the Judiciary.[34] The JSC has a crucial role to perform in the appointment and removal of judges. It recommends judges for appointment by the President, except for the Chief Justice and the Deputy Chief Justice whose appointment must be approved by the National Assembly.[35]

30 See the International Commission of Jurists- Kenya Section, ' Memorandum Submitted to the Departmental Committee on Security and National Administration Inquiry to the Miguna Miguna Deportation and Removal' Available at: http://www.icj-kenya.org/jdownloads/Legal%20Opinions/Memorandum%20of%20ICJ%20Kenya%20views%20to%20the%20Departmental%20Committee%20on%20Nat%20Security.pdf (Accessed on 15 April 2018).

31 The trend of the government's defiance of court orders has been copied by university lecturers who have defied a court order to call off a labour strike. See S. Ndonga, 'University Dons Defy Court Order to Halt Strike, Set to Appeal Ruling' Available at: https://www.capitalfm.co.ke/news/2018/03/university-dons-defy-court-orders-to-halt-strike-set-to-appeal-ruling/ (Accessed on 15 April 2018).

32 See P. de Vos, 'Between Moral Authority and Formalism' (2009) 2 *Constitutional Court Review* 409.

33 G. N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?,* (Chicago: University of Chicago Press, 1991).

34 See articles 171 and 172 of the Constitution. See generally, W.O. Khobe, 'The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective' in J.C. Ghai, (ed.), *Judicial Accountability in the New Constitutional Order* (Nairobi: International Commission of Jurists-Kenya Section, 2016), pp. 47-71 for a critique of the independence and accountability of the JSC.

35 Article 172(1) (a) of the Constitution.

It also initiates the process of removal of judges, though the determination whether a judge should be removed from judicial office vests with an independent tribunal appointed by the President to inquire into the suitability of a particular judge to hold office.[36] These twin roles, appointment and initiation of judges' removal process, makes the JSC a powerful actor in the control of the Judiciary in the Kenyan context.

This has attracted the attention of the executive branch in the post-2017 elections period which has embarked on the process of reining in and taking control of the JSC.

The JSC is composed of the Chief Justice as its Chairman, one High Court judge, one Court of Appeal judge, one Supreme Court judge, one Magistrate, the Attorney General, two advocates (a man and a woman), one nominee of the Public Service Commission, and a man and a woman to represent the public, not being lawyers appointed by the president with the approval of the National Assembly.[37] The composition of the JSC is carefully crafted and excludes political interests – this was designed to prevent party political considerations from trumping other considerations and to insulate the process of appointment and removal of judges from political considerations.

This is so because in a constitutional democracy like Kenya, judges who enforce an expansive Constitution would be particularly vulnerable to attacks by politicians when the decisions of the judges have far-reaching political consequences.

Dissatisfied with the performance of the previous members of the JSC, who had largely supported the independence of the Judiciary,[38] the President replaced four members of the JSC. The Attorney General, Githu Muigai was replaced with Justice Paul Kihara Kariuki, who was the President of the Court of Appeal at the time of his appointment. The two representatives of the public, Winnie Guchu and Kipng'etich arap Korir, were replaced with Olive Mugenda, and Felix Koskei. While the representative of the Public Service Commission, Margaret Kobia, was replaced by Patrick Gichohi.[39]

It should be noted that the appointments of the three commissioners, the exception being the Attorney General, was later challenged in court for lack of public participation and the High Court temporarily barred the three nominees from assuming office.[40]

In addition, the appointment of Justice Kihara Kariuki as the Attorney General from the bench raises worrying concerns about the independence of the bench. Appointing a judge to serve as the top-most legal adviser of the executive branch undermines the independence and integrity of the judge as well as violates the principle of separation of powers. The appointment points to a possible trend of dangling the carrot of career advancement through attractive executive appointments for judges. Angling for such appointments has the cumulative effect of eroding judicial independence.

36 Article 168 of the Constitution.
37 Article 171(2) of the Constitution.
38 See C. Omondi, 'Kenyan Judiciary on the Defence' Available at: http://www.theeastafrican.co.ke/news/Kenya-Judiciary-on-the-defence/2558-4102810-om1h3q/index.html (Accessed on 15th April 2018).
39 See R. Rajab, 'Is There a Plot to Kick Maraga Team Out of JSC?' Available at: https://www.the-star.co.ke/news/2018/02/27/is-there-a-plot-to-kick-maraga-team-out-of-jsc_c1721027 (Accessed on 15th April 2018).
40 See M. Kakah, 'Court Suspends Swearing-In of JSC Nominees' Available at: https://www.nation.co.ke/news/Court-suspends-swearing-in-JSC-nominees/1056-4335566-6bipwl/index.html (Accessed on 15th April 2018).

In a further attempt to shore up the Executive's control of the JSC, the President purported to submit the name of the elected Court of Appeal's representative to the JSC, Justice Mohamed Warsame, to the National Assembly for parliamentary approval. This purported requirement for parliamentary vetting of a judge elected by judges of the Court of Appeal to represent the appeals court in the JSC violates *Article 171(2) (c)* of the Constitution.[41] The Constitution does not impose parliamentary vetting as a prerequisite for a representative of the Judges to assume office in the JSC.[42]

There is a strong textual argument that the constitution does not require parliamentary approval for elected representatives of judges and lawyers to the JSC. This is due to the fact that the constitution explicitly provides such a requirement for the representatives of the public to the JSC.[43] So if the constitution makers wanted to provide such a requirement for the elected representatives of the judges and lawyers, they would have said it openly, as they did regarding representatives of the public appointed by the President. It should be noted that the electoral dominance of the ruling Jubilee Party that has captured parliament would render such a vetting process to serve as a mechanism of weeding out independent judges who refuse to bend to the whim of the Executive.

The Jubilee Party has enjoyed electoral dominance in parliament, first as a coalition of the National Party (TNA) and United Republican Party (URP) in the 2013 elections and then as a merged party in 2017 elections, with all other parties and coalitions lagging far behind. Such a system in which one political party continuously wins overwhelming electoral victories in elections is often referred to as a "dominant-party democracy".[44]

It is important to note that the electoral dominance of one political party has the potential to influence the manner in which various constitutional structures in a democracy operate. Advocates of the dominant-party thesis argue that the dominant status of one political party in a democracy has the tendency to erode the checks on the power of the Executive created by a democratic constitution.

Legislative oversight over the Executive in Parliament may be stymied and opposition parties may be marginalized where one political party dominates the Legislature. There is also a danger that a dominant party may 'capture' various independent institutions –including independent constitutional commissions like the JSC – by ensuring parliamentary approval for people whose views are agreeable to the dominant party's agenda thus removing effective checks on the exercise of power by the executive branch of government.[45]

41 See F. Olick, 'State Wants JSC Picks to be Vetted by Parliament,' Available at: https://www.the-star.co.ke/news/2018/04/23/state-wants-jsc-picks-to-be-vetted-by-parliament_c1747653 (Accessed on 25 April 2018).

42 The High Court temporarily barred the National Assembly's intended vetting of Justice Warsame. See A. Wambulwa, 'Court Bars MPs from Vetting Justice Mohamed Warsame for JSC Post' Available at: https://www.the-star.co.ke/news/2018/03/26/court-bars-mps-from-vetting-justice-mohamed-warsame-for-jsc-post_c1736580 (Accessed on 15 April 2018).

43 See article 171(2) (h) of the Constitution.

44 See S. Choudhry, 'He Had a Mandate: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy', (2009) 2 *Constitutional Court Review* 1; See also S. Issacharoff, 'The Democratic Risk to Democratic Transitions' (2013) 5 *Constitutional Court Review* 1.

45 P. de Vos 'Between Promise and Practice: Constitutionalism in South Africa More Than Twenty Years after the Advent of Democracy' in M. Adams, *et al* (eds.) *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge: Cambridge University Press, 2017) p. 234.

2.6 Budgetary Manipulation as an Assault on Institutional Independence

Following the annulment of the 8 August 2017 presidential election, the Executive made a decision to slash the budgetary allocation for the Judiciary and a number of independent constitutional offices. The government rationalized this reduction of budgetary allocation on the basis that it needed money for the repeat presidential elections and to enhance free day secondary education. [46]

The Judiciary lost 1.95 billion Kenya Shillings (Ksh.) in the budget cuts presented by the Cabinet Secretary for the National Treasury, Henry Rotich, through the Supplementary Estimates Number 1 for the financial year 2017/18. The loss of Ksh. 1.95 billion represents 11.1 per cent decrease from an earlier allocation of Ksh. 17.561 billion towards the dispensation of justice. Of the Ksh. 1.95 billion lost by the Judiciary, Ksh. 1.07 billion was slashed from the Judiciary's gross current estimates while development spending lost Ksh. 879.9 million.

The JSC, an independent Commission that plays a crucial support role to the Judiciary, had its budget slashed by 62.6 per cent. The JSC's allocation was reduced from Ksh. 490.2 million to Ksh. 183.5 million.

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 of funds from the Judiciary shows that the institution continues to be under-resourced thus compromising its ability to deliver justice effectively. The Judiciary's budget was further capped from Ksh. 31.2 Billion to Ksh. 17.3 Billion through the National Government's Budget Policy Statement and further to Ksh. 14.5 Billion by Parliament through the Appropriation Act.[47]

The process of budgeting and monetary allocation remains a political process as the political branches of government uses this as a mechanism to reward or punish the Judiciary, depending on the stance that the Judiciary takes in political disputes. Furthermore, the process of lobbying by the Judiciary for more financial resources remains a political endeavour that potentially threatens judicial independence. A turning the leadership of the Judiciary into political' supplicant carries with it an obvious risk to judicial independence.[48] A possible solution to this threat to judicial independence would be a constitutional amendment to have a fixed percentage of the budget reserved for the Judiciary as this would eliminate at least the appearance of negotiation between the Judiciary and political branches of government. This includes the enactment and implementation of legislation and rules underpinning the provisions of the Judiciary Fund as envisaged by the Constitution of Kenya 2010.[49]

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46 See W. Menya, 'Treasury CS Raids Judiciary Coffers to Fund Presidential Poll,' Available at: https://www.nation.co.ke/news/Treasury-CS-raids-Judiciary-coffers-to-fund-election/1056-4119008-e5wtec/index.html (Accessed on 25 April 2018).

47 Judicial Service Commission (JSC) 'Statement on the State of the Judiciary in Light of Drastic Cuts in Budgetary Allocations' 24 July 2018 available at https://www.Judiciary.go.ke/download/statement-on-the-state-of-the-Judiciary-in-light-of-drastic-cuts-in-budgetary-allocations/

48 H. K. Prempeh, 'Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa,' (2008) 35(4) *Hastings Constitutional Law Quarterly* 761, at 828.

49 The Kenyan Section of the International Commission of Jurists (ICJ Kenya) 'Statement on the State of the Judiciary in Light of Drastic Cuts in Budgetary Allocations' 7 August 2018 available at http://apanews.net/en/pays/kenya/news/kenya-parliament-faulted-over-onslaught-on-Judiciary

3. The Implications of the Failure of the Supreme Court of Kenya to Raise a Quorum to Hear a Petition Filed on 25th October 2017 Seeking to Halt the 26th October Presidential Election

On 24 October 2017, two days to the scheduled repeat of the 2017 presidential elections, three civil society activists, Khalef Khalifa, Samuel Mohochi, and Gacheke Gachuhi, filed a petition before the Supreme Court seeking to stop the Electoral Commission from conducting the then impending repeat presidential elections.[50] The trio argued that the IEBC Commissioners were serving partisan interests.

The Chairman of the Electoral Commission had publicly admitted that he could not guarantee a credible election, and that the withdrawal of the opposition candidate, Raila Odinga, from the repeat election vacated the gazette notice announcing the 26 October repeat elections. Chief Justice David Maraga certified the petition as urgent and directed that it be heard on 25 October 2017.

On 25 October 2017, the date scheduled for hearing the petition, only Chief Justice Maraga appeared in court. The Chief Justice announced that the Supreme Court could not hear the petition due to a quorum hitch. He announced that only two judges, the Chief Justice and Justice Lenaola, were present when the Court convened. Since two judges could not meet the stipulated threshold of five judges to form a quorate court at the Supreme Court, the petition could not be heard.[51] He went ahead and explained that the Deputy Chief Justice Mwilu could not attend court due to an attack on her bodyguard, who had been shot by unknown attackers on the evening of 24 October 2017.

Justice Mohamed Ibrahim was unwell and was receiving treatment outside the country. Two of the judges, Justices Smokin Wanjala and J.B. Ojwang' were "unable to come to court". While the seventh judge, Justice Njoki Ndung'u was out of the capital city, Nairobi, and was "unable to get a flight back to Nairobi in time".[52]

It is arguable that due to the extreme rhetorical attacks, threats of removal of judges, and even an ill-disguised warning of physical harm to the judges, through the shooting of Deputy Chief Justice Mwilu's bodyguard, the judges decided to exercise Bickelian-inspired prudential discretion not to hear the petition on postponement of the repeat election out of concern for institutional security of the Supreme Court. Alexander Bickel's philosophy of judicial prudence made famous what he called "passive virtues"[53]

50 See Daily Nation, 'Kenyan Trio Asks Supreme Court to Stop Repeat Election' Available at: http://www.theeastafrican.co.ke/news/3-voters-Supreme-Court-stop-Kenya-election/2558-4153792-cfl2gnz/index.html (Accessed on 16 April 2018).

51 Article 163(2) of the Constitution provides that: "The Supreme Court shall be properly constituted for the purposes of its proceedings if it is composed of five judges."

52 See The East African, 'Kenya Supreme Court Fails to Hear Repeat Election Case' Available at: http://www.theeastafrican.co.ke/news/Kenya-elections-Supreme-Court-quorum/2558-4155052-1095f1nz/index.html (Accessed on 16 April 2018).

53 See A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, CT: Yale University Press, 1986); For a discussion situating Bickel in the context of a court dealing with difficult political circumstances, see C. H. Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford: Oxford University Press, 2013). See also R. Dixon, and S. Issacharoff, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy', (2016) *Wisconsin Law Review* 683, 699 describing the strategy of deferred judicial review as a means for the Court to avoid direct political confrontations.

by which a court could avoid hearing politically damaging disputes that would harm the Court in the long run. By advocating for the United States Supreme Court to practice "passive virtues", Bickel urged the Court to discover means of sidestepping some issues that might damage its prestige and institutional effectiveness. Bickel challenged the argument that Congress, simply by conferring jurisdiction, could compel the Court to adjudicate certain type of cases. Regardless of the disputes that found their way to the Court's doorstep because of statutory requirements, the Court retained discretion to decline the exercise of jurisdiction.[54]

It should be noted that Bickel recognized that the considerations open to a court "are for the most part prudential in character, but they should not be predilectional, sentimental, or irrational."[55] To behave in this fashion would diminish the prestige and legitimacy of a court.

The practice of "passive virtues" by the Supreme Court of the United States has sometimes resulted in outright refusal to decide cases that might trigger political retaliation, as with the justices' initial decision to avoid the issue of miscegenation in the wake of the regional firestorm surrounding *Brown v. Board of Education*.[56] Sometimes these political calculations have resulted in strategic retreats from incipient policies that are under assault, as with the United States' Supreme Court's decision in the late 1950s to pull back from offering modest due process protections to those who refused to cooperate with the House Un-American Activities Committee.[57]

Courts, therefore, do not only pursue right decisions from the standpoint of law. Political survival is also a primary pragmatic concern. A court that is insensitive towards that fact is less capable of carrying on its constitutional assignment. Courts must avoid, therefore, impolitic moves that erode their reservoir of energy and may undermine their very political viability.

On this reading of the failure by the Supreme Court of Kenya to muster a quorum on the 25 October 2018, the judges of the Supreme Court could be argued to have been passively virtuous without deigning to explain themselves. This is clearly evident in Justices J.B. Ojwang' and Smokin Wanjala's communication to the Chief Justice that they were "unable to come to court", without tangible reason for their inability to make it to court. It is arguable that the judges, given the extreme backlash from the ruling party and its supporters following the 1 September 2017 decision, were reluctant to intervene or interfere in the political process. A plausible argument can be made that the institutional security of the Judiciary is best safeguarded by pragmatic judges who are prepared to enforce the provisions of the Constitution against the politically dominant Legislature and Executive but also appropriately deferent to avoid, as far as possible, continuous and persistent head-on confrontation with the political branches of government.

54 See A.M. Bickel, 'The Supreme Court, 1960 Term-Foreword: The Passive Virtues', (1961) 75 *Harvard Law Review*, p. 40, at 46.

55 As above at p. 79.

56 See *Naim v. Naim,* 350 U.S. 891, 891 (1955); 350 U.S. 985, 985 (1956). Justice Frankfurter expressed the view in conference that "[t]o thrust the miscegenation issue into 'the vortex of the present disquietude' would risk 'thwarting or seriously handicapping the enforcement of [*Brown*].' " Memorandum from Justice Felix Frankfurter (November 4, 1955), *reprinted in* D. J. Hutchinson, 'Unanimity and Desegregation: Decision-making in the Supreme Court, 1948–1958,' (1979) 68 *Georgetown Law Journal*, 1, 64.

57 See W. F. Murphy, *Congress and the Court: A Case Study in the American Political Process*, (Chicago: University of Chicago Press, 1962), pp. 229–30; See also C. H. Pritchett, *Congress versus the Supreme Court, 1957-1960*, (Minneapolis: The University of Minnesota Press, 1961), pp. 48–53.

However, in response to the Bickelian-prudence inspired defence of the Court, it can be argued that the Court's institutional security comes from public support for the Court and thus the judges should have sat to hear the petition to inspire public confidence in the judicial process.

As is often claimed and acknowledged, courts, having neither the power of the purse nor the sword,[58] rely on their legitimacy in order to secure compliance with their decisions. That legitimacy can be normative – that is, derived from courts' adherence to principles of legitimacy under a particular theory of justice – or it can be sociological – that is, derived from the empirical fact that people, for whatever reason, happen to find their decisions acceptable.[59]

In the sociological view, public support for the Court bolsters it against attacks by the political elite. The argument is that in considering the relationship between legal legitimacy of a court, public support for that court, and the institutional security of that court, one can assume that "institutional security typically follows from public support".[60] The vigorous pursuit of the values and principles of the Constitution will, at least in theory, enhance the institutional security of the Court as it will enhance public support for it.

Of course, this does not discount the fact that there is a potential tension between the norms embodied in the Constitution and the beliefs of many Kenyan voters, who often harbour the most reactionary views and would not lend the Judiciary public support due to ethnic or political interests. Despite this qualification, it is arguable that had it sat, the Supreme Court would have portrayed the image of a guardian of the democratic process and this would have inspired public confidence in the Judiciary.

4. Perceived Hostility from the Supreme Court Bench Against a Section of Petitioners (Civil Society Actors) During the Hearing of a Petition Challenging the Credibility of the October 26th Repeat Poll

The core function of the Judiciary is to impartially apply the Constitution and the Law to any dispute that comes before courts. This function is linked to the legitimacy of the Judiciary and the constitutional order. Impartiality is critical. That is, judges are called upon to examine without prejudice the facts before them, and apply the law even-handedly and without being influenced by political views or personal preferences. Not only does impartiality provide the best possibility of justice to the dispute at hand; it also builds credibility and trust in the Judiciary as an institution.

Despite this crucial place of impartiality in the administration of justice, the Supreme Court Bench was perceived to have been hostile to civil society activists who filed a petition to challenge the result of the October 26th 2017 repeat of the presidential election.

58 The Federalist No. 78 (Alexander Hamilton).

59 On the different meanings of legitimacy in the judicial context, see R.H. Fallon, Jr., 'Legitimacy and the Constitution', (2005) 118 *Harvard Law Review*, 1787; O. Bassok, 'The Sociological-Legitimacy Difficulty', (2011) 26 *Journal of Law & Politics*, 239.

60 See T. Roux, 'Principle and Pragmatism on the South African Constitutional Court', (2009) 7 *International Journal of Constitutional Law*, 106 at p 110.

Human rights activists, Njonjo Mue and Khalef Khalifa, filed a petition challenging the integrity of the repeat of the presidential election. They raised questions on universal suffrage and failure by the electoral commission to conduct elections in all the 290 constituencies. They also alleged that the elections were marred with violence and intimidation before and during the voting process, this in addition to having been laced with massive irregularities and illegalities. The two human rights activists also alleged that the electoral commission was not independent as it was being influenced by outside forces. Further, they claimed that the withdrawal of the NASA presidential candidate from the polls vitiated the outcome of the election.[61]

A comparison of the approach and disposition by the Supreme Court to the *Raila Odinga petition* challenging the 8 August elections and the same bench during the hearing of the *Njonjo Mue and Others petition* reveal worrying and stark change of stance which raises concerns on impartiality by the Bench.

This point can be illustrated by a comparison of the Supreme Court's approach to one of the vexing jurisprudential concerns that has dogged Kenyan legal culture since time immemorial. This is the question of the formalistic judicial philosophy that always lead to Kenyan courts placing undue emphasis on procedural technicalities, thus procedural concerns trumping substantive justice.[62] This state of affairs led to the drafters of the Constitution providing an explicit provision in the form of *Article 159(2) (d)* to the effect that: "justice shall be administered without undue regard to procedural technicalities". The provision is intended to provide an ideational justification for a shift in legal culture. Kenya's Judges and Magistrates Vetting Board poignantly observed thus on the 2010 Constitution's vision for substantive justice:[63]

> We are unaware of any other constitution in the world that has chosen to elevate the avoidance of undue technicalities to the status of an express constitutional value. Sad Kenyan experience indicates why those words were included. The raising of technical and procedural questions was a particularly strong weapon in the armoury of those who sought to defend the powerful and the wealthy with the connivance of compliant judges. Substantive questions could be evaded and matters left to drift in the courts for so long that outcomes became irrelevant. Reliance on ultra- technicality was used to impede the work of agencies set up to investigate malfeasance by those in positions of authority. Far from furthering the rule of law, these narrow, technical rulings, issued in the name of legality, contributed massively to the prevalence of impunity. Indeed, they undermined the rule of law, promoting a spirit of lawlessness that proceeded from the highest in the land all the way down. The unhappy lesson for the country was that the emancipatory vision of the rule of law should not be confused with the tyranny of heartless legalism.

61 See *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 3 others*, [2017] eKLR.

62 See for example, *Mwai Kibaki v. Daniel Toroitich Arap Moi,* Civil Appeal No. 172 of 1999 as consolidated with Civil Appeal No. 173 of 1999, *where the Court held that a petition must be served personally upon the Respondent; See also Kenneth Stanley Matiba v Daniel Toroitich Arap Moi* & Others, Civil Application No. 241 of 1993, Election Petition 27 of 1993 where the *Court insisted that petitions must be personally signed by the Petitioner.*

63 See JMVB Report Number 4 of 2012 at para. 17.

The application of *Article 159 (2) (d)* of the Constitution faced the Supreme Court in both the *Raila Odinga* and the *Njonjo Mue and Others petitions*. Strangely, the Court adopted a different stance in the petitions. While in *Raila Odinga petition* the Court was charitable and upheld the vision of the Constitution by allowing for admission of documents filed out of stipulated timelines,[64] the Court was mean-spirited and adopted a formalistic approach in the *Njonjo Mue and Others petition*. The Court expunged from the Court records and denied the petitioners the opportunity to rely on internal memos from the electoral commission to prove internal wars within the commission and the lack of independence of the commission.[65] These documents had been leaked and were in the public domain, available to every Kenyan on social media and their contents published in the mainstream media, well before the conduct of the repeat presidential elections.[66]

Thus the basis upon which the Court expunged the documents from the Court record is untenable. Moreover, the alleged violation of the Commissions' right to property and privacy, due to access to the leaked internal memos by the petitioners, is unfounded in human rights theory as state organs are duty bearers but not right holders as has been held in Kenyan human rights jurisprudence.[67] It should be noted that the internal memos which were struck out were crucial to the petitioners, thus the petition was in the words of some commentators "doomed after the internal memos were rejected."[68]

This difference in approach by the same Bench over a similar juridical question, taken in the context of the overall hostile disposition of the bench to the lawyers representing the civil society petitioners, raises doubts about the impartiality of the bench.

It is arguable that owing to the attacks the bench had faced following the 1 September 2017 nullification of the 8 August 2017 election, the judges' minds were made up to dismiss any further challenge to and questions on the electoral process regardless of the merit of such a challenge.[69] A give away of this anxiety on the bench can be discerned from the Dissenting Opinion of Justice Njoki Ndung'u to the Majority Opinion in the *Raila Odinga Petition*, where the majority suggested that the Court would invalidate another election should the same fail to conform to the dictates of the Constitution and electoral law.[70]Justice Ndung'u in a vituperative rejoinder writes: "This [suggestion], to my mind is unfortunate – it is injudicious and imprudent."[71]

64 See *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.

65 See *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR.

66 Justice G.V. Odunga of the High Court has subsequently doubted the cogency of the reasoning of the Supreme Court in this decision. See *Okiya Omtatah v Central Bank of Kenya & 7 others* [2017] eKLR at para. 217 where he states: "Pursuant to Article 163(7) of the Constitution, I am bound by the decision of the Supreme Court though I, with due respect, do not entirely agree with it."

67 See *Meru County Government v Ethics & Anti-Corruption Commission* [2018] eKLR.

68 See K. Muthoni, and P. Ogemba, 'Petition Lawyers Caught Off-Guard Over Confidential Documents' Available at: https://www.standardmedia.co.ke/article/2001260850/how-poll-case-was-lost (Accessed on 18 April 2018).

69 An illustrative example of this point is the alleged conservatism of the Chilean Courts. Javier Couso has demonstrated that the conservative jurisprudential leaning of Chilean judges is insufficient explanation for their retreat from their constitutional powers. He shows that such behaviour is actually a survival strategy after traumatic events against judicial independence in Chilean history. As Couso summarizes: the "deliberate passivity" of the Chilean Courts is a "reasonable response by a judicial system that gives priority to its survival". See J. Couso, 'The Politics of Judicial Review in Chile in the Era of Democratic Transition, 1990–2002,' (2003) 10 (4) *Democratization* 70–91, at 88.

70 *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR para. 402.

71 *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR para. 704.

Confronted by the puzzle of a bench that adopts a mean-spirited approach to admission of documents just a few months after embracing an emancipatory approach on the same question, one could point to institutional security concerns as the only plausible explanation for this change of stance. It should be recalled that the 1 September 2017 decision alienated the supporters of the ruling party thus their allegations that the Court was favouring the opposition NASA coalition. It would appear that the Court was determined to make peace with the ruling party thus its quest to regain their support by dismissing the *Njonjo Mue and Others* petition. This is not entirely unprecedented in comparative judicial politics. Some scholars of comparative judicial politics have argued that building legitimacy requires gaining support among successive, non-overlapping constituencies.[72] If courts always favoured the same groups, however, they would not be perceived as legitimate.[73]

For example, Heinz Klug has argued that the South African Constitutional Court's initial success can be explained by the fact that it favoured different constituencies, striking down old apartheid legislation and newer African National Congress (ANC) laws alike.[74]

However, in response to the argument that the Court retreated from its majestic position in the *Raila Odinga 2017 decision* to preserve its legitimacy and thus institutional security. It should be noted that the constitution provides for security of tenure for the judges through stringent and difficult removal process for judges.

Further it provides for onerous constitutional amendment process in case of attempts to disband the Supreme Court or whittle its jurisdictional competence. Thus, the appearance of partiality by the judges during the *Njonjo Mue and Others petition*, even if out of concern for institutional security, is not justified.

It should also be observed that legitimacy can be built through legal techniques such as precedent-based reasoning, "investing rhetorical effort in maintaining neutrality," and carefully crafting decisions so that they appear to be based on legal reasoning alone.[75] This would assure the parties and the public that the Court does not favour any side of the political divide and that there are no extra-legal considerations that influence judicial decision-making.[76] This also obviates the need for the Court to distribute legal victories evenly to the various sides of the political divide, which seems to have been the overriding consideration during the determination of the *Njonjo Mue and Others* petition.

72 See J.L. Gibson, *et al,* 'On the Legitimacy of National High Courts', (1998) 92 *American Political Science Review* 343, at 354–55; See also A.S. Chilton, and M. Versteeg, 'Courts' Limited Ability to Protect Constitutional Rights', (2018) 85 *The University of Chicago Law Review* 293, 301.

73 See M. Shapiro, 'The European Court of Justice: Of Institutions and Democracy', (1998) 32 *Israeli Law Review* 3, at 11 suggesting that a court that "consistently favours some of the power holders over others" will not be seen as neutral, which might undermine its success.

74 See H. Klug, 'Constitutional Authority and Judicial Pragmatism: Politics and Law in the Evolution of South Africa's Constitutional Court', in D. Kapiszewski, *et al*, (eds), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge: Cambridge University Press, 2013) 93, 109–12; See also T. Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005*, (Cambridge: Cambridge University Press, 2013); J. Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa*, (Cambridge: Cambridge University Press, 2016).

75 See R.H. Fallon Jr, 'Legitimacy and the Constitution', (2005) 118 *Harvard Law Review* 1787, at 1840–41.

76 Courts should be especially resilient to popular and partisan pressure, as their very mandate is counter-majoritarian, calling for an uncompromising insistence on what is right and just. They must be 'independent' which means that their loyalty is to constitutional norms, values, and principles only – not to prevailing popular public sentiment or powers that be. Indeed courts have been described as 'Socratic' in this regard, as they are likely to 'offend the values and traditions of the community' and should not be weary of it. See M. Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review,' (2010) 4 *Law, Ethics and Human Rights* 141, 141.

5. Judicial Independence in Times of Crisis: Comparative Perspective on Court Curbing

Whenever court decisions threaten the interests of influential political actors, there is always a tendency for the political actor to retaliate against courts. Mark Tushnet has observed that: Once a heroic court has exercised what is regarded as aggressive constitutional review, and by that positioned itself as a political actor, this creates a political backlash against judicial activism and a political assault to limit the Court's jurisdiction or to change judicial selection methods.[77] Thus the backlash from the ruling Jubilee Party and threats to the independence of the Kenyan Judiciary following the landmark nullification of the 8 August 2017 presidential election is not new.

Such measures are commonly referred to as "court curbing"—that is, "actual changes to the Court's institutional power—through jurisdiction stripping, court packing, or other legislative means."[78] Such measures can be passed through constitutional reform, legislative measures, or the overturn of long-standing conventions.[79] Regardless of the form, their goal is to limit courts' powers. In this section, we look at how different jurisdictions have dealt with threats to judicial independence when faced with threats of court curbing.

5.1. The Case of the United States

When the Lochner-era, the Supreme Court of the United States of America repeatedly struck down President Franklin Delano Roosevelt's (FDR) New Deal Policies during the 1930s, Roosevelt responded with a plan to alter the composition of the Court through court packing.[80] Although there are no provisions within the U.S. Constitution barring an alteration of the Court's size, this was clearly an attempt to alter the composition of the Court in a way that not only made it friendly to the incumbent government but that also subverted the norm that replacement should occur via the natural rate.

Disingenuously citing the courts workload and the justices' advanced age, the plan proposed to allow FDR to appoint an additional judge for each federal judge who declined to retire after the age of 70.[81] With respect to the U.S. Supreme Court it would have permitted Roosevelt to name up to six additional justices.

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77 See M. Tushnet, 'After the Heroes Have Left the Scene: Temporality in the Study of Constitutional Court Judges,' Paper Presented at the Workshop: *Understanding Constitutional Change: The State of the Field* (Tulane Law School, 14 October 2017).

78 See T.S. Clark, 'The Separation of Powers, Court Curbing, and Judicial Legitimacy', (2009) 53 *American Journal of Political Science* 971, 972; See also A.S. Chilton, and M. Versteeg, 'Courts' Limited Ability to Protect Constitutional Rights', (2018) 85 *The University of Chicago Law Review* 293, 314.

79 See D. Landau, 'Abusive Constitutionalism', (2013) 47 *University of California Davis Law Review* 189, 195–215 describing the phenomenon of "abusive constitutionalism," whereby the tools of constitutional amendment and constitutional replacement are used for undemocratic means, including court curbing.

80 G.A. Caldeira, 'Public Opinion and the U.S. Supreme Court: FDR's Court Packing Plan', (1987) 81 *American Political Science Review,* 1139-53.

81 M. Gordon, 'One Text, Two Tales: When Executive/Judicial Balances Diverged in Argentina and the United States*',* (2009)19 *Indiana International & Comparative Law Review* 323-348.

Across the political spectrum, the bid was roundly criticized as a blatant challenge to judicial independence and was rejected by the U.S. Senate Judiciary Committee, who referred to the proposal as: [82]

> a needless, futile and utterly dangerous abandonment of constitutional principle…without precedent or justification. … it would subjugate the courts to the will of Congress and the President and thereby destroy the independence of the Judiciary, the only certain shield of individual rights. … it stands now before the country, acknowledged by its proponents as a plan to force judicial interpretation of the Constitution, a proposal that violates every sacred tradition of American democracy.

FDR's court packing plan was abandoned following the U.S. Supreme Court's famous "switch in time" from opposing to supporting the social legislation of the New Deal era.[83] This is evidence of the fact that despite their nominal structural independence, the U.S. Supreme Court justices are demonstrably attentive to the political environment within which they operate.[84]

5.2. The Case of Russia

Following the dissolution of the Soviet state, the newly elected president of Russia, Boris Yeltsin, clashed with leaders of the Russian parliament over governmental reforms that often came before the new Constitutional Court. The Constitutional Court declared a number of presidential decrees to be unconstitutional.

The President's decree merging the Ministry of Internal Affairs and Ministry of Security; components of three decrees declaring the Communist Party to be illegal; a decree banning the formation of the National Salvation Front; and a televised presidential address were all declared unconstitutional.[85]

Theoretically, the Constitutional Court had broad institutional powers that could hold other branches of government to account, but the implementation of these powers by those branches was speckled at best.[86] However, it should be noted that the institutional endowment that the Russian Constitutional Court supposedly enjoyed was terribly undercut by the problems of effective enforcement, leaving the Court in a far lower standing institutionally than it was conceived to have and providing a major reason to doubt the legitimacy or the political efficacy of the institution as it intervened further into politics. The Russian constitutional court jumped headfirst into the controversy surrounding the negotiations over a new constitution in 1992 between the Legislature and the Executive. The Court chose the side of the Parliament publicly in the final days of the Executive-Legislative crisis.

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82 As above at 342.

83 See B. Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution,* (Oxford: Oxford University Press, 1994).

84 This aspect of U.S. Supreme Court's politics is best captured in the literature on strategic decision-making by the justices. *See* L. Epstein, and J. Knight, *The Choices Justices Make*, (Washington, DC: Congressional Quarterly Press, 1998), p. 13. For an earlier treatment, see W. F. Murphy, *Elements of Judicial Strategy*, (Chicago: The Chicago University Press, 1964), pp. 245-68.

85 See in this regard the accounts in C.L. Thorson, *Politics, Judicial Review and the Russian Constitutional Court* (London: Palgrave Macmillan, 2012); See also A. Trochev, *Judging Russia: The Role of the Constitutional Court in Russian Politics 1990-2006*, (Cambridge: Cambridge University Press, 2008).

86 K. L. Scheppele, '*Guardian of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe,*' (2006) 154 *University of Pennsylvania Law Review* 1757.

To solve the crisis, Yeltsin suspended the Constitutional Court in the fledgling democracy in October of 1993, dissolved the Legislature, and ordered tanks to fire on the Parliament building.[87]

In the Russian case, the constitutional vision of the Constitutional Court was potent in its desire to mold the post-communist transition landscape, but it did not have the unambiguous support of other institutions or broader elements of society. Moreover, the Court's institutional clout was blocked by poor enforcement and low respect among other branches, it lacked allies, and the political power of the Executive proved to be too great to balance against. The court would not be re-established until 1995, and as a meek and passive body.[88]

5.3. The Case of Hungary

In Hungary, a group of roundtable negotiators created a constitutional court in 1989, five months before the first legislative elections under the new post-communist regime. The court was institutionally powerful, having been given strong powers of review in the negotiated transition settlement. The Hungarian Court held a wide constitutional mandate, including the power of abstract ruling, and the ability for it to review legislation both before and after enactment, as petitioned by legislators or even by common citizens.[89]

To prevent the incumbent government from dominating the Court, members were to be appointed by a representative committee of the National Assembly, and approved by a two-thirds vote by the full Legislature.

In the early years of the new regime the Court was active; striking down roughly one third of all legislation it reviewed between 1990 and 1995.[90] This active role was helped by continued divisions within the fractious Legislature, within the government, and between the Legislature and the Executive, leading to constant political friction as legislation to shape the new post-communist Hungarian state was debated back and forth. The Court proved to be highly active politically until 2010.

Hungary's right-wing government, led by Prime Minister Viktor Orban, which came to power after gaining over two-thirds of the seats in Parliament in 2010 adopted a new constitution that both allowed the government to pack the Constitutional Court with government supporters and stripped the Court of many of its powers.[91] The government curbed the Court's power in three ways: by amending the process for nominating constitutional judges as to remove veto power from the opposition parties; by excluding from its jurisdiction many fiscal matters; and by significantly expanding the size of the Court,

87 See L. Epstein, *et al*, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government', (2001) 35 *Law & Society Review* 117, 135.

88 N.J. Brown, and J.G. Waller, 'Constitutional Courts and Political Uncertainty: Constitutional Ruptures and the Rule of Judges', (2016) 14(4) *International Journal of Constitutional Law* 817-850.

89 E. Klingsberg, '*Judicial Review and Hungary's Transition from Communism to Democracy: The Constitutional Court, the Continuity of Law, and the Redefinition of Property Rights'*, (1992)1 *Brigham Young University Law Review* 41, 55.

90 K. L. Scheppele, 'Democracy by Judiciary. Or, Why Courts Can Be More Democratic than Parliaments', in A. Czarnota, *et al*, (eds.), *Rethinking the Rule of Law after Communism* (Budapest: Central European University Press, 2005) 25, 44.

91 See S. Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?', (2015) 53 *Columbia Journal Transnational Law 285*, 295–97.

thus allowing ruling party to appoint rubber-stamp judges.[92] It further abolished the *actio popularis*, which had allowed all citizens to bring a case to court, regardless of whether they were personally affected by the challenged laws or regulations. In the Hungarian case, most of these measures were passed through a series of constitutional amendments and the writing of a new constitution.

5.4. The Case of India

When a court becomes very active in political disputes, the elected branches may want to rein it in by amending the constitution to remove the provisions that judges have used to thwart the intentions of the political branches. This was the experience of the Supreme Court of India beginning in the period from 1960s to the 1970s. The Supreme Court of India engaged in major confrontation with the then Prime Minister Indira Gandhi and Parliament.

In 1967, the Supreme Court of India, by a thin majority of 6-5, held in *Golak Nath v. Punjab*[93] that Parliament could not amend the Constitution to take away or abridge fundamental rights. This decision was severely criticized by the political branches of government. The 1971 elections saw Indira Gandhi campaign on a populist platform against the *Golak Nath* decision and regain two-thirds majority in Parliament. The government quickly passed amendments that directly challenged the Court's declaration that the fundamental rights could not be amended and further shielded laws from fundamental rights review. When that amendment was challenged, the Supreme Court, sitting in its largest strength of 13 judges held in *Kesavanand Bharati v. Kerala*[94] that although Parliament could amend every provision of the Constitution, it could not alter the basic structure of the Constitution. The basic structure doctrine was created in large part out of the immediate political circumstances in which the Court and the country found themselves.

The Court justified its intervention on two grounds. First, it found that although the founders did not explicitly restrict amendment of the Constitution, there were implicit limits. Second, the Court argued that certain principles of "civilization" or good governance exist that all modern democracies must follow. Through these two justifications, the Court claimed that representative bodies, even constituent ones, are not free to remake their constitutions however they wish; rather, they have a duty to do so only within acceptable limits.

Subsequently, in June 1975, Indira Gandhi's government declared an Emergency, suspending several fundamental rights and rounding up political opponents. This was followed by the Supreme Court deciding the case of *Indira Nehru Gandhi v. Raj Narain*.[95] The case did not end the Emergency or remove Prime Minister Gandhi from power, but it did show the Court was willing to be an independent voice. A High Court had earlier ruled that Indira Gandhi had committed corrupt practices in her election campaign and disqualified her from holding office for six years. In response, her government amended the Constitution to say that any challenge to the election of the person who is, or becomes, Prime Minister can be made only through a tribunal created by law. The Judiciary would have no power to challenge such a law or the decision of the tribunal.

92 See M. Bánkuti, *et al*, 'Disabling the Constitution', (2012) 23 *Journal of Democracy* 138, 139–40. See also K. L. Scheppele, 'Autocratic Legalism' (2018) 85 *The University of Chicago Law Review* 545, 575; K. L. Scheppele, 'Constitutional Coups and Judicial Review' (2014) 23 *Transnational Law and Contemporary Problems* 51.

93 A.I.R. 1967 S.C. 1643.

94 A.I.R. 1973 S.C. 1461.

95 A.I.R. 1975 S.C. 2299.

The Supreme Court struck down this amendment under the basic structure doctrine as violating the separation of powers and judicial review, both core principles of the Indian Constitution. However, in a politically pragmatic manoeuvre that also followed an existing line of precedent, the Court found Indira Gandhi's election valid by upholding legislation that had retroactively removed the legal basis for her original conviction.[96]

It emerges from the practice of the Indian Supreme Court that the basic structure doctrine is posited on the hypothesis that the power of constitutional amendment could not be equal to the power of making a constitution. The power of constitutional amendment cannot be used for repealing the entire constitution. The identity of the original constitution must remain intact. This doctrine imposes a restriction on the power of the majority and is in that sense a counter majoritarian check on democracy in the interest of democracy.[97]

Kim Lane Scheppele[98] has argued that it is theoretically open for courts to claim the power to declare constitutional amendments unconstitutional as a strategy to defend their independence. This is in recognition of the fact that there are constitutional principles, including judicial independence, that are so fundamental that they also bind the framers of the constitution.

5.5. Lessons from the Comparative Experience for the Kenyan Context

The lesson from comparative judicial politics is that judicial independence is a function, not merely a set of formal structural protections,[99] but also of historically contingent political alignments and the tendency by judges to assess the strategic political context within which they are operating.[100] Thus, judicial intervention in political disputes must take into account contextual and strategic variables given that courts do not operate in a vacuum. It emerges from this comparison that a number of external factors will influence whether the Judiciary retains its independence and impartiality in a context where the political establishment attempts to rein in and control the institution.[101] Specifically, it depends on strategic behaviour by the courts due to fear of political reprisal. It also depends on the ability of the political branches to collude against the Judiciary, and their expected electoral penalty for doing so. Further it depends on the legitimacy of the Court. That is, to what extent the Court has built support for its role in resolving political conflicts within a particular polity. We will explore these three factors in turn.

96 See the account in N. Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court,' (2009) 8 (1) *Washington University Global Studies Law Review*, p.1, 32.

97 See R. Dworkin, *Taking Rights Seriously*, (Cambridge, MA: Harvard University Press, 1978).

98 K.L. Scheppele, 'Declarations of Independence: Judicial Reaction to Political Pressure,' in S.B. Burbank, and B. Friedman, (eds.) *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, (London: Sage Publications, 2002), pp. 252-254.

99 It should be noted that constitutional and statutory provisions on judicial independence serve to insulate the Judiciary from other actors by reducing the number of weapons at the disposal of the Judiciary's potential enemies. Constitutional and statutory texts raise the cost of interfering with judges, in part because they inform other actors e.g., the public, governmental institutions, and other interested audiences about potential threats to the Judiciary.

100 H. Gillman, 'Judicial Independence Through the Lens of *Bush v. Gore*: Four Lessons from Political Science' (2003) 64 *Ohio State Law Journal* 249.

101 M. C. Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis,' (1996) 44 *American Journal of Comparative Law,* 605–26.

The comparison of the United States' Supreme Court in this section demonstrates that under certain circumstances, the judges sometimes have to take into account the external political environment in which their decisions will be received. In this respect, the judges take into consideration the need to ensure that their decisions will be enforced and reduce the potential for hostile political reactions. The case of the United States shows that although courts have succeeded in influencing policy, they have often been forced to make choices between fights they can win and those they cannot, so as to live to fight another day. The lesson for the Kenyan Judiciary is that it should pick its battles carefully. It is acceptable for judges to engage in politically deferential patterns of decision making when reprisal can undermine the independence of the Judiciary, at least in particularly salient cases. In such situations, the normal practice of deciding cases as a judge sees fit may give way to strategic calculations.

The next lesson from the comparative study is that institutionally fragmented political branches are less capable of reining in independent-minded courts. This is illustrated by the fact that while in the United States the legislative branch was able to stall FDR's "court packing" plan; the Hungarian example shows that structural protections for political independence can be overcome by sufficiently determined power-holders where they dominate the political scene. The Hungarian case shows that the political establishment's ability to bend the Judiciary to its will depends on the ability of the political branches to agree among them on how to deter or upend judicial independence.

When a legislative majority stands ready to work with a president/prime minister, attempts by courts to rule against legislation or executive orders would be met with new legislation and possibly worse—attempts to impeach particular justices or assaults on judicial autonomy.

This is a relevant factor in the Kenyan context given the domination of Legislative branch by the Jubilee Party. However, a hamstrung political actor poses little threat to a defiant Judiciary as illustrated by the comparative case study of the United States above.

However, as the experience of the Supreme Court of India shows, a court can creatively interpret its power to defend the independence of the Judiciary. In the Kenyan context, *Article 10* of the Constitution enumerates several open textured values and principles including, the values of rule of law and good governance, that can be used to develop a doctrine of unconstitutional constitutional amendments. This argument is anchored on the view that post-2010 constitutional order does not consist of a set of independent rules for specific problems but, instead, the Constitution contains values and principles that must be used to interpret other laws and constitutional provisions and amendments. Furthermore, *Article 255(1) (g)* of the Constitution stipulates that a constitutional amendment touching on the independence of the independence of the Judiciary must be approved through a referendum to be valid. This provision supports the adoption of the notion of a limited doctrine of unconstitutional constitutional amendments that should be used by the Kenyan Judiciary to curb any attempts to by political actors to use constitutional amendments to impinge on the autonomy and effectiveness of the Judiciary.[102]

102 See also R. Dixon, and D. Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment,' (2015) 13(3) *International Journal of Constitutional Law*, pp. 606-638.

Finally, a strong public belief in the Judiciary's legitimacy is another important factor that will oblige the political establishment respect the independence of the Judiciary. The reason public support is a source of power for the Judiciary – perhaps the most important source of power – is because it is a resource which it can draw upon to make decisions with which the public and political actors will disagree. The rationale by which public trust in courts insulates them from political retribution is expressed by Georg Vanberg, who writes: [103]

> If citizens value judicial independence and regard respect for judicial rulings as important, a decision by elected officials to resist a judicial ruling may result in a loss of public support (i.e., citizens may withdraw their support at the voting booth, in an opinion poll, etc.). The fear of such a public backlash can be a forceful inducement to implement judicial decisions faithfully.

A significant factor in the failure of FDR's "court packing" plan in contrast to the success of court curbing measures by Yelstin and Orban in Russia and Hungary respectively could be argued to be a function of the democratic tradition in the respective country. Where there is a major potential cost that an incumbent government would have to deal with due to its interference in the Judiciary in the form of public backlash the political establishment will hesitate to interfere with judicial independence. Thus, if incumbent politicians expect that a strong public reaction would follow any attempt to pressure the Judiciary, they will refrain from taking such actions. Especially where political competition is stiff the incumbent politicians would be more sensitive to public backlash.

It is noteworthy that many scholars have pointed out judicial legitimacy as the key for an independent and powerful Judiciary.[104] Accordingly, Staton argues that: "if we continue to assume that public preferences constitute the primary incentive for political action in the elected branches, then we can conclude that the public will influence the choice to respect judicial decisions." [105] In this regard, if the electorate has low confidence in the Judiciary, it may tolerate political interference and judges will lack the leverage to exercise authority. In contrast, if the electorate is unwilling to accept any interference in the Judiciary, judges will have the leverage to influence policy outcomes effectively.[106] Hence, in a country where the society does not hold strong confidence in the Judiciary, the political establishment's attempt to create subservient courts may not lead to considerable public backlash.

Applying this insight to the Kenyan context, given the historic ethnic nature of public discourse and exercise of political choice in the country, more should be done to enable the deployment of public backlash as a deterrent to interference with judicial independence.

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103 G. Vanberg, *The Politics of Constitutional Review in Germany*, (Cambridge: Cambridge University Press, 2005) at p. 20.

104 G. A. Caldeira, 'Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court,' (1986) 80 *American Political Science Review* 1209–26; J. L. Gibson, (1989) 'Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance,' (1989) 23 *Law & Society Review* 469–96; W. F. Murphy, and J. Tanenhaus, 'Publicity, Public Opinion and the Court,' (1990) 84 *Northwestern University Law Review,* 985–1023.

105 J. K. Staton, *Judicial Power and Strategic Communication in Mexico*, (New York: Cambridge University Press, 2010).

106 M. C. Stephenson, 'Court of Public Opinion: Government Accountability and Judicial Independence,' (2004) 20*The Journal of Law, Economics, and Organization,* 379–99; C. Carrubba, 'The European Court of Justice, Democracy and Enlargement,' (2003) 4 *European Union Politics,*75–100.

The argument is that the political establishment would perceive public backlash as a credible threat only when the citizens are capable and willing to punish politicians who attempt to pressure the Judiciary.[107] For Kenyans to hold the political elite accountable for subversion of judicial independence, first, the Kenyan electorate should be informed and educated[108]on the transgressions of the incumbent government to be able to discern the Executive's attempts at interfering with the independence of the Judiciary. Secondly, there should be an effort to inculcate high levels of confidence in the Judiciary; and third, the Kenyan electorate should adopt an electoral culture with a clear understanding of the electorate's power to punish an incumbent government.

This also means that courts should invest in gaining the public view of the Judiciary as the "most credible branch of government". Judicial leadership should become more active in responding to individual anti-judge and institutional level anti-court rhetoric. Strategic use of off-Bench outreach, as an offensive as well as defensive strategy, is essential for gaining and maintaining the legitimacy of the judicial branch in the context of Kenyan politics that is plagued by ethnicity, cronyism, clientelism and corruption. In short, the careful and strategic management of political and public hostility towards the Judiciary, while not entirely remedial, could aid in protecting the institutional legitimacy of the Judiciary. Thus the Judiciary should not shy away from public dialogue and should be open and transparent when addressing highly politicized cases or issues.

In further efforts to bolster the legitimacy of the judicial branch, Civil Society Organizations (CSOs) should also play a role in supporting judicial independence.[109] This is due to the reality that is very difficult for judges to descend to the political arena to defend the Judiciary. It is up to the Civil Society, including the bar association, to speak out for the importance of an independent Judiciary. One mechanism to attain this is through public education. Human rights and civic education organizations can play an important role in educating the public on the important role the Judiciary plays in providing an institutional framework for resolution of political disputes. The public should be educated to appreciate that absent a legitimate judicial forum for resolution of political disputes,[110] the only other option for resolution of such disputes will be extra-legal resolution of such disputes through violence such as the post-election violence that Kenya experienced in 2007-2008.

107 A. Aydın, 'Judicial Independence across Democratic Regimes: Understanding the Varying Impact of Political Competition' (2013) 47(1) *Law & Society Review*, pp. 105-134.

108 On the role of education on the democratic project, see J. Dewey, *Democracy and Education*, (New York: Free Press, 1916), p. 88.

109 See for example the role of Non-Governmental Organizations, including the Law Society of Kenya, in the fight for the empowerment of the Judiciary as analysed in J. T. Gathii, *The Contested Empowerment of Kenya's Judiciary, 2010-2015: Historical Institutional Analysis*, (Nairobi: Sheria Publishing House, 2016) Chapter five.

110 See W. F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order,* (Baltimore, Maryland: John Hopkins University Press, 2006), p. 333; See also D. L. Horowitz, 'Constitutional Courts: A Primer for Decision Makers,' (2006) 17(4) *Journal of Democracy*, 125, 128.

6. Policy Proposals/Recommendations

We can distil the following policy recommendations from the analysis:

1. A constitutional amendment is required to have a fixed percentage of the budget reserved for the Judiciary Fund as this would eliminate at least the appearance of negotiation between the Judiciary and Executive branches of Government.

2. The Kenyan Judiciary should adopt a jurisprudential approach that is alive to the political context within which it operates. It is acceptable for judges to engage in politically deferential patterns of decision making when reprisal can undermine the independence of the Judiciary, at least in particularly salient cases. In such situations, the normal practice of deciding cases as a judge sees fit may give way to strategic calculations to ensure that political backlash does not hurt the independence of the Judiciary.

3. Judicial decisions, particularly in politically salient cases including public interest litigation and electoral disputes, must be grounded on the rule of law, constitutionalism, and an unbiased judicial disposition that is tempered and yet circumspect in findings. This is informed by the reality that a situation where the Judiciary proceeds unbridled in the use of its powers may result in extreme measures by the Legislature and the Executive in terms of funding and other measures, which can lead to friction between the arms of government and may not augur well for judicial independence in Kenya.

4. Pursuant to Article 255(1)(g) of the Constitution, the judiciary should enforce the requirement that any constitutional amendment touching on judicial independence is only valid if approved in a referendum, particularly when the validity of such amendments are challenged in Court.

5. Judicial leadership should become more active in responding to individual anti-judge and institutional level anti-court rhetoric. Strategic use of off-bench outreach, as an offensive as well as defensive strategy, is essential for gaining and maintaining the legitimacy of the judicial branch.

6. Non-Governmental Organizations, including bar associations, should speak out for the importance about an independent Judiciary and educate the public on the important role the Judiciary plays in providing an institutional framework for resolution of political disputes.

7. Conclusion

A supreme constitution imbued with values and principles of governance – especially one as expansive as the 2010 Kenyan Constitution – will always create tension between the political branches of the state and the Judiciary. The Constitution contains a promise that the state will protect traditional civil and political rights, and social, cultural and economic rights, including the rights whose protection is a prerequisite for the flourishing of democratic contestation. It further imposes limits on the exercise of power by the two democratic branches of government. The courts are called upon to play a pivotal role in realising these promises. It would be surprising if these powers did not lead to disagreement or rivalry.

Once the Courts intervened aggressively in the 2017 political contest, the Judiciary lost, to some degree, its apolitical image. Adjudication of election disputes without no doubt embroils the Judiciary in political disputes, and consequently its judgements are often portrayed in popular discourse as aligning with the views of a particular political camp. For those who wish the Judiciary to remain 'outside politics', this may be regrettable. On the other hand, there is a price to pay for recognizing that the Judiciary is part of a political structure and has a role in ensuring that political disputes are resolved within judicial channels and not through extra-judicial means like happened during the bloody post-election violence after the December 2017 General Elections.

This analysis has demonstrated that judicial intervention in the political process has unfortunately led to the Judiciary being politicised. It should be noted that every state has such 'constitutional moments'. During such extraordinary moments, singular interventions reshape the body politics conception of itself.[111] The challenge to judicial independence that has followed the nullification of the 8 August 2017 presidential elections is to be expected as the Kenyan political elite are not cultivated in a culture of accountability to other actors. However, active efforts should be made to persuade political elites and the general public on the crucial role the Judiciary plays in a stable polity by providing an institutional framework for resolving political controversy. Once this role of the Judiciary is appreciated, judicial independence will be consolidated and accepted by most segments of the Kenyan society.

111 B. Ackerman, *We the People, Volume 1: Foundations* (Cambridge, MA: Harvard University Press, 1993).

The Judicialization of Politics in Kenya

Chege Waitara[112*]

1. Introduction

The expansion of judicial authority into non-traditional areas is a global phenomenon from which Kenya has not been spared. Like any major change it has had its fair share of discontents. Expanding judicialisation has chaffed against the traditional order and aspersions have been cast on the impartiality, professionalism and constitutional propriety of judicial behaviour. Questions have also arisen as to what this trend means for Kenya in the future. This paper seeks to address these questions by placing the phenomenon of judicialisation in Kenya by exploring the phenomenon within the country as well as placing it within a global context. The first part will examine the term in greater depth and the second will focus more on Kenya specifically, looking at case law, specific socio-political concerns and finally what Kenya can expect from judicialisation of politics going forward.

2. The Scope of Judicialisation

2.1. What Does Judicialisation of Politics Mean?[113]

An examination of forays by the Judiciary into political territory presupposes that these territories are separate. This is true to an extent. There are indeed distinct political decisions and there are judicial decisions, whose character is inherently different, but which overlap at their margins. The peculiar character of political decisions is those whose nature is to effect the will of the majority. They are characterised by compromise and meetings of the powerful behind closed doors, which in the Kenyan context for example has involved having so called 'tea' or strategic 'retreats' in a handful of well-known hotels . Judicial decisions in contrast give voice to the rights of individuals. Judicial proceedings are generally open to the public, and rather than compromise[114] , rely on rules and precedent which offer less room for discretion.

112 * The author acknowledges and is grateful for illuminating discussions on this topic with Duncan Okello, Chief of Staff, Chief Justice of Kenya and Wambua Kilonzo, Managing Partner, Wambua and Company Advocates.

113 Torbjörn Vallinder, 'The Judicialisation of Politics. A World-Wide Phenomenon: Introduction'(1994) International Political Science Review / Revue internationale de science politique, Vol. 15, No. 2, The Judicialisation of Politics. La judicialisation de la politique (Apr., 1994), pp. 91-99. Accessed 20/4/2018

114 Although this does of course exist in a limited sense in jurisdictions that allow plea bargaining and court enforced mediation/alternative dispute resolution.

In light of the foregoing, judicialisation of politics thus refers to a situation where political decisions take on an increasingly judicial nature. It is perhaps easiest to see within the context of a continuum between two extremes[115]: government by judiciary, on the one hand and dictatorship of the majority[116] on the other. Judicialisation refers to any movement towards the former. It is characterised by an increasing reliance on courts and judicial means for addressing some of the most fundamental moral predicaments, public policy questions, and political controversies[117] that a country is capable of facing including the outcome of presidential elections as happened in the United States, the validity of an entirely new democratic and constitutional order as happened in South Africa, declarations of war as happened between Russia and Chechnya, questions of pure economic policy such as trade, commerce and the welfare state as happened in Argentina and Hungary and the scope and influence of religion within the body politic as has been judicially interrogated in Egypt, Turkey and Israel.

Internationally, transnational tribunals such as the European Courts of Justice and Human Rights, as well as the World Trade Organisation's Dispute Settlement Body have grown in mandate and stature to become the main venues for coordinating policies at the global or regional level, from trade and monetary issues, to labour standards and environmental regulations.

2.2 Forms of Judicialisation

Judicialisation occurs when the Judiciary takes on roles traditionally played by politicians, and in particular the Legislature, or by administrators, being the Executive. This has traditionally been seen in judicial review of administrative action, or legislative action. However, in countries with a written constitution such as Kenya, judicial review may be seen as merely a means to ensure that legislators abide by the constitution, on one hand, and that administrators abide by legislation on the other. The courts may be seen therefore to be merely enforcing rules derived through a democratic process. Judicialisation also occurs when administrative action takes on a judicial nature, for example when there are tribunals within the administrative process.

Hirschl[118] distinguishes 3 broad aspects of judicialisation. The first is the spread of legal discourse, jargon, rules, and procedures into the political sphere and policy making forums and processes. The second is judicialisation of public policy-making through "ordinary" administrative and judicial review. Traditional judicial review is more concerned with procedural rather than substantive fairness, interrogating the probity of the manner in which a decision is made rather than the merits of the decision itself. A subset of this is the enforcement of procedural fairness through administrative review. Thus for example an aggrieved party can appeal a tender award without necessarily litigating but going through an administrative process whose essential character is judicial[119].

115 Vallinder (n 2), 97.

116 Famously termed by political scientist Mutahi Ngunyi as the 'tyranny of numbers', referring to a situation where ethnic politics and tribal numbers combine to render elections superfluous since (he argues) they are effectively decided at the point of voter registration. www.kptj.africog.org/what-tyranny-of-numbers-inside-mutahi-ngunyi's-numerology/

117 Ran Hirschl, 'The New Constitution and the Judicialisation of Pure Politics Worldwide' (2006) 75 Fordham L. Rev. 721.

118 Ibid. 723.

119 As happens often in Kenya as is examined in specific detail further below.

This examination of procedural fairness has in recent times extended its purview into what may be referred to as "the law of democracy.[120] Areas of judicial determination have included the probity or otherwise of the redrawing of electoral districts, party funding, campaign financing, and broadcast advertising during election campaigns. A lot of this judicial decision-making will tend to delve into the actual merits of the decision made and push against the boundaries of traditional judicial review.

The third is so called judicialisation of "pure politics"-the transfer to the courts of matters of an outright political nature and significance including core regime legitimacy and collective identity questions that strike at the very core of what it means to be a nation, on which there is often fundamental disagreement. Included within this category are situations where constitutional democracies have banned or attempted to ban outright entire political parties from participation in elections,[121] and examined the substance rather than procedure of the conduct of presidential elections to an extent of acting as a substitute electoral body, so that the *Bush v Gore* scenario, regarding which commentators at the time wondered whether it was an appropriate exercise of the United States' Supreme Court's mandate to delve into presidential elections in this manner, has not only been embraced but in some cases expanded upon.

Another aspect of the judicialisation of pure politics include judicial intervention is the expansion of justiciability through the outright rejection of the so called political question doctrine, an American legal innovation which holds that courts ought to distance themselves from decisions on politically charged issues. Such issues have been further delineated and elaborated. In *Oetjen v Central Leather company*[122] the Court held that the conduct of foreign affairs is a political affair constitutionally given to the Executive and the Legislature, and that therefore the propriety of any action conducted in foreign affairs is not subject to judicial review. The doctrine and holding of this case has been explicitly rejected by the Supreme Court of Canada in *Operation Dismantle v R*[123] the Court held that the political question doctrine has its roots in the separation of powers, which was a subsidiary rather than a fundamental tenet of Canadian law. The more fundamental question in determining justiciability was whether the Executive or Legislature had violated the Constitution.

The Canadian Supreme Court has subsequently gone on to rule on fundamental matters of Canadian identity such as the potential secession of the province of Quebec and the disintegration of the Canadian polity as well as health policy which might otherwise be seen as clearly within the purview of the Executive. In addition and contrary to the principle in *Oetjen,* the Russian Constitutional Court agreed to hear petitions by a number of opposition politicians challenging the constitutionality of presidential decrees ordering the Russian military invasion of Chechnya.[124] Decisions by courts in other doctrines further illustrate the decline of the political question doctrine with courts finding it fit to pronounce themselves on nationalisation and welfare policy such as in Hungary; the Supreme Court of South Africa refusing to accept a national constitutional text drafted by a representative constitution

120 Hirschl (n 6) 729.
121 In Belgium, Israel, India Spain and Turkey. Hirschl ibid.
122 246 U.S. 297 (1918)
123 [1985] 1 S.C.R. 441
124 William E. Pomeranz, 'Judicial Review and the Russian Constitutional Court: The Chechen Case', (1997) *23* Rev. Cent. & E. Eur. L. 9

making body; and the restoration of the 1997 Fiji Constitution,[125] where in what can fairly be described as a sequence of events each more unprecedented than the other, a 'businessman turned adventurer' named George Speight executed a coup in May 2000 and then handed over the reins of leadership to the military in return for amnesty. The military then purported to abrogate the 1997 Fiji Constitution but were thwarted in their attempts by the Supreme Court of Fiji which declared the coup unconstitutional[126].

In addition to the Supreme Court of Canada pronouncing itself on Quebec, fundamental matters of national identity have also received judicial consideration in Egypt, whose Supreme Constitutional Court considered the constitutionality of executive and administrative acts on the basis of their compliance to sharia law, and Israel whereas mentioned earlier, judicialisation has advanced perhaps more than in any other democracy. Israel has been described as close to a fully-fledged juristocracy where "not a single week passes by without the Supreme Court of Israel……issuing a key ruling that is widely reported by the media and closely watched by the political system" with a key question for judicial determination and for the collective identity of Israel as a Jewish state being "who is a Jew."[127]

2.3. Reasons for Judicialisation

The arch of global history, it may be observed, is moving towards increased judicialisation of politics. The ascendancy of individual rights over monarchic authority began as early as the *Magna Carta* in England in 1215 where King John, to appease a group of rebellious barons, signed a charter limiting monarchic power by providing that even the monarch is subject to the law securing individual rights by providing for the right to justice and a fair trial for every English citizen, whose effect has resounded through the ages and is still felt to this day.[128] These developments towards individual rights were further developed during the Enlightenment and following the revolutions in England (1688), America (1775-83) and France (1789-99). In the course of this seminal period of world history, philosophical principles underpinning western democracy were developed including, relevant to a new legal order, the institutional realisation of political ideals of freedom and equality; promotion of religious diversity and therefore a separation of church and state; a list of basic human rights to be respected regardless of the ebb and tide of changing political geographies and fortunes; and the idea that in order for all these things to happen, no arm of government ought to have an undue preponderance over the other to be achieved through a system of intra-governmental checks and balances.[129]

With the French Revolution, monarchies in Europe began to fall one after the other. Until the rise of the Nazi regime in Germany in the 1930s, however, it was generally deemed sufficient for individual rights merely that monarchies were overthrown.

125 Hirschl (n 6) 732

126 Ghai Yash, Cottrell Jill 'A tale of three constitutions: Ethnicity and politics in Fiji'(2007), International Journal of Constitutional Law, Volume 5, Issue 4, 1, 639

127 Hirschl (n 6) 739.

128 Loulla-Mae Eleftheriou-Smith, *The Independent,* "Magna Carter: What is it and why is it still important today?" https://www.independent.co.uk/news/uk/magna-carta-what-is-it-and-why-is-it-still-important-today-10017258.html

129 Bristow, William, "Enlightenment", *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), Edward N. Zalta (ed.), https://plato.stanford.edu/entries/enlightenment

Thus a profound transfer of power from representative institutions to unelected judiciaries,[130] whether domestic or supranational, may prima facie seem undemocratic yet there are reasons why this is the case. Indeed the concept was further developed in the United States following the views of such thinkers as Alexander Hamilton who argued that the Judiciary was not only a bulwark against legislative overreach, acting to limit the power of the Legislature according to the Constitution, but that the Judiciary being by far the weakest of the three arms of government represent a relatively safe repose for such power.[131]

The idea that further reform was required remained elusive until the largely democratic rise of an autocratic and ultimately genocidal regime in Germany under the popularist auspices of Adolf Hitler. How this could have arisen in a democracy shocked Europe and the world, putting paid to the notion that mere political majoritarianism without bulwarks to support individual rights, was sufficient to prevent tyranny and give effect to the voice to the governed in as far as their government was concerned.

From the perspective of legal theory, it is interesting to note that modern challenges to legal positivism have provided a theoretical impetus for judicialisation of politics. It will be recalled that positivism arose as a challenge to the natural law position that there was a necessary nexus between law and morality and that therefore law in the absence of morality was not law. Legal positivism as grounded in the ideas of Hobbes, Hume and Bentham held that to be a fiction, instead providing that the validity of law depended purely on social conventions absent any underlying merits, a view that came to dominate legal thought until the mid-20th century when it came under attack by such luminaries as Ronald Dworkin, who argued that a separation between law and morality is not at all clear cut and certainly not as positivists would argue. Instead he argued that in reality all law is subject to interpretation in determining what it is and that this very interpretation is rooted on moral ideas on what the law ought to be. There were also legal positivists who had no problem accepting that law and morality can be linked,[132] though the latter is not necessary for law to be valid. Any attack on positivism by its nature implies that legal validity by its nature depends on some sort of moral consideration and that those affected by the law share a certain view about the nature of morality. Thus for example the ubiquity of rights based approaches to constitutionalism, through bills of rights, and international law, for instance the widespread acceptability of the universality of human, imply that there is agreement on the fundamental nature of human rights regardless of any specific legal or political regime. And as noted earlier the very nature of judicial authority is to give voice to individual rights. Constitutional supremacy has widely replaced authoritarian regimes in the former Iron Curtain countries and in Latin America and Asia and as observed earlier has made major inroads even in parliamentary democracies after the Westminster mould most notably in Israel but also in Canada, New Zealand and the UK itself.[133] The language and underlying shared moral understanding of human rights in Constitutions and in international law therefore necessarily implies a more interventionist judiciary that ensures that these rights are not overridden by legislatures and executives.

130 The latter being controversial since in a case like Kenya for example the judicial regime was voted upon in a referendum. Also it is not entirely clear that voting judicial officials into office each term is an improvement on the situation. See The Daily Record "Let's eliminate the phrase 'unelected judges 'from our discourse' https://thedailyrecord.com/2015/07/01/lets-eliminate-the-phrase-unelected-judges-from-our-discourse/

131 Valinder (n 2), 94.

132 So called 'inclusive positivists'. Stanford Encyclopedia of Philosophy, *Legal Positivism,* https://plato.stanford.edu/entries/legal-positivism/

133 Hirschl (n 6) 721.

Finally, as will be explored further below in the section on pros and cons, judicialisation may disclose certain challenges or unresolved pressures within the political system. These may include a divided political system that is incapable of reigning in a rampant judiciary or is so dysfunctional that the Judiciary is compelled to step in to fill a gap, politicians who are unwilling to make hard political decisions or to take principled stands on contentious matters and therefore seek to pass the buck of decision making to the Judiciary through litigation; politicians may also seek to enhance their media profile or harass opponents through litigation. And finally it has been observed that the more competitive a political system the more likely it is that contestants will seek to ventilate their issues in court and therefore the more powerful a judiciary is likely to be and the more its decisions are likely to have political consequences. In Kenya, for example, the elections of 2002 that overthrew the long-time ruling party were largely non-contentious because one side's support, in this case the opposition, was so overwhelming that the result was largely seen as a foregone conclusion. All subsequent elections have been much closer and have therefore been subject to acrimonious contention both before courts and elsewhere with the result that courts have therefore been called upon to determine the outcome of elections.[134]

3. Kenya

3.1. Constitutional Matters

There is no doubt that Kenya has witnessed an increased judicialisation of politics. This in the first instance ought to be no surprise, given the global trends described in the foregoing. However, in Kenya's particular case, the Constitution of 2010 is by its very nature a very interventionist one. The history of the relationship between the Executive and other arms of government in Kenya is one of a creeping usurping of rights with the result that the Judiciary had been rendered a mere tool of the Executive. The Constitution of Kenya 2010 therefore arose within the context of a pervading mistrust of the Executive and a desire that it never be allowed again to run roughshod over the individual rights of Kenyans.

It might also be observed tangentially that Kenya did not inherit, from the outset, a robust set of constitutional judicial review principles. From colonial times, Kenya's law arose from a desire to serve the interests of the colonial power rather than to give voice to the interests of the governed. Many institutions established under colonial law were coercive and their aim was to manage and control by fair means and foul the majority of Kenyans from in any way undermining colonial supremacy and it was questionable whether such institutions were fit for purpose in a newly independent country.[135] Moreover and subsequently Kenya's law particularly the Independence Constitution followed the Westminster tradition where on one hand, Parliament is supreme and not subject to review by the Judiciary, on the other hand, the highest organ of the Judiciary is the House of Lords which is part of Parliament. The Parliament was then subject to numerous and sustained acts of usurpation by the Executive that left it a pale shadow of its former self.

134 Dorothy Jebet, 'How we yearn for 2002 election'. *The Star, Kenya*, (23 May 2017). https://www.the star.co.ke/news/2017/05/23/how-we-yearn-for-2002-election_c1565421

135 These institutions that Kenya inherited have therefore been described as "congenitally defective'. Wachira Maina 'Kenya's Institutions: Evaluating their character and potential' in *Kenya at the Crossroads: Scenarios for our future. Institute of Economic Affairs, Society for International Development* (2001) pp. 5-7

It has also been observed elsewhere[136] that devolution of legislative competence necessarily expands the purview of judicial review in Kenya from what it has been in the past simply because additional layers of executive and legislative competence have been introduced by the new constitution. Thus in addition to traditional areas of judicial review the constitution now authorises courts to examine the propriety of administrative action by devolved units especially counties as well as the legality of legislation made at the county level in addition to the national one both as regards the Constitutional as well as national legislation.[137]

As regards judicialisation of politics, the power of the Judiciary in as far as judicial review is concerned is now very broad. The Constitution[138] grants power to the High Court to uphold and enforce the bill of rights and to grant a wide variety of reliefs including a declaration of rights, an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and an order of judicial review. It also grants the High Court unlimited original jurisdiction in criminal and civil matters; jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; jurisdiction to hear an appeal from a decision of a tribunal appointed under the Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144; and jurisdiction to hear any question respecting the interpretation of the Constitution.[139] In a very real sense therefore, the concern about the expansion of judicial power and any claims of judicial advocacy need to be viewed within the context that that this expansion was deliberate, is legal, and was advocated for by those who voted in a new Constitution.

As observed earlier one aspect of judicialisation occurs when administrative action takes on a judicial nature. Kenya has exemplified this par excellence through the existence of statutory tribunals. Tribunals are statutory bodies established to exercise quasi-judicial functions in ensuring procedural fairness in a wide variety of matters such as the award of licences, tenders, to oversee and discipline professionals licensed under the relevant Act and some like the Rent Tribunal adjudicate disputes between landlords and tenants. Indeed any statutory body is likely to have a corresponding tribunal and by some conservative accounts there are more than sixty statutory tribunals in Kenya.[140] The use of judicial language and the exercise of quasi-judicial power within administrative bodies represent an aspect of judicialisation.

Yet Kenya goes even further. The Constitution of Kenya clearly mandates that statutory tribunals are now to fall under the Judiciary. *Article 1(3) (c)* on Sovereignty provides that sovereign power is delegated to three institutions: the Executive, the Legislature and lastly *the Judiciary and independent tribunals*.

136 Chege Waitara, "The Constitution of Kenya 2010 and the Judiciary: A return to public confidence?" (2010), *Judiciary Watch Report-Constitutional Change Democratic Transition and the Role of the Judiciary in government Reform: Questions and Lessons for Kenya,* Murungi C. (ed.) pp.245-247

137 Interestingly counties are empowered to make both primary and subsidiary legislation both of which will be subject to judicial review going forward.

138 Article 23.

139 Article 165.

140 Dache J., "Reforming tribunals in Kenya: concept paper" *Kenya Law Reform Commission* 22 November 2016. http://www.klrc.go.ke/index.php/klrc-blog/522-reforming-tribunals-in-kenya-concept-paper-by-joash-dache?showall=1&limitstart=

Furthermore at *Article 169(1) (d)* under Chapter 10 on the Judiciary the Constitution defines Subordinate Courts to include any tribunal that may be established under an Act of Parliament. Under the mandate therefore the Judiciary has taken steps to consolidate the diverse panoply of tribunals under its aegis.

Table 1: Tribunals under the Judiciary and caseload[141]

Name of Tribunal	Pending Cases 30th June, 2016	Cases filed in 2016/17	Cases resolved in 2016/17	Pending Cases 30th June 2017*
Business Premises Rent Tribunal	2,085	2,351	1,334	3,302
Communication and Media Appeals Tribunal				
Competition Tribunal	-			
Co-operative Tribunal	9,273	1,002	6,576	3,699
Education Appeals Tribunal		90	0	No members
Energy Tribunal	-	6	6	0
HIV & AIDS Tribunal	-	81	30	51
Industrial Property Tribunal	19	20	19	20
National Environment Tribunal	-	24	8	16
Political Parties Disputes Tribunal	5	574	574	0
Public Private Partnership Petition Committee	-	2	2	0
Rent Restriction Tribunal	587	7,091	6,321	800
Sports Disputes Tribunal	12	89	26	75
Standards Tribunal	0	2	1	1
State Corporation Appeals Tribunal	-			
Transport Licensing Appeals Board Tribunal	0	51	45	6
All tribunals	**11,981**	**11,383**	**14,942**	**7,970**

141 Judiciary of Kenya, "State of the Judiciary and the Administration of Justice". *Annual Report* 2016-2017 p.63

As may be seen from the above table, diverse areas traditionally considered under the administrative competence of the Executive, or of a political nature, now fall under the Judiciary most notably political party disputes. Now there are good reasons to bring order into the erstwhile system of tribunals. They operated under a chaotic system with each governed by a different Act of Parliament, employing different rules of procedure and evidence and so on. Nonetheless it is clear that by consolidating them under the Judiciary this contributes further to the expansion of judicial power into new areas.

We have seen that in other jurisdictions such as Canada, judicialisation of mega politics has entailed the Court making rulings in traditional executive functions such as health care. In Kenya universal healthcare is one of four pillars that the government has made a priority for its current term. According to the Cabinet secretary for health Kenya has an absolute deficit of 40, 332 doctors as per World Health Organisation provisions.[142] Pursuant to this the government signed a memorandum of understanding with the government of Cuba in March 2017 under which 100 specialist doctors were to be engaged by the Kenyan government. The agreement also covered a wide raft of other areas of cooperation including research training for primary healthcare workers as well as specialists advanced medical and vaccine trials and vector control in malaria. The Kenya Medical Dentists and Practitioners Board opposed the plan as having been made hastily, without consultation and in disregard of over 2000 unemployed Kenyan doctors. Five doctors in two separate suits moved to the High Court and obtained preliminary orders stopping the hiring of the doctors, which orders were subsequently vacated in a full hearing of the suit when the presiding judge held *inter alia* that the applicants had not proven the existence of sufficient Kenyan specialists as alleged. He however faulted the government for failing to consult with relevant stakeholders.

The entire scenario must have presented something of an embarrassment to the government in its international relations and challenges the notion that health care is the exclusive purview of the Executive. The government must have felt hamstrung in the drafting of health policy and the Cuban doctors found themselves caught in a crossfire that they did not deserve.[143]

3.2. Case Law 2017: Judicial Review and Electoral Matters

The Constitution of Kenya 2010 is a relatively recent document. As such 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. Earlier on courts were reticent to take on overtly political matters. In *International Centre for Policy and Conflict and 5 others vs. The Hon Attorney General and 4 others*[144] the question under consideration was whether the 3rd and 4th Respondents being Uhuru Kenyatta and William Ruto were qualified to run for the 2013 election given their on-going trial before the International Criminal Court for events subsequent to the 2007 general election.

142 Muchangi and Imende "Inside the Kenya-Cuba doctors'deal. *The Star, Kenya,* (10 May 2018). https://www.the-star.co.ke/news/2018/05/10/inside-the-kenya-cuba-doctors-deal_c1756414

143 The Conversation, "Why Cuban doctors in Kenya don't deserve the treatment they're getting" *Business Daily, Nation Media Group,* (28 June 2018). https://www.businessdailyafrica.com/analysis/ideas/Why-Cuban-doctors-in-Kenya-dont-deserve/4259414-4635996-vq70s6/index.html

144 Petition No. 552 of 2012.

It was the contention of the 1st Petitioner that a person thus committed to trial would be unable to discharge official state duties and that the very fact that the ICC found substantial grounds to commit the two to trial made them unsuitable for office under Chapter Six of the Constitution dealing with leadership and integrity.

In deciding the case the Court upheld the principle established *in Francis Gitau Parsemei and others v National Alliance Party and others*,[145] This was a case that arose out of the Kajiado North by-election following the death of area MP George Saitoti. The Petitioner sought to question the process of nomination in which he found himself unsuccessful by seeking orders stopping the nomination of the successful candidate.[146] On the one hand, *Article 88(4) (e)* of the Constitution, as well as section *74* of the *Elections Act 2011*, places the mandate for determining election nomination disputes upon the Independent Electoral and Boundaries Commission (IEBC). On the other hand the same Constitution incorporates a comprehensive Bill of Rights which protects *inter alia* political rights. Moreover *Article 258* of the Constitution gives *locus standi* to any person to institute court proceedings where they feel that the Constitution has been or is in danger of being contravened.

The question for determination therefore was the appropriate forum for the redress of such grievances. Was it the High Court or the IEBC? In finding that it was the latter, Majanja J. observed[147] that there is a distinction in character between a political process, in which decisions are made on a balance of the rights of many actors including the citizens and the institutions; and a judicial process whose purpose is to enforce the rights of the particular individual before the Court.[148] He found that in the exercise of political rights, regard must be given not only to the rights of the individual but also to the larger interests of society and the need for a free and fair election; that where there is a self-contained dispute resolution mechanism established un statute and underpinned by the Constitution then that mechanism must be exhausted prior to moving the Court, which the petitioner did not do. The IEBC therefore was the appropriate forum and the petition was dismissed.

This notion that for any person to move the Court, other competent tribunals need to be exhausted has taken a significant beating subsequently. Courts in Kenya have expanded their jurisdiction into hitherto unexplored areas. Illustrative in this regard is the *Al Ghurair* series of cases involving the award of tenders for ballot printing to said company and numerous challenges to that award.

In *Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & another*[149] the Appeal was in respect to a decision by Odunga, J. dated 13th February, 2017 in Misc. Application No. 637 of 2016 where the High Court granted, inter alia, an order of certiorari to quash the decision of the 2nd respondent (the IEBC) to award a tender for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers to the appellant (Al Ghurair).

The appellant faulted the high court judge for failing to draw a clear distinction between the roles of the Commissioners and the Accounting Officer/Secretariat to the IEBC; finding that the Commission was not properly constituted at the time of making the impugned award;

145 Petition No. 356 of 2012
146 One Moses ole Sakuda of the National Alliance Party.
147 As has been observed earlier under section 1.1 of this paper
148 Paragraph 5.
149 Civil Appeal No. 63 of 2017.

for failing to cite specific violations of the Election Laws (Amendment) Act (ELAA), and for failing to appreciate the overriding public interest of preparing for the forthcoming general election in a timely fashion. Importantly and in addition, the IEBC contended that the High Court had no jurisdiction to entertain the judicial review outside the 14 days period stipulated under *Section 17* of the *Public Procurement and Asset Disposal Act*, and that since it was in the public interest for the general elections to be held on August 8 2017 court proceedings were likely to occasion delay and therefore undermine the public interest.

On the question of jurisdiction there was a question as to whether the first respondent (CORD) could qualify as an aggrieved party before the review board given that it was neither a tenderer nor a procuring entity. The question was important because if answered in the negative then the first respondent would have had no locus in the statutorily established dispute resolution mechanism and its only route of redress would have been the high court. Thus the question of jurisdiction would have been solved neatly since one could not exhaust a dispute resolution mechanism in which one could not participate. There was division on this issue, with the two judges who concurred differing on the matter, one holding that the first respondent qualified and the other holding that it did not. Nonetheless, the Court found that the High Court had jurisdiction in the first instance because some of the issues raised by the first respondent were outside of the jurisdiction of the review board established under the Public Procurement and Asset Disposal Act and only the High Court had the jurisdiction to hear and determine them.

The appeal was dismissed. The Court found that the Judge was correct in his assessment that the Commission was not properly constituted as at 30 November, 2016 when the procurement contract in issue was executed by the Commission's secretary and accounting officer and furthermore that contravention of the Constitution or a statute cannot be justified on the plea of public interest.

It was back to the drawing board, and subsequently *Al Ghurair* was again awarded the tender by the IEBC, occasioning the judicial review before the High Court in *Republic v Independent Electoral and Boundaries Commission (IEBC) and 6 others ex parte National Super Alliance (NASA) Kenya*[150] *Al Ghurair* had been awarded a tender for the supply of election materials for the presidential elections of 8 August 2017. The applicant was of the view that the tender was awarded irregularly and unconstitutionally. The respondent countered with an argument questioning the jurisdiction of the Court in the matter on two main limbs; first that the applicant could not approach the Court without first exhausting the dispute settlement mechanism set out under the Public Procurement and Asset Disposal Act; and secondly that because the IEBC had the autonomy, institutional competence, expertise and legal mandate to conduct elections the High Court ought to decline to exercise jurisdiction should it find it had it-in other words that the Court should exercise judicial restraint.

The High Court took an expansive view of its own jurisdiction. On the first question, exhaustion, the Court found that whereas it was a valid doctrine of law, it was not applicable in the present case for two reasons. Firstly *Section 165(1)* of the *Public Procurement and Asset Disposal Act* provided that the only persons who could seek administrative review were a candidate or a tenderer.

150 Judicial Review No. 378 of 2017.

The Applicant fitted into neither category and a person thus locked out had access to other remedies including an application for judicial review and a constitutional petition. Secondly the Court found that the matters the Applicant raised went beyond the procurement statute and were matters of constitutional interpretation and application over which the High Court had jurisdiction.[151]

On the second question, restraint, the Court found that the law of Kenya calls for neither judicial restraint nor judicial activism. A court is merely to follow the law. In this regard courts are not only empowered but required by the constitution to delineate the boundaries of administrative competence. Such power may be found in *Article 23* which provides judicial review as a relief available for a violation of a right or fundamental freedom, as well as *Article 47* which provides for a right to fair administrative action. Judicial review was therefore both a statutory and a constitutional issue that was expanded in its mandate compared to before the 2010 constitution was passed. As such it was no longer possible to distinguish the grounds upon which judicial review could be brought under statute and those under which it could be brought under the constitution.

Dissatisfied with this decision, the IEBC appealed in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others*.[152] The Appellant faulted the Judgment of the High Court for inter alia finding that public participation is a mandatory pre-condition in direct procurement; by failing to appreciate the effect of the orders sought would split the tender in contravention of *Section 54* and *176 (a)* of the *PPDA*, 2015; and by failing to weigh and apply the weight of public interest. The first responded argued inter alia that the decision to award the tender was made in total disregard of national values and principles in Article 10 of the Constitution; and that His Excellency the President of Kenya Hon. Uhuru Kenyatta met with officials of the Dubai Chamber of Commerce which delegation the Applicant believes was led by the chairman of the winner of the tender, Al Ghurair.

The Court in allowing the appeal found inter alia that Public participation is neither a constitutional nor a statutory mandatory requirement in direct procurement, and that the High Court exercised its discretion wrongly without regard to the constitutional time lines within which presidential and general elections is to be held vis-à-vis timelines for various procurement activities thereby threatening the right of millions of Kenyan voters enshrined in *Article 38 (2)* and *136 (2) (a)* of the Constitution being the right to free, fair and regular elections based on universal suffrage. Notably while it reversed the decision of the High Court it did not find fault with its findings on jurisdiction.

Further evidence of the Judiciary's expanded mandate may be found *IEBC vs. Maina Kiai & 5 Others*[153] which was an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi in Constitutional Petition No. 207 of 2016 in which it was held that the declaration and issuance of a certificate by the constituency returning officer meant that

151 Gatembu J., dissented on both issues. On exhaustion he found that once a person was made a party to the review board proceedings, the provisions of the public Procurement and Asset Disposal Act on review of the board decision were applicable to that person. On restraint he found that under article 1(3) and article 3 of the Constitution the Review Board was required to comply with, respect, uphold and defend the constitution and that therefore it had powers to deal with procurement matters relating to the constitution.

152 Civil appeal no. 224 of 2017.

153 Civil Appeal No. 105 of 2017.

the results thus certified for each presidential candidate were final and could only be challenged in the Supreme Court in an election petition. The IEBC could not at the tallying centre or elsewhere engage in any exercise of confirmation of results. The Appellant challenged the decision of the High Court on the grounds that the High did not have the requisite jurisdiction to hear the matter; the impugned provisions of the Elections Act and Regulations were constitutional; and the issues raised in the petition were res judicata, having been raised and determined in *Raila Odinga &2 Others v. IEBC & 3 Others*[154]*([2013]eKLR)*. The Supreme Court found emphatically that it had jurisdiction, agreed that the lower court also had jurisdiction to hear the matter but nonetheless the Appeal failed on all the three grounds and was dismissed.

Similarly in *Cecil James Oyugi v Public Procurement Administrative Review Board & another [2017]*[155] the Petitioner challenged the decision by the 1st Respondent (the public Procurement Administrative Review Board) which allowed the 3rd Respondent's request for review and ordered the Commission to re-tender and procure afresh the materials the subject of the tender using such method as it may consider appropriate. The petitioner herein challenged the decision of the Board on the grounds that the 3rd Respondent was not a candidate, bidder or tenderer therefore had no capacity to move the Board. The Petition was dismissed. The Court agreed with the Board's findings that the 3rd Respondent purchased the bid documents, and was qualified as a candidate and a bidder.

R vs. Independent Electoral & Boundaries Commission & another ex parte Coalition for Reforms and Democracy (CORD)[156] addressed the crucial and therefore contentions issue of the voter register. Indeed it has been observed that one can tell the outcome of an election merely by perusing the voter register before any voting has occurred. The Respondent made an oral Application to have the Judge refer the case to a different Judge of the same bench since he had decided similar issues in *Republic vs. the Independent Electoral and Boundaries Commission & Others Ex parte the Coalition of Reform and Democracy*[157] and it was therefore improbable that the Judge would arrive at a different decision.

In dismissing the application the Court found that the issues raised did not raise a substantial question of law to warrant reference of the same to the Chief Justice as required under *Article 165(4)* of the Constitution. Accordingly, the prayer for certification and reference to the Chief Justice for empanelling the bench failed and was disallowed. That the issues raised did not meet the test for the recusal or disqualification of a Judge. The judge nonetheless referred the matter to Hon. Mr. Justice Chacha Mwita for further orders with respect to the hearing and disposal of the same.

154 SC. Pet. No. 5 of 2013.
155 Constitutional Petition No. 241 of 2017.
156 Misc. Application no. 648 of 2016.
157 Misc. Application No. 637 of 2016.

3.3. Pros and Cons of Judicialisation: What Can Kenya Expect?

Judicialisation frequently follows a process of constitutional review. If this process had a popular mandate and was conducted in a free and fair manner, it stands to reason that those who expanded the judicial mandate are unlikely to be discontented if the Judiciary proceeds to exercise that very mandate.

In the case of Kenya the Constitutional Referendum of 2010 was widely regarded as free, fair and representative of the wishes of the Kenyan populace. The election was largely peaceful and witnessed a voter attracted a turnout of 70 per cent of whom 68 per cent voted in favour of the constitution in an environment that generally attracted positive sentiment both locally and abroad.[158]

It may therefore be argued that the very process of judicialisation we are witnessing in Kenya, far from being undemocratic, is one whose mandate derives in a very direct sense from the people and reflects their will to expand the judicial mandate.

Moreover in view of the fact that the people of Kenya clearly wanted a counter-establishment break with the past order, it might be argued that had the Judiciary not sought to give effect to its expanded mandate, this would not only be unconstitutional but would go against the zeitgeist that gave birth to the Constitution, which in itself would bring its own set of negative consequences. Key among these might be a lack of faith in the institution of the Judiciary. It is to be recalled that the Judiciary is essentially the final arbiter of political competition and if faith in it were to erode, so too would prospects of peace. If political losers were unwilling to turn to the Judiciary for recourse they would very likely resort to violence of one form or another.

In addition it is eminently conceivable that some of the very institutions that today feel the Judiciary is overreaching, would attack the Judiciary were it seen to be too close to the establishment and therefore overriding the will of the people. The judiciary might for example face legislative backlash as has happened in other jurisdictions. Recalling that the Legislature retains a wide mandate to change laws it is free to respond to judicial decisions by doing so in a manner critical of the Judiciary.

This has happened in other jurisdictions in response to decisions of the Supreme Courts of the United States, India and Australia. Regarding the latter in particular, there was harsh political reaction to the decision of the Australian High Court in *Mabo v Queensland No.2*[159] which recognised for the first time in that country that natives at the time of colonial taking of their land held title to it rejecting the concept of *tera nullius* (literally 'nobody's land) that legally empowered the coloniser to enter into a country, import its laws and institutions and annex land as though nothing existed prior to their arrival. This offended powerful domestic interests and led to the Legislature changing the relevant legislation in such a manner as to defeat the ruling.

158 Namunane, Bernard, 'Kibaki to sign new laws amidst pomp and fanfare', *The Daily Nation,* August 6 2010. https://www.nation.co.ke/kenyareferendum/Kibaki-to-sign-new-laws-amid-pomp-and-fanfare-/926046-972298-t44nu1/index.html

159 *Mabo v Queensland (No 2)* [1992] HCA 23, (1992) 175 CLR 1 (3 June 1992),High Court.

The picture is not entirely rosy though. Judicialisation of politics taken to its logical conclusion militates against the traditional idea of representative democracy and separation of powers, potentially leading to an aristocracy of judges who unlike politicians do not have an electoral mandate and allowing politicians to abrogate responsibility for difficult choices instead going to litigation and passing the buck onto the Judiciary. The case of Israel is instructive, because this country has been subject to judicialisation more than any other in the west.

Due to a failure of the political class who are more beholden to partisanship than actual probity of decision making, and in addition do not have either the inclination or the wherewithal to deal with crucial and divisive political questions, it has fallen upon the Judiciary to make decisions that in any other democratic country would be settled at the political stage, even going so far as to review the internal workings of Israel's Parliament[160]. In this scenario, therefore, judicialisation aids and abets democratic failure acting as a stop gap second-best measure in the face of the incompetence of the political class, representing a democratic deficit rather than an ideal to be aspired to.

Judicialisation of politics may lead to more entrenched political positions. After the decision in *Roe v Wade*[161] in the United States, in which the Supreme Court legalised abortion until the third trimester, the question of abortion far from being settled became and remains more divisive than ever. Indeed it is difficult to imagine a single more divisive political issue within the United States, with the country being split at the grassroots between pro-life and pro-choice camps, a matter that greatly influences who gets elected to the Presidency and who gets appointed to the Supreme Court. This raises the question whether the Judiciary is the right forum to ventilate and conclusively determine issues of this nature.

Wary of an expanded judicial mandate, the political establishment may seek to undermine the independence of the Judiciary through intimidation, both overt and subtle, as well as seeking to influence judicial appointments. Events in Kenya are illustrative.

Following the Supreme Court decision nullifying the election the president notoriously referred to the presiding judges in threatening terms as *Wakora* (thugs)[162] which was of particular emotive significance in the tense political environment following the election. Supreme Court Justice Isaac Lenaola was sufficiently concerned over his privacy, security and reputation as to threaten to sue State House Digital Director Dennis Itumbi for alleged social media posts of a defamatory nature, as well as well as to question the circumstances under which the country's premier telecommunications firm Safaricom[163] allegedly released call logs from his personal phone to be used in a lawsuit against him.[164]

160 Edelman, 'The Judicialisation of Politics in Israel', International Political Science Review (1994) Vol. 15, No. 2, p.177

161 *Roe v. Wade*, 410 U.S. 113 (1973)

162 Al Jazeera, Kenyan judges criticise Kenyatta over 'veiled threats' (3 September 2017) https://www.aljazeera.com/news/2017/09/kenyan-judges-criticise-kenyatta-veiled-threats-170903081232522.html

163 Of which the Government of Kenya is the joint largest shareholder with Vodacom at 35%.

164 Kamau Muthoni, "Justice Lenaola protests to Safaricom over call logs, *The Standard* (23 September 2017). https://www.standardmedia.co.ke/article/2001255316/justice-lenaola-protests-to-safaricom-over-call-logs

Moreover an attack was carried out on the official car of Deputy Chief Justice Philomena Mwilu in which gunmen shot and killed her driver[165] mere hours prior to a hearing regarding the repeat election that had the potential to suspend it,[166] which sufficiently unsettled the Judge that she did not attend the hearing causing an adjournment due to a lack of quorum.

The intimidation has not been confined to Supreme Court Judges with specific judges of lower courts accused of political bias publicly. Justice Odunga of the High Court for example was accused in Parliament by no less a personage than the leader of the majority Aden Duale of tribalism and partisanship[167].

More recently and of great concern is that the Judiciary looks set to experience tremendous difficulties in fulfilling its constitutional mandate as well as its own strategic plan, Sustaining Judicial Transformation, following a drastic cut in its budgetary allocation by Parliament. During the budget-making process, the Judiciary requested a total of Sh31.2 billion from the Government to support its operations for the financial year 2018-19. However, when Parliament passed the Appropriation Act, only Ksh. 5 billion was awarded. As a result, more than 70 court construction projects will certainly stall. Tellingly a development budget of Ksh 2.6 billion in the previous financial year was slashed to a mere Ksh. 50 million.[168] It is feared that this reduction in funding is directly linked to the expanded mandate of the Judiciary and its willingness to use it, in particular to call for a re-run of the August 8 2017 general election.

4. Conclusion

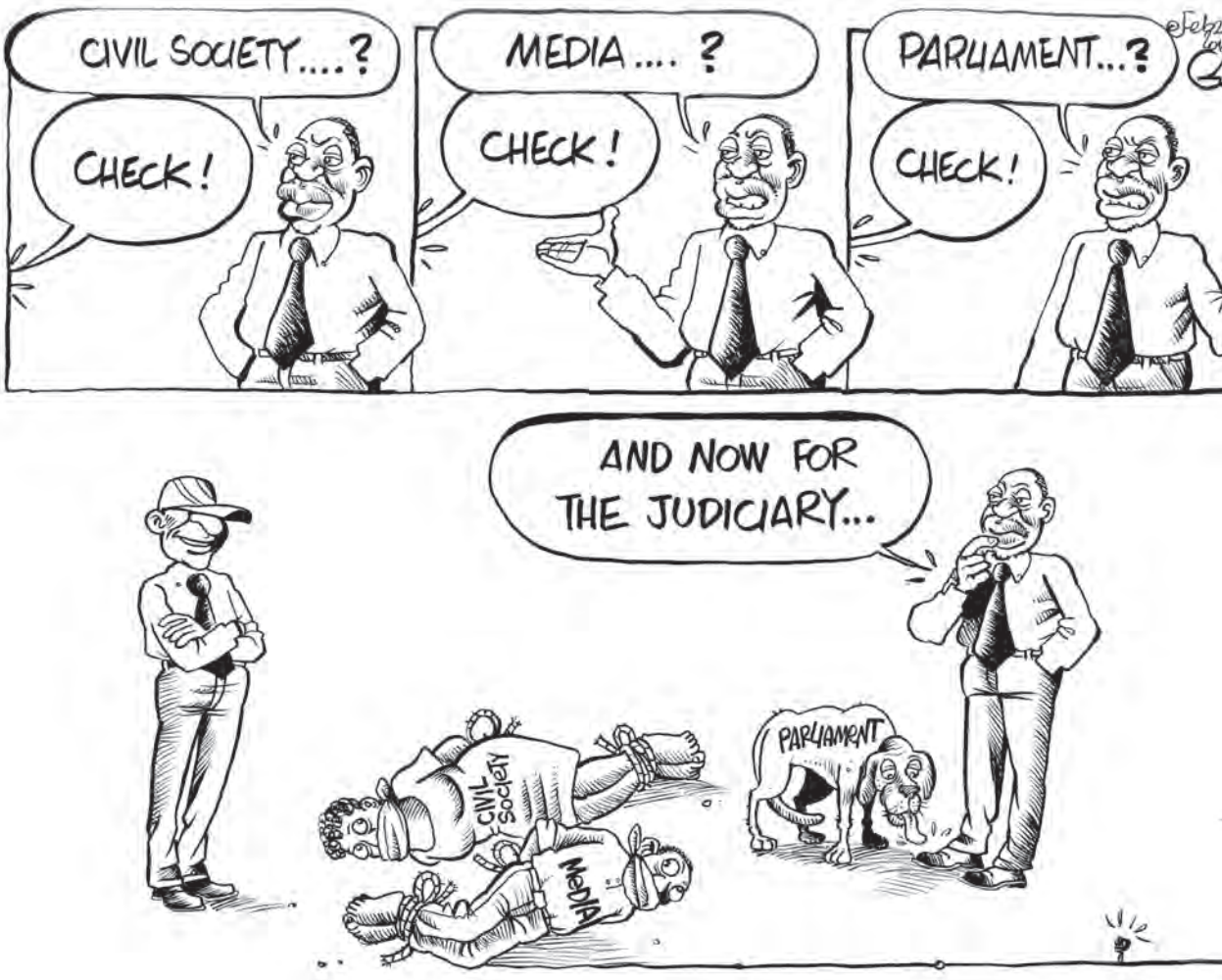
Judicialisation of politics is a global phenomenon and it would be expected that Kenya would not be spared. However, it has not been. If anything, judicialisation of politics finds firm foundations in a constitution that expands the scope for judicial review and in a judiciary that is conscious of its independence and willing to exercise it. Whereas there have been various claims of judicial activism by the political class, it would appear that the new judiciary owes its robustness more to the law than to unduly idealistic elements within it. That this has not gone down easily in certain quarters is to be expected and robust debate ought to be encouraged. Nonetheless the overriding concern ought to be a society governed by the rule of law rather than individual whims whether they emanate from politicians or judges.

165 Cyrus Ombati, "Deputy CJ Philomena Mwilu's driver shot in an attack along Ngong Road". *The Standard,* (24 October 2017).https://www.standardmedia.co.ke/article/2001258320/deputy-cj-philomena-mwilu-s-driver-shot-in-an-attack-along-ngong-road

166 Sam Kiplagat, 'How judges endured harsh words, threats for carrying out their work', *The Nation* (1 January 2018). https://www.nation.co.ke/news/How-judges-endured-threats-for-carrying-out-their-work/1056-4247428-vm2dw5z/index.html

167 Ibid.

168 Judiciary of Kenya (Press Release) 'Statement on the State of the Judiciary in light of Drastic Cuts in Budgetary Allocations', *Business Daily* (24 July 2017). https://www.businessdailyafrica.com/releases/Judiciary-statement-on-drastic-cut-in-budget-allocations/1941082-4679328-pu3f7j/index.html


CIVIL SOCIETY....?
CHECK!
MEDIA.... ?
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PARLIAMENT...?
CHECK!
AND NOW FOR THE JUDICIARY...
CIVIL Society
MEDIA
PARLIAMENT

Judicialisation of "Mega" Politics in Kenya: Contributor to Democratization or Mere Recipe for Backlash?

Duncan Okubasu Munabi[169*]

1. Introduction

In the past three decades, judiciaries worldwide have become a centre stage for major political contests. In many cases, the intrigues have taken the form of individuals, pressure groups or non-government actors seeking review of legality of legislation, state action or policy in courts over matters that were traditionally perceived or even justified as falling in the domain of political institutions.[170] Courts have also been thrust at the centre of democratic processes, as referees, in view of the scepticism towards negative influence of political actors in institutions as potential dangers to democratic processes. The result of this development continues to be provocation of moral and legal questions on the scope of judicial review, the main vehicle that judicialisation of politics has been seen to occur.

In one view, 'Judicialisation of Politics' is justified as one of the means of countering totalitarian tendencies of representative bodies. In another, it is seen as the enforcement of the notion of constitutional supremacy. Several reasons, including political ones, have been cited in favour or against this phenomenon. Divergent opinions on how courts should behave if they are to live up to their expectations without threatening their institutional security or social legitimacy have also been put forward.[171] This reflection on the subject of judicialisation of politics, with a focus on Kenya, is concerned with how involvement of courts in what Hirschl has dubbed as 'mega' politics has either contributed to democratization or to institutional inefficiency by ruining the social legitimacy of the courts- a factor that has been said to have an influence on the success not only of apex courts, but also on the institution of judicial review as a whole.[172] The main probe centres on the impact of judicialisation of politics on the quality of democracy and in part institutional tensions and relations.

169 I wish to acknowledge Josephat Kilonzo for his assistance with the background research that went into this paper

170 Ran Hirschl, The Judicialisation of Mega-Politics and the Rise of Political Courts' (2008) 11 *Annual Review of Political Science* 93-118

171 See, Theunis Le Roux, Principle and pragmatism on the Constitutional Court of South Africa (2009) 7(1) *International Journal of Constitutional Law* 106–138; see also Bassok, Or, The Sociological-Legitimacy Difficulty (October 12, 2010). Journal of Law and Politics, Vol. 26, p. 239, 2011

172 Bassok (n 2 above).

The case that we ultimately make in this contribution is that unless Kenyan courts disentangle themselves from self-destructive tendencies and in turn adopt behaviours that insure both their legal and sociological legitimacy through display of sufficient autonomy in their character and decision making, chances that they will become objects of political condemnation and inefficient umpires of political processes are high. In addition, they could become easily co-opted by political actors in the process of manipulation of democratic exercises or legitimation of illegitimate regimes, as they engage with "mega" politics. In this set of facts, the gains associated with judicialisation of politics become elusive and moral objections against it become material. Thus, as courts get involved in political controversies as a result of the judicialisation of politics in Kenya, they must endeavour to take a balanced approach that protects their status and independence. Such an approach would enhance their effectiveness as midwives of justice while they settle political controversies.

The first part of the article engages with theoretical issues arising from 'judicialisation of politics' – mega ones- including its theoretical underpinnings, comparative development and value. The second part is concerned with the actual involvement of courts in Kenya in political contests, the textual basis for this endeavour, forms of participation and the net result on democratization. This part also considers developments within the Judiciary in Kenya that arguably explain the political censure of courts and its effects.

2. The Rise of Courts and Judicialisation of Politics: Comparative Foundations

Judicialisation of politics has emerged as a distinct theme in constitutional theory/comparative constitutional law in the last few decades as the role of judiciaries in strengthening democracy has become more prominent. In Hirschl's view, there has over the last decade, been a significant global growth in the reliance on judiciary to deal with 'some of the most fundamental quandaries a polity can contemplate.'[173] In many parts of the world, a great fraction of hotly contested political controversies are now settled by judiciaries which - unlike politicians or citizens- are considered as the appropriate forum for adjudicating the disputes.[174]

Globally, political issues such as the political future of Quebec and Canadian Federation, the new constitutional order in South Africa, Argentina's economic policy, American presidential election in 2000, the war in Chechnya and Germany's place in the European Union (EU), have been characterised as constitutional issues which fall within the province of courts.[175] These trends, according to Hirschl, can be collectively termed as judicialisation of politics.[176]

Judicialisation of politics takes place at various levels.[177] The first level is an abstract one where political sphere and policy-making processes are imbued with 'legal discourse, jargon and procedures'.[178] The second level which is more solid entails enlargement of the province of judiciaries in hearing and determining public policy outcomes, mostly via judicial review

173 Hirschl (*Supra* note 1).
174 Ran Hirschl, 'The New Constitutionalism and the Judicialisation of Pure Politics Worldwide' (2006) 75 *Fordham Law Review* P 722.
175 *Ibid.*
176 *Ibid.*
177 Hirschl (*Supra* note 4).
178 *Ibid.*

and 'ordinary' rights jurisprudence.[179] The third level of judicialisation of politics, and which is of great relevance to this paper, is the reliance on judiciary for what might be called 'mega-politics.'[180] Hirschl observes, rightly so, that worldwide, the judicialisation of politics has expanded its domain beyond 'flashy rights issues' to entail what may be called 'mega-politics – matters of outright and utmost political significance that often define and divide whole polities.'[181] One of the areas where Hirschl observes a manifestation of judicialisation of 'Mega-politics' is oversight of electoral processes by the Judiciary.[182] This encompasses increased judicial power to scrutinize pre-electoral processes, in many countries where elections, plebiscites or referenda are held.[183]

At the core of judicialisation has been the invitation of courts to review the procedural and substantive aspects of democratic process- and at times, hot political intrigues such as national and constitutional identity or regime legitimacy.[184] In Germany, despite an obvious alignment of the country with parliamentary tradition, judicialisation of election review which 'thrusts the Judiciary into the realm of pure politics', is self-evident.[185] Article 41 of the Basic Law enshrines judicialisation of election review in the sense that although the *Bundestag* has the responsibility for scrutiny of elections, complaints against such decisions may be instituted before the Federal Constitutional Court.[186]

Thus due to judicialisation of politics, the Judiciary enjoys a unique predominance in German's constitutional order, notwithstanding the country's longstanding tradition of an efficient parliament.[187] Also, the socio-political phenomena of judicialising the electoral arena has been witnessed in countries like Zimbabwe, Taiwan, Ukraine and Italy where the Judiciary has become the ultimate decision-maker in regard to national election outcomes.[188]

The growing reliance on judiciary in tackling public policy issues, political controversies and core more predicaments 'presupposes a more visible presence of judiciary in political and social life.'[189] This occasions the 'transformation of the legal and political culture in a polity.'[190] Subsequently the Judiciary emerges in the social and political milieu as

the forum of choice for the settling of political, social and economic disputes. In this context, the Judiciary attains independence and ceases to be perceived as a specialized agency or technical department of government and starts to act as an essential arm of government which competes for space with the other arms of government.

179 *Ibid.*
180 *Ibid.*
181 Hirschl (*Supra* note 1).
182 *Ibid.*
183 *Ibid.*
184 Democracy is multidimensional and constitutes of substantive aspects such as the rule of law, democratic values and human rights. The procedural aspects of democracy are characterised by majority rule. See *A Barak, The Judge in a Democracy* (2006).
185 Russel A Miller, *'Lords of Democracy: The Judicialisation of "Pure Politics' in the United States and Germany'* (2012) Washington & Lee Public Legal Studies Research Paper Series Paper No. 2011-42 p 641.
186 *Ibid.*
187 *Ibid.*
188 Hirschl (*Supra* note 4).
189 Hakeem O Yusuf 'Robes on Tight Ropes: The Judicialisation of Politics in Nigeria' (2008) 8 (2) *Global Jurist* p 3.
190 *Ibid.*

Greater judicial independence coupled with judicialisation of politics has resulted in many judiciaries around the world to taking up a higher political role or profile that centres them as the ultimate defenders of constitutional commitments and arbiters of political and social policy.[191] As judiciaries continue to exert their power as arbiters of polemical political controversies, they have assumed a more pronounced role within critical social and political debates that conventionally were left to the province of other arms of government. Progressively, political actors, social movements and individual citizens 'frame their political struggles in the language of rights, and turn to courts to advance them.'[192] This has in turn increased the use of law, legal discourse and litigation to address political disputes thereby enlarging judicial engagement in political matters.

One of the effects of the enlarged courts' engagement in political affairs is the reshaping of the doctrine of separation of powers and its corollary-political question doctrine. The political question doctrine as characterised by the United States Supreme Court in *Marbury v Madison*,[193] places the law of democracy or oversight of political processes outside the purview of courts. Conventionally, oversight of political process as stated in the decision falls within the precincts of representative arms of government. As stated by Huefner and Foley, historically political questions were left to be dealt with by the political arms of government and courts would ordinarily be reluctant or exercise restraint in dealing with such issues.[194] However, with time this position has changed as constitutional supremacy continues to spread globally and increased judicialisation of politics is manifested. This has also lent credence to the fact that the doctrine of separation of powers is dynamic, does not admit rigidity and its contours are determined by the constitution or constitutional culture of a country.[195]

3. Theoretical Foundations of Judicialisation of Politics

Questions arising from the non-canonical nature of judicialisation of politics partly spawns from the long- standing understanding that judiciaries role in classical understanding of constitutional law, is confined to interpreting legal formations. The Judiciary was viewed as the *third* of the main anchors of 'constitutional order, after Legislature and the Executive, sequencing probably linked to 'perceptions of relative capacities'.[196] Representative institutions were considered to be best placed to assess public policy choices and take direct political responsibilities for them. This view of the Judiciary is the one, perhaps to which we attribute the concept of the political question doctrine, a theme devoted to dissuading courts from vetoing policy and legislative preferences.

191 Alexandra Huneeus *et al*, Cultures of Legality: Judicialisation and Political Activism in Latin America Legal Studies Research Paper Series Paper No. 1118 Cambridge University Press, 2010 p 10.

192 *Ibid* p 11.

193 5 U.S. 137 (1803).

194 Steven F Huefner & Edward B Foley, The Judicialisation of Politics: The Challenge of the ALI Principles of Election Law (2014) 79(2) *Brooklyn Law Review* 1918.

195 Zack Yacoob, *Separation of Powers in a Democratic South Africa: An Evolving Process*, 2nd Stellenbosch Annual Seminar on Constitutionalism in Africa (2014).

196 JB Ojwang, *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (2013) Strathmore University Press p 25.

Alexander Hamilton, a leading figure in American constitutional law makes this claim as follows:[197]

> The Judiciary…has no influence over either the sword or the purse; no direction either of the strength or the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will…and must ultimately depend upon the aid of the Executive arm even for efficacy of its judgments.

Yet this understating of the Judiciary as mere third arm of government has been challenged by the rising awareness of the notion of constitutional supremacy and the vesting of final say about what the constitution says on the judicial arm. Thus, where there is a controversy about whether what a particular arm of government has said or done is within the borders of the constitution, the Judiciary's say prevails. In reality, increased judicialisation of politics, zealous guard of independence of judiciary and expansion of judicial power judiciaries in many countries challenge this long-standing view. The judiciary cannot be termed as a weak organ of the government. Thus, with judicialisation of politics, when the Judiciary settles polemic political controversies, it is not a meddlesome interloper.

Several reasons have been advanced, generally, for this shift in balance of power through judicialisation of politics in favour of judiciaries over political institutions. Judicialisation of politics is perceived as 'an inescapable fact, a circumstance that is based on constitutional and institutional design adopted in many democratic states and dynamics of politics.'[198] For instance, the constitutional design of countries such as South Africa, Colombia and Brazil encompasses judicialisation of politics where courts have jurisdiction to determine political matters.[199] Another reason that has been advanced for judicialisation of politics is the recognition in the post-World War II era, of the necessity of a robust and independent judiciary as a core element of contemporary democracies, in order to protect fundamental rights and the rule of law.[200] As pointed out by Farber & Sherry certain basic values and human rights are 'too important to be left entirely to the protection of politicians'[201] Thus they assert:[202]

> Majority rule by itself cannot be trusted to protect religious, political, racial, and geographic minorities from oppression, nor to protect fundamental human rights when they are needed by the powerless or the unpopular. Nor do elections offer a complete check against the desire of politicians to aggrandize their power and enrich their friends.

Essentially, spread of judicial power is attributed to the 'reflection of a broader extension of rights consciousness around the globe.'[203] This is hinged on the demand for judicial protection of fundamental freedoms and rights.

197 As quoted by JB Ojwang above.

198 Luís R Barroso, Counter-Majoritarian, Representative and Enlightened: The Roles of Constitutional Courts in Democracies (September 4, 2017). Available at SSRN: https://ssrn.com/abstract=3096203 or http://dx.doi.org/10.2139/ssrn.3096203 p 6.

199 *Ibid.*

200 *Ibid.*

201 D A Farber & S Sherry, *Judgment Calls: Principle and Politics in Constitutional Law* (2009).

202 *Ibid.*

203 T Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003) p 11.

The triumphs of human rights movement, the move towards markets that place reliance on concepts of private property as well as the spread of democracy impose the importance of notions of protection of fundamental freedoms and rights.[204] Ginsburg makes the case that as consciousness of fundamental freedoms and rights spreads, 'the argument goes, so too, does the importance of courts as the primary political actors with the mission to protect rights.'[205]

Judicialisation of politics in Germany is a proper example of the post-world war II consciousness on the need to have a judiciary that has enhanced powers to protect fundamental freedoms and rights. In Germany, judicialisation generally as well as the judicialisation of election review particularly finds their roots in the 'post-war constitutional reaction to the popularist excesses of the Weimer system that made the Nazi dictatorship possible.'[206] This historical justification permits the intrusion of the German Judiciary into the domain of pure politics, a domain that German constitutionalism traditionally preserved for the Legislature.[207] It is in this regard that it is claimed that the decision of Germany's Federal Constitutional Court in the *Hessen Election Review* Case 'reaffirmed this shift and closed the door to an era of great faith in popularist institutions.'[208]

Also the fact that political actors often prefer courts to be the ultimate 'deciding actor of certain controversial issues for which there is reasonable moral disagreement in society' has been given as a basis for judicialisation of politics.[209] In certain instances, political branches leave some divisive matters such as gay marriage, decriminalization of soft drugs like marijuana and abortion to be dealt with by the courts.[210] Hirschl argues that from the politicians' perspective, delegating controversial political matters to the Judiciary may be an effective measure of shifting responsibility, and thereby reducing on risks to themselves and to the institutional mechanisms within which they carry out their activities.[211] This grants impetus to the notion of judicialisation of politics specifically in dealing with contentious political matters which politicians seek to avoid taking responsibility over.

Another factor to which judicialisation of politics has been attributed entails a sort of 'disillusionment with majoritarian politics' because of the crisis of functionality and representativeness of legislatures in general.[212] The shift of policy making power from legislature to a 'judicial elite' traditionally would seemingly be a subversion of democracy in a 'fairly straightforward, zero-sum way' but deficits or dysfunction of legislature and executive justify 'remedial judicial intervention'.[213] The practice of any efficient representative democracy seems impossible and citizens are only treated to a 'series of broken promises' because representative institutions fail to live up to majorly unattainable yardsticks set by ideal theories of participatory democracy.[214]

204 *Ibid.*
205 *Ibid.*
206 Miller (*Supra* note 15) p 649.
207 *Ibid.*
208 *Ibid.*
209 Barroso (*Supra* note 28) p 6.
210 *Ibid.*
211 R Hirschl, 'The New Constitutionalism and the Judicialisation of Pure Politics Worldwide' (*Supra* note 6) p 744.
212 Luís R Barroso, Counter-Majoritarian, Representative and Enlightened: The Roles of Constitutional Courts in Democracies (September 4, 2017). Available at SSRN: https://ssrn.com/abstract=3096203 or http://dx.doi.org/10.2139/ssrn.3096203 p 6.
213 Richard Bellamy & Cristina E Parau, 'Introduction: Democracy, Courts and the Dilemmas of Representation' (2013) 49(3) *Representation* p 255.
214 Norbeto Bobbio, *The Future of Democracy: A Defence of The Rules of the Game* (1987) as quoted in Bellamy & Parau above.

The foregoing position finds support in the argument that the more 'dysfunctional or deadlocked the political system' the higher the prospects of expansive judicial power.[215] This means that political jurisprudence cannot be appreciated distinctly from political, social and economic struggles that give shape to a political system.[216] Judicialisation of politics is an integral part and demonstration of political, social and economic struggles that people go through, and it cannot be properly appreciated in isolation from those struggles.[217]

More specifically when it comes to the global south and emerging democracies,[218] the enhanced judicial power has been problematized in the context of judicial review.[219] Essentially, enhanced judicial role and constitutional design in new democracies is premised on the assumption that legislature and executive should not be trusted, not just to protect minorities but also to efficiently effect majoritarian will.[220] The most striking feature of emerging constitutional democracies like India, Colombia and South Africa, is the enhanced power that constitutions bestow on judges in determining political issues. This is informed by a 'series of dysfunctions in new democracies' which include susceptibility to authoritarian erosion, defects in political party systems and legislature as well as absence of constitutional culture.[221]

Landau in describing the political and democratic dysfunction in new democracies points out that:[222]

> As much recent political science work has documented, the category "democracy" is complex and possesses considerable variation. Many newer democracies suffer from several different kinds of problems with their political systems: (1) they are more likely to face erosion towards authoritarianism, or in other words are particularly "fragile"; (2) they suffer from problems in political representation, accountability, and capacity that make them function poorly even if they do not lead to democratic breakdown; and (3) they suffer from a general absence of constitutional culture—neither politicians nor the public cares about constitutional values.

Based on the above assertion, he argues that drafters of constitutions and the Judiciary in emerging democracies are not occupied with the classic counter-majoritarian difficulty or the dilemma of judiciary exerting its power in democratic spaces and reshaping legislative roles.[223] Their main question is 'how to make democratic institutions work better.'[224] Thus often judiciary's power is expanded or enhanced in order to play a *dynamic* role as it continues to shape democratic space in emerging democracies.[225]

215 Hirschl (*Supra* note 4) p 744.
216 *Ibid.*
217 *Ibid.*
218 Emerging democracies are countries which governments that have attained power through a more legitimate process than those in restricted systems. Restricted systems of government constitute regimes that have dominant ruling political party that is in control of levers of power, access to media and the electoral process in a manner that precludes challenge to its political hegemony. See Albert C Nunley, African Elections Data Base 2004-2012 (2012). Available at http://africanelections.tripod.com/ accessed 26 June 2018.
219 Landau David, 'A Dynamic Theory of Judicial Role' (2014), 55 *Boston College Law Review* p 1502.
220 *Ibid.*
221 *Ibid.*
222 *Ibid* p 1505.
223 *Ibid* p 1502.
224 *Ibid.*
225 *Ibid.*

4. Textual and Contextual Basis in Kenya

The contours of judicialisation of politics in Kenya and the scope of judicial authority or power in the post-2010 era are best understood through a consideration of the normative configuration of the country's democratic space courtesy of the Constitution of Kenya 2010- and also of the role that courts play in (competitive) authoritarian regimes. The first limb of this claim was expressed by the Supreme Court in the matter of Speaker of the *Senate & another v Attorney-General & 4 others*, where the Court thus rendered itself:[226]

> [51] Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy*. This is clear right from the preambular clause which premises the new Constitution on – *"RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."*

The Supreme Court in the decision seems to have been reaffirming its position expansive power and position within Kenya's democratic space. Its specific words were that:[227]

> [54] The context and terms of the new Constitution, this Court believes, vests in us the mandate when called upon, to consider and pronounce ourselves upon the *legality and propriety of all constitutional processes and functions of State organs*. The effect, as we perceive it, is that the Supreme Court's jurisdiction includes resolving any question touching on the *mode of discharge of the legislative mandate*.

As an academic, Ojwang has observed that the judicial role is 'the central pillar in the entire configuration of Kenya's new Constitution; and the success of this organ is destined to determine that of the Constitution, as vehicle of democracy.'[228] This supposition points to the expansion of judicial power and judicialisation of politics in Kenya as well as the great significance of courts in Kenya's political affairs.

Without doubt, the enhanced role of the courts in Kenya's democratic space finds foundation in the concept of constitutional supremacy proclaimed under *Article 1 (3)* of the Constitution and provisions empowering the Judiciary to assess either the legality of democratic processes or state action. The article reads that 'Sovereign power under this Constitution is delegated to…. (c) the Judiciary and Independent tribunals.' This formulation means that the exercise of sovereign power of the people is no longer a preserve of the elected branches of government. The delegation of power is a deliberate effort by the people of Kenya towards ensuring that the Judiciary contributes to the improvement of the nature and quality of political, social and economic systems of the country in its own right as an independent institution.

226 [2013] eKLR para 51.
227 *Ibid.*
228 Ojwang (*Supra* note 25) p 20.

Also, to address the maladies that have bedevilled Kenya and reflect a different light on political, social and economic spheres, the Constitution under *Chapter 4* outlines a robust and comprehensive Bill of Rights which is applicable to all organs of government and all persons.[229] The Constitution under *Article 19(1)* provides that, 'the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural practices.' In addition, the Constitution under *Article 19(2)* provides that the essence of recognizing as well as protecting human rights and fundamental freedoms is to '*preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings*.' Such an elaborate scope of protecting fundamental freedoms and rights necessarily expands judicial role beyond 'technical legalism, to perceptions in the social and political context.'[230] Consequently, this entrenches judicialisation of politics within the sphere of judicial enforcement of fundamental freedoms and rights.

Notably, *Article 22* of the Constitution allows every person an opportunity to institute judicial proceedings claiming that a fundamental freedom in the Bill of Rights has been 'denied, violated or infringed, or is threatened.' In addition, the Constitution under *Article 258* provides that 'every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention'. *Article 165* of the Constitution, on its part, grants the High Court jurisdiction to hear and determine among others, any question on interpretation of the Constitution, question whether any law is inconsistent with or in contravention of the Constitution and whether anything alleged to be done under the authority of the Constitution is inconsistent with, or in contravention of the Constitution. These provisions provide room for increased judicialisation of politics in Kenya as social movements, political actors and individuals characterize their political struggles in language of rights and fundamental freedoms and approach the Judiciary to resolve them.

In addition, to safeguard Kenya's democratic space the Constitution under *Article 10* enshrines national values and principles of governance which include patriotism, national unity, sharing and devolution of power, democracy and participation, good governance, equality, equity, inclusiveness and transparency and accountability. These national values and principles of governance are binding on all organs of government, state and public officers and all persons. It is apparent that these principles are largely political in nature. Their enforcement by the Judiciary obviously expands the scope of judicial powers to matters of political controversy and inevitable entrenchment of the judicial arm of government in policy and political discourse.

Furthermore, judicialisation of politics in Kenya and enhanced judicial role are deepened by inclusion of political or electoral rights in the Constitution. For instance, *Article 38* which entails the right to participate in forming a political party, to participate in activities of a political party and to campaign for a political party or cause. *Article 86* which requires the Independent Electoral and Boundaries Commission to ensure that voting method used in an election is simple, accurate, accountable and transparent and to eliminate electoral malpractice. *Article 144* allows a person to lodge an election petition in the Supreme Court challenging the election of a President-elect 'within seven days after the date of the declaration of the results of the presidential election'. Undoubtedly, this amounts to vesting of powers over mega politics into the arms of the Judiciary over political controversies. It also does inject in political discourse, legal normativism.

229 Article 20(1).

230 Ojwang (*Supra* note 25)

Another incidence of great judicialisation of politics and expansive judicial power in Kenya is based on the broad scheme of interpretive approach of Supreme Court as espoused under Section 3 of the Supreme Court Act, 2011. The Section 3 provides that the Supreme Court has the power:

a) *to assert the supremacy of the Constitution and Sovereignty of the people of Kenya;*
b) *to develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth.*

Essentially, all the provisions of the Constitution epitomize judicialisation of politics and expansion of judicial authority in Kenya. However, from the foregoing provisions of the Constitution it is crystal clear that Kenyan people, at the point of drafting and enacting the new Constitution, were deliberate on the judicialisation of politics and expansion of judicial power. As the former Chief Justice Willy Mutunga stated, the Judiciary in Kenya is placed first among equals following the erosion of public confidence in other branches of government.[231]

Prior to the enactment of the Constitution, Kenya experienced a chequered history largely defined by absence of a democratic constitutional culture, massive human rights violations, marginalization and socio-economic exclusion which resulted in many people living as *imaginary* citizens, oppressive state, defective legislature and executive and a *weak* Judiciary. The nature of the Kenyan State pre-2010 is aptly stated by the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission led by Mutua stated:[232]

> Since its creation by the British in 1895, the Kenyan state has largely been a predatory and illiberal instrumentality, an ogre defined by its proclivity for the commission of gross and massive human rights violations.

Thus, the extensive judicial power as espoused by the text of the new Constitution is not without reason or foundation. This is because the people of Kenya through the Constitution seek to entrench democratic constitutional culture and respect for human rights by all.

The Constitution of Kenya 2010 vests in the courts the power to review legislation, and the validity of elections. There are also contextual reasons that can be inferred from the behaviour of the courts and the outcomes of their involvement, thus far. This is what we describe as the 'unintended though real reasons' why there is growing faith in the Judiciary by the political elites, even if their use of the Court counters democracy and the rule of law. These motives are best understood under the context, that Kenya, like some other countries, are more or less, regimes characterised by electoral authoritarianism. Rana Aziz conducted an audit of the electoral mandate and elaborated that:[233]

> Kenyan political elites are using the mechanism of the election to cloak their authoritarianism in democratic credibility and shield themselves from international suspicion.

231 Willy Mutunga, The 2010 Constitution of Kenya and Its Interpretation: *Reflections From The Supreme Court Decisions*, University Of Fort Hare Inaugural Distinguished Lecture Series October 16, 2014.

232 Government of Kenya, Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (2003) 19.

233 Rana Aziz, Kenya's New Electoral Authoritarianism, Boston Review available at http://bostonreview.net/politics/aziz-rana-kenyas-new-electoral-authoritarianism

In these sorts of regimes, the political games are played partly on the ground and also in other forums such as courts.[234] Put differently, there is a competition over the game and also over the rules of the game.[235] Kenyan courts can therefore be treated – to some extent- as playing the role of legitimating political regimes in the sense that as soon as an electoral exercise is conducted; regime legitimacy is seen to lie in judicial determination ascribing formal legitimacy to the outcome. The October 26th presidential election, serves as a good illustration of this phenomenon. The sceptical attitude of political elites towards approaching the courts, whenever they see a real or perceived electoral injustice, supports this claim. This was advanced as the reason for Raila Odinga's refusal to submit his grievances to Court following the disputed 2007 elections. This scepticism was also seen in 2017 immediately after the 8 August presidential election.

This is not to mean that courts have not played any role towards halting retrogression of democracy in post-2010 Kenya. If that was not the case, the antagonism that was visited upon it, or some the judges would not have arisen. Their involvement has been in some cases, profound and manifold: they have reversed executive orders purporting to limit the right to peaceful assembly, association and peaceful demonstration. The Courts have invalidated party primaries outcomes; invalidated legislation perceived to be invasive to rights and liberties; have posed as stumbling blocks to the pre-election procedures; and have invalidated, not least, the presidential election outcome of August 2018. This involvement is discussed with some detail in the section that follows.

5. Mega Politics in Kenyan Courts: Some Post 2010 Evaluation

Participation of courts in Kenya in political processes has been ubiquitous since 2010. Though it may be controversial whether this is as a result of 'judicialisation of politics' by design- the invitation of courts to render themselves on matters perceived to be under the competence of other institutions- not necessarily representative ones- is common aspect of Kenya's post 2010 political economy. Broadly conceived, it can be said that there are four classifications of disputes epitomising direct engagement with politics by the Judiciary. The involvement of the Judiciary has taken various forms, ranging from review of appointments or executive orders by the president, to review of processes leading to removal of sitting governors by County Assemblies- and Senate in some cases, to assessment of constitutionality of legislation from Parliament by the Judiciary or even in the appraisal of pre- election and post-election processes and results. Some of the judicial interventions have been cross-cutting.

Other than the mere fact that the Legislature and executive are directly popularly composed entities, thus possessing 'political' power, the partisan component of the disputes that have found their way into courts revolves around contests in Parliament in which politicians find courts as the alternative forum for formal extra-parliamentary appeal.

234 *Ibid.*

235 See, Levitsky, Steven and Way, Lucan A., Organizational Power and the Fate of Competitive Authoritarianism in Sub-Saharan Africa, 1990-2010 (2010). APSA 2010 Annual Meeting Paper. Available at SSRN: https://ssrn.com/abstract=1642742

Therefore, individuals or civil society organisations have been involved in some of these disputes, a great number of them have been initiated by political parties, more so opposition parties.[236] Even in respect of election petitions, the loser is often the party that triggers the dispute either directly or through a proxy.[237] The political undertones might vary, depending on the issue in contention or the actors involved. Courts are often asked to take a position over a controversy with political undercurrents and bearing. In some respect, courts are seen as part of the arena of politics, an arena where a win secures a political gain, notwithstanding its wider implication on democracy or the protection of rights. If the contest is indeed about the game itself and the rules of the game, then control of courts becomes strategic as part of the political game.

As hinted, review of presidential actions and directives has been witnessed since 2010. Most common incidents have included review and setting aside of appointments and nominations to parastatals, statutory and constitutional bodies.[238] One of the most compelling incidents to illustrate this is the episode that culminated in the case of *Independent Policing Oversight Authority & another v Attorney General & 660 others*.[239] In that case, the National Police Service Commission had recruited 10,000 persons as police constables. A number of complaints were raised to the Independent Police Oversight Authority which also culminated into various petitions filed in many High Court stations in the country. Those petitions were consolidated and heard in Nairobi, in favour of the petitioners. Though the Court quashed the recruitment process, President Uhuru Kenyatta ordered the recruits, whose appointment had been nullified to report to work, stating that he would take "full responsibility" for his actions.[240] The state appealed against the decision, and the appellate court dismissed the appeal.[241] On this occasion, the President seemed to have lost, but the relationship between the Judiciary and the Executive was placed on a combatant trajectory. This was certainly seen as a major clash between the Judiciary and the Executive, over a matter that the President felt, was within his prerogative power more so, following a series of preceding terrorist attacks.

Though not raising serious inter-institutional tensions, processes leading to impeachment of Governors have also been a subject of judicial controversy. There have been, since the coming into being of county governments, several initiatives by county assemblies- and in some case with the involvement of Senate- to impeach governors.[242] Embu, Makueni, Kericho, Nairobi and Muranga counties, to list some, have set into place motions to impeach governors.[243] Some of these initiatives, more so the successful ones– or potentially so- have become a subject of judicial interventions despite the high stake politics surrounding them. The impeachment process of the first Governor of Nairobi, Evans Kidero was unsuccessful

236 See for instance, Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR.

237 See e.g. *Dickson Mwenda* Githinji *v* Gatirau *Peter Munya* & 2 Others [2014] eKLR

238 See e.g. *Republic v Attorney General & 3 others Ex-Parte Tom Odoyo Oloo* [2015] eKLR

239 [2014] eKLR.

240 Tessa Diphoorn *et al*, The State against the State #Anthrostate, Allegrab, June 2015 available at http://allegralaboratory.net/the-state-against-the-state-anthrostate/ accessed 9 June 2018.

241 Attorney General & 2 others v Independent Policing Oversight Authority & another [2015] eKLR

242 See James Mbaka, Senators reject impeachment bid against Nyeri Governor Gachagua, The Star 14 September 2016, available at https://www.the-star.co.ke/news/2016/09/14/senators-reject-impeachment-bid-against-nyeri-governor-gachagua_c1420672 accessed 10 June 2018.

243 See Nation, Murang'a votes 35-17 to send governor home, Daily Nation online, 21 October 2015, available at https://www.nation.co.ke/news/politics/Muranga-Governor-impeached/1064-2924446-15d4e8lz/index.html

after the High Court issued an order stopping it.[244]

In another incident, the High Court declined to stop the impeachment of governor Mwangi wa Iria of Muranga, on the basis that under the Constitution, the Senate would also review the legality of the impeachment- so the proceedings were felt to be premature.[245] But the Court did flag out that its doors would be open to the Petitioner, if Senate impeached him in a process that countermanded the Constitution. The Governor of Embu, Martin Wambora's various cases at the High Court affirmed the Court's involvement in the process, rejecting the political question doctrine.[246] In Wambora's impeachments the High Court quashed the decision of Senate to affirm his impeachment, thus countering the political question doctrine and its invitation upon courts to display scepticisms when dealing with matters of a political nature such as these.[247]

The third instance in which the Judiciary deliberated proactively on political matters concerned review of the constitutionality of legislative enactments. Since 2010, several pieces of legislation have been determined to be unconstitutional by courts at times raising serious tensions between the Judiciary and Parliament.[248] Certain declarations of unconstitutionality have not generated acrimony between the Judiciary and the Legislature- salient being the declaration that criminal defamation is unconstitutional- yet some have injected unhealthy strain in the relationship.[249] In one occasion, the Speaker of the National Assembly Justin Muturi dubbed orders from the courts as 'unreasonable" and "idiotic" and expressed unwillingness to obey them.[250]

The most dramatic episode in this genre perhaps is the one concerning amendment of laws by the state to address terrorism- the so called security law amendment.[251] This law gave the state enormous powers, or at least, it sought to align legal formations to state attitudes towards terrorism. The law was opposed on many human rights and democratic governance fronts by the opposition, and human rights agencies, in one of the most dramatic episodes.[252] The final debate of the bill was in an emotive session that displayed scenes of violence in Parliament and the pouring of water on the temporary Speaker by Members of Parliament.[253] A female Member of Parliament is claimed to have been sexually assaulted.[254] The bill was passed because of the majorities that the ruling party commanded in Parliament.

244 See *Republic v Speaker of Nairobi City County Assembly & another Exparte Evans Kidero* [2017] eKLR.

245 See, *Mwangi Wa Iria & 2 others v Speaker Murang'a County Assembly & 3 others*[2015] eKLR

246 *Martin Nyaga Wambora and 3 others –v- Speaker of Senate and 6 others* **CACA 21 OF 2014 (2014) eKLR**; *Martin Nyaga Wambora & 32 Others v County Assembly of Embu* **HCCP No 7 & 8 of 2014 at Embu (consolidated) [2015]eKLR;** *Martin Nyaga Wambora & 33 Others -v- County Assembly of Embu & 4 others* **HCCP No. 7 of 2014 [2015]eKLR.**

247 *Ibid.*

248 *Institute* For *Social Accountability* & Another v Parliament of Kenya & 3 others [2014] eKLR.

249 For instance, the declaration that the Constituency Development Fund Act, 2013 was unconstitutional.

250 Julian Kamau, Muturi: Parliament will not honour "idiotic and unreasonable" court orders 28 April 2015 https://www.standardmedia.co.ke/ureport/story/2000160069/muturi-parliament-will-not-honour-idiotic-and-unreasonable-court-orders

251 Security Laws (Amendment) Act, No 19 of 2014

252 ARTICLE 19, Kenya: Concerns with Security Laws (Amendment) Bill,https://www.article19.org/resources.php/resource/37800/en/kenya:-concerns-with-security-laws-(amendment)-bill

253 See, Business Daily, Chaos as Kenyan MPs pass contested security laws, 19 December 2017 available at http://www.businessdailyafrica.com/Chaos-as-MPs-pass-contested-security-laws/-/539546/2561728/-/2nintxz/-/index.html

254 See, MP Millie Odhiambo's Panty remark startles Parliament on closing day, https://www.youtube.com/watch?v=jUB-XeYtAN4

The political opposition sponsored a case challenging the law: *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another*.[255] The case of the opposition in court was that:

> the Bill contained extensive, controversial and substantial amendments affecting the Public Order Act (Cap 56) the Penal Code (Cap 63), the Extradition (Contagious and Foreign Countries) Act (Cap 76), the Criminal Procedure Code (Cap 75), the Registration of Persons Act (Cap 107), the Evidence Act (Cap 80), the Prisons Act (Cap 90), the Firearms Act (Cap 114), the Radiation Protection Act (Cap 243), the Rent Restriction Act (Cap296), the Kenya Airports Authority Act (Cap 395), the Traffic Act (Cap 403), the Investment Promotion Act (Cap 485B), the Labour Institutions Act of 2007, the National Transport Safety Authority Act, Refugee Act No. 13 of 2006, the National Intelligence Service Act No. 28 of 2012, the Prevention of Terrorism Act No. 30 of 2012, the Kenya Citizenship and Immigration Act (Cap 172), the National Police Service Act (Cap 84) and the Civil Aviation Act No. 21 of 2013.[256]

A bench of five judges declared several portions of the legislation to be unconstitutional for among others, 'violating the freedom of expression and the media guaranteed under *Articles 33* and *34* of the Constitution' 'freedom of the media' 'the right of an accused person' 'the right to be released on bond or bail on reasonable conditions' 'the right of an accused person to remain silent during proceedings', 'the principle of non-refoulment as recognized under the 1951 United Nations Convention on the Status of Refugees which is part of the laws of Kenya by dint of *Article 2(5)* and *(6)* of the Constitution', and 'violating *Article 246(3)* of the Constitution.'[257]

National security is certainly one of the aspects of public regulation that the Executive has traditionally staked a claim to in many places. Violations of rights and legal protection to authoritarian tendencies have, however, found homage in claims validating states action in the name of securing national interests.[258] Despite the determination that the ruling Jubilee Party had to have the proposed amendments become law, the courts did counter them by declaring them unconstitutional. If the changes that that legislation proposed were allowed to be part of the legal order, they would have eroded the liberal aspects of the constitutional order quite substantively. Striking down the amendments also meant that even though the ruling party had a legislative majority, it did not have an unconstrained right to abuse democratic exercises.

The courts' foremost involvement in real political exercises has been in connection with electoral disputes. As hinted, these have included both pre- and post- electoral disputes. After the party primaries, the Registrar of the Political Parties disclosed that a total of 316 cases had been filed at the Political Parties Disputes Tribunal 305 of which resulted from political parties primaries.[259]

255 [2015]eKLR
256 *Ibid.*
257 *Ibid.*
258 See e.g. Treatment of persons described in Rasna Warah, Eastleigh Crackdown Offers Major Opportunity for Bribe-Taking and Harassment by Police Saran Journal, April 2014, available at http://sahanjournal.com/eastleigh-crackdown-offers-major-opportunity-bribe-taking-harassment-police/#.W0NeD9Izbcs
259 Everlyne Judith Kwamboka We did our best with the tight deadlines, disputes team says 2 July 2017, Standard Digital, Read more at: https://www.standardmedia.co.ke/article/2001245750/we-did-our-best-with-the-tight-deadlines-disputes-team-says

The intervention alone of the Political Parties Dispute Tribunal, in few cases seemed deleterious to political ambitions of very popular candidates. The dispute concerning the eligibility of Susan Kihika, who later became the Senator for Nakuru is a salient illustration. Despite her popularity and strong perception of her victory and closeness to the presidency, the Political Parties Disputes Tribunal determined that she was ineligible. It took the intervention of the High Court to reverse the Tribunal's decision.

It also suffices to note that several election petitions have been filed following the 2013 and 2017 elections. As a gain, if a robust system of review of electoral validity did not exist, electoral fraud/illegalities would not only be present, but perhaps more also unconcealed. Attempts by courts to resolve disputes emanating from gubernatorial and parliamentary contests have not raised serious inter-institutional relations or tensions of the magnitude that can be compared with Presidential elections, in terms of either pre-election preparations or the validity of the outcome. In cases where Presidential elections has been either alone or interlinked with the other elections, interventions of the Court in reviewing pre-election preparations by the IEBC over questions such as who was to print ballot papers and how the results were to be declared - was seen in the cases of *Maina Kiai & 2 Others v IEBC and 2 Others, Okiya Omtata v IEBC & 2 Others*[260] - stimulated rancorous exchanges between the courts and either the ruling jubilee on the one side or the opposition parties depending with the nature of the outcome- the courts being always on the receiving end. When it was felt that the continued review of actions of the IEBC threatened the certainty of the election date, the President was visibly irate at the Judiciary and on several occasions political elites were seen to invite the Chief Justice to join them in elective politics, terming the intervention of courts as a pure political venture.[261] Open attacks by the incumbent regime or even the powerful opposition figures following these rulings certainly had far reaching implication on courts sociological legitimacy let alone that they undermined judicial independence.

It is however the decision of the SC to annul the presidential election of August 8 2017 that triggered institutional strains of a calamitous character. When the Supreme Court, in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others*,[262] determined that President Kenyatta had not been validly elected as the President elect, the courts institutional security, let alone its sociological acceptability came under real threat. In the course of hearing of this dispute, lawyers representing the president had cautioned the courts to respect the 'political question' doctrine and exercise caution when overturning the 'will of the people' that had been expressed.[263] This decision was not received lightly by the President and the ruling jubilee party. The President issued a press statement almost immediately after the judgment indicating that though he respected the judgment of the Court, he had placed the Court on alert- reminding the judges that they would going forward deal with him, not as a president elect, but as "the president" – as he enjoyed temporary incumbency bestowed upon him by the Constitution pending swearing in of a new president.[264]

260 *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR

261 Imende Benjamin, Uhuru bullied courts to favour IEBC, Al Ghurair in ballot printing – Raila, The Star, https://www.the-star.co.ke/news/2017/07/25/uhuru-bullied-courts-to-favour-iebc-al-ghurair-in-ballot-printing_c1603037

262 Presidential Petition 1 of 2017.

263 Ahmednasir Abdullahi's argument on when a court can invalidate a presidential election, Video available at https://www.youtube.com/watch?v=X5RRWN8C5Vk

264 Will Worley, Kenyan President Uhuru Kenyatta vows to 'fix' judiciary after Supreme Court election annulment 2 September 2017, http://www.independent.co.uk/news/world/africa/kenyan-president-uhuru-kenyatta-vows-fix-judiciary-supreme-court-election-annulment-a7925586.html

In a latter address, he reminded the Supreme Court that he was going to "revisit" its powers on the basis that it "overturned' the will of the people.[265] A few days after this decision, the President toned down his maligning rhetoric on the Court and in a latter address even stated that the act of the Court showed that Kenya's democracy was starting to mature.[266]

Though the Court's independence had been threatened, the impotence of the threat grew stronger with time. Thus, the President was seen to modify the tone of his tantrums towards the Court. Under the Constitution, the President's participation in appointment and removal of judges is confined to appointing a person that has been nominated by the Judicial Service Commission (JSC) and vetted by the National Assembly.[267] It must be recalled that sometime in 2016, the President had sponsored a bill in Parliament to demand that JSC forwards names of three persons for appointment as Chief Justice and Deputy Chief Justice, both of whom serve in the Supreme Court.[268] The bill was enacted into law, but it was struck down by the Courts on the basis that it undermined judicial independence.[269] Striking down of these amendments meant that the powers of the President of controlling entry to the Supreme Court had been nested and it is this disposition that- perhaps- gave the Supreme Court enormous sense of legal security to annul his "victory" among other decisions shooting down unconstitutional laws and policies by the Executive.

The decision of the Supreme Court in Presidential Petition No. 1 of 2018, arguably, had far reaching implications on practice of politics in Kenya. To the incumbent regime, it showed that in enforcement of the Constitution, the courts were prepared to nullify an election if the outcome was secured by electoral fraud and irregularities which depict the phenomenon of electoral authoritarianism. For the first time since the dawn of multi-party politics in Kenya in 1992, the Court undid the basis for presidential mandate: manipulation of laws and institutions to secure a predetermined undemocratic result.[270] To the opposition, it dispelled the despair that power can only be acquired through unconstitutional means at least at the time the judgment was being delivered.[271] Its judgment acted as a statement of assurance that that through the framework of the constitution, a ruling government is likely to lose power. This hope was however dissipated with the immediate amendment of electoral laws by the ruling party because of its parliamentary majority.[272] This intervention by the ruling Jubilee Party, through changing the rules of the game- which is a characteristic of authoritarian regimes- attempted to dilute the assurances that the Court has issued to the public and opposition when it invalidated the election. As a consequence, the illiberal aspects of the legal and political order are seen to be safeguarded from the influences of the institution of judicial review courtesy of parliamentary majorities. The response of the opposition to this initiative was to withdraw its participation in the fresh election and its entire parliamentary participation.[273]

265 Al Jazeera, Uhuru Kenyatta to court: 'We shall revisit this' 2 September 2017. http://www.aljazeera.com/news/2017/09/uhuru-kenyatta-court-revisit-170902130212736.html

266 Uhuru Kenyatta's, Acceptance Speech 30 October 2017, available at https://www.youtube.com/watch?v=G-TJuv7mqsw

267 See Judicial Service Act.

268 *Statute Law (Miscellaneous Amendment) Bill, 2015*

269 *Law Society of Kenya v Attorney General & another* [2016] eKLR.

270 See Rana Aziz (*Supra* note 63).

271 See, Raila Odinga's full speech after the final presidential petition ruling, https://www.youtube.com/watch?v=cXckC9S93mM

272 See, Business Daily, Kenya parliament passes bill to amend electoral laws, 11 October 2017, available at http://www.theeastafrican.co.ke/news/Kenya-passes-electoral-laws/2558-4134612-ylokvo/index.html

273 See, Raila Odinga, Raila Odinga quits: Nasa's full statement, Daily Nation, 10 October 2017, available at http://www.nation.co.ke/news/Raila-Odinga-quits-repeat-presidential-election-Kenya-Nasa/1056-4133616-tr6we4z/index.html

Before majoritarian intervention of the Jubilee Party, following the 1 September 2017 annulment of the 8 August Presidential election by enactment of amendments to the election laws, the institution of judicial review had been robust in pursuit of judicial means of challenging electoral outcomes. The initial scepticism towards judicial contestation of the electoral victories at the parliamentary, gubernatorial or county assembly elective posts changed. The Supreme Court decision triggered host of suits by various individuals signalling an increase in public faith in the Judiciary. 31 cases were filed in the High Court to challenge the election of 47 governors and the total number of cases filed was estimated to be around 277, more by 88 compared to suits filed in 2013 following the elections of that year.[274] A journalist remarked that the 'upsurge of the cases could be as a result of the annulment of the presidential election by the Supreme Court.'[275]

It would seem that following the annulment of the elections and the attendant attacks by the Judiciary, which obviously undermined the courts security, its comportment changed too. A petition was filed by a previous participant in the election, Ekuru Aukot, seeking to have his name on the ballot paper.[276] The High Court allowed his petition with the effect that more than one candidate was allowed on the ballot box despite the withdrawal of the lead opposition party.[277] Because what was fronted as causing withdrawal of the leading opposition party was change of rules of the game- amendment of laws- and institutional capture of IEBC, the judgment of Justice Mativo allowing repeat elections to continue was a blow to the strategy by the lead opposition candidate, Raila Odinga, to counter Jubilee. In some sense thought it stood in the way of disestablishment of competitive authoritarianism. The claim that the decision of the SC in 2013, about the effect of withdrawal of a candidate, as *orbiter dicta*[278] thus not being at a core constitutional formation should be understood as a misunderstanding of the place of constitutional pronouncements in a system with a supreme constitution and immense powers vested in courts.

The effects of the attacks on the Judiciary appear to have been all pervading. Just a day before the repeat elections, the Supreme Court was presented with a dispute that sought to halt the repeat presidential elections. A spurious justification supplied for its inability to hear the decision was that there was a lack of quorum. The lack of quorum was partly because the Deputy Chief Justice's was absent following the shooting of her driver.[279] Two judges- Smokin Wanjala and Jackton Ojwang - did not explain their whereabouts while one of the judges - Njoki Ndungu did not have the means to travel for hearing of the case, according to the Chief Justice.[280] The reasons adduced for the lack of quorum were clearly unconvincing and an inference that the Court had been repressed because of the role it had played in invalidation of the 8 August 2017 election outcome.

274 See, Sam Kiplagat, 277 petitions filed after August 8 General Election 12 September 2017. Available at http://www.nation.co.ke/news/Election-petitions-Kenya-elections/1056-4092138-5lkmwrz/index.html

275 *Ibid.*

276 *Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others* [2017] eKLR

277 *Ibid.*

278 Obiter dictum (plural obiter dicta) is an opinion or a remark made by a judge which does not form a necessary part of the Court's decision. The word obiter dicta is a Latin word which means "things said by the way." Obiter dicta can be passing comments, opinions or examples provided by a judge. Statements constituting obiter dicta are therefore not binding. For example, if a court dismisses a case due to lack of jurisdiction and offers opinions on merits of a case, then these opinions constitutes obiter dicta.

279 **Ibrahim Oruko** & **Sam Kiplagat**, Absentee Judges Clear the Way for Repeat Election, 26 October, 2017 available at https://www.nation.co.ke/news/politics/Absentee-judges-clear-the-way-for-repeat-election/1064-4156182-695x5p/index.html

280 *Ibid.*

After the repeat election, civil society actors moved the Supreme Court seeking nullification of the outcome of the repeat elections.[281] Unsurprisingly, despite severe irregularities, the Supreme Court declined to allow the request for nullification, and upheld Uhuru Kenyatta's 'victory.' This, as far as we can see, was the Court legitimating an illegitimate regime, by conferring upon the incumbent President a formal electoral mandate in the place of a substantive one. Whether this initiative was the lesser evil given the greater need to bring closure to electioneering is one aspect, but 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. Perhaps it can be claimed that if the Court was to assert its authority, it would expose its institutional security to greater danger. In the following sections the paper examines, what has made Kenyan courts unable to play their role more effectively as referees for mega politics.

6. Impediments to Effectiveness

Though attacks by politicians on courts undermine judicial independence, we make the claim 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. This is not however to suggest that Kenyan courts are so devious that nothing of worth has or can come out of them- we have already flagged interventions of courts in various forms and documented triumphs. It is only that these tendencies have a greater effect more so on the perception of the public, a phenomenon that catalyses attacks by politicians against the Judiciary.

The first inhibitor has been corruption within the Judiciary. The uproar surrounding the retirement of Justice Tunoi, and claims that he had received a bribe of USD 200,000 to influence a decision of the Supreme Court over the election of the Governor of Nairobi and his deputy, an election that had been vetoed at the High Court but overturned by the Court of Appeal had far reaching implications on the Supreme Court and by extension, the Judiciary as a whole.[282] Sadly, reports such as that implicating Tunoi are not isolated. In 2013, the Judicial Service Commission sacked the Chief Registrar of the Judiciary, Gladys Shollei, over allegations of 'incompetence, misbehaviour, and violation of the prescribed code of conduct for judicial officers.'[283] According to the then Chief Justice, Willy Mutunga, 'Shollei had admitted to 33 allegations in which Sh1.7 billion taxpayer funds had been lost or were at risk.'[284] Some incidences of corruption in the Judiciary that have come to public include allegations towards Justice Mutava, towards whom a tribunal formed by the President to investigate his conduct found him culpable.[285]

281 *Ibid.*
282 *Ibid.*
283 See, *Gladys Boss Shollei v Judicial Service Commission & another* [2014] eKLR
284 Nation Reporter, JSC sacks Chief Registrar Gladys Shollei 18 October 2013, available at http://www.nation.co.ke/news/politics/1064-2038326-woee1o/index.html
285 Ghosts of Goldenberg: Tribunal recommends sacking of judge Joseph Mutava, available at https://www.youtube.com/watch?v=DZlMLqwo21A

He had apparently removed a file from Nairobi on his own motion and transferred it to Kericho, his new work station and also solicited Kshs. 2.5 million on behalf of another judge.[286] In 2017, a clerk and secretary of a Judge at the Judicial Review division of the High Court, justice Aburili were probed for receiving a Ksh. 2 million bribe at the High Court in Nairobi.[287]

Other than corruption, interpretative models adopted by the SC and the Court of Appeal (CoA) – in some occasions- have also undermined the influence of the constitutional intentions into politics through courts. This is particularly true in respect of gender and socio-economic rights. Participation of women in politics is a political controversy itself whose answer is a continued pursuit of African societies that aspire for equality- an ultimate longing of most societies. The Constitution of Kenya 2010 removed this matter from the vicissitudes of normal democratic politics and qualified it with a radical demand, which when implemented would change the status of women's participation in politics apocalyptically. Yet, confronted with- what we perceive as a spuriously framed- request for an advisory opinion, the Supreme Court adopted the conservative view that such a requirement could only be realised progressively.[288] With this hedging, constitutional interventions become of a lesser value, no wonder, subsequent attempts by the High Court to undo the Supreme Court opinion have been counter- productive.

The Court of Appeal, just like the SC, has particularly not been reluctant to reverse decisions of the High Court that are thought to have been influenced by activism. Thus, an important decision on the obligations of the state and an attempt by the High Court to issue the remedy of structural sanctions was thwarted by the Court of Appeal.[289] It summarised its discomfort as follows:[290]

> It is advisable to bear in mind that in interpretation of the Constitutional Articles on socio-economic right, it is not the role or function of courts to re-engineer and redistribute private property rights. Re-engineering of property relationship is an executive and legislative function with public participation. In the absence of a legal framework, courts have no role in the guise of constitutional interpretation to re-engineering, take away and re-distribute property rights.

What this attitude means is that the Court shied from engineering bold and non-violent revolutions because of theoretical conceptions about the role of courts that have been advanced as the case against judicial review. These have instead prevented these courts from being authoritative agents of political and social change.

286 *Ibid.*
287 Dominic Wabala, EACC probes Sh2 million High Court bribery bid 9 January 2017, available at https://www.the-star.co.ke/news/2017/01/09/eacc-probes-sh2-million-high-court-bribery-bid_c1484041
288 *In the Matter of the Principle of Gender* Representation in the National Assembly and the Senate [2012]eKLR.
289 See, *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR
290 *Ibid.*

7. Conclusion

As demonstrated, the engagement of judiciaries in political machinations is a phenomenon that is on the rise globally. Increasingly, judiciaries are getting involved in political matters triggered by individuals, pressure groups and non-government actors that seek to review the legality of legislation, executive action and policy decisions that were conventionally viewed to fall within the sphere of political branches of government. Notably, political actors, social movements and individual citizens have been framing political struggles in the language of rights and subsequently approaching the courts to resolve them. This has resulted to increased employment of law, legal discourse and litigation as means to deal with political disputes thereby enlarging the engagement of judiciary in political matters.

Essentially, the engagement of judiciary in political controversies has been emboldened largely by constitutional designs that envision involvement of courts in political controversies and confidence in judiciary by individual citizens, social movements and politicians. This has greatly been informed by scepticism towards negative influence that individuals or groups that control representative organs of governments, particularly the Executive, that are perceived as antagonistic to democratic processes. In such contexts, courts emerge as the platform of choice for settling of political disputes by social forces. Consequently, the odds are in favour of greater judicial independence which in turn clothes the Judiciary with more power to defend constitutional commitments and democratic ideals.

In Kenya, following the enactment of the Constitution in 2010, the involvement of judiciary in political matters has been abundant. The text and design of the Constitution has provided room for increased judicialisation of politics in Kenya. Empirically, social movements and political actors and individuals have been characterizing their political struggles in the language of rights and fundamental freedoms and approach the courts for solutions. Generally, courts in Kenya have not shied away from dealing with such political controversies thus increased presence of courts in Kenya's post 2010 political trajectory. This has made courts useful instruments in countering totalitarian tendencies of representative organs of government and at the same time entrenching constitutional supremacy and a culture of justification.

Although the courts have had significant impact in promoting democratic ideals and respect for human rights, judicialisation of politics in Kenya has in certain instances occasioned attacks and criticism towards the Judiciary. Some of the attacks include public statements by politicians that are calculated to undermine the reputation of the Judiciary and threats to curtail its power and to reduce its budget. In light of the attacks and criticism, courts should behave in a manner that upholds the confidence bestowed upon them by Kenyans while at the same time safeguarding their institutional security or sociological legitimacy.

To survive political attacks, the Judiciary should shun invitation by political actors to engage in ways that are likely to erode democratic gains that have been made in the post-2010 era. Judges and magistrates should avoid involvement in malpractices such as corruption that diminish their standing in the public. This will most likely help the Judiciary attain public support which would in turn embolden the Judiciary to promote democratic ideals and culture of constitutionalism in Kenya, even in the face of recrimination from the Executive and Parliament.

Part Two

The Use of Violence as a Tool of Electioneering in Kenya

Blood In The Street: Police Violence and Human Rights Violations During the 2017 General Election in Kenya

Japhet Biegon[291*] *& Cecilia Mugo*[292**]

1. Introduction

Since 1991 when it became a *de jure* multiparty state, Kenya has approached its general elections with much trepidation. This ever-present apprehension regarding what is otherwise a normal political occurrence in established democracies may seem unfounded or unreasonable. It is not. General elections in Kenya are quite literally a matter of life and death. Every general election held during the 26-year period between 1991 and 2018 has been marred with political violence, albeit of varying intensity and scope. It is as though the spectre of violence, and the senseless loss and maiming of lives that accompany it, is an inescapable reality of Kenya's electoral cycle.[293] Indeed, violence has come to be regarded as "one of the most striking features of Kenya's political scene",[294] so much so that averting it has often been the preoccupation of some of the key stakeholders involved in the electoral process. For instance, security agencies spend a considerable time ahead of elections training for riots,[295] mapping out what they call hotspots for violence,[296] and restocking their cache of anti-riot gear and equipment.[297]

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293 On the "inescapables" in Kenya's elections see C Thibon et al 'Kenya's 2013 general election: A national event set between "the inescapable and the unforeseeable" in C Thibon et al (eds) *Kenya's past as prologue: Voters, violence and the 2013 general election* (2014) 6.

294 D Anderson & E Lochery 'Violence and exodus in Kenya's Rift Valley, 2008: Predictable and preventable?' (2008) 12 *Journal of Eastern Africa Studies* 328, 338.

295 See e.g. K Otieno 'Police, prison officers conduct anti-riot drill in Nyanza', 23 July 2017, available at https://www.standardmedia.co.ke/article/2001248849/police-prison-officers-conduct-anti-riot-drill-in-nyanza (accessed 3 July 2018).

296 See e.g. M Oloo 'State rolls out security plan for 20 poll chaos hotspots', 2 July 2017, available at https://www.standardmedia.co.ke/article/2001245663/state-rolls-out-security-plan-for-20-poll-chaos-hot-spots (accessed 3 July 2018).

297 See e.g. C Ombati 'Polls: State acquires more anti-riot gear', 30 July 2017, available at https://www.standardmedia.co.ke/article/2001249689/polls-state-acquires-more-anti-riot-gear (accessed 3 July 2018).

For the Kenyan police force, preparation for a general election is akin to getting ready for a perilous war. This is an old-age practice and approach that predates modern-day elections. Ahead of the 1963 election, for instance, security agencies took drastic pre-emptive measures to the extent that one would have thought that the country was on the edge of a civil war:[298]

> There were many predictions at the start of the campaign that violence would be widespread. Precautions were taken to deploy troops to likely trouble spots. One company of the King's African Rifles was moved to Kakamega, center of the closely disputed Baluhya country, the Western Region. Another went to Kisii, on the assumption of trouble between this K.A.N.U. tribe and their K.A.D.U. neighbours, the Kipsigis. Mombasa, considered the problem town, was, however, left to the police. The tough 45th Marine Commando was flown in from Aden a week before polling began, but made itself inconspicuous by disappearing on an exercise into the forests around Mount Kenya. Beverley aircraft were kept at readiness for any emergency. Two other K.A.R. battalions and the British infantry brigade were not on formal stand-by but kept ready to move at 48 hours' notice.

Fuelled by pervasive and age-old inter-ethnic rivalries and tensions in the country, election-related violence in Kenya has always involved the same cast of lead characters: the politician or businessman who stirs ethnic hatred or sponsors the violence; the neighbour who turns against his long-standing neighbour with a machete, an arrow, or some other crude weapon; and the police officer who uses excessive and deadly force against individuals protesting the election process or its outcome. This chapter concerns itself with the nature and pattern of the violence perpetrated during the 2017 general election by the last actor in this list: the police officer. The 2017 general election, like the one that took place a decade earlier in December 2007, will be remembered for many years to come for the extensive damage it caused to Kenya's social fabric, economic development, and democratic progress. If the mediation process following the 2007/2008 post-election violence pulled the country back from the brink of collapse as it surely did,[299] then the 2017 general election pushed it closer to the edge again.[300]

A tense political environment and waves of electoral violence characterized the 2017 general election, threatening to tear the country apart. The Supreme Court's annulment of the August presidential election, the decision of a key contender to boycott the fresh presidential election, and his subsequent installation as the "people's president", were developments of a nature never witnessed before in Kenyan politics. While it is largely the utterances, decisions and actions of political actors that largely brought the country to this dire situation, the police are equally to blame. Their use of excessive force to disperse crowds protesting the process and outcome of the presidential election led to bloodshed and mayhem. Police killings were at some point alarmingly referred to as acts of genocide,[301] a reference that reminded many of the chaos that riddled the 2007 post-election period.

298 C Sanger & J Nottingham 'The Kenya general election of 1963' (1964) 2 *Journal of Modern African Studies* 1, 29.

299 The Office of the AU Panel of Eminent African Personalities *Back from the brink: The 2008 mediation process and reforms in Kenya* (2014).

300 On how the 2007/2008 post-election pushed the country to the brink see Kenya National Commission on Human Rights *On the brink of a precipice: A human rights account of Kenya's post-2007 election violence* (2008).

301 L Awich 'Investigate genocide against our supporters, NASA tells ICC' available at https://www.the-star.co.ke/news/2017/11/23/investigate-genocide-against-our-supporters-nasa-tells-icc_c1674251 (accessed 30 May 2018).

The police did not kill and injure as many people in 2017 as they did in 2007-2008, perhaps because the protests against the electoral process and outcome were concentrated in a few areas. Still, the high levels of police violence and the resultant deaths and injuries evoke similar questions asked ten years ago. Why are the police such active perpetrators of violence during election cycles in Kenya? What can be done to stop this abhorrent culture?

This chapter revisits these questions using the 2017 electoral experience as its backdrop. Reports describing the nature and patterns of police violence in the context of the 2017 general election are hundreds of pages. The most prominent of these are: "*Mirage at dusk: A human rights account of the 2017 general elections"* and "*Still a mirage at dusk: A human rights account of the 2017 fresh presidential elections"* by Kenya National Commission on Human Rights (KNCHR); *"Kill those criminals: Security forces violations in Kenya's August 2017 elections"* by Amnesty International and Human Rights Watch; and *"They were men in uniform: Sexual violence against women and girls in Kenya's 2017 elections"* by Human Rights Watch. These reports are detailed and well researched. The evidence against the police is overwhelming. What the reports lack, however, is a comprehensive explanation of why the police behaved the way they did. In this chapter, we walk in the footsteps of the handful of scholars who have previously attempted to explain police behaviour during elections in Kenya.[302] We must clarify, though, that our endeavour to "explain" police violence is not to "justify" the trend. It is to seek to interrogate its root causes and driving forces. Our aim is to contribute to discussions on how to find a lasting solution to police violence.

While we return to relatively old questions, we do so under a very different legal and policy environment. In 2007/2008, the police operated under a constitutional and statutory framework that placed little constraints, if any, on their behaviour regarding the use of force and respect for human rights. With this kind of operational environment, the police force, or at least its leadership, did not think that its collective conduct in the aftermath of the 2007 general election was below any expected standard. This fact is clear from the testimony of Major General Mohamed Hussein Ali, the then Commissioner of Police, before the Commission of Inquiry into the Post-Election Violence (CIPEV). When asked by the CIPEV whether with the benefit of hindsight he would have handled matters differently, the police commissioner was adamant that he would still act "exactly the same way".[303] In the ten years since he made this statement, new laws and policies have replaced the old. An elaborate list of expected or acceptable standards of police behaviour has been introduced.

The 2010 Constitution provides that the pursuit of national security must be "in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms."[304] It specifically requires the police force to "strive for the highest standards of professionalism and discipline among its members" and to "comply with constitutional standards of human rights and fundamental freedoms".[305]

302 M Ruteere & K Wairuri 'Explaining and mitigating elections-related violence and human rights violations in Kenya' in K Njogu & P Wekesa (eds) *Kenya's 2013 general election: Stakes, practices and outcomes* (2015) 112; M Ruteere 'More than political tools: The police and post-election violence in Kenya' (2011) 20 *African Security Review* 11.

303 Republic of Kenya *Report of the Commission of Inquiry into Post Election Violence (CIPEV)* (2008) 206 (Hereinafter: Waki Report)

304 Constitution of Kenya, section 238(2)(b).

305 Constitution of Kenya, 2010, section 244(a) & (c).

The 2011 National Police Service Act (NPS Act) requires any use of force by the police to be strictly in accordance with the proportionality and necessity test.[306] Lawful force must only be used after non-violent means of responding to a situation are ineffective or offer no promise of achieving the intended result.[307]

The use of force should in any event be reserved for the limited purpose of saving or protecting life or in self-defence against imminent threat of life or serious injury.[308] In addition to these regulations on the use of force, internal and external mechanisms for police accountability generally and on the use of force in particular have been established and are fully operational. The internal mechanism – the Internal Affairs Unit (IAU) – sits within the police force. It carries out internal investigations into police misconduct. The external mechanism – the Independent Policing Oversight Authority (IPOA) – provides civilian oversight over the police. It investigates police misconduct and cases of death or serious injury at the hands of the police. A third body – the National Police Service Commission (NPSC) – manages the human resources aspects of the force, including the recruitment of new police officers and the vetting of existing ones for suitability.

With the above regulations and accountability mechanisms, general expectations or demands on police behaviour are quite different and considerably higher now as compared to a decade ago. Yet, and to the extent that societal demands are a source of police behaviour,[309] the police did not act fundamentally different during the 2017 general election. They killed and maimed as if the old dispensation was still in place. The quest to understand this paradox lies at the heart of this chapter. The chapter is divided into six sections. This section introduces the subject of discussion. Section 2 provides an overview of the evolution of police violence during general elections while Section 3 focuses on the pattern of police violence and human rights violations during the 2017 general election. Section 4 explains why police violence is prevalent during elections. Section 5 critiques the on-going police reform programme and proposes what needs to change in order for it to contribute to stemming the tide of police violence in the country. Section 6 draws the chapter to a conclusion by reminding the reader of the "big picture" on understanding and addressing police violence in Kenya.

2. The Police Force and Electoral Violence: A Brief History

Before delving into the 2017 experience, it is important to go back in time and trace the evolution of the role of the police in election-related violence. The focus here is on police behaviour in the context of elections held after Kenya formally became a *de jure* multiparty state in 1991. However, it is important to note that the general violent posture of the Kenyan police, like many other practices entrenched within the force, has deep colonial origins. As they are well documented in the literature,[310] it is not necessary to rehash these origins in the present work. What we must remember is that the force that has been entrusted with the responsibility of ensuring law and order in the post-independent period bears a striking resemblance to the colonial police: "narrow in outlook, unclear in mission and violent in tendency".[311]

306 National Police Service Act No. 11A of 2011, Sixth Schedule, section A (2).
307 NPS Act, Sixth Schedule, section A (1).
308 NPS Act, section B(1)
309 O Marenin 'Policing Nigeria: Control and autonomy in the exercise of coercion' (1985) 28 *African Studies Review* 73, 76.
310 See e.g. Republic of Kenya *Report of the Truth, Justice and Reconciliation Commission: Volume IIA* (2013) 34-72.
311 TJRC Report Volume IIA (n 18 above) 72.

The colonial police force was an instrument of state oppression. It was a deadly crude tool with which the colonial master hammered the African population into submission. It has been aptly described as "one of the most violent and coercive institutions of the colonial era".[312]

With independence, the leadership and face of the command structure of the police force changed but not its mind-set, culture and practice. The core characteristics that defined the colonial police force have been carried deep into the independence era. They have been faithfully passed from one generation to another. Shifts, if any, have been very minimal. As the Truth, Justice and Reconciliation Commission (TJRC) observed:[313]

> Independent Kenya inherited a police force which was deeply and historically troubled. From the 1890s right through to the late 1950s and early 1960s, the Kenya police force clearly structured itself around the policing needs of a small and politically powerful elite and racial minority. Kenya's police force was from the outset built to cater to these privileged few. When, however, the Kenya Police Force did encounter African populations it was with a force and devastating violence. Throughout the Commission's mandate [1963-2008] this never changed. The police force remained a law unto itself.

In focusing on post-1991 elections, we do not in any way intend to suggest that pre-1991 elections were entirely free of police violence. Excessive use of force by the police in the context of elections has been a matter of concern for decades on end. Consider, for example, the 1963 general election, ahead of which there was palpable tension and occasional violent clashes in several parts of the country between supporters of the two-main competing political parties – Kenya African National Union (KANU) and Kenya African Democratic Union (KADU). Writing in 1964, Sanger and Nottingham recall what they describe as an "outstanding incident" in Kangundo, Machakos, where the two parties held parallel rallies way too close to each other.[314] Instead of ensuring that peace prevailed, a platoon of the General Service Unit (GSU) of the police disrupted the KADU rally with such brutal force that Sanger and Nottingham liken their behaviour to that of the notorious *Force publique* of pre-independent Congo. In their own words, "the ferocity of the G.S.U. paramilitary unit in attacking elderly men and innocent stall-holders who were not nimble enough to escape was a depressing echo of the methods of the *Force publique* before Congo independence".[315] Other recorded episodes of police dispersal of crowds in the context of the 1963 general election are not as detailed. However, they still point to a generally permissive use of force by the police. In Mombasa, it is reported that police used teargas to disperse a crowd protesting the killing of a pro-KANU supporter.[316]

They similarly used teargas in Kitale to disperse a crowd that had attempted to stone Jomo Kenyatta's car.[317]

312 TJRC Report Volume IIA (n 18 above) 57.
313 TJRC Report Volume IIA (n 18 above) 99.
314 Sanger & Nottingham (n 6 above) 30.
315 Sanger & Nottingham (n 6 above) 31.
316 'KANU youth knifed dead in Coast brawl' *Daily Nation*, 11 March 1963, cited in E Owuor 'Women and political inclusion in Kenya: A historical overview, 1963-2016 in J Biegon (ed) *Gender equality and political processes in Kenya* (2016) 7, 13.
317 Sanger & Nottingham (n 6 above) 30.

It is helpful to divide the history of the role of the police in post-1991 experiences of election-related violence into two distinct phases. The first phase covers the general elections held between 1991 and 2006 while the second phase covers those held between 2007 and 2017. As the discussion below shows, police in Kenya have gradually evolved from indirect to direct perpetrators of electoral violence. This is not a rigid classification but it reveals the broader trajectory of police behaviour during elections.

2.1 Indirect perpetrators: 1991-2006

Kenya's police force largely played a covert or indirect role in electoral violence during the 1990s. The force aided or abetted communal-based organized gangs to carry out ethnic violence against real or perceived political opponents. This was particularly the case in the Rift Valley where organized gangs affiliated to the Kalenjin and Maasai communities violently attacked Kikuyu, Kisii, Luhya, Luo, and other non-Kalenjin populations residing in the province. In the months leading up and following the 1992 general election, these organized gangs, particularly the so-called "Kalenjin warriors", killed more than 1000 individuals and displaced over 300,000 others.[318] The 1997 general election was affected by a similar pattern of violence witnessed in 1992. This time round, the violence extended from Rift Valley and its borderlands (Nyanza and Western provinces) to as far as the coastal region of the country.[319] One incident stands out in relation to electoral violence in the coastal region. On the night of 13 August 1997, armed raiders from the local community attacked the Likoni police station. They burnt it down, made away with dozens of guns and thousands of ammunitions, and more shockingly, killed six policemen.[320] It is estimated that the violence that engulfed the coast province prior to the 1997 general election claimed the lives of over 100 people, mainly from non-coastal communities such as the Kikuyu, Kamba, Luo and Luhya.[321]

Reports of official inquiries, as well as those of independent monitors, have all concluded that the police force was complicit in the 1992 and 1997 waves of ethnic violence. In many instances, including the 1997 raid on the Likoni police station, intelligence reports about impeding attacks were available to the police but they did little in the way of prevention.

In other instances, they stood by and watched as gangs carried out attacks on targeted communities. They turned away victims who went to police stations to report attacks or seek shelter. The police rarely opened investigations or arrested suspected perpetrators, and when they occasionally did, it was altogether part of an officially sanctioned smokescreen. The assessment of police response to the attacks against members of the Luo community residing in Owiro farm in Nandi district by the 1998 Judicial Commission of Inquiry Appointed to Inquire into Tribal Clashes in Kenya (Akiwumi Commission) is an excellent depiction of the complicity of the police in the 1992 electoral violence.

318 See Republic of Kenya *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and other Parts of Kenya* (1992); Human Rights Watch *Divide and rule: State-sponsored ethnic violence in Kenya* (1992); National Christian Council of Churches *The cursed arrow: A report of organized violence against democracy in Kenya* (1992).

319 See Republic of Kenya *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya* (1999) (Hereinafter: Akiwumi Report); Kenya Human Rights Commission *Killing the vote: State sponsored violence and flawed elections in Kenya* (1998).

320 Kenya Human Rights Commission (n 27 above) 56.

321 Kenya Human Rights Commission (n 27 above) 2.

The Commission observed as follows:[322]

> It is our view that the conduct of the police smacked of negligence, cowardice, and callousness. Indeed, whatever they did was clearly inadequate and bordered on condoning the clashes. It is unthinkable that all non-Nandi houses, except the negligible few, could be torched and razed down, in more than three locations without any single person being positively identified, arrested and successfully prosecuted for it. A few people who were arrested were merely scapegoats, and in any case, many of them were released without charges being preferred against them; and where any charges were preferred the investigation of the cases was conducted in a half-hearted manner.

In relation to both the 1992 and 1997 episodes of electoral violence, the Akiwumi Commission received evidence of a similar pattern of police behaviour in most of the other parts of the country. It concluded as follows:[323]

> In our view, it is not the lack of adequate security personnel and equipment or preparedness that contributed to the tribal clashes. The Police Force and the Provincial Administration were well aware of the impeding tribal clashes and if anything, connived at it. … The circumstances that initiated and fanned the tribal clashes were not so much logistical, as the negligence and unwillingness on the part of the Police Force and the Provincial Administration to take firm and drastic action which would surely have prevented the clashes from erupting and even if they erupted, would have brought the initial clashes to a speedy conclusion and discouraged further clashes.

The motivation behind electoral-related clashes in the 1990s partly explains the indirect involvement of the police. Just prior to yielding to pressure to make Kenya a multiparty state by law, President Daniel arap Moi ominously warned that multi-party democracy would tear the country apart along ethnic lines. As if to give credence to this prediction, politicians allied to President Moi, and mainly from the Rift Valley province, quickly originated a call for a *majimbo* or federal system of governance. In reality, *majimbo* was a code word for the expulsion of non-Kalenjins from the Rift Valley province. As the 1992 general election drew closer, they incited and sponsored gangs from the Kalenjin, Samburu, Turkana and Maasai communities to attack members of other communities residing amongst them and perceived to be pro-opposition.

The ensuing clashes were purposely designed to alter voting patterns and create some sort of homogenous voting blocs that would favour President Moi. All that the police were required to do in this scenario was to turn a blind eye and allow the violence to proceed as planned. Similar logic informed the ethnic violence witnessed in 1997 as well as police complicity.

322 Akiwumi Report (n 27 above) 81.
323 Akiwumi Report (n 27 above) 284.

2.2 Direct perpetrators: 2007-2017

In the last three general elections (2007, 2013 and 2017), the police have taken a more overt or direct role in electoral violence. They have been involved in actual acts of violence, including killings, rape, sexual violence, torture, and beatings. The police are no longer mere accomplices. They are active perpetrators. Or, at the very least, they are the prime suspects. Their direct involvement in electoral violence is so pronounced such that they account for a substantial percentage of recent electoral-related killings and serious injuries. To the extent that the state is involved, election-related violence has transformed from "state-sponsored violence" to "state violence". The state is no longer a mere by-stander or a sponsor; it has descended into the theatre of violence and actively takes part in it.

Thus, of the 1133 people killed in during the 2007/2008 post-election violence, the police were responsible for 35.7 per cent or 405 of the killings.[324] In Nyanza and Western provinces, the police were responsible for even higher percentages of killings, 79.9% and 72.5% respectively.[325] The Waki Commission concluded that the large number of people killed by the police in the two provinces was "inexcusable and highly regrettable".[326] In the context of the 2013 general election, all cases of recorded killings in Kisumu, where protests were held after the Supreme Court affirmed Uhuru Kenyatta's election as president, were attributed to the police.[327] As will be seen in detail below, the police equally accounted for the largest percentage of killings reported in the context of the 2017 general election.

The direct role played by the police in electoral violence is again partly related to changes in the methods used by incumbents to manipulate election outcomes. In the 1990s, as has been seen above, the incumbent deployed citizen-to-citizen violence coupled with police complicity to influence voting patterns. In the last three elections, concerns about manipulation have largely revolved around the tallying of votes rather than whether certain sections of society have been prevented from taking part in the polls by violent or other means. This has shifted much of the electoral-related violence from the pre-election to the post-election period. The nature of the violence has also changed. While citizen-to-citizen attacks remain a key plank of electoral violence, the police are now actively involved. This is connected to the role they play in responding to protests or demonstrations concerning election processes or outcomes.

3. The 2017 General Election: Police Violence and Human Rights Violations

The general election held on August 8 2017 was the second under the 2010 Constitution and the sixth since the reintroduction of multiparty politics in 1991. Although voters had six ballots to cast for different levels of political offices, much of the local and international attention was understandably on the presidential contest.

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324 Waki Report (n 11 above) 316.
325 Waki Report (n 11 above) 342.
326 Waki Report (n 11 above) 344.
327 Human Rights Watch 'Kenya: Witnesses describe Kisumu killings by police", 23 May 2013, available at https://www.hrw.org/news/2013/05/23/kenya-witnesses-describe-kisumu-killings-police (accessed 31 June 2017). See also International Network of Civil Liberties Organizations *Take back the streets: Repression and criminalization of protest around the world* (2013) 38-43.

This particular contest has a history of bringing out the worst of Kenyans, setting one ethnic group against another. The 2017 presidential poll attracted a total of eight candidates. But like in 2013, it quickly narrowed down to a race between two individuals: Uhuru Kenyatta of Jubilee Party and Raila Odinga of National Super Alliance (NASA). These two were not just competing against each other; they were, more importantly, carrying the hopes and dreams of their respective ethno-regional alliances.

The August 2017 presidential election took place against the background of hastily initiated changes to the electoral laws, last hour selection and appointment of a new electoral body,[328] a flood of court cases challenging different aspects of the electoral process,[329] and the brutal murder of the electoral body's director of information and communications technology.[330] In the end, a relatively peaceful and orderly election took place. But like in previous elections, the story does not end there. It actually gains momentum from this point onward. What followed the August presidential poll was a protracted tussle that lasted for more than three months and for which scores of individuals, including a six-month old baby, paid with their dear lives.

3.1 The First Round of Police Violence in 2017

A day after the election and with Kenyatta taking an early lead, Odinga disputed the results that were trickling into the national tallying centre from around the country. He claimed that the electoral computer system had been hacked with the aim of manipulating the results in favour of Kenyatta, triggering protests in parts of Nairobi and Kisumu. The electoral body refuted the claim, and on the night of 11 August, it declared Kenyatta the winner. Protests that had started on 9 August in Nairobi and Kisumu gathered traction and extended to other parts of NASA's political strongholds. In Nairobi, the protests were concentrated in informal settlements populated by Odinga supporters: Babadogo, Dandora, Kariobangi, Kawangware, Kibera, Korogocho, and Mathare. For several days, the police were engaged in running street battles with protestors. The aftermath was death, tears and bloodshed, attributed mainly to excessive use of force by the police.

The Kenya National Commission on Human Rights documented 37 deaths in Nairobi, Kisumu, Siaya and Homa Bay counties.[331] Police gunshot wounds or beating caused all the deaths, except two.[332]

328 The changes to the electoral laws and the electoral body came at a heavy price. Between April and June 2016, security forces killed at least four people during demonstrations calling for these changes to be put in place. See Independent Policing Oversight Authority *Monitoring report on police conduct during public protests and gatherings: A focus on the anti-IEBC demonstrations (April-June 2016)* (2017); Human Rights Watch 'Kenya: Police killings during protests' available at https://www.hrw.org/news/2016/06/20/kenya-police-killings-during-protests (accessed 29 May 2018).

329 See W Khobe in this volume.

330 See 'IEBC ICT manager Chris Musando found dead' available https://www.the-star.co.ke/news/2017/07/31/iebc-ict-manager-chris-musando-found-dead_c1607611 (accessed 29 May 2018).

331 Kenya National Commission on Human Rights *Mirage at dusk: A human rights account of the 2017 general elections* (2017) 163.

332 As above.

Seven of the dead were children and included a six-month old baby who was clobbered on the head while under the care of her mother at home. Amnesty International and Human Rights Watch reported a higher death toll compared to the KNCHR. In a joint report, the two organizations presented calculations showing that the death toll "could be as high as 67".[333] The KNCHR concurs that the number of deaths could be higher than what it reported as it may have not received all the information at the time of writing its report.[334] A good number of those whose lives were spared suffered serious injuries, including gunshot wounds and broken bones. The KNCHR documented a total of 126 cases of serious injuries, only three of which could not be attributed to the police.[335] Other reports place the number of people who suffered injuries in Nairobi alone, and mainly in Eastlands and Kibera areas, at a staggering 333.[336]

3.2 The Second Round of Police Violence in 2017

Odinga had initially indicated that he would not take the electoral dispute to the relevant court of law for adjudication. However, he reversed this position and lodged a Supreme Court petition against the declaration of Kenyatta as president-elect. On 1 September 2017, the Supreme Court ruled in his favour, observing that the election was riddled with illegalities and irregularities to the extent that it was null and void.[337] It ordered a fresh presidential election to be conducted within 60 days. Ahead of the fresh election, initially scheduled for 17 October and then shifted to 26 October 2017, NASA organized demonstrations calling for a minimum set of reforms to be undertaken before a new poll could be conducted. Again, the police responded to these protests with unbridled force. Between 1 September 2017 when the August presidential election was annulled and 25 October, 2017 the eve of the fresh presidential election, the KNCHR documented 25 new cases of deaths and 100 new injuries in Nairobi and Kisumu.[338]

When it appeared to Odinga that the full range of the minimum reforms would not be implemented, he called upon his supporters to boycott the poll. Odinga supporters generally heeded to his call. Surprisingly also, the boycott call also suppressed turnout in Jubilee strongholds.[339] Turnout stood at a mere 38.84% of all registered voters compared to 77.48% during the August election. Most importantly, Odinga supporters effectively obstructed the electoral body, including by violent means, from conducting the election in 27 constituencies. Kenyatta was nevertheless declared the winner after he garnered 98.27% of the votes. This declaration sparked another wave of protests in NASA strongholds.

The protests continued in fits and starts for several days after the declaration and somewhat reached a climax on 17th November when supporters of Odinga mobilized to welcome him on his return from abroad, clashed with the police in Nairobi for ten long hours.

333 Amnesty International & Human Rights Watch *Kill those criminals: Security forces violations in Kenya's August 2017 elections* (2017) 1.
334 KNCHR (n 39 above) 164.
335 KNCHR (n 39 above) 178.
336 Amnesty International & HRW (n 41 above) 15.
337 Raila Amolo Odinga & Another v IEBC & 2 Others, Presidential Petition No. 1 of 2017, available at http://kenyalaw.org/caselaw/cases/view/140716/ (accessed 30 May 2018).
338 Kenya National Commission on Human Rights *Still a mirage at dusk: A human rights account of the 2017 fresh presidential elections* (2018) 10.
339 There was 42.36% voter turnout in areas where voting took place.

The police claimed that only five people were killed on this day.[340] Yet, the KNCHR recorded a total of 11 deaths, seven of which had all the main attributes of police involvement.[341] Indeed, between 26th October and 29th November, the KNCHR recorded 32 deaths.[342] The organization observed that 18 of these were caused by the fact that the police "fired directly into crowds", hitting protestors in the head and chest.[343] This number included three children.[344]

In addition to shooting or bludgeoning protestors to death and disfiguring survivors, the police were also involved in rape and acts of sexual violence. On the eve of the fresh presidential election, a group of 20 civil society organizations (CSOs) wrote an open letter to relevant government officials raising concern about sexual violence during the chaos that followed the August general election. The CSOs had that far counted at least 60 cases of sexual violence committed mostly by police officers and/or "men in uniform".[345] Subsequent evidence presented by Human Rights Watch suggested that there was "widespread sexual violence against women and girls, and sexual attacks on men, in terms of numbers and locations".[346] In an earlier version of its report on human rights violations committed in the context of the fresh presidential election, the KNCHR indicated that it had come across reports of sexual violence during the monitoring exercise. It decided, "due to the magnitude of such violations", to initiate "a robust investigations exercise" that would lead to a separate report on this issue.[347] However, a second version of the report curiously omits any reference to sexual violence, save for indicating that a group of police officers in Chemelil beat up a woman and threatened to rape her.[348]

Without a central repository of data, it is difficult to tell with certainty how many people were killed or injured by the police during the 2017 general election. We may have to work with rough estimates as gleaned from various reports and update the figures as new evidence emerge.[349] However, it may be confidently said that more than 100 people were killed during the entire election period and that the police caused most of the deaths. Findings of post mortem conducted by the Independent Medico-Legal Unit (IMLU) implicate the police in almost all cases in which this procedure was conducted.[350]

340 D Miriri 'At least five killed in Kenya as violence greets opposition leader's return', 17 November 2017, available at https://www.reuters.com/article/us-kenya-election/at-least-five-killed-in-kenya-as-violence-greets-opposition-leaders-return-idUSKBN1DH0T6 (accessed 9 July 2018).

341 KNCHR (n 46 above) 75-79.

342 KNCHR (n 46 above) 73.

343 KNCHR (n 46 above) 74.

344 KNCHR (n 46 above) 73.

345 'An open letter to Cabinet Secretary for Health Dr. Cleopa Mailu, Acting Interior Cabinet Secretary Dr. Fred Matiang'i, and Inspector General of Police Mr. Joseph Boinnet: Stop police rape of civilians, and ensure access to medical care for victims", 25 October 2017, available at http://physiciansforhumanrights.org/assets/misc/kenya-open-letter-on-election-related-sexual-violence.pdf (accessed 30 May 2018).

346 Human Rights Watch, *They Were Men in Uniform: Sexual Violence Against Women and Girls in Kenya's 2017 Elections* (2017) 2.

347 Kenya National Commission on Human Rights *A human rights monitoring report on the 2017 repeat presidential elections* (2017) 25.

348 KNCHR (n 46 above) 89.

349 See e.g. Human Rights Watch 'Kenya: Fresh evidence of election-period abuses', 25 February 2018, available at https://www.hrw.org/news/2018/02/25/kenya-fresh-evidence-election-period-abuses (accessed 9 July 2018).

350 Independent Medic-Legal Unit 'Press statement on public order management in the August and October 2017 general elections', available at https://www.imlu.org/index.php/shortcode/press-release/send/6-press-releases/13-imlu-press-statement (accessed 9 July 2018).

In concluding this section, it is apposite to note that the impact of the electoral violence on the quality of the fresh presidential election was one of the issues that was submitted for determination by the Supreme Court in the petition challenging the second declaration of Uhuru as president-elect.[351] The petitioners argued that the violence preceding the fresh presidential election, including police violence, had prevented most parts of western Kenya and some other parts of the country from participating in the election. This fact was compounded by the decision of the electoral body to cancel the election in a total of 27 constituencies. As a result, the election had not met the constitutional threshold of a free and fair election. It had failed the universal suffrage test as a huge part of the country had been denied the right to vote.

While it took judicial notice of the violence that riddled the election, including the role played by the police, the Supreme Court dismissed the petitioners' argument. It ruled that the relevant question for determination was whether the electoral body and other state organs had failed to take necessary action to ensure that voters in the affected areas were given an opportunity to vote. Apparently based on the evidence before it, the Supreme Court held that the electoral body and the state had taken adequate measures to ensure that voting would take would place in the affected areas, and as such, they could not bear the responsibility for the eventual turn of events.[352] According to the Supreme Court, the responsibility for the failure of the election to take place in the affected areas squarely falls on "unidentified private citizens and political actors" who caused or instigated the violence.[353]

4. Explaining Police Violence

The mainstream view is that police violence in the context of general elections in Kenya reflects the failure of the force to grasp the basic principles relating to use of force and the proper management of public assemblies, including protests and demonstrations.[354] The default police response to protests and demonstrations is to disperse them with brutal force and violence.[355] The peaceful conduct of demonstrators is rarely a factor that dissuades the police from resorting to use of force. It also seldom matters whether the demonstrators are children, students or adults.[356] Negotiation and de-escalation as a skill of crowd management is rarely practiced.

351 *John Harun Mwau & 2 Others v IEBC & 2 Others*, Presidential Petition No. 2 & 4, Supreme Court of Kenya, 11 December 2017 (Hereinafter: *Harun Mwau et al Petition*).

352 *Harun Mwau et al Petition*, para 295.

353 *Harun Mwau et al Petition*, para 297.

354 See Joint Report of the Special Rapporteur on the rights to freedom of assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, A/HRC/31/66, 4 February 2016; African Commission on Human and Peoples' Rights Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa, adopted at the 21st extraordinary session, 23 February – 4 March, Banjul, The Gambia; UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted at the eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August – 7 September 1990.

355 J Biegon *et al Domestic adherence to continental and international norms in the practice of policing assemblies in Africa* (2017) 25.

356 See Commission on Administrative Justice *In the best interests of the child: An investigation report on use of excessive force by police officers and improper conduct by other public officers involved in quelling the 19th January, 2015 demonstration at Langata Road Primary School* (2015); C Ombati 'IPOA: There is evidence police assaulted UoN students during riots' available at https://www.standardmedia.co.ke/article/2000198980/ipoa-there-is-evidence-police-assaulted-uon-students-during-riots (accessed 25 June 2018).

The norm is to use force, often in excessive amounts, regardless of the circumstances. Therefore, killing and maiming of demonstrators in between general elections is rampant. In 2015, the police killed four people and injured numerous others in an estimated 140 demonstrations around the country.[357] In 2016, the number of people killed by the police rose to 12, even as they wounded many more.[358] As such, Kenya as a country has repeatedly come under international spotlight because of reported violations of the rights to freedom of assembly and of association.[359]

Protests and demonstrations acquire more significance in the context of elections, not just in Kenya but around the world too. In these contexts, the issue at stake is not limited to the extent to which individuals are able to enjoy the relevant rights and freedoms. It is also an issue of the degree to which the election and its outcome meets the internationally accepted threshold. As the United Nations (UN) Special Rapporteur on the rights to freedom of assembly and of association has noted:

> An electoral process, in which widespread barriers are systematically placed on the exercise of the rights to freedom of peaceful assembly and of association, cannot be said to be either free or fair and, as such, the outcome should not be considered to be the result of 'genuine' elections, as required under international law.[360]

In the past, analysts have attributed police violence in the context of elections to poor laws and regulations on the use of force as well as the lack of basic understanding of proper management of public assemblies. In relation to police violence in 2007/2008, the CIPEV observed that police response to protests was "inconsistent in its application, jeopardized the lives of citizens and was in many cases a grossly unjustified use of deadly force".[361] It recommended that the aspects of the Police Standing Orders relating to use of force and policing of demonstrations be overhauled.[362]

Philip Alston, former UN Special Rapporteur on extrajudicial, summary and arbitrary executions, similarly blamed the country's laws on the use of force, which he found to be "contradictory and overly permissive".[363] He also found that "internal and external police accountability mechanisms are virtually non-existent; there is little check on, and virtually no independent investigations of, alleged police abuses".[364] The National Task Force on Police Reforms (Ransley Task Force) further argued that the problem lies in the training of Kenyan police.

357 Article 19 'Country report: Protests in Kenya 2015' available at https://www.article19.org/resources/country-report-protest-in-kenya-2015/ (accessed 25 June 2018).

358 C Ombati 'Police killed 12 people in 175 protests in the last 11 months: Agency says' available at https://www.standardmedia.co.ke/article/2000226060/police-killed-12-people-in-175-protests-in-the-last-11-month-agency-says (accessed 25 June 2018).

359 See e.g. African Commission on Human and Peoples' Rights 'Joint press release on the need to carry out prompt and effective investigations into the violence that occurred during demonstrations in Kenya', 30 May 2016, available at http://www.achpr.org/press/2016/05/d301/ (accessed 25 June 2018).

360 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/68/99, 7 August 2013, para 7.

361 Waki Report (n 11 above) 419.

362 Waki Report (n 11 above) 421.

363 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Mission to Kenya, A/HRC/11/2/Add.6, 29 May 2009, para 6.

364 As above.

The Task Force reviewed the training of police recruits and found that it predominantly focused on field drills and parades at the expense of mental fitness and character or what it termed as "intelligent" police training.[365] This focus, it noted, "inculcates in the recruits a psyche that policing is combative and confrontational".[366]

The above factors still account for police violence in the context of elections. But they only tell part of the story. Indeed, it may be argued that some of the factors, such as the lack of clear laws and regulations on the use of force, are no longer as strong as they were 10 years ago. As mentioned earlier, the relevant laws, including the NPS Act, are now crystal clear regarding the conditions under which the use of force is warranted. Indeed, hundreds of police officers have undergone training on the use of force and management of assemblies in the last few years, although the quality of the training is suspect.[367] Ahead of the 2017 general election, the KNCHR held 10 regional training workshops during which a total of 450 senior police officers were trained on principles of human rights and crowd management.[368] Of course, this number is arguably insignificant considering that the force planned to deploy 180,000 police officers to provide security during the election period.[369]

However, it is worth recalling that the force has actually proven that if it so wills, it can properly manage protests and demonstrations. This fact became an open secret on 30 January 2018 when Odinga took oath as the "peoples' president" at Uhuru Park in Nairobi. It had been justifiably feared that a planned police obstruction or dispersal of the assembly,[370] would perhaps lead to unprecedented bloodshed. On the material day, the police surprisingly refrained from interfering with the assembly. Odinga was sworn in before thousands of his supporters who were peaceful before, during and after the ceremony. Not a single life was lost.

If the police can be professional and disciplined as they were on 30 January 2018, what accounts for their different and callous behaviour in the immediate aftermath of the two presidential elections of 2017? Clearly, there is more that explains police behaviour over and above the argument that they lack a proper understanding of the principles on the use of force and management of crowds. In the pages that follow, we argue that police behaviour in the context of elections could be explained by three additional and interrelated factors.

First, police violence in the context of elections is motivated by the fact that the police are, for all intents and purposes, tools in the hands of the ruling political elite. The Kenyan police officer engages in what some scholars call "regime policing". He acts to protect the political interests of the incumbent president.

365 Republic of Kenya *Report of the Task Force on Police Reforms* (2009) 95 (Hereinafter: Ransley Report).
366 As above.
367 See R Rajab 'Police brutality a case of training challenges and wrong attitude', 23 May 2016, available at https://www.the-star.co.ke/news/2016/05/23/police-brutality-a-case-of-training-challenges-and-wrong-attitude_c1354362 (accessed 25 June 2018).
368 KNCHR (n 37 above) 162.
369 P Langat & S Cherono 'Police, election officials manning 2017 polls increased', 9 May 2017, available at https://www.nation.co.ke/news/politics/State-to-deploy-180-000-police/1064-3919494-115rga2/index.html (accessed 25 June 2018).
370 See C Ombati 'Police rehearse how to stop NASA swearing-in event', 29 January 2018, available at https://www.standardmedia.co.ke/article/2001267611/police-rehearse-how-to-stop-nasa-swearing-in-event (accessed 25 June 2018).

Regardless of what the law says, he is in the service of and ultimately accountable to the president (not the people from whom he receives his mandate and powers). This model of policing informs the day-day-day operations of the police force, but it is openly manifested during contested election processes or outcomes.

Second, police violence in the context of elections is fuelled by ethnic bias. Elections in Kenya are highly charged events because of their deep ethnic dimension. For many pundits of Kenyan politics, elections are ethnic surveys; they are "nothing more than a measure of the numerical strength of ethnic groups".[371] Indeed, ethnicity defines why and how politicians seek, retain or cede power.[372] Therefore, election disputes and the accompanying violence are inherently ethnic in nature and so is the police response. Third, police violence in the context of elections is a product of punitive policing. The deadliest protests and demonstrations in Kenya are election-related because they explicitly or implicitly reveal the political choices of the participants as well as their real or perceived ethnic background. In most cases, therefore, police violence is about punishing demonstrators for their political choice as it is about protecting the regime or an expression of ethnic bias. Each factor is now examined in detail below.

4.1 Regime Policing

It is rather tempting for one to think of applauding the police for their decision not to disperse Odinga supporters who gathered to witness his swearing in ceremony on 30 January 2018. However, before proceeding to issue a congratulatory message, any keen and long-term observer of Kenya's police behaviour may want to examine why the police acted out of character in this instance. He is bound to quickly discover that this decision emanated from outside the ranks of the police force.[373] It was politically activated. In other words, it was not a pure professional policing decision, although in the end it was a wise one. This decision reveals the extent to which policing in Kenya suffers from political interference and how it serves the narrow interests of the political elite. The police think of themselves as being part and parcel of the political regime. Perhaps nothing makes this clearer than the chilling words of police officers who raped a woman before her husband and children during the 2017 election chaos. They told her: "This is our government and there is nothing you can do to us".[374]

As in other countries in Africa, policing in Kenya is basically an "expression of presidential preference, and the key variable in police governance is a president's political calculations'.[375] Analysts have long lamented about this state of affairs.

371 J Biegon 'Politicization of ethnic identity in Kenya: Historical evolutions, major manifestations and the enduring implications' in Kenya Human Rights Commission (ed) *Ethnicity and politicization in Kenya* (2017) 9.

372 As above.

373 F Mukinda 'Why late-night security meeting chose to pull out police from Uhuru Park', 31 January 2018, available at https://www.nation.co.ke/news/Why-police-pulled-out-Uhuru-Park/1056-4285122-xv1y7t/index.html (accessed 10 July 2018).

374 Human Rights Watch (n 54 above) 16.

375 A Hills 'Police commissioners, presidents and the governance of security' (2007) 45 *Journal of Modern African Studies* 403, 420.

Writing about their behaviour during the 1990s, Auerbach observed that the police "often placed the demands of the ruling party and of powerful individuals ahead of the rule of law and ahead of the needs of the citizens."[376]

In a 2005 journal article, Akech similarly observed that the Kenyan police force has since colonial time not only practiced "regime maintenance", but it has traditionally also lacked autonomy from the executive branch of the government.[377] He submits that the influence of politics in the work of the police is "considerable" and that the police simply serve the interests of the political regime of the day.[378] Ghai, the renowned Kenyan constitutional lawyer, concurs in a recent commentary. He argues that Kenya police force still practices the colonial model of policing: "*its major mission is to keep the people under control to prevent any challenge to the regime, which is dominated by one ethnic group or political party*".[379] Human rights groups, such as the Commonwealth Human Rights Initiative and Kenya Human Rights Commission, have expressed similar sentiments.[380]

That the Kenyan police force predominantly serves the political interests of the ruling elite is a fact that becomes apparent during elections. As they present the possibility of change, elections threaten the regime's hold on power. The conventional response of the regime is to use the coercive powers of the state to retain this power. As van der Spuy and Rontsch correctly point out, "*the Kenyan police have been part of the strong-arm arsenal of the various governments, particularly during election years*".[381] This explains why police violence spikes when the presidential contest pits the incumbent president against a strong and viable opposition candidate, as was the case in 2007 and 2017. The political establishment, rather than the leadership of the force itself, is usually the one that defines the overall police response to electoral-related demonstrations and protests.

Taking advantage of the high level of discretion that prevails mainly at the lower levels of many police forces,[382] a few individual police officers may act in defiance of the overall regime-defined plan. They may choose to exercise obedience to the law and work in the service of the people. However, this is an exception rather than the rule. Most police officers are not only happy to preserve the existing political order as is the case in many countries around the world,[383] but are also more than willing to pander to its whims and advance its partisan or factional interests. Others neglect their duty to act professionally for fear of reprisal. A police officer interviewed by Amnesty International and Human Rights Watch's report on the 2017 general election, revealed that while some police commanders knew that a decision to deploy paramilitary units would be unwise, they nevertheless went ahead to do so because they were under the orders of their superiors, who had no interest in sensible and life-saving decisions.[384]

376 J Auerbach 'Police accountability in Kenya' (2003) 3 *African Journal of Human Rights* 275, 277.

377 M Akech 'Public law values and the politics of criminal (in)justice: Creating a democratic framework for policing in Kenya' (2005) 5 *Oxford University Commonwealth Law Journal* 225, 240.

378 Akech (n 85 above) 235 & 240.

379 Y Ghai 'From colonial police to democratic police – and back?' 31 August 2013, available at https://www.the-star.co.ke/news/2013/08/31/from-colonial-police-to-democratic-police-and-back_c822486 (accessed 2 July 2018).

380 Commonwealth Human Rights Initiative & Kenya Human Rights Commission *The police, the people, the politics: Police accountability in Kenya* (2006) 27.

381 E van der Spuy & R Rontsch *Police and crime prevention in Africa: A brief appraisal of structures, policies and practices* (2008) 6.

382 M Marks 'Policing democracy? The case of the public order unit in Durban' (1999) 24 *African Development* 221, 234.

383 Marenin (n 17 above) 75.

384 Amnesty International & HRW (n 41 above) 37.

In the context of the 2007/2008 post-election violence, the CIPEV found strong evidence of political interference with police response. "On a number of occasions", the CIPEV observed,

> "*the decision making and behaviour of senior police officers was influenced by factors outside the formal operating arrangements, chain of command and in direct conflict with mandated duties*".[385]

But perhaps the most damning evidence unearthed by the CIPEV was the deployment of the police to serve as agents of the government's favoured candidate and to deliberately disrupt elections in the western part of the country.

The evidence is that around the 23rd of December [2007] a large number of officers, about 1600, were assembled at the Administration Police Training College at Embakasi to undertake training to act as agents for a political party during elections polling. The training was conducted by senior academic and high-ranking government officials including the hierarchy of the Administration Police. These officers were deployed on the 24th December 2008 to Luo-Nyanza. Ostensibly their role was to disrupt polling and where possible ensure that government supporters amongst the candidates and voters prevailed. All officers deployed were dressed in plain clothes, easily identified as they were not from the local community and travelled in large groups by more than 30 chartered buses. In addition, they received Ksh. 21,000 each for their duties.[386]

The Commission also found that a select group of police officers in the Coast Province had been specifically tasked to receive results of the elections in the region, compile them, and forward the compilation to police headquarters. It concluded that the assignment revealed an "activity that is clearly not within the role or responsibility of the Police and has disturbing connotations".[387]

The 2010 Constitution of Kenya seeks to break the country's long history of regime policing and political interference with the police force. As earlier indicated, the Constitution makes it mandatory for the police force to strive for the highest standards of professionalism and discipline among its members.[388] More importantly, the Constitution seeks to shield the force from political interference by providing that although he is appointed by the President with the approval of Parliament, the Inspector General of Police (IG) has "independent command" over the force.[389] He may receive lawful directions from the cabinet secretary responsible for police services but only in relation to policy matters.[390] For the avoidance of doubt, the Constitution clarifies that the IG cannot receive instructions from anyone in relation to any pending investigations, the enforcement of the law against any person(s), or the employment, assignment, promotion, suspension or dismissal of any member of the force.[391] Unlike in the past when the commissioner of police served at the president's pleasure, the Constitution provides the IG with some form of security of tenure. He serves for a fixed term of four years and may be dismissed only for a limited set of reasons.[392]

385 Waki Report (n 11 above) 407.
386 Waki Report (n 11 above) 405-406.
387 Waki Report (n 11 above) 409-410.
388 Constitution of Kenya, section 244(a).
389 Constitution of Kenya, section 245(a) & (b).
390 Constitution of Kenya, section 245(4).
391 Constitution of Kenya, section 245(4)(a)-(c).
392 Constitution of Kenya, section 245(6) & (7).

Individual police officers, like all members of national security agencies, are bound not to act in a partisan manner, further any interest of a political party or cause, or prejudice a legitimate political interest or cause.[393]

The reality is quite different from what the Constitution envisions. Political interference in matters of policing is still rife. There are many reported incidences linked to the 2017 general election that attest to this reality. In its monitoring report of the 2016 "anti-IEBC demonstrations", the IPOA cited the police force for political partisanship as it pointed to numerous verbal non-policy directives to the police by the then Cabinet Secretary for Interior, Joseph Nkaissery.[394] These would have passed for empty directives had it not been for the fact that the Cabinet Secretary was sometimes flanked by the IG when making them. The most revealing of directives came on 19 October 2017 when Nkaissery's temporary replacement, Fred Matiang'i, declared himself a member of the *Chinkororo*, an outlawed militia group affiliated with the Kisii community, during a public address in a Jubilee Party rally in Kisii.[395] He then proceeded to say that he had the power to direct the police to look away if it became necessary for the *Chinkororo* militia group to defend the Kisii against neighbouring communities using violent means. In his own words, "I am the minister for security and will tell the police to look the other way so that they [Chinkororo] can slap that person".[396]

It is also not uncommon for the Executive to eagerly come to the defence of the police force or seemingly assume the role of police spokesperson when the force is accused of excessive use of force and human rights violations. The passion with which the Executive defends the police leaves the perception that the two institutions are one and the same. On 12 August 2017, as reports of police violence and killings begun to surface, the Cabinet Secretary for Interior confidently told the country that the police had neither used firearms nor killed any protestor.[397] He claimed that the few people who had been killed by the police were criminals engaged in looting of shops and the burning of a vehicle.[398]

Moreover, and despite the fact that many human rights groups had expressed concern about police behaviour during the 2017 general election, President Kenyatta sent a congratulatory message to the police on 2 December 2017, praising them for their "selfless dedication to duty" and for covering the electoral process "effectively and in accordance with the law".[399] A few weeks later, several donor countries funding the police reform programme through the United Nations Office on Drugs and Crime (UNODC) reportedly discontinued the funding citing police violence during the general election.[400]

393 Constitution of Kenya, section 239(1)

394 Independent Policing Oversight Authority *Monitoring report on police conduct during public protests and gatherings: A focus on the anti-IEBC demonstrations (April-June 2016)* (2017) 20.

395 'Fred Matiang'i on the spot over Chinkororo remarks in Kisii' available at https://www.nation.co.ke/news/Fred-Matiang-i-on-the-spot-over-Chinkororo-remarks/1056-4146734-mr8xrh/index.html (accessed 4 July 2018).

396 As above.

397 J Wakaya 'Matiangi denies protestors killed by police, warns violence will be crushed', 12 August 2017, available at https://www.capitalfm.co.ke/news/2017/08/matiangi-denies-protesters-killed-by-police-warns-violence-will-be-crushed/ (accessed 9 July 2018).

398 As above.

399 F Mukinda 'President Kenyatta commends police work during election', 1 December 2017, available at https://www.nation.co.ke/news/Uhuru-commends-police-for-good-work/1056-4210494-1227hur/index.html (accessed 9 July 2018).

400 I Benjamin 'Donors stop police funds over brutality', 19 December 2017, available at https://www.the-star.co.ke/news/2017/12/19/donors-stop-police-funds-over-brutality_c1686853 (accessed 9 July 2018)

According to Hills, the police across Africa are content to be used by the Executive.[401] This assertion is, without a doubt, true of Kenya's police force. In an NPS publication reflecting on police performance during the 2013 general election, and co-authored by the former Inspector General, David Kimaiyo, the reader will find a rather curious admission that the "security agencies take cue from the political leadership". The publication attributes the apparent success of the police in managing the 2013 general election to the cue they received from the political leadership: "the incumbent President Mwai Kibaki provided the enabling environment for the security agencies to be impartial and professional". In other words, absent this cue, the police would not have acted as required by the law. Other instances that reveal police acceptance of political interference are subtle.

The police never contradict the improper directives issued to them. Nor do they ever seek to clarify that they are independent from the Executive in relation to policing decisions. In fact, police action following executive directives always tends to confirm that the force is happy to abide by such directives. The leadership of the force has also remained silent in the face of retrogressive legislative proposals or enactments. In 2014, the Executive pushed through Parliament an amendment to the National Police Service Act in order to give the President a stronger say in the appointment of the IG by entirely removing the National Police Service Commission from the recruitment process.[402] While parliamentary approval is still required, this amendment has effectively returned the country to the era when the President enjoyed extensive discretion in the appointment of police commissioners. Relevant stakeholders in the country, such as the KNCHR and independent analysts, questioned this unfortunate move.[403] The police force said no word.

4.2 Ethnic-Based Policing

Kenyan police officers are more than political tools.[404] They have multiple identities and persona, which define their world-view as well as their understanding and approach to policing. According to Marenin, "the police are a tool for class rule, yet they are also actors in their own rights and interests".[405] For the Kenyan police and indeed for the society in general, the single most dominant identity is ethnicity. It shapes how they relate with the public and the extent to which they are committed to or are trusted to preserve the existing political order. As one of the present authors has observed elsewhere, the instrumentalization or politicization of ethnic identity is at the root of the many ills that torments Kenya's body politic,[406] including police violence and human rights violations during electoral cycles.

Even if the law requires them to be politically non-partisan, the reality is that police officers do hold political opinions and in any general election they would most probably have a preferred presidential candidate. As is the case with many Kenyans, this preference would most likely be defined by their ethnic identity.

401 Hills (n 83 above) 420.
402 National Police Service (Amendment) Act No. 11 of 2014.
403 Ghai (n 87 above).
404 Ruteere (n 10 above) 16.
405 Marenin (n 17 above) 74.
406 Biegon (n 79 above) 9.

In the event that the election is contested, as has become routine, police officers would be tempted to view the dispute from an ethnic lens. Their response to any ensuing protests and demonstrations would thus be shaped by this view, as flawed and unprofessional as it is.

Ethnic bias in the Kenyan police force has a long history. Under the colonial regime, the force was deliberately filled by police officers from ethnic communities that were thought to be friendly to the regime.[407] This defective logic of recruitment continued even after independence.[408] During President Kibaki's tenure, and especially at the height of the 2007/2008 post-election violence, the top leadership of the force was heavy with individuals from his Kikuyu ethnic group.[409] The 2010 Constitution seeks to address the question of ethnic imbalance in the composition of the force. It provides that "recruitment by the national security organs shall reflect the diversity of the Kenyan people in equitable proportions".[410] Recruitment into the force is thus based on a quota system – each region of the country is allocated a specified number of slots depending on its population. However, ethnic considerations in the appointment of the top leadership of the force persist. Since its creation, the office of the IG has had two occupants, both from Elgeyo Marakwet County. Although it falls outside the purview of the police force, the office of the cabinet secretary for police services has been reserved for someone from the Maasai ethnic group from the days of President Kibaki. This practice changed only recently with the death of Nkaissery and his replacement with Matiang'i.

The stage for ethnic bias in responding to electoral-related demonstrations and protests is often set at that moment when the police conduct a mapping of potential hotspots for violence. The result always reveals a disturbing detail: the analyses appear to be largely based on ethnic profiling and perceived political affiliation of the communities residing in identified hotspots. Most of the hotspots that the police identified in Nairobi ahead of the 2017 general election, by way of example, were areas that were thought would vote for Raila as opposed to Uhuru. These included: Dandora, Kariobangi, Kawangware, Kibera, Korogocho, and Mathare. The announcement that these areas were hotspots in the eyes of the police sent panic amongst the residents.[411] It is no coincidence that these same areas eventually suffered significant amounts of police violence. As Amnesty International and Human Rights Watch commented in its report, "the hotspots were all opposition strongholds in ethnic majority Luo and Luhya areas, creating the impression of an ethnic and political dimension to the excessive police action that followed the poll".[412] The KNCHR reached an almost similar finding.

It observed that while it could not be able to determine whether the use of force by the police was "predetermined and targeted", the evidence before it showed that "majority of the victims were from one ethnic community and from informal settlements".[413]

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407 M Ruteere & M Pommerole 'Democratizing security or decentralizing repression? The ambiguities of community policing in Kenya' (2003) 102 *African Affairs* 587, 591.

408 Akech (n 85 above) 236.

409 Ruteere (n 10 above) 18.

410 Constitution of Kenya, section 238(2)(d).

411 D Wesangula 'Kenyans apprehensive as police map out poll violence hot spots' available at https://www.standardmedia.co.ke/article/2001247711/kenyans-apprehensive-as-police-map-out-poll-violence-hot-spots (accessed 5 July 2018).

412 Amnesty International & HRW (n 41 above) 2.

413 KNCHR (n 39 above) 164.

Kisumu and other parts of Nyanza that are popularly considered the bedrock of Raila's support were equally identified as hotspots. Given previous experiences, this categorization was not unique though it was based on similar improper grounds like the case of Nairobi hotspots. What was unique and did shock the country was the reported delivery to the police in Kisumu of hundreds of body bags just a few hours before the general election.[414] Police intention to use force, including deadly force, was essentially laid bare for all to see. Events following the election arguably confirmed the country's fears.

While mapping of hotspots may be disguised as an objective exercise, the deployment pattern is out rightly biased. For the 2017 general election, the force deployed significantly large numbers of police to opposition strongholds. This fact alone created a conducive atmosphere for the eruption of violence. Heavy presence of the police in the hotspot areas was in and of itself provocative.[415] It is useful to recall at this point that the Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa require police deployment to consider "the potential adverse influence that the visible appearance of law enforcement officials, deployment tactics and equipping of officials at an assembly can have on the way in which an assembly develops".[416] The Guidelines recommend that only the minimum number of officials commensurate to the size of the demonstration should be deployed. If at any point, more numbers are required, a graduated approach should be taken.[417]

Bias in deployment goes far beyond the issue of numbers. Police deployed to opposition strongholds are generally trigger-happy. They are more violent than those deployed to other parts of the country, a fact that suggests that they may be selected based on their real or perceived proximity or loyalty to the regime. There is a real possibility that ethnicity plays a role in the selection process. In its analysis of the use of force during the 2007/2008 post-election violence, the CIPEV was struck by the disparity of the extent to which the police in different parts of the country were prepared to fire live ammunition. Noting that live ammunition was predominately used in the western part of the country (Nyanza and Western provinces), the CIPEV concluded as follows: "It appears that police in different provinces did not respond uniformly with regard to the use of force, even when faced with similar situations".[418] Others like Maina Kiai, former UN Special Rapporteur on the right to freedom of assembly and of association, are more forthright in their analysis of this disparity:

> Keen observers were not surprised by the level of force and violence used by the police in Kisumu and Siaya [during the anti-IEBC demonstrations]. For we have seen this before and always in areas mainly populated by the Luo community, including Kibra in Nairobi. It is time to state this openly: The Kenya Police Force (it is not a service despite the name change) seems to target the Luo community for extra-ordinary brutality and violence. No other community is subject to as much force and use of live ammunition as the Luo. There are countless demonstrations across the country, but nowhere else do we witness as many casualties – from the overwhelming use of force.…

414 See J Ndunda 'Kisumu body bags raises eyebrows, says IPOA boss', 8 August 2017,available at https://www.the-star.co.ke/news/2017/08/08/kisumu-body-bags-raises-eyebrows-says-ipoa-boss_c1611678 (accessed 7 July 2018).

415 Amnesty International & Human Rights Watch (n 39 above) 12.

416 Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa, Guideline 14(2).

417 Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa, Guideline 14(3).

418 Waki Report (n 11 above) 343.

> When it comes to Luoland, the police force essentially converts itself into a militia serving a political purpose. And this police-cum-militia for Luoland is not new.[419]

One valid conclusion that may be drawn from the hotspots and deployment patterns is that the police force usually has only a single scenario in mind in relation to an election outcome: a win by the incumbent president followed by protests. If this is the case, then they only prepared for an Odinga loss and its aftermath in relation to the 2017 general election. The possibility of an Uhuru loss seems not to have been considered for policing purposes.

4.3 Punitive Policing

Ruteere and Pommerole have correctly observed that the Kenyan police was "born with the marks of a punitive citizen containment squad".[420] These birthmarks have stubbornly remained in place, 55 years after Kenya gained independence. The police routinely resort to collective punishment of communities when faced with a security challenge. Kenyans have come to know that when the police speak of a "crackdown" or a "security operation", then in practice this means that everyone in the targeted community will be beaten up, harassed and tortured. They will be punished solely for the reason that they belong to the targeted community. Some will be killed, sometimes in unsettling numbers. Memorable episodes of collective punishment in post-independence history include security operations in the context of Shifta war in the North-Eastern Province,[421] the 1984 Wagalla operation in Wajir,[422] and the 2008 *Operation Okoa Maisha* in Mount Elgon region.[423]

The most recent and vivid example of a collective punishment episode is the April 2014 terrorism-related *Operation Usalama Watch* during which thousands of members of the Somali ethnic community were rounded up and interned at the Safaricom Kasarani Stadium in Nairobi, apparently because they were suspected of being illegal immigrants.[424] The thread that strings together all major episodes of collective punishment in Kenya is the concerned security agency's notion that it is fighting a community that is hostile to the regime. As Whittaker reminds us, "collective punishment and the use of state violence have all therefore been 'necessary' against a population that is believed to be 'hostile' to the interests of the state'.[425]

Like all major security operations, police response to electoral-related demonstrations and protests in Kenya has always had a punitive element. The motive of the police transcends the mere dispersal of demonstrations. They attack demonstrators and everyone else within their surroundings.

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419 M Kiai 'When it comes to Luoland, police force converts itself into a militia', 10 June 2016, available at https://www.nation.co.ke/oped/opinion/440808-3244226-jlaad4/index.html (accessed 7 July 2018).

420 Ruteere & Pommerole (n 115 above) 591.

421 H Whittaker 'Legacies of empire: State violence and collective punishment in Kenya's North Eastern province, c. 1963-present' (2015) 43 *Journal of Imperial and Commonwealth History* 641.

422 TJRC Report Volume IIA (n 18 above) 221-366.

423 Human Rights Watch *All men have gone: War crimes in Kenya's Mt Elgon conflict* (2008); Kenya National Commission on Human Rights *The mountain of terror: A report of the investigations of torture by the military at Mt Elgon* (2008).

424 Independent Policing Authority *Monitoring report on operation sanitization Eastleigh publically known as Usalama Watch* (2014).

425 Whittaker (n 129 above) 643.

This serves as a form of punishment for the political choice or opinion of the concerned individuals as well as of the broader community to which they belong. This explains why it is common during electoral-related demonstrations for police officers to simply fire into crowds, beat up demonstrators or bystanders, or break into houses under the cover of darkness or even in broad daylight. In the context of the 2017 general election, Amnesty International reported that it had observed "a deliberate campaign to punish inhabitants [of Kisumu] for continuing to protest".[426] In many cases, the police made it clear to their victims that they were being punished for one reason or the other:

> Remarks made by police during many beatings suggested victims were being punished for the way that they had voted, or because of their ethnicity. One man in Mathare told researchers that GSU police beat him saying: "You people will know the government is not yours … You can call your Baba (Raila) to come and help you.[427]

The punishment may also be in the form of explicit police refusal to assist victims of citizen-citizen electoral violence. In the context of the 2007 general election, police officers believed to be from the Kalenjin and Luo ethnic groups blatantly refused to help or come to the rescue of victims from the Kikuyu ethnic group. In many cases, police officers taunted the victims with President's Kibaki's*"Kazi iendelee"*slogan. In Eldoret, police officers told victims "*Si mlisema kazi iendelee? Wacha basi iendelee*! (Didn't you say work should go on? Let it go on)".[428] Police officers used a similar line in Nairobi.[429] The Waki Commission found evidence of similar forms of punishment: "some officers derided Kisii and Kikuyu victims "that they were paying the price for voting "kazi iendelee" (let the work continue)" which was the PNU slogan".[430]

5. Stemming Police Violence: Rethinking the Focus of Police Reform

Police behaviour during the 2017 general election adds to the ever-mounting evidence of the disastrous failure of the police reform programme initiated in the aftermath of the 2007/2008 post-election violence. The normative foundation of this programme is the 2009 report of the Ransley Task Force. It contains at least 200 recommendations on how to reform the police force in six broad areas: police accountability, culture and image; organizational structure; professionalism and terms and conditions of service; logistical capacity and operational preparedness; national policing policy; and community policing and partnerships.

The Police Reforms Implementation Committee (PRIC) was established in January 2010 to roll out the reform programme. In 2013, the Police Reforms Steering Committee established by the Ministry of Interior and National Coordination took over the functions of PRIC. This committee is responsible for coordinating and supervising the reform process.

426 Amnesty International 'Kenya: Violence, killings and intimidation amid election chaos' available at https://www.amnesty.org/en/latest/news/2017/10/kenya-violence-killings-and-intimidation-amid-election-chaos/ (accessed 5 July 2018).
427 Amnesty International & HRW (n 41 above) 15.
428 KNCHR (n 8 above) 70.
429 KNCHR (n 8 above) 48.
430 Waki Report (n 11 above) 89.

Another committee – the Police Reforms Programme Governance Committee (PGC) – sits at the apex of the institutional arrangement of the reforms programme and provides strategic oversight and direction. This section examines the role of the on-going police reform in Kenya in addressing police violence and human rights violations during electoral cycles. It begins by taking stock of the achievements, if any, of the reform process. It then makes a case for a rethinking of the focus of the reform process from a legalistic or administrative exercise to one that places the key attributes of democratic policing at its core.

5.1 The Road Travelled

The first phase of the police reform programme (2011-2014) focused on four key areas: enactment of relevant legal and policy frameworks; building the institutional structure; enhancing professionalism, integrity and accountability; and strengthening operational preparedness, logistical capacity and capability.[431] For this phase, the Kenyan taxpayer parted with a staggering KES 184 billion, which went into paying for development and recurrent expenditure of the police force.[432] Donor countries contributed KES 1.45 billion directly into the reform programme.[433] The second phase (2015-2018) focuses on building on the progress of the first phase. It is estimated that it will ultimately cost KES 95.5 billion.[434]

Enactment of relevant laws and establishment of new institutional structures are the only true achievement of the reform programme so far.[435] In addition to a renamed police force – National Police Service (NPS) – operating under a single command structure, two separate independent institutions have been established as part of the efforts to build a transparent and accountable police body. These are the NPSC and the IPOA. The NPSC manages the human resources elements of the force, including recruitment of new police officers and vetting of existing ones for suitability and competence. While it is the most visible and publicized function of the NPSC, the vetting process has been criticized for failing to weed out persistent violators of human rights from within the police force.[436] The IPOA serves as an external civilian oversight mechanism for the Kenyan police. More than anything else, non-cooperation from the police has undermined efforts by IPOA to effectively discharge its mandate.[437]

Beyond the mere existence of new laws and institutions, there is little else for celebration. Independent assessments of the police reform programme have returned quite depressing verdicts. The programme has utterly failed to change the attitudes and habits of the police. A 2015 joint report by the KNCHR and the Centre for Human Rights and Peace of the University of Nairobi lamented as follows: "the mind-set and institutional culture of the police has not changed even though the law, policies and guidelines are new".[438]

431 Republic of Kenya *Revised police reforms programme document 2015-2018: A strategy framework for implementation of reforms in the National Police Service* (2015) 6.

432 Republic of Kenya (n 139 above) 11.

433 As above.

434 Republic of Kenya (n 139 above) ix.

435 J Biegon & A Songa 'Kenya: The impact of counter-terrorism measures on police reform' in E Alemika *et al* (eds) *Police reform in Africa: Moving towards a rights-based approach in a climate of terrorism, insurgency and serious violent crime* (2018) 197

436 Biegon & Songa (n 143 above) 204; Kenya National Commission on Human Rights and Centre for Human Rights and Peace *Audit of the status of police reforms in Kenya* (2015) 42.

437 Independent Policing Oversight Authority *End-term Board report, 2012-2018* (2018) 93.

438 Kenya National Commission on Human Rights & Centre for Human Rights and Peace (n 144 above) 62.

In a previous separate report of its own, the KNCHR had observed that the overarching purpose of creating new institutions, that is, "to make policing work in the country professional, accountable, service oriented and above all entrench the principle of democratic policing", largely remained a mirage.[439] Another assessment commissioned by Saferworld and published in 2016 reaches a similar conclusion:

> In spite of new oversight institutions – IPOA and the NPSC – and increased awareness about human rights through training, reports from local and international human rights groups show that the police continue to act unaccountably. The underlying reason is that the NPS has continued to sustain a culture of impunity by protecting members accused of misconduct. The NPS continues to be unwilling to admit that accountability is weak and needs to be addressed.[440]

The IPOA has also added its voice in criticism of the state and impact of the police reform programme. In its monitoring report of the 2016 anti-IEBC demonstrations, the IPOA expressed its opinion in the following words:

The laws that created this (sic) three new entities [IPOA, NPSC and NPS) provide a legal framework that if followed in letter and spirit, then the police transformation process should have begun in 2012. That transformation, according to IPOA never started, and if it did at all, it was nipped in the bud in the year 2014, through many attempts or successful amendments of the same laws (save for the IPOA Act), no to mention the introduction of draconian laws such as the Security Laws (Amendment) Act of December 2014. Beyond the 'hardware' issues of law and lack of modern equipment and tools, not to mention police welfare, the 'software' issues of attitudes, behaviour, culture and response of police to public order policing, and their knee-jerk reactions when accountability is demanded, are urgently needed.[441]

It is not surprising, therefore, that the police are awfully far from winning back the confidence and trust of the public. As a matter of fact and mainly due to police violence, public trust in the police has dwindled over the last few years. A survey published in May 2014 revealed that at 36%, the level of public confidence in the police was at its lowest since 2008.[442] An equal percentage of the survey respondents believed that policing standards had worsened.[443] For this reason, a significant proportion of Kenya's population deliberately ignores to seek police intervention in matters falling under their jurisdiction. A 2016 survey by Transparency International Kenya shows that 27% of respondents in Nairobi and 22% in Kisumu chose not to approach the police when they fell into a situation that required their intervention.[444] It follows that only in compelling and unavoidable circumstances would such people approach the police.

439 Kenya National Commission on Human Rights *A country under siege: The state of security in Kenya – an occasional report (2010-2014)* (2014) 74.

440 M Ogada *Deepening police reforms in Kenya post-National Accord: Policy implications* (2016) 4.

441 IPOA (n 102 above) 13-14.

442 Usalama Reforms Forum *Status of the police reforms: A progress monitoring report-preparedness of the police to combat insecurity and crime* (2014) 10.

443 Usalama Reforms Forum (n 150 above) 11.

444 Transparency International Kenya *Kenya police service satisfaction survey and needs analysis report 2016: A focus on Kisumu and Nairobi counties* (2016) 28.

5.2 The Road Ahead

Stemming the tide of police violence in the country must entail some critical reflection on why the police reform programme thought to be the largest such initiative in Africa,[445] is showing no meaningful indicators of success. The police must accept what actors outside of the force have been saying for far too long: the focus of the reform programme must be rethought. The emphasis of the programme since inception has been on enactment of laws and policies, establishment of new institutional structures, improving technical know-how, and acquisition of modern operational tools and equipment. These target areas are important, but they do not necessarily change the behaviour and culture of the police. For Amnesty International, the reform programme is "overly legalistic" and has little relevance for lived realities of policing in Kenya.[446] Similarly for Kivoi and Mbae, "what is going on so far are what may be termed as 'administrative reforms" which do not essentially entail reforming the way policing is done in the country".[447]

The focus of the police reform programme should urgently turn to ensuring accountability and changing the behaviour, habits and attitudes of the police. The police should adopt an approach, which as Auerbach puts it, "views institutional accountability as the paramount objective of reform, and as the foundation for further reform".[448] The aim should be to move towards democratic policing. All aspects of the reform should be designed to achieve the core attributes of democratic policing – responsiveness, accountability, protection of human rights, and transparency.[449] A legalistic or administrative approach to police reform does little to inculcate these values. As Bayley cautions, investment in technology or cognitive knowledge is no guarantee to changes in behaviour, although it does play a part.[450] The central key to a successful police reform process is the embracing of new practices and a shift in mental attitude.

Changing behaviour is admittedly the most difficult part of police reform. Yet, it is the difficult things to change that are the most important when it comes to police reform.[451] The Kenyan police force, or more accurately its leadership, has clearly chosen those police reform activities that are easy to achieve, not simply out of pragmatism, but to conceal the fact that it is not truly committed to the reform programme. It essentially engages in what Osse has called "reform speak" or "reform façade", the main objective of which is to "stabilise the prevailing balance of power and ensure nothing substantial changes".[452]

Police leadership in Kenya has consistently avoided tackling questions about accountability and behaviour. It has indeed actively resisted legitimate external efforts to hold the force accountable.

445 Republic of Kenya (n 139 above) 6.
446 Amnesty International *Police reforms in Kenya: A drop in the ocean* (2013) 17.
447 D Kivoi & C Mbae 'The Achilles' heel of police reforms in Kenya' (2013) 2 *Social Sciences* 189, 193.
448 Auerbach (n 84 above) 278.
449 D Bayley *Democratizing the police abroad: What to do and how to do it* (2001) 10-15. See also P Heyman 'Principles of democratic policing' in National Institute of Justice Research Report on Policing in Emerging Democracies: Workshop Papers and Highlights (1995) 9.
450 Bayley (n 157 above) 43
451 Bayley (n 157 above) 42. See also D Bayley 'Who are we kidding? Or developing democracy though police reform' in National Institute of Justice Report (n 157 above) 59.
452 A Osse 'Police reform in Kenya: A process of meddling through' (2016) 26 *Policing & Society: An International Journal of Research & Policy* 907, 910 & 919.

By way of example, the IG has previously directed police officers not to cooperate with the IPOA or allow its investigators entry into police stations without his express authority.[453] The political leadership has adopted the same approach to police reform. As Osse notes, "political support seems only to be for those (aspects of the) reforms that do not substantially enhance effective and impartial policing".[454] The political leadership has aggressively sought to erode or undermine the authority of police external accountability mechanisms, namely the NPSC and the IPOA. As previously mentioned, the Executive has successfully removed the NPSC from the recruitment process of the IG. A similar process to dilute the independence of the IPOA by removing the security of tenure of its board members was withdrawn after a huge public outcry.[455] Another proposal to clip the powers of the IPOA to summon police officers to produce evidence was similarly withdrawn.[456]

6. Conclusion: The Big Picture

This chapter focuses on police behaviour during general elections. It documents the patterns and explains the driving forces of police violence and human rights violations committed during the 2017 general election. The popular view is that police violence in times of elections is a product of the failure of the police to grasp the basic principles on the use of force and proper management of public assemblies. This article argues that there is much more that explains police electoral-related violence. It points to three interrelated factors. First, the police are in the service of the president and the ruling political elite (regime policing) and thus become handy political tools during elections. Second, the police are influenced by ethnic bias in their response to election-related demonstrations and protests (ethnic-based policing). Third, the police view election-related protestors and demonstrators as a people to be punished for their political opinion and position (punitive policing). The combination of these factors makes the police a partial as well as a deadly force during elections.

The narrow focus of this chapter on police violence during elections should not serve as a distraction from the big picture. The behaviour that police manifest during electoral cycles is simply an extension or a reflection of deeply embedded day-to-day habits and attitudes.

The Kenya police are infamously known for torture, extra-judicial killings and enforced disappearances. It is estimated that the police extra-judicially killed at least 612 people in the three-year span running from 2013 to 2016.[457] The scale of police killings is so high that *The Nation*, one of the country's leading daily newspapers, has established an online database dedicated to tracking this phenomenon.[458] As of writing, a select number of human rights groups were also in the process of developing *Missing Voices*, another online database containing details of people killed by the police.

453 C Ombati 'Protest over proposed amendments on IPOA Act', 18 January 2017, available at https://www.standardmedia.co.ke/article/2000230383/protest-over-proposed-amendment-on-ipoa-act (accessed 8 July 2018).

454 Osse (n 142 above) 919.

455 Commission on Administrative Justice *Advisory opinion on proposed amendments to the Independent Policing Oversight Authority*, 2016, available at http://www.ombudsman.go.ke/wp-content/uploads/2016/04/Advisory-Opinion-on-Proposed-Amendment-to-IPOA-Act.pdf (accessed 8 July 2018).

456 Ombati (n 161 above).

457 Independent Medico-Legal Unit *Deaths from police bullets from January to December 2016* (2017) 5.

458 'Deadly force: People killed by the Police in Kenya' available at https://newsplex.nation.co.ke/deadlyforce/index.php# (accessed 8 July 2018).

At the same time, reports documenting extra-judicial killings and enforced disappearances continue to be published with increasing frequency,[459] prompting human rights groups to call for the establishment of a commission of inquiry into police killings and disappearances.[460]

Another vice that afflicts the police force is endemic corruption. The police force has traditionally ranked as the most corrupt state organ in Kenya, with the most recent surveys confirming this trend.[461] Although police services are free, it is common for police officers to demand or receive a bribe in order to offer services. According to a 2016 survey conducted by Transparency International Kenya, 32% of the respondents that had sought police services in Nairobi and 23% in Kisumu paid a bribe to secure those services.[462] Perhaps what is more interesting than the scale of corruption in the Kenyan police is the almost insignificant percentage of the police officers who think that corruption affects their performance. In a survey published by IPOA in 2013, only 3% of police officers interviewed for the survey indicated that corruption affected their performance, compared to 54.6% who identified low pay and incentives as the determinant factor of performance.[463] Yet, corruption is one of the reasons why a significant proportion of Kenya's population deliberately ignores to seek police intervention when they need it.

Understanding the big picture is relevant for any efforts aimed at changing police behaviour during electoral cycles. The police are unlikely to be professional, discipline and respectful of human rights in the context of elections if they do not practice these values in other contexts. For this reason, a holistic approach should be taken in addressing police violence and human rights violations. Beyond establishing a commission of inquiry as human rights groups have suggested, the focus of the on-going police reform must be rethought. The current process has neglected questions around police culture and attitude. It places emphasis on laws and policies, institutional structure, technical know-how, and adequacy and relevance of tools and equipment. The reform process has not altered the culture of the force in any meaningful manner. Police culture remains as intact as it were before the process commenced.

This chapter argues for a rethink of the focus of the police reform agenda. The programme should seek to change behaviour and mental attitude. It should inculcate in the force the key attributes of democratic policing – responsiveness, accountability, defence of human rights, and transparency.

Changes in police culture must be coupled with changes in the country's political culture. The political leadership must commit and strive to embrace the basic tenets of a democratic society, including respect for the rule of law and human rights. The police stand little chance to change for the better if the political environment in which they operate remains undemocratic.

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459 See e.g. Kenya National Commission on Human Rights *The error of fighting terror with terror: Preliminary report of KNCHR investigations on human rights abuses in the ongoing crackdown against terrorism* (2015); Human Rights Watch *Death and disappearances: Abuses in counterterrorism operations in Nairobi and in north-eastern Kenya* (2016).

460 Amnesty International 'Kenya: Establish commission of inquiry into violations by security agencies', 10 December 2016, available at https://www.amnesty.org/en/latest/news/2016/12/kenya-establish-commission-of-inquiry-into-violations-by-security-agencies/ (accessed 6 July 2018).

461 Ethics and Anti-Corruption Commission *National ethics and corruption survey, 2016* (2018); Transparency International *The East African Bribery Index 2017* (2018) 15.

462 Transparency International Kenya (n 152 above) 24.

463 Independent Policing Oversight Authority *Baseline survey on policing standards and gaps in Kenya* (2013) 32.

It behoves the political leadership to heed to the advice of the Ransley Task Force, which had already foreseen in 2009 that "reforming the Police without also targeting reforms in other sectors, is therefore unlikely to have as pronounced an impact on the broad Kenyan society as many might expect".[464]

464 Ransley Report (n 73 above) 26.


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Jurisprudence on Election-Related Violence in Kenya

Omwanza Ombati[465*]

1. Introduction

Election-related violence has persisted in Kenya's elections since the advent of multi-partyism in 1992 following the repeal of the controversial Article 2(A) of the then Constitution of Kenya, 1963.[466] In 2017, election-related violence was a major challenge as reflected in subsequent election petitions, including the second presidential election petition. At the heart of the problem is the threshold for the invalidation of an election. As noted by Azu in the context of presidential elections in Kenya and Ghana:

> In all the instances where presidential election petitions have been unsuccessful, although the petitioner alleged non-compliance with electoral laws and adduced evidence in support, the courts declined to invalidate the election results on the basis that the alleged irregularities were not substantial enough to affect the validity of the results.[467]

This assertion represents the position of the courts with regard to election-related violence. This paper analyses the jurisprudence emanating from the Judiciary in relation to election-related violence in Kenya. The paper is divided into four main parts. The first part discusses the constitutional and legislative framework that deals with election-related violence in Kenya. In particular, it looks at the relevant provisions contained in the Constitution of Kenya 2010 and the Election Offences Act, 2016.[468] The second part analyses the issue of jurisdiction in relation to election-related cases. In particular, it looks at the jurisdiction of the Supreme Court in relation to other election courts. The third part analyses the jurisprudence of election-related violence in Kenya. In particular, it discusses the issue of standard of proof as well as the threshold for deciding cases relating to election-related offences.

465 * Omwanza Ombati Advocate. I acknowledge Advocate Paul Ogendi for doing the background research for this chapter

466 Repealed by Act 12 of 1991, s. 2. For a copy of the previous constitution please see: www.focusonland.com/download/51b76515764c4/ *(accessed 6 June 2018).*

467 Miriam Azu 'Lessons from Ghana and Kenya on why presidential election petitions usually fail' (2015) 15 *African Human Rights Law Journal* 151.

468 No 37 of 2016.

The last part is a critical analysis of the jurisprudence on election-related violence in order to determine whether there is consistency or confusion and then answer the question as to whether the current approach in domestic case law is prudent for the consolidation of democracy in Kenya.

2. Election-Related Violence Constitutional and Legislative Framework

This section discusses the Constitution, 2010, the Election Offences Act, 2016 and other legislation. These two instruments are discussed below.

2.1 The Constitution of Kenya, 2010

According to *Article 81(e)* of the Constitution of Kenya 2010, the general standard in relation to elections is that they should comply with, among other things, the principle of free and fair elections, which are-

i. by secret ballot;
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.[469]

From the above, *Article 81(e) (ii)* is particularly instructive in the context of election-related violence. Free and fair elections therefore require that elections be free from violence. The requirement of freedom from violence is conjoined with the requirement of freedom from intimidation, improper influence or corruption. It is therefore not uncommon to find pleadings addressing the three areas together because one leads to the other. In other words, violence may result in intimidation. Violence may also lead to improper influence or violation of electoral laws. The constitutional provision on free and fair elections and the requirement of freedom from violence, intimidation or improper influence or corruption has also been replicated under *Section 25* of the *Independent Election and Boundaries Commission (IEBC) Act No 9 of 2011* in the same language as the provision in the Constitution of Kenya 2010.

The Election Offences Act, 2016 contains the specific offences that are related to election-related violence as discussed below.

469 Article 81(e) (ii) of the Constitution.

2.2. The Election Offences Act, 2016

The key piece of legislation in relation to election-related violence is the Election Offences Act, 2016. In sum, there are about four offences that are related to election-related violence in the Election Offences Act, 2016, namely: undue influence; use of force or violence during the election period by public officers and national security organs; and offences relating to elections committed by different actors in the election cycle. These offences have been discussed separately below.

2.2.1 Undue influence

The first offence that addresses the issue of election-related violence under the Election Offences Act is the offence of undue influence. The offence is been described as follows:[470]

> A person who, directly or indirectly in person or through another person on his behalf uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of— (a) inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election; (b) inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate; or (c) impeding or preventing a person from being nominated as a candidate or from being registered as a voter, commits an offence of undue influence.

In essence, therefore, this provision recognizes that violence can be used in many ways to influence elections unlawfully. The offence also targets private persons or people who are not authorized to use violence as opposed to police officers and other law enforcement agencies that currently enjoy the monopoly of violence according to the constitutional framework. In recognizing that police officers may also use violence to unduly influence the elections unduly, the Election Offences Act deals with this category separately as discussed separately below.

2.2.2 Use of Force or Violence

The second offence under the Election Offences Act that deals with election-related violence is the offence of use of force or violence during election period. In this regard, the Elections Offences Act provides as follows:[471]

> A person who, directly or indirectly in person or by any other person on his behalf, inflicts or threatens to inflict injury, damage, harm or loss on or against a person— (a) so as to induce or compel that person to support a particular candidate or political party; (b) on account of such person having voted or refrained from voting; or (c) in order to induce or compel that person to vote in a particular way or refrain from voting, commits an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.

470 Section 10(1) of the Election Offences Act

471 See section 11of the Election Offences Act.

This offence appears similar to the above offence of undue influence but the difference here is that the offence of undue influence touches on more than physical injury on a person but the offence of use of force or violence during an election focuses on inflicting or threatening to inflict injury, damage among other things on or against a person. The former offence is therefore broader than the latter and focuses even on things like 'harmful cultural practices'.

2.2.3 Use of National Security Organs

The third offence that touches on election-related violence is the offence of use of national security organs. *Section 12* of the *Election Offences Act* provides in relation to this offence that:

> a candidate or any other person who uses a public officer, or the national security organs to induce or compel any person to support a particular candidate or political party commits an offence and is liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding six years or to both.

This provision unlike the previous section targets national security organs and its penalty is higher. The other offence of undue influence by a private person attracts a lesser penalty of a fine of two million shillings or imprisonment for a term not exceeding six years or both whilst the present offence attracts higher penalties -ten million shillings fine or to imprisonment for a term not exceeding six years or to both. The difference is therefore in relation to the fines imposed.

2.2.4 Offences Relating to Elections

The fourth election offence that addresses election-related violence is the offence relating to elections under *Section 13*. *Section 13(f) (i)* of the Election Offences Act provides that:

> a person who interferes with free political canvassing and campaigning by using language which is threatening, abusive or insulting or engages in any kind of action which may advocate hatred, incite violence or influence the voters on grounds of ethnicity, race, religion, gender or any other ground of discrimination… commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years or to both.

Similarly, under *Section 13(f) (ii),* the same punishment has been provided for:

> a person who directly or indirectly, using the threat of force, violence, harassment or otherwise preventing the conduct of any political meeting, march, demonstration or other event of a political nature or any other person from attending or participating therein.

In both cases, incitement to violence and threat of violence is prohibited under the Elections Offences Act. In this regard, the Election Offences Act has elaborate provisions to deal with the issue of election-related violence and provides hefty penalties including fines and imprisonment terms.

2.3 Codes of Conduct

In addition to the above provisions of the Election Offences Act, there are a few codes of conduct that addresses elections-related violence, namely: The Election Code of Conduct; and the Code of Conduct of Political Parties.

2.3.1 Election Code of Conduct

The Election Code of Conduct, 2017, attempts to minimize if not eliminate election-related violence in Kenya's electoral landscape. Illustratively, *paragraph 5(d)* of the Election Code of Conduct provides that:

> registered political parties, referendum committees, officials of political parties and referendum committees and candidates do, by subscribing to this Code, further commit themselves to condemn, avoid and take steps to prevent violence and intimidation.

This paragraph imposes an obligation on political parties, referendum committees and candidates to prevent violence and intimidation. Another provision that addresses the issue of election-related violence *is paragraph 6* of the Election Code of Conduct, which provides as follows:

> All those bound by this Code shall, throughout an election period— (a) publicly and repeatedly condemn violence and intimidation and avoid the use of hate speech, language or any kind of action which may lead to violence or intimidation, whether to demonstrate party strength, gain any kind of advantage, or for any other reason; (b) refrain from any action involving violence or intimidation.

The above provision imposes a positive obligation on those bound by the Election Code of Conduct to not only condemn but also refrain from actions that may lead to violence and intimidation.

In order to enforce the provisions discussed above, the Independent Election and Boundaries Commission (IEBC) has been given the power to institute proceeding at the High Court against various persons including political parties and party leaders as follows:[472]

> Without prejudice to the provisions of paragraph 7, the Commission may either of its own motion or in consequence of any report made to it, institute proceedings in the High Court as may be appropriate in the case of any alleged infringement of this Code by a political party or by the leader, any office-bearer or member of a political party or person who supports a political party or any candidate and where the Court finds the infringement of the provisions of this Code—

472 See paragraph 9 Election Code of Conduct.

> (a) in the case of a political party, any act or omission involving violence, intimidation or a gross or systematic violation of the rights of any political party, candidate or voter, the Court may, in addition to or in substitution for any other penalty or sanction specified in paragraph 7(a), make an order cancelling the right of such party to participate in the election concerned; or
>
> (b) in the case of the leader, any office-bearer or member of a political party or person who supports the political party or of any candidate, that any act or omission involving violence or intimidation or gross or systematic violation of the rights of any political party candidate or voter, the Court may in addition to or in substitution of any other penalty or sanction specified in paragraph 7(a)(i) and (ii), make an order disqualifying, in the case of a person who is a candidate, that person from being a candidate or deleting the name of that candidate from the list or lists of candidates concerned.

The broad powers given to the IEBC is aimed at ensuring that political parties and their leaders play a crucial role in ensuring that violence is not perpetrated in their political parties.

The Election Code of Conduct also contemplates and addresses the issue of suspension of nominations due to disruptions including violence for a day. In this regard, *paragraph 50(1)* of the Election Code of Conduct provides that

> where the proceedings of a nomination in an election area are interrupted by riots, violence, floods or other natural disaster, the proceedings in that election area shall be suspended for that day.

This provision is important since it is aimed to ensure that violence and other disruptive activities do not undermine the outcome of elections. Similarly, adjournment of elections has also been addressed under *paragraph 64(1)* as follows:

> Notwithstanding the terms of any notice issued under the Act or these Regulations, a presiding officer may, after consultation with the returning officer, adjourn the proceedings at his or her polling station where they are interrupted by a riot, violence, natural disaster or other occurrence, shortage of equipment or other materials or other administrative difficulty, but where the presiding officer does so, the presiding officer shall re-start the proceedings at the earliest practicable moment.

From the above two paragraphs, it appears that returning officers have the first opportunity to address any impact violence and other disruptive activities in terms of the outcome of elections. The remedy provided is to suspend the process and resume it at the 'earliest practicable moment' at least in relation to elections. In relation to nominations, the suspension is to be done for a day.

2.3.2 Code of Conduct for Political Parties

The prohibition of violence as a fundamental component of free and fair elections is also contained under the Code of Conduct of Political Parties which reads as follows: 'A political party shall not engage in or encourage violence by, or intimidation of, its members, supporters, opponents or any other person.'[473] In this regard, a political party is liable for punishment if it engages in or promotes violence.

3. The Issue of Jurisdiction for Election-Related Violence

Election-related violence has been equated to criminality by several election courts, which means that it can be addressed by both criminal courts and election courts in Kenya. In this regard, election-related offences can be pursued through both the criminal process in relation to pursuing criminal responsibility or by way of an election petition in relation to nullification of the results of an affected election. In ***Peter Odima Khasamule v Independent Election & Boundaries Commission (I.E.B.C) & 2 others,***[474] the Judge observed that the allegations of bribery, violence and oath taking do not only violate election laws and regulations but are also criminal offences.[475]

3.1 The Supreme Court of Kenya

The Supreme Court of Kenya (SCOK) is established under *Article 163* of the Constitution, 2010 to, among other things, have 'exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140.'[476] In this regard, all matters pertaining to election-related violence in relation to presidential elections should be filed at the Supreme Court. Under *Section 2* of the *Elections Act*, 'elections court' has been defined to include 'the Supreme Court in exercise of the jurisdiction conferred upon it by *Article 163(3(a)*….' It is on this particular basis that the Supreme Court of Kenya has jurisdiction to entertain election petitions in relation to presidential elections on the basis of election-related violence among other things.

3.2 Other Election Courts

Apart from the Supreme Court of Kenya, the High Court and political parties' tribunal have jurisdiction to hear and determine election petition cases in relation to other elections.

473 Article 91(2) (b).
474 [2018] eKLR.
475 As above, para 32.
476 Article 163(3)(a).

4. Jurisprudence for Election-Related Violence in Kenya

The jurisprudence relating to the issue of election-related violence can be addressed in two separate stages, namely: standard of proof; and threshold. These two stages have been discussed separately below.

4.1 Standard of Proof

Election-related violence can be categorized as an illegality and therefore requires a higher standard of proof. Like criminal cases, election-related offences must be proven beyond reasonable doubt as is the case with all criminal cases. This is different from the standard that is applicable in other election petitions based on election irregularities where the standard is intermediate, somewhere between a balance of probabilities and beyond reasonable doubt. In the Supreme Court of Kenya Petition 1, 2017 three standards of proof were identified as follows:[477]

> Various jurisdictions across the globe have adopted different approaches on the question of the requisite standard of proof in relation to election petitions. From many decisions, three main categories of the standard of proof emerge: the application of the criminal standard of proof of beyond reasonable doubt; the application of the civil case standard of balance of probabilities'; and the application of an intermediate standard of proof.

The Supreme Court of Kenya further noted that the criminal standard of beyond reasonable doubt arises when allegations of commission of criminal or quasi criminal acts are made in a petition.'[478] This standard is also applicable in Kenya as confirmed by the Supreme Court of Kenya in the petition under discussion.[479]

However, the Supreme Court of Kenya in line with the presidential election petition of 2013[480] stated that the standard of proof for most election petitions is the intermediary one. In this respect, the Supreme Court observed the following:[481]

> In many other jurisdictions including ours, where no allegations of a criminal or quasicriminal nature are made in an election petition, an intermediate standard of proof', one beyond the ordinary civil litigation standard of proof on a balance of probabilities', but below the criminal standard of beyond reasonable doubt', is applied. In such cases, this Court stated in the 2013 Raila Odinga case that the threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt….

Virtually all election courts have dealt with the issue of standard of proof in the same manner. Illustratively, in the case of *Moses Masika Wetangula v Musikari Nazi Kombo*,[482]

477 See para 144.
478 See para 145.
479 See para 146.
480 Raila 2013.
481 See para 148.
482 [2015]eKLR.

the Judge observed that in bribery, the standard of proof is beyond reasonable doubt, which means that 'the petitioner has to adduce evidence that is cogent, reliable, precise and unequivocal, in proof of the offence alleged.'[483] Similarly, in *Suleiman Kasuti Murunga v Independent Election and Boundaries Commission & 2 others*[484] the difference between irregularities and illegalities was clarified as follows:[485]

> 56. The Black's Law Dictionary (9th Edition, 2009) at page 906defines the terms *'irregular'* and *'irregularity'*. 'Irregular' is defined as '*Not in accordance with law, method, or usage, not regular'*. 'Irregularity' is defined as '*Something irregular; esp. an act or practice that varies from the normal conduct of action*.' The Supreme Court in distinguishing between an 'illegality' and an 'irregularity' in the 2017 majority judgment stated that '*Illegalities refer to breach of the substance of specific law while irregularity denote violation of specific regulations and administrative arrangements put in place'*.
>
> 57. In the context of this matter therefore the grounds of bribery, violence and voter intimidation are illegalities for they infringe specific Acts of Parliament and are criminal in nature. Their standard of proof is therefore different from the one in irregularities….

On the same issue of evidence, in *Apungu Arthur Kibira v Independent Election & Boundaries Commission & 2 others*,[486] the election court went as far as terming the lack of evidence to prove that a respondent was responsible or condoned or perpetrated the violence that occurred at party nominations as 'vexations and malicious'.[487]

The election courts have been very strict in terms of applying this standard to the extent that they have not been able to excuse the evidentiary burden even where a petitioner is unable to produce witnesses for fear of victimization. In *Denis Magare Makori & another v Independent Election and Boundaries Commission & 3 others*,[488] it was noted that as a result of witness protection Act, 2006, it was not possible to claim that a witness was unable to appear in court for fearing for his safety since the Act is now firmly in place with the chief object and purpose of providing special protection to persons in possession of important information and who are facing potential risks of intimidation due to their co-operation with prosecution and other law enforcement agencies.

The issue of applying the beyond reasonable doubt standard has not gone down well with some authors on elections. Hatchard for instance notes that even where there are allegations of criminal or quasi-criminal conduct made against the respondent, '*placing on petitioners an additional hurdle of satisfying the criminal standard of proof is surely unacceptable*.'[489]

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483 [2015] eKLR.
484 [2018] eKLR.
485 Para's 56 and 57.
486 [2018] eKLR.
487 Para 96.
488 [2018] eKLR.
489 John Hatchard 'Election petitions and the standards of proof' (2015) 27 *Denning L.J.* 298.

Hatchard further observes that a lower standard of proof is required 'because an election court is widely (and arguably correctly) viewed as being a civil court, that the imposition of a lower standard of proof is justified.' The main reason for this distinction it appears is because election court is incapable of imposing criminal sanctions and because of this it should not insist on higher standards such as the criminal standard of beyond reasonable doubt.[490]

4.2. Threshold

Apart from the issue of standard of proof, in order for an election petition to succeed on account of violence, a petitioner has to meet the general threshold required to succeed in nullifying an election. Under *Section 83* of the Election Act, it is provided that:

> no elections 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 writes law or that the non-compliance did not affect the result of the election.

The invalidation of elections on the basis of violence is therefore pegged on its effect of the results of election. In Supreme Court of Kenya Petition 1, 2017, the dissenting opinion of Justice Njoki Ndung'u addressed the question of threshold. The learned Judge appeared to have suggested that the qualitative aspects of an election including an atmosphere of violence on its own should not be sufficient to nullify elections unless the quantitative aspects or the results are also implicated in a substantial way.[491] The Judge as such noted that 'alleged illegalities or irregularities ought to have a nexus with the declared result.'[492] This finding has been integrated in many other cases as will be discussed below. In addition, two more standards have been developed by other election courts in this regard.

In *Odera Arthur Papa v Oku Edward Kaunya & 2 others*,[493] the learned Judge noted that the threshold necessary to invalidate an election requires that one must show that the violence is traceable to or attributed to the respondent(s), the violence must be widespread and not isolated and the violence must have affected the voting and the election results.[494]

Similarly, in *Julius Makau Malombe v Charity Kaluki Ngilu & 2 others*,[495] the election court dealt with the question of the threshold for deciding on election-related violence and observed that the threshold required is that 'the Petitioner must show that the violence is traceable to or attributed to the respondent(s), the violence must be widespread and not isolated and the violence must have affected the voting and the election results.'[496]

490 As above, 299. Hatchard argues that 'whilst a person found to have been involved in electoral malpractice may face serious consequences, including being disqualified from participation in future elections, an election court does not impose criminal penalties. This is a matter for a criminal court which is very different animal, especially given the application of the right to a fair trial provisions and the restrictive rules as to the admissibility of evidence.'

491 Para 678.

492 Para 682.

493 [2018] eKLR.

494 Para 37.

495 [2018] eKLR.

496 Para's 103.

These three-step guidelines have largely been endorsed as the threshold required in order to invalidate an election. These steps have been canvassed separately below and analysed using actual case studies.

4.2.1 Violence is traceable to or attributable to the respondents

The first issue regarding threshold is that the violence must be attributable to the respondent. Various courts have developed this requirement in many cases even if violence is proven and there is no link to the respondent, an election petition is not invalidated with the exception of one case.

Consequently, in Presidential Petition 2 and 4, as consolidated, 2017 the issue of election-related violence was canvassed at length by the Supreme Court. The Supreme Court took judicial notice that on the date of the repeat elections there was violence that happened in the country and this was '*more pronounced in the twenty five (25) constituencies where it was not possible to conduct an election*.'[497] Having taken judicial notice of the violence that happened during the day of the repeat election, the petitioners needed not to prove that the violence occurred and that it had somehow affected the result.

However, in a precedent setting finding, the Supreme Court of Kenya appeared to have determined that where the respondent is not responsible for causing the violence, an election result cannot be nullified simply because there was violence. In this regard, the Supreme Court noted that *'those who intentionally instigate and perpetrate violence must not plead the same violence as a ground for nullifying an election*.'[498] The import of this statement is that it will be hard in the future to nullify an election if the respondent is not directly linked to the violence. It should be noted that the petitioners in this case had attributed the violence to the police.[499]

497 Para 311.

498 Para's 311-315.

499 This can be seen for example in the following paras:

[19] In her affidavit, of 5th November, 2017, in support of petition No. 4 of 2017, Ms. Perpetua Adar, citing reports of election observers such as the European Election Observation Mission; the Election Observation Group (ELOG); Kenya National Commission on Human Rights (KNCHR) and the Independent Medico-Legal Unit (IMLU) and others, deposed that the election of 26th October, 2017 was held in a tense and polarized political environment characterized by violence, which involved cases of deaths in Nairobi, Busia, Migori, Kisumu and Athi River areas, getting to a total of 37. She further deposed that as a result of the said violence and intimidation, only Jubilee Party election agents were present in most polling stations, posing a risk of vote-count error and manipulation.

[21] The 2nd and 3rd petitioners contend that on Election Day, scenes of militia groups, increased administration, and taking of oaths, prayers, and practices previously associated with the secret Mungiki sect, had been witnessed. These petitioners attributed cases of violence, killings, rape and other atrocities in areas deemed NASA strongholds, to the police. The petitioners also alleged that police and persons dressed in police uniform had broken into houses in some parts of the country, beaten up and maimed men, and raped women, with the effect of provoking the voters in certain regions to resent voting in the fresh Presidential elections.

[26] In summary, it is the 2nd and 3rd petitioner's contention that the alleged acts of violence and undue influence had polluted the voting environment, and seriously undermined free voting in the fresh Presidential election in most parts of the country, so that the relevant election cannot be said to have been an election at all.

It is not clear however which people had been castigated to have been responsible for the violence even though the respondents appeared to have accused the opposition of following its announcement to boycott the planned elections and the subsequent campaign by the governors of Migori, Siaya, Kisumu and Homa Bay for violence.[500]

Following the Supreme Court of Kenya verdict discussed above, other election courts have applied a similar approach by denying a petitioner who has perpetrated violence the luxury of benefitting from it. This approach has also been applied to include people associated with the petitioner. Illustratively, in *Samwel Kazungu Kambi v Nelly Ilongo County Returning Officer Kilifi County & 2 others*, the election court refused to allow the petitioners to benefit from violence that was perpetrated by people associated with him.[501] In *Mary Emaase Otucho v Geoffrey Omuse & another*[502] the election court observed that it must also be proved that the said violence was meted at the instigation of a party who was to benefit from the said mayhem.'[503]

However, this determination has not always been applied consistently especially where the petitioner is not directly implicated and only the supporters have been implicated in the violence. In this regard, there are instances when violence may be attributable to the respondent but due to other circumstances including popularity of a candidate the occurrence of the violence has been excused by an election court. In *Pius Yattani Wario & another v I.E.B.C & 2 others*,[504] the election court observed that 'an election is a political process which involves members of public. It is common knowledge that at times it becomes difficult to control one's supporters.'[505]

4.2.2 Violence Must be Widespread Not Isolated

The second issue of threshold is that violence must be widespread and not isolated. The election court as such has been reluctant to nullify an election simply because there is an allegation of fracas.

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500 The following paragraphs are instructive in this regard:
[157] It is the 3rd respondent's case that the Governors for Kisumu, Siaya, Homa Bay and Migori Counties had conducted campaigns of violence and threat, against any member of the public daring to vote and/or participate in the fresh Presidential election, and that this was the direct cause of the failure of the electoral process in the constituencies of those Counties.
[159] On the attribution of violence during election preparations, the 3rd respondent denies having caused violence, voter intimidation, voter influence, or corruption. He urges that, to the contrary, it was the NASA leader who instigated violence and intimidation, especially in parts of Kisumu, Siaya, Homa Bay and Migori Counties. He states that the allegation about the activities of the "Jubilee Women Brigade" operating at his behest, is misrepresented and misleading, and states that the said organization was a lawful and legitimate lobby, formed to encourage Kenyans to come out and vote in the repeat Presidential election. He denied any knowledge of oath-taking by this, or any other group, and averred that no evidence had been adduced showing otherwise. He also states that there was no violence, killings, rape or other atrocities, as alleged by the petitioners, attributable to him. He further states that the petitioners' allegations regarding remarks made by the acting Cabinet Secretary for the Interior and Co-ordination of National Government in Kisii, were misleading, and taken out of context. He asserts that, contrary to the petitioners' interpretation, the acting Cabinet Secretary had called on the Kisii community to co-exist harmoniously with other Kenyans, and to turn out in large numbers to vote.

501 Para 122.

502 [2018] eKLR.

503 Para 16.

504 [2018] eKLR.

505 As above.

Illustratively, in *Joseph Makilap Kipkoros v Independent Election and Boundaries Commission & 2 others* [506] it was emphasized that 'the mere allegation of fracas with proof and with admission of largely peaceful election cannot pass the muster of violence capable of impeaching the integrity of the voting exercise at the polling station less still in the Constituency election.' In *Rashid Juma Bedzimba v Ali Menza Mbogo & 2 others*,[507] it was held that a single incident involving an agent or voter could not affect the result of an entire constituency[508]. In *Sammy Kemboi Kipkeu v Independent Election and Boundaries Commission & 2 others*,[509] it also emerges that violence, including shootouts, with fatalities that occur 1km away from the polling station at the tail end of the voting may not be sufficient to nullify an election unless forms were changed or other forms of fraud occurred.[510]

4.2.3 Violence must have affected the voting and election results

The last issue in relation to the threshold is that the violence must have affected the voting and election results. This requirement appears to be very important since the courts have declined on various occasions to nullify elections when it was invited to do so. Election courts have determined that violence occurring outside the polling station was not material. In *John Munyes Kiyonga v Josephat Koli Nanok & 2 others*, the election court noted that instances of violence which were isolated and occurred away from the polling station were not capable of affecting the conduct of or disrupting the voting exercise.[511]

Two, the election court has also declined to nullify an election if the voter turnout is still optimal. In *Mary Emaase Otucho v Geoffrey Omuse & another*[512] the election court observed that 'for any alleged act of violence to be said to have affected the results of an election, the effect must be evident in the voter turnout. This must be significant. It must be demonstrated through evidence that but for the violence, the turnout would have been higher. In *Zebedeo John Opore v I E B C & 2 others*,[513] it was observed that it was not necessary to establish the culpability of the perpetrators with finality. What was important for the Court to establish is that the violence affected the elections in terms of 'preparations for the polls, the voting (turnout) and the counting in such a manner as to lead to the conclusion that the elections were not free and fair and free from violence or intimidation.'[514]

The election court also applied itself to the pertinent questions that arise in the context of election-related violence and observes that these questions are:

(i) Whether, the violence was rampant and widespread causing fear, anxiety and compromising the security and safety of voters.
(ii) Whether as a result there was a low voter turnout.
(iii) Whether overall the atmosphere created was conducive to a free and fair election.
(iv) Whether the violence was perpetrated by the elected candidate or by his agents under his instructions.[515]

506 [2018] eKLR.
507 [2018] eKLR
508 Para 97.
509 [2018] eKLR.
510 Para 117.
511 [2018] eKLR.
512 [2018] eKLR.
513 [2018] eKLR.
514 Para 81.
515 Para 82.

Three, the election court has also determined that there must be a direct relationship between the violence and the election process. In *Ahmed Abdullahi Mohamad & another v Mohamed Abdi Mohamed & 2 others*[516] the Court noted that violence that was 'not directed at or intended to…either the election or the counting or tallying of the…election' was not relevant in an election petition.[517]

Four, in certain circumstances, the election court required that the violence must have happened in the polling station and not anywhere else including the constituency tallying centre due to lack of proximity with the results of an election. In *Mutisya Albanus Paul v Independent Election and Boundaries Commission, Returning Officer (Machakos Town Constituency) & Munyaka Victor Kioko*,[518] it was held that violence and intimidation that happened at a constituency tallying centre as opposed to the polling station cannot materially affect the results of an election.[519] In *Daniel Ongong'a Abwao v Mohamed Ali Mohamed & 2 others*,[520] the election court observed that:

> an assault occurring outside the polling station and which did not affect the results of that election, was a criminal offence to be addressed in the normal manner through the criminal justice system and not in the manner it had been introduced into the election petition.

Five, in *Mercy Achieng Mola & another v Raphael Bitta Sauti Wanjala & 2 others*,[521] it was held that violence that had taken place one day after the voting even if it could be proved during the election, the courts will look at the voter turnout, which was high at 77.91% before annulling the results of the elections.[522] In *Clement Kungu Waibara v Annie Wanjiku Kibeh & another*,[523] the election court noted that 'in any event, Courts have used high voter turnout which is consistent with other Polling Stations in the region as proxy to conclude that absent cogent proof, allegations of violence and intimidation are unfounded.[524] Election courts have also declined to nullify elections on account of violence that happened after the election results had been announced. In *Samwel Kazungu Kambi v Nelly Ilongo County Returning Officer Kilifi County & 2 others*,[525] the election court noted that the violence alleged did not affect the elections since it was perpetrated after results had been announced in all the polling station.[526]

Six, the election court has also declined to nullify an election if calm had been restored following an incident of violence at a polling station.

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516 [2018] eKLR.
517 Para 120.
518 [2018] eKLR.
519 Para 70.
520 [2018] eKLR.
521 [2018] eKLR.
522 Para 24.
523 [2018] eKLR.
524 See Philip Osore Ogutu v Michael Onyura Aringo & 2 others [2013] eKLR; at para 48 and Henry Okello Nadimo v Independent Election And Boundaries Commission & 2 others [2013] eKLR; at para 73. In the four Polling Stations cited by the Petitioner, the turnout was: 81% for Gikindu; 91% for Njatha-ini; 89% for Muirigi and 87% for Kawira. These turnouts are consistent with the turnout numbers in other Polling Stations. The conclusion that the Court came to was that the allegations were unproven at paragraph 73.
525 [2018] eKLR.
526 Para 123.

In *Tuneya Hussein Dado v Independent Election and Boundaries Commission, Returning Officer, Tana River County & Dhado Gaddae Godhana*, the election court dismissed the petition because the violence complained about did not affect the elections since despite being violence the situation of normalcy was restored and the process of tallying and the announcement of results continued.[527] In this case, the election court also observed that 'mere suspicion' cannot be used to support allegations of violence. The court noted as follows in this regard, 'Suspicion no matter how strong cannot be a substitute for cogent evidence.'[528]

Lastly, the election court has actually used violence as a ground to nullify an election even in the absence of a direct link with the respondent. In *Francis Wambugu Mureithi v Owino Paul Ongili Babu & 2 others [2018] eKLR*, the election court nullified the election of the MP Owino since the Court was satisfied that elections were adversely affected by a violence that happened in one polling station, Soweto Social hall, even though it could not be attributable to the 1st respondent. The learned Judge observed as follows:

> I have already identified from the evidence that there was violence which took place at Soweto Social hall polling centre. Though the violence cannot be attributed to the 1st respondent, the truth of the matter is that the election in the entire polling centre was affected.[529]

However, on appeal this was found defective and dismissed. The Court of Appeal noted that the learned Judge had not shown how the elections had been affected by the violence. The Court of Appeal noted in this regard as follows:[530]

> …there was not a single voter who testified that they were disenfranchised and thus failed to exercise their constitutional right to vote. To the contrary, evidence was tendered to the effect that voting hours were extended to compensate for any time that was lost due to the unrest that occurred at Soweto Social Hall Polling Centre. The learned Judge's conclusion that the election in the entire polling Station was affected had no legal premise and must therefore be rejected.

In light of the decision above, it appears that no election has so far been nullified on the basis of election-related violence despite violence being an integral part of the election process as noted in the introduction to this paper.

4.3 Political Parties' Tribunal

The Political Parties Tribunal has also largely followed the threshold discussed above. In *Geoffrey Okuto Otieno v Orange Democratic Movement & 2 others*,[531] the tribunal noted that police interference in the counting process and that the result of that counting and tallying was not credible as to reflect the will of the ODM members of Hospital Ward, Mathare Constituency including close nomination was held to be sufficient to nullify the nomination.

527 Para xvi.
528 Para xvii.
529 Para 67.
530 Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 Others [2018] eKLR, para 82.
531 [2017] eKLR.

The judge stated:

> I, therefore, uphold the concurrent finding of the Special Tribunal and the Political Parties Dispute Tribunal that there was police interference in the counting process and that the result of that counting and tallying was not credible as to reflect the will of the ODM members of Hospital Ward, Mathare Constituency.

5. Critical Analysis of the Election-Related Violence Jurisprudence in Kenya: Confusion or Consistency in Relation to Democratic Consolidation in Kenya

This section addresses two separate issues, namely: the Judiciary as a stumbling block to democratic consolidation in Africa; and comparative jurisprudence from other African countries in order to determine whether the approach in Kenya is isolated or its entrenched in the continent.

5.1 Judiciary as a Stumbling Block to Democratic Consolidation in Africa

The judiciary in Africa has been accused of being the current stumbling block in relation to consolidating democracy in Africa in line with the gains that had been made in the democratic waves of 1980s and 1990s. According to Kaaba, the manner in which presidential election petitions have been disposed of with is generally 'unsatisfactory and a disincentive for the further growth and consolidation of democracy' in Africa.[532] Kaaba therefore identifies the following patterns as being responsible for the negation of democratic advancement in Kenya by sifting through various decisions of African Courts: (a) All cases are decided in favour of the status quo; (b) Many cases are dismissed on flimsy technical and procedural rules without consideration of the merits; (c) There is misuse of the substantial effect rule to uphold defective elections; (d) In some countries, the resolution of disputes is inordinately delayed so as to render the whole process nugatory; and; and (e) Judges simply fail to address the issues presented before them by constraining themselves from making appropriate decisions.[533]

From the above list, whilst all the other patterns are also relevant, pattern (c) is perhaps directly applicable in relation to election-related violence jurisprudence. Consequently, Kaaba argues that the fact that many African countries that are politically stable have election laws and regulations, this has failed to guarantee free and fair elections because of various factors including violence.[534] On the basis of the substantial effect rule adopted from the English case of *Morgan v. Simpson*[535] many African countries have been reluctant to nullify election on the basis of minor irregularities or infractions of the rules.[536]

532 O'Brien Kaaba 'The challenges of adjudicating presidential election disputes in domestic courts in Africa' (2015) 15 *African Human Rights Law Journal* 330.
533 As above, 334-335.
534 As above 343.
535 (1975) 1 QB 151.
536 Kaaba above, 344.

Justice Ndung'u summarizes the law according to Justice Denning in *Morgan v Simpson* in her dissenting opinion in the Supreme Court of Kenya Petition 1, 2017 as follows:[537]

> 1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. This proposition came out of a case where 2 out of 19 polling stations were closed all day thereby disenfranchising more than 5000 voters (re Hackney Election Petition, Gill v. Reed (1874) 2 O_M & H.77)
>
> 2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the results of the election.
>
> 3. But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls-and it did affect the result-then the election is vitiated.

The tension resulting from the above rule was a subject of much analysis by Justice Njoki Ndung'u following the nullification through a majority decision of the first presidential election in 2017.[538] While nullifying the elections, the majority had to consider the application of the substantial effect rule and appears to have given it a fresh meaning which includes two parts, namely: whether irregularities were of such a nature, or such a magnitude, as to have either affected the results of the election, ***or to have so negatively impacted the integrity of the elections, that no reasonable tribunal would uphold it***.'[539] This concept of safeguarding the integrity of elections is a new concept, which eventually played a major role in the outcome of this petition. However, the dissenting opinion of Justice Ndung'u cautioned against such an approach by observing the following two points as required by the substantial effect rule as contained in *Morgan v Simpson* case cited above:

> [217] If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities.
>
> [218] Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection are not enough, by and of themselves, to vitiate an election.

The above application of the substantial effect rule appears to suggest that qualitative aspects of election irregularities may not be adequate to invalidate an election unless it is tied to or shown to have affected the results.

537 Para 211.

538 Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another, 2017.

539 As above, 373.

Justice Ndung'u relying mainly on Munya case observes the following fundamental points in relation to nullification of elections:[540]

1. If it is demonstrated that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such an election is not to be invalidated only on ground of irregularities.
2. Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, and then such an election stands to be invalidated.
3. Mere allegations of procedural or administrative irregularities and other errors occasioned by human imperfection are not enough, by and of themselves, to vitiate an election.

As summarized by Justice Ndung'u, 'the upshot is that the alleged illegalities or irregularities ought to have a nexus with the declared results.' As a result of the substantial effect rule, it has always been impossible to annul elections on qualitative basis alone without linking it to the results or the quantitative aspects of that election. According to Kaaba, this rule has worked in the 'most disingenuous way in Africa to uphold elections fraught with major irregularities and fraud.'[541]

From the analysis conducted in the previous section, one of the threshold requirements is that election-related violence must affect the results. It thus appears that the jurisprudence in Kenya is significantly in favour of substantial effect rules and with it comes the frustration of how to further consolidate democratic gains in Kenya. This frustration was aptly captured in *Clement Kungu Waibara v Annie Wanjiku Kibeh & another*,[542] where the election court registered its displeasure with the current threshold and observed that it was promoting a culture of 'election lawlessness' in Kenya. The election court noted that:[543]

> By allowing this narrative about the "imperfection" of human beings charged with the task of conducting elections and the impossibility of establishing sound systems manned by competent people with the capacity for excellence and adherence to election laws and regulations in running elections, we are dangerously subverting the Constitution rather than drawing the line in terms of fidelity to the process. We permit the IEBC, a ken of excuses; a kit of tools from which it can persist in its seeming imperviousness to become a learning organization. We enable the very culture of election lawlessness which the Kriegler Commission found to be a key driver of violence and impunity in Kenya to thrive.

Consequently, the majority decision in Petition 1 of 2017 of safeguarding the integrity of elections appears to be the only practical way to further consolidate democratic gains in Africa away from the old substantial effect rule, which appears to be currently dominant. This should therefore be promoted as a matter of urgency in all cases involving election-related violence.

540 Justice Ndungu dissenting opinion, para 348.
541 Kaaba above, 345.
542 [2018]eKLR.
543 Para 128.

However, the commitment of the Supreme to the above standard has come under question in the wake of the second presidential petition, which despite massive irregularities and illegalities including violence which brought into question the issue of integrity of the elections failed to nullify the elections. The court noted the following in relation to violence:[544]

> ...Violence in any form, by any person or agency (private or State), against any person, community, institution or establishment, constitutes a travesty of justice and of the rule of law. Violence undermines the democratic process and makes a mockery of the pacific resolution of disputes which is one of the hallmarks of our progressive Constitution. Unchecked and unbridled episodes of violence are a sure recipe for the disintegration of a nation, and the destruction of the constitutional order. This Court stands not for lending legitimacy to any acts of violence, as a device for settling disagreements.

However, having made the strong statements above, the same court refused to nullify the elections on the basis of violence even having taken judicial notice that violence affected 25 constituencies in the country.[545] In reaching its conclusion, the Supreme Court unanimously decided that the declaration of the results was done in accordance with the Constitution and thus valid.[546]

The Supreme Court appear to have dwelt on the issue of the quality of evidence presented before it by the petitioners noting that it was not enough to shift the burden of proof to the respondents as opposed to the issue of threshold. In this regard, the unanimous decision of the Supreme Court observed the following:

> **[408]** If it emerges that, in accordance with Article 81(e) of the Constitution of Kenya, the repeat election was conducted by *secret ballot*; that it was *free from violence* (more particularly, such violence being initiated and prosecuted by the electoral body, or by State agencies); that the voters were *not influenced by intimidation or corruption;* that the management process was *in the hand of IEBC;* that *voting was transparently done*; that such voting proceeded *transparently, efficiently, accountably, with precision and clear expression of voter-preference* – then such election has to be judged to have been *credible* for the purposes of the *Constitution*, the *law,* and the *national expectation*.

544 Para 313.

545 Para 311.

546 The relevant paragraphs are as follows:

[321] In the present case, voters from 25 constituencies did not vote, due to politically-instigated violence. There were also individuals who opted to boycott the election. The IEBC then designated a different day for the elections to be conducted in the 25 Constituencies that had not voted. However, even on this specially-designated Election Day, elections could not be held in the said areas, due to violence; and the 1st respondent called off the repeat elections. Consequently, upon the tallying and verification of results being complete, the Commission declared the winning candidate as the President-elect, despite the electorate in the 25 Constituencies not having voted.

[322] It is clear that the Commission made its declaration pursuant to Article 138 of the Constitution, 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

> **[409]** It is our considered view, therefore, that the *burden falls on the 2nd and 3rd petitioners*, not just to allege, but *to show by objective evidence* the legal foundations of their claim; and thereafter to lay before this Court *weighty evidence* to sustain each and all of their claims. As already demonstrated, some of their claims are of such *a generic order* as to lend only feeble grounds for the Court to depart from *prima facie* perceptions of *legitimacy* and *credibility*….

The second electoral petition therefore missed the opportunity to delve into the substantive issues in the petition because there was not enough evidence to prove that the credibility and legitimacy of the elections were at stake. The issue of substantial effect rule therefore did not play a major role in this decision. The issue of evidentiary burden appears to be the main issue of the future in election petitions.

In the end, the Kenyan landscape appears to be in total confusion in relation to democratic consolidation. The genesis of the confusion is Presidential Petition 1, 2017, which was a significant departure from the ***Morgan v Simpson*** restrictive approach in relation to the substantial effect rule. This confusion is especially so in light of the cases that have been decided by election courts and court of appeal where the restrictive approach is still being upheld as opposed to the approach adopted by the Supreme Court in its first presidential election petition in 2017, which also recognized the need to safeguard the integrity of elections, without necessarily looking at its effect on the result, as a basis for the nullification of elections.

Indeed, the issue of safeguarding the integrity of the elections is not unique to Kenya. It appears to be especially preferred in countries where there has been bitter past experiences and mistrust of the electoral system leading to legitimacy and governance problems in the country. In a Jamaican Supreme Court case, the results of a closely contested election were nullified principally because of its qualitative aspects. The learned Judges observed that the irregularities proven 'led to a substantial distortion or subversion of the ***process*** of a free and fair election in the constituency.' It then observed the following critical points to explain its decision:[547]

> In any democracy, more so in this country where because of past bitter experience there is a deep and abiding mistrust of the integrity of the electoral system, it is imperative not only that elections should, in fact, be conducted in a manner that is free and fair and free from fear, but also that elections should manifestly be seen to be so conducted. In all of this the public perception is of critical importance. It is one thing for a political party to win a general election and then proceed to form a government. It is quite another thing to attempt afterwards to govern a people, a sizeable majority of whom do not accept the legitimacy of that government. People will resist governmental authority if they perceive that it was gained through corruption or subversion of the electoral process. A country is more easily governed and good governance is made more likely when, after an election, the loser accepts that they have fairly lost.

547 The Representation of the People Act v Election Petition Act, Suit No. M001/98, In the Supreme Court of Judicature of Jamaica, 48-49.

> Ultimately, it is the duty of Government to ensure that elections, whether for membership of the House of Representatives, the Kingston and St. Andrew Corporation or the Parish Councils, are conducted in a manner that is free and fair and free from fear, and with due regard to the overriding principle of one man, one vote; same man, same vote.

From the above, at the heart of the new approach therefore is the need to secure legitimacy and good governance. It is therefore important to note that some courts have been willing to overlook the issue of results to nullify elections and consider qualitative aspects or the process as a sufficient ground to nullify elections.

5.2. Comparative Jurisprudence from Other African Countries

Before concluding this paper, it is prudent to look at the issue under discussion using cases from other jurisdictions especially in Africa. Indeed, as noted by Isanga, courts of judicial review should engage in comparative trans-African jurisprudence more frequently in order to be more effective in the judicialization process.[548] Indeed Kenya was cited as one of the countries that have referenced a broad range of precedents from many African countries especially those from common law as can be discerned from its case laws.[549]

Consequently, this section will review three main decisions from Uganda, Ghana and Nigeria in relation to the issue at hand. This section will conclude by looking at a Supreme Court decision in Jamaica, which seems to be developing in the right direction in relation to safeguarding the integrity of elections.

In Uganda, in the case of *Amama Mbabazi v Yoweri Kaguta Museveni & 2 Others*, the Court interpreted the meaning of Section 59(6)(a) of the Presidential Election Act and found that 'compliance failures **do not automatically** void an election'. 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 also that such failure to comply did affect the results of the election in a significant (substantial) manner.'[550] Relying on this, the Court went ahead to find that there was noncompliance in the elections but that the noncompliance did not affected the result in a substantial manner.[551]

548 Joseph M Isanga 'African judicial review, the use of comparative African jurisprudence, and the judicialization of politics' (2017) 49 Geo. Was. Int'l Rev 752-753.

549 As above, 781.

550 Supreme Court of Uganda Presidential Election Petition No 1 of 2016, Amama Mbabazi v Yoweri Kaguta Museveni & 2 Others, 41. Section 59(6)(a) provides that 'noncompliance with the provision of this Act, if the Court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the noncompliance affected the result of the election in a substantial manner.'

551 As above, 45.

In Ghana, in the case of *Nana Addo Dankwa Akufo-Addo & 2Others v John Dramani Mahama & 2Others*[552] the Supreme Court cited with approval of *Morgan v Simpson* and observed the following:[553]

> It is clear from this decision that a petitioner is not entitled to an order quashing election results merely upon establishing some form of noncompliance with the rules governing the poll; the non-compliance must further either be of a substantial proportion or the non-compliance must produce a different outcome in the election, namely, result in some person emerging victor who would but for the non-compliance not secure such victory.

In Nigeria, in the case of *General Muhammadu Buhari v. Independent National Electoral Commission & 4 Others* that country's Supreme Court observed that:[554]

> It is manifest that an election by virtue of [the applicable statute] shall not be invalidated by mere reason that it was not conducted substantially in accordance with the provisions of the [applicable statute]. It must be shown clearly by evidence that the non-compliance has affected the result of the election. Election and its victory is like soccer and goals scored. The Petitioner must not only show substantial non-compliance but also the figures, i.e. votes that the compliance attracted or omitted.

The influence of *Morgan v Simpson* case is permissive in Africa as illustrated in the cases cited above from Uganda, Ghana and Nigeria.

6. Conclusion

From the foregoing, the following conclusions can be made. First, the law is now clear on what constitutes election-related violence with the majority of offences being captured under the Election Offences Act.

Secondly, the Supreme Court of Kenya has jurisdiction to hear election-related violence in the context of presidential election petitions. Other election courts including the High Court and the Political Parties' Tribunal may also hear and determine cases invoking election-related violence in the context of other elections.

Thirdly, the standard of proof for election-related offences is beyond reasonable doubt. In relation to the threshold, three things must be proven. One, the violence is attributable to the respondent. Two, the violence was widespread. Three, the violence affected the results of the elections.

552 Nana Addo Dankwa Akufo-Addo & 2Others v John Dramani Mahama & 2Others, 2013.
553 As above, para 88.
554 Para 75.

Out of these three, the last parameter is usually the most important consideration and where the results appear to have been substantially affected, an election court may nullify an election even in the absence of the two other parameters.

Fourthly, in the interest of further consolidating democratic gains in Kenya, there is need to move away from the substantial effect rule, which is currently being utilized in many cases that involve election-related violence. This rule requires that the results of the elections must be affected by any alleged irregularities before the nullification of elections can be done.

Lastly, the jurisprudence from other countries including Uganda, Ghana and Nigeria are not better than what we have in Kenya, which is the application of *Morgan v Simpson*. A little innovation such as that in Kenya in the first petition and Jamaica may be required to overturn this dominant approach.

Part Three

The Inability of Management Bodies to Carry out Credible Elections in Kenya

Reflections on Electoral Management in Kenya - Violence and Intimidation: Lessons From the 2017 Presidential Elections In Kenya

Felix Odhiambo Owuor[555*]

1. Introduction

The challenges of holding credible and accountable elections remain the weakest link in consolidating democratic governance in Kenya. Weaknesses in the electoral process permeate the entire electoral cycle- defined as "the holistic, interrelated and complimentary phases that constitute a general election".[556] Analysis of the various International Election Observation Mission reports that observed the 2017 elections, pointed out that the Kenya's electoral and political landscape is characterised by: tension, division, polarisation, an exclusive political system, weak election management and administration, a weak institutional framework for political parties, conflicting and overlapping legal framework for elections, structural electoral violence and inadequate electoral dispute resolution mechanisms[557].

These weaknesses in the electoral process were confirmed by a continental survey conducted by Afro-Barometer across a number of African countries in 2016. Specifically, for Kenya, the report revealed worrying trends ahead of the 2017 elections that included low public trust in the Independent Electoral and Boundaries Commission (IEBC -22 per cent), fear of violence and intimidation (47 per cent) and the general lack of confidence in the quality and integrity of the 2017 elections. While the conduct of IEBC was a major factor in the run up to 2017 elections, the invalidation of the 8 August Presidential elections by the Supreme Court, on the basis of illegalities and irregularities committed by the electoral body, provided perhaps the last nail in the coffin regarding its credibility. The Supreme Court ruling left the IEBC's reputation severely dented. A subsequent ruling by the same court during the repeat presidential petition did not cure the IEBC's reputation. Weaknesses in the electoral cycle militate against the realisation of electoral justice. Electoral justice is defined as 'holding elections that substantially conform to the constitutional, legal and administrative framework, and that are reflective and responsive to the wishes of the electorate'.[558]

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556 International IDEA, Elections Systems and Design

557 See the European Union International Election Observation Mission to 2017 elections in Kenya. See also the Carter Center Election Mission report to 2017 elections.

558 Francis Aywa, Election Management Bodies in East Africa: Open Society Initiatives for East Africa (OSIEA), p 70

This chapter provides a comprehensive reflection on the conduct of IEBC within the context of the two presidential elections held in Kenya in 2017. The paper contends that while electoral violence reflects the wider systemic, institutional and political culture, the fundamental problem revolves around election management and administration. To this end, the paper establishes the causal link between weak election management and electoral violence that has been a permanent feature of elections since Kenya reverted to multi-party politics in 1991. Analysis of the conduct of IEBC in the 2017 presidential elections, poses fundamental but interrelated questions. These questions include: What is the role of IEBC in preventing election related violence and what is the effect of violence on the administration of elections? Can independent electoral institutions effect their mandate in an environment of fear and intimidation? What are the legal, constitutional, political and policy implications of violence and intimidation on elections? The chapter concludes by making a strong pitch for electoral reforms, the question of violence will be mitigated. Justification for electoral reforms is premised on the fact that failure to carry out comprehensive and inclusive electoral reforms during the 2017-2022 electoral cycle, will only serve to polarize the country politically leaving the country susceptible to election related violence. Accordingly, the general elections expected in 2022 will potentially bear more negative ramifications on the already precarious socio-political fabric in the country and will most certainly lead to violence, if extensive reforms are not carried out.

1.1 Conceptualising Free and Fair Elections and Electoral Violence

The current understanding of the term "free and fair" elections has evolved quite deliberately within the last three decades. The classic literature in the post-second world war and cold war era focused on demarcating the core elements of democratic theory and identified free and fair elections as one of its variables.[559] While it is interesting to examine the early foundations of this term, a review of the literature shows that there was no fundamental refinement of the concept of 'free and fair' until the last three decades.[560]

The first difficulty that confronts any analysis of free and fair elections is the need for clarity in contextualising democratic theory. The democratic theory debate spans centuries while its core foundational element of "free and fair" elections obtained its fuller definition in the post-cold war era. Any definition of 'free and fair' is dependent on the democratic values that emerge from different traditions, along with the 'political space' and 'the structure and nature of social and other divisions in the society in question'[561]. Increasingly, the term credible elections that substantially meet the democratic threshold is being used to replace 'free and fair' which some have argued is loose-ended and difficult to measure.

Electoral Violence is defined as "*any harm or threat of harm to any person or property involved in the election process, or the process itself, during the election period with the express intention of gaining electoral advantage*.[562]

559 Robert Fatton, 'Liberal Democracy in Africa' (1990) 105 (3) Political Science Quarterly 455, 471.

560 Caroline van Ham, Beyond Electoralism, Electoral Fraud in the Third Wave Regimes 1974-2009' (PHD Thesis, European University Institute) 11.

561 Rafael Lopez- Pinto, 'Democracy, Institutional Governance and the Rule of Law; Election Management Bodies as Institutions of Governance (UNDP).

562 International Foundations for Electoral Systems, *'Challenging the Norms and Standards for Election Administration'* (IFES) 2012.

The transition to multi-party democracy in most African countries was accompanied by political polarization, division and ethnic mobilization that often led to electoral violence. Prior to the first multi-party elections in the 1990s, incumbent regimes were on record in countries such as Kenya, Ghana, Nigeria, Malawi and Zambia, cautioning that multi-party politics would revive and entrench ethnic strife thereby engendering electoral violence.[563]

A major catalyst for electoral violence is the condition of structural conflict that exists in most African countries. As defined by Johan Galtung, structural conflict denotes negative peace where despite the absence of armed conflict, the situation is characterized by tension, power relationships and social interaction that is unjust and inequitable[564]. The causes, dynamics and conflict pattern during the 2007-08 Post- Election Violence in Kenya was a clear manifestation of structural conflict. It is conceded that while the trigger was the 2007 disputed elections, the escalation and regionalization of violence was attributed to the historical injustices, regional imbalances and marginalization that had entrenched inequality among and between various communities in Kenya.[565]

2. Election Management and Violence in Comparative Perspective

Kenya has had a chequered history with election management and administration. In every election since 1992, the credibility, neutrality, competence, and impartiality of an election management body has been a recurring theme. The 2017 general elections marked the sixth multi-party elections since the country reverted to multi-party politics, during which time, the composition, structure and outlook of the electoral commission has changed six times[566].

The persistent debate on the constitutional, legal and institutional framework for elections that emerges every five years, coupled with the inability of the election management body to procure a credible process, has led many observers to conclude that election management represents the greatest democracy deficit that undermines the realisation of values and principles enshrined in the Constitution of Kenya 2010.[567] With the exception of 2002 elections, the inability of the electoral commission to hold a credible election, state capture and the toxic influence of state security agencies, led to violence with the 2007 election representing a near total collapse, when unprecedented violence claimed the lives of over 1300 Kenyans.[568]

The challenges of holding credible elections are not unique to Kenya as evidenced in the Afrobaramoter report and indeed other election observations reports, majority of countries in the continent face daunting tasks in holding elections that can be regarded as free, fair and credible.[569]

563 David K Leonard, 'Elections and Conflict in Africa. Journal of African Elections, Volume 8 No. 1 (2009) EISA Publication, p 4.

564 Johan Galtung, (1969), *Violence, Peace and Peace Research.*

565 David K Leonard, Owuor Felix 'Elections and Conflict in Africa, *The Political and Institutional Context of the 2007 Kenyan Elections and Reforms.* Journal of African Elections, Volume 8 No. 1 (2009) EISA Publication, p 74.

566 ECK- Chesoni Commission, ECK- Kivuitu Commission, IPPG Commission, IIEC, Ahmed Isaac led IEBC, and Wafula Chebukati led IEBC.

567 Owuor Felix 2016, LLM Research paper on Reforming Election Management in Kenya, University of Nairobi, pg. 43.

568 Waki Commission Report on the 2007 Electoral Violence in Kenya.

569 See AFROBAROMETER Report on Election Quality, public trust are central issues for Africa's upcoming contests (2016).

While the return of multi-party politics was a celebrated event across Africa, sound constitutional and legal frameworks for actualising credible elections were not institutionalised. As observed by Professor Khadiagala, elections became a ritual, held to comply with the legal requirements for periodic elections, but which failed to meet the quality or democratic test.[570]

Multiple arguments have been advanced to explain the paradox between multi-party elections that began with the elections in Malawi in 1990, and the failure to institutionalise multi-party competition 27 years since the return of multi-party democracy in Africa. For the most part, the struggle for the restoration of multi-party politics that was christened "the second liberation" was premised on the wrong foundation. The struggle presumed that the return to multi-party politics would cure all ills associated with previous authoritarian regimes. However, the colonial legacy and rule, neopatrimonialism, the imperial presidency and systematic weakening of state institutions that had characterised the 1960-1990 political dispensation proved more complex and entrenched. These chasms could not be solved merely by holding multi-party elections.

The gains associated with multi-party-political competition were modest and short lived. While the elections held in early 1990s introduced political pluralism, widened political competition, engineered regime change in some countries and conferred legitimacy to elected government, these elections were not characterised by comprehensive constitutional reforms that could engender transformative politics.[571] A combination of factors namely; inadequate legal frameworks, weak institutional frameworks for political parties, complicit electoral commissions and inadequate mechanisms for electoral dispute resolution, led to incumbent regimes gaining political legitimacy from shambolic elections that were neither democratic nor transparent. It was therefore not surprising that, with very few exceptions, such as in Malawi, Zambia and South Africa, the independent incumbent parties won the ensuing multi-party elections in countries such as Kenya, Ghana, Benin, Tanzania, and Uganda, among others.

Richard Tlemcani (2007), christened the electoral façade that defined the first two multi-party elections held in the 90s, as *electoral authoritarianism,* defined as regimes that present an illusion of multi-party democracy at the local and national level while effectively stripping elections of efficacy.[572] In his much-acclaimed article "*The Rise of Illiberal Democracy*" Fareed Zakaria drew a distinction between periodic elections and constitutional liberalism. He defined constitutional liberalism as denoting *a political system marked not only by free and fair elections, but also by the rule of law, separation of power and the protection of basic liberties of speech, assembly, religion and property.*[573] Fareed Zakaria contented that comparative analysis in Africa, Latin America, Asia and Eastern Europe demonstrated that while electoral democracy had thrived, with authoritarian and semi authoritarian countries routinely holding periodic elections, constitutional liberalism had retrogressed.

Greater focus on electoral accountability and credible election in Africa gained prominence a decade after the restoration of multi-party politics. The ten- year experimentation phase led to the realisation that political pluralism without corresponding comprehensive constitutional, legal and institutional reforms had not yielded the desired results.

570 Khadiagala Gilbert, 2011, 'Reflections When Elephant Fight EISA Publication Johannesburg.

571 Owuor Felix, 2006; The National Rainbow Coalition in the Politics of Party Coalition in Africa, edited by Kadima Denis, EISA Publication Johannesburg 2006, p 63.

572 Tlemcani Rachid, 2007: Carnegie Endowment for International Peace.

573 Fareed Zakaria, "The Rise of Illiberal Democracy" (1997) 76 (6) Foreign Affairs 22, 22.

Whereas a number of countries, among them Ghana, Kenya, Nigeria, Tanzania had embarked on constitutional reforms, the same had not necessarily entrenched democratic competition. On a positive note, majority of the 54 African states succeeded in comprehensively or partially instituting reforms. However, the question as to whether these reforms have yielded democratic elections is yet to be resolved. Regrettably, electoral democracies in a number of countries are on the retreat despite constitutional provisions allowing multi- party democracy (Kenya 2007, 2013, 2017; Zimbabwe 2008, 2012; Ivory Coast 2010; Uganda 2016; Gambia 2016). An emerging phenomenon across these elections is the emergence of electoral violence, leading to the conclusion that election violence has become the new manifestation of conflict in post-cold war Africa.[574]

The fate of constitutional reforms is vital to an understanding of the context of electoral violence because the dominant picture remains the persistence of democracies without liberal institutions.[575] In unpacking the causes of electoral violence, Gilbert Khadiagala, formulated two categories. The first is electoral violence caused by broader political conflicts, particularly in societies that are beset by ethnic, communal and sectarian fissures, and secondly whether electoral violence is a product of imperfect electoral rules that allow some parties to manipulate elections through fraud, vote buying and rigging.[576]

Analysis of elections that did not meet the democratic threshold in Africa reveals that the point of convergence in the two categories is a complicit, partial and partisan electoral commission. The conduct of ECK during the 2007 elections and IEBC in 2013 and 2017 vindicate the foregoing claim.[577] With the exception of 2002 elections in Kenya, electoral violence during the 1992, 1997, 2007, 2013 and 2017 elections, was a product of both deeply entrenched structural factors inherent in the political system as well as imperfect constitutional and institutional framework used to gain political advantage.[578] These factors rendered the election management body incapable of presiding over a credible election.[579]

2.1 Elections Management and Administration in Kenya and International Trends

The clamour for constitutional and electoral reforms in the late 1990s and early 2000s revisited the discussion on electoral management and administration. More academics, civil society organisations, and international organisations paid more attention on the political elite minded on perpetual control of the state through elections which were largely seen as facades. Correlative attention necessarily focused on the legal framework, institutional design, conduct of persons mandated to supervise elections, management of political parties and security or dispute resolutions institutions.[580]

574 Owuor Felix, 2016, Reforming Elections Management and Administration in Kenya; LLM Thesis University of Nairobi, 2016, pp. 7. (Electoral Violence in Kenya 2007-8, Zimbabwe 2008, Ivory Coast 2010)

575 Khadiagala Gilbert, "Reflections on the Causes, Courses and Consequences of Election Violence in Africa" in Khabele Matlosa, Gilbert Khadiagala and Victor Shale (eds) *When Elephants Fight,* Resolving *Election -Related Conflicts in Africa* (EISA 2010), p 15.

576 Ibid, pp. 16.

577 See International Election Observation Reports (EU, The Carter Center) among others.

578 Akiwumi Report on ethnic clashes in Kenya, Waki Report on the 2007 post- election violence.

579 John Oucho, "The Political Economy of Violence in Kenya" in Karuti Kanyinga and Duncan Okello (eds), *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections* (Society for International Development and Institute for Development Studies University of Nairobi 2010) cap 5.

580 Owuor Felix, 2016; LLM Research Paper, University of Nairobi 2016, pp. 45.

The facilitative role played by the electoral commission in rigging and other electoral malpractices brought into question the composition structure and organisation of an effective electoral body. In assessing the quality of electoral administration, Johan Elklit and Andrew Reynolds proposed three test criteria, namely; perceived degree of legitimacy or acceptance; perceived degree of independence and autonomy, and perceived degree of service delivery[581]. The design, composition, and structure of electoral commissions worldwide are closely linked to the recurring theme of governance and public administration. Other factors that influence the choice of an Electoral Management Body (EMB) include the level of political competition, colonial legacy, political system, the extent of decentralisation, and the entrenchment of multi-party-political competition. In achieving the complimentary functions of an effective EMB, three models have emerged that characterise electoral commissions worldwide. These include; the government-based model, the independent model and the hybrid model.[582]

Typically, the *Government Model* is common in advanced democracies or in emerging democracies that have not reformed the electoral legacies left by the colonial administrations[583]. Under this model, functions of the EMB are undertaken by a government agency as is the case in most developed countries and francophone countries. The efficacy of the government-based model requires a strong and impartial civil service, strong foundation for the rule of law and strong institutional framework to safeguard independence.[584] The *Independent Model* denotes a system where the composition, structure and outlook of the EMB are a product of independent process rendering the EMB to be neutral and autonomous.

While the constitutional and legislative framework may require operational and fiscal oversight by a constitutional body such as the Executive or Parliament, the independent electoral commissions are granted sufficient operational independence and insulated from directives by the respective state organs. Majority of African countries, among them, Kenya, South Africa, Ghana and Nigeria have opted for this model. In the *Hybrid Model,* important functions of the EMB are shared between the government agency responsible for the conduct of the elections and an autonomous commission responsible for policy development. Countries using this model include Japan, France, Spain, and most French colonies.[585]

In designing an electoral model, Kenya has moved in step with the international model with mixed fortunes. The country has experimented with various designs of the electoral management bodies, tinkered with the law, adjusted regulations and changed personnel. Kenya has also witnessed hopeful moments of peaceful democratic transition like in 2002 and unfortunate moments of near total collapse of the state in 2007.[586]

581 Jorgen Elklit and Andrew Reynolds, "The Impact of Election Administration on the Legitimacy of Emerging Democracies: A New Research Agenda (September 2000) Kellogg Institute Working Paper No. 281.

582 International Institute for Democracy and Electoral Assistance, Electoral System and Design: The New International IDEA handbook (International IDEA 2005)

583 Owuor Felix, "LLM Research on Reforming Election Management and Administration in Kenya" University of Nairobi, 2016, p 47. See also http://www.un.org/en/peacekeeping/issues/electoralassistance.shtml} accessed 10 May 2018.

584 Ibid, 48.

585 Ibid, p 49.

586 Walter Oyugi, "The Politics of Transition in Kenya 1992-2003: Democratic Consolidation of Decolonisation?" in Walter Oyugi, Peter Wanyande and Crispin Odhiambo- Mbai, *The Politics of Transition in Kenya: From KANU to NARC* (Heinrich Boll Foundation 2003), p 345.

Since independence, Kenya has moved from legal subversion of the will of the people in the colonial and one-party era and expanded political rights in the Constitution of Kenya 2010 which is generally acclaimed for its progressiveness.[587]

The repeal of Section 2A of the then Kenyan Constitution (1969 Constitution) that ushered the country into multi-party-political dispensation also introduced a new framework of election management by establishing the Electoral Commission of Kenya (ECK). Previously under the single party regime, election management reposed in the office of the Supervisor of Elections which was a department within the office of the Attorney General.

The Supervisor of Elections was essentially a civil servant supported by other public officials who were mostly provincial administration officials. The model of election management was thus the government model electoral commission argued above. The elections held under the one-party state were a coronation ritual where preferred candidates garnered unassailable victory. The electoral façade during the single party days was perhaps demonstrated in 1988 when the then ruling party, Kenya African National Union organised a shambolic election where secret ballot was replaced by queue voting that involved voters lining up behind their preferred candidates. The chaos, confusion, intimidation and fear propagated by the provincial administration and police resulted in candidates who had the shortest ques win with overwhelming majority. This was christened the *Mlolongo* (queue) voting system which heralded the beginning of fraud and impunity as instruments of electioneering by incumbent regimes. The development in 1988 effectively introduced the illicit involvement of the security sector, the police and the deep state in the electoral process - a fact that has persisted to date.

The most notorious desecration of electoral democracy during this era was the queue-voting system of 1988 known as '*Mlolongo*'. The decision to conduct primaries by having voters queue behind the image of their favoured candidates set the stage for massive rigging. Voting malpractices had been witnessed in other elections but this decision made it possible to cheat on a scale never witnessed before, given the opportunity it presented for open voter bribery and intimidation to queue behind state-sponsored or regime-friendly candidates.[588]

Despite the fact that future elections in 1992 and 1997 were held by secret ballot, the legacy of Mlolongo entrenched a political culture of electoral fraud and malpractices, including voter bribery and intimidation, alteration of votes in transit and state-sponsored violence in areas that were perceived as hostile to the Executive. The violence was often designed to displace 'hostile' communities in order to curb voter turnout.

587 Owuor Felix, "LLM Research on Reforming Election Management and Administration in Kenya" University of Nairobi, 2016, p 50.

588 Mugo, Waweru "How the 'Mlolongo' System Doomed Polls" The Standard Newspaper 20th November 2013 cited in *OCTOBER 26th ELECTION: Can the sovereign will of the people prevail in an environment of state terror and intimidation?* By James Gondi, Available at https://www.theelephant.info/features/2017/10/25/october-26th-election-can-the-sovereign-will-of-the-people-prevail-in-an-environment-of-state-terror-and-intimidation/

The ECK was established under Article 41 of the former Constitution and operational functions spelt out in the National Assembly and Presidential Elections Act (repealed). While the ECK was expected to exercise functional and operational autonomy, the President retained the powers of appointing commissioners who were effectively beholden to the appointing authority. The political and electoral environment that preceded both the 1992 and 1997 elections were characterised by violence and ethnic clashes that complicated the operations and effectiveness of the *electoral* commission. The ECK was perceived to be largely partisan and ineffective in conducting a credible election. In 1997 following street protests and demonstration that led to loss of lives and destruction of property, the government yielded to the demands of the opposition and expanded the Commission (from 11 to 21) under the Inter Parties Parliamentary Group (IPPG) arrangement.

The major reflections from the 2002 General Elections indicate significant maturity of the Electoral Commission of Kenya in its leadership to facilitate transparent and robust consultations with political parties and stakeholders; targeted legal reforms through incremental initiatives in 1992, 1997 and 2002, increased administrative proficiency of the electoral commission staff, remarkable effort to curtail the legacy of undue influence by the public service particularly the provincial administration and security agencies, transparent engagement with stakeholders and clarity in communication, at least by the leadership of the Electoral Commission.

On the flip side, the 2002 and more conspicuously the 2007 elections reflected, remarkable inefficiency in administration and management especially in procurement of critical election materials, unpreparedness on election day, lack of clarity in the instruction of polling officials especially regarding assisted voters, categories of ballots during counting, management of polling station streams, issuance of ballots, ambiguity in the true franchise through a determinate and published voters register, counting and reconciliation procedures and election results transmission. There was conspicuous asymmetry, wilful or otherwise, between the electoral commission at the Headquarters and Returning Officers which made the whole electoral process vulnerable or liable to undue influence and speculation.

Lastly, the Electoral Commission displayed feeble efforts or indifference in the exercise of its powers to enforce the electoral code of conduct, the use of public resources or to buttress its independence from the security agencies.[589] These stated weaknesses were overshadowed by the landslide electoral victory by the opposition in 2002. In 2007, they provided inescapable footing for consequential systemic failure in election administration and the proximate trigger to the violence that ensued.[590]

The confidence and trust that the electorate had on the IPPG ECK Commissioners was shattered in 2006 and 2007 when vacancies arose in the replacement of the commissioners whose terms had expired. President Mwai Kibaki, in total disregard to the IPPG spirit, unilaterally appointed commissioners, a move that nourished discontent and deprived the commission of public trust and confidence.[591]

589 Edwin Abuya, 'Consequences of a flawed Presidential Election' (2009) 29 (1) Legal Studies 128.

590 Owuor Felix, 2006; The National Rainbow Coalition in the Politics of Party Coalition in Africa, edited by Kadima Denis, EISA Publication Johannesburg 2006, pp. 63.

591 Owuor Felix, 2006; The National Rainbow Coalition in the Politics of Party Coalition in Africa, edited by Kadima Denis, EISA Publication Johannesburg 2006, pp. 63.

The heated political campaigns that characterised the 2007 elections, the high-stake politics, fomenting of ethnic animosity, the involvement of the police and a complicit electoral commission conspired to create the most unprecedented electoral violence in Kenya, massive displacement and destruction of property.[592]

The impetus for reforming election management and administration was provided by the disputed 2007 elections and the unfortunate post -election violence that followed in 2008. The post-election mediation process spearheaded by Kofi Annan recommended the establishment an independent inquiry into the conduct of 2007 elections, a commission to investigate post- election violence (Waki Commission), and the establishment of the Truth Justice and Reconciliation Commission as part of the comprehensive long-term reforms under Agenda Four Items.

The Kriegler Commission Report found fundamental weaknesses in the Kenyan political culture, institutional breakdown and weaknesses in election management and administration[593]. In light of the failures of the 2007 elections and the manner in which the ECK conducted the elections, Kriegler recommended a complete overhaul of the commission a move that was actualised via the Constitutional Amendment Act No 10 of 2008, the effect of which was the creation of two interim commissions; The Interim Independent Electoral Commission (IIEC) and Interim Independent Boundaries Review Commission (IIBRC), to undertake the tasks previously vested on the ECK.

The constitutional foundation for the establishment of permanent electoral commission is traceable to the Constitution of Kenya promulgated in 2010. The new constitutional framework is normative and inherently post liberal in its architecture[594]. The transformative and progressive nature of the 2010 constitution is evidenced by elaborate chapters on the Bill of Rights, reconfiguration of the state through devolution, comprehensive chapters on elections and representation of the people, and the rights-based agenda tied to governance and the exercise of public authority.[595]

The Constitutional framework for elections is augmented by the elections sector laws namely the Elections Act 2011, IEBC Act 2011, Political Parties Act 2011 and the Election Campaign Financing Act of 2013. Constitutional and legal regime for elections and election management was transformative and progressive. But despite clear constitutional and legal guarantees and protection, IEBC exhibited significant weaknesses during the 2013 and 2017 elections. The two presidential elections held in August and October 2017 and the wrangles that characterised IEBC operations in the run up to the elections undermined the electoral process and made electoral violence inevitable.

592 Report of the Independent Review Commission (Kriegler Report) on the General Elections held in Kenya on 27 December 2007 (17 September 2008), p 5. See also the Waki Commission Report on the Post- Election Violence in Kenya.

593 Independent Review Commission (Kriegler Report), on the Conduct of the 2007 Election, p 5.

594 Heidi Evelyn and Waikwa Wanyoike, 'A New Dawn Postponed' The *Constitutional Threshold for Valid Elections in Kenya and Section 3 of the Elections Act,* International Law Development Organisation and the Judiciary Training Institute, (2015) p 46.

595 Owuor Felix, 'LLM Research Thesis, *Reforming Elections Management and Administration in Kenya:* University of Nairobi (2016), p 50.

3. The 2017 Presidential Elections in Perspective

Measuring the quality of the administration of an election is an inherently difficult quest.[596] Firstly, because election management is intrinsically linked to the context of the society in question. Secondly, election administration is both process and outcome oriented[597]. Election frameworks are considered to mature after at least three successful cycles. That period is considered in many instances, to be sufficient in testing the legal, managerial, environmental elements, and the necessary circumstantial maturity of a society's democratic progress.

In societies emerging from particularly illiberal pasts, the third cycle presumably follows from the first election which is considered a turning point from a demonstrably illiberal past or post conflict situation. Samuel Huntington aptly captured the foregoing in the now acclaimed phrase the "*two turn over test*". As a measure of democratic consolidation, the test is met when a party or group that takes power in the initial election at the time of transition, loses a subsequent election and turns over power to those election winners, and if those election winners then peacefully turn over power to the winners of a later election.[598] In Africa, the only country that has routinely passed the '*two turn over test*' is Ghana. Since 1992 elections, peaceful transition and transfer of power has occurred between the two main parties the National Democratic Congress (NDC), and the New Patriotic Party (NPP).

In Kenya the 2002 general election heralded a peaceful transition that was however short lived. The circumstances which followed the 2007 General Elections and eventual enactment of a new Constitution in 2010 would justifiably mark the 2002 election as a false start in the democratic path and assign 2013 as an appropriate beginning of an era in election management. The 2017 General Elections was the second, following the discredited and near conflict situation of the 2007 General Elections, and the enactment of the Constitution of Kenya 2010. It ought therefore to have marked considerable milestone in obtaining maturity in electoral standards of integrity. This section attempts to do this by giving context in measuring election standards, assess electoral management and violence and the standards expressed in the Constitution of Kenya 2010, with a view to determining whether any milestones were obtained in 2013, and if the 2017 elections had any improvements.

3.1 Some Antecedents to the Constitution of Kenya 2010

As mentioned in the foregoing sections, the gains obtained in the 2002 general elections were largely extinguished by the controversial 2007 election administration and the circumstances which followed that election. Accordingly, the 2007 election can be regarded as the true ground zero and 2013 General Election as a fresh step towards democratic elections, both in a "near post-conflict" period and based on the clean slate provided by the Constitution of Kenya 2010. The 2013 and 2017 general elections ought to have reflected the benefits of hindsight from the experience of the 2002-07 elections as well as the strong foundation established by the Constitution of Kenya 2010.

596 See generally, Johan Elklit and Andrew Reynolds, *A framework for the systematic study of election quality,* https://pdfs.semanticscholar.org/9161/37c271ec9b689cfb34db8c95937e584f098a.pdf

597 Elizabeth Carter and David Farrell, Electoral Systems and Electoral Management. *https://www.ucd.ie/t4cms/Farrell_Carter Election Management.Pdf} accessed on 1 May 2018.*

598 Graham Harrison, '*Democratisation and Liberalism,* Political Science Journal. *https: www.britannica.com/topic/democratisation # ref 1181736},* accesses 20 May 2018

3.2 Elections in the Post 2010 Constitutional Framework: The 2013 Presidential Elections

To understand challenges on election administration and violence during the 2017 elections, it is imperative to look at the context set during the 2013 elections. Failures in 2013 elections that re-emerged in 2017 are consistent with the new discourse in electoral studies namely "inconclusive electoral cycle". Essentially, the concept has been advanced to explain that challenges and shortcomings that are not addressed in one election re-appear and complicate subsequent elections.[599] The examples are in Kenya, Zimbabwe, DRC, Chad, and Uganda among others. The 2013 General Elections provided an immense opportunity for substantial development of the electoral framework.[600] The enactment of the Constitution of Kenya 2010 and overhaul of the statutory framework signified radical reforms and profound change in democratic society. Re-establishment of the electoral management body, increased resources and other institutional reforms gave a signal of freshness. These reforms were expected to transform Kenyan elections. The short space between 2010 and 2013 provided the opportunity for a clean script of Kenya's elections since all elements of the election cycle were undertaken including: reform of the law, boundary delimitation, fresh voter registration, election planning, training, stakeholder engagement, ICT integration, and actual election operations.

A reflection from the 2013 General Elections must be that, if it presented the chance for profound transformation of elections in Kenya, then it was an opportunity spectacularly lost. Its conduct and subsequent evaluation reflect substantially all the challenges of the 2002 and 2007 processes.

Similar problems occurred in 2013 in comparable scales to the 2007 '*ground zero*' General Election. Despite substantial investments and expectations raised through integration of technology, the Commission failed to deliver expected determinacy of the franchise in a single voter register, and consequentially, ambiguity on the number of polling stations or how polling stations were managed in terms of queues.[601] The Commission produced a seemingly fresh Biometric Voters' register with similar integrity questions as the out-dated and the inexpensive Optical Marker Readable register used in 2007.[602]

The Commission encountered significant institutional and planning challenges. The Commission undertook three major procurements in relation to the Biometric Voter Registration devises and system, the voter identification systems, and ballot papers.

The procurement of the BVR devices failed and the Commission finally decided to outsource its responsibility to the Executive through an opaque government to government procurement channel. In relation to the procurement of EVID machines, the Commission was late in procurement, delivery, and allegations of modifications to the specifications. These challenges had inevitable consequences on the deployment and implementation of the two technologies including training of officials.

599 Diamond L, '*The Spirit of Democracy: The Struggle to Build Free Democracies Throughout the World* (Henry Holt and Company 2008)

600 Owuor Felix, 'LLM Research Thesis, *Reforming Elections Management and Administration in Kenya:* University of Nairobi (2016), p 55.

601 Ibid

602 Independent Electoral and Boundaries Commission Post-Election Evaluation report on the March 4 2013 General Elections (October 2014), p 36.

The ballot paper procurement attracted controversy during procurement. However, the more drastic allegations came to light after the elections when Smith and Ouzman Ltd, the company was found by a UK court to have paid bribes to undertake the job in Kenya and Mauritania. It Chairman, Christopher Smith and marketing manager Nicholas Smith were convicted for these bribery offences at the Southwark Crown Court.[603] While these were major procurement that were more conspicuous in undermining electoral integrity, the Commission has similar allegations on unscrupulous dealings in relation to smaller items. The Commission seemed indifferent on whether it would procure a system for result transmission or rely on the International Foundation for Election System (IFES) to provide technical assistance. The Commission employed the system designed by IFES, but there was lack of clarity on the scope of support it required from independent service providers and telecom companies.

The 2013 General Election planning and election day operations were also not without challenges. The inordinate delays and challenges in securing critical procurements had adverse effect on logistics, training and Election Day operations. Election Day processes went on peacefully. They were marked by long queues, lack of clarity in dealing with assisted voters, the use of multiple reference materials in addition to the BVR register, inconsistencies in the issuance of ballots. There was inconsistency in the procedure for dealing with the different categories of ballots, especially rejected and spoilt ballots. There was near total and dramatic failure of the result transmission system. 2013 perhaps had some additional challenges compared to 2002 and 2007 such as lack of transparency and incredible reluctance by the Commission to robustly engage with political parties and stakeholders.

Most of these issues were subject of the presidential petitions challenging the 2013 Presidential Elections. The 2013 presidential election petitions commonly cited as ***Raila Odinga vs. IEBC*** [604] was a consolidated dispute involving three separate petitions. One of the petitions challenged the decision of the IEBC to include rejected votes in the final tally in computing the percentage votes won by each candidate. The two other petitions one filed by the Civil Society and the other by Raila Odinga impugned the elections on varied grounds. The main grounds included: that the 2013 General Elections was not conducted substantially in accordance with the Constitution and electoral law; failure to develop and maintain a determinate and published voters register that met the requirements of accuracy and verifiability; that the IEBC employed a system that failed the constitutional test of simplicity and verifiability in the conduct of elections; that the elections was not verifiable and accountable owing to the total failure of the electronic result transmission system and anomalies identified in the manual tallying of votes; and lack of transparency including maltreatment of agents at polling stations and tallying centres.

The saving grace of the Commission in 2013 was the permissive approach taken by the Supreme Court in its decision on the various petitions filed to challenge the presidential elections. The Supreme Court in 2013 seemed to have been overly persuaded by the inherent cautiousness of election courts in election petitions,[605] its reading of the standard required to invalidate an election,[606] and a sweeping acceptance of the explanations proffered by the IEBC.

603 United Kingdom Serious Fraud Office (SFO) Case of *Smith and Ouzman* available at https://www.sfo.gov.uk/cases/smith-ouzman-ltd/

604 *Raila Odinga and 5 Others vs. IEBC & 3 Others* Election Petition No 5 of 2013 (Supreme Court of Kenya).

605 Heidi Evelyn and Waikwa Wanyoike, *A New Dawn Postponed: The Constitutional Threshold for a Valid Elections in Kenya and Section 83 of the Elections Act* (Paper published in Balancing the Scales of Electoral Justice, Resolving Disputes from the 2013 and the Emerging Jurisprudence.

606 Wachira Maina, *Verdict on Kenya's Presidential Election Petition*

3.3 A Standard of Measure of the 2017 Presidential Election

The 2017 General Election was in many respects a repeat of the 2013 General Elections. The circumstances of the period intervening 2013 and 2017 preserved the high political temperatures and divisions. While the IEBC had the opportunity to learn lessons from the 2013 challenges and rise to the true standards of democratic elections, it seemed to have been hardened by a narrow view of formal legal validity and endorsement by the Supreme Court in 2013. Finally, in 2016, the two political sides agreed on a mechanism that was expected to provide for replacement of the Commissioners, foster radical reform of the Commission Secretariat and secure necessary patchwork to the electoral legal framework.

The bipartisan deal also purposed to inform certain administrative reforms including complete audit and clean-up of the voter register and an integrated approach to the integration of election technology through a transparent mechanism that was to involve political parties in conceptualisation, procurement and deployment. Despite the legal reforms, the political and electoral environment that preceded the 2017 presidential elections was toxic, polarised and pointed to a high possibility of violence. To begin with, the tension and mistrust that characterised the 2013 election was left unresolved and persisted throughout the 2013-2017 election cycle.

Deep ethnic cleavages and factional politics defined and indeed characterised the 2017 presidential elections. Public approval on IEBC and other electoral institutions remained low throughout the post 2013 elections and deteriorated further in 2016 when massive protests led by opposition parties forced the IEBC Commissioners led by Ahmed Isaac Hassan to resign and were replaced by a 7-member commission led by Wafula Chebukati. Appointment of the new commissioners less than a year to the elections was at variance with the recommendation made by the Kriegler Commission. The deterrence posed by the International Criminal Court (ICC) following the indictments of leaders on the allegation of having committed criminal activities during the Post- Election Violence had waned in the run up to 2017 given the fact that the cases had collapsed.

Accordingly, the presidential campaigns were characterised by inflammatory and inciteful language that further contributed to the toxic electoral environment. The stakes for the 2017 presidential elections were also heightened by the fact that the incumbent President was seeking a re-election. Evidence in Kenya and other African countries suggest that in every election where incumbent presidents are contesting, elections become a zero-sum game where the price of winning or losing becomes extremely high.[607]

A major factor during the 2017 presidential elections was also the deep state and the inordinate use and deployment of security personnel in opposition strong holds. As evidenced from the Kenya National Commission of Human Rights report (KNCHR), majority of deaths and violence perpetrated during the 2017 elections on August 8, as well as the repeat presidential elections were caused by the police. Massive deployment during the repeat presidential election was so massive that four (4) Counties in opposition strongholds did not participate in the repeat poll.[608]

607 See the various election observer mission reports for elections in Kenya 2007, 2017, Zimbabwe 2008, 2013, Uganda, Rwanda and Burundi 2015.

608 Kenya National Commission on Human Rights Report for the 2017 elections in Kenya.

Undoubtedly, the violence that accompanied the presidential elections was largely caused by factors that were external to IEBC. However, the conduct of IEBC in the overall management, and supervision of the 2017 presidential elections contributed significantly to the tension and violence during the elections. Throughout the 2017 electioneering period, IEBC exhibited a high degree of incompetence, unprofessionalism, partisanship, and impunity that provided the trigger for the violence that occurred and lack of confidence in the process.[609] The inconclusive electoral cycle, unresolved contestations, including organisational, planning and management challenges witnessed in 2013, recurred and were compounded during the 2017 presidential elections.

With respect to procurement of election materials, the Commission undertook major procurements including, the extension of the contract with the company that supplied the BVR services, the Kenya Integrated Election Technology System (KIEMS), and the procurement of the ballot papers. Minor procurements included the company to undertake the Audit of the voter's register. Each of these procurements suffered similar challenges comparable to the 2013 experience with Smith and Ouzman. A general lack of clear procurement planning, lack of transparency, contempt in relation to reservations expressed by political parties or civil society, proxy litigation to claw back on the 2016 amendments and counter statutory reforms ostensibly intended to undo the progress made by the bi-partisan consensus led by Senators James Orengo and Kiraitu Murungi and the initiative for political finance regulation.

Recommendations by the Kriegler Commission on clear demarcation of roles and responsibilities between the Commission and the Secretariat also came to haunt the IEBC and complicate its smooth operations. In a bid to insulate the secretariat from the Commission and based purely on the 2007 elections, Kriegler recommended that operational and logistical aspects of the elections be undertaken by the secretariat, while policy and oversight vested on the commission. This development was entrenched in the IEBC Act of 2011. However, the late appointment of the Commissioners meant that the secretariat that had been in existence since 2011 was firmly in place. Throughout 2017, the public was treated to endless wars, friction and backstabbing, between the Commissioners on one hand and between the Commission and the secretariat on the other. While the intention of Kriegler was noble, the recommendations did not address itself to a situation where the Secretariat could become rouge and the obvious dangers of multiple centres of power, in the management of elections in a highly divided and polarised electoral environment.

Integration of technology to the results management system inspired hope that the perennial challenges of results management which involved, counting, tabulation, transmission and declarations of results would be overcome. The purpose of KIEMS was to integrate key aspects of data involving voter register, voter identification, results transmission and results display system under one seamless function. The two presidential elections and the way the IEBC handled the presidential results demonstrated that the objective of integration envisioned under KIEMS was far from being realised. Perhaps the greatest instance of fraud during the 2017 elections was the attempt to display unconfirmed, unverifiable and unaccountable presidential results by IEBC and refer to them as statistics.[610]

609 Owuor Felix, Election Management and Presidential Petition- a paper presented during the Law Society conference on post mortem of the 2017 elections.

610 IEBC response to the presidential petition during the Raila Odinga petition of 2017. See also Owuor Felix, Election Management and Presidential Petition- a paper presented during the Law Society conference on post mortem of the 2017 elections.

In deeply divided electoral contexts multi-party liaison committees are institutionalised to offer dialogue and mediation platforms for resolving important and pertinent electoral issues instead of resorting to the formal judicial process. This was the case with South Africa during the transitional elections in 1994 when the concept of Multi-Party Liaison Committee (MPLC) was mooted. In Ghana, the Inter Parties Advisory Committee (IPAC) plays an important role in mediating conflicts that occur during the high stake presidential elections.[611] Both the MPLC and IPAC are institutionalised within the Independent Electoral Commission (IEC) and the Electoral Commission of Ghana (EG) as important and indispensable electoral institutions.

The inability by IEBC to institutionalise the Political Parties Liaison Committee, (PPLC) in Kenya, as an Alternative Dispute Resolution mechanism was one of the major failures during the 2017 presidential elections. The legal framework for the establishment of the PPLC is provided for both in the Elections Act and the IEBC Act (2011) with the express mandate for the resolution of political disputes. The absence of a well-functioning PPLC deprived IEBC of a reliable platform to formalise regular and structured dialogue with political parties and presidential candidates, a situation that meant recourse to judicial intervention in the electoral disputes.

One of the greatest threats towards the consolidation of electoral democracy in Kenya is the emergence of *Deep State*. The phenomenon of deep state denotes a situation where private citizens, foreign representatives, companies and/or public officers form a group with formal state structures to make-by all means- democracy work for their private interests and not for the people[612]. While deep state pervades the entire spectrum of life in a number of countries, its manifestation is increasingly evident in electoral processes. The use of violence and intimidation to secure electoral victories in countries such Kenya, Uganda, Zimbabwe, Nigeria, provides examples of how deep states undermine democratic elections. Increasingly, the instrumentalization of constitutional and political reforms, repeal of presidential term limits, the weakening of accountability institutions and the concentration of power in the Executive have been prevalent especially in the East African Sub Region.[613]

The institutionalisation of the '*Deep State'* in the electoral process was rampant through the 2017 presidential elections in Kenya. There were integrity issues that surrounded the procurement of major electoral materials, virtual state capture of IEBC, infighting and factional wars within IEBC. Further, brutalisation and killings of dissenting voices-punctuated by massive security deployment in opposition strongholds, partisan legislature, voter bribery, fear and intimidation including killings and threats of killing aimed at the IEBC officials and members of the Judiciary[614] and the siege mentality directed to other organs of state and independent institutions confirmed that the deep state and state capture was indeed entrenched in the Kenya's electoral process.

611 See Institute of Economic Affairs (IEC) Ghana Report for the 2008 elections. See also the African Union Election Observation Mission for the Republic of Ghana in 2008, 2012 and 2016 elections.

612 See Open Society for West Africa (OSIWA), Working Paper on Threats and Opportunities relating to Democracy in Africa. OSIWA Conference Dakar Senegal May 4-5, 2018.

613 Owuor Felix, '*Impact of the Presidential Presidential Petition on the Electoral Laws and Reforms*. A Paper Presented at the Law Society of Kenya Colloquium on the 2017 Presidential Petition, Hilton Hotel, Nairobi 22nd January 2018.

614 The murder of IEBC Manager of ICT Chris Msando (one month to the elections) and the attempted assassination of the Body Guard of the Deputy Chief Justice.

The torture and murder of Chris Msando who was at the helm of the IEBC's ICT infrastructure and who appeared severally on television programs stating that the results transmission system and other IT applications would not be tampered with on his watch cannot be ignored in a discussion about the role of the Deep State in manipulating elections. According to credible international media houses such as Al Jazeera and the Times, his torture and murder was clearly related to his role in burglar-proofing the IEBC's ICT infrastructure from outsiders who may have wanted to manipulate it so as to alter results. According to Murithi Mutiga, an analyst for the International Crisis Group:[615]

> Few believed that the death of the election official was coincidental. Some have suggested that Mr Msando was tortured to reveal details of the computer systems, to allow them to be infiltrated and potentially manipulated. In an environment that's already highly charged and in a climate where there's already very low trust in institutions, such a deeply disturbing development just makes things more toxic.

According to a report by Al Jazeera:[616]

> In the weekend that Msando was killed, the IEBC was struggling to explain why it had printed an excess of more than 1.2 million ballot papers - well over the 1 percent (about 192,000) allowance for spoilt votes that is demanded by its own regulations. Msando's last assignment on Friday night was a live television segment in which he demonstrated the Integrated Election Management System (IEMS) electronic vote count system - a move probably triggered by the intense legal and legislative battle on the use of an electronic versus a manual voter identification system. Public confidence in the possibility of a truly free and fair election was already low, but this murder significantly undermines it.

Furthermore:[617]

> As details emerge, it is clear that Msando was murdered, possibly because of his role. He was one of a handful of people in Kenya who knew both the login information and the physical location of the servers that will run the highly digitised election. The use of torture - he was allegedly missing an arm and was bleeding even at the morgue - suggests that Msando died because of information he had. Kenyans are now left to speculate on why this election mattered so much to one of the people seeking their endorsement for political office that Msando had to be killed.

Going by this account of the murder of Chris Msando who sat at the helm of the ICT infrastructure at the IEBC and had promised Kenyans that there would be no manipulation of technology on his watch, it appears that Kenya's culture of violence in electioneering has escalated to the assassination of election officials viewed by the Deep State as an impediment to rigging elections among other forms of manipulation of the right to suffrage. The 2017 election cycle has therefore brought Kenya to new low with regard to the culture of violence and rigging with regard to elections.

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615 'Murder of Election Official Chris Msando 'Throws Doubt on Kenya Poll' available at https://www.thetimes.co.uk/article/murder-of-election-official-chris-msando-throws-doubt-on-kenya-poll-g8rpz8qqj

616 The Murder that shook the Kenyan Elections: Why was Electoral Commission Official Chris Msando Tortured and Killed just Days Before the Kenyan Elections? Available at https://www.aljazeera.com/indepth/opinion/2017/08/murder-shook-kenyan-elections-170801075934936.html

617 *Ibid*

3.4 Judicial Intervention During the 2017 Elections

In a bid to offer clarity and guidelines to streamline the 2017 presidential elections, the Judiciary was called upon to make determination of the various phases of the electoral cycle. For the most part, the judicial interpretation underscored the need for quality, free, fair and credible elections provided for in the constitution and election sector laws.

Despite the hindsight of the 2013 experience of Smith and Ouzman as the ballot paper printer, which was impugned at home for bias and indicted in the UK for fraud, IEBC procured the services of Al-Ghurair for the supply of ballot papers in the 2017 General Elections under questionable circumstances. This tender was the subject of the Judicial Review Application by NASA Coalition. The Court in *Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017]*, was critical of IEBC albeit falling short of vacating the constitutional election date. In its critical comments against IEBC the Court noted that *"We accept that this history demonstrates troubling questions on the competence of the IEBC to navigate the admittedly murky and complex waters of tendering of Ballot Papers." While finding clear demonstration of incompetence, possibility of bias and lack of transparency or non-compliance with the values expressed under article 10 of the constitution*".

IEBC suffered similar fate during the procurement of the KIEMS kits. The procurement was invalidated by the Public Procurement and Asset Disposal Tribunal (PPADT) in April 2017 for failure to comply with mandatory procedures under the Public Procurement and Assets Disposals Act. The IEBC in, now customary fashion, used the excuse to pick a preferred supplier, MORPHO OT through direct procurement process without any mark of transparency.

That decision was never challenged by any of the bidders except in a subsequent constitutional petition[618] which fell short of proving non-compliance with the Constitutional Standards under *Articles 10* and *38*. The Court took a permissive view of the IEBC explanation to establish complementary mechanism in order to implement the counter reform provisions under *Section 44A* of the Regulations under the *Elections Act*.[619] This decision effectively operated to dwarf the objectives of the consensus obtained through the bi-partisan parliamentary process and the 2016 legal reforms[620] to the extent that the Commission was expected to invest in a system that gave full effect to *Article 86* of the Constitution as far as management of election results was concerned. The decision also dwarfed the progressive instinct of *Maina Kiai vs. IEBC*.[621]

Maina Kiai vs. IEBC, had concerned the interpretation of *Section 39 (2)* and *(3)* of the *Elections Act*. In this case, the petitioners had impugned the provisions of *Section 39* which purported to give the Commission officials at the Headquarters the power to alter the declaration of elections at the constituency level.

618 *Khelef Khalifa & 2 others v Independent Electoral and Boundaries Commission & another [2017] eKLR Constitutional Petition No 168 OF 2017*

619 *National Super Alliance (Nasa) Kenya v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR Petition No. 328 of 2017*

620 Election Law Amendment Act of 2016 following the recommendation of the bi partisan parliamentary committee chaired by Senator James Orengo and Kiraitu Murungi.

621 Maina Kiai case on the finality of the vote at the polling station.

The Case also attacked the *regulations 83(2)* and *87(2) (c)* which were made in pursuance of Section 39. In *Maina Kiai vs. IEBC*, the Court expressed itself with unprecedented clarity that was new to this area of electoral reforms. It brought to bear the cumulative learning from the ECK challenges in 2007, the mischief upon which the constitution elaboration in *Article 86* was based and pronounced itself extensively. The learning from this decision is that electronic results is a critical investment within the constitutional scheme and cannot be viewed as "provisional, temporary or interim." This position is at the centre of the attempts at electoral reforms from 2002 when Kenya adopted counting of ballots at polling stations and tallying at constituency level. The reversal which was obtained by the counter reform legislation in 2017 reversed the gains obtained through the implication from Article 86, the bi-partisan amendments in 2016 and the decision in *Maina Kiai vs. IEBC*.

These court decisions, intransigence at the political level, and a commission unprepared or unwilling to seize any opportunity for genuine inclusive progress were the prelude to the challenges of the 2017 presidential election and the Supreme Court determination on the 8 August poll. The Supreme Court was seized of the questions as to the validity of the 2017 Presidential Election in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR Election*.[622] The Presidential Petition was fought in somewhat different strategy from the 2013 petition. The petitioners framed the issues before the Court to include the Court's interpretation in the 2013 petition regarding interpretation of *Section 83* of the *Elections Act*. The court adopted a disjunctive approach in interpreting the section which gives due prominence to qualitative analysis of validity and is consistent with jurisprudence elsewhere *(Morgan v. Simpson [1974] 3 ALL ER 722; opinion of Justice Professor Lilian Tibatemwa Ekirikubinza issued in the case of Col. DR Kizza Besigye v. Attorney-General*[623] *and the decision in Gatirau Peter Munya v. Dickson Mwenda Githinji and 2 Others (2014) eKLR).*

The Supreme Court cleared the air with regard to the doctrine to be used with regard to the invalidation of an election. It departed from its 2013 decision which held that a petitioner must not only prove substantial illegalities and irregularities but that these must affect the result as per its 2013 interpretation of the case of *Morgan v. Simpson [1974] 3 All ER 722* applied in *Buhari v. Obasanjo (2005) CLR 7K (SC)*. The Supreme Court of Kenya this time held that substantial illegalities and irregularities which affect the integrity of the electoral process cannot be sanctioned by a court simply because the numerical impact on results cannot be established.

The Supreme Court stated that it could not see why a petitioner must not only prove that the conduct of the election violated the principles in our Constitution as well as other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the election as counsel for the respondents assert. In our view, such an approach would be tantamount to a misreading of the provision of *Section 83* of the *Elections Act"*. Indeed:[624]

> A petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election.

622 *Petition No. 1 of 2017*

623 *Col DR Kizza Besigye v. Attorney General Constitutional Petition Number 13 of 2009*

624 Decision of the Supreme Court of Kenya in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR* Presidential Petition No 1 of 2007

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. Never has the word 'OR' been given such a powerful meaning. This is in keeping with the disjunctive interpretation in the famous case of *Morgan v. Simpson [1974] 3 All ER 722*: "Never has the word 'OR' been given such a powerful meaning."[625]

The central issue on the second substantive issues for determination in the case concerned the results management framework. IEBC in their submissions opined rightly, as has been alluded to in this paper by a reading of *Article 86, Section 39, Section 44* of the *Elections Act* and the decision of the Court of Appeal in *Maina Kiai vs. IEBC* that the regime of provisional or interim results was effectively extinguished. However, in complete disregard of the implication that investment in electronically transmitted results ought to yield data that can reflect and verify the statutory forms. IEBC impressed upon the Court to accept a position that electronic results were mere "statistics" and of no value. According to IEBC the *"numbers manually entered in the KIEMS kit at the close of polling, and transmitted simultaneous to the Constituency Tallying Centre and the National Tallying Centre, bore no status in law. They were mere statistics, although, as Mr. Muhati stated in his affidavit, the presiding officer had to show the agents present the entries made for confirmation before transmission."*[626]

The decision turned largely on non-compliance with the constitutional and legal provisions on results management. Despite attempts by the Judiciary to give life and meaning to the progressive constitution of Kenya 2010, it is remarkable to note that IEBC was at the centre of each of these moments, each time choosing the regressive side of the argument instead of making genuine and inclusive steps to enhance transparency and electoral integrity. The attitude of IEBC during 2017 elections inevitably heightened tension and enhanced the perception of bias that ultimately fed in the presidential elections, with the cumulative effect of electoral violence.

3.5 Lessons from Ghana and Nigeria 2015- 2016 Presidential Elections

Ghana is one of the few countries in Africa that has been able to achieve "the two turn over test" propounded by Samuel Huntington. Ghana relatively represents the continent with remarkable maturity in election management. It has genuine peaceful turnovers in political leadership at the presidential level. Political mobilisation, organisation and campaign strategy actually win it for political parties. They have underlying challenges of aggressive tactics, ethnicity, and low scales of violence. What has seemingly tipped the scales is the independence of its electoral management body and the attitude to safeguard electoral integrity through inclusivity and transparency.[627]

Ghana reverted to multi-party democracy in 1992 and has had regular elections every four years. In 1992 elections, the incumbent president Jerry Rawlings of the National Democratic Congress (NDC) won the elections and proceeded to govern until 2000 having won his re-election in 1996.

625 *Ibid*
626 See Submission of IEBC Lawyers during the hearing of Petition No 1 of 2017.
627 CDD CODEO Report on the 2016 Elections in Ghana.

In 2000 elections, Ghana had a peaceful transition when President John Kufuor, of the New Patriotic Party (NPP), won the elections and ruled for 8 years following his re-election in 2004. In the 2008 elections power again shifted to the NDC when John Atta Mills won the presidential elections and was succeeded by John Dramani Mahama following his demise before completing his term. After 8 years of NDC leadership 2008-2016, President Nana Addo of NPP was elected to succeed the NDC president through a peaceful transfer of power in 2016.

It is remarkable how the competence and transparency in the management of elections have contributed to the growth of the democratic society in Ghana. Joe Baxter came to this conclusion when he made a technical comparison between election administration in Ghana in 1992 and 1996. In his conclusion, the administration of the presidential election in "1992 elections worked to impede Ghana's democratic transition while the administration of the 1996 elections contributed to the furtherance of Ghana's transition to democratic governance."[628] He made the observation that the dynamics of conducting a referendum do not require exactitude comparable to an election.

The thrust of his distinction between the 1992 and the 1996 elections focused on the genuine attitude and initiative in 1996 by the Electoral Commission (EC) to foster transparency through genuine and effective engagement of political players and stakeholders. During the 2008 elections, the professionalism, independence and competence of EC was tested through very close and highly contested elections that was conducted through two rounds elections and a third round in Tain constituency whose election had been suspended. The 2008 was perhaps the closest presidential contest throughout the history of Ghana.

Like Kenya, Nigeria has had mixed successes and failures in the administration of elections since in returned to multiparty democracy in 1999. Perhaps more of its previous elections falling below the Kenyan average in respect to integrity, violence and management. The 2015 presidential election in Nigeria is however remarkable for at least one distinctive reason. The Independent National Electoral Commission (INEC) introduced progressive reforms that guaranteed a credible process in Nigeria. Operational and logistical challenges, the legal and institutional reforms and the introduction of technology all contributed meaningfully to the improved electoral framework that characterised the 2015 presidential election. That Nigeria could hold a credible and peaceful presidential election against the backdrop of Boko Haram menace in 2015 was a remarkable achievement and a demonstration that an independent EMB can truly act as a conflict prevention and mediation tool in a highly divisive electoral environment.

From the foregoing consideration of Kenyan election, the perspective puts a focus on the progress or otherwise in election administration. The full account of this analysis necessarily involves a catalogue of many factors and complementary institutions. Like the Kreigler Report noted it certainly involves critical challenges concerning the society and wider democratic maturity. Taking all these factors as a whole and circumstances relating to the last two electoral cycles, a critical perspective on the Independent Electoral and Boundaries Commission is inevitable.

628 Joe C. Baxter, *Elections in Ghana: The case for effective election administration,* Paper presented at the annual meeting of the African Studies Association, Columbus, Ohio, November 13-16, 1997

There is a clear contrast between the attitude of Kenya's IEBC in comparison to its counterparts in Ghana and Nigeria. Ghana's EC took lessons from the questions posed in relation to the 1992 elections in that country and has made consistent progress since. In 2015, Nigeria's INEC encountered the odds, much more volatile security situation, criticism from political players and a much weaker legal framework in terms of ICT integration. What made the difference in the two jurisdictions is a genuine and proactive effort by the two EMBs to safeguard the sovereignty of their people through transparent, inclusive and genuine engagement. Transparency in elections is a necessary part of integrity. In the management of elections, transparency and independence are in fact mutually reinforcing factors, not exclusive elements.[629] Those two countries have lurking challenges in their democratic progress. The challenges are somewhat more surmountable with clarity of leadership in the EMB.

The attitude of the Kenyan EMB affected the opportunity presented by the Constitution of Kenya 2010, overhaul of the electoral legal framework, re-establishment of the IEBC, increased investment in elections and the progress toward greater democratic development. Unlike the Nigerian INEC's proactive steps to implement the voter identification cards, the IEBC contested, litigated against, sponsored proxy litigation, and tacitly lobbied for late statutory reforms in order to undermine what it considered as onerous constitutional standards and the 2016 bi-partisan reforms.

Ultimately, the Commission's actions and omissions adversely affected critical components of including implementation of the KIEMS, audit of voter registration, transparency in procurement of ballot papers and results transmission. More significantly, the progress made in 2002 for inclusive and transparent planning has been greatly lost in the last electoral cycles. It is arguable that the ECK leadership held more frequent and robust consultative forums in 2002 alone compared to the IEBC in 2013 and 2017. The ECK also took clearer steps to enforce the Code of Conduct and engage with the security agencies at the national, regional and constituency levels. This paper does not overlook the challenges of IEBC but questions critically whether any real progress has been made in the last two elections. If the conclusion is that the ineffective management of the 2007 elections provided significant asymmetry in information and thereby an opportunity for manipulation through collusion with regional election officials, the conclusion regarding 2017 must be that the failure of leadership at the top institutionalised such opportunities for manipulation.

4. Towards Peaceful and Credible Presidential Elections: Reforming Elections Management and Administration in Kenya

Elections are a hallmark for democracy and the convectional mechanism for peaceful transfer of the levers of political power through democratic means. Chapter 7 of the *African Charter on Democracy, Elections and Governance (ACDEG)* stipulates principles and values which govern the conduct of democracy elections. The same principles and values are enshrined in the Constitution of Kenya promulgated in 2010 by ushering a new political and democratic dispensation that sought to transform the election management and system in Kenya,

629 Jorgen Elklit and Andrew Reynolds, 'The Impact of Election Administration on the Legitimacy of Emerging Democracies: A New Research Agenda' (September 2000) Kellogg Institute Working Paper No. 28, 9.

which was the trigger for the election violence in 2007/2008.[630] The 2017 electoral process presented a reversal of electoral gains despite the high financial and institutional investment into the election management system in Kenya. Whilst the bi-partisan approach adopted in 2016 in reforming the IEBC led to a consensual EMB, the management of the elections in 2017 has created a confidence crisis to the extent that the EMB as currently constituted does not enjoy the trust which is necessary in spearheading a reform process that will ultimately lead to organizing credible and democratic elections in 2022.

4.1 Revisiting the Debate on the Electoral System in Kenya

The debate on the electoral system has pre-dominated the political discussion since the country reverted to multi-party politics in 1991. At independence Kenya inherited the constituency based 'First Past the Post System' from the British colonialists. However, for deeply divided and ethnicised societies, it has been argued extensively that the first past the post system perpetuates division rather than promoting national integration[631]. Both the Kriegler Commission and the Constitution of Kenya 2010 seemed indifferent on Kenya's electoral system. The indifference was also reflected in the series of the versions of the draft constitutions; the CKRC draft, the Wako draft, the harmonized draft and the referendum draft all had varied proposition with respect to the electoral system. It was therefore no doubt that the Constitution of Kenya 2010 sustained an imprecision in respect to the electoral system in Kenya.

The constitutional basis for the electoral system is provided for in *Articles 81, 89, 90, 97, 98*, and *177*. Principles governing the electoral system is articulated under *Article 81* which includes; not more than two-thirds of the members of elective public bodies shall be of the same gender; fair representation of persons with disabilities; and universal suffrage based on the aspiration for fair representation and equality of vote.

Articles 89 and *90* are the substantive articles on the electoral system. *Article 89* provides the framework for delimitation of constituencies and wards. Thus, Kenya's electoral system is fundamentally based on specific geographical electoral districts demarcated in accordance with the criteria and methodology stated under *Article 89*. Under *Article 90(1)* Elections for the seats in Parliament provided for under *Articles 97(1) (c)* and *98 (1) (b), (c)* and *(d),* and for the members of county assemblies under *177 (1) (b)* and *(c),* shall be on the basis of proportional representation by use of party lists. While there is a semblance of proportional representation in the Kenya electoral system, predominantly the electoral system remains largely the first past the post.

The problems associated with the first past the post system, the high stakes presidential elections, political and electoral environment, polarisation and division necessitate reconsideration of the electoral system in Kenya. Arguably, there is a strong justification for a shift from a purely majoritarian First Past The Post System (FPTP) to a Mixed Member Proportional Representation (MMPR) system to ameliorate the extreme effects of the FPTP by having multiple seats elected through party lists nominated and published prior

630 Kriegler Report on Electoral Violence; Agenda 4 of the National Accord

631 Michael Bratton and Nicholas van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective* (Cambridge University Press 1997) 43.

to the elections. MMPR system will not only contribute to peaceful elections that will have implications on the presidential elections but will also ensure the realisation of the constitutional principle of mainstreaming women in elective politics.

4.2 Reforming Elections Management and Administration (IEBC)

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. The interface between the imperial neopatrimonialism over the years, the overwhelming hold of ruling parties on election administration and ethnicity presents imminent problems to effective functioning of the EMBs and designing an administrative model for elections. The experience with 2017 presidential elections and the conduct of IEBC require radical changes and overhaul in the composition, structure, tenure and management of elections by the Commission. Justification on reforming the IEBC is further premised on the finding of illegalities and irregularities by the Supreme Court in the presidential petition No. 1 of 2017.

The mode of appointment of Commissioners and the qualification of the commission is a matter that requires considerable reforms. While it is argued that the Independent EMB model currently in place in Kenya should be retained, the appointment of commissioners should involve nomination by political parties similar to the Inter Parties Parliamentary Group (IPPG) arrangement that presided over the 2002 elections.

Professor Edwin Abuya distinguishes two modes of appointment of EMBs namely political and mixed process of appointment.[632] The argument advanced by Professor Abuya is that in politically divided contexts, political appointments is important in mitigating problems associated with perception of bias.[633] Given the highly polarised and competitive political process in Kenya and considering the fact the 2002 election (managed by the IPPG -ECK) is regarded as the most democratic in the history of electoral politics in Kenya, the country should revisit an IPPG arrangement in constituting the successor commission.[634]

The recommendation by Kriegler Commission on the Organisational structure of IEBC should also be revisited. In a bid to insulate the secretariat from the commission, Kriegler recommended that all operational and managerial tasks associated with the elections should be vested in the secretariat. The 2017 presidential elections demonstrated practical problems and challenges associated with multiple centres of power in IEBC. Further, the finding of irregularities and illegalities in the presidential results transmission by the Supreme Court was a clear indictment on the secretariat. IEBC secretariat is organised along specific directorates each headed by a director. Accordingly, the Supreme Court finding of illegalities and irregularities committed by the Commission was sufficient to indict the Directorates of Elections Operations, Legal, and ICT, to bear responsibility those offences.[635]

632 Edwin Odhiambo Abuya, 'Can African States Conduct Free and Fair Presidential Elections?' 2010 8 (2) Northwestern Journal of International Human Rights, p 122.

633 Ibid.

634 Owuor Felix, '*Impact of the Presidential Petition on the Electoral Laws and Reforms.* A Paper Presented at the Law Society of Kenya Colloquium on the 2017 Presidential Petition, Hilton Hotel, Nairobi 22nd January 2018.

635 Ibid.

To facilitate smooth operation, the commissioners should exercise collegiate authority through the plenary and work through specific committees. This arrangement was intended to facilitate effective day to day control by the commissioners. The downside is that full time Commissioners are likely to get involved in executive roles, direct supervision of the operational level thereby blurring the line between the strategic and operational levels and the accountability framework.[636]

Given the challenges noted during the presidential elections, the organisational structure of the IEBC should be reformed and aligned to reflect the EC of Ghana where the chairman is Executive and exercise full responsibility in the overall management of the commission. This would require amendments to the *IEBC Act Section 10* that outlines the functions of the commission secretary.[637] To cure the potential for a constitutional vacuum, the IEBC Act should be amended to impose similar requirements for both the chairperson and the vice chairperson. Same qualification for the chair and the vice chair was the case with the National Assembly and Presidential Act[638] (repealed) and the Electoral Commission Act of Ghana, where the Chair and the Vice Chair must possess similar qualification as the Court of Appeal Judge. Finally, IEBC reforms should extend to financial management and the manner and the process of recruiting Returning and Presiding Officers for the purposes of presidential elections.[639]

4.3. Results Management System and Integration of Technology

After the 2007 General Elections, tallying, transmission and publication of results attracted substantial debate. The failures of 2013 General Elections necessitated the enactment of specific provisions in the Constitution, the Elections Act and the Regulations. The finality of presidential votes at the polling/constituency centres and the Kenya Integrated Election Management System were intended to enhance results management system for the presidential elections. The IEBC made substantial investments to integrate technology to guarantee assurance of speed, efficiency, transparency and verifiability of results through a scheme of electronic transmission of provisional results. All these factors were considered indispensable to the credibility of a highly contested election in a potentially volatile transitional political environment. Public expectations hinged on substantial reform to the result management framework.

Despite the massive investment in technology IEBC experienced significant challenges in the management of presidential election results. The publication of inaccurate and false results as statistics and the finding of the Supreme Court on irregularities and illegalities is a clear case in point. In respect to tabulation of official results, officials invariably resorted to the use of excel spread sheets in place of the database systems. There were numerous errors, rectifications and in some cases printing of parallel forms for the same electoral area.[640]

636 Owuor Felix, '*LLM Thesis on Reforming Elections Management and Administration in Kenya.* University of Nairobi (2016), p 60.

637 IEBC Act 2011 at Section 10.

638 Former Cap 7 of the Laws of Kenya (now repealed).

639 See Owuor Felix, '*LLM Thesis on Reforming Elections Management and Administration in Kenya.* University of Nairobi (2016).

640 See the Presidential Election Petition for both the August 8 and October 26 presidential elections.

The constitutional and legal framework for results management is both progressive and sufficient. *Articles 38, 81, 86, 138*, and *140* all speak to quality presidential elections which are accurate, verifiable, efficient and held in an accountable manner[641]. Recommendations made by the Bi Partisan Parliamentary Committee on the Elections Act Amendment of 2016 should be reinstated. The Election General Regulation (2012) should be amended and aligned to the Elections Act to integrate technology and to enhance the results management system. Integration of technology will enhance efficiency, speed, transparency and accountability which will in turn diffuse tension associated with handling of presidential results. Clear penalties and sanction provided for in the Election Code of Conduct should be enforced with severe consequences on IEBC officials who interfere with the results[642].

4.4 Entrenching the Rule of Law and Constitutionalism

The greatest paradox in the consolidation of electoral democracy in Kenya remains the deficit between the progressive constitution enacted in 2010, and the quality and credibility of elections expected to be held under it. The 2010 Constitution created a new legal and institutional framework for managing elections that were intended to guarantee a credible process. As part of the implementation of the new Constitution, Parliament in 2011 enacted the Election Act, Independent Electoral and Boundaries Commission (IEBC) Act, and the Political Parties Act, whose objective was the operationalization of the Chapters on Elections and Representation of the People envisioned under the 2010 constitution. Additionally, the institutional framework created by the constitution saw the establishment of the IEBC, Office of the Registrar of Political Parties (ORPP), Political Parties Dispute Tribunal (PPDT), and the reformed Judiciary to strengthen Electoral Dispute Resolution (EDR). Despite the enactment of the progressive 2010 Constitution and the new legal and institutional framework for managing elections, the second election under the constitution (the 2017 general elections), did not realise marked improvement in terms of quality and conduct of those elections. As a result, the 2017 elections realised an inordinately high number of petitions challenging the presidential elections and other elective offices hitherto unprecedented in Kenya's electoral history.

The constitutional, legal and policy implications of violence and intimidation are that the consolidation of electoral democracy will remain a pipe dream. Following years of neopatrimonialism, history of election violence, elections that are not credible, impunity and corruption, the new constitutional and legal framework have routinely failed to achieve transformative democracy. The foregoing is what the renowned law Professor Okoth Ogendo referred to as constitutions without constitutionalism that denotes the existence of a constitution but without sufficient constitutional culture to motivate obedience.[643] The supremacy and equality before the law are the essential pillars that underpin the principle of the rule of law.[644] The absence of constitutionalism and the rule of law in Kenya's presidential elections conspire to deny the process any iota of credibility.

641 See the Constitution of Kenya 2010 (Article 81 (e)

642 Election Code of Conduct (Schedule I) Election Act of 2011.

643 Prof Ogendo H W Okoth, *'Constitutions Without Constitutionalism: An African Political Paradox'* in Douglas Greenberg, B. Oliviero and S.C Wheatley (Eds) Constitutionalism and Democracy: Transitions in the Contemporary World (Chapter 4) OUP, New York.

644 See AV Dicey on the essential elements that constitute the rule of law.

The impunity that accompanies the process operates to mean that electoral malpractices will always go unpunished. The net effect of the foregoing is that the Chapters in the Constitution that deal with Values and Principles and leadership and integrity are flagrantly ignored[645]. Constitutionalism and respect for the rule of law will potentially address state capture and the deep state that is a major feature of the electoral process in Kenya.

4.5 Operationalizing Political Parties Liaison Committees

For countries such as Ghana and South Africa, multi-party liaison committees have contributed significantly to peaceful elections by diffusing tension between the various political protagonists. In Kenya, a Political Party Liaison Committee (PPLC) is established both in the Elections Act (where the jurisdiction and management vests with the IEBC), and the Political Parties Act (where oversight is vested on the Registrar of Political Parties). Despite clear legal provisions, the operationalization and management of the PPLC has been a tall order.

By contrast, in South Africa, the MPLC is consulted on a wide range of issues including; voter registration, electoral reforms, election operations, recruitment and deployment of IEC staff and Election Day activities.[646] Similarly, in Ghana both in 2008, 2012 and 2016 elections, the peaceful presidential contest was attributed to the Inter-Party Advisory Committee (IPAC) which acted as a sounding board to resolving complex and divisive political contestations. The proper functioning of PPLC during the 2017 presidential elections in Kenya would have made a big difference since contestations ensued in all the major phases of electoral cycle. Operationalizing PPLC would require harmonisation of the Elections Act and Political Parties Act to resolve jurisdictional issues that emerged during 2017 elections. Borrowing from international best practice, it is important to consider the practice in Ghana and South Africa where structured political party liaison happens through the EMB. Adequate resources would also be required to finance crucial operational and dispute resolution functions of the Political Parties Liaison Committees.

4.6 Elections Integrity

The legitimacy issue that are associated with elections which inevitably attends to the establishment of a popular government in liberal democracies has brought into focus the question of election integrity. Absence of integrity in the political and electoral system ultimately leads to what Mwesiga Baregu calls legitimacy and democracy deficits[647]. Successful electoral processes and election management in Africa underscores the fact that elections are primarily about transparency and integrity. Ghana, South Africa, Botswana and recently Nigerian are classic examples.

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645 Article 10 and Chapter 6 of the Constitution of Kenya 2010

646 Mosotho Moepya, *'The Role of Multiparty Liaison Committees in Preventing and Managing Conflict in South Africa'.* In When Elephants Fight; Preventing and Resolving Election- Related Conflicts in Africa. EISA Publication (2010), p 145.

647 Mwesiga Baregu, *'The Legitimacy Crisis and the Resurgence of Military Coups in Africa'*: In When Elephants Fight; Preventing and Resolving Election- Related Conflicts in Africa. EISA Publication (2010), p 32

In Kenya, the question of electoral integrity has dogged election management since 1992 with the situation worsening during the last two general elections (2013-2017). The Auditor General reports for 2013 and 2017 elections are replete with questionable transactions and integrity issues that involved senior IEBC officials. As mentioned in the succeeding sections, bribery and kickbacks that accompanied the procurement of ballot papers disclosed criminal culpability that led to the conviction of Smith and Ouzman officials in the United Kingdom. Currently the CEO of IEBC is suspended following investigation of bugled procurement involving essential election materials during the 2017 elections.

It should be emphasised that election integrity issues in Kenya goes beyond IEBC and involve systemic and wilful conduct of other players in the electoral process. The conduct of political party nominations, the vested business interests in election procurement, the deep state, bribery, and electoral impunity all underlie integrity issues in the electoral process. For IEBC, it is this author's contention that the institutionalisation of corruption in the electoral process is a *quid pro quo* where IEBC officials are permitted to engage in corrupt activities so as to make them complicit if and when electoral malpractices are committed. Justice Johan Kriegler's assertion that *Kenya cannot hold an honest election in a dishonest environment* aptly captures the integrity dilemma in the electoral process in Kenya. To cure integrity issues the constitutional principles articulated in *Article 10* and Chapter 6 should be implemented. This should be augmented by the enforcement of the Code of Conduct provided for in Elections Act and the IEBC Act. Ultimately, electoral integrity will require the appointment of personnel who can uphold the highest degree of integrity.

4.7 Revisiting the Discussion on the Accuracy of the Voter Register

The question surrounding the voter register re-emerged during the second presidential petition following the October 26 repeat presidential elections. Although the Supreme Court did not address itself fully on this matter, and considering the ambiguity during the 2013 petition, it is highly likely that the debate will re-emerge in future presidential elections. For compelling reasons, voter registration attracted substantial investments in the lead up to the 2013 General Elections. The legal framework, the new boundaries delimitation concluded in 2012, and the recommendations of the Kreigler Report necessitated a fresh voter registration. Presumably, not for the sake of getting a new voter register but so as to premise voter registration on the higher principles of accuracy, verifiability and the principles articulated in the Constitution.[648]

Integrity of the voter's register is predicated on two mutually re-enforcing elements of accuracy and completeness of the suffrage.[649] These elements found the expression in the principles stipulated under *Article 81* of the Constitution, political rights under *Article 36* of the Constitution, the Elections Act and regulations. However, criticisms of the old framework in the Kreigler report and other observer reports focused heavily on enhancing suffrage of women and youth. While the report noted issues relating to accuracy it was explicit on the mechanisms necessary to remedy the gaps.

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648 See Owuor Felix, '*LLM Thesis on Reforming Elections Management and Administration in Kenya.* University of Nairobi (2016).

649 Mozaffar S, 'Patterns of Electoral Governance in Africa's Emerging Democracies' (2002) 3(1) International Political Science Review 85.

The efficacy and the reliability of the voter register are measured by the following three tests; is the voter register comprehensive with acceptable geographical spread? Is the voter register authoritative? And finally, is the voter register accurate and verifiable?[650] Undoubtedly, the Constitution of Kenya and the Elections Act, provide sufficient foundation for the registration of voters. The legal framework makes voter registration rights based, and integrally connected to the freedom of political choice articulated under *Article 38, 83*, and *88* which are straight forward and written in plain terms.[651] However, a comparison of the voter register during the 2013 and 2017 elections does not seem to conform to the legal aspiration provided for in the Constitution and the Elections Act (2011).

In 2013 election for example, Kakamega County which is the second most populous county, with an estimated population of 1,660,651 and an estimated voting population of 774,194 managed to register 568,813 voters (73.5 per cent) while Kiambu County, the third largest county in terms of population, with a population of 1,623,282 and an estimated voting population of 756,773 managed to register 860,716 which represented 113.7 per cent.[652] In 2017 elections Kakamega and Bungoma Counties (the second and the fourth largest counties in terms of population density) registered a total of 743,715 and 559,821 voters respectively. Kiambu County (third most densely populated) registered a total of 1,180, 901 voters.[653] The absurdity here is that the total number of registered voters in the third most populous county is almost the same as the total for the second and the fourth counties in Kenya. The high number of voters who were not captured in the KIEMS system during the repeat presidential elections (October 26) further confirms problems with the voter register.

The 2017-2022 electoral cycle offers a new opportunity to remedy gaps in the voter register. Potentially, the fresh boundaries review expected within the current electoral cycle should lead to a fresh voter registration exercise. In the long run Kenya will have to align voter registration with other civil registry databases as is the case in both South Africa and Rwanda[654]. This will ensure an effective maintenance of the voter register that can meet the three tests of comprehensiveness, authoritativeness, accuracy and verifiability.

5. Conclusion

Violence has been a persistent feature of elections in Kenya. The causes and consequences of violence are varied: a powerful executive epitomized by an imperial presidency, a centralized state with ethno- regional inequalities, history of impunity and corruption, the police and the security sector, poverty and unemployment. While there are multiple causes of violence the trigger to violence during the 2017 elections was the conduct of IEBC and its inability to manage the elections in a neutral, professional and non-partisan manner. As demonstrated in this chapter, the causes and consequences of electoral violence have a wider implication on election management, which if left unresolved, will continue to undermine democratic elections in Kenya.

650 Owuor Felix, '*LLM Research Thesis: Reforming Election Management and Administration in Kenya: The Case for IEBC.* University of Nairobi, (2016)

651 Ibid, p 73.

652 IEBC Principle Voter Register Gazetted on 18th December 2012.

653 IEBC Voter Register Gazetted in 2017.

654 Owuor Felix, '*LLM Research Thesis: Reforming Election Management and Administration in Kenya: The Case for IEBC.* University of Nairobi, (2016)

The electoral violence and contestation that ensued in the pre-electoral, electoral and post electoral phases with ethnic undertones presented continuity of the gruesome past electoral processes that has left the country more politically polarised along and beyond the NASA-Jubilee political axis. While the scope of violence was far below the 2008 post-election violence, the inconclusive electoral process and unresolved and underlying structural factors have ensured that polarisation and division persist well beyond the 2017 elections. Despite the fact that the outcome of the 26 October 2017 fresh presidential election was upheld by the Supreme Court, the 2017 electoral process sustained deep political polarization that are harbinger for the new electoral cycle.

As the country emerges from the tumultuous electoral process in 2017, the new electoral cycle offers new challenges as well as opportunities to engage in inclusive dialogue and electoral reform process that will foster national cohesion and strengthen democracy and good governance in line with the Kenya's constitutional and political context, as well as international best practices on democratic governance.

Ultimately, electoral reform is necessary to restore confidence in institutions and processes of electoral governance to foster peaceful and democratic political transitions in Kenya, pursuant to Chapter 7 of the African Charter on Democracy, Elections and Governance (ACDEG), and the Constitution of Kenya 2010.

As noted by Khadiagala, the upsurge in electoral violence is an outcome of the lack of attention to the framing rules and social contract that is required to stabilise African Politics. In Kenya political stability will be realised if the country institute major constitutional, legal and administrative reforms to address governance challenges that have persisted since independence. This should, as a matter of necessity, also target key actors most responsible for the perpetration of violence. If left unresolved, electoral violence will continue to be a major feature of the Kenya's electoral process, with every election witnessing some form of violence or the other.

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The 2017 election period marked a major milestone in the Kenyan Democracy. On 1st September 2017, the Supreme Court of Kenya annulled the August 8th 2017 Presidential election citing illegalities and irregularities in the electoral process, particularly on the part of the Independent Electoral and Boundaries Commission (IEBC). The Supreme Court ordered a repeat election within sixty days. Kenya became the fourth country in the world and first in Africa to annul a Presidential election through a court process.

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