

The People Versus Uhuru Kenyatta

Lessons from challenging the
2017 fresh election result

A civil society story of change



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List of abbreviations

AFRICOG	Africa Centre for Open Governance
AU	African Union
CSO	Civil Society Organisation
ECK	Electoral Commission of Kenya
ELOG	Election Observers Group
EU	European Union
ICC	International Criminal Court
ICJ Kenya	Kenyan Section of the International Commission of Jurists
IEBC	Independent Electoral and Boundaries Commission
IFA	InformAction
IP	Internet Protocol
IT	Information (Communication) Technology
KEDOF	Kenya Domestic Observers Forum
KHRC	Kenya Human Rights Commission
KPTJ	Kenyans for Peace with Truth and Justice
KYSY	Kura Yangu Sauti Yangu
NASA	National Super Alliance
NCHRD	National Coalition of Human Rights Defenders
PALU	Pan-African Lawyers Union
SIM	Subscriber Identification Module
VPN	Virtual Private Network
WHO	World Health Organisation
WTP	We-The-People

Note from the Publishers

The deeply polarising General Election in 2017 and the fresh election that followed it continue to spark impassioned public dialogue about the integrity and independence of democratic institutions in Kenya.

Never before, since the promulgation of the 2010 Constitution, has the Judiciary faced such severe tests on its independence as an organ designed to check the functioning of the Executive, Parliament and independent commissions in their respective spheres. The Supreme Court's bold decision to nullify the results of the August 8, 2017 presidential election opened judges to personalised attacks and the judiciary to institutional assaults. Those displeased with the court's decision, notably in the Executive and in Parliament, as well as in political parties, openly denigrated judicial authority and attempted to lower public confidence in the institution. Markedly, President Uhuru Kenyatta directed derogatory remarks at the judges of the Supreme Court; there were petitions for the removal of judges from office; unspecified threats to deal with the Judiciary as a whole; the passage of legislative amendments to the Elections Act seeking to limit the role of the Judiciary in the resolution of electoral disputes; disregard for court orders; the mock swearing in of opposition leader Raila Odinga; government shutdown of leading television and radio stations; and cuts in the budgets of the Judiciary as well as other constitutional commissions.

Katiba Institute and the Kenyan Section of the International Commission of Jurists (ICJ Kenya) were part of the civil society coalition that came together to advocate free, fair and credible elections, but were forcibly thrust in the forefront of litigation to secure the public political rights.

Over and above seeking to secure public rights by lodging cases in court, civil society organisations (CSOs) have steadfastly stood in solidarity with the Judiciary in the face of attacks from the Executive and other quarters. The filing of civil society petitions over presidential election petitions in 2013 and 2017

not only affirmed the role of the judiciary as an arbiter in intractable disputes but also claimed the courts as arenas for agitating for public rights.

ICJ Kenya and Katiba Institute's unique position as members of the Kura Yangu Sauti Yangu coalition in the 2017 election placed the two institutions at a vantage point to document the experiences of civil society organisations in public interest litigation and advocacy to protect the integrity and independence of democratic institutions. Each of the experiences, positive and negative, had a profound and lasting effect on all those who were involved.

This publication attempts to document an important epoch in the evolution of public dialogue about judicial independence and enhancing constitutionalism, but also seeks to create a formal record that will contribute to strengthening the capabilities of civil society in challenging unlawful actions by the State.

Greater awareness of CSOs experiences around the fresh election – especially the presidential election petition – can provide lessons on best practices in the preparation and deployment of litigation as a tool in the pursuit of the public interest.

It is hoped that increased awareness will trigger deeper public engagement in national dialogue on constitutional and electoral processes. A corollary of the foregoing is that the Judiciary will become sturdier and more capable of responding to threats that undermine democracy and the rule of the law.

Although civil society organisations had prepared a petition to challenge the presidential election result in 2013, their experiences have not been formally documented. The best practices from that enterprise have, therefore, not been widely shared. The lessons from civil society responses to the 2017 elections have the potential to inform the preparation of future petitions not only in Kenya, but also in other countries where the option of such litigation exists.

Stakeholder and partner engagements around instituting election petitions on such a grand scale can benefit from the experiences of Kenyan civil society.

The documentation of civil society experiences deliberately elected to use a qualitative approach, employing the services of a psychologist to not only provide a safe emotional and mental space but also to offer psycho-social support for participants who needed it.

We owe a deep debt of gratitude to Njonjo Mue and Khelef Khalifa for volunteering their names in filing of Petition No. 4 of 2017; as well as Samuel Mohochi and Gacheke Gachihi for agreeing to be petitioners in Petition No. 17 of 2017. Julie Soweto, Haron Ndubi, Waikwa Wanyoike, Donald Deya and Eunice Lumallas were the lawyers who made presentations at the Supreme Court, but behind the scenes, there was a team of other lawyers, managers, communicators and other professionals, including Wanjeri Nderu-Musembi; Teresa Mutua; Stella Ndirangu; Susan Kendi; Silas Kamanza; Seema Shah; Purity Kirema; Perpetua Adar; Nancy Mwangi; Moses Okinyi; Margaret Murrigu; Maina Kiai; Lucy Hannan; Liban Hannan; Kwamchetsi Makokha; Kingwa Kamencu; Jane Odiya; Gladwell Otieno; George Kegoro; Fabian Rodriguez; Eunice Lumallas; Edigah Kavuravu; Dudley Ochiel; David Kimani; Chris Gitari; Brian Obara; Bobby Opollo; Brian Osoro; Bemih Wanyama; and Andrew Songa. These individuals not only gave their time and service, but also opened their hearts to share their experiences of how taking part in the petitions had affected them.

Dinah Kituyi was the psychologist who moderated the debriefing sessions while Victor Kapiyo was rapporteur and Kwamchetsi Makokha provided editorial leadership to realise this publication.

Alvin Wafula, Vincent Kimathi and Silas Kamanza of ICJ Kenya's Access to Justice Programme were led by Teresa Mutua in overseeing the implementation of the project, undertaken with the generous support of the Ford Foundation.

Abdul Noormohammed

Executive Director
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Foreword

Listening to human rights defenders debriefing on their role in the petition challenging the fresh presidential election of November 2017, it was apparent that there was no psychosocial preparedness to their undertaking such a hugely emotive task in a highly polarised political environment.

Over 90% of people involved in filing the petition suffered burnout. According to the World Health Organisation (WHO), burnout is a syndrome resulting from chronic workplace stress that has not been successfully managed. An employee can seek legal remedy when they suffer from burnout.

Yet, many human rights defenders were greatly challenged in dedicating time to the psychological debriefing. There was general stigma around and low appreciation of mental health. Internally, human rights organisations still have a responsibility to create awareness and reduce stigma within the sector about the importance of psychosocial integration at the workplace.

Human rights defenders have contributed to struggles for the realisation of human rights and democratic freedoms in Kenya on numerous occasions through various strategies including research, documentation, networking, litigation and advocacy, among others. As they plan their strategies for intervention, it is important for them to use holistic approaches that encompass the issues of litigation, communication, psychosocial, finance and logistics.

All these approaches need to be encapsulated in the psychological panoply of self-care, anticipating positive and negative results; and planning how to fall or rise -- especially how to pick up the pieces after the conclusion of the assignment.

Experiences from the debriefing sessions held nearly two years after the petition suggest the need for a psychosocial strategy, especially when undertaking assignments that come with a heavy workload within a limited time frame, and

in environment riven with organisational conflicts a clash of personal interests, limited finances, political sensitivity and peppered with risks to individual safety.

This kind of high-pressure assignment in an unsupportive political environment causes a great deal of psychological trauma and burnout. Many relationships at the workplace and across organisations get affected and can spill into private wellbeing with the potential to destroy relations. The long-term effects on mental health are far reaching.

Winning or losing a case in court cannot be at the cost of a human rights defender's mental wellbeing. Doing so would negate the very human rights principles organisations are fighting to uphold.

Strategic and operational planning for human rights work needs to take these issues into account. Civil society in general, and the human rights defenders in particular, should incorporate measures for mental healthcare within their work policies to foster an environment that cushions them from work-related hazards.

Organisations and individual human rights defenders that speak for many voiceless Kenyans in securing democracy and the rule of law in an inflammatory political environment need to be celebrated more. This report is a first step in sharing expertise from human rights practice but also the emotions and experiences of their undertaking.

Dinah Kituyi

Psychologist

Nairobi, October 2019

Introduction

A wave of new constitutions in Africa ushered in direct suffrage presidential elections, with an important provision for challenging the results within a short time.

Presidential election petitions have been lodged several times in Nigeria, Ghana, Uganda and Kenya; and once in Sierra Leone, Angola, Zambia and Zimbabwe. Until Kenya's Supreme Court nullified the results of the August 2017 election, courts across the continent had been seen as being restrained to interfere with the politics.¹

As more courts entertain petitions and render judgments on high profile political causes, they are coming under greater public scrutiny and expert critique. Some judiciaries are growing more confident and evolving into important sites for affirming human rights.

The tight timelines make the preparation of the petition frenetic for litigants and judges, but also constrict opportunities for truth telling and evidence testing. Even as questions linger about the quality of justice dispensed under such high-pressure litigation, presidential election petitions have provided a steep learning curve for candidates and political parties filing them, but also for lawyers representing the election management bodies, and the beneficiaries of the results declaration.

Kenya's civil society organisations have blazed the trail in interpreting the presidential election as a public interest question over and above the competition between political formations to acquire or maintain power. In 2013, civil society organisations stood behind the petition by activists Gladwell Otieno and Zahid Rajan to challenge the validity of the election, raising important questions about

¹ Miriam Azu, 2015, 'Lessons from Ghana and Kenya on why presidential election petitions usually fail', *African Human Rights Law Journal*, 15: 150-166

the credibility of the voters' register; and the effect of the electronic results transmission failing.

In the aftermath of the 2017 fresh election, civil society organisations again petitioned the Supreme Court to nullify the declared result arguing that it was neither credible nor legitimate. Although the court did not affirm civil society in both instances, the petitions demonstrated that the public had a direct interest in election outcomes, and also shone a light on some of the violations that had occurred.

A dispute over the 2007 election a decade earlier had escalated into widespread violence because the courts were not seen as impartial arbiters. The civil society presidential election petition in 2017, in the absence of any other challenge, was an especially poignant reminder for the country to manage political disputes within the law and the established constitutional order. It sought to protect the judiciary from the backlash it suffered in the wake of its decision to nullify the August 2017 election results, but also to affirm the rights of voters.

Civil society litigation in presidential election petitions in Kenya's 2013 and 2017 offer important lessons for similar institutions, judiciaries and political actors in similar jurisdictions. Documenting these experiences is especially critical, coming as it does at a time when civic space is shrinking in Africa and around the world. Their experiences point out the hurdles to overcome, the opportunities to be seized, and the agenda for the future.

Although civil society organisations had filed a petition at the Supreme Court to challenge the results of the 2013 presidential election, much of the experience from that process remained undocumented. No audit of the effect that petition had on individuals, and organisations, has been undertaken.

The story of how Kenya's civil society organisations became the main challenger of the result from the fresh election has not been told before. The cost, toll and effects of this action on individuals and institutions continue to be felt years and months after the petition was concluded.

Evaluation is applied research used to test the effectiveness of a programme. A qualitative evaluation is akin to telling the story of a programme – its lived

experiences and impact on participants. Narratives of change methodology is strongly grounded in the experiences of individuals and recognises change by recounting stories that explore and demonstrate the movement that has occurred as a result of a programme.²

A story is light, glue and web all rolled into one: it highlights fault lines, illuminates activities, and shines a light on the future while building community through coherence. It explains connectedness between the loss of innocence and the acts of necessity. It weaves changing personal narratives with cultural narratives that frame the issues people advocate in order to change myths influencing their worldview.

Collecting information for this story entailed connecting people, listening in on a series of four debriefing conversations facilitated by a psychologist and a lawyer, recording experiences and writing the narrative. It took nearly two years before people who had prepared, filed and argued the 2013 petition could be brought together to talk about their experiences.

Activists rarely share the psychological battles they confront alongside their direct involvement in social struggles for change. When spaces for sharing these experiences are not provided, people can suffer harm in silence even as they seek to survive by focusing on the greater good. Still, psychological challenges that people face, the harm suffered, and how they survive also provide lessons for building resilience in the future.

Psychosocial wellness does not have a strong tradition in the human rights movement, despite the fact that human rights defenders carry heavy burdens from experiencing or witnessing trauma. Many people carry the burdens from their struggles over a long time into their personal lives and, therefore, suffer harm over an extended period, especially if the social context, the working environment, and the institutions and individuals with whom they interact appear to be hostile or unsympathetic.

2 Valentina Baú, 2016, A Narrative Approach in Evaluation: 'Narratives of Change' method, *Qualitative Research Journal*, Vol. 16 No. 4, 2016 pp. 374-387 and Bailey, Helen, 2015, *Stories of Change*, Institute of Development Studies, Sussex, <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/7141/GOKH%20Stories%20of%20Change%20FINAL.pdf?sequence=1>

Exploring the emotions associated with individual and collective experiences around the petition offered an opportunity to interrogate how organisations were affected and to draw lessons for the future.

The debriefing sessions were, therefore, part of internal community dialogue seeking to create a language that would express emotions and thoughts to enable those who felt dispirited to find purpose in their work and to carry on.

Separate debriefing sessions were held for different categories of people, allowing individuals with a longer shared history to explore their experiences in an atmosphere of trust while also giving newer activists space to speak candidly about the frustrations they encountered in their work. All the groups were brought together for a final debriefing session that focused on the technical aspects of preparing and filing the petition.

After overcoming the initial anxiety about the invasion of personal emotional spaces, activists spoke about the context in which they had been working, and why they were motivated to take action. Lessons from the experiences shared were deepened through key informant interviews to clarify and contextualise emergent truths.

This publication uses narrative methodology to reconstruct the experiences of civil society actors from the political decision making about lodging the petition, through to managing the logistics of the effort; preparing and presenting the case; and communicating with the public. It concludes with for civil society, electoral management bodies and judiciaries.

Prologue

Harambee House, the 12-storey concrete block in Nairobi overlooking the squat Parliament building with its rising cornucopia, houses the president's office but he rarely uses it.

On the grouchy Friday morning of March 9, 2018, a day before the milestone 100 days since taking the oath of office for a second term as president, Uhuru Kenyatta and his challenger in the 2017 election, Raila Odinga, stood at the podium, smiled at the cameras, shook hands, and ended the longest election dispute in the country's political history.

Despite fears of widespread violence, Odinga had also publicly taken oath as 'the People's President' 38 days earlier on January 30, 2018, allegedly on the strength of the August 8, 2017 election, whose results the Supreme Court had annulled after allowing the petition against the result. The first Odinga mock swearing-in ceremony – scheduled to coincide with the December 12, 2017 independence celebrations – had been postponed over fears of violent confrontations with state security forces, and during the second one, disaster had been averted after troops deployed to the venue were withdrawn at the last minute.

Kenya's political crisis had come to a head when its August 8, 2017 presidential election, the second under the new Constitution, was found to be so flawed as to justify nullification by the Supreme Court. The court ordered a fresh election in 60 days, threatening to annul the result again should it not pass constitutional muster. The court's decision would mark the beginning of a barrage of legislative, administrative and political aggressions against the judiciary – manifest in petitions for the removal of individual judges, physical attacks and threats, amendments to the law, cuts in the judiciary's budget, and heightened political rhetoric to discourage the judiciary's involvement in one of the country's worst political crises. The mysterious killing of the Independent Electoral and Boundaries Commission (IEBC)'s ICT manager, Chris Msando,

a few days before the August election had also cast a long shadow on the electoral process.³

On October 10, 2017, Odinga withdrew from the fresh election scheduled to take place on October 26, and whose organisation he dismissed as a sham. His supporters vowed to boycott the election even as his competitors pressed on with campaigns.

Behind the scenes, civil society organisations (CSOs) were frantically canvassing the main competitors to agree to a postponement of the election: The elections commission was falling apart, with one commissioner having resigned and fled into exile, and the secretariat staff in tension with the commission chairperson. The country was tense, and the security situation appeared to be unable to support universal suffrage. The legal terrain was uncertain since the legislature had just passed a series of amendments to the elections law, while courts continued to make pronouncements on evolving electoral disputes.

When efforts to postpone the election by consent failed, civil society organisations feared that the country was heading into a crisis and filed a petition at the Supreme Court seeking to stop it. As it were, the seven-member Supreme Court was unable to raise a quorum of five to hear the matter on the eve of the election. To date, it has not been heard.

Meanwhile, Odinga urged his supporters to boycott the repeat election given that concerns about the impartiality and competence of the election body and its commissioners had still not been resolved. On October 30, 2017, the elections commission declared Kenyatta the winner in the fresh election, with 98% from a turnout of about one-third of registered voters.

But the country was still in the grip of political crisis. Odinga, whose petition had caused the fresh election, had boycotted it. Opportunity for Odinga to mount a credible challenge to the declaration of Kenyatta as winner of the fresh election had been severely diminished. Voters who had taken part in the fresh election or been frustrated from participating in it appeared helpless.

3 See The Kenyan Section of the International Commission of Jurists & Journalists For Justice, 2019, *60 Days of Independence: Kenya's judiciary through three presidential election petitions*.

The civil society petition challenging the validity of the fresh election, therefore, presented an opportunity to assess the health of Kenya's democracy and the functioning of its institutions, especially the judiciary, which had come under sustained attack.

Civil society movements in Kenya have been standing up to power on principle for decades, so the experiences from the petition challenging the fresh election results were a continuation of a long and ongoing struggle to entrench democracy and good governance. Since the 1990s, civil society has forged partnerships with the religious sector and the media, but some of these alliances have been tested and broken.

A critical turning point for civil society engagement in the country's politics was the response to the violence that characterised the dispute over the 2007 elections. The indictment of Uhuru Kenyatta and William Ruto for crimes against humanity charges at the International Criminal Court (ICC) as part of accountability measures for the violence presented moral dilemmas for civil society organisations, especially when the two ran for the 2013 election on a joint presidential ticket. The analysis by the Kenyan Section of the International Commission of Jurists (ICJ Kenya) of the implication of a presidency occupied by Kenyatta and Ruto was a source of such great discomfort that neither the editor nor the institution's leaders wanted to be associated with it.

Be that as it may, the 2010 Constitution emboldened civil society to look to the courts more as an arena of struggle for achieving social change. A series of positive decisions in the High Court affirmed civil society morally. The judiciary was becoming the respected, independent institution civil society had invested so much to secure.

The Kenya Human Rights Commission and ICJ Kenya therefore petitioned the High Court, seeking an interpretation of the Constitution on whether or not individuals facing serious crimes against humanity charges should contest elections, given the risk of their instrumentalising political power. The High Court dodged the question in its February 2013 decision,⁴ saying the matter belonged in the jurisdiction of the Supreme Court, and slapped the two

4 See International Centre for Policy and Conflict & 5 others v Attorney General & 5 others [2013] eKLR, <http://kenyalaw.org/caselaw/cases/view/86293/index.html>

organisations with a Sh214 million bill in costs. Civil society activists were, therefore, greatly shocked that Kenyatta and Ruto went on to win the election in spite of their ICC indictments in post-2010 Kenya.

The civil society sector went into the March 2013 elections reeling from the High Court's rebuke, but soon realised that it had to approach the Supreme Court over the presidential election result. They filed the 2013 petition with a sense of grievance but did not articulate the issue about the eligibility of Kenyatta and Ruto to contest the election, instead focusing on the validity of the voter register. The Supreme Court unanimously affirmed the Kenyatta-Ruto election on March 31, 2013.

Litigating on elections aims to improve the quality of the process. However, CSOs were ill-prepared for the pushback from the courts, and for the hostile public opinion generated by their exposure of election irregularities. The civil society movement began to have moral difficulties with its public posture when people began to look at them as challenging Kenyatta and Ruto, who had been packaged to the country's population as 'God-ordained'. On their part, the presidential candidates had presented the election as a "referendum against the ICC", and had cast themselves as victims of a racist international court supported by Western donors. This rhetoric deepened ethnic divisions in the country, and polarised the electorate. CSOs were ill prepared for the pushback from the courts, and for the hostile public opinion generated by their exposure of election irregularities. Public attacks against civil society caught its leaders on the back foot, thus producing a feeling of alienation and disillusionment among activists, who feared that they had been fighting for a public that did not want to act in its own best interests.

The Supreme Court's judgment in the 2013 presidential election petition has been criticised not just as inadequate jurisprudence but also a cause of great rapture between the judiciary and mainstream civil society. For a while, civil society grievance shifted from Kenyatta and Ruto to the judiciary.

Remarkably, the governance terrain had changed between 2007 and 2013, with attendant shifts in what constituted the community of commitment to human rights. After helping to mobilise the public to elect Mwai Kibaki as president in 2002, many activists joined government, thus denying the sector access to

broader intellectual resources available in the country. After the 2013 election, a new impetus was added to the political agenda – neutralising alternative voices.

Fatigue arising from frustration and the passage of time caused some people to settle in, and others sought to move on.

In the struggle to maintain neutrality and the stated principle of non-partisanship, institutional policies and mandates were inadequate to navigate the political environment. On the other hand, political actors identified civil society actors as their most organised opponent and launched frontal attacks on them, creating and popularising 'The Evil Society' derogatory moniker to undermine their public stature. Conversations about these experiences seek to build resilience and solidarity to reduce feelings of vulnerability.



BOX 1: KURA YANGU SAUTI YANGU COALITION MEMBERSHIP

1. Kenya Human Rights Commission
2. Constitution and Reforms Consortium
3. InformAction
4. Civil Society Reference Group
5. Africa Centre for Open Governance
6. Kenyan Section of the International Commission of Jurists
7. Inuka Trust
8. Katiba Institute
9. Independent Medico-Legal Unit
10. Kenyans for Peace with Truth and Justice
11. Development Through Media
12. Freedom House
13. Kenya Correspondents Association
14. Muhuri
15. Awaaz
16. Mazingira Institute.

A call to arms

Civil society organisations approached the August 2017 elections with the expectation that they would be conducted in accordance with the law and the Constitution to meet the standards for being free, fair and credible.

During the year, litigation by civil society groups had produced greater clarity in the electoral law, for example, the decisions in the case filed by Maina Kiai, Khelef Khalifa and Tirop Kitur;⁵ as well as the Independent Elections and Boundaries Commission versus the National Super Alliance.⁶

Given the potentially divisive nature of political contests, it seemed that the proper role for civil society in the election would be one of oversight only. Yet, election observation had become problematic since the hotly disputed elections of 2007, which exploded into a crisis only resolved through an African Union (AU) mediation process led by Kofi Annan that lasted two months and which resulted in a coalition government.

The disputed 2007 election had left more than 1,000 people dead and some 600,000 people displaced. As the country grappled with the possibility that the election might have been rigged or compromised, it also had to contend with the fact that Kenyan society had broken down at various levels. Many CSOs viewed the violence and large-scale displacement as a failure on their part to promote tolerance and democratic values in Kenyan society. They were shocked that their civic education campaigns prior to the election had gone to wrong, prompting a great deal of soul-searching.

5 See Maina Kiai & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017], in <http://kenyalaw.org/caselaw/cases/view/133874/>,

6 See Independent Electoral and Boundaries Commission v National Super Alliance & Others; Republic Vs IEBC and KPMG (interested party) ex parte KPMG Misc Civil Application 648 of 2016 and Republic Vs IEBC and others ex parte CORD, Misc application 637 of 206

From the outset it became clear that the electoral process had not been monitored adequately. The Kenya Domestic Observer Group (KEDOF) was not able to credibly complete its observation of the 2007 elections, and resorted to data from the Electoral Commission of Kenya (ECK) whose credibility was in question. Kenyans for Peace with Truth and Justice (KPTJ) was formed in 2008 to step into the breach arising from KEDOF's limitations. Foreign observer groups tended to withhold their reports long after the election contestations had ended.

In the 2013 elections, the revamped Elections Observers Group (ELOG), which replaced KEDOF, affirmed the results released by the newly constituted Independent Elections and Boundaries Commission (IEBC) without much data, thus exacerbating tension with civil society organisations, which found the results problematic, especially when compared to the register of voters.

Going into the 2017 elections, ELOG had the official sanction to observe the polls but the broader Kura Yangu Sauti Yangu (KYSY) coalition sought to restore the integrity of the elections by tackling the political, legal and technical questions in their management.

Pressure from KYSY contributed to the compromise to reconstitute the IEBC, as well as other reforms, including defining the margins of electoral conduct through a series of court decisions. Since KYSY did not coordinate with ELOG, its members trained and deployed 2,000 volunteers to observe the August elections in almost all the counties.

Although foreign observers – especially from those deployed by the European Union and the African Union – endorsed the August elections as credible, KYSY found a gap of 517,555 in the valid votes.⁷ Despite the anomalies the KYSY observation found, a legal opinion the coalition adopted counselled against challenging the result in court. It was believed that doing so would be dangerous because of fears that the Supreme Court was not the appropriate forum to ventilate emerging electoral grievances. After the negative precedent in 2013, CSOs did not want to legitimise the court – hence the decision to avoid approaching it altogether. Civil society, however, sent volunteers to observe the

7 <https://www.devex.com/news/did-international-monitors-get-it-wrong-on-the-kenyan-election-90968>

BOX 2: KURA YANGU SAUTI YANGU OBJECTIVES

1. Leadership and governance in the management of elections

- Credibility of current commissioners
- Transition at IEBC
- Management of financial resources (accountability)
- Low public confidence and trust in IEBC
- Lack of impartiality
- Low competence level in the management of electoral process
- Respect and consultation of only specific stakeholders
- Political insensitivity toward the opposition

2. Credibility of electoral governance process

- What constitutes a voters' register?
- Management of voters' registration process
- Use of technologies
- Clarity on valid votes versus votes cast
- Management of nominations

3. Security in electoral governance

- Inadequate accountability mechanisms in place
- Public order policing
- What is the role of the National Intelligence Service?
- Issues of independence, i.e., the Executive's interference
- Securitisation of political dialogue

4. Discrimination in electoral governance

- Implementation of the two-thirds gender rule
- Participation of ethnic minorities and people with disabilities

5. Dispute resolution in electoral governance

- Transition at the Supreme Court
- Credibility of some of the judges

preparation of the petition filed by Raila Odinga challenging the results of the August 8 election. It proved to be useful learning on the intersection between civil society and political actors, and would inform the distance needed for them to remain non-partisan.

The team preparing the Odinga petition reached out to civil society in their search for evidence, and one member swore an affidavit, discussing the KYSY analysis of election results. The Supreme Court annulled the August 8 presidential election result and ordered a fresh election within 60 days.

On the strength of that decision, civil society organisations listed over 20 offences that had been committed by election officials and sent a petition to the Director of Public Prosecution on September 13, 2019. No action has been taken on the petition since.

In the run-up to the fresh election, CSOs believed the country was on the brink of a catastrophe not dissimilar to the 2007 crisis, and began to expand the membership of KYSY to draw trade unions, faith-based groups and professional societies into a bigger tent they named We-The-People. Odinga's withdrawal from the fresh election and the calls for a boycott caused widespread panic because of fears that the rally for protest demonstrations would be interpreted as a call to violence. The IEBC, on the other hand, insisted that all candidates were on the ballot.

Civil society efforts to persuade the religious sector and the Kenya Private Sector Alliance to weigh in for postponing the election had failed. Once it became apparent that the forces keen on the fresh election had carried the day, irrespective of how it would be conducted, civil society leaders decided to ask the court to stop the poll. Legal opinion was divided on whether or not the fresh election – being conducted pursuant to a court order, had to be held within the 60 days timeline. Other opinions suggested that the election had not been specifically provided for in the Constitution, and that the High Court previously set a new election date in the transition from the old constitution to the new in 2013, and that there was room for judicial innovation.

New legal questions about democracy and the rule of law had emerged that needed answers. If the anxiety felt across the country was not extinguished, Kenya was at risk of falling into grave uncertainty.

The decision by civil society to go to court was an act of frustration but it also offered direction on the future of the country at a time of deep confusion and angst. Civil society organisations thought to offer the Supreme Court an opportunity to pronounce itself on the emergent crisis: the question was whether it would sit back or rise to offer leadership.

When the pleadings were ready, there was no litigant. One of the prospective petitioners appears to have been compromised to withdraw from the case. That is how Samuel Mohochi, Khelef Khalifa and Gacheke Gachihi ended up putting their names on the petition and were on the front line – at the risk of being ordered to foot the costs of the suit.⁸

BOX 3: PROVIDING POLITICAL LEADERSHIP

- Decide the overall strategy for litigating as well as the political posture of the coalition or institution
- Establish contact with allies and agree on lines of alignment/ engagement
- Mobilise the evidence
- Decide on the leadership model and accompanying management arrangements
- Set down rules about communication
- Structure the teams that will perform the tasks of evidence gathering, logistics, litigation, and communication
- Mobilise the people to staff the teams

Although ICJ Kenya had been aware of the possibility of being involved in a petition, it had underestimated the cost in financial and reputational terms. While it was important to preserve the case and the story, meetings with members to discuss the case did not produce a consensus. Some members supported the litigation team remotely while others provided research and yet others did not want to be seen to be supporting the petition.

The Supreme Court failed to raise a quorum of five judges, and the matter was stood over.⁹ It seemed that the tactic of bullying of the Supreme Court had succeeded. The decision on whether or not

8 See Khelef Khalifa, Samuel Mohochi and Nahashon G. Kamau v Independent Electoral and Boundaries Commission, <https://africanarguments.org/wp-content/uploads/2017/10/kenya-supreme-court.pdf>

9 See The Kenyan Section of the International Commission of Jurists & Journalists For Justice, 2019, 60 Days of Independence: Kenya's judiciary through three presidential election petitions, Nairobi

civil society would file a petition to challenge the results of the fresh election had been taken out of their hands due to the manner in which events had evolved. An intervention was necessary to bring the Supreme Court back to confront the questions of constitutionality, legality and morality that the fresh election posed.

Petition 17, the case seeking to postpone the fresh election, had been prepared within a brief window over a weekend, with one of the lawyers who was travelling having to send in submissions from the airport in Accra, Ghana. It sought to flesh out key questions that had not been addressed with regard to the fresh election set for October 26, 2019. More importantly, it had been filed with ICJ Kenya's executive director Samuel Mohochi as one of the petitioners. ICJ Kenya's Council faced difficulties over having its executive director as a petitioner. It would express similar concerns about ICJ Kenya being involved in Petition No. 4, which challenged the validity of the fresh election result. Some wanted ICJ Kenya not to be involved at all, yet the organisation was already a critical player in the KYSY coalition, with responsibility to host the legal centre.

The We-The-People/KYSY coalition was big, and ICJ Kenya was providing leadership as a litigation centre with assistance from Katiba Institute, but there was no clarity emerging from conversations at its secretariat or its council. For example, ICJ Kenya members questioned the organisation's leadership about its non-partisanship. The absence of clarity undermined the institution's capacity to deliver on its mandate. Within the coalition, there were suspicions among individual members, making it necessary to renew the community of commitment to human rights.

Questions about perceptions of impartiality and neutrality continued to dog the coalition over how it chose to intervene in the evolving political crisis. Amid these contestations, it was felt that even though the Supreme Court might not annul the election, it was necessary for the issues to come to the fore through a petition, given that political actors were unwilling to confront them.

The chain of events after the Supreme Court's decision to nullify the presidential election, and leading to the declaration of the result from the fresh election, required an escalated plan to observe and monitor the evolving processes. In the first round there were 2,900 monitors under the KYSY coalition and an additional 1,400 deployed by KHRC in October.

Against this backdrop, civil society knew that the credibility of the fresh election was in serious doubt. If there were to be no petition to challenge the results, no formal record of the evidence from the fresh election would be available.

Returns from observers highlighted many problems. Cumulatively analysing the issues, it would be important for posterity that the truth be told, irrespective of the court's conduct.

Many in the civil society coalition were convinced that what had occurred around the fresh election was not constitutionally right, irrespective of whether or not the court would rise to the occasion to say so. Challenging the election was going to be the ultimate test of governance. There was a deep belief that the court would be better off with the petition filed, regardless of how it decided.

Thus, KYSY, which had begun as a platform to bring the strengths of civil society organisations together to guarantee electoral outcomes that resonated with the spirit and letter of the Constitution, found itself thrust in the role of political litigant. Since the coalition's objectives aligned with those of member organisations in a fast evolving political context, it seemed only logical that it would provide the umbrella for mounting a serious political challenge in the form of a presidential election petition.

The decision by civil society organisations not to participate in the petition challenging the August 8 election result had denied the sector an opportunity to ventilate many issues. Notably, after the brutal killing of IEBC's information technology manager, Chris Msando, there had been pressure on Kenyan civil society from donors and foreign observers not to be involved in the election petition.

The fresh election presented a new opportunity to pay the moral debt. The documentation provided would contribute to the country's history and would be seen in many years to come for its immensity.

Civil society leaders were trying to change the country in various formations by bringing different people together to find political leverage for postponing the election. The coalition strategy was adopted for self-protection using the logic that it would be difficult to hang all the 16 organisations at once. The coalition, which had been joined by another five trade unions and faith-based

groups, had been created in response to the targeting of individuals, individual civil society organisations and their leaders.

The political stakes were high, and suspicion was rife in civil society ranks. At the time the fresh election was held, the front line civil society organisations believed to have the capacity to mount a petition were dislocated and had been robbed of their capacity. Government officials with armed escort attempted to confiscate documents from the Africa Centre for Open Governance (AfriCOG). The Kenya Human Rights Commission (KHRC) was issued with a notice to close and a military helicopter was circling over the premises occupied by InformAction.

Navigating coalition spaces posed leadership challenges on questions of principle about when to align forces with political actors and when to keep them at a distance. The right balance needed to be struck between too little alignment, and too much, given past experiences around democratic reform and constitution making.

Differences within the leadership arose from the emergent crisis of neutrality. Lack of coherence in coalition member organisations multiplied in the broader formation. In response, lawyers were tasked to review the pleadings to demonstrate the partisanship or identify positions that did not resonate with the missions of participating organisations as a basis for discussion.

Ultimately, the petition challenging the result from the fresh election was seen as a continuation of the case seeking to postpone that exercise, which had not been heard. Yet, given civil society's traditional posture as a non-partisan sector, KYSY member organisations remained in denial about engaging in a political struggle, in which litigation was one of the tools at their disposal. There was a danger of the principles of neutrality and non-partisanship being deployed to hobble civil society.

Despite misgivings, there was agreement on the need to engage in a petition in order to ventilate those who wanted to do things right. Within the coalition, there was a health check to assess whether or not a petition was a burden that they could carry. Three people were dispatched to meet the National Super Alliance (NASA) team to learn what it took to file the successful petition that got the August election result annulled. They came back greatly humbled about

CSO capacity to move mountains. In making the decision on whether or not to go to court, five options presented themselves:

1. CSOs could elect not to go to court at all. Since NASA was not going to court, given that its candidate had withdrawn from the fresh election and called for a boycott, there was a risk that a Trojan Horse petition would be filed to get courts to endorse the declaration of results. This option was not acceptable.
2. CSOs could file a lean petition based on their capacity. Yet, in considering the optics of filing a lean petition that had the potential of sending the country into another election, this did not look attractive.
3. CSOs could consider the offer by NASA to support a petition in court on its behalf. This option and the offer were rejected the offer on grounds that it would injure CSOs' reputation for neutrality.
4. CSOs could file their own petition, but they were constrained by the enormity of the task given the short timelines.
5. CSOs could obtain evidence from NASA and remain in charge of the their case theory. NASA's boycott of the election denied it access to critical information, and it was considered better for any member of the public who had relevant evidence to bring it forward.

Debate raged online and in person to explore the pros and cons of going to court:¹⁰

1. It would be a good follow-up on the petition that was not heard. A petition could delay the swearing in and provide a chance to lay out in detail the failures to obey the law and the constitution. It would also enable the politicians to be distant from the case and continue their resistance campaign. The details the petition revealed could help to facilitate or delegitimise the regime. It could portray IEBC as incompetent and make a new case for reforms and accountability while showing CSOs as an independent actor in the political sphere. Additionally, a petition could debunk the false narrative that not only Nyanza region,

¹⁰ Email correspondences, personal communication.

predominantly inhabited by the Luo community, kept away from the fresh election.

2. There was a likelihood of losing the case because of the mounting political pressure on the Supreme Court. There was also a risk of CSOs being seen as opposition leader Raila Odinga's minions, and an even bigger danger of elevating the courts into the position of arbiters in political disputes and thus undermine the strategies the We-The-People movement. There was a further risk of going back to same situation as had obtained after the September 1 nullification decision and would expose the judiciary to further attacks. There was also a risk of not having sufficient evidence and funds to mount the challenge, which could delegitimise the CSO sector:

There was a general irritation about civil society organisations participating in a political context, even if they had heavily invested in the courts and the rule of law to occasion social change. As the clock ticked down on the seven days provided for filing a petition from the declaration of results, there was expectation even by the president-elect's party that CSOs would go to court.

Against the backdrop of vicious threats and intimidation of the judiciary, failing to go to court would have meant that the attacks had succeeded and would thus close that institution off as a space for struggle. The question then was whether spin-driven legitimacy was better than that conferred by the Supreme Court. Kenyatta's struggle for legitimacy would not have been demonstrated as dramatically as it was had civil society elected to sit it out and not filed or argued the petition.

On November 2, a day after the declaration of results, KYSY leaders decided to file a petition at the Supreme Court. It was a decision that came at great political and personal cost.

Drafting started over the weekend, with a legal team creating an outline of a petition and setting up teams for research and evidence collection in readiness for filing on Monday, November 6, 2017. Although the ICJ Kenya Council was divided, as were many other boards of organisations in KYSY, filing the petition reaffirmed them as a community of commitment in the struggle for human rights.

It brought together people who gave up their time and resources to do what, out of conviction, they deemed right.

Sometimes, the overriding objective of public interest litigation is to document grievance in order to stop others from documenting events in their own way that would sanitise them.¹¹

CSOs decided to file the petition for the record: They were clear that the odds were stacked against them. The court had been intimidated after the September 1 nullification decision. They were, therefore, under no illusion about succeeding in court but sought an opportunity to make the court stand up at a difficult moment in the country's history. The petition would thus be drafted to create a formal record about the level of violations that the IEBC, political actors and the security forces had committed. Nobody could erase that.

Lessons

1. Toxic political environments always pose the question of neutrality, which requires a robust response.
2. CSO's leadership should meet with political actors strategically because civil society organisations will pay a price for too much or too little alignment with political leaders and formations. There is no need for apology if a CSO position matches that of a political party, since it would be a confluence of interests.
3. Civil society can address internal leadership struggles early to ensure clarity at critical moments. Organisational and coalition politics need to be unpacked so that questions of power are resolved early to avoid their spillage into the petition. A conscious effort should be made to align CSOs with grassroots movements fighting for democracy in order to secure greater the legitimacy.

¹¹ See Kenyans for Peace with Truth and Justice, Africa Centre for Open Governance and Katiba Institute, A Guide to Public Interest Litigation in Kenya, <http://kptj.africog.org/wp-content/uploads/2015/03/PIL-24032015.pdf>

4. The CSO leaders need to be on the same page, ideologically, so that teams implement their decisions from a common understanding of their assignment.
5. Divisions within the civil society community can be resolved by consolidating principles to guard against infiltration or co-optation of the leadership and cadre.
6. Given the need for lead-time in filing a petition, the decision to go to court needs to be made before the election to allow for robust critique.
7. Experience has shown that civil society organisations can change their stand on whether or not to go to court at the last minute. Being prepared for court all the time is the correct posture to adopt. Institutions should invest time to discuss what a petition entails to secure buy-in among the various teams.
8. There is need to develop a shared understanding of presidential election petitions and for courts to also appreciate the effort it takes civil society organisations to prepare and file. A distinction needs to be made between public interest or single welfare litigation, on the one hand, and on the other challenging presidential election results – especially on the question of costs because elections are not a private affair.
9. A deliberate strategy for filing a petition needs to evolve that addresses court work, scrutiny and the outcomes each activity is expected to produce.
10. The absence of a single document on how to file a petition necessitates a deliberate plan, as well as contingency arrangements, to ensure those who place their names on petitions are not compromised or unnecessarily exposed.

Racing against time

Chaos is the closest description of the scenes at the house off Laikipia Road in Nairobi, the future ICJ Kenya office that would also serve as the command centre for filing the petition.

Once the IEBC chairperson declared Uhuru Kenyatta the winner in the fresh presidential election on October 30, the time for challenging that declaration began to shrink:

A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.¹²

For a challenge to the election to be admitted, it had to be filed in the Supreme Court by midnight of November 6, 2017. Civil society leaders had decided to file a petition on November 2. They had 96 hours to assemble lawyers, draft their petition, collect evidence, and present it to the Supreme Court by midnight of the last day.

CSOs had underestimated the magnitude of the process and the need to plan in advance. They filed in a case based on evidence and the technical aspects of electoral law in a situation where the IEBC and the state were hostile to any inquiry. It was a huge undertaking that needed a plan – but there was none, and would emerge from the disarray and rush of adrenaline in the days to follow.

The decision to file came abruptly, and work started immediately after; but it took much longer to mobilise the technical resources needed to mount a challenge on the presidential election results. The sheer number and diversity of legal expertise required; the big level thinkers to support the technical team.

¹² Republic of Kenya, 2010, Constitution of Kenya, Article 140(1)

A motley crew of 50 lawyers, information technology experts, accountants, communication specialists and managers volunteered for duty to challenge the absolute power of the state. The goodwill and energy was enough to light a country. The first attempt at constituting teams was made by asking people to volunteer for tasks they were comfortable doing. In the end, the teams were organised along the same lines as the Kura Yangu Sauti Yangu coalition with a political centre, a data and evidence centre, a communication unit and a legal centre.

The strategy revolved around allowing leadership to emerge from the technical aspects of the work. Yet, there were far too many factors outside the team's control: those factors in its control were also not the best managed, especially around logistics and linking the evidence.

The teams had been constituted late, and so many of the volunteers did not understand what other people were doing. There were weak lines of accountability, and the conversations on what the petition would entail carried out even later.

The lead counsel recalls: "I was given a team – I did not pick the team – my leadership skills were being tested, and it was not the time for them to be tested."¹³

The command centre resembled a factory floor, and the logistics were being run on a wing and a prayer.

BOX 4: MANAGING LOGISTICS

- Assemble the team working on the petition
- Organise the technical leadership of each team and how they communicate with each other
- Map the assets available and those required from space, to technology, machinery, supplies, equipment, security and transport
- Procure food, accommodation
- Procure supplies
- Create a resources management plan

13 Debriefing session notes on August 5, 2019

One of the logistics team managers, who had some experience from filing of the civil society petition in 2013, began to guide the finance officers on how much money was needed. None of the logistics team members had been to the preparations for filing the August petition to appreciate what was required. They were shooting in the dark because none of them had ever drafted a budget for a presidential election petition.

The work was stressful and challenging, and many of the programme officers began to ask themselves why they, and not other colleagues, were being involved in such a punishing exercise. Volunteers joining the petition team were meeting all sorts of people for the first time, and they all needed to be catered for – from their food to their temporary sleeping arrangements. At some point during the night, there would be up to fifty people working, and then there would just be six as dawn broke over the horizon. The numbers kept changing by the hour and there was no indication that there was a plan.

Telephone inquiries from friends, allies and sometimes unknown people would filter in to demand answers on why there seemed to be nothing happening in court, or to demand updates on the status of the affidavits and the filings. Answers were not always available. Other well-wishers called to warn the team that they had information about efforts to stop civil society organisations from filing the petition. Although the logistics coordinators were supposedly in charge, they often did not have a total picture of the state of play since they had not been briefed. Some understood their role and had the capacity to function, but others were not as ready or sure about how to contribute to the effort.

Within the context of leadership struggles and incoherence in the coalition, the various teams were battling to meet the deadline to file. Outside, thin sharp needles of rain were falling, and a power blackout disrupting the activities did not seem like such a remote possibility. It had not occurred to the logistics team that the power line could be cut so no arrangements for electricity backups had been made. Fears about a power outage forced the team to hire a generator for the weekend.

Team leaders with some experience around sensitive court filings instructed that all voice calls would be on WhatsApp or Telegram but the team also needed information technology support, starting with the purchase of dedicated

subscriber identity module (SIM) cards, and migrating communication to the new units.

Systems for the data centre were well established – from the security of the information to how to enter and leave the premises, to personal transport.

Two information communication technology specialists jumped onto a moving train to respond to needs for telephony and Internet connectivity services. Purchase of huge numbers of SIM cards would raise a red flag since each requires identity documents. New information communication devices were also needed.

The information technology team members did not know each other either, and there was no time for introductions. Their involvement had not been planned or thought through, and was therefore executed as an afterthought. By the time the team got in, people had started coming with their laptops, which had their private information and browsing histories. An early draft of the civil society petition, complete with yellow highlights, was circulating on some lawyer WhatsApp groups.

The legal centre did not have a seamless arrangement: someone could be working on a document on the first floor of the apartment, but needed to walk downstairs to share the document with a colleague. There was no centralised document sharing system – similar to the data centre – even though the information at the legal centre required the same security as that in the data centre.

The anxieties around securing information at the legal centre persuaded teams of the need to make sure that none of the draft affidavits could be found in any form. Ideally, security conscious computer use ought to have been through employing virtual private networks (VPN) to mask Internet protocol (IP) addresses.

Still, material that was required in court was lost at the command centre. A virus caused the server at the command centre to crash, and it took the IT specialists some time to troubleshoot and get it up again. The lead IT specialist had information from IEBC servers, encrypted drivers, and delivered them to InformAction at 3 am without any security.

It was thought ICJ Kenya would take up the responsibility for security, but the effort went only as far as stationing guards at the gate. The National Coalition of Human Rights Defenders linked the group to a company to carry out a quick assessment and begin work.

Ideally, security arrangements would have been made prior to going to the command centre, preceded by a security assessment, but this wasn't done as people were already on site due to time constraints. Security was mobilised at the last minute and they in turn met the key contact people later.

It was difficult to plan for security without knowing who was supposed to be at the command centre. Some team members were aware of the need to be security-conscious, while many did not know that they needed to take safety measures.

None had been briefed about the implications of undertaking such a monumental task. It was only much later, on the evening of the first day that a short security announcement was made. Many people were not sure about what should have been done before coming to the command centre, and what the dos and don'ts were.

Many people, including the security team, did not have a full picture of what was happening. They didn't need to know everything, but the person in charge was accommodative of the last-minute preparations and was able to mobilise his team. They carried out surveillance and were conscious of the possibility of power lines being cut.

It was not apparent that there would be need to shuttle between the command centre and the lead lawyer's office; or to file documents in court – with the result that security arrangements were made on the go and communicated minutes before they needed to be put into action.

Although one of the logistics team leaders would authorise the use of taxis, finance officers were puzzled that some taxis would keep going round and round and demanded to know whether the organisations were getting value for money. Yet, because of security concerns, people felt they could not travel straight to their destinations.

Many of the organisations' vehicles were familiar in certain places, and using them was not advisable given the sensitivity of the task at hand. It was not possible to avoid using taxis, but a better system would have reduced the chaos. The manner in which transport was coordinated posed significant challenges. There was no prior briefing and so people kept going to different people to seek taxi transport without the benefit of coordination. There were many people coming in or leaving the legal centre, so a lot of times a dedicated taxi company was used for transport. One would request a taxi, and it would not come, but then several taxis would come for the same person, which had cost, and security implications.

"Taxis would come in and out, and we didn't know whom they were coming for or bringing," says one of the logistics managers.

One evening, a taxi was ordered, arrived but the driver got out of the vehicle and gave the logistics manager one look before making a call of his own and driving off. Then a different taxi came. When the manager called the taxi dispatch office, they claimed that the first driver had a flat tyre – it was not true. When the manager and her colleague entered a second taxi, the driver kept asking where they were going, what they were going to do, how long we would be there, and capped it by asking where the lawyer lived.

"At the time, I was not staying at home, and he was talking about my home, and about how he had not seen me at home or dropped me off there. It was a subtle attempt to interrogate and confuse me."¹⁴ The security officials thereafter advised against using that particular taxi service.

The noise and traffic to and from the command centre were excessive, threatening to blow the lid off the covert preparations for the petition. One night, as the rain began to pound, one neighbour came out of his house demanding to know what the new tenants were up to, and if this was going to be his new way of life.

There was great focus on how taxing the preparation for going to court was, but those working in the background probably carried heavier burdens.

¹⁴ Personal communication and debriefing session on August 22, 2019.

Resources were a major sticking point and exacerbated the leadership crisis in the coalition. The Kenya Human Rights Commission was coordinating KYSY, which had a membership of 16 organisations, and managing the purse would prove a testing task.

Staff at the ICJ Kenya finance office worked closely with the logistics team to get round internal procurement rules, but still there were challenges.

Estimates for food, paper and transport costs were always on the lower side of the budget, and initially, there was only one administration officer authorising the use of taxis. There was no time to seek approval for expenses, and no indication of the goods and services that needed to be procured or for how long. No one had estimated the magnitude of the amount of paper needed to file the petition.

Typically, organizations require three quotations and price comparisons as a basis for making purchase decisions. In a situation where there was no time to invite tenders for supply of goods and services, it fell to individuals to rustle up quotations from people they could find over the weekend.

Individuals who had strengths like being unruffled under pressure were able to calm the restless members of their teams in seeking solutions objectively given that they were not involved directly in preparing the petition.

Although there were financial resources dedicated to getting the work done, and having a cash deposit in hand for filing the petition in court, getting the money from the bank required multiple signatories. Some expenses, such as hiring motorcycles for deliveries, had receipts and appeared to overcharge. Some of the senior officials had to use credit cards in supermarkets to buy printing paper. The greatest challenge emerged from finding printing paper and materials. The team bought all the paper at city supermarkets and had to seek additional supplies in downtown Nairobi. A team that was driving around the city in an effort to buy photocopying paper buyers was trailed and physically blocked from approaching shops and supermarkets. In the end, one team member called a shopkeeper in downtown Nairobi to sell paper required for printing some 200,000 pages of documents for the petition.

The logistics team relied on volunteers to put together the hard copies, given the manpower needs of the task. A volunteer who was in charge of the assembly line carried a lot of authority in determining how everything worked, which took away the civil society team's control because of the manner in which she had been introduced. Yet, the task was not so complex as to require help from unfamiliar people.

There was no backup if power failed or was cut, and ultimately, the team had to hire a generator and copiers, as well as technicians to operate machinery round the clock.

Some people had not slept for 45 hours, and the strain was beginning to show. A senior CSO leader began to pack documents in his car with the intent to take them to the Supreme Court in the event that someone would prevent the filing of the petition. Thirty minutes before the deadline for filing, and none of the bundles ready, one lawyer put the first bundle in his car and drove to court to make sure that the petition would not be time barred. Two teams had similar bundles, and took different routes to court. They both arrived. And then some of the leaders went underground.

Many of the people who had taken part in preparing the petition were suffering burnout. There had been a complete lack of appreciation of what the petition would require, and no support had been engaged for those who worked on the project.

The work was draining and required support, beyond just training but also being on the same page, and finishing together. Nerves were frayed, and personality clashes sometimes threatened to derail the entire effort. Often, it would not be the best side of human nature that would come into view when colleagues disagreed about an issue or did not show empathy for a hurt inflicted on one another.

One lawyer recalls the anxiety of working while expecting goons or security troops to barge in at any time. Driving home at 3 am, he would have the distinct feeling that he was being followed.

One of the coalition leaders, who was living alone at the time, collapsed in his bathroom. He came to on his own hours later. Some leaders developed coping

mechanisms, such as drinking and taking up different other jobs afterwards, while others were assailed by severe migraines due to the pressure of work. Activists who were busy saving the country had neglected to care for themselves.

Lessons

1. A decision on whether or not to file a petition needs to be made early, probably even before the election is held. Indecision can stall many administrative processes. Time is a critical consideration and lack of prior preparation only exacerbates the crises around time and creates opportunities for error.
2. Contingency budgets for the unexpected would prevent people from having to carry around large sums of money.
3. Organisations contributing financially to the petition's success should enable logistics teams to begin early preparations to receive the legal team and other volunteers.
4. Security should be addressed through early briefing, taking into account physical, and digital aspects for all team members. Information technology teams need to think through security by creating firewalls. Failure to secure information related to the petition, together with the individuals handling it, can open fault lines can pose a risk to the petition or even fracture team relationships.
5. The drafting team should be familiar with one another and be able to gel. Those who join teams from private practice need to also be subject to established lines of command and control.
6. Logistics needs to be managed by experienced people who can also train newcomers.
7. Election work needs to be framed in a way that frees CSOs to intervene in situations without seeking donor approval.
8. A balance needs to be struck between understanding the environment in order to deal with security threats and avoiding paranoia over random

occurrences. The security of funds – such as the Sh 1.5 million required in cash to lodge the petition – needs special logistics in place.

9. Creativity should be allowed to flourish in dealing with emergent issues – such as using electronic numbering on large documents instead of the familiar manual one.
10. CSOs need to be careful about how much veto power they cede to donors funding their activities if they are to maintain flexibility in deciding whether or not to go to court. Given donors' seeming reluctance to prolong the election process, a petition would not get their blessing.

Taking the plunge

A few minutes after midnight, when the excitement of beating the deadline to file petition at the Supreme Court had died down, Njonjo Mue sat in his hotel room and began to draft an email to members of ICJ Kenya.

He began by explaining that he had filed the petition in his individual capacity as a voter, not as the chairperson of the ICJ Kenya Council. As it were, the petition, like the one lodged two weeks earlier seeking to postpone the fresh election, had been filed without the ICJ Kenya Council's blessing.

At the time of filing the October petition, known in legal circles as Petition 17 of 2017, there had been friction; and there would be more afterwards. At the time, the optics had been carefully considered in presenting faces and names representing Kenya's perceived contending ethnicities in the election – the Kikuyu, the Luo and the Kalenjin. At the last minute, one of the prospective petitioners appears to have been compromised to withdraw from the case, leaving Samuel Mohochi to volunteer his name as co-petitioner to Khelef Khalifa and Gacheke Gachihi. The case was filed on Monday, October 24, certified as urgent, and set down for hearing the following day when all parties had been served. Although the government declared the following day a public holiday and barricaded the entrance to the Supreme Court building, the case did not take off as since only Chief Justice David Maraga and Judge Isaac Lenaola were in the premises. There was insufficient quorum in the Supreme Court to hear the matter.

The fresh election had proceeded amid great difficulty, with just 39% voter turnout, and produced the picture of a divided country. How was the president going to govern a divided country?

The case – from the petitioners to the lawyers on the record – sought to represent Kenya's communities, generations, and gender. It was not dissimilar to the civil society petition in the 2013 election, when they had chosen the

36-year-old Kethi Kilonzo as lead counsel. Another young woman lawyer, 40-year-old Julie Soweto, was chosen as the face of the court team in the 2017 petition. Senior lawyers Haron Ndubi, Donald Deya and Waikwa Wanyoike, who had been on the 2013 petition, as well as Eunice Lumallas, provided support in court.

Litigation of the presidential election petition in 2013 had shown Kenya's ugly ethnic underbelly where the Kikuyu lawyers represented Uhuru Kenyatta, the Kalenjins batted for William Ruto,; the Somali for the IEBC chairman Isaack Hassan and the Luo for Raila Odinga.

Again, as was the case in 2013 when Gladwell Otieno and Zahid Rajan had put their names forth as petitioners risking their all to defend the rule of law, two activists -- Njonjo Mue and Khelef Khalifa -- put their names forward, with the attendant risk of being bankrupted by court costs.

Civil society organisations' appetite for litigation had been blunted in 2013 when the High Court, in refusing to determine that Kenyatta and Ruto were ineligible to contest the presidency, had slapped the Kenya Human Rights Commission and ICJ Kenya with a Sh214 million bill in costs. The award has been appealed.

Filing a presidential election petition posed a greater risk of treachery and high costs given the high political stakes involved. Njonjo Mue reasoned that if civil society leaders believed in the cause they were pushing, they needed to lead from the front, given the risks that attended challenging the election of a president. Khelef Khalifa, who described himself as a person of little education, remained on the second petition.

Those chosen as litigants had a proven track record of defending human rights, but they were believed to be steady enough to take the heat. Still, there was a personal cost to putting one's names on a petition. It attracted political and social pressure that one can never adequately prepare for. Specifically, Njonjo had lived with a bi-polar, a treatable mental health condition, for 30 years. It was an issue that would fascinate the blogosphere when partisans made memes and posts challenging his affidavit, claiming he was not a 'Kenyan of sound mind' as is oft-stated in the first paragraph.

Khelef, a founding commissioner of the Kenya National Commission on Human Rights and chairman of the Muslims for Human Rights (Muhuri), on the other hand, was portrayed as a member of the opposition Orange Democratic Movement party and therefore doing the bidding of politicians.

“A senior advocate convinced me that Njonjo was a mad man,” said one of the petitioners’ lawyers who led the court-ordered scrutiny of election materials.¹⁵

Many civil society leaders had already been profiled by political players as early as August and placed on the no-fly lists in an attempt to prevent them from leaving the country, but also to intimidate them against taking action. IEBC commissioner Roselyn Akombe and InformAction’s Maina Kiai were some of the people immigration officials at the airport prevented from leaving the country. Activists would also be reached through family and friends to dissuade them from taking frontal political action.

On the morning of November 6, 2017, the deadline for filing any presidential election petition at the Supreme Court, the NGO Coordination Board sent a letter to civil society leaders banning the operations of Kura Yangu Sauti Yangu and the We-The-People coalition for allegedly funding political instability.

Uncertainty around whether or not the fresh election would occur had delayed the mobilisation and deployment of election observers to the field. Observation reports would form the basis of much of the petition that would be lodged at the Supreme Court, yet, the country was sharply divided between those who wanted the election over and done with and those boycotting it.

KYSY deployed 2,900 observers but at the time, it was not clear what information they would be collecting, and for what purpose. In the end, it is these reports, representing just under 7% of the national spread of polling stations, that the lawyers began to comb through in search of the screw that would pry open the election results database. The data centre was stringing together analyses of the results posted on the IEBC portal and putting them through stress tests. Their analysis would form an important plank in the evolving case theory.

¹⁵ Personal communication at the debriefing meeting of August 4, 2019

It was a far cry from what had been observed in the effort to gather evidence for the successful Odinga petition to annul the August 2017 presidential election. The lessons from the unsuccessful petition in 2013 and the successful one in August 2017 suggested that farming out the work to a law firm would not achieve the expected results. The collegial approach adopted by CSOs, on the other hand, tried to involve every volunteer but blunted killer instincts of private legal practice. It would slow down work considerably.

Notwithstanding the shortcomings in the preparations, CSOs believed that they could use access to information and public disclosure laws to obtain evidence from IEBC. Before filing, the legal team considered what their case should be. Did the election meet the threshold set in the Constitution?

The kind of challenge that could be mounted suggested itself in two options. The first was to present a prima facie case that attacked the process by arguing that the election did not meet legal and constitutional requirements. The second was to present a combination of a prima facie case and an evidentiary one. The latter required an analysis of large amounts of data, significant skills, resources, expertise within a very limited time. It was the harder option, but it is the one civil society organisations chose.

By IEBC's own admission, only 39% of electors had voted. The petition claimed that the atmosphere was ruled by such violence, intimidation and fear that a significant portion of the electorate chose not to vote,

BOX 5: PREPARING THE CASE

- Generate a legal opinion
- Get a foretaste of the evidence and develop a brief
- Develop a case theory
- Rope in the evidence required to make the case
- Draft the petition, anticipating respondent responses
- Agree on the litigation strategy
- Align the evidence and link it to the petition
- Anticipate respondent strategies to demolish the case
- Prepare for explanation of the petition in the court of public opinion outlining the injustice, and the reliefs sought

and that this therefore robbed the election of its legitimacy and credibility. It further argued that the conduct of the electoral management body had not demonstrated its independence, impartiality and neutrality; and its management of the entire electoral process was riddled with illegalities and irregularities. And what was to be made of Odinga withdrawing his candidature from the fresh election?

Compared to the IEBC huddle, complemented by the Jubilee quarrel – itself a testament of how seriously the civil society petition was being taken -- the small team of lawyers at the command centre was a puny mimicry of a David versus Goliath contest. The lawyers began to piece together the evidence, extract statements from observer reports and commission them as affidavits. Waikwa Wanyoike, a regular litigation counsel at the Supreme Court, took charge of the management of the case.

The leadership crisis in civil society had been apparent for a while, but it was not clear how deeply it affected the mentorship of the next generation of activists. Many young people were involved in the petition, but few were in real positions of leadership or appreciated the context of the ongoing struggle. Whereas the leaders did not like to be directly involved in the drafting and the day-to-day management of the petition to give them a detached strategic view of the entire enterprise, their lieutenants did not feel adequately prepared for the roles that fell on them.

The lead counsel brought experience from drafting the petition challenging the results of the August 2017 presidential election, which the Supreme Court annulled. Several civil society leaders who had observed the preparation of the petition were also at the command centre as the team began to sift through evidence from the observer reports for the fresh election.

IEBC, on the other hand, acted as if it had no obligation to provide information. It was no environment to obtain information, let alone information that might embarrass the IEBC a second time after it was excoriated for its conduct of the August election.

Although lessons had been culled from the presidential election petitions in 2013 and August 2017, little or no mind was paid to how IEBC and the

president-elect would respond to the petition. The risk of evidence being struck out was always a possibility; and there was general irritation with civil society participating in a legal contest with high political stakes.

IEBC's and Kenyatta's lawyers sought to expunge evidence from the petition in the opening hours of the case. Evidence of the frenetic preparation of the petition would become apparent when an affidavit referred to in the petition had not been sworn or filed. They wanted volumes of hundreds of pages excluded from the evidence since they had been filed late. Although the court allowed the volumes to remain, the judges significantly obliged IEBC's and Kenyatta's lawyers by, stripping the petition of five internal IEBC memoranda meant to demonstrate the dysfunction in the commission. Although the memoranda were in the public domain, the court found that they had not been obtained in the manner prescribed by the law and the Constitution, and thus excluded them from the evidence.

The lawyers for the civil society petition elected to take the high road and not to oppose the inclusion of evidence from IEBC and government officials. The high ground they took did not earn the team the respect they required to litigate in the Supreme Court. Although the petition had been filed on time, its other seven copies had been stamped a day later but were at risk of being struck out. The lawyers began their appearance in court from a weak point of having to plead to be accommodated.

Everyone who worked on the petition acknowledged that the most important quality of their experience was the teamwork. Up to 90% of the legal work was done pro bono, on a volunteer basis. People stayed in the command centre for up to 36 hours, sleeping for as little as five hours. It was proof of Kenyans taking charge of their affairs from an understanding of what was at stake and acting to right the situation. For the young lawyers, it was exciting to be part of the change, to be part of a team of great lawyers. But these efforts could have been better coordinated. Teams did not know each other, or even know that other teams existed. Some of the lawyers saw elements of the evidence after they had closed their arguments in court. Crucial evidence that had been prepared was not referred to in court because the teams had not prepared together.

Even if the judges said the evidence was insufficient, the petition's success hinged on the application for scrutiny of election materials to prove or disprove the election results as accurate.

As it were, the Supreme Court only granted access to the results data but stopped short of ordering a scrutiny, and also allowed access to a copy of the voter register at the petitioner's cost. Orders were issued at around 1 pm, but there was no activity until nine hours later.

Lawyers and six youthful data clerks went to IEBC believing they had been granted orders for scrutiny but found an intimidating presence of senior advocates working for IEBC and Kenyatta as well as police officers. Nasty verbal exchanges punctuated the night as the clock ticked. Security had not been considered when seeking to use scrutiny as a tool for finding the truth. The petitioners' representatives were put through security checks and ordered to surrender their bags, phones and computers outside; they could only carry in pens and notebooks. There were several security checks to go into the rooms.

Ultimately, the orders were issued in futility, and the entire exercise was academic. The court was disinterested in what the petitioners found from the documents since it did not allow them to file a report.

The Supreme Court granted access to election results on the understanding that the petitioners would submit a report of their findings. An hour before the petitioners could submit their report, the court declined to accept any written submissions. Although the court did not grant the petitioners access to records of all voters whose details could not be found on the electronic identification kit but were on the hard copy register, a sample examination of election results returns from 95 polling stations across eight constituencies had revealed a 6,592 difference between the voter turnout in the electronic kits and what was entered by hand.¹⁶ The court's failure to oversee the scrutiny and its decision to not allow a written report denied it the opportunity to see or understand that the same issues that had led to the annulment of the August election had reappeared in the October one. There were non-serialised results forms and incorrectly completed or erroneously calculated numbers.

16 See Africa Centre for Open Governance & Kenyans for Peace with Truth & Justice, 2018, 'Unanswered Questions: Findings of the Scrutiny of the October 2017 Presidential Election'

Three weeks after the determination was read, the house of one of the lawyers observing the access to results was burgled, his two laptops and an iPad stolen.

Whereas human rights lawyers will sometimes play to the gallery, private practice litigators have to think and act in a manner that maintains their reputation in the eyes of the court lest they contend with a dented reputation in the future.

For lawyers coming from private practice, where they exerted greater control over their cases, the civil society petition threw them into the maelstrom of contested coalition leadership. Decisions were tortured, authority not always linear, and responsibility picked as voluntarism rather than assignment. It was also a clash of egos and leadership styles from command and control to the concessional negotiated variety. The team lawyers did not know each well, and so could not hold honest conversations without risking jeopardy for the entire enterprise. As a result there was a lack of coherence in how the case was put together and argued.

Additional to the stress of time, lawyers were also under pressure to be non-partisan, instances being the ICJ Kenya membership, and the Pan African Lawyers Union (PALU), from which Donald Deya came.

In 2013, the good arguments came from the CSO petition, but they clearly irritated the court and received short shrift in the judgment. It was the same case in the 2017 petition judgment, where the judges summarised the petitioners' case in 6,400 words spread across 44 paragraphs, but reproduced the respondents' filings 12,920 words in 158 paragraphs. Having caricatured the civil society case as a straw man, the judges then went ahead to demolish him in their subsequent analysis, minimising the petitioners' case and maximising the respondents'. CSOs didn't want to address the court. Odinga's lawyers did the case as the law firm. Notably, the court rejected the application by Prof Yash Pal Ghai, the father of the Constitution, to participate in the petition because he was ostensibly biased against some of the respondents because of participating in litigation against them in court.

The court gave the petitioners 20 minutes to argue their case – thus keeping the bulk of the work out of public view. Civil society had taken the monkey that was the fresh election to court, but the judges had refused to give it a

public viewing. In seeking to answer the questions in the political environment, the court looked past the issues raised in Petition 17 and declared:

“From the controlling factor of legitimacy, the election would be perceived as credible, **in the absence of clear evidence that the bulk of it simply failed; that due procedure** was not followed in the conduct of election; that **someone other than IEBC conducted the election**; that the **procedures of vote counting** were not followed; that false results were announced, in place of the true outcome; that the **voters were turned away** from polling stations by IEBC, or by State agencies of power; that the **motions of verification** and announcement of vote-outcome were not complied with. We have stated elsewhere in this judgment that none of these factors were at play or at play in any significant manner.”¹⁷

The court did not annul the fresh election, and understandably so. There were many balls in the air at the time. The situation had changed at the court since the nullification decision. Judges and the court were under pressure.

Litigation is a subset of the political strategy. In 2013 the leadership was in situ and would meet after every court session to reflect on strategy. In 2017, the entire top leadership of KYSY were out of the country.

Litigating rights in a toxic political contest comes at a great cost. For example, the lead lawyer for the civil society petition in 2013, Kethi Kilonzo, was charged with fraud for obtaining a voter's registration slip, allegedly forging it, and presenting it when seeking nomination to contest the Makueni Senate seat, which had become vacant after her father's death. The charges were withdrawn six years later. Similarly, the petition challenging the fresh presidential election results was filed at a great cost for individuals and institutions.

Reluctant leaders thrust in the front line of political struggle bore great pressure at the personal, family and professional level. The petition caused great exhaustion, but it also had a toll on people in other ways. There has been

17 See John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR, p.157 in <http://kenyalaw.org/caselaw/cases/view/145261/>.

a temptation among those involved to shoulder the failings and shortcomings as personal faults. Some of the lawyers leading the effort cannot help feeling that the failings in the petition were theirs, even though they had no control over what was happening. One senior lead lawyer has neither looked at the judgment nor even read it to learn from it.

Individuals bore the cost long after the petition had ended. Job and consultancy opportunities shrunk and doors shut.

Families often provide unequivocal support, but sometimes they do not receive a full and accurate accounting of the decisions activists take, and the consequences that these could have in the future. Activists rarely access the same support from institutions in terms of mental and psychosocial support.

The man in the eye of the storm, Njonjo Mue, chose to stay away because he saw little point in sitting in court; he did not want his face on the live television cameras because he understood that once you stepped into some spaces, nothing was quite off the table. Although he had already decided to speak openly about his battle with bipolar as part of owning his story even as he continued to engage in efforts to save the country, the online attacks were beginning to take their toll.

As lead petitioner, he did not realise what he had volunteered himself for until it happened. When the weight of it all sunk in, he eclipsed everyone from his life and locked himself in his hotel room.

The petition also publicity elevated the profiles of the lawyers – some positively, others negatively. Where there was public acclaim and empathy, there would also be odium and calumny in equal measure. Some lawyers have been blacklisted because they are perceived as being opposed to the government.

More sombrely, as the judges were writing the judgment for the petition after delivering their decision, the Annual Jurists Conference was under way in Mombasa. During elections for the governing council of ICJ Kenya, and Njonjo Mue chose to withdraw from the contest for chairmanship.

Lessons

1. Civil society organisations need to start preparation for petitions early, and should consider how to address the strict timelines. Consideration needs to be given to how to encourage compliance with court orders by the election management body.
2. There is a need to build capacity for litigation within civil society organisations for the future. Thought should be given to whether or not there is a need for a dedicated law firm or legal centre prior to elections to develop and prepare admissible material. Prior and better preparation, coordination and training of teams, especially for specialist tasks like scrutiny, logistics, e.g. printing, and finances., is needed. Schools of law should be invited to provide expertise and volunteers for filing a presidential election petition to reduce pressure on civil society organisations. Uganda's Makerere University has participated in the country's election petitions in the recent past.
3. An institution or coalition filing a petition should set up the relevant teams at least 90 days to the election to allow them to formulate work plans, and to negotiate legal strategy, advocacy, security and logistics. Building teams in advance enables individuals to ventilate possible conflicts. The team needs to gather together to give members an opportunity to know one another, and to know how to respond and where to go.
4. Observers need to have a more intimate engagement with the election so that the information they obtain and dispatch to the command centre meets can be useful in court.
5. CSOs need to prepare volunteers and other people likely to play a role in their petitions mentally. There is a need for heightened and responsive security training to raise consciousness of threats but also prepare for mitigation as well as support of family and other people that might be sucked in. There is urgent need for full security briefings, mental preparation and psycho-social support.
6. Advocacy for the creation of an online public elections portal should also address the admissibility of such information in litigation. Election

management bodies should not just provide information based on requests, but should also be encouraged to make public disclosures even without formal requests.

7. Elections require financial resources and CSOs must start securing resources early. Planning needs to embrace measures to pay external counsel. Currently donors have not seen the benefit of funding elections work early and often come in at the last minute.
8. There is need to mitigate the pressure leaders are placed under during such events by excluding them from managing operational details to free them to focus on offering strategic direction.
9. The courts' attitude towards civil society litigation needs to be addressed before returning to litigate before them.
10. Activists who are perceived to have strayed from course should be readmitted and rehabilitated when they return only through a known and recognised accountability process to nurture and rebuild trust within the rights community.

Courting public opinion

Court contests arrive in living rooms and on mobile phones as adversarial confrontations in which witticisms, oratorical prowess, dramatic surprises, and the foreboding sense of loss or victory draw in the public.

Besides the entertainment guaranteed by public access and the now established practice of live streaming the drama of petition hearings, the cases also pose moral dilemmas in which the public is invited to participate as judge and jury. Just like the process of making sausages is never part of the breakfast menu, court processes belie tonnes of paperwork in evidence, research, reasoning, uncertainty, error and experiment.

Lawyers, who are the leading *dramatis personae* in court dramas, consider the pleadings and the courtroom litigation to be sufficient communication to achieve change. But audiences beyond their adversaries in court and the judges are always an important check on possible abuse of power – but they rarely thought of or accommodated.

A common criticism of progressive organisations is their failure to incorporate communication in their overall strategy rather than lacing it on top like icing on a cake. Generally, civil society organisations have weak communication capacity because much of the leadership and programmatic practice consider it as a support function to the main mandate.

Although the Kura Yangu Sauti Yangu coalition included bespoke grassroots and online media communication organisations like Development Through Media, Inuka Trust and InformAction, public affairs was not inbuilt in the strategic approaches seeking to cause change in the political environment ahead of the elections and after.

Traditionally, civil society has not fully appreciated the importance of communicating with the public – not just to win support and validation for

their causes, but also as a form of accountability. By the time the petition was filed, civil society was labouring under the yoke of the anti-ICC trials narrative that had framed them as the 'Evil Society' (local minions working at the behest of foreign powers) with one important complication. Representatives of foreign missions had already cast their lot with the Kenyatta election before it was nullified, and appeared more anxious about the failure to conduct a fresh election than the Kenyans who had the biggest stake in it.

Public support and empathy for civil society had been eroded by its being labelled as Evil Society, especially when it failed to respond and its leaders were profiled as lackeys of the political opposition.

CSO leadership in the public sphere was tentative, uncertain, and avoided explaining the political alliances it was pursuing for greater national goals. The absence of the senior civil society leadership from the country at the time of the petition gave the mainstream legacy and agenda-setting media the excuse to elide credible voices from conversations on the public anxiety around the unfolding political crisis. For example, the media were not allowed or encouraged to seek views on what would happen if the fresh election result were nullified.

Distortionary media ownership and operational control patterns undermined democratic culture in the public sphere and opened media to being instrumentalised

BOX 6: COMMUNICATING WITH THE PUBLIC

- Map the communication environment, including external and internal audiences
- Design a strategy to serve the audiences identified
- Assemble a team to support delivery of the strategy
- Identify the tools that further the broader communication goal and the immediate petition needs
- Create narrative frames and generate content to flesh it
- Deploy distributional nodes to ensure communication reaches target audiences
- Anticipate and respond to opposition attacks/ counter-narratives
- Evaluate success and challenges to adjust accordingly

in the broader political struggle. Media, for example, have always accepted to be co-opted as accredited observers in elections and remain beholden to the elections management body, holding back reports until the IEBC speaks, thus negating their oft-stated claim of independence.

While civil society sought to expand public knowledge, deepen understanding and cultivate support, ideological competitors in the political sphere were weaponising communication.

Elections hold the country spellbound, and politicians contesting them seemed to have greater voice than civil society leaders who were absent. The mobilisation of an ad hoc communication team to support the petition was a response to existing gaps and mitigation for deficits in coalition management. Besides the institutional support from Development Through Media and InformAction, communication resources had not been mobilised or deployed strategically but were instead summoned for transactional purposes only.

The limited civil society perception of communication as accessing the media through press conferences was in sharp relief with the multi-million-dollar international propaganda campaigns mounted by opponent to reach into the largest world capitals but also infect local communities, such as by the British firm, Cambridge Analytica.

The communication gaps in managing the coalition were magnified during the petition. Material resources were inadequate, were provided late and were often unresponsive to the evolving context. By the time there was an appreciation of the stakes involved, and resources deployed, the petition was in the final stages of drafting.

A combined team of civil society communication officers, lawyers, freelance journalists and bloggers were mobilised at the weekend to break down the petition into understandable language and put it out. The team included two lawyers who were also writers, a writer-journalist, a blogger and social media influencer, a cartoonist and a graphic designer. The communications team was ethnically diverse and included progressive people. After receiving briefing on secure communication and security, they jumped headlong into the deep end of the petition. Team members were all coming from different places of angst

and frustration, but waded into a fast-moving stream and tried to change its course. It was chaotic, with little clarity at the beginning, and overwhelming because of the volume of information that needed to be read and simplified. Additionally, new issues were emerging every day, and narratives needed to change.

Their first success was in capturing the moment and ensuring that the filing – done past midnight when legacy media had already gone to press was not missed or wasted. They then moved on to explain the petition.

The team partially succeeded in influencing legacy media to place the petition on the national agenda. They sustained that initial success by writing and sharing articles in the mainstream media, through social media and sending speakers to local language radio and television stations. Within the wider population, an understanding began to crystallise of what the issues were from the informational graphics, fact sheets and excerpts from court proceedings. Communication around the petition recorded over 15 million impressions on Facebook and Twitter in the first two days of the hearing.

By employing disruption of the communication environment, the team succeeded in forcing mainstream media to pay attention to the issues at a time when the public mood suggested that the country had been beaten into submission. In short, civil society's narrative about what had happened with the fresh election began to emerge in an otherwise hostile environment. Still, the strategy was overly dependent on events and occurrences in the courtroom. When the struggle for truth shifted to places where the sun did not shine, such as the inspection of the election results, the team could not access findings or use them in their campaign for fear of offending the court.

The team adapted quickly to sudden changes in the environment. Police disrupted a solidarity march in support of the judiciary standing up for its independence, and the communication team turned the event into a candle-lit vigil outside the Supreme Court, all lasting no more than 10 minutes.

But success on social media belied a larger shortcoming: A different skill set and alternative resource base was required to influence community media who have greater traction with grassroots populations.

Still, it was difficult to shift public opinion on highly emotive political positions: Civil society did not weaponise communication and stayed within the margins of good behaviour; hardly calling out bad conduct and propaganda when it was deployed. The communication team was shy to disrupt the Supreme Court and other election institutions, such as the Kenyan election observers' endorsement of the results, the absence of foreign observers for the fresh election, and the judges bullying the petitioner's lawyers or Kenyatta's lawyers attacking Njonjo's state of mental health.

Media content on the petition was being produced regularly and repeatedly, but there were no aggressive forays into the larger public sphere by, for example, publishing opinion that explored what the case and its outcomes would mean. As a result, there was weak public pressure on the courts to do the right thing.

The dissonance between the teams drafting the petition and those providing communication support undermined chances of success. Trust deficits evident in other teams were replicated in the communication team. In one instance, documents meant for filing in court disappeared from the command centre after they had been prepared. Some volunteers had to be released, but still there was need to balance the interests of those who were committed to the petition against those who were merely doing their jobs.

At the end, there were lingering questions about how to dispose of the material and paper, and how to decommission the team.. The teams were on high alert, having been made more conscious of their security. Many were taken out of their comfort zone of being parents with families and began to ask themselves what would follow for their loved ones if something happened to them.

With the benefit of hindsight, the communication strategy could have been more coherent on how it would begin, proceed and end: Civil society's petition at the Supreme Court did not entail a completion strategy outlining what, at the end, needed to be said. The lack of a completion strategy for the petition meant that when the petition was dismissed, civil society did not have the last word on it, or did not even attempt to explain what the effort had been about. It is not unlikely that because the petitioners' rush to beat the deadline, omitted crucial information that would have helped the case in the court and in the court of public opinion.

In the end, it was apparent that it would take more than propaganda and spin, threats, bribes and intimidation to rule a country. After the 2013 petition, it was clear that the video evidence in court showed up the integrity of the election results. This underlines the importance of deploying communication teams in the observation process even as the evidence for a possible petition is being gathered.

Critiques of the 2013 petition judgment changed the posture of the court. Yet, the court's decision in the second petition in 2017 raised even more issues that have not been confronted in the public sphere or in the academic community. If civil society believes that the judgment in the petition was not good jurisprudence, it has not invested any effort in persuading the court's peers to address it through debate, shadow judgments and other critiques.

Lessons

1. CSOs should cultivate themselves into a louder voice for social good, not just for elections, but also to create a dominant narrative in how politics evolves.
2. Media accountability for its reportage and analysis of elections should inform new monitoring and observation models. Media reporting of elections can be more independent once the power asymmetry with the IEBC is righted.
3. Civil society organisations and other petitioners should consider allowing conditional embedding of media in their petition preparations.
4. There is need to improve communication and obtain public support for civil society enterprises. People may have crucial information that could be useful in the petition but have not been mobilised to volunteer it.
5. An honest, conscious self-evaluation by the civil society movement is necessary to assess communication resources that should be harnessed in a synergised response to the broader political environment, and to know who has been captured.

6. A lot of thought needs to go into how to help people to understand events and processes beyond the news reportage of the petition and the court contest.
7. More scientific mapping of media and audiences should determine where resources should be deployed. A system needs to evolve that ensures grassroots audiences receive information by targeting community media.

Conclusion and recommendations

The country was spellbound for a week because of the petition civil society organisations filed. It was an opportunity for five lawyers with a team of 20 behind them to speak truth to power.

The petition made an important statement: that the public and civil society organisations could mount a credible challenge to a very complex process in a toxic environment with very high stakes. The risks that lay in wait for individuals and institutions were immense, given the heavy personal investment by Kenyatta and Ruto as well as the intelligence community, the security services and the Deep State that were unwilling to let go of power. Civil society organisations had demonstrated their ability to mobilise independently and to mount a challenge of such a magnitude.

Had the petition not been filed, it is unlikely that Kenya would have turned out the way it did – with its political compromises and accommodations that followed. Thus, civil society helped to keep the country from descending into conflict that could not be managed using the rule of law.

The current political atmosphere should inform the likely scenarios in preparing for the 2022 elections cycle.

Working under the umbrella of a coalition of credible organisations mitigated the cost of the undertaking, but a question that still begs an answer is why not all human rights organisations were not on board to file the petition. Some were dealing with challenging transitions, while others were struggling with managing the risk of being perceived as partisan even though the issues in consideration were within their mandate. The fault lines emerging in the civil society movement prevented organisations from moving in unity, and these need to be interrogated in exercising oversight on election management.

The daily grind of civil society work sometimes detracts from the broader goal of seeking to deliver human rights outside logical frameworks designed and negotiated with donors. The experiences from filing and arguing the petition in court, with all its pressure, the tricks deployed, and the security considerations, were enriching and deserving to be mined for lessons on future engagements.

Civil society organisations must own and drive the litigation strategy to focus on what they want to achieve with it. Although early preparation cannot be overemphasised, anomalies in the electronics that the technology experts were unable to make sense of meant wasted many hours in deciphering information in time for the court petition. The research and analysis from the data centre was good but much of it did not see the light of day in the petition because no one in the team was able to highlight it for the lead counsel.

Data analysts had difficulty receiving requests and responding to instructions that emanating from outside their usual chains of command. Discipline issues around time management, availability for strategy meetings, and devolving leadership to teams presented human resource management difficulties. Allowing leadership to devolve to legal and technical teams can resolve some of the operational questions around the division of labour but a balance still needs to be maintained between healthy suspicion and trust.

Suspicious about possible infiltration of team damaged trust also made longstanding loyal troops resentful in a way that undermined the esprit de corps, lowered morale and discouraged good people from continuing to volunteer when they were needed the most.

It is regrettable that the sheer volume of good work done was not highlighted in the court, and has never been presented in the court of public opinion because of technical shortcomings. There was limited time to draft, and the court only allowed the lawyers to highlight the key issues from the petition.

The judiciary opened itself to instrumentalisation by the respondents' lawyers and avoided issues that were critical to the country. Accountability for courts is something civil society needs to think about, especially in view of the fact that the Supreme Court expunged affidavits with the potential of interfering with the delivery of substantive justice.

Trial observation for the hearing and determination of the second petition in 2017 was weak, with too little being done too late. Whereas the August petition had external court observers who included leading jurists, the petition challenging the fresh election had none. Yet, with the benefit of hindsight, the fresh election petition seemed to require such support since it raised more vexing issues. In the event that there is another presidential election petition, managing the court's public posture and behaviour where litigants are not big political players has more import than in ordinary circumstances. Judges had overpromised when nullifying the August 2017 presidential election result but under-delivered when confronted with difficult questions. They ran away physically, when they failed to sit on October 26, and constructively when presented with a petition. There are real fears that institutions of justice could have institutionalised impunity by their sins of commission and omission, which has been fast-tracked by the state.

One of the tactical errors made in the application for scrutiny, even though proceeding from a previously successful one in the August election, was its broadness. The application for scrutiny in the August 2017 election was limited and direct. Although the court had allowed it, backlash from the respondents who lost the case had discouraged the judges from getting involved, a consideration that was not factored into the November application, giving it room to allow access to the results documents without the scrutiny supervised by the court's registrar.

The results of a petition rest on a small team. In the 2013 election, the findings of civil society observers on the court-ordered scrutiny produced interesting findings that were never brought to light. The scrutiny in the August 2017 election was important and the people who observed were frustrated by IEBC's refusal to grant access. It took deploying big-bodied individuals to stare down the opposition, resulting in the conclusion that access to servers had been frustrated.

In the November 2017 petition, past experience around scrutiny was turned away because of fears of political contamination. The court accepted scrutiny at 1 pm and allowed for reports the following day. IEBC gave the team the run-around, with the result that scrutiny did not begin until after 10 pm. Part of the frustration within the civil society litigation team was that they had

a scrutiny report the court was disinterested in receiving. Once it became apparent that the civil society team would not be allowed to conduct a scrutiny, the most important submission in court needed to be that the exercise had been blocked. Yet, some of the petitioner's lawyers shot up in the courtroom to complain and were thus allowed to conduct the review at 10 pm when they could not achieve much. In the end, even the report was not filed or admitted. There was no exit strategy from the frustrated scrutiny, and thus the insistence on following the court's order had no effect.

Significantly, the work from the data centre showing the areas where numbers had been fudged, and witnesses for Kenyatta admitted as much, could not be used because it was filed late or not being brought to the attention of lead counsel.

Only two-thirds of the anomalies unearthed by information technology experts were used in court. Some of the findings were evidence of negligence rather than manipulation, but still, there are gaps that need to be addressed. If the 2013 and 2017 elections are used as a barometer, they point to more information technology-centred disputes. The two individuals suspected of being the architects of electoral fraud in the two elections continue to be active, and so a clear election result is unlikely in 2022.

An information technology infrastructure needs to be built to track data before, during, and after the election. There is a need to leverage legal knowledge with technical expertise because the kind of cases around elections will most likely revolve around the use of information technology. Most legal experts on elections and constitutional law do not have a technology bent. It becomes difficult to develop technical arguments for court proceedings, or to draft applications, let alone convince judges, who also have similar shortcomings and confidence crises around information technology.

The election observation teams in the field generate the information used in the courts. Yet, observers are not trained or properly selected, and do not have sufficient resources to perform the role assigned to them. Observers are deployed to give information, which is hardly ever the case. Election observation should improve on the 1992 template, which has been repeatedly used over time. Observer reports using video recording brought a human element to the 2013 presidential election petition, which even though dismissed by leading

counsel as ‘River Road photographs’,¹⁸ nonetheless graphically represented what had gone wrong with the election. Technology, especially deploying mobile telephony, has the potential to change how elections are monitored and reported.

Recommendations

1. A colloquium is required to dissect the judgment on the civil society petition challenging the results of the 2017 fresh presidential election. ICJ Kenya and Katiba Institute have the capacity to convene a broader expert panel to debrief on the petition. It is important for judges from comparative jurisdictions to review the evidence and write a shadow judgment, looking at the issues presented, and to make recommendations. The alternative view on the judgment needs to reach the judiciary.
2. Civil society relationships with academia and the religious sector can be leveraged to generate knowledge and debate past experiences to extract lessons for the future. It might take a while before another fresh election is held in Kenya, so reflections on the experiences from the petition can form part of a publication.
3. The toxic political environment in which the competence of the electoral management body was in doubt but was still the only constitutional body mandated to conduct elections presents structural governance challenges that need to be tackled.
4. Since ICJ Kenya works regionally, it should draw in expertise from the African Union, the European Union and the United Nations to problematise the issues around litigating against constitutional entities.
5. A harmonised public interest litigation manual should be developed, building on the guide by KPTJ, AfriCOG and Katiba Institute to address gaps not anticipated in challenging a presidential election.¹⁹

¹⁸ River Road is a street in downtown Nairobi pejoratively renowned for its preponderance of forgers and fraudsters.

¹⁹ A helpful resource is Kenyans for Peace with Truth and Justice, Africa Centre for Open Governance and Katiba Institute, A Guide to Public Interest Litigation in Kenya, <http://kptj.africog.org/wp-content/uploads/2015/03/PIL-24032015.pdf>

6. Emergent outstanding legal reform issues should engage Parliament around reforming the election management body, given its conduct in petitions.
7. Early petition drafting should be supported by an offshoring strategy in case of attempts to physically demobilise the operation.
8. Civil society organisations need to craft a digitalisation strategy even where courts insist on paper filing, so that they are able to furnish a document and digitise it. There is currently poor access to all the documents in court.
9. Resources to fund election petitions should be mobilised early by looking beyond the traditional donors and reaching out to the public for support. Previous GoFundMe efforts demonstrate public support for civil society work. Resource mobilisation professionals need to guide donors about the significance of presidential election petitions as a point of intervention in delivering social change.
10. Lawyers have dominated the human rights sector in Africa, placing law at the centre of civic action. There is a need to ensure that other aspects of civic action are not placed on the periphery to bring back diversity to the human rights movement. A decision must be made on who has the capacity, and at what level, to engage with election petitions.
11. There is a need for greater public engagement by simplifying and explaining legal concepts and principles. Civil society movements should craft a strategy that speaks directly to the public by continuously breaking down decisions for ordinary citizens to appreciate the level of institutional capture. Ultimately, if the platforms from which justice is expected continue to be compromised, and institutions are weakened, new ways of engagement have to be found. Petitions can be lost in court, and still win in the court of public opinion.
12. There is a need to hold debriefing sessions before the start of the process of filing a petition and immediately after the outcome in order to harvest lessons when memories are still fresh.

Undertaking highly sensitive political work like filing a presidential election petition has serious costs in terms of money, relationships and opportunities. Besides the burnout, such intensive exercises have traumatic effects on people and can undermine relationships. There is a price to pay, but the alternative is not to do anything and let the country slide into lawlessness.

Lessons from the 2017 elections will need to be applied sooner rather than later in the context of emerging politics. There is a need for more deliberate mentorship to match the initiative from younger people who are ready to take on expanded responsibility.

The legacy documentation is part of the process of handing over the baton of leadership in the civil society movement. By telling their stories more and sharing information and insights, civil society not only documents history, but also build a circle of trust to motivate and inspire the next generation of activists.





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