

The Kenyan Judiciary, the Doctrine of ‘Substantiality’ and the Resolution of Presidential Election Disputes

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Abstract

This article assesses the continuities and discontinuities that have attended electoral law reform in Kenya since the enactment of the 2010 Constitution. Using the presidential elections of 2013 and 2017 as main frames of reference, the paper examines the extent to which the vision of electoral justice established under Kenya’s transformative Constitution has been realized in law and in practice. Ultimately, it suggests that beyond the legal contestations which periodically emerge during electoral cycles, lie important socio-political struggles which have their roots in the history and structure of the post-colonial Kenyan State. It is this broader, and more fundamental, political question which must be addressed if true electoral justice is to be achieved in Kenya.

Introduction

Few expected the Kenyan judiciary to annul the results of the presidential elections of August 2017. This was not because of any great belief that the poll had been free and fair. Instead, this was mainly due to the fact that a judicial annulment of a presidential election was entirely unprecedented in Kenya, and had few precedents anywhere else in the world. The Supreme Court’s annulment of the election on 1st September 2017, therefore, came as a shock to many around the world, including in Kenya.

This article seeks to revisit this significant moment in African judicial history in a bid to understand its implications for the judicial resolution of high-stakes political disputes. It starts with a brief historical account of the socio-political conditions that informed the 2010 Constitution, and the subsequent electoral legislation enacted thereunder, before proceeding to an assessment of the legal framework for electoral justice in Kenya, in light of the August 2017 elections and the repeat elections of October 2017.



Understanding the 2010 Constitutional framework for electoral integrity

Kenya's post-independence journey followed the trajectory of many other African countries, with an early descent into single party rule and limited political and other freedoms. A consequence of this would be the use of political power to enhance economic power, which further enhanced ethnic and other divisions that had preceded the establishment of the post-colonial State.¹ A step towards a return to democracy was made with the restoration of multipartyism in December 1991 and gathered more momentum with each successive election in 1992, 1997 and 2002.

Given this history the 2007 elections were expected to mark a further step towards consolidating the country's democratic gains. However, allegations of electoral injustice in those elections sparked a wave of ethnically-charged violence which left at least 1,000 people dead and more than 700,000 displaced.² After prolonged mediation by various national, regional and international actors, on 28 February 2008 incumbent President Mwai Kibaki and opposition challenger Raila Odinga signed an agreement under whose

terms a coalition government would be formed, with the latter holding the newly created position of Prime Minister. The agreement was effected by the passage in March 2008 of the Constitution of Kenya (Amendment) Bill, constitutionally establishing the posts of Prime Minister and Deputy Prime Minister. Furthermore, steps towards a coalition government were taken with the naming in April 2008 of an inclusive Cabinet of 40 ministers and 50 assistant ministers. The longer-term resolution of the deep-seated grievances which had led to the 2007-2008 post-election violence was addressed by a Truth and Justice Commission (TRJC), chaired by Bethuel Kiplagat and by the Independent Review Commission (IREC), chaired by South African Justice Johann Kriegler. A key observation of the IREC would be that the 2007 elections had been based on an extremely problematic voter registration process.³ The Electoral Commission of Kenya (ECK) used a manual register, the so-called 'Black Book', which had left room for manipulation of the electoral roll.⁴ A key recommendation of the IREC, therefore, was the deployment of electronic means of voter registration, and the compilation of a single national register for all voters in Kenya.⁵

At the same time, the violence provided fresh impetus for a new

¹ See, generally, ES Atieno Odhiambo 'Hegemonic enterprises and instrumentalities of survival: Ethnicity and democracy in Kenya' (2002) 61 *African Studies Review* 223-249.

² DK Maraga 'Scrutiny in electoral disputes: A Kenyan judicial perspective' in C Odote and L Musumba (eds) (2016) *Balancing the scales of electoral justice: Resolving disputes from the 2013 elections in Kenya and the emerging jurisprudence* p.224, at footnote 10.

³ Independent Review Commission Report (2008) *The 2007 General Elections in Kenya* at p.32.

⁴ Independent Review Commission (n 3 above) at p.32.

⁵ Independent Review Commission (n 3 above) at p.32.

constitutional order. The push for a new Constitution had been made as far back as the early 1990s, and had culminated in a draft Constitution (the ‘Bomas draft’) in 2004. Following substantial amendment to this draft, the new version (the ‘Wako draft’) was rejected following concerted mobilization against the instrument led by Raila Odinga and the putative Orange Democratic Movement (ODM). The 2007-2008 violence that followed rejection of the Wako draft led to a more serious and concerted process of Constitution-making led by a Committee of Experts, resulting in the adoption of a new Constitution of Kenya in 2010.

The 2010 Constitution must therefore be understood as a politico-legal document drafted, and adopted as a direct response to deep historical cleavages, exposed most powerfully by the 2007-2008 electoral violence. In this regard, the 2010 Constitution contains several provisions aimed at enhancing electoral justice in the Republic. First, under Article 1(1) provided that all sovereign power belongs to the people of Kenya and must be exercised only in accordance with the Constitution. Second, Article 1(2) stipulated that the people are empowered to exercise their sovereign power either directly or through their democratically-elected representatives.

In addition, under Article 38(1), every citizen is free to make political choices, which include the right to form and join political parties and to

campaign for political causes. Every citizen is also guaranteed the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors.⁶ Further, under Article 38(3), every adult citizen is guaranteed the right, without unreasonable restriction: i) to be registered as a voter; ii) to vote by secret ballot in any election or referendum; and iii) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office. Relatedly, under Article 83(1) of the Constitution, it is provided that a person qualifies for registration as a voter at elections or referenda if the person: i) is an adult citizen; ii) is not declared to be of unsound mind; and iii) has not been convicted of an election offence during the preceding five years. In addition, under Article 83(3), administrative arrangements for the registration of voters and the conduct of elections must be designed to facilitate, and must not deny, an eligible citizen the right to vote or stand for election.

In terms of Article 81, the Kenyan electoral system must comply with the following principles: i) freedom of citizens to exercise their political rights under Article 38; ii) not more than two-thirds of the members of elective public bodies may be of the same gender; iii) fair representation of persons with disabilities; iv) universal suffrage based on the aspiration for fair representation and equality of vote;

⁶ Article 38 (2), 2010 Constitution.

and v) free and fair elections. Such free and fair elections must, under Article 81 (e), be: by secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner. Article 81 has to be read together with Article 10 of the Constitution, which prescribes a set of national values and principles of governance. In terms of Article 10 (2), the national values and principles of governance include: i) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; ii) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; iii) good governance, integrity, transparency and accountability; and iv) sustainable development.

Under Article 88(1), the Constitution established the Independent Electoral and Boundaries Commission (IEBC). Under Article 88 (2), a person is not eligible for appointment as a member of the IEBC if the person: i) has, at any time within the preceding five years, held office, or stood for election as a member of Parliament or of a county assembly,⁷ or a member of the governing body of a political party;⁸ or ii) holds any State office.⁹ Members of the Commission

are also prohibited from holding any other public office.¹⁰ By the terms of Article 88 (4), the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for the following functions: i) the continuous registration of citizens as voters;¹¹ ii) the regular revision of the voters' roll;¹² iii) the delimitation of constituencies and wards;¹³ iv) the regulation of the process by which parties nominate candidates for elections;¹⁴ v) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;¹⁵ vi) the registration of candidates for election;¹⁶ vii) voter education;¹⁷ viii) the facilitation of the observation, monitoring and evaluation of elections;¹⁸ ix) the regulation of the amount of money that may be spent by or on behalf of a candidate or party

¹⁰ Article 88 (3), 2010 Constitution.

¹¹ Article 88 (4) (a), 2010 Constitution.

¹² Article 88 (4) (b), 2010 Constitution.

¹³ Article 88 (4) (c), 2010 Constitution.

¹⁴ Article 88 (4) (d), 2010 Constitution.

¹⁵ Article 88 (4) (e), 2010 Constitution. This has to be read together with Article 47 (1), which guarantees the right of all persons to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In addition, under Article 47 (2), if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

¹⁶ Article 88 (4) (f), 2010 Constitution.

¹⁷ Article 88 (4) (g), 2010 Constitution.

¹⁸ Article 88 (4) (h), 2010 Constitution.

⁷ Article 88 (2) (a)(i), 2010 Constitution.

⁸ Article 88 (2) (a)(ii), 2010 Constitution.

⁹ Article 88 (2)(b), 2010 Constitution.

in respect of any election;¹⁹ x) the development of a code of conduct for candidates and parties contesting elections;²⁰ and xi) the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.²¹ The IEBC is required, in the performance of all these functions, to adhere to the Constitution and national legislation.²²

Within the specific context of a presidential election, Article 136 (1) of the Constitution provides that the President shall be elected by registered voters in a national election conducted in accordance with this Constitution and any Act of Parliament regulating presidential elections.

Under Article 138 (2) of the Constitution, if two or more candidates for President are nominated, an election must be held in each constituency. In addition, under Article 138 (3), in such presidential election: i) all persons registered as voters for the purposes of parliamentary elections are entitled to vote;²³ ii) the poll must be taken by secret ballot on the day specified in Article 101 (1) at the time, in the places and in the manner prescribed under an Act of Parliament;²⁴ and iii) after counting the votes in the

polling stations, the IEBC must tally and verify the count and declare the result.²⁵ According to Article 138 (4), a candidate may only be declared elected as President if the candidate receives: i) more than half of all the votes cast in the election²⁶ and ii) at least twenty-five per cent of the votes cast in each of more than half of the counties.²⁷ Within seven days after the presidential election, the Chairperson of the IEBC must declare the result of the election;²⁸ and deliver a written notification of the result to the Chief Justice and the incumbent President.²⁹

According to Article 140 (1) of the Constitution, 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. Under Article 140 (2), within fourteen days after the filing of a petition under clause (1), the Supreme Court must hear and determine the petition and its decision shall be final. Finally, under Article 140 (3), if the Supreme Court determines the election of the President-elect to be invalid, a fresh election must be held within sixty days after the determination.

The above enumeration demonstrates the care taken, in terms of the design of the 2010 Constitution, to craft a system that would ensure electoral justice for

¹⁹ Article 88 (4)(i), 2010 Constitution.

²⁰ Article 88 (4)(j), 2010 Constitution. Under Article 84 of the Constitution, in every election, all candidates and all political parties must comply with the code of conduct prescribed by the IEBC.

²¹ Article 88 (4)(k), 2010 Constitution.

²² Article 88 (5), 2010 Constitution.

²³ Article 138 (3) (a), 2010 Constitution.

²⁴ Article 138 (3) (b), 2010 Constitution.

²⁵ Article 138 (3) (e), 2010 Constitution.

²⁶ Article 138 (4) (a), 2010 Constitution.

²⁷ Article 138 (4) (b), 2010 Constitution.

²⁸ Article 138 (10) (a), 2010 Constitution.

²⁹ Article 138 (10) (b), 2010 Constitution.

Kenyans. In this way, the framers of the Constitution sought to avoid a repeat of the electoral injustices which triggered the 2007-2008 conflict. In addition, and just as importantly, the constitutional framework seems to have been deliberately designed to ensure that those entrusted with State power obtained that mandate through a transparent, credible and legitimate process. Such a government would be well placed to handle broader and more entrenched historical concerns beyond the immediate issues and differences implicated in electoral contests. Indeed, as Sihanya has observed, ‘the Constitution of Kenya 2010 is a transformative and progressive constitutional text and is a good basis for electoral justice’.³⁰

The 2013 Presidential Election and its Resolution by the Supreme Court

In compliance with, and to further the vision for electoral justice

³⁰ B Sihanya (2017) ‘Electoral justice in Kenya under the 2010 Constitution: Implementation, enforcement, reversals and reforms’ available at [http://www.innovativelawyring.com/attachments/Electoral Justice In Kenya Edited. pdf](http://www.innovativelawyring.com/attachments/Electoral%20Justice%20In%20Kenya%20Edited.pdf) (last accessed 9 April 2018) at 5. See, further, EZ Ongoya ‘The legal framework on resolution of electoral disputes in Kenya’ in G Musila (ed) (2013) *Handbook on election disputes in Kenya: Context, legal framework, institutions and jurisprudence* at 42; H Evelyn and W Wanyoike ‘A new dawn postponed: The constitutional threshold for valid elections in Kenya and Section 83 of the Elections Act’ in C Odote and L Musumba (eds) (2016) *Balancing the scales of electoral justice: Resolving disputes from the 2013 elections in Kenya and the emerging jurisprudence* at 90-97 and F Ang’ila Aywa ‘A critique of the Raila Odinga v IEBC decision in light of legal standards for presidential elections in Kenya’ in C Odote and L Musumba (eds) (2016) *Balancing the scales of electoral justice: Resolving disputes from the 2013 elections in Kenya and the emerging jurisprudence* at 56-60.

elaborated in, the 2010 Constitution, laws relevant to the conduct of elections were enacted in 2011. These included the Independent Electoral and Boundaries Commission Act;³¹ the Elections Act;³² and the Supreme Court Act.³³ In addition, in exercise of its powers under Section 109 of the Elections Act, the IEBC enacted a number of Regulations, including: the Elections (General) Regulations, 2012 and the Elections (Registration of Voters) Regulations, 2012. Similarly, in exercise of power under Section 31 of the Supreme Court Act, then-Chief Justice Willy Mutunga enacted the Supreme Court (Presidential Elections) Rules, 2013. Together with the 2010 Constitution, the above primary and secondary legislation would form the major features of the legal architecture under which the 2013 elections were conducted.³⁴ It was thus under this framework that on 4 March 2013, Kenya held its first General Election following the enactment of the 2010 Constitution.

The March 2013 elections were the first in Kenya wherein electoral technology was employed to facilitate the process. These technologies were: Biometric Voter Registration (BVR), used during voter registration; Electronic Voter Identification (EVID), employed on the polling day itself; and the Results Transmission System (RTS), used during the tallying

³¹ No.9 of 2011.

³² No.24 of 2011.

³³ No.7 of 2011.

³⁴ The Public Procurement and Disposal Act, Cap 412C was also critical, especially in terms of establishing the rules for procurement of requisite electoral material.

and transmission of the results. On 9 March 2013, then-Chairperson of the IEBC, Issack Hassan announced Mr. Uhuru Kenyatta as winner of the elections with a total of 6,173,433 out of a total of 12,338,667 votes cast.

Following that announcement, three petitions were filed before the Supreme Court to challenge the results of the Presidential election, which were consolidated as *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission and 3 Others*.³⁵ In that case, while several issues were canvassed,³⁶ the Supreme Court upheld the election in favour of Kenyatta.

Inevitably, the Court had to consider the threshold for the assessment of a presidential election, and indeed this matter was canvassed albeit not at great length.³⁷ According to the Supreme Court, the test for annulment was: '[d]id the Petitioner clearly and decisively show the conduct of the election to have been so devoid of merits, and so distorted, as not to reflect the expression of the people's electoral intent?'.³⁸

As Evelyn and Wanyoike have noted, this reading of Section 83 of the Election Act made it 'an

³⁵ [2013] eKLR.

³⁶ These included: i) the procurement and use of technology in the electoral process; ii) institutional independence, discharge of public responsibility and exercise of discretion; iii) voter registration; iv) the meaning of 'votes cast'; and v) the meaning of a 'fresh election'.

³⁷ Evelyn and Wanyoike (n 70 above) at 99 (noting that the Supreme Court '[did] not explicitly rely on Section 83 of the Elections Act, but instead mix[ed] the standard for a valid election with the required standard of proof'.

³⁸ Judgment of the Supreme Court, at Para 304.

insurmountable task to challenge a declared winner of an election' and that it protected 'someone who may have benefited from a deficient (and unconstitutional) electoral process against a court challenge'.³⁹

In a 2016 book chapter written in his personal capacity, Chief Justice David Maraga—while not commenting directly on the 2013 decision on this point—adopted an interpretation of Section 83 which pointed towards a lower threshold for annulling a presidential election. In his view, that Section provided for 'two *disjunctive* situations' under which elections could be voided: i) failure to carry out an election in accordance with the principles laid down in the Constitution; and ii) where there was non-compliance with any written law relating to an election which affected the result of the election.⁴⁰ In a view that would later be reiterated in the 2017 Supreme Court decision to overturn the August 2017 Presidential election, Maraga further noted that an election went 'beyond simple arithmetic'.⁴¹ He went on to observe that:

...the qualitative test is the major determinant of a free and fair election. The qualitative principles have their grounding in due process. Due process, which is concerned with the quality of the ballot, is the hallmark of any democratic electoral process ... The result

³⁹ Evelyn and Wanyoike (n 70 above) at 101.

⁴⁰ Maraga (n 2 above) at 270.

⁴¹ Maraga (n 2 above) at 271, citing James Omingo Magara v Manson Onyongo Nyamweya and 2 Others [2014] 5 KLR (EP) 292.

of an election is therefore affected when the violation of qualitative factors fundamentally undermines the integrity of the electoral process ... That is to say, *apart from the figures*, the result of an election is affected when the irregularities and malpractices committed render the legitimacy or reliability on the numerical result and the sanctity of the ballot questionable.⁴² [Emphasis added]

The 2017 Presidential Elections and their Resolution by the Supreme Court

The August 2017 Presidential Election

The Legal Framework Relating to the August 2017 Election

Although the Supreme Court upheld the 2013 presidential election, it faulted the IEBC in a number of instances. The main challenges identified related to the credibility of the Electoral Management Body (EMB), the use of technology and the transmission of results.

Given the many issues raised by the 2013 poll, efforts were made to respond to the identified challenges. Those efforts culminated in the institution, in 2016, of a Joint Parliamentary Select Committee (JPSC) with membership drawn from both the Senate and the National Assembly. The JPSC invited, and received submissions from a range of key stakeholders across the country. These views informed the important

⁴² Maraga (n 2 above) at 271-272.

amendments that were made to the electoral framework, including: i) the Elections Laws (Amendment) Act 2016;⁴³ ii) the Election Offences Act (2016)⁴⁴ and the Elections Technology (Regulations) 2017.

Section 44(1) of the Elections Act (as amended by the 2016 law), established the Kenya Integrated Electoral Management System (KIEMS) to enable biometric voter registration, electronic voter identification and electronic transmission of results. A critical pillar of the KIEMS was its combination and consolidation of the various technology streams that had been employed, with limited success, during the 2013 elections.⁴⁵ The IEBC was required to develop a policy on the progressive use of technology in the electoral process,⁴⁶ and was further mandated to ensure that the KIEMS was simple, accurate, verifiable, secure, accountable and transparent.⁴⁷

In addition, under Section 44(4) (a) and (7)(b) of the Elections Act (as amended in 2016), the technology to be used in the election was required to be procured at least 8 months before the general election. In addition, under Section 44(a) of the Elections Act (as amended), the IEBC was

⁴³ Act No.36 of 2016; assented to on 13 September 2016, and in force on 4 October 2016.

⁴⁴ Act No.37 of 2016; assented to on 13 September 2016, and in force on 4 October 2016.

⁴⁵ These had included: the Biometric Voter Registration system (BVR); the Electronic Voter Identification Devices (EVID); and the Results Transmission System (RTS).

⁴⁶ Section 44 (2) of the Elections Act (as amended).

⁴⁷ Section 44 (3) of the Elections Act (as amended).

required to test, verify and deploy such technology at least sixty days before the general election.

Another critical amendment to the Elections Act was the introduction of Section 39(1C) under which, for the purposes of a presidential election, the IEBC was obliged to: i) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;⁴⁸ ii) tally and verify the results received at the national tallying centre;⁴⁹ and iii) publish the polling result forms on an online public portal maintained by the Commission.⁵⁰

There was a further amendment to the Elections Act in January 2017, by the terms of the Elections Laws (Amendment) Act.⁵¹ Among other things, that amendment introduced a new Section 44A in the Elections Act, which required the IEBC to put in place a complementary mechanism for the identification of voters and the transmission of election results. Under the same provision, such complementary system was required to be simple, accurate, verifiable, secure, accountable and transparent, in compliance with Article 38 of the Constitution. In addition, in 2017, the IEBC enacted the Elections (Technology) Regulations, aimed at further enhancing the framework for the

use of technology in the ascertainment of the true will of the voter.

For its part, the Supreme Court prepared to deal with any disputes that might emerge from the elections through the enactment by the Chief Justice of the Supreme Court (Presidential Election Petition) Rules of 2017.⁵² It was under this greatly amended legal framework, therefore, that on 8 August 2017, Kenya held its second General Election under the 2010 Constitution.

The August 2017 Presidential Election Dispute and its resolution by the Supreme Court

For many, the August 2017 election constituted yet another opportunity to demonstrate progress, however halting, in Kenya's democratic trajectory. Voting was largely peaceful. Indeed, the reports of many observers appear to have based on this fact to determine that the election had been largely free and fair.

On 11 August 2017, the Chairperson of the IEBC, Wafula Chebukati, announced Uhuru Kenyatta as winner of the elections, with 8,203,290 votes received. On 18 August 2017, Raila Odinga and Stephen Kalonzo Musyoka, the candidates of the National Super Alliance (NASA) coalition, filed a petition before the Supreme Court, to challenge the results as declared.⁵³

Unsatisfied with the results, Raila Odinga challenged them before the

⁴⁸ Section 39 (1C) (a), Elections Act (as amended).

⁴⁹ Section 39 (1C) (b), Elections Act (as amended).

⁵⁰ Section 39 (1C) (c), Elections Act (as amended).

⁵¹ Act No.1 of 2017.

⁵² Legal Notice No.113.

⁵³ Raila Odinga and Another v IEBC and 2 Others Presidential Election Petition No.1 of 2017.

Supreme Court . The petition was filed on Friday 18 August 2017, within seven days of the announcement of the results of the election, as required by Article 140 (1) of the 2010 Constitution of Kenya. The petitioners alleged that the elections fell short of the requisite constitutional and legal standards. In particular, the petitioners impugned the process of transmission and tallying of results, which, in their view, had tainted the credibility and validity of the results announced.

In a majority decision rendered on Friday 1st September 2017, the Supreme Court concluded that the election had not been conducted in accordance with the requisite constitutional and statutory requirements. In so doing, the Supreme Court rendered an authoritative interpretation of Section 83 of the Elections Act, to the effect that it established a disjunctive, rather than a conjunctive test for the annulment of a presidential election. Having come to this conclusion, the Supreme Court decided that the election had to be annulled on the basis of its qualitative inferiority, without the need for a demonstration that those qualitative shortcomings had, in fact, had a material impact on the results of the election.

According to the Court, it was important to emphasize that an election was a process rather than an event, and that the results announced at the tail end of that process could only be valid if the entire chain leading up to their pronouncement was untainted by irregularities.

The aftermath of the Supreme Court's September decision

In Kenya, the Court's decision was criticized and applauded in equal measure. This was perhaps only to be expected, coming as it did in the thick of a contentious political process, moreover one attended by significant ethnic undertones.

As might be expected, supporters of the Uhuru-Ruto ticket condemned the Court's decision as a glaring example of judicial overreach. On the other hand, many other Kenyans appreciated the decision as an instance of the Court defending the Constitution and the popular will, from those who had sought to subvert democracy.

The response from the Uhuru-Ruto campaign was mixed. On the day of the Court's decision, President Uhuru appeared to accept the Court's decision, noting that while he disagreed with it, he would abide by it. However, a few days later, the tone had changed from one of uneasy accommodation to outright hostility. In an address to supporters a few days later, Uhuru described the Chief Justice and members of the Court who had rendered the opinion as *wakora* (a Swahili term meaning 'thugs') and vowed to 'revisit' the matter once the political dust had settled. In the event, it would appear that the 'revisiting' would be set in motion much earlier than initially signaled.

Intimidation of the Judiciary

In the first place, there are some indications that certain members of the Supreme Court came under intense pressure following the decision, apparently in an effort to avoid a repeat of the September 2017 decision, should the results of the repeat election again be challenged before the Supreme Court.

Electoral Legal Reform

Aside from the threats and direct intimidation of the judges, the Kenyatta government engaged in a process of ‘revisiting’ the electoral framework which had facilitated the Court’s September 2017 decision. That goal was achieved through a raft of legislative amendments pushed through Parliament in November 2017, a process boycotted by the opposition. The main legislative response to the Supreme Court which annulled the August 2017 elections was the passage and gazetting of the Election Laws (Amendment) Act, 2017,⁵⁴ with the most critical of these amendments relating to the legal standards for invalidating a presidential election.⁵⁵ In particular, the word ‘or’ in Section 83 of the Elections Act, to which the Supreme Court had attached great importance in the September 2017 decision was

amended to read ‘and’. The effect of the amendment was that the test for annulment was changed from a disjunctive one, to a conjunctive one. As I have noted elsewhere, the use of ‘and’ (which establishes a conjunctive test) and ‘substantially’ usually makes it very difficult for apex courts to invalidate the results of presidential elections.⁵⁶ Henceforth, before annulling a presidential election, the Supreme Court would have to be satisfied not only that there had been irregularities in the conduct of the elections, but further that these

⁵⁶ See B Kabumba ‘How so you solve a problem like “Substantiality”?: The Supreme Court and Presidential Elections in Uganda’, Book Chapter in J Ahikire and J Oloka-Onyango (eds) (2016) *Controlling consent: Uganda’s 2016 elections* Kampala: Africa World Press. See, also, F Ssempebwa, E Munuo, L Tibatwemwa-Ekirikubinza and B Kabumba (2016) *A comparative review of presidential election court decisions in East Africa* Kampala: Fountain Publishers. Examples of challenges rendered unsuccessful by such a high threshold include: Rtd. Col. Dr. Kizza Besigye v. Electoral Commission and Yoweri Kaguta Museveni Presidential Election Petition No.1 of 2001, [2001] UGSC 3 (21 April 2001) (Uganda); Rtd. Col. Dr. Kizza Besigye v. Electoral Commission and Yoweri Kaguta Museveni Presidential Election Petition No.1 of 2006, [2007] UGSC 24 (30 January 2007) (Uganda); Amama Mbabazi v. Yoweri Kaguta Museveni, Electoral Commission and the Attorney General Presidential Election Petition No.1 of 2016, [2016] UGSC 3 (31 March 2016) (Uganda); Mbowe v. Eliufoo (1967) EA 240, Court of Appeal (Tanzania); Ibrahim v. Shagari & Others (1985) LRC (Const.) 1 (Nigeria); Buhari v. Obasanjo (2005) CLR 7K (Nigeria); General Muhammadu Buhari v. Independent National Electoral Commission & 4 Ors (2008) 12 S.C. (Pt. I) 1 (Nigeria); Abubakar v. Yar’Adua [2009] ALL FWLR (Pt 457) 1 SC (Nigeria); In Re Election of First President – Appiah v. The Attorney General (1970) 2 G&G 2d 1423 (Ghana); Nana Addo Dankwa Akufo-Addo & 2 Others v. John Dramani & 2 Others Presidential Election Petition Writ No. J1/6/2013 (Ghana); and Anderson Kambela Mazoka and 3 Others v. Levy Patrick Mwanawasa and 3 Others Presidential Petition No. SCZ/01/02/03/2002 (Zambia).

⁵⁴ The law was gazetted on 2 November 2017, and by virtue of Section 1 thereof, took effect on that same day.

⁵⁵ Other amendments reduced the role of technology in the electoral process, and vested the IEBC Chairperson with the power to announce final results of the election prior to receiving results from all the constituencies, if the Chairperson was satisfied that the results not yet received would not affect the final result.

irregularities had had a substantial effect on the results of the election.

The amendment also added the word ‘substantially’ to the provision, further raising the bar for the annulment of presidential elections in Kenya. As a result, under Section 83 of the Elections Act (as amended), the Supreme Court can only invalidate an election where it is determined that the election was not conducted in accordance with the principles laid down in the Constitution and in other written law *and* that such non-compliance *substantially* affected the result of the election. Through this measure, the Executive and Parliament in effect overturned the legal precedent which had been set by the Maraga Court in September 2017. For all intents and purposes, the most potent tool in the hands of the Judiciary for setting aside a flawed election had been fundamentally fettered. It was, of course, still possible for the Court to annul the election, but the path to such a conclusion had been made distinctly more difficult.

For his part, having achieved this emasculation of the Judiciary, President Kenyatta now distanced himself from the legal amendments. He did so in the apparent knowledge that political mileage could be claimed from the non-assent of the Bills in question, while continuing to enjoy their legal benefit. This was particularly the case given the nature of Kenya’s legal framework, whereby the Bills would come into effect

notwithstanding his non-assent to them.

The November 2017 amendment also significantly raised the threshold for invalidating presidential elections, by replacing the word ‘or’ in Section 83 of the Elections Act with ‘and’.

Taken together with the harsh political rhetoric directed against the Court, this changed legal landscape would make a repeat annulment unlikely, notwithstanding Chief Justice Maraga’s stated commitment, in the September 2017 decision to a strong judicial oversight role.

The above realities may have informed the decision by Raila Odinga not to challenge the results of the repeat election before the Court. Nevertheless, the issue as to the validity of that repeat election would again be placed before the Supreme Court by a number of parties.⁵⁷

The October 2017 Presidential Election Dispute and its Resolution by the Supreme Court

The challenge to the results of the repeat election was fashioned largely along the lines of the August 2017 petition. The petitioners alleged that there had been non-compliance

⁵⁷ It should be noted that, unlike the case in a number of other jurisdictions, the Kenyan Constitution grants the right to challenge the results of an election to ‘any person’ as opposed to restricting it to the candidates who took part in the impugned election – See Article 140 (1), 2010 Constitution of Kenya. On the other hand, for example, Article 104 (1) of the 1995 Constitution of Uganda limits the right to challenge to ‘any aggrieved candidate’.

with the requisite constitutional and legal standards and asked the Supreme Court to, once more, annul the elections. On their part, the respondents argued that the election had been conducted in substantial compliance with the requisite law, and that, in any case, any irregularities that had attended the process could not be said to have materially affected the overall outcome of the election.

A critical issue before the Court—upon which the very success of the petitions hinged—related to the legal effect of the amendment to the electoral law which had been passed following the Court’s September 2017 decision. Notwithstanding the above amendments, they came into force after the repeat elections had been conducted. Therefore, with one exception, while they remain relevant for the conduct of future elections, they were not able to inform the 26 October 2017 fresh presidential election. The one exception related to the Section 83 amendment, which concerned the threshold for annulment of presidential elections.

The results of the fresh presidential election having been challenged,⁵⁸ one of the issues before the Supreme Court was whether Court had to apply the standard under the old Section 83 (which used the word ‘or’) or that under the new Section 83 (which employed the word ‘and’ plus a threshold test of ‘substantiality’). Given the critical place of the amendment, the law was challenged before the High Court of

Kenya by the Katiba Institute and the Africa Centre for Open Governance (Africog) on 2 November 2017. An expedited hearing and determination of this case might have been useful in terms of settling the legal question in advance of the second challenge then before the Supreme Court. However, by the time the challenge to the repeat presidential election was heard, the hearing of the Katiba/Africog petition had been postponed to 5th December 2017. As such, the legal question remained unresolved at the time the results of the repeat presidential election were challenged. It thus fell to the Supreme Court to decide the validity of the amendment.⁵⁹

In the end, in a decision rendered on 20th November 2017, the Supreme Court of Kenya dismissed both petitions in a summary decision read by Chief Justice David Maraga. The Court held that the repeat presidential election had been conducted in substantial compliance with the requisite legal standards, noting that it had reached that decision after “... having carefully considered the above issues, the specific prayers in each petition, as well as the Constitution and the applicable laws.” Following a trend of Courts dealing with similarly sensitive political questions, the decision of the Court was a unanimous

⁵⁹ The High Court’s decision in this regard was eventually delivered on 6th April 2018. Justice Chacha Mwita found most of the electoral amendments (including that to Section 83 of the Elections Act) to have been unconstitutional, and declared them invalid on this basis - See <https://www.nation.co.ke/news/Judge-annuls-election-law-changes/1056-4375360-td9tpwz/index.html> (last accessed 9th April 2018).

⁵⁸ Harun Mwau and 2 Others v IEBC and 2 Others, Presidential Election Petition Nos.2 & 4 of 2017.

one. Unanimity in such circumstances allowed the Court to send a powerful signal of legal legitimacy, important in terms of calming the significant political tensions in Kenya at the time.

General observations on trends in Kenyan Electoral Legal Reform

The provisions in the Kenyan Constitution relating to electoral justice are borne out of a very specific, long and painful national history. The constitutional framework, and the legislative framework that was crafted out of it, was therefore aimed at addressing those historical injustices through ensuring, among other things, free and fair elections. In this regard, a number of issues are implicated with regard to the broader architecture of electoral justice in Kenya including:

The role of dominant political actors (and communities) in achieving electoral equity

The response by President Kenyatta to the 1 September 2017 Supreme Court decision was initially moderate although it later took a sharper turn. The most affirmative response appears to have been legislative reform which mainly took the form of a diminution of the role of technology in the electoral process, and raising the threshold for annulling presidential elections. Both these were reactive measures that amounted to a diminution of the democratic

gains that Kenya made following the enactment of the 2010 Constitution.

On the other hand, there were already early signs of a hardening of political stances on the part of the opposition under the National Super Alliance (NASA). NASA and their allies seemed to be increasingly more willing to test the limits of the law – including the very foundations of the Constitution itself. The most visible expression of this reaction was the announcement of a ‘Peoples’ Assembly’ with a roadmap for the adoption, working with County Assemblies, of a new constitutional compact. Although the trend has been temporarily halted by a High Court order,⁶⁰ this is only a temporary respite,⁶¹ and the stage is set for a much larger clash between the dominant political actors and those ethnic groups which do not see any viable path to political inclusion through the ballot. It is this larger issue that the Kenyan legal and political class will have to contend with in the coming weeks and months.

Although, as the Kitui High Court order demonstrates, part of this clash will occur in the courts of law, the more significant area of contestation will be in the political arena. In such

⁶⁰ On 21 November 2017, upon the application of an entity known as Counties Development Group, High Court Judge Lilian Mutende issued an order restraining County Assemblies from passing or implementing resolutions for the establishment of a Peoples’ Assembly.

⁶¹ The order was an interim order, aimed at preserving the status quo, pending the hearing of the substantive case in January 2018. It is not, therefore, a permanent or final order. In any case, it is liable to be set aside, if successfully appealed before the Court of Appeal.

a case, as has been the experience in a number of jurisdictions, with Zimbabwe being the most recent example, the trend has usually been for the Courts to validate political success (even where this has been achieved through illegal means).⁶²

The place of the Kenyan Supreme Court (and the Judiciary generally) as a mediator in high-stakes political disputes

Related to the role of dominant political players in ensuring electoral justice is the place of the Judiciary in overseeing electoral management and resolving high-stakes political disputes. In the 2013 presidential election dispute the Supreme Court appeared to be extremely sensitive to its relatively weak position as

compared to the political branches of government (Executive and Parliament). This attitude is clear from the following reflections of the court:

This may not be the most complex case, in terms of the relevant facts and the applicable law; but it is of the greatest importance for the following reasons: ... since the promulgation of the Constitution, its ‘non-majoritarian’ elements, such as the Judiciary and the Independent Commissions, have assumed their special roles; but the ‘majoritarian’ elements, in the form of a popularly elected Legislature and Executive, were still in abeyance; ... the cardinal role of implementation of the principles and terms of the Constitution of Kenya, 2010 rests with the *Executive Branch*, acting through laws emanating from the Legislature, and subject to the restraints of the Constitution itself and the law, as superintended by the Judiciary; and hence the electoral process which now sets the Presidency afoot, in the provision of national leadership, is all-important to the people of Kenya; ... although the Supreme Court has been in place for about one year-and-a-half, charged with the obligation to ‘assert the supremacy of the Constitution and the sovereignty of the people of Kenya’ ... it is only now that it has the first opportunity to consider the vital question as to the *integrity of a Presidential election*, and, therefore, the scope for the new Constitution to anchor its processes on the operations of a lawful Executive Branch; and ... this is the first

⁶² There is judicial precedent for the notion that illegal acts or revolutions, where they succeed in overthrowing previously established legal orders, are thus rendered legally valid. As pointed out in that Brief, the most prominent theory in this regard is that of the ‘revolution in law’ advanced by Professor Hans Kelsen – see Hans Kelsen, *General Theory of Law and State* (Anders Wedberg trans., 1961) – and one which has received judicial affirmation in a number of cases such as: *State v. Dosso* (1958) P.L.D. S. Ct. 533 (Pakistan); *Uganda v Commissioner of Prison, Ex Parte Matovu* (1966) E. Afr. L.R. 514 (Uganda); *Madzimbamuto v Lardner-Burke* [1968] 3 All E.R. 561, 573-74, 578 (P.C.) (English Privy Council, acting as Appellate Court for present-day Zimbabwe, minority decision of Lord Pierce); *Valabhajiv v Controller of Taxes Civil Appeal No.11 of 1980* (Seychelles); *Mitchell v. Director of Public Prosecutions* (1986) L.R.C. Const. 35 (Grenada); *Mokotso v. King Moshoeshoe II* (1989) L.R.C. Const. 24 (Lesotho) and *Matanzima v. President of the Republic of Transkei* [1989] 4 S. Afr. L.R. 989 (Transkei). However, again as highlighted in that Brief, other theories include the doctrine of necessity – upheld in *Bhutto v. Chief of Army Staff 1977* P.L.D. S. Ct. 657 (Pakistan) and *Mitchell v. Director of Public Prosecutions* (1986) L.R.C. Const. 35 (Grenada); and the Political Question doctrine.

test of the scope available to this Supreme Court, to administer law and justice in relation to a matter of the expression of the *popular will* – election of the President ...⁶³ [Emphasis in the original]

Later in the judgment, the Supreme Court again referenced the importance of the position of President, and reflected upon its own place in the resolution of disputes arising in this regard:

... The office of President is the focal point of political leadership, and therefore, a critical *constitutional office*. *This office is one of the main offices which, in a democratic system, are constituted strictly on the basis of majoritarian expression*. The whole national population has a clear interest in the occupancy of this office which, indeed, they themselves renew from time to time, through the popular vote. ... *As a basic principle, it should not be for the Court to determine who comes to occupy the Presidential office; save that this Court, as the ultimate judicial forum, entrusted under the Supreme Court Act, 2011 ... with the obligation to ‘assert the supremacy of the Constitution and the sovereignty of the people of Kenya’ ... must safeguard the electoral process and ensure that individuals accede to power in the Presidential office, only in compliance with the law regarding elections.*⁶⁴ [Emphasis added]

The Court’s emphasis on the majoritarian nature of the presidential mandate as compared to its own non-

majoritarian authority signalled the Court’s concern not to assert, too early in its life under the 2010 Constitution, its authority too strongly. Put differently, the Court was concerned about the implications of a limited judicial branch setting aside the results of a major political exercise, in which millions of Kenyans participated.

By contrast, the majority of the Supreme Court Justices who rendered the 1 September 2017 decision appeared to have swung to the opposite end of the spectrum, in terms of their understanding of the power of the Court, relative to the nature of the presidential election as a significant political exercise. In this regard, the Supreme Court notably observed that: “... elections are not about numbers as many, surprisingly even prominent lawyers, would like the country to believe ... Elections are not events but processes.”⁶⁵

The Supreme Court’s view of its power relative to the popular will was re-asserted in its concluding remarks:

What of the argument that this Court should not subvert the will of the people? This Court is one of those to whom that sovereign power has been delegated under Article 1(3)(c) of the same Constitution. *All its powers including that of invalidating a presidential election is not, self-given nor forcefully taken, but is donated by the people of Kenya*. To dishonestly exercise that delegated power and to close our eyes to constitutional violations would be a dereliction

⁶³ Judgment of the Supreme Court of Kenya (2013), at Para 177.

⁶⁴ Judgment of the Supreme Court of Kenya (2013), at Paras 298-299.

⁶⁵ Judgment of the Supreme Court of Kenya (2017), at Para 224.

of duty and we refuse to accept the invitation to do so however popular the invitation may seem. Therefore, however burdensome, let the majesty of the Constitution reverberate across the lengths and breadths of our motherland; let it bubble from our rivers and oceans; let it boomerang from our hills and mountains; let it serenade our households from the trees; let it sprout from our institutions of learning; let it toll from our sanctums of prayer; and to those, who bear the responsibility of leadership, let it be a constant irritant.⁶⁶

One other statement by the Supreme Court of Kenya in its September 2017 decision is critical to highlight, touching as it does on the previous point (the role of dominant political actors):

In this judgment, we have settled the law as regards Section 83 of the Elections Act, and its applicability to a presidential election. We have shown that contrary to popular view, the results of an election in terms of numbers can be overturned if a petitioner can prove that the election was not conducted in compliance with the principles laid down in the Constitution and the applicable electoral law. Never has the word ‘OR’ been given such a powerful meaning. Why did we do that? ... We did so because as Judges we have taken an oath (as advocates first and as Judges later). In the two oaths, the fundamental words are fidelity to the Constitution without fear or favour. The constitutional

principles that we have upheld in this judgment were embedded and became a critical part of our electoral law. *The Legislature in its wisdom chose the words in Section 83 of the Elections Act and in keeping to our oath, we cannot, to placate any side of the political divide, alter, amend, read into or in any way affect the meaning to be attributed to that Section.*⁶⁷

Therefore, the Supreme Court variously justified its authority on the basis of the delegation of power conferred on it by the people of Kenya, as well as in terms of its faithful application of the law as enacted by the ‘the Legislature in its wisdom’.

It is evident that the September 2017 Supreme Court was a much bolder one than the 2013 one. At the same time, following the intense pressure it faced from the Executive branch following its September decision, there are many signs that the Supreme Court headed by Chief Justice Maraga will move towards the more deferential attitude of the 2013 Supreme Court headed by Chief Justice Mutunga. One of the most prominent of these signs was the approach by the Supreme Court towards the November 2017 challenges to the results of the fresh presidential election (with less far ranging orders granted for discovery and the expunging of internal IEBC Memos among others) and the eventual unanimous dismissal of those petitions.

⁶⁶ Judgment of the Supreme Court of Kenya (2017), at Para 399.

⁶⁷ Judgment of the Supreme Court of Kenya (2017), at Paras 389-390.

In my view, both the September and November 2017 decisions of the Supreme Court of Kenya were important in terms of advancing the achievement and understanding of electoral democracy in Kenya and the rest of the world. The decision of 1st September 2017, as unexpected as it was, was an important signal to the Kenyan political establishment of the Court's capacity to decisively intervene as an arbiter of high-stakes political disputes. In so doing, the Court introduced a much-needed element of uncertainty as to the Court's reaction when faced with flawed elections. Until that point, the expectation – almost to the point of certainty – was that no Court, particularly in Africa, could be bold enough to set aside the results of a presidential election, notwithstanding the nature or gravity of the flaws in that process. By invalidating the election, therefore, the Supreme Court struck at the heart of this certainty. All else aside, this was a major contribution to electoral jurisprudence and discourse, one with effects for jurisdictions beyond Kenya. Henceforth, in Kenya and elsewhere, Electoral Management Bodies (EMBs) and other key actors in electoral processes would have to contend with the possibility of a judicial body doing 'a Maraga' and annulling the results of an election. Such knowledge should be an important mechanism for checking impunity and improving electoral integrity.

For its part, the decision of 20th November 2017 showed that the Supreme Court had the capacity to

respond to political and economic realities when necessary. It was evident that the political process by that time had been tested to near breaking point. The repeat elections had been successfully boycotted by the Raila faction and there was no guarantee that future elections would fare any better. In economic terms, too, there was little appetite for another election. The August 2017 general election cost USD 480 million; while the repeat election of October 2017 was estimated to cost another USD 117 million.⁶⁸ The uncertainty triggered by the long political impasse slowed domestic economic activity and dampened foreign direct investment. In sum, there was little to be gained, politically or economically, from yet another election, on the one hand, and much to be lost, on the other.

The Supreme Court did its part and could hardly be faulted, at this point, for shelving the tools at its disposal, and allowing the fundamentally political impasse to ultimately be resolved by the principal political actors in question. The myth of inevitable judicial deference to high stakes political disputes was fundamentally challenged in the September 2017 decision. Having achieved this, the decision of November 2017 to uphold the repeat presidential election neither diminished the Court's standing, nor affected the utility or validity of the precedent it had established

⁶⁸ See <https://qz.com/1074031/elections-in-kenya-2017-presidential-election-re-run-in-october-will-cost-117-million/> (last accessed 9 April 2018).

in September 2017. In its most substantial aspects, the September 2017 decision remains as a warning for political actors around the world as to the consequences of arranging flawed elections. In the similar vein, it stands as a guide post for Courts around the world as to the possibilities open to judiciaries faced with umpiring not just presidential elections but other high-stakes political disputes.

Kenya has come a long way from the time its apex court was so deferential to executive power that on two occasions presidential petitions were dismissed on technicalities rather than being heard and disposed of on their substance.⁶⁹ In the wake of resurgent judicial power under the 2010 Constitution of Kenya, the Supreme Court is, and will likely continue to be, an important actor in the resolution of high-stakes political disputes. This trend is not restricted to Kenya, but is part of a global drift

in this regard.⁷⁰ As Kwasi Prempeh has observed:

The growing judicialisation of elections, especially outside the long-established democracies, is one of the fruits of the ‘third wave of democratization’. It also reflects the fact that, the rise of competitive multiparty politics in post-authoritarian democracies has been accompanied by the emergence of independent and assertive courts.⁷¹

Instrumentalisation of the law and courts as part of broader socio-political struggles

For all intents and purposes the 2010 Constitution heralded a new era for democratic reform in Kenya and was meant to act as a bridge between the country’s problematic past, and a new future in which the collective dreams of Kenyans could be realized. A pillar of this new dispensation was the strong foundation laid for robust public interest litigation which, it was hoped, would go a long way

⁷⁰ For the global trend towards the judicialisation of politics, see: R Hirschl (2004) Towards juristocracy: The origins and consequences of the new constitutionalism (2004); R Hirschl ‘The new Constitution and the judicialisation of pure politics worldwide’ (2006) 75 Fordham Law Review 721 available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4205&context=flr> (last accessed 9 April 2018); J Oloka-Onyango (2017) When courts do politics: Public interest law and litigation in East Africa; H Kwasi Prempeh ‘Comparative perspectives on Kenya’s post-2013 election dispute resolution process and emerging jurisprudence’ in C Odote and L Musumba (eds) (2016) Balancing the scales of electoral justice: Resolving disputes from the 2013 elections in Kenya and the emerging jurisprudence at 150-151; CN Tate and T Vallinder (eds) (1995) The global expansion of judicial power and M Shapiro and AS Sweet (2002) On law, politics, and judicialisation.

⁷¹ Kwasi Prempeh (n 147 above) at 150-151.

⁶⁹ Kenneth Stanley Matiba v. Daniel Arap Moi(1993) and Mwai Kibaki v. Daniel Arap Moi(1999).

towards realizing the promise of that document—including the promise of electoral justice. In many ways, Kenyan citizens and lawyers have lived up to this task, and a number of cases have helped to articulate and define key constitutional principles. Through litigation, for instance, the following were determined: the date of the first elections under the 2010 Constitution;⁷² that presidential elections results should be the first to be announced;⁷³ that the Supreme Court has jurisdiction to hear appeals from decisions of the Court of Appeal in electoral disputes (notwithstanding the silence of the Constitution and the Elections Act in this regard);⁷⁴ that Section 83 of the Elections Act should be read disjunctively;⁷⁵ that the term ‘votes cast’ in Article 138 (4) has to be read as ‘valid votes cast’;⁷⁶ that an election is a process, rather than an event, with the quality of that process being as significant as

the numerical results thereof;⁷⁷ that the Supreme Court has exclusive jurisdiction relating to presidential elections;⁷⁸ that presidential results announced by Returning Officers at constituency level are final and not subject to alteration by the IEBC Chairperson (and thus that Section 39 of the Elections Act and Regulation 83 (4) of the Elections (General) Regulations) were inconsistent with Articles 86 and 138 of the Constitution).⁷⁹

On the other hand, especially in respect to electoral matters, the sheer scale of litigation presents a real test for both the judiciary and the IEBC. For instance, in the wake of the August 2017 elections: 35 petitions were been lodged in respect of County Gubernatorial positions;⁸⁰ 15 in respect of Senator positions;⁸¹ 12 in respect of Women Representatives;⁸² and 98 for National Assembly seats.⁸³ In addition, the Political Parties Disputes Tribunal (PPDT), established under the Political Parties Act, appears to have handled over 560 disputes relating to

⁷² John Harun Mwau and 3 Others v Attorney General and 2 Others [2012] eKLR (High Court), to the effect that the elections take place within sixty days from the date on which the National Coalition was dissolved. The date set by the IEBC, of 4 March 2013, was subsequently affirmed by a Court of Appeal decision in *Centre for Rights Education and Awareness and 2 Others v John Harun Mwau and 6 Others* [2012] eKLR.

⁷³ IEBC v Maina Kiai and 5 Others CA No. 105 of 2017.

⁷⁴ Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others Supreme Court Petition No.2B of 2014 [2014] eKLR; *Hon Lemanken Aramat v Harun Meitamei Lempaka* Supreme Court Petition No.5 of 2014 and *Anami Silverse Lisamula v IEBC and 2 Others* Supreme Court Petition No.9 of 2014.

⁷⁵ Raila Odinga and Another v IEBC and 2 Others Presidential Election Petition No.1 of 2017.

⁷⁶ Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission and 3 Others [2013] eKLR and *Raila Odinga and Another v IEBC and 2 Others* Presidential Election Petition No.1 of 2017.

⁷⁷ Raila Odinga and Another v IEBC and 2 Others Presidential Election Petition No.1 of 2017.

⁷⁸ International Centre for Policy and Conflict and 5 Others v Attorney General and 5 Others [2013] eKLR.

⁷⁹ IEBC v Maina Kiai and 5 Others CA No. 105 of 2017. See also *Hassan Ali Joho v Suleiman Said Shahbal and IEBC* Supreme Court Petition No.10 of 2013.

⁸⁰ <http://kenyalaw.org/kl/index.php?id=7647> (last accessed 9 April 2018).

⁸¹ <http://kenyalaw.org/kl/index.php?id=7650> (last accessed 9 April 2018).

⁸² <http://kenyalaw.org/kl/index.php?id=7651> (last accessed 9 April 2018).

⁸³ <http://kenyalaw.org/kl/index.php?id=7657> (last accessed 9 April 2018).

either Party primaries⁸⁴ or to Party lists.⁸⁵ Similarly, in 2013, the IEBC Dispute Resolution Committee handled over 2000 disputes relating to Party lists and over 200 disputes relating to Party nominations.⁸⁶ The law and dispute resolution bodies in Kenya seem to have become important fora for contestation and ‘lawfare’ in which litigants have extended political struggles into the legal arena. Good examples of such lawfare include the litigation over the IEBC’s decision to award the contract for the printing of presidential ballot papers⁸⁷ as well as that over the appointment of returning officers for the fresh presidential election.⁸⁸ In both instances, through litigation, the electoral process was almost brought

to a standstill. Such action would have had significant economic, political and social consequences.

Conclusions and Recommendations

From the preceding account, it is clear that the courts of law have a critical role to play with respect to the realization of electoral democracy in Kenya and other similarly-situated countries in the region. However, there is a need for caution. As Kwasi Prempeh has noted, ‘turning election disputes over to courts does not, in and of itself, alter the inherently political character and context of such disputes ... an election petition is but a partisan fight between two rival contenders for an elective political office; a political fight that has spilled over into the courtroom’.⁸⁹ This seems to have been the experience in Kenyan electoral litigation and jurisprudence since 2010.

A survey of Kenya’s electoral history and the legal framework developed for the management of electoral disputes reveals that while the actors may differ, the issues at play have been substantially the same. The struggle has been, and continues to be, towards the achievement of an electoral system which is transparent and accountable. A comparison of the issues raised in the 2013 and 2017 petitions, for instance, reveals that voter registration, voter identification and the transmission of results

⁸⁴ <http://kenyalaw.org/kl/index.php?id=7522>(last accessed 9 April 2018).

⁸⁵ <http://kenyalaw.org/kl/index.php?id=7523>(last accessed 9 April 2018).

⁸⁶ C Odote and L Musumba ‘Introduction’ in C Odote and L Musumba (eds) (2016) *Balancing the scales of electoral justice: Resolving disputes from the 2013 elections in Kenya and the emerging jurisprudence* p.7, at footnote 45, citing the IEBC Dispute Resolution Committee Case Digest (2013).

⁸⁷ On 7 July 2017, the High Court rendered a decision nullifying the award of the tender to Al Ghurair, on the ground of the lack of public participation in the same – see *Republic v IEBC Ex Parte NASA and 6 Others*[2017] eKLR. This decision would be overturned by the Court of Appeal on 20 July 2017, citing, among others, the strict electoral timelines under the Constitution – see *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others* [2017] eKLR.

⁸⁸ On 25 October 2017 the High Court held that the appointment of Constituency and Deputy Constituency Returning Officers was illegal for failure to follow the prescribed procedures – see *Republic v IEBC Ex Parte Khelef Khalifa and Hassan Abdi Abdille Judicial Review Miscellaneous Application No.628 of 2017*. On the evening of the same day, the Court of Appeal set aside the declaration of the High Court, pending the determination of an appeal lodged by the IEBC.

⁸⁹ Kwasi Prempeh (n 147 above) at 153.

remain key challenges. As Sihanya has observed:

Election petitions in Kenya have had numerous recurring themes. These themes either relate to the substantive rights or obligations of the parties, including (academic) or social political process or procedures (i.e. the electoral process); jurisdiction of the petition (in this case the courts). Some of the core recurrent themes include the determination of whether the process was free and fair; the jurisdiction of the determining court or tribunal; the role of the relevant parties in the electoral process, and related issues. The conduct of the Electoral Management Body (EMB) has also been a major issue.⁹⁰

More fundamentally, the recurrence of these themes suggests that the Kenyan polity faces certain foundational challenges, which legal and institutional reform alone may not be able to resolve. Notwithstanding the enactment of the 2010 Constitution, the elephant in the room of electoral justice remains the challenge of how to craft a governance architecture (enshrined in the Constitution), that allows for more equitable access to and sharing of political power within the diverse ethnic communities of Kenya. This single issue (however it is presented or framed) remains at the root of the harsh political conflict played out

during the country's electoral cycles. This is the most fundamental and most urgent agenda item for political and legal reform in Kenya.

In the immediate and medium-term, it is critical that, going forward, an agenda for electoral legal and institutional reform be articulated which in the first instance is progressive rather than regressive (in terms of implementing and enhancing the recommendations made by the Supreme Court, rather than diminishing them through legislation). Secondly it should support the IEBC in its electoral management role (including through learning the lessons provided by the Supreme Court decisions of 2013 and September and November 2017). Finally, it must enhance the capacity of the Supreme Court and the entire judiciary to support the peaceful resolution of political contestation.

⁹⁰ B Sihanya 'Constitutionalism, the rule of law and human rights in Kenya's electoral process' in G Musila (ed) (2013) *Handbook on election disputes in Kenya: Context, legal framework, institutions and jurisprudence* at 42.