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CHANGE WITHOUT PROGRESS: PRESIDENTIAL ELECTION DISPUTE RESOLUTION AND ELECTORAL REFORM IN POST-2010 KENYA

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'Plus ça change, plus c'est la même chose' (The more things change, the more they remain the same) ~ Jean-Baptiste Alphonse Karr (1849)

Abstract

This article assesses the continuities and discontinuities that have attended electoral law reform in Kenya since the enactment of the 2010 Kenya Constitution. Using the presidential elections of 2013 and 2017 as main frames of reference, the article 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 beneath the legal contestations which periodically emerge during electoral cycles, lie important socio-political struggles which have their roots in the history and

* Lecturer, School of Law, Makerere University. A substantial portion of the information presented in this article was obtained over the course of a three-month period of residence in Nairobi, from September to November 2017. A number of Kenyan colleagues provided significant assistance in clarifying various points of Kenyan electoral law, including, in no particular order: Walter Ochieng Khobe, Waikwa Wanyoike, Collins Odote, Jackson Awele, Duncan Okubasu, Roseline Njogu, Eric Liyala and Kevin Nyenyire. My deep thanks to you all. Discussions with Amanda Serumaga also greatly helped to guide my thinking around the nature and purpose of law in resolving political contestation. I am similarly indebted to Joe Oloka Onyango, for his valuable and insightful comments, which significantly improved the form and substance of this work. My thanks also to the editors of the *Makerere Law Journal* (MLJ) for helpful feedback on earlier versions of this article, and to the African Development Law Institute (ADLI) for critical institutional support provided. Finally, I am grateful to the Africa Oxford Initiative (AfOX) and the Faculty of Law of the University of Oxford, for awarding me the inaugural AfOX-Law Visiting Fellowship for the period October to November 2018; and to St. Anne's College, Oxford, for the award of a Plumer Visiting Fellowship covering the same duration. These Fellowships provided a much needed opportunity for clarifying and refining the thoughts presented in this article. My deep thanks, in this regard, to Jonathan Herring, Kevin Marsh, Anne Makena, Nomfundo Ramalekana, Liora Lazarus, Imogen Goold, Antonios Tzanakopoulos, and many others too numerous to mention individually. All errors and omissions in the article, of course, remain solely mine. In addition, the views expressed herein do not necessarily reflect those of the individuals and institutions I have mentioned. The laws and politico-legal developments analyzed are as they stood on 15 December 2018.

structure of the post-colonial Kenyan state. It is these broader, and more fundamental, political questions which must be addressed if true electoral justice is to be achieved in Kenya.

1. Introduction

Few expected the Kenyan judiciary to annul the results of the August 2017 presidential election. 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.¹ The Supreme Court's annulment of the election on 1 September 2017, therefore, came as a shock to many in Kenya and around the world.

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. It then proceeds to an assessment of trends in legal reform and electoral justice in Kenya, having particular regard to the presidential elections of March 2013 and August and October 2017, and the resolution, by the Supreme Court, of disputes arising therefrom.

2. 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 enhanced ethnic and other divisions

¹ The rare examples of annulment of presidential election results include the 2004 decision in *Yuschenko vs Yanukovych* (Ukraine) and the 2010 decision in *Gbagbo vs Ouattara* (Cote d'Ivoire) – see J. Oloka Onyango, 2017, *When Courts do Politics: Public Interest Law and Litigation in East Africa* pp.256-257.

that had preceded the establishment of the post-colonial state.² 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 consolidate and enhance 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.³ After prolonged mediation by various national, regional and international actors, on 28 February 2008 then-incumbent President Mwai Kibaki and opposition challenger Raila Odinga signed an agreement spelling out terms for a coalition government, with the latter to hold 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 positions 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 an 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.⁴ The Electoral Commission of Kenya (ECK) used a manual register, the so-called 'Black Book', which had left room

² See, generally, E. S. Atieno Odhiambo 'Hegemonic Enterprises and Instrumentalities of Survival: Ethnicity and Democracy in Kenya', 2002, 61 *African Studies Review* pp. 223-249.

³ D. K. 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. 244, at Footnote 10.

⁴ Independent Review Commission Report, 2008, *The 2007 General Elections in Kenya* at p. 32.

for manipulation of the electoral roll.⁵ A major 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.⁶

At the same time, the violence provided fresh impetus for a new 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. After substantial amendments to this draft, the new version (the 'Wako Draft') was itself rejected, following intensive mobilization against the instrument led by Raila Odinga and the putative Orange Democratic Movement (ODM). The 2007-2008 post-election violence 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 country. Apart from guaranteeing the sovereignty of the Kenyan people (Article 1), it elaborately articulates the political rights of citizens, including the freedom to make political choices and the right to free, fair and regular elections based on universal suffrage, which must be guaranteed to all without unreasonable restrictions (Articles 38 and 83). The constitution also establishes a number of broad principles to ensure electoral justice, which include the freedom to exercise political rights; the requirement that no more than two-thirds of any elective public bodies be composed of persons of the same gender; fair inclusion of persons with disabilities; as well as universal suffrage and free and fair elections (Article 81). These are buttressed by the stipulation of a set of national values and principles of governance, which include: national unity, sharing and devolution

⁵ As above.

⁶ As above.

of power, the rule of law, democracy and participation of the people, equality, human rights, good governance, integrity, transparency and accountability (Article 10). In addition, the Independent Electoral and Boundaries Commission (IEBC) is established, with certain significant safeguards to ensure its credibility. For instance, a person is not eligible for appointment as a member of the IEBC if the person 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, or a member of the governing body of a political party; or holds any state office (Article 88). In the specific context of a presidential election, the constitution requires strict compliance with its provisions and those of statutory electoral law (Article 136) and enables *any person* to challenge the results of the poll (Article 140).

Evidently care was taken, in the design of the 2010 Constitution, to craft a system that would ensure electoral justice for Kenyans. In this way, the framers of the constitution sought to avoid a repeat of the electoral injustices which triggered the 2007-2008 conflict. Furthermore, 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 arising from 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’.⁷

⁷ B. Sihanya, 2017, ‘Electoral Justice in Kenya under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms’ available at <http://www.innovativelawyering.com/attachments/ElectoralJusticeInKenyaEdited.pdf> (last accessed 15 December 2018). See, further, E. Z. 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 p. 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 pp. 90-97

3. The 2013 Presidential Election Dispute: A First Test for the Post-2010 Supreme Court

In compliance with, and to further the vision for electoral justice 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;⁸ the Elections Act;⁹ and the Supreme Court Act.¹⁰ 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 pillars of the legal architecture under which the 2013 elections were conducted.¹¹ 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 technologies were 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

and F. Ang'ila Aywa, 'A Critique of the Raila Odinga vs 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 pp. 56-60.

⁸ No. 9 of 2011.

⁹ No. 24 of 2011.

¹⁰ No. 7 of 2011.

¹¹ The Public Procurement and Disposal Act, Cap 412(C) was also critical, especially in terms of establishing the rules for procurement of requisite electoral material.

Transmission System (RTS), used during the tallying and transmission of the results. On 9 March 2013, then-chairperson of the IEBC, Issack Hassan announced Uhuru Kenyatta as winner of the presidential election with 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*.¹² In that consolidated case, a number of issues were canvassed, including: (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’. Crucially, 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.¹³ 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?’¹⁴ In the end, applying this threshold, the Supreme Court upheld the election in favour of Kenyatta. Although the Supreme Court upheld the presidential poll, 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.

As Evelyn and Wanyoike have noted, the test for annulment articulated by the court, and its implications for the interpretation of Section 83 of the Election Act made it ‘an insurmountable task to challenge a declared winner of an

¹² [2013] eKLR.

¹³ Evelyn and Wanyoike (n 7 above) at p. 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’.

¹⁴ Judgment of the Supreme Court, at Para 304.

election’ and essentially protected ‘someone who may have benefited from a deficient (and unconstitutional) electoral process against a court challenge’.¹⁵ It is noteworthy, in this regard, that 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 an election 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.¹⁶ In a view that would later be reiterated in the September 2017 Supreme Court decision to overturn the August 2017 Presidential Election, Maraga further noted that an election went ‘beyond simple arithmetic’.¹⁷ This suggested that a quantitative test – which emphasized numbers of votes obtained – was not, by itself, a sufficient guide for a court assessing the validity of an election. It had to be complemented by a more qualitative enquiry into the nature of the electoral process and, in particular, a consideration as to whether this process was consistent with the requisite constitutional and statutory standards. Indeed, Maraga appeared to suggest that it was the latter test, rather than the former, which was critical. According to him, the qualitative test was ‘the major determinant of a free and fair election’ and an electoral outcome was ‘affected when the violation of qualitative factors fundamentally undermine[d] the integrity of the electoral process’.¹⁸

¹⁵ Evelyn and Wanyoike (n 7 above) at p. 101.

¹⁶ Maraga (n 3 above) at p. 270.

¹⁷ Maraga (n 3 above) at p. 271, citing *James Omingo Magara v Manson Onyongo Nyamweya and 2 Others* [2014] 5 KLR (EP) 292.

¹⁸ Maraga (n 3 above) at pp. 271-272.

There was, therefore, significant unease with the Supreme Court's ratio for its 2013 decision, especially in terms of its conceptualization, and application, of the threshold for evaluation of a presidential election.

4. Electoral Reform Ahead of the August 2017 Presidential Poll

Given the significant and varied issues raised by the 2013 poll, efforts were made to respond to the identified challenges. Those efforts culminated in the establishment, 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 from across the country. These views informed important amendments that were made to the electoral framework, including: (i) the Elections Laws (Amendment) Act 2016;¹⁹ (ii) the Election Offences Act (2016)²⁰ 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 crucial 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; such as the Biometric Voter Registration system (BVR), the Electronic Voter Identification Devices (EVID) and the Results Transmission System (RTS). The IEBC was required to develop a policy on the progressive use of technology in the electoral process,²¹ and was also mandated to ensure that the KIEMS was simple, accurate, verifiable, secure, accountable and transparent.²²

¹⁹ Act No. 36 of 2016; assented to on 13 September 2016, and in force on 4 October 2016.

²⁰ Act No. 37 of 2016; assented to on 13 September 2016, and in force on 4 October 2016.

²¹ Section 44 (2) of the Elections Act (as amended).

²² Section 44 (3) of the Elections Act (as amended).

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 elections. Furthermore, under Section 44(a) of the Elections Act (as amended), the IEBC was required to test, verify and deploy such technology at least sixty days before the general elections.

Another important amendment to the Elections Act was the introduction of Section 39(1C) under which, for the purpose 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;²³ (ii) tally and verify the results received at the national tallying centre;²⁴ and (iii) publish the polling result forms on an online public portal maintained by the commission.²⁵

There was a further amendment to the Elections Act in January 2017, by the terms of the Elections Laws (Amendment) Act.²⁶ Among other things, that amendment introduced a new Section 44(a) 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 a 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 presidential election through the enactment by the Chief

²³ Section 39 (1c) (a), Elections Act (as amended).

²⁴ Section 39 (1c) (b), Elections Act (as amended).

²⁵ Section 39 (1c) (c), Elections Act (as amended).

²⁶ Act No.1 of 2017.

Justice of the Supreme Court (Presidential Election Petition) Rules of 2017.²⁷ It was under this greatly amended legal framework, therefore, that on 8 August 2017, Kenya held its second general election under the 2010 Constitution.

5. The August 2017 Presidential Election Dispute and Resurgent Judicial Power

For many, the August 2017 election constituted yet another opportunity to progress, however haltingly, towards a more democratic and just order. Voting was largely peaceful; indeed, the preliminary views of some election observers, that the poll had been largely free and fair, appear to have been based on the absence of significant election-related violence.²⁸

On 11 August 2017, the Chairperson of the IEBC, Wafula Chebukati, announced Uhuru Kenyatta as winner of the election, with 8,203,290 votes received. After some hesitation, Raila Odinga and Stephen Kalonzo Musyoka, the candidates of the National Super Alliance (NASA) coalition, opted to file a petition before the Supreme Court, to challenge the results as declared. 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.²⁹ The petitioners alleged that the election 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.

²⁷ Legal Notice No.113.

²⁸ See 'Kenya Election 2017: AU and Commonwealth say Poll Credible' *BBC News*, 10 August 2017, available at <https://www.bbc.com/news/world-africa-40887129> (last accessed 15 December 2018).

²⁹ *Raila Odinga and Another v IEBC and 2 Others* Presidential Election Petition No. 1 of 2017.

In a majority decision rendered on Friday 1 September 2017,³⁰ the Supreme Court concluded that the election had not been conducted in accordance with the requisite constitutional and statutory requirements³¹ and directed the IEBC to organize a fresh election ‘in strict conformity’ with the applicable law, within 60 days from that date, as required by Article 140(3) of the constitution.³² In its full reasoned decision, released on 20 September 2017,³³ the Supreme Court rendered an authoritative interpretation of Section 83 of the Elections Act, to the effect that it established a disjunctive, rather than conjunctive, test for the annulment of a presidential election.³⁴ According to the majority (Chief Justice David Maraga, deputy Chief Justice Philomena Mwilu and Justices Smokin Wanjala and Isaac Lenaola), an election could be set aside either for qualitative deficiencies in terms of non-compliance with fundamental constitutional principles, or based upon a more quantitative assessment of the effect of any illegalities upon the electoral outcome.

In the event, based on a review of the evidence before it, the court found that the election had not been conducted in accordance with the constitution and the statutory law, and on that sole ground, set it aside.³⁵ The minority (Justices Njoki Ndung’u and Jackton Ojwang) would have favoured the approach adopted by the Supreme Court in 2013, which accorded greater deference to the poll results as the manifestation of the popular will.

³⁰ *Raila Odinga and Another v IEBC and 2 Others*, summary decision of the Supreme Court, available at <http://kenyalaw.org/caselaw/cases/export/140478/pdf> (last accessed 15 December 2018).

³¹ At Para 2.

³² At Para 3.

³³ *Raila Odinga and Another v IEBC and 2 Others*, full decision of the Supreme Court, available at <http://kenyalaw.org/caselaw/cases/export/140716/pdf> (last accessed 15 December 2018).

³⁴ At Paras 171-212.

³⁵ At Para 303 (‘For the above reasons, we find that the 2017 presidential election was not conducted in accordance with the principles laid down in the Constitution and the written law on elections in that it was, *inter alia*, neither transparent nor verifiable. On that ground alone, and on the basis of the interpretation we have given to Section 83 of the Elections Act, we have no choice but to nullify it’).

6. The Aftermath of the Supreme Court's September Decision

In Kenya, the court's decision of 1 September 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 characterized by significant ethnic undertones. As might be expected, supporters of the Uhuru-Ruto ticket condemned the court 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 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 decision, President Uhuru appeared to accept the decision, noting that while he disagreed with it, he would abide by it. However, his tone would soon change 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 for 'thugs') and vowed to 'revisit' the matter once the political dust had settled.³⁶ There are also indications that certain members of the Supreme Court came under intense pressure in the days following the decision,³⁷ apparently in an

³⁶ M. Fick, 'Kenyan President, Election Overturned by Court, Attacks Judiciary', *Reuters World News*, 2 September 2017, available at <https://www.reuters.com/article/us-kenya-election/kenyan-president-election-overturned-by-court-attacks-judiciary-idUSKCN1BD0ES> (last accessed 15 December 2018).

³⁷ For instance, a few days to the fresh presidential election of 26 October, Deputy Chief Justice Philomena Mwilu's driver was shot and seriously wounded – see C. Ombati, 'Deputy CJ Philomena Mwilu's Driver shot in an Attack along Ngong Road', 24 October 2017, *Standard Media*, available at: <https://www.standardmedia.co.ke/article/2001258320/deputy-cj-philomena-mwilu-s-driver-shot-in-an-attack-along-ngong-road> (last accessed 15 December 2018). It is also curious that, a day to the fresh elections, the Supreme Court was unable to realize a quorum required to consider a petition seeking to delay the poll – see K. Muthoni, 'Case to Block Election Affected by lack of Supreme Court Quorum', 26 October 2017, *Standard Media*, available at: <https://www.standardmedia.co.ke/article/2001258419/case-to-block-election-affected-by-lack-of-supreme-court-quorum> (last accessed 15 December 2018).

effort to ensure a much more restrained court, in the event of a renewed challenge of the results of the repeat presidential poll.

Besides 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's annulment of the August 2017 election was the passage and gazetting of the Election Laws (Amendment) Act, 2017. This law was gazetted on 2 November 2017 and, by virtue of its Section 1, took effect on that same day. It introduced a number of significant amendments to Kenyan electoral law. For instance, the importance of technology in the electoral process was diminished; and the IEBC Chairperson was vested with the power to announce final results of the election, prior to receiving results from all the constituencies, if satisfied that the results not yet received would not affect the final result. However, perhaps the most critical amendments introduced by this law were those related to the legal threshold for invalidating a presidential election. 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 replaced with 'and'. The effect of this particular amendment was that the test for annulment was changed from a disjunctive one, to a conjunctive one. 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 could only invalidate an election where it was 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 the above two measures, the executive and parliament in effect overturned the legal precedent which had been set by the Maraga Court in

September 2017. 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 election, but further that these irregularities had had a substantial effect on its results. As I have noted elsewhere, the use of ‘and’ (which establishes a conjunctive test) and ‘substantially’ together make it very difficult for apex courts to invalidate the results of presidential elections.³⁸ Therefore, for all intents and purposes, the most potent tool in the hands of the Kenyan judiciary for setting aside a flawed election had been fundamentally fettered by the amendments. It was, of course, still technically possible for the court to annul the results of the repeat presidential 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.³⁹ He did so in the

³⁸ See B. Kabumba, ‘How do you Solve a Problem like “Substantiality”: The Supreme Court and Presidential Elections in Uganda’, book chapter in J. Oloka-Onyango and J. Ahikire (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*, 197, 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).

³⁹ In his first speech to the nation after being declared winner of the fresh poll, Kenyatta claimed that he did not necessarily support the amendments: ‘I listened to all voices regarding rules of engagement in the run-up to the elections and decided not to sign the document because the law should be reasoned based on principles’ – see W.

probable knowledge that political mileage could be claimed from declining to assent to the Bills in question, while still being poised to enjoy the benefit of the legal framework they would establish. This was particularly the case given the nature of Kenya's legal framework, whereby the Bills could come into effect notwithstanding his non-assent to them.

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 sustained judicial oversight role. Indeed, this reality 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. It bears noting, in this regard, that unlike the case in a number of other jurisdictions, Article 140(1) of 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. On the other hand, for example, Article 104(1) of the 1995 Constitution of Uganda limits this right to 'any aggrieved candidate'.

7. Resolving the Dispute over the October 2017 Repeat Presidential Election: A Temporary Settlement Amidst a Continuing Jurisprudential Dispute

The challenge to the results of the repeat election was fashioned largely along the lines of the August 2017 petition. The petitioners⁴⁰ alleged that there had been non-compliance with the requisite constitutional and legal standards and

Mwangi, 'Election Amendment Bill becomes Law despite Uhuru's "failure" to Assent' *The Star*, 3 November 2017, available at:

https://www.the-star.co.ke/news/2017/11/03/election-amendment-bill-becomes-law-despite-uhurus-failure-to-assent_c1663813 (last accessed 15 December 2018).

⁴⁰ *Harun Mwau and 2 Others v IEBC and 2 Others*, Presidential Election Petition Nos. 2 & 4 of 2017 (Consolidated Petition).

asked the Supreme Court to, once more, annul the election. 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.

An important consideration for the court – upon which the fate of the petitions hinged – related to the legal effect of the amendments to the electoral law which had been passed following the court’s September 2017 decision. The Supreme Court had to consider whether 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 further threshold test of ‘substantiality’). Given their significance for the adjudication of presidential election disputes, among other things, the post-September 2017 amendments had been 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 Supreme Court’s determination of any petitions challenging the results of the repeat presidential election. However, by the time these petitions were heard, the hearing of the Katiba/Africog petition had been postponed to 5 December 2017. As such, the issue as to the legal threshold to be applied in determining the validity of the October 2017 presidential election remained unresolved at the time the petitions against that process and its outcome were challenged before the Supreme Court.

In the end, on 20 November 2017, the Supreme Court of Kenya dismissed both petitions,⁴¹ noting that it had chosen to uphold the repeat presidential election after ‘... having carefully considered ... the Constitution and the applicable

⁴¹ *Harun Mwau and 2 Others v IEBC and 2 Others*, summary decision of the Supreme Court, available at <http://kenyalaw.org/caselaw/cases/export/143813/pdf> (last accessed 15 December 2018).

laws.⁴² Following an emerging trend of courts dealing with similarly sensitive political questions, the decision of the court was a unanimous one.⁴³ 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.

Although the November 2017 summary decision provided finality to the immediate legal issue presented to the Supreme Court – the validity of the repeat presidential election – the question as to the legal standard applicable to this determination remained contentious. Indeed, the full reasoned of the Supreme Court, rendered on 11 December 2017, revealed that while the court had been unanimous as to the final decision, there was less consensus regarding the reasons for the decision and especially, the legal standard applicable to the resolution of presidential election disputes.⁴⁴ All six justices of the court were of the opinion that the petitioners had presented claims which were ‘of such a generic order as to lend only feeble grounds’ for a departure from the presumption of the ‘legitimacy and credibility’ of the presidential poll.⁴⁵ It was the unanimity on this point which had allowed the court to present a united front in its summary decision, rendered on 20 November 2017, to dismiss the petitions. However, with respect to the applicable legal threshold, the schism of the September 2017 decision remained. The majority of the court (Chief Justice Maraga, deputy Chief Justice Mwilu and Justices Wanjala and Lenaola, now joined by Justice Ojwang) were of the opinion that the amendments to Section 83 had no retroactive application and, therefore,

⁴² At Para 4.

⁴³ See, for instance, the unanimous decisions in *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission and 3 Others* [2013] eKLR (Supreme Court of Kenya) and *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) (Supreme Court of Uganda).

⁴⁴ *Harun Mwau and 2 Others v IEBC and 2 Others*, full decision of the Supreme Court, available at <http://kenyalaw.org/caselaw/cases/export/145261/pdf> (last accessed 15 December 2018).

⁴⁵ *Harun Mwau and 2 Others v IEBC and 2 Others*, Presidential Election Petition Nos. 2 & 4 of 2017 (reasoned decision of the court), at Para 407.

that the legal threshold for determining the validity of the election remained that under the old Section 83.⁴⁶ Having reached this determination, the majority of the court further declined the invitation to consider the constitutionality of the amendments to Section 83, on the basis that this was the subject of a pending matter before the High Court – the *Katiba/Africog* case.⁴⁷ For her part, Justice Ndung’u (who, along with Justice Ojwang, had dissented from the majority decision in September 2017) recalled that the old Section 83 had been ‘an integral part’ of the majority’s September decision.⁴⁸ In her opinion, that circumstance, taken together with the post-September 2017 legislative amendments to that provision, placed Section 83 ‘at the centre of any determination by an election court’ and that provision had to be the ‘determinate vector’ for the court.⁴⁹ In her view, therefore, the Supreme Court had the jurisdiction, and the duty, to determine the constitutionality of the post-September 2017 amendments to Section 83, since this was central to any comprehensive determination of the validity the repeat presidential election.⁵⁰ To do otherwise would be to leave ‘main issues unresolved’, create ‘a lacuna in the application of the law’ and render only ‘a partial determination’ of the dispute placed before the court.⁵¹ On these premises, upon her review of the law, she departed from the majority’s view that the amended Section 83 was not applicable to the dispute before the court. According to her, the amendments, in so far as they related to the legal threshold for the determination of a presidential election dispute, were not retroactive.⁵² As the amendments had taken effect before the filing of the election petitions before

⁴⁶ At Paras 381-384.

⁴⁷ At Paras 385-389.

⁴⁸ Opinion of Justice Ndung’u at Para 449.

⁴⁹ At Para 451.

⁵⁰ At Paras 452-457.

⁵¹ At Para 458. See also Paras 462 (‘...this court cannot shy away from determining conclusively all the issues relating to constitutional interpretation and application that arise within a presidential election...’) and 463 (‘Failure, by this court, to determine an issue that is integral to the petition would have the effect of leaving part of the dispute between the parties unresolved. In terms of Section 83, it would have the effect of leaving undetermined, the fulcrum of the election cause itself’).

⁵² At Para 473.

the Supreme Court, the court had to apply the legal threshold established under the new Section 83.⁵³ In the same vein, she was of the opinion that amendments to Section 83 were constitutional and valid, being a legitimate and deliberate exercise of legislative power.⁵⁴

A comparison of the majority opinion and that of Justice Ndung'u reveals that deep ideological cleavages in the Supreme Court remain, the brief demonstration of unity on 20 November 2017 notwithstanding. The crux of the matter remains the legal threshold for determining the validity of a presidential election, and this politico-legal issue remains very much alive. For instance, four months after the release of the Supreme Court's full reasoned decision in December 2017, the High Court's decision in the *Katiba/Africog* case was eventually delivered, on 6 April 2018.⁵⁵ In it, Judge Mwita found most of the electoral amendments (including those to Section 83 of the Elections Act) to have been unconstitutional, and declared them invalid on this basis. In terms of the amendments to Section 83 (the attempt to replace 'or' with 'and', and the inclusion of the word 'substantially') in particular, he found them to be inconsistent with the constitutional values relating to the holding of free, fair and transparent elections.⁵⁶ He noted that the majority of the Supreme Court in the December 2017 decision had deferred to the High Court's jurisdiction in this respect,⁵⁷ and that, in the circumstances, the opinion by Justice Ndung'u on this point did not bind him.⁵⁸ As might be expected, this High Court decision has been appealed to the Court of Appeal. A hearing date for the appeal is yet to be fixed, but there is, thus far, no stay or suspension of the High Court decision pending appeal. As such, for the moment, Judge Mwita's decision stands, and the old Section 83 remains the law of the land in Kenya.

⁵³ As above.

⁵⁴ At Paras 474-496.

⁵⁵ *Katiba Institute and 3 Others v Attorney General and 2 Others* [2018] eKLR.

⁵⁶ At Paras 106-119.

⁵⁷ At Para 118.

⁵⁸ At Para 119.

8. 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 crafted out of it, was aimed at bridging those historical fault lines through ensuring, among other things, free and fair elections. In this regard, a number of issues are implicated concerning the broader architecture of electoral justice in Kenya: (i) the role of dominant political actors (and communities) in achieving electoral equity; (ii) the place of the Kenyan Supreme Court (and the judiciary in general) as a mediator in high-stakes political disputes; and (iii) instrumentalization of the law, and courts, as part of broader socio-political struggles. We consider each of these in turn.

8.1 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 decisive 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 of these were reactive measures that amounted to an erosion of the democratic gains that Kenya had made following the enactment of the 2010 Constitution.

On the other hand, there were already early signs of a hardening of the political stance 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.⁵⁹ The trend was momentarily halted by an order by High Court Judge Lilian Mutende, issued in Kitui County on 21 November 2017, following an application by an entity known as Counties Development Group. The order restrained county assemblies from passing or implementing resolutions for the establishment of a Peoples' Assembly. It was, however, only an interim order, aimed at preserving the *status quo*, pending the hearing of the substantive case, which was scheduled for January 2018. In any case, it was liable to be set aside, if successfully appealed before the Court of Appeal. Nonetheless, the High Court order demonstrated that the courts could be used to restrain, even if temporarily, some of the political momentum on the part of the opposition.

However, there remained little doubt that the more significant political contestation would occur outside, and not in, the Kenyan courtrooms. If NASA could continue to mobilize the disaffection and disillusionment of its adherents, there was no telling how disruptive this could be for Kenya's tenuous political fabric. In any case, in the event NASA were successful in their efforts at political revolution, the Kenyan courts would very likely legitimize any such legal – or even illegal – victory.⁶⁰

⁵⁹ See 'Raila NASA issues roadmap to people's assembly, no turning back' *Kenya Today* 8 December 2017 available at <https://www.kenya-today.com/politics/breaking-raila-nasa-issues-roadmap-peoples-assembly-no-turning-back> (last accessed 15 December 2018).

⁶⁰ There is global judicial precedent for the notion that certain extra-legal actions, where they succeed in overthrowing previously established legal orders, might thereafter be deemed legally valid. The most prominent theory in this regard is that of the 'revolution in law' advanced by Professor Hans Kelsen – see H. Kelsen, *General Theory of Law and State* (Anders Wedberg trans., 1961). This theory 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 Moshoeshe 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). Other theories, to the same effect, include the doctrine of necessity – upheld in *Bhutto v. Chief of Army Staff* 1977

The limits of legal contestation being evident – the stage continued to be set for a much larger clash between the dominant political actors and those ethnic groups which did not see any viable path to political inclusion through the ballot. This remained the larger issue that the Kenyan legal and political class would have to contend with following the politically inconclusive repeat presidential election. There have already been a number of telling developments in this regard. To this end, a very public rapprochement between Uhuru and Raila began with a handshake between the two at a meeting at Harambee House on 9 March 2018; and continued on to a now famous hug at a National Prayer Breakfast held on 31 May 2018. It remains to be seen whether and how this détente will continue to play out – in the context of Kenya’s highly complex politico-ethnic configurations – in the run up to the next scheduled election in 2022.

8.2 The Judiciary 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 more political branches of government (executive and parliament). In this respect, the court noted that the matter before it was not ‘the most complex case’ in terms of the relevant facts and the law applicable, but that the petition was, nevertheless, ‘of the greatest importance’ in so far as it required the court ‘to consider the vital question as to the integrity of a presidential election’.⁶¹ It was

P.L.D. S. Ct. 657 (Pakistan) and *Mitchell v. Director of Public Prosecutions* (1986) LR.C. Const. 35 (Grenada); and the ‘political question’ doctrine.

⁶¹ Judgment of the Supreme Court of Kenya (2013), at Para 177.

also ‘the first test’, since the enactment of the 2010 Constitution, ‘of the scope available to [the court] to administer law and justice in relation to a matter of the expression of the popular will’ in no less a matter than the election of the President.⁶²

According to the court, the office of President was ‘the focal point of political leadership’, ‘a critical constitutional office’, and ‘one of the main offices ... constituted strictly on the basis of majoritarian expression’.⁶³ The court further noted that ‘[t]he whole national population [had] a clear interest in occupancy of [that] office’ and that it was this entire population which determined this occupancy ‘from time to time, through the popular vote’.⁶⁴ In these circumstances the court felt that ‘[a]s a basic principle, it should not be for the court to determine who comes to occupy the presidential office’, provided that the court ‘as the ultimate judicial forum’ was required to ‘safeguard the electoral process and ensure that individuals accede to power in the presidential office, only in compliance with the law regarding elections.’⁶⁵

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. The court seemed to be particularly sensitive to 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. The

⁶² As above.

⁶³ Judgment of the Supreme Court of Kenya (2013), at Para 298.

⁶⁴ As above.

⁶⁵ Judgment of the Supreme Court of Kenya (2013), at Para 299.

court notably observed that: ‘... elections are not about numbers as many, surprisingly even prominent lawyers, would like the country to believe ... [e]lections are not events but processes.’⁶⁶ The court stressed that, by its decision, it had ‘settled the law as regards Section 83 of the Elections Act, and its applicability to a presidential election’ and, further, that it had shown that ‘contrary to popular view, the results of an election in terms of numbers [could] be overturned if a petitioner [could] prove that the election was not conducted in compliance with the principles laid down in the Constitution and the applicable electoral law’.⁶⁷ The court was also of the view that the word ‘or’ had never been given a meaning as powerful as it had just done, and justified this approach on the basis of the obligation of the institution to uphold the constitution without fear or favour.⁶⁸ According to the court, the legislature had ‘in its wisdom chose[n] the words in Section 83 of the Elections Act’ and the court did not have the discretion to ‘alter, amend, read into or in any way affect the meaning to be attributed to that Section’.⁶⁹ In its view, it could not ‘to placate any side of the political divide’ do otherwise than to give that word – ‘or’ – its ordinary meaning, even if this had significant, far-reaching and unprecedented legal and political implications.⁷⁰

In addressing the notion that the court had to ensure that it did not undermine the will of the people, the court observed that it was itself ‘one of those to whom that sovereign power [had] been delegated under Article 1(3)(c) of the same constitution’.⁷¹ According to the court, ‘[a]ll its powers including that of invalidating a presidential election [were] not self-given nor forcefully taken, but [were] donated by the people of Kenya’.⁷² In such circumstances the court

⁶⁶ Judgment of the Supreme Court of Kenya (2017), at Para 224.

⁶⁷ Judgment of the Supreme Court of Kenya (2017), at Para 389.

⁶⁸ Judgment of the Supreme Court of Kenya (2017), at Paras 389-390.

⁶⁹ Judgment of the Supreme Court of Kenya (2017), at Para 390.

⁷⁰ As above.

⁷¹ Judgment of the Supreme Court of Kenya (2017), at Para 399.

⁷² As above.

felt that it would be a 'dereliction of duty' if it were to ignore constitutional violations brought to its attention.⁷³

To this end, unlike the 2013 court which appeared painfully aware of its institutional limitations and keen to avoid a clash with the more politically powerful branches, the 2017 court appeared confident in its own constitutional authority and to actually invite the annoyance of the more majoritarian branches. The attitude of the 2017 court was perhaps best exemplified by this, rather immodest, declaration of the virtue of its decision:

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.⁷⁴

It is evident that the September 2017 Supreme Court decision was much bolder than the 2013 one. In the 2017 decision the 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' to assert a much more ambitious vision of judicial power in the context of presidential election dispute resolution.

Later, following the intense pressure it faced from the executive branch after its September 2017 decision, there were many signs that the Supreme Court headed by Chief Justice Maraga would 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 in the course of the hearing of the November 2017 challenges to the results of the

⁷³ As above.

⁷⁴ As above.

fresh presidential election – with the court striking out NASA as a respondent, and expunging a number of IEBC internal Memos, among other interlocutory orders.⁷⁵

That said, the September and November 2017 decisions of the Supreme Court of Kenya were both important in terms of advancing the achievement and understanding of electoral democracy in Kenya and the rest of the world. The decision of 1 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 an apex 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 assumption. 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.

⁷⁵ During the Pre-Trial Conference held on 14 November 2017, among other things, the Supreme Court upheld an application by Uhuru Kenyatta, to strike out several IEBC internal memos, sought to be relied upon by the petitioners. It had been argued, on Uhuru’s behalf, that the memos had been illegally obtained, and that allowing them in evidence would be a violation of the confidentiality envisaged under Section 27 (2) of the IEBC Act. The Court also upheld Uhuru’s application to have the opposition coalition, NASA struck out as a respondent – See P Vidija ‘IEBC memos expunged from presidential election petition’ *The Star* 14 November 2017 available at https://www.the-star.co.ke/news/2017/11/14/iebc-memos-expunged-from-presidential-election-petition_c1669845 (last accessed 15 December 2018).

For its part, the decision of 20 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 had, by that time, been tested to near breaking point. The repeat election 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 had cost USD 480 million; while the repeat election of October 2017 was estimated to cost an additional USD 117 million.⁷⁶ The uncertainty triggered by the long political impasse slowed domestic economic activity and dampened foreign direct investment. In sum, there was generally 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 had done its part in the September decision. It could hardly be faulted, at this point, for shelving the tools at its disposal and allowing the fundamentally political stalemate to be ultimately resolved by the principal political actors in question. The myth of inevitable judicial deference to high-stakes political disputes had been fundamentally challenged by 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 in September 2017. In its most substantial aspects, the September 2017 decision continues to stand as a warning to political actors around the world regarding the consequences of arranging flawed elections. In a similar vein, it also 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, at least on two occasions, presidential petitions were

⁷⁶ See <https://qz.com/1074031/elections-in-kenya-2017-presidential-election-re-run-in-october-will-cost-117-million/> (last accessed 15 December 2018).

dismissed on technicalities rather than being heard and disposed of on their substance.⁷⁷ 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.⁷⁸

8.3 Instrumentalization of the Law and Courts as Part of Broader Socio-political Struggles

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. Among other things, it laid a strong foundation for robust public interest litigation which, it was hoped, would go a long way 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;⁷⁹ that presidential election results should be the first to

⁷⁷ *Kenneth Stanley Matiba v Daniel Arap Moi* (1993) and *Mwai Kibaki v. Daniel Arap Moi* (1999).

⁷⁸ This trend is not restricted to Kenya, but is part of a global drift towards the judicialization of politics – See R. Hirschl, 2004, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*; R. Hirschl 'The New Constitution and the Judicialization of Pure Politics Worldwide' 75 *Fordham Law Review*, 2006, at p. 721 available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4205&context=flr> (last accessed 15 December 2018); Oloka Onyango (n 1 above); 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 pp. 150-151; C. N. Tate and T. Vallinder (eds), 1995, *The Global Expansion of Judicial Power* and M. Shapiro and A. S. Sweet, 2002, *On Law, Politics, and Judicialization*.

⁷⁹ *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.

be announced;⁸⁰ 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);⁸¹ that Section 83 of the Elections Act should be read disjunctively;⁸² that the term ‘votes cast’ in Article 138 (4) has to be read as ‘valid votes cast’;⁸³ that an election is a process, rather than an event, with the quality of that process being as significant as the numerical results thereof;⁸⁴ that the Supreme Court has exclusive jurisdiction relating to presidential elections;⁸⁵ as well as 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).⁸⁶

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 lodged arising from county gubernatorial positions;⁸⁷ 15 in relation to senator positions;⁸⁸ 12 regarding women representatives;⁸⁹ and 98 for National Assembly seats.⁹⁰ In

⁸⁰ *IEBC v Maina Kiai and 5 Others* CA No. 105 of 2017.

⁸¹ *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.

⁸² *Raila Odinga and Another v IEBC and 2 Others* Presidential Election Petition No.1 of 2017.

⁸³ *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.

⁸⁴ *Raila Odinga and Another v IEBC and 2 Others* Presidential Election Petition No.1 of 2017.

⁸⁵ *International Centre for Policy and Conflict and 5 Others v Attorney General and 5 Others* [2013] eKLR.

⁸⁶ *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.

⁸⁷ <http://kenyalaw.org/kl/index.php?id=7647> (last accessed 15 December 2018).

⁸⁸ <http://kenyalaw.org/kl/index.php?id=7650> (last accessed 15 December 2018).

⁸⁹ <http://kenyalaw.org/kl/index.php?id=7651> (last accessed 15 December 2018).

addition, the Political Parties Disputes Tribunal (PPDT), established under the Political Parties Act, handled over 560 disputes relating to either party primaries⁹¹ or party lists.⁹² Similarly, in 2013, the IEBC Dispute Resolution Committee handled over 2000 disputes relating to party lists and over 200 disputes relating to party nominations.⁹³ The law and dispute resolution bodies in Kenya seem to have become important mechanisms and fora for contestation and ‘lawfare’⁹⁴ through 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 papers⁹⁵ as well as that over the appointment of returning officers for the fresh presidential election.⁹⁶ In both instances, through litigation, the electoral process was almost brought to a standstill – a

⁹⁰ <http://kenyalaw.org/kl/index.php?id=7657> (last accessed 15 December 2018).

⁹¹ <http://kenyalaw.org/kl/index.php?id=7522> (last accessed 15 December 2018).

⁹² <http://kenyalaw.org/kl/index.php?id=7523> (last accessed 15 December 2018).

⁹³ 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).

⁹⁴ I use this term in the sense initially envisaged by Carlson and Yeomans who, in criticizing the Western legal tradition, noted that: ‘The search for truth is replaced by the classification of issues and the refinement of combat. Lawfare replaces warfare and the duel is with words rather than swords’ – see J. Carlson and N. Yeomans, ‘Whither Goeth the Law – Humanity or Barbarity’ in M. Smith and D. Crossley (eds), 1975, *The Way Out: Radical Alternatives in Australia* at p. 155. For a more recent conceptualization of the term, see C. J. Dunlap Jr ‘Lawfare Today: A Perspective’, 3 *Yale Journal of International Affairs*, 2008, at p. 146 (defining it as ‘the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective’. See also, generally, O. F. Kittrie, 2016, *Lawfare: Law as a Weapon of War*.

⁹⁵ On 7 July 2017, the High Court rendered a decision nullifying the award of the tender to AI 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.

⁹⁶ 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.

circumstance which would have had significant economic, political and social consequences.

9. Conclusion

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. However, there is a need for caution. As Kwasi Prempeh has noted, a legal challenge to an electoral outcome does not necessarily diminish the ‘inherently political character and context’ of the dispute in question.⁹⁷ An electoral petition remains essentially ‘a partisan [and] political fight that has spilled over into the courtroom.’⁹⁸ 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 fair, transparent and accountable. A comparison of the issues raised in the 2013 and 2017 petitions, for instance, reveals that voter registration, voter identification and transmission of results remain key challenges. As Sihanya has observed, legal challenges to electoral outcomes in Kenya have reflected ‘numerous recurring themes’, including the quality of the electoral process, the jurisdiction of the court, the actions of the various political players and the role of the body charged with conducting the election.⁹⁹ The recurrence of particular themes in electoral litigation suggests that the Kenyan polity faces deep foundational tensions, which legal and institutional reform alone may not be able to resolve.

⁹⁷ Kwasi Prempeh (n 78 above) at p. 153.

⁹⁸ As above. See also, generally, Oloka Onyango (n 1 above).

⁹⁹ 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 p. 42.

Notwithstanding the enactment of the 2010 Constitution, the elephant in the room of electoral justice remains the challenge of crafting a governance architecture which can allow for more equitable access to, and sharing of, political power within the diverse ethnic communities of Kenya. This single issue, however variously presented or framed, remains at the root of the harsh political conflict played out during the country's electoral cycles. It remains perhaps the most critical agenda item for politico-legal consensus and reform in Kenya.

In addition, in the immediate and medium-term, it is important 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 the recommendations made by the Supreme Court in its 2013 and 2017 decisions, rather than diminishing them through legislation. Secondly, it should support the IEBC in its electoral management role, again through following the guidance provided by the Supreme Court's post-2010 decisions. Finally, it must enhance the capacity of the Supreme Court and the entire judiciary to ensure the peaceful resolution of high-stakes political disputes.

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