BUDDING DEMOCRACY OR JUDICIALISATION

LESSONS FROM AFRICA'S EMERGING ELECTORAL JURISPRUDENCE

EDITED BY
CHRISTOPHER MBAZIRA
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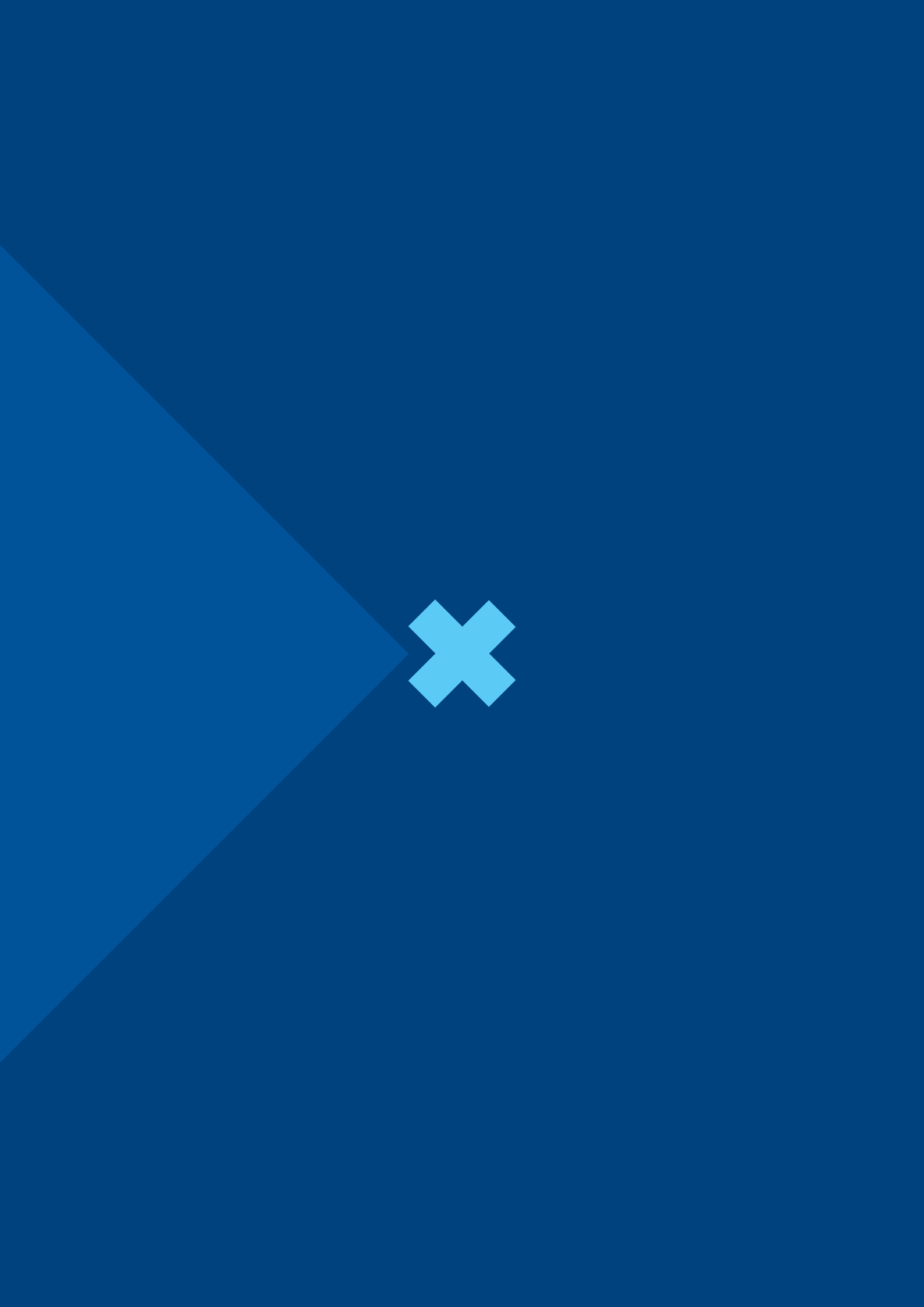

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FOREWORD

Elections are an important tool for promoting democratic governance in a country. They provide an opportunity for citizens to choose their leaders, ultimately determining their fate. Electoral processes test a country's political stability, social cohesion, and the levels of tolerance for diversity. This is in addition to testing the legal tenacity of the country and its judicial institutions. However, although elections are supposed to be a source of joy and a celebration of political and social diversity, they have been a source of tears in many African countries. In some countries, elections have been the subject of coercion, violence, and manipulation, becoming more of a divisive than a unifying factor. This has, among other things, arisen from weaknesses in the safeguards in place to avoid this, including weak legal frameworks, weak judicial institutions, and the militarisation of politics. Nonetheless, some African countries have exhibited resilience. These have, despite several obstacles, been able to build effective safeguards and organised free and fair elections. This has, among other things, come because of effective legal frameworks, resilient political actors, and judicial institutions committed to uploading the law.

It is against the above background that this book should be understood. The book examines the diverse approaches some African countries have taken in managing their elections. It focuses on the way the law has dealt with different matters that emerge in the electoral processes, from the pre-election period, election period, to the post-election period. Indeed, the quality of an election is determined at all stages of the electoral cycles. For instance, failure to resolve pre-election disputes can be a source of conflict that could escalate into violence. The same is the case during both the election and post-election period. The law must, therefore, provide all the necessary safeguards to resolve the disputes. This requires legal institutions that are mandated to discharge their duties in a transparent, free, and fair manner. In addition, the law must define principles and put in place systems to manage internal political party matters. It is only then that the law can support the building of strong political parties and nurture multi-party democracy.

This book showcases the approaches that select African countries have taken in managing their elections. The well-researched and written chapters explore various issues that afflict almost all African countries. This includes the role of traditional leaders, the approach of internal party dispute resolution mechanisms, electoral management body systems and judicial approaches. In an illuminating manner, the book discusses the sticky issue of the role of technology in managing elections. The book illustrates both shortcomings and best practices.

Perhaps what the book does not fully consider is whether other forms of electoral processes and justice are possible. Is it time to interrogate and problematize, and exorcise the liberal virus in our electoral processes? How can we, in our African poor apologies for liberal democracies, deal with dominance of wealth, foreign interests, technology, artificial intelligence and public relations agencies that make our citizens queue up to vote only for their will to be subverted by all these forces? Of course, this issue is tied up with the quest for alternative and radical political leadership in Africa that, going forward, will face the imperialism of the West and East. It is this leadership that will participate in dialogues about the overthrow of the unaccepted and sustainable status quo on the different planet.

I would like to recommend this book to all persons and institutions involved in election management processes on the continent, especially those involved in electoral law reform, implementation of electoral laws, and adjudication of electoral disputes. The issues raised and discussed in the book should inform electoral reforms, guide effective management of electoral processes and adjudication of electoral disputes.

HON DR. JUSTICE WILLY MUNYOKI MUTUNGA

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Retired Chief Justice of the Republic of Kenya and former
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CHAPTER 1

INTRODUCTION

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INTRODUCTION

Elections are the time-tested method of enabling all citizens to choose their political leaders and ensuring representation in governance of different interests. There is no other more safe and peaceful means of ensuring that people select their leaders in a manner which is measurable and verifiable. Moreover, the periodic nature of elections makes regular changes of leadership possible and gives opportunity to those that desire change in society to make their interests and agendas known. Elections are also a sure means of bringing leaders to account and to evaluate their performance. Indeed, elections are one of the key ways of ensuring that people take part in their governance.

It is based on this, among others, that the rights related to political representation and the right to vote are guaranteed in several international instruments. The *Universal Declaration of Human Rights* (UDHR) guarantees everyone the right "to take part in the government of his country, directly or through freely chosen representatives."[1] The *International Covenant on Civil and Political Rights* (ICCPR) is even more forthright on the right to vote.[2] It guarantees every citizen the right to "vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."[3] As seen above, this provision goes on to prescribe the standards to which elections should adhere, which includes "universal and equal suffrage," "secret ballot," and "free expression of the will of electors." To be effective, these rights need to be accompanied by other political rights, such as freedom of speech, freedom of assembly and association, the right to an effective remedy, and freedom from discrimination and equality before the law. These standards have been supplemented by further treaties and developed by the relevant treaty monitoring bodies.[4] These standards are affirmed by the United Nations throughout its work. For instance, the United Nations Secretary General is quoted saying that:

> The credibility of an election is closely related to the extent to which (a) the democratic principles of universal suffrage and political equality and other international obligations are respected and (b) the election is professional, accurate, impartial and transparent in all stages of its administration."[5]

For its part, the *African Charter on Human and Peoples Rights* (ACHPR) guarantees every citizen "the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."[6] The *African Charter on Democracy, Elections and Governance* (ACDEG) is more forthright and more detailed.[7] The ACDEG's adoption by the African Union (AU) was informed by the need "to entrench in the Continent a political culture of change of power based on the holding of regular, free, fair and transparent elections conducted by competent, independent and impartial national electoral bodies."[8]

Elections in Africa need to be understood against the backdrop of the history of the continent as related to democratisation. It has been demonstrated that Africa has gone through two phases of what has been described as "liberation."

1 Universal Declaration of Human Rights, adopted and proclaimed by United Nations General Assembly Resolution 217 A (III) of 10 December 1948, Article 21(1).
2 International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.
3 ICCPR, Article 25(a).
4 The International Convention on the Elimination of All Forms of Racial Discrimination 1966, the Convention on the Elimination of All Forms of Discrimination Against Women 1979, the Convention on the Rights of Persons with Disabilities 2006 and the United Nations Convention Against Corruption 2003.
5 United Nations *Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization - Report of the Secretary-General* 2011(A/66/314).
6 African Charter on Human and Peoples Rights, adopted at the 8th Assembly of Heads of State and Government of the Organisation of African Unity, June 1981, Article 13(1).
7 African Charter on Democracy, Elections and Governance, adopted by the African Union Eight Ordinary Session of the Assembly, Addis Ababa, Ethiopia, 30th January 2007.
8 ACDEG, preamble, para 8.

The first liberation is said to have come between the 1960s and 1970s, when several states emerged after gaining independence from the colonial powers.[9] This phase was characterised by the emergence of nationalist states, with many, after a short time, establishing one-party states. There were only a few exceptions.[10] The second phase came in the 1990s, when many countries ended one-party rule and embraced multi-party systems, at least on paper, holding periodic elections. In many countries, however, the elections were characterised by ruling parties dominating the elections over a weak, fragmented, and in some cases, repressed opposition, and by only limited enjoyment of wider political rights such as freedom of expression and of association.[11] These are characterised as "limited democracies."

Since then, elections have become a source of both excitement and misery in many African countries. Said Adejumobi in a piece written as early as 2000 summarised the scepticism with elections in Africa:[12]

> The precepts, structures and processes of elections are mostly characterized by reckless manipulations, the politics of brinkmanship and subversion. Thus, the role and essence of elections in a democracy are highly circumscribed in terms of expressing the popular will, engendering political changes and the legitimation of political regimes. The present tendency is to regard elections not as catalyst, but as a devalued element of the democratic process in Africa.[13]

"SINCE THEN, ELECTIONS HAVE BECOME A SOURCE OF BOTH EXCITEMENT AND MISERY IN MANY AFRICAN COUNTRIES"

In some countries, elections became the new "*coup d'état*," replacing the overthrow of political leaderships using military force and were characterised by reprisals against agents and supporters of subdued regimes. Elections became the new tool of political legitimation, a strategy to put a veneer of democracy on military regimes. Pseudo-democracies emerged, holding regular but "bogus" elections characterised by use of force against opposition leaders and their supporters. Ballot box stuffing and outright alteration of election results became the order of the day. This has been the foundation of democratisation on the Continent. According to *The Economist*, "most leaders now seek at least a veneer of respectability; elections have become more frequent and more regular."[14]

Although things have been changing, there has not been a uniform approach across the continent. Some countries have been able to "sanitise" their electoral processes, in some cases progressively building democratic elections. Some countries have remained stuck. What is clear, though, is that progress in many countries has been a result of the struggles of several stakeholders. This has included advocates for law reform, election observers, inter-governmental agencies, political groups, academicians, and the courts. All these actors have worked both independently and jointly to ensure that all stages of elections are free and fair.

In recent times, one of the key players in catalysing progress with elections are judiciaries and other quasi-judicial and administrative electoral dispute resolution (EDR) mechanisms. Courts and dispute resolution mechanisms in some countries have taken bold steps in discharging their constitutional mandate of adjudicating electoral disputes. The courts have, for instance, in some cases annulled what they adjudge to be irregular elections not held according to the law. This has in some countries included presidential elections. Moreover, the courts would not have taken the bold steps

9 Wondwosen, Teshome "Democracy and Elections in Africa: Critical Analysis" (2008) International Journal of Human Sciences 5.
10 Senegal, Namibia and Botswana are some of the examples.
11 Wondwosen, op. cit., at p 8.
12 Adejumobi, Said "Elections in Africa: A Fading Shadow of Democracy?" (2000) 21 International Political Science Review, pp. 59-73.
13 Adejumobi, op. cit., pp 59 – 60.
14 The Economist "Political reform stalls: Africa's fragile democracies," Aug 2016, available at <https://www.economist.com/leaders/2016/08/20/africas-fragile-democracies> (accessed on 17th August 2020).

they took without basing them on the legislative framework, which, to the credit of legislatures in some countries, provides a sound foundation for this.

> “THE COURTS HAVE, FOR INSTANCE, IN SOME CASES ANNULLED WHAT THEY ADJUDGE TO BE IRREGULAR ELECTIONS NOT HELD ACCORDING TO THE LAW”

The above notwithstanding, progress by the courts on the continent has not been universal. Some countries have advanced faster than others. Indeed, it is currently not possible to point to elections as defining a universal level of democracy on the continent or even independent adjudication of electoral disputes. Moreover, even for those countries that appear to have made progress, the processes are still fragile and still require nurturing. In addition, there are still jurisprudential and administrative approaches that are the subject of criticism, requiring improvement.

> “THE PURPOSE OF THE BOOK IS TO SHOWCASE PROGRESS IN JUDICIAL, QUASI-JUDICIAL, AND ADMINISTRATIVE JURISPRUDENCE IN THE ADJUDICATION OF ELECTORAL DISPUTES IN SELECTED AFRICAN COUNTRIES”

It is against the above context that this book should be understood. The purpose of the book is to showcase progress in judicial, quasi-judicial, and administrative jurisprudence in the adjudication of electoral disputes in selected African countries. The jurisprudence reviewed is with respect to disputes that arise at all stages of the electoral process: pre-election, election, and post-election. It is hoped that the critiques and information provide by this book will enhance knowledge on some of the causes of electoral disputes and how these can be adjudicated by the different dispute resolution mechanisms.

CHAPTERS IN THIS BOOK

CHAPTER TWO

Linet Sithole, Brian Dube, and Cowen Dziva in Chapter Two tackle the subject of the involvement of traditional leaders in electoral processes in Zimbabwe. In Zimbabwe, as is the case in many countries in Southern and some parts of West Africa, traditional leaders hold a special place in society, as opinion leaders and in some as wielders of political power. As a result, although in Zimbabwe they are traditionally and legally prohibited from engaging in partisan politics, they get involved in elections. The chapter demonstrates that partisan conduct of traditional leaders during electoral process contravenes national law and has been a source of electoral disputes in Zimbabwe. This notwithstanding, the authors demonstrate that there remains a dearth of legal studies with a nuanced analysis of cases regarding this conduct. It is based on this that the authors use court cases, extant literature, and election reports to explore the legally expected role and conduct of traditional leaders vis-a-vis their practices during electoral processes. The authors argue that the Constitution and relevant legislation clearly and unambiguously define the role of the institution of traditional leadership in electoral processes. It is demonstrated that despite being rigid in their application of procedural rules, Zimbabwean courts have made some key judgments against the partisan conduct of traditional leaders. The challenge, though, is with traditional leaders who defy court orders and continue to be prejudiced by politicians. The chapter argues for relaxation of court rules and procedures, respect and enforcement of judgments to reign in errant leaders.

CHAPTER THREE

Wafula Wakoko in Chapter Three uses Kenya to discuss the subject of pre-election dispute resolution. It is argued that resolution of pre-election disputes is among the bridges towards a free and fair election and that it offers an initial avenue for aggrieved parties to seek redress. Kenya's law bestows the jurisdiction for settling pre-election disputes on the Independent Electoral and Boundaries Commission, among other bodies. The chapter explores how the EDR framework is central to electoral integrity under the Kenyan framework. Examined is the sufficiency of laws and structure of political party politics. Also discussed is the subject of dispute resolution in the context of the following issues: the operational setting, Electoral Code of Conduct, nomination rules, Party primaries, allocation of special seats by use of Party lists, independent candidates, and registration of candidates for elections. It is noted that EDR alone cannot solve the problem of violence in elections. Compliance with existing laws, continued capacity building of EMBs and courts, timely review of laws, demilitarisation of elections, and voter education are just but some of the factors that must be given life.

CHAPTER FOUR

Dzikamai Bere in Chapter Four discusses the law and practice during the pre-election period. Dzikamai opines that elections in most African countries are a nightmare, usually associated with violence and fraud, and are a breeding ground for conflict that will take decades to resolve. Based on this, the author sets out to discuss some of the issues that could arise during the pre-election period and their impact. In doing this, the author analyses jurisprudence and best practices in the pre-election period and the election environment. The chapter looks at the role of the courts in EDR, as well as the question of political violence and its impact on participation. This is followed by an analysis of the rationale of such frameworks and any supporting mechanisms, using mainly Zimbabwean and South African cases. In this, the chapter also maps best practices and their impact on elections. The chapter analyses the link between the pre-election environment and election outcomes. It discusses the infrastructure for promotion of a credible election, which includes peaceful dispute resolution. Particular attention is given to the judiciary and the role of information in activating participation, especially of marginalised groups in Africa. The chapter concludes by making a set of recommendations aimed at bridging the gaps in law and practice in relation to the creation of a conducive pre-election environment.

CHAPTER FIVE

Muriuki Muriungi in Chapter Five assesses emerging jurisprudence from Kenyan courts and other EDR forums on the resolution of pre-election disputes. The chapter analyses the various forms of pre-election disputes that form the subject of adjudication in EDR bodies and which have a bearing on the integrity and outcome of elections. These include, among others, political party nomination disputes; eligibility of voters and candidates to participate in elections; and instances of electoral malpractice, including voter bribery and violence before elections or during nominations. This is in addition to whether a candidate has met the qualification criteria set in law to contest for a particular elected office. The review of emerging jurisprudence is intended to help in documenting and critiquing existing knowledge and underlining the importance of pre-election disputes. The chapter demonstrates that this subject has received scant scholarly attention relative to post-election disputes, and this assessment is also consistent with the emerging consensus that an election is not an event but a process.

CHAPTER SIX

Tarisai Mutangi in Chapter Six uses emerging jurisprudence to discuss the approach of the courts to the subject of the standard of proof in election disputes. The chapter is premised on the high failure rate prevalent across the continent. The author argues that petitioners find it almost impossible to reverse an election result based on allegations of electoral malpractices, fraud or any other grounds allowed by the law of each country. One of the causes of this is that there is no consensus among sub-Saharan countries whether election proceedings are civil or criminal. This has a bearing on the standard of proof required. In addition, the Chapter shows that there is consensus that the petitioner bears the onus of proving that the election was not conducted in accordance with the law or that there were irregularities that had the effect of affecting the result in a "substantial manner," and further that onus shifts to the respondent to rebut the petitioner's prima facie case. In addition, there is no consensus on the standard of proof, with some jurisdictions using the balance of probabilities, others proof beyond reasonable doubt, while a few use the "intermediate standard." Other jurisdictions have rejected this approach in preference for a human rights-based approach that makes the effective exercise of the right to vote the primary consideration. The author concludes that there is no basis for elevating the standard of proof in election petition proceedings to a level higher than any other proceedings. Where civil allegations are made, the petition should prove to the civil standard, but where criminal allegations are made, to a higher standard, if appropriate.

CHAPTER SEVEN

Godfrey Mupanga in Chapter Seven, just like Tarisai, discusses the subject of the standard of proof. He illustrates that the superior courts in Zimbabwe have often ruled that the standard required to overturn an election result is the more onerous proof beyond reasonable doubt as opposed to proof on a balance of probabilities. In this, the author uses the recent presidential election petition in *Nelson Chamisa v Emmerson Dambudzo Mnangagwa & Others*, to show how the Constitutional Court avoided engaging with proof on a balance of probabilities and proof beyond a reasonable doubt. Instead, complicating the subject, the Constitutional Court opted to simply state that the petitioner must prove his case to *the satisfaction of the court*. The Chapter assesses the reasoning of the courts in preferring the more onerous standard in cases that are purely civil in nature. It is argued that because an election petition is a civil case, the standard of proof should be "proof on a balance of probabilities" or some other way of putting it that keeps the standard at that level as the High Court of Malawi has recently settled the matter. It does not matter that the issues in contention are serious or that they constitute criminal offences attracting lengthy periods of imprisonment. The author recommends that in Zimbabwe, perhaps, this matter requires legislative intervention.

CHAPTER EIGHT

Marystella Auma Simiyu in Chapter Eight examines the preparedness of the courts in handling election-related digital threats, drawing from the experiences of the 2013 and 2017 Kenyan elections. She applauds the 2017 decision of the Supreme Court for upholding the constitutional standard for a genuine, free, and fair election. The Chapter further discusses new and emerging digital threats to electoral systems and what Kenyan courts and relevant stakeholders need to do to ensure that they are well-equipped to effectively provide redress and jurisprudential guidance. The author particularly cautions against the growing effect of disinformation on the voting process, an aspect that is untested in Kenyan courts.

CHAPTER 2

INTERROGATING THE INVOLVEMENT OF TRADITIONAL LEADERS IN ELECTORAL PROCESSES IN ZIMBABWE

LINET SITHOLE*, BRIAN DUBE & COWEN DZIVA*****

ABSTRACT

The partisan conduct of traditional leaders during electoral process contravenes national law and has been a source of electoral disputes in Zimbabwe. However, there remains a dearth of legal studies, with a nuanced analysis of cases regarding this conduct. Using court cases, extant literature and election reports, and this chapter explores the legal expectations for the role and conduct of traditional leaders during electoral processes. The chapter argues that the Constitution and relevant legislation clearly and unambiguously define the role of the institution of traditional leadership in electoral processes. Moreover, the chapter argues that despite being rigid in their application of procedural rules, Zimbabwean courts have made some key judgements against the partisan conduct of traditional leaders. The challenge, however, remains that of traditional leaders who defy court orders. The chapter vouches for relaxation of court rules and procedures and demands respect for and enforcement of court judgements.

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INTRODUCTION

In some parts of Africa, traditional leaders remain the main form of government for the rural populace. This is the case in Zimbabwe, where the Constitution,[1] read together with the Traditional Leaders Act [Chapter 27:17], establishes traditional leadership. These laws prohibit traditional leaders from engaging, directly or indirectly, in partisan politics.[2] However, existing literature[3] and election reports[4] point to traditional leaders' active participation in politics. This is especially true with respect to influencing electoral outcomes in favour of the ruling Zimbabwe African National Union Patriotic Front (ZANU PF) party. Important as these studies are, however, they lack nuanced case law analyses that build jurisprudence on the involvement of traditional leaders in electoral politics.

This chapter, therefore, seeks to fill the void described above and provides analysis of the law *vis-a-vis* the practice, backed with cases on the conduct of traditional leaders in partisan politics. Thus, the chapter contributes to the existing literature on the legally defined role of traditional leaders *vis-a-vis* their conduct during elections in Zimbabwe. Beyond this debate, the chapter critiques existing jurisprudence with regard to traditional leadership's involvement in electoral processes, making use of judicial cases, quasi-judicial cases, and extant literature in Zimbabwe. A study of this nature builds a case for consolidation of democracy by imploring litigants to implead effectively for de-politicisation of traditional leaders and the greater consolidation of inclusive and competitive democracy.

METHODOLOGY AND STRUCTURE OF CHAPTER

Methodologically, the chapter relies heavily on extant literature from books, journals, reports, legal documents, case laws, newspaper articles, and opinions of traditional leaders. This is in addition to the views of lawyers and individuals within civil society organisations involved in electoral politics and democratisation in Zimbabwe. The chapter also benefits from the experience of the second author, who has been in electoral litigation during the 2008, 2013 and 2018 harmonised elections in Zimbabwe. The experiences of the first and third authors, who once worked as Human Rights Officers responsible for handling complaints (including election-related complaints) at the Zimbabwe Human Rights Commission, were also important and immensely benefited the study.

This chapter is divided into three sections. Section one is this INTRODUCTION and background. Section two examines the LEGAL INSTRUMENTS GUIDING THE CONDUCT OF TRADITIONAL LEADERS AGAINST THE PRACTICE IN ZIMBABWE. Section three examines the EXISTING JURISPRUDENCE ON THE INVOLVEMENT OF TRADITIONAL LEADERS IN ELECTORAL POLITICS. Section four is the CONCLUSION, which summarises the discussion and proffers suggestions on entrenching the proper conduct of traditional leadership in electoral politics and democratisation.

1 Secs 280 – 283 of the Constitution of Zimbabwe.
2 Secs 281 of the Constitution of Zimbabwe.
3 L Ntsebeza *Democracy Compromised: Chiefs and the Politics of the Land in South Africa's National and Provincial Elections* (2005) 43; C Logan 'The Roots of Resilience Exploring Popular Support for African Traditional Authorities' (2015) 27 *Journal of Contemporary African Studies* 221; T Chigwata 'The role of traditional leaders in Zimbabwe: Are they still relevant?' (2016) 20 *Law, Democracy & Development* 71; G, Mwonzora & E Mandikwaza, 'The Menu of Electoral Manipulation in Zimbabwe: Food Handouts, Violence, Memory, and Fear – Case of Mwenezi East and Bikita West 2017 by-elections' (2019) 54 *Journal of Asian and African Studies*, p 1130.
4 *European Union (EU) '2018 European Union Election Observation Mission: Final Report, Republic of Zimbabwe Harmonised Election 2018' October 2018 https://eeas.europa-eu/election-obseravtion-mission/eom-zimbabwe-2018_en (accessed 20 February 2020) 1; Zimbabwe Election Support Network (ZESN) Report of the Zimbabwe Electoral Support Network on Pre-Election Political Environment and Observation of Key Electoral Processes* (2018).

CONCEPTUALISATION AND POLITICAL MANIPULATION IN COLONIAL AND POST-COLONIAL ZIMBABWE

Traditional leadership comprises indigenous institutions of governance such as chiefs, headmen and village heads. Zimbabwe's peri-urban and rural communities are manned by close to 2,500 village heads, with each of these leaders overseeing close to 35 households.[5] The village heads report to a headman, of whom there are close to 452 countrywide.[6] A headman is a sub-chief who is accountable to the paramount chief of an area.[7] By their nature, traditional leaders remain the most respected and immediate form of local government in many of Africa's rural communities.[8] The importance of this institution also emanates from its ability in many instances to deliver various governmental responsibilities where the State is absent or has a limited presence.[9] In Zimbabwe, traditional leaders are the custodians of tradition, culture and community development in areas under their jurisdiction.[10] They play both the executive and judicial roles in their communities, enforcing customary laws and settling customary law disputes.

2500
village heads

35
households

Taking advantage of traditional leader's proximity to communities and the respect they command in many rural and peri-urban areas, politicians have manipulated this institution as a way to disseminate political information and propaganda to the grassroots.[11] In many African nations, the compromised relationship between traditional leaders and political elites dates back to the colonial era. As Chigwata has noted, "successive governments in both colonial and independent Zimbabwe have sought to maximise this strength for their respective narrow political interests."[12] In their efforts to consolidate power, the British, Portuguese and French colonialists used varied means, including indirect and direct rule systems, to co-opt traditional leaders into formal institutions. In so doing, they delegated power downward and used traditional leaders to govern subjects,[13] thereby securing reliable mouthpieces for their colonial agenda.[14] In most cases, compliant traditional leaders were relied on to mobilise natives for taxation and to provide free labour in white farms on behalf of the colonial government.[15] The locals strongly resisted this role by traditional leaders. Traditional leaders were also relied on to legitimise the colonial authority in Africa. Thus, traditional leaders acted "as brokers between colonial powers and locals, often trading their (and people's) acquiescence for material or political gods."[16]

During this colonial era, traditional leaders who complied and bowed to the demands of colonialists were handsomely rewarded, while dissenting leaders were heavily punished and removed from office.[17] The role of traditional leaders has in many

5 Centre for Conflict Management and Transformation (CCMT) *Role and responsibilities in rural local governance in Zimbabwe: parallels, overlaps and conflict* (2014) 10.
6 N Musekiwa 'The role of local authorities in democratic transition' in E Masunungure & J Shumba (eds) *Democratic Transition* (2012) 242.
7 As above.
8 Chigwata (n 3) 243.
9 As above.
10 D Kadt & AL Horacio 'Agents of the Regime? Traditional Leaders and Electoral Politics in Africa' (2018) 80 *The Journal of Politics*, 384.
11 Musekiwa (n 6) 242.
12 Chigwata (n 3) 243.
13 M Mamdani *Citizen and Subject* (1996); DT Acemolgu & AR James 'Chiefs: Economic Development and Elite Control of Civil Society in Sierra Leone' (2014) 122 *Journal of Political Economy* 323.
14 Chigwata (n 3 above) 243.
15 EG Marsh, ED Roper & DA Kotze 'Local government in Rhodesia' in WB Vosloo, DA Kotzee & WJO Jeppe (eds) *Local government in Southern Africa* (1974) 184.
16 Kadt & Horacio (n 10) 390.
17 Zimbabwe Election Support Network (ZESN) *Role of Traditional Leaders in Elections and Electoral Processes in Zimbabwe:* Position Paper (2020) 1.

instances been controversial, such as the situation in Uganda, where the Buganda Chiefdom stood out as collaborators and were used as the centre for spreading colonial rule. The colonialists, however, faced challenges in Bunyoro Kingdom, where the king was exiled for not complying with the colonisers' demands.[18] In extreme cases, such as in colonial South Africa and Mozambique, legitimate indigenous leaders were replaced with "puppet" leaders or parallel structures to undermine their authority and quell dissenting voices to colonial rule.[19]

In the post-independence era, literature also portrays traditional leadership as an avenue through which ruling parties consolidate power. As a respected institution that is closer to the people, ruling elites rely on traditional leaders to make subjects toe their partisan political lines. Chigwata notes how the ZANU PF party galvanised support from traditional leadership to deal with the rising force of the opposition Movement for Democratic Change (MDC) in rural areas since 2000.[20] Through performing varied roles that included mobilisation of party supporters and intimidating dissenting voices, the institution of traditional leadership has remained a politicised entity.[21] Although all political parties are interested in working with traditional leaders, ruling parties are often the ones who control this institution. In the case of Zimbabwe, chiefs are controlled through the Minister of Local Government, who oversees their appointment and removal and sets their conditions of service in terms of section 50 of the Traditional Leaders Act Chapter 29:17].

Indeed, traditional leaders are more likely to trade the votes of their subjects with incumbent elites, who have greater access to resources than opposition parties.[22] In Zimbabwe, the state's influence on traditional leaders also stems from the fact that the President appoints traditional leaders in accordance with the relevant and prevailing traditional culture, norms and practices.[23]

In appointing traditional leaders, the President consults with the relevant Minister responsible for traditional affairs and the District Administrator.[24] This appointment criterion leaves room for the President as the appointing authority and his party to manipulate and control traditional leaders.[25] Usually, the Ministry of Local Government, responsible for the administration of traditional leaders, is superintended by senior ZANU PF officials, such as Ignatius Chombo (2000 to 2015), Saviour Kasukuwere (2015 to 2017) and currently, July Moyo, who assumed office in November 2017. This is to ensure that the institution of traditional leaders is perpetually captured by the ruling party for partisan political benefits.

Mindful of the influence and important role of traditional leaders in societal development, the ruling party in Zimbabwe has also used state resources and power to shower benefits to this institution. In the heat of political competition, traditional leaders have received motor vehicles, fuel subsidies, household electrification and other improvements of their homes, and allowances and salaries, which are usually reviewed during the period toward elections or where key political activities or processes are taking place. This is confirmed in that chiefs were given 226 vehicles, worth $6 million, in October 2017, which was announced by the then Local Government Minister Saviour Kasukuwere ahead of the National Council of Chiefs Conference, which was to be attended by the then President of Zimbabwe R.G. Mugabe. At that time, the ruling party was facing internal turbulences, and it is believed that Mugabe wanted to buy the loyalty of the chiefs. The vehicles came with a raise in the allowance of chiefs. This was

226

vehicles worth $6m

18 P Mutibwa *Uganda Since Independence: A story of unfulfilled hopes?* (1992).
19 EG Marsh, ED Roper & DA Kotze 'Local government in Rhodesia' in WB Vosloo, DA Kotzee & WJO Jeppe (eds *Local government in Southern Africa* (1974) 184.
20 Marsh, Roper & Kotze (n 15), 287.
21 ZESN (n 18) 2; European Union (EU) (n 5) 2; Mwonzora & Mandikwaza (n 3) 1145.
22 M Slovik 'Don't Back No Losers! The Supply of Political Labor and the Political Organization of Clientelism' unpublished manuscript, 2014.
23 Sec 283 (i) Constitution of Zimbabwe 24.
24 As above.
25 C Keulder Traditional leaders and local government in Africa: Lessons from South Africa (1998) 142; J Makumbe 'Local government institutions and elections' in J de Visser, N Steytler & N Machingauta (eds) Local government reform in Zimbabwe: A policy dialogue (2010) 87; Chigwata (n 3 above) 243.

arguably payback for appreciation of the services they rendered in their areas of jurisdiction.[26] These goodies and gifts have worked to incentivise the traditional leaders to act as campaign managers and agents of the ruling party. Following his ascendency to power in 2017, President Emmerson Mnangagwa convened a forum with chiefs in the city of Gweru and offered them motor vehicles and improvement of their welfare. Critiques equated this to swaying traditional leaders' allegiance to the incumbent party and president ahead of the 2018 elections. The legal basis for the vehicles and other goodies that chiefs receive are not generally outlined as official benefits that are legitimately expected in terms of the terms and conditions of the office of a chief. They are not clearly laid down in advance but just given at the time that the ruling party decides, usually at the most convenient political period to the ruling party's interests. Mnangagwa won this election, amid stiff competition and allegations of manipulation of votes by the closest contender, Nelson Chamisa of the Movement for Democratic Change Alliance (MDC-A).[27]

As recipients of benefits and incentives from incumbent governments, traditional leaders are accused of disregarding their traditional role as they become appendages to ruling parties. As payback to ruling parties, for the goodies they receive from them, traditional leaders often mobilise supporters for the ruling party in their areas of jurisdiction ahead of elections. For these reasons, Dominika Koter labelled traditional leaders "king makers," who use their authority, power and resources to directly influence the electoral behaviour of their subjects.[28]

"AS PAYBACK TO RULING PARTIES, FOR THE GOODIES THEY RECEIVE FROM THEM, TRADITIONAL LEADERS OFTEN MOBILISE SUPPORTERS FOR THE RULING PARTY IN THEIR AREAS OF JURISDICTION AHEAD OF ELECTIONS"

Just as in the colonial era, post-independence governments have used the "carrot and stick" method to coerce the conformity of traditional leaders. For instance, three traditional leaders were threatened with demotion and expulsion by the Minister of Local Government for failing to attend a ZANU PF meeting meant to evict a former party member, Temba Mliswa from Spring Farm in Hurungwe West constituency.[29] The three leaders were accused of boycotting ZANU PF meetings because they supported and sympathized with Temba Mliswa. They were violently attacked and threatened with dethronement by the then Minister of Local Government, Ignatius Chombo.[30] This highlights the risks of being apolitical and the insecurity in the offices of the traditional leader. Similarly, Chief Nhlanhlayamangwe Ndiweni, a long-time critic of the ruling party, was stripped of his crown, jailed, and later released, and what triggered this was arguably his stance on the government's alleged human rights violations and his perceived alignment with opposition politics.[31] Many traditional leaders fear the same predicament and bow to the demands of the ruling party instead.

26 Chigwata (n 3) 243.
27 F Fayawo 'Zimbabwe's 2018 Elections: The Changing Footprints of Traditional Leaders' (2018).
28 D Koter 'King Makers: Local Leaders and Ethnic Politics in Africa' (2013) 65 *World Politics* 188.
29 *Zinyama and Ors v The State and Anor ZHRC/CI/33/15.*
30 As above.
31 'Chief Ndiweni released from prison after securing bail pending appeal' *ZimLive* 29 August 2019.

LEGISLATIVE FRAMEWORK

This section analyses the legislative framework on elections in Zimbabwe, particularly on the conduct of traditional leaders in electoral processes. The discussion focuses on the Constitution, the Electoral Act [Chapter 2:13] and the Traditional Leaders Act [Chapter 29:17].

THE CONSTITUTION [AMENDMENT NO. 20] 2013

The institution of traditional leaders is established in Chapter 15 of the Constitution. The responsibilities of traditional leaders are explained in Section 280 (2) of the Constitution. These include performing the cultural, customary and traditional functions of the community. Section 281 of the Constitution outlines the principles that traditional leaders must observe.

Section 281(1) of the Constitution states that:

1. **Traditional leaders must:**

   a. act in accordance with this Constitution and the laws of Zimbabwe;
   b. observe the customs pertaining to traditional leadership and exercise their functions for the purposes for which the institution of traditional leadership is recognised by this Constitution; and, treat all persons within their areas equally and fairly,

2. **Traditional leaders must not:**

   a. be members of any political party or in any way participate in partisan politics;
   b. act in a partisan manner;
   c. further the interests of any political party or cause; or
   d. violate the fundamental rights and freedoms of any persons.

Section 282 (1) of the Constitution then lays down the functions of traditional leaders as follows:

1. **Traditional leaders have the following functions within their areas of jurisdiction:**

   a. to promote and uphold the cultural values of their commodities and, in particular, to promote sound family values;
   b. to take measures to preserve the culture, traditions, history and heritage of their communities, including sacred shrines;
   c. to facilitate development;
   d. in accordance with an Act of Parliament, to administer Communal Land and to protect the environment;
   e. to resolve disputes amongst people in their communities in accordance with customary law; and
   f. to exercise any other functions conferred or imposed on them by an Act of Parliament.

The provisions of Section 281(2) of the Constitution require traditional leaders be refrain from partisan politics. The execution of the traditional leaders' functions necessitates the holding of public meetings. However, such meetings should not be for the purposes of "(a) furthering the interests of any party or cause; and (b) violating the fundamental rights and freedoms of any person." Such meetings must be used to advance constitutional norms and values, including access to information and political rights in election times.

The exclusion of traditional leaders from partisan politics in terms of the Constitution of Zimbabwe is peremptory. It is unconstitutional for traditional leaders to be members of any political party (including the ruling party), to act in a partisan manner, further the interests of any political party, or violate the fundamental human rights and freedoms of any person (including political rights).

> “IT IS UNCONSTITUTIONAL FOR TRADITIONAL LEADERS TO BE MEMBERS OF ANY POLITICAL PARTY (INCLUDING THE RULING PARTY), TO ACT IN A PARTISAN MANNER, FURTHER THE INTERESTS OF ANY POLITICAL PARTY, OR VIOLATE THE FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS OF ANY PERSON (INCLUDING POLITICAL RIGHTS)”

TRADITIONAL LEADERS ACT

The Traditional Leaders Act [Chapter 29:17] elaborates the role and lawful conduct of traditional leaders. Section 45 of the Traditional Leaders Act provides that:

> [I]n an election, traditional leaders are entitled to exercise their right to vote for any candidate of their choice, but traditional leaders may not stand for election to public office as president, parliamentarian or councillor. Traditional leaders may also not canvass or campaign for any candidate in an election or act as election agents or managers for election candidates. Nor any traditional leaders nominate any person as a candidate in an election for political office.

This provision is consistent with Section 281 of the Constitution, which prohibits traditional leaders from participating in partisan politics. It also prevents traditional leaders from standing for, or holding, any political office while proscribing participation in political activities. However, many traditional leaders have contested in elections under a political party ticket. For instance, during the 2018 elections, an acting Headman, one Mukahanana, contested for a seat under the ZANU PF ticket in Mutasa Central Constituency.[32] He was also accused of directing all known opposition supporters in his area to be assisted in the voting process.[33] When the issue was brought to light, the candidate opted to let go of the traditional leadership position and pursue his political campaign.

The prohibitions on traditional leaders’ partisan participation in electoral processes does not infringe their right to vote, as provided in Section 67 of the Constitution.[34] They can vote but cannot be voted for in national politics. The question that may be asked is whether the limitation on traditional leaders’ political participation is reasonably justifiable. As Makumbe has noted,[35] this requirement does not prevent traditional leaders from seeking political office. Rather, it requires traditional leaders with such ambitions to relinquish their posts before joining politics. This ensures that traditional leaders remain independent and impartial. As an important institution with a broad mandate in community development, traditional leadership must be kept outside the toxicity of political parties to retain its dignity and respect. Thus, the prohibitions on political participation are reasonably justifiable in a democratic society.

32 Zimbabwe Human Rights Commission (ZHRC), ‘2018 Harmonized Elections Report’ (2018) 20.
33 As above.
34 Sec 67 provides as follows: Political rights (1) Every Zimbabwean citizen has the right—(a) to free, fair and regular elections for any elective public office established in terms of this Constitution or any other law; and (b) to make political choices freely. (2) Subject to this Constitution, every Zimbabwean citizen has the right—(a) to form, to join and to participate in the activities of a political party or organisation of their choice; (b) to campaign freely and peacefully for a political party or cause; (c) to participate in peaceful political activity; and (d) to participate, individually or collectively, in gatherings or groups or in any other manner, in peaceful activities to influence, challenge or support the policies of the Government or any political or whatever cause. (3) Subject to this Constitution, every Zimbabwean citizen who is of or over eighteen years of age has the right— (a) to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret; and (b) to stand for election for public office and, if elected, to hold such office. (4) For the purpose of promoting multi-party democracy, an Act of Parliament must provide for the funding of political parties.
35 Makumbe (n 25) 88.

PRACTICES OF TRADITIONAL LEADERS DURING ELECTIONS

This section analyses the situation on the ground, Zimbabwe Human Rights Commission (ZHRC) case reports and extant literature to establish whether traditional leaders comply with their constitutional and legal obligations. Traditional leaders can play a pivotal role in pre-election period by mobilising residents and disseminating electoral information. In 2018, the ZHRC noted how the Zimbabwe Electoral Commission (ZEC) placed posters at chiefs, headmen and village heads' homesteads. These leaders were also given flyers and pamphlets for onward distribution.[36] ZEC and other organisations accredited to conduct voter education relied on traditional leaders for mobilisation of communities while conducting their voter registration and education exercises.[37] Working with the decentralised institution of traditional leadership, organisations disseminated election-related information through traditional and community gatherings.

Pursuant to their role in entrenching peace in society, some traditional leaders in the Midlands and Manicaland provinces called upon their subjects to shun violence during the 2018 elections.[38] Nonetheless, many traditional leaders remain accused of fanning political violence against opposition supporters in contravention of section 133A (a and c) of the Electoral Act.[39] Many of these traditional leaders also remained silent when their subjects were intimidated and suffered gruesome human rights abuses. During the elections in 2000, 2002, 2005, 2008 and 2013, violence was instigated by war veterans, youth militias and state-aligned security forces. War veterans and youth militias established camps and bases to assault and kill opposition supporters and activists.[40]

Those who survived these gruesome attacks either towed the expected political party line or migrated to other areas.

While the law obliges traditional leaders to be impartial, research shows how the institution has been used by politicians to canvass support for certain political parties. Fayawo notes how several village heads and headman in Zhombe openly supported the opposition MDC-A during the 2018 elections.[41] Some village heads were also assimilated in party structures to coordinate electoral activities.[42] There is also evidence of village heads canvassing votes for political parties, in contravention of the Electoral Act.

> "WHILE THE LAW OBLIGES TRADITIONAL LEADERS TO BE IMPARTIAL, RESEARCH SHOWS HOW THE INSTITUTION HAS BEEN USED BY POLITICIANS TO CANVASS SUPPORT FOR CERTAIN POLITICAL PARTIES"

During voter registration and education exercises, some traditional leaders misled their subjects into believing that pictures taken during the biometric voter registration process would be used to trace how people vote.[43] Some traditional leaders are also accused of tracking voting preferences of registrants whose registration slip serial numbers

36 ZHRC (n 32) 21.
37 As above.
38 Fayawo (n 27).
39 Mwonzora & Mandikwaza (n 3) 1144
40 Fayawo (n 27).
41 As above.
42 Musekiwa (n 7) 242.
43 Fayawo (n 27). *European Union (EU) (n 5 above) 2.*

they had recorded.[44] In the run-up to the 2018 elections, the ZHRC received 46 complaints regarding forced collection and recording of voter registration slip serial numbers by ZANU PF members and traditional leaders.[45] These actions were contrary to section 133A(d) of the Electoral Act.[46] They intimidated registrants, thereby undermining the integrity, fairness and credibility of the election.

> "SOME TRADITIONAL LEADERS ARE ALSO ACCUSED OF TRACKING VOTING PREFERENCES OF REGISTRANTS WHOSE REGISTRATION SLIP SERIAL NUMBERS THEY HAD RECORDED"

Some traditional leaders made it impossible for opposition political parties to freely associate and campaign ahead of the elections. In such areas, only the ruling party candidates and their colleagues were allowed to campaign. During the 2015 Hurungwe West by-election, the independent candidate, Temba Mliswa, revealed how traditional leaders participated in partisan politics in violation of the Constitution.[47] When interviewed by the ZHRC, many traditional leaders confirmed that they were strong ZANU PF supporters and that they no longer wanted Temba Mliswa to be their parliamentary representative, because he had been expelled from ZANU PF.[48]

Similarly, the 2018 elections had selective food and agricultural distribution by traditional leaders in favour of supporters of the ruling party while denying such aid to opposition supporters.[49] Several observer reports also lamented how traditional leaders were influencing the electorate by threatening to cut supply of agricultural inputs and food aid for villages that did not vote for ZANU-PF.[50] In Rushinga Constituency, the ZHRC received a complaint that Chief Makuni distributed presidential inputs based on a beneficiary list that he allegedly compiled and which benefited only ZANU PF supporters.[51] On investigating the case, the ZHRC confirmed that food aid was given to people wearing ZANU PF T-shirts and card-carrying members of that party. Traditional leaders were also accused of using registration slips as a condition for receiving presidential inputs and food aid, contrary to the best electoral practices of non-discrimination and fairness.[52]

Election-day reports suggest that traditional leaders worked closely with political parties against the law. Several traditional leaders reportedly frog-marched their subjects to vote for the ruling party.[53] In some cases, traditional leaders carried a register and crosschecked voters who came to vote. In fact, traditional leaders in Hurungwe confirmed that it was a norm to escort their subjects to polling stations for voting, to ensure they voted for the "right candidate," that is, for the ruling ZANU PF candidate.[54] This practice seriously affects the legality and legitimacy of the vote in Zimbabwe.

> "ELECTION-DAY REPORTS SUGGEST THAT TRADITIONAL LEADERS WORKED CLOSELY WITH POLITICAL PARTIES AGAINST THE LAW"

44 As above.
45 ZHRC (n 32 above) 21.
46 Section 133A (a) of the Electoral Act prohibits the "persuasion of another person that he or she will be able to discover for who that person cast his vote or her vote."
47 *Mliswa v The State & ZANU PF, ZHRC/CI/38/15.*
48 As above.
49 Mwonzora & Mandikwaza (As above, note 3) 1144; ZHRC (n 33) 20; *European Union (EU) (n 5 above) 2.*
50 ZHRC (n 32) 20.
51 As above.
52 ZHRC (n 32).
53 *European Union (EU) (n 4) 2*; ZHRC (n 32) 21.
54 *Mliswa case* (n 62).

JURISPRUDENCE AND COURT CASES

This section deals with legal recourse for misfeasance by traditional leaders, judicial remedies and the challenges faced in this type of litigation. The analysis is based on cases decided since the 2013 Constitution was enacted.

ELECTION RESOURCE CENTRE VS CHIEF CHARUMBIRA AND OTHERS

The cases of *Election Resource Centre vs Chief Charumbira and others* [HH 270/18] and *Elton Mangoma and Another vs Chief Charumbira and others* [HCMSV 92/18],[55] both expose the controversy surrounding the role of traditional leaders in Zimbabwean politics. In both cases, Chief Fortune Charumbira, the President of the Chiefs' Council, is accused of acting unlawfully and unconstitutionally. It was alleged that, during an address at the Annual Chiefs' Conference on 28 October 2017, he made remarks to the effect that traditional leaders have been supporting and must continue to support ZANU PF and its presidential candidate. He was quoted thus:

> As Chiefs, we agreed during the 2014 congress that Cde Mugabe is our candidate for the 2018 elections. We are all united and he is still our candidate. We have been supporting him and we can confirm that winning is guaranteed.56

He repeated those remarks again on the 13th of January 2018. Among other things, Chief Charumbira said:

> Some people were saying at your conference in Bulawayo you, chiefs said you will support the party in power. That is the truth and you ask why we have said it.[57]

The Court declared the utterances by Chief Charumbira to be in clear violation of section 281(2) of the Constitution and section 45 of the Traditional Leaders Act. The Court ordered as follows:

> Chief Charumbira to retract in writing the statements that he made to the effect that traditional leaders should support and vote ZANU (PF) by issuing a countermanding statement in a newspaper with national circulation and endeavour to make the statement available to private and public media houses and the national broadcaster within 7 days of being served with this order.[58]

Chief Charumbira ignored the court order and remained adamant. Instead, he made further utterances at the ZANU-PF Annual Conference in December 2018 restating institutional support to the ruling party:

> The problem is that some in the audience are nervous. *They were actually saying, 'chiefs, why don't you leave politics' and I said 'no, chiefs are doing their job...* Those in Zanu-PF must not be more nervous than the chiefs themselves when we're working with you. Some of you are nervous and are actually discouraging the chiefs ... We will not stop coming. *Those who want to go to court, we'll meet in court. Zanu-PF is the party of chiefs.*[59] [Emphasis added]

In 2019, the Election Resource Centre filed a criminal case against Chief Charumbira. The media was awash with reports of the Chief's imminent arrest. However, this did not happen and, to date, the court order remains unenforced. Chief

55 In this case, the High Court banned and prohibited all traditional leaders from making further political statements on their involvement and allegiance to ZANU PF on any public platform. A further ruling was made in that case on the fact that traditional leaders, who include Chiefs, Head Persons or Village Heads as provided in section 280(2) of the Constitution, must not be involved in partisan politics as this is a violation of the right to a free and fair election as provided for in terms of section 67(a) of the Constitution. Conducting campaigns on behalf of the ruling party by traditional leaders was ruled to be unconstitutional and a violation of the right not to be treated unfairly or in a discriminatory manner on the basis of political affiliation.

56 Pg 3 of the judgement.

57 As above.

58 At p 1 of the judgment, particularly para 2 of the relief sought and obtained.

59 See: 'Chief Charumbira dares Zanu PF rivals' *The Daily News* 30 December 2018; 'Charumbira defies court again as he declares chiefs' support for Zanu-PF' *Bulawayo24 News* 15 December 2018.

Charumbira's total disregard of a standing court order shows how the institution of traditional leaders does not respect the rule of law. This creates bad precedent for future litigation, as litigants will lose faith in the effectiveness of judicial remedies.

These cases demonstrate that actions, conduct and attitudes by traditional leaders contravene section 281 of the Constitution and warrants their removal from office in terms of section 283(c) (i) of the Constitution. The cases also show that there is no legislative framework that protects traditional leaders from political manipulation by political parties. Traditional leaders should be independent and impartial, so that they can work to foster peace and political tolerance.

> "TRADITIONAL LEADERS SHOULD BE INDEPENDENT AND IMPARTIAL, SO THAT THEY CAN WORK TO FOSTER PEACE AND POLITICAL TOLERANCE"

CASES DISMISSED ON PROCEDURAL TECHNICALITIES

There are many other cases against traditional leaders' participation in partisan political activities that were not successful before the courts. This has mainly been due to procedural technicalities. Although factual issues had been placed before the courts, the cases were not determined on their merits.

FAILURE TO COMPLY WITH THE EXHAUSTION OF INTERNAL REMEDIES PRINCIPLE

There are cases which are actually determined on the merits but are dismissed because of failure to exhaust internal remedies. There is a distinction between cases where the merits are never determined, wherein the case is dismissed because it is in the wrong format or wrong names of respondents have been cited. In the case of *Mureyi vs Charumbira*,[60] the applicant was a candidate in the harmonized elections conducted on 31 July 2013. He complained of electoral malpractice on the part of the President of the Traditional Chiefs' Council, who was also a traditional leader in his constituency. The applicant argued that, as a chief, the respondent is supposed to unify people beyond their political orientation. As such, he should not have uttered such hate language as, "Down with Takanayi Mureyi." The applicant argued that the chief's open support for ZANU PF, intimidation of and threats to villagers were all completely unacceptable, unlawful and unconstitutional.

The case was dismissed for lack of compliance with the exhaustion of internal remedies principle. It was ruled that the applicant ought to have reported the case to the police for investigation before approaching the court on an urgent basis. On the issue of exhaustion of internal remedies, Mtshiya J, as he then was, highlighted that:

> The applicant has every right to approach this court on an urgent basis where threats against his life are made by any person regardless of their status. However, in doing so, the applicant must first prove that the other remedies have been denied him.[61]

In dismissing the case, Mtshiya J stated as follows:

> Whereas I do not dispute the applicant's clear right to protection, I do believe, as I have already demonstrated, that similar protection, other than an interdict, is still available to the applicant. In that light, I accept that the circumstances of this case do not therefore justify a measure that will effectively interfere with the respondent's exercise of his Constitutional duties.[62]

This shows some of the challenges litigants face when approaching the courts for redress. In terms of the law, litigants are expected to exhaust all

60 *Mureyi vs Charumbira HH 363/13.* This case was determined on its merits. However, it was dismissed because applicant failed to adhere to the exhaustion of all internal remedies principle.
61 As above.
62 As above.

internal remedies before approaching the courts. The problem with complying with this rule in election complaints involving traditional leaders is that when such cases are reported to the police, the police do not investigate, citing political reasons. This leaves litigants between a rock and a hard place: they cannot approach the courts before reporting to the police but get no joy when they do report to the police. This leaves traditional leaders unaccountable and the general public without a remedy.

FAILURE TO PROVIDE CONTACT DETAILS OF PERSONS ACCUSED OF ELECTORAL MALPRACTICES

The cases of *Mutinhiri v Chiwetu, Makanyaire v Mliswa and Nyaude v Matangira* also related to the conduct of traditional leaders.[63] The petitioners in the three cases alleged that the chiefs, headmen and other traditional leaders in their constituencies had engaged in corrupt or illegal practices. The major defect in these cases was the petitioners' failure to provide details of persons accused of electoral malpractices in terms of Rule 21(f) of the Electoral Rules, which provides that:

> 21. An electoral petition shall generally be in the form of a court application and shall state... (f) Where the petitioner relied on a corrupt or illegal practice, the petition had to state the full name and address, if known, of every person alleged to have been guilty of such a practice.[64]

Although some of the alleged perpetrators were named in Mr. Makanyaire's petition, the names were not given in full and no addresses were provided. None of the petitioners claimed that the alleged perpetrators' names and/or addresses were unknown to them.[65] In dismissing the petitions, Justice Bhunu stated as follows:

> A petitioner is obliged to render strict compliance with the Rules, failure of which the Court has no option but to invalidate the petition. The Electoral Court, being a creature of statute, is strictly bound by the four corners of the enabling Act.[66]

FAILURE TO COMPLY WITH HIGH COURT RULES

The case of *Temba Mliswa vs ZEC and others* [HH 586/15] dealt with the failure to comply with High Court Rules. It was alleged that the ZANU PF Minister of Local Government, Ignatius Chombo, had tasked traditional leaders with the role of systematically leading their subjects to polling stations and monitoring how they would vote. This was done to identify those who would have voted for the independent candidate and former ZANU PF member, Temba Mliswa. The matter was struck off the roll for failure to comply with the rules of the court, precisely r231 and r232 of the High Court Rules, 1979. The Applicant consciously chose the procedure through which he brought his matter to Court, a court application.[67] It was argued that this procedure determines the time frames within which the respondents are expected to file their responses. Where an applicant files an ordinary application in terms of r 231 (3) of the High Court rules 1971, which the applicant used, a respondent is in terms of r 232 entitled to file his response within not less than 10 days, exclusive of the day of service, plus one day for every additional 200 kilometres or part thereof where the place of service is more than 200 kilometres from the court where the application is to be heard. It was further submitted that this deadline had not yet elapsed and that the respondents were entitled to file their responses within the time permitted by the rules. Uchena J dismissed the application and stated as follows:

> The need to hear electoral cases urgently is not in dispute. I accept that such cases should be heard as soon as possible, but an applicant has to follow the correct procedures to achieve that objective. It does not assist the smooth and

63 *Mutinhiri v Chiwetu ECH 11-13*. All 3 cases were combined as they presented similar complaints.
64 Electoral (Applications, Appeals and Petitions) Rules 1995 Statutory Instrument 74A of 1995.
65 Veritas. 'Election Petitions Challenging 2013 Election Results in the Electoral Court Part II: Petitions Dismissed by Electoral Court' Court Watch 5/2014 *http://www.veritaszim.net/courtwatch?page=2*, accessed on 7 April 2020.
66 As above.
67 See Order 32 r226 of the High Court Rules, 1971, which provides on the nature of applications as follows: (1) Subject to this rule, all applications made for whatever purpose in terms of these rules or any other law, other than applications made orally during the course of a hearing, shall be made— (a) as a court application, that is to say, in writing to the court on notice to all interested parties; or (b) as a chamber application, that is to say, in writing to a judge.
68 As above.

> efficient administration of justice for an applicant to apply for remedies on the 11th hour, and for his legal practitioners to choose a wrong procedure and thereafter expect the court to extricate them from their chosen timing and procedure, without their doing what the law of procedure requires them to do, to achieve that objective.[68]

Research suggests that petitioners and litigants must exercise due diligence to circumvent the procedural hurdles in court processes. In addition, there is also need for judicial activism, where courts are prepared to deal with merits of cases involving constitutional issues without over-emphasising procedural irregularities. In *Mukaddam v Pioneer Foods (Pty) Ltd and Ors*,[69] the Constitutional Court of South Africa relied on the same principle of flexibility, where it is stated that:

> Flexibility in applying requirements of procedure is common in our courts. Even where enacted rules of court are involved, our courts reserve for themselves the power to condone non-compliance if the interests of justice require them to do so. Rigidity has no place in the operation of court procedures.[70]

"RESEARCH SUGGESTS THAT PETITIONERS AND LITIGANTS MUST EXERCISE DUE DILIGENCE TO CIRCUMVENT THE PROCEDURAL HURDLES IN COURT PROCESSES"

COMPLAINTS AGAINST THE CONDUCT OF TRADITIONAL LEADERS IN PRESIDENTIAL ELECTORAL PETITIONS

The case of *Morgan Tsvangirai vs Robert Mugabe and others* [CCZ 7/2013] was the first presidential election petition under the 2013 Constitution. The Applicant sought a declaration that the elections were null and void. In his Founding Affidavit, the Applicant argued that "traditional leaders commandeered rural voters under their jurisdiction to vote at specific times and to declare illiteracy so that they would be 'assisted' to vote." However, the issue was never properly ventilated and decided, as the petitioner withdrew his case before the Constitutional Court could deliberate on it. The reasons for withdrawal hinged on the fact that petitioner had not received the requested election material for use in the petition, thus, he could not meaningfully argue his case.[71]

In the case of *Chamisa & Ors v Emmerson Mnangagwa & Ors*,[72] the conduct of traditional leaders and rogue security elements was one of the grounds for challenging the outcome of the 2018 Presidential elections. The Applicant alleged that he had evidence to show that traditional leaders were involved in the electoral process as election agents on behalf of the first respondent, Emmerson Mnangagwa. He contended that there were people who identified themselves as security officers, who went about campaigning on behalf of Mr. Mnangagwa. He alleged that these people were threatening villagers. It was alleged that the ZEC failed to condemn the conduct of the traditional leaders and rogue security agents. Mr Mpofu, representing Nelson Chamisa, referred to the involvement of traditional leaders, who allegedly threatened some members of the electorate to vote for Mr. Mnangagwa. He alleged duress as an element that questioned the validity of Mr. Mnangagwa's win. In the same breath, it

69 *Mukaddam v Pioneer Foods (Pty) Ltd and Ors 2013 5 SA 89 (CC).*
70 Para 39. See also the case of *PFE International and Others v Industrial Department Corporation of South Africa Ltd2013 1 SA 1 (CC)* where the Court reaffirmed the principle that rules of procedure must be applied flexibly.
71 Part of the Affidavit withdrawing the Presidential election petition in case number CCZ71/13 read as follows: As at the time of deposing to this affidavit (3.43pm) on Friday August 16 2013) the judgment in the applications (for election material) had not been delivered. This in my view, seriously handicaps my prosecution of the petition and it had rendered it impracticable for me to proceed with same. The fact that I still do not have the material means that I cannot meaningfully prosecute my petition.
72 *Nelson Chamisa v Emmerson Dambudzo Mnangagwa and Others CCZ 21/19.*

was alleged that there were instances where there had been undue influence and bribery of the electorate through the distribution of "freebies." This, it was argued, resulted in an unfair advantage to Mr. Mnangagwa and worked to Mr. Chamisa's disadvantage. The Constitutional Court ruled that the allegations made by Mr. Chamisa in relation to voters in the rural areas and the role of traditional leaders were unfortunate. It held that:

> In an effort to show that the harmonised elections were not free, fair and credible, the applicant rehashed the allegation which has had pride of place in previous applications challenging the validity of elections in the country. The essence of the allegation is that voters in the rural areas vote for food aid or grain they receive from Government. If they are not voting for food aid, they are voting under the undue influence of traditional leaders who allegedly ensure that they vote for ZANU-PF. Rural voters are not respected as independent human beings capable of rationalising about the use of the vote to protect and advance their own social, economic and political interests. Whether living in rural or urban areas, Zimbabweans are educated people who are capable of understanding the meaning and use of the right to vote... The influence traditional leaders were alleged to have exerted on voters in rural areas to vote for the first respondent is not borne out by the facts. The allegation of involvement of traditional leaders was not linked to any other relevant information.[73]

The court avoided ruling on whether the traditional leaders had acted in the manner alleged and whether this would be constitutional and lawful. The court seemed defensive to the traditional leaders.

"THE COURT SEEMED DEFENSIVE TO THE TRADITIONAL LEADERS"

73 At pp 110 and 111.

CONCLUSION AND POLICY OPTIONS

This chapter discussed the role played by traditional leaders in the electoral process in Zimbabwe. It is apparent that the Zimbabwean laws governing the role of traditional leaders in electoral processes are largely clear, unambiguous and therefore adequate. They prohibit participation in politics and advancing the political interests of any political party and its members. However, traditional leaders still practice politics on behalf of political parties by canvasing for votes, intimidating and threatening voters, frog-marching and escorting voters to polling stations, using food aid for vote buying and publicly declaring their support for the ruling party.

Although cases of electoral malpractice involving traditional leaders are reported and litigated in courts, traditional leaders have a tendency to defy court orders with no consequences whatsoever. This blatant disregard of the law has resulted in a few cases being reported to the police or successfully litigated in the courts. Yet litigants face procedural challenges in reporting their cases to the police and the courts. According to findings of this chapter, the police appear reluctant to investigate matters involving traditional leaders for fear of being reprimanded by the ruling party. Courts are also unwilling to genuinely call traditional leaders to order as many times, courts rule on technicalities, avoiding direct condemnation of traditional leaders for aiding and abetting the ruling party during elections. The questions for many aggrieved persons remain: What, then, is the use of going to court, if the court order will not be obeyed? What is the use of going to court, if the courts are unwilling to confront the demon of traditional leaders' involvement in the ruling party interests? This reduces faith in the justice system, especially when the defiant traditional leaders are left unaccountable, with no consequences whatsoever.

The chapter recommends for the Electoral Act Code of Conduct and the Electoral Act to be amended to exclude traditional leaders as parties who are formally or informally involved in politics, as this is against the Constitution. There must be no ambiguity insofar as the prohibition of the involvement of traditional leaders in partisan politics is concerned. The traditional leaders must be proscribed from attending or organising any partisan political meetings or gatherings. Traditional leaders must not attend or address political party gatherings, including congresses and conferences organised by political parties. Any chief or headman involved directly or indirectly with partisan political activities, including forcing their subjects to attend political gatherings or to vote for any particular political party, must be prosecuted and severely punished, including being jailed and automatically disqualified from continuing to hold the office of a traditional leader. The current situation of repeated violations of electoral laws by traditional leaders is because there is no legal deterrence through criminal prosecution and punishment. A stiff penalty will deter would-be offenders from deliberately violating electoral laws. Fear of losing the prestigious office of traditional leader and all the benefits that come with it would also be a deterrent for traditional leaders.

Judicial reform is required to enable a human rights-oriented jurisprudence. The current system emphasises technicalities over human rights promotion, protection and enforcement. All matters that are brought to court for purposes of determining political rights and violation of electoral laws must be determined on merit, unless the matter is frivolous and vexatious. Judges must not avoid making decisions by overemphasising technical conveniences over citizens' rights to access to justice and protection of the law. Election-related issues are human rights issues and must never be determined on procedural technicalities. Although courts cannot disregard or do away with legal or procedural technicalities, they must strike a balance with the imperative obligation of promoting, protecting, enforcing and fulfilling human rights in Zimbabwe.

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CHAPTER 3

PRE-ELECTION DISPUTES THROUGH THE LENSES OF KENYA'S LAW, POLITICS, AND EXPERIENCES

WAFULA WAKOKO*

ABSTRACT

Resolution of pre-election disputes is among the bridges towards a free and fair election. as it offers an initial avenue for aggrieved parties to seek redress. Free and fair election is understood to include a process devoid of violence and an environment that facilitates the exercise of political rights.[1] Kenya's law bestows the jurisdiction of settling pre-election disputes on the Independent Electoral and Boundaries Commission (IEBC), among other bodies.[2] This chapter finds that the Electoral Dispute Resolution (EDR) framework is central to electoral integrity under the Kenyan framework. The discussion in this chapter looks at the laws for resolution of disputes and the experiences drawn from the pre-electoral period of the 2017 general election. The sufficiency of laws and political parties' internal democracy is examined. This chapter also discusses proposals, where practical, and poses questions that require further discourse. The salient themes include operational setting, Electoral Code of Conduct, nomination rules, party primaries, allocation of special seats by use of party lists, independent candidates, and registration of candidates for elections. As illustrated in Kenya's post 2007 election, the lack of an effective and trusted EDR system contributes to electoral violence.[3]

Its importance notwithstanding, use of EDR alone cannot solve the problem of election violence. Conduct of EDR in strict compliance with existing laws, continued capacity building of EMBs and courts, timely review of laws, demilitarisation of elections, and voter education are just but some of the factors that must be given life.

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1 Constitution of Kenya Art 81.

2 Constitution of Kenya Art 88(4) (e).

3 At http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Independent-Review-Commission-on-the-General-Elections-held-in-Kenya-on-27th-December-2007.pdf (accessed 20 February 2021).

INTRODUCTION

The establishment of an Electoral Dispute Resolution (EDR) Mechanism for resolution of pre-election disputes crystallised in Kenya through the 2010 Constitution. Recognising compromised electoral processes as a driver of electoral violence reinforced the need for timely and effective avenues for dispute resolution.[4]

> "RECOGNISING COMPROMISED ELECTORAL PROCESSES AS A DRIVER OF ELECTORAL VIOLENCE REINFORCED THE NEED FOR TIMELY AND EFFECTIVE AVENUES FOR DISPUTE RESOLUTION"

To appreciate the role of EDR, one must define elections using the correct language while alive to different circumstances in different jurisdictions. Language as a tool in the realisation of human rights is germane, because fitting words paint the true state of affairs may lead to determining root causes of problems, if not finding solutions. Elections as an expression of popular will through voting emphasises casting the ballot to determine the winner, with limited focus on preceding events. Yet elections within the meaning of an electoral cycle include activities and processes in the pre-electoral, electoral, and post-electoral periods. In this regard, elections are continuous processes that include planning, training, nomination, voter registration, conduct of campaigns, voting, results, review, and reform, and dispute resolution applies to all stages in the cycle.[5] To refer to a process that is deficient in these features and does not meet international standards as an "election" can only be called a ploy to legitimise a flawed process.

> "ELECTIONS AS AN EXPRESSION OF POPULAR WILL THROUGH VOTING EMPHASISES CASTING THE BALLOT TO DETERMINE THE WINNER, WITH LIMITED FOCUS ON PRECEDING EVENTS"

In Marxist terms, the existence of class differences in a society presupposes the bourgeoisie setting the political agenda, which is, in turn, forced on the proletariat. This is evident in present-day Kenya, where electoral laws are spearheaded and enacted by the elite to cater for their interests.[6] The case in point is the Election Laws (Amendment) Act of 2017. The legislature is almost an elites-only club, due to the lack of a level playing field that would enable all Kenyans to participate meaningfully in elections. Party officials have unfettered liberty to employ direct nominations.[7] Political parties and candidates, on the other hand, can use their financial fortunes in political campaigns without limits or effective scrutiny. It is worth noting that, as explained later on in the chapter, the Election Campaign Financing Act of 2013, which is supposed to regulate the use of money in the conduct of campaigns, has never been implemented. Elections, therefore, are not a way for a people to elect leaders but for the

4 H Fjelde & K Höglund 'Ethnic and Elite competition: the roots of electoral violence in Kenya' in M Kovacs & J Bjarnesen (eds) Violence in African elections: Between Democracy and Big Man Politics (2017).
5 At <http://aceproject.org/electoral-advice/electoral-assistance/electoral-cycle> (accessed 1 April 2020).
6 At https://www.reuters.com/article/us-kenya-election-law-idUSKCN1C31K5 (accessed 20 February 2021).
7 Political Parties Act No. 11 of 2011 Second Schedule Sec 19.
8 S. Adejumobi 'Elections in Africa: A Fading Shadow of Democracy?' (2000) 21 *International Political Science Review* 59-73.
9 Constitution of Kenya Art 81.

elites to compete among themselves to be picked. Electoral processes can become a manipulation, where winners are not a reflection of the people's will. Even so, Marxism acknowledges periodic elections as necessary for attaining freedom in a capitalist social order.[8]

Amongst the safeguards intended to prevent elections becoming a meaningless ceremonial venture, Kenyan law provides for resolution of pre-election disputes by various bodies, including the Independent Electoral and Boundaries Commission (IEBC), the Political Parties Disputes Tribunal (PPDT or Tribunal), and by political parties through the Internal Dispute Resolution Mechanism. These bodies try to ensure that none of the players is unfairly denied an opportunity to take part in elections, none has undue advantage, and parties do not resort to violence. Instances of violence, intimidation, improper influence or corruption mean that an election is not free and fair.[9]

> "KENYAN LAW PROVIDES FOR RESOLUTION OF PRE-ELECTION DISPUTES BY VARIOUS BODIES, INCLUDING THE IEBC, PPDT OR TRIBUNAL, AND BY POLITICAL PARTIES THROUGH THE INTERNAL DISPUTE RESOLUTION MECHANISM"

The focus of this chapter is on Kenya's experience in the resolution of electoral disputes ranging from principles of EDR, thematic areas of disputes, lacunae in law, successes and failures of the Kenyan story.

STRUCTURE OF CHAPTER

This chapter is divided into seven parts. Part one is this INTRODUCTION. Part two discusses the ROLE OF THE IEBC with respect to its mandate to settle election disputes. Part three discusses the mandate and ROLE OF THE PPDT and presents some of the issues the Tribunal has handled. Part four discusses the ROLE OF THE POLITICAL PARTY DISPUTE RESOLUTION MECHANISM. Part five discusses the EMERGING ISSUES AND THEMES THAT THE IEBC DISPUTE RESOLUTION PROCESSES has dealt with. Part six presents LESSONS AND CHALLENGES IN THE EDR PROCESSES AND MAKES PROPOSALS FOR REFORM. Part seven is the CONCLUSION.

ROLE OF THE IEBC

The IEBC is established under Article 88 (1) of the Constitution, with its mandate stipulated in various provisions. Besides the power and duty to conduct and supervise elections and referenda, the IEBC is also responsible for settling electoral disputes. This comprises disputes relating to or arising from nominations, but excludes election petitions and disputes that arise subsequent to the declaration of election results.[10] The substance of the IEBC's jurisdiction to settle pre-election disputes as provided in the Constitution is replicated under the Elections Act.[11] The consideration of disputes is also guided by Rules of Procedure.[12]

The disputes alluded to include disputes on the electoral code of conduct, registration of candidates for elections, flouting of campaign finance rules, registration of voters, submission of nomination rules, submission of party membership lists, and development and submission of party lists for purposes of special seats. Disputes regarding the conduct of political parties and candidates during an election period are not pre-election disputes, strictly speaking, as they overlap between the period before and after voting.

A complaint to the IEBC is initiated by filling out a form developed under the Rules of Procedure on Settlement of Disputes.[13] The form requires details of the complainant, respondent, and description of the complaint. The form must be accompanied by duly sworn affidavit(s) relaying the evidence, and a further affidavit as evidence of prior service on the respondent. The IEBC is required to determine a complaint within 10 days of lodging.[14] In the event that a complainant is aggrieved by the decision of the IEBC, the complainant is at liberty to appeal the said decision to the High Court. The Appeal must include typed proceedings of the IEBC and a duly signed and dated decision.

ELECTORAL CODE OF CONDUCT

The IEBC has the duty to develop a code of conduct for candidates and parties contesting elections.[15] To give life to the code of conduct, the Elections Act 2011 requires, among other things, that every political party and every person who participates in an election under the Constitution subscribe to and observe the Electoral Code of Conduct.[16] The failure and or neglect by a political party or a candidate to subscribe to the code makes them ineligible to contest in elections.[17] For purposes of a general election, the Electoral Code of Conduct applies from the date of publication of a notice of election until the swearing in of newly elected candidates.[18] The Electoral Code of Conduct Enforcement Committee (ECCEC) has the mandate of resolving disputes under the Electoral Code of Conduct on behalf of the IEBC.[19]

The Electoral Code of Conduct, as the name suggests, regards the standard of acceptable conduct of, *inter alia*, political parties, candidates, and agents during an election period. The Code is determined by the IEBC, as guided by the provisions of the Elections Act 2011 and Elections Offences Act 2016.[20] The Code's content requires actors to refrain from violence, prohibits inciting supporters to engage in violence, proscribes employing hate speech, and bans the plagiarizing of symbols, colours, or acronyms of other parties. The overarching goal of the operation and enforcement of the Code is to ensure free and

10 Constitution of Kenya art 88(4) (e).
11 No. 24 of 2011, sec 74(1).
12 Rules of Procedure on Settlement of Disputes L.N 139/2012.
13 As above.
14 Elections Act No. 24 of 2011 sec 74(2).
15 Constitution of Kenya art 88(4) (j).
17 Elections Act 24 of 2011 Section 110 (1) and (2).
18 Elections Act 24 of 2011 Second Schedule para 18 (a).
19 Elections Act 24 of 2011 Second Schedule para 15.
20 Elections Act 24 of 2011 Second Schedule para 6, Election Offences Act No. 37 of 2016 sec 20.

fair elections. The legal standing required to file a dispute with the Committee is clear: Any person has legal standing to file a complaint regarding the breach of the Code.[21]

The ECCEC comprises at least five members of the IEBC whose Chairperson must be a person qualified to hold the office of Judge of the High Court.[22] A person is qualified to be a High Court Judge if he or she has been an Advocate for no less than 10 years.[23] The penalties for breaching the Code include a formal warning; a fine; prohibition from holding any public meetings, campaigns or meeting voters during election period; and ultimately, if other sanctions are not complied with, being barred from contesting prevailing or future elections.[24] Parties who are aggrieved by the orders of the IEBC can appeal to the High Court or challenge the same through a judicial review process.[25]

In 2017, the ECCEC, while sitting in Nairobi, entertained 71 disputes.[26] Of those 71 cases, 35 cases were prosecuted and found to be in violation of the Code, 14 were prosecuted and found not to have been in violation of the Code, 14 cases were dismissed for non-attendance of complainants, and 3 were withdrawn by complainants.[27] Of these 71, the High Court issued a judicial review order that stayed the ECCEC judgment, and the remaining three cases were dismissed by orders of the High Court. The running themes in the disputes related to campaigns leading to violence, plagiarism and/or use of symbols of other candidates, independent candidates using political party symbols or pictures, and destruction or defacing campaign materials of other candidates.

The Elections Act further envisions the establishment of Peace Committees in every constituency during an election period. These committees are authorised to reconcile warring parties, mediate political disputes, liaise with government security agencies in the constituency,

71
disputes

35
in violation

14
not in violation

14
dismissed

report suspected election malpractices, and report any violation of the Code to the ECCEC for appropriate action.[28] The composition of the Peace Committee is not provided in the Elections Act. These Committees have never been operationalised since the enactment of the Elections Act 2011.

OBSERVATIONS

In the run-up to the 2017 general election, the IEBC's orders included fines and formal warnings.[29] The highest fine charged against an accused was a cumulative Kenya Shillings 2,000,000 (approx. $20,000) arising from two cases. Of the available penalties, barring a political party or a candidate from contesting elections is the harshest, and it borders on violation of political rights. Yet a section of Kenya's electorate, namely women,

21 Elections Act 24 of 2011 Second Schedule para 19.
22 Elections Act 24 of 2011 Second Schedule paras 15 & 15 (2).
23 Constitution of Kenya art 166(5).
24 Elections Act 24 of 2011 Second Schedule para 7.
25 Republic v Independent Electoral & Boundaries Commission and Another Ex Parte Neto Adhola & Anor (2017) eKLR http://www.kenyalaw.org/caselaw/cases/view/140031/
26 Independent Electoral and Boundaries Commission Post Election Report https://www.iebc.or.ke/uploads/resources/V9UUoGqVBK.pdf (accessed 28 February 2021).
27 As above.
28 Elections Act 24 of 2011 Second Schedule parag 17.
29 Independent Electoral and Boundaries Commission Post Election Report https://www.iebc.or.ke/uploads/resources/V9UUoGqVBK.pdf (pg 231-237) (accessed 28 February 2021).

cannot exercise political rights through effectively participating as voters or candidates due to violence.[30] Would it then be justifiable to impose the harshest of penalties? The Code does not, however, envision barring a candidate from participating in the ongoing election in the first instance.[31] The IEBC barred an independent candidate, Neto Adhola, from contesting elections on account of failure to pay the fine imposed within 48 hours.[32] The candidate had violated the Code by using the colours of a political party.

A considerable section of the political class has abundant resources to spend, making monetary penalties ineffective. There are no available data on politicians' 2017 campaign expenditure, save for the contribution and expenditure limits set by the IEBC in August 2016 under the Election Campaign Financing Act 2013. These limits resulted from research, experiences of Kenya, and consultations with stakeholders, among them elected leaders, on their 2013 expenditure. For instance, the expenditure limit for a Presidential candidate was set at Kenyan Shillings 5,247,588,207.74 (approximately $52,475,882), a County Ward Representative candidate in Fafi Ward (Garissa County) was set at Kenyan Shillings 68,884.07 (approximately $688, while in Imara Daima Ward (Nairobi County) the limit was set at Kenya Shillings 9,745,184.69 (approximately $97,451.84).[33] The limits were never operationalised, but they offer insight into the finances of some individuals in the political class.[34] A discussion on regulating campaign expenditure in elections is captured later in the chapter under the subject of campaign financing.

It should be noted that a remedy is effective only when it is practical. An EDR body that makes orders deviating from this principle risks not only being a poor arbiter but also a contributor towards limiting the expression of popular will. Although it is a tough and memorable sanction to bar a political party or a candidate that breaches the Code from contesting elections, this could have negative consequences. These may include the affected party or candidate instigating violence; in this case, EDR would have failed to prevent violence. The Code cannot be used as a tool to whip political parties into shape if they had been, before the election period, allowed not to comply with electoral law provisions. What would be the effect of barring a political party with a relatively huge base of members and supporters? Would the opposing political party have legitimacy if it wins such an election? What would be the effect of such a penalty on the voters who support the barred political party or candidate? Be that as it may, the law does not exist as a source of livelihood for the legislature, to keep Parliament busy, it must have force. In the same vein, EDR requires pragmatism; this is a strong argument for using intermediate sanctions before resorting to the harsh ones.

Although there is a Code and Rules of Procedure, the ECCEC has sweeping discretion on what penalties to mete out. There is no guidance on which sanctions would apply to particular violations, resulting in a lack of clarity and certainty. Although the Second Schedule to the Elections Act under paragraph 7(2) provides guidance on when one could be barred from contesting elections, one of the questions is whether the gravity of an offence should warrant being barred from contesting elections. The nature and repercussions of such a penalty demands certainty in terms of the offences. The penalty should be applied, if merited.

The requirement for ECCEC to comprise five members is strenuous for the IEBC and its performance, given the demands of an election period on an EMB. The composition of ECCEC is, however, linked to a time when the IEBC consisted of the Chairperson and eight other members, as opposed to the current composition of a Chairperson and six other members.[35] The 2017 and 2018 developments that saw four

30 Yolande B & Others 'Women's political inclusion in Kenya's devolved political system, Journal of Eastern African Studies'(2019) https://www.researchgate.net/deref/https%3A%2F%2Fdoi.org%2F10.1080%2F17531055.2019.1592294 (accessed 26 February 2021).
31 Elections Act 24 of 2011 Second Schedule para 7(b).
32 As above.
33 See http://kenyalaw.org/kenya_gazette/gazette/volume/MTQwMg--/Vol.CXVIII-No.%2090/ (accessed 1 April 2020).
34 The limits are meant to curb huge spending and provide an equal playing field. The Orange Democratic Movement while commenting on the limits termed them to be high, however, they were a ceiling. The political class has not publicly and genuinely provided clarity on their expenditure.
35 Independent Electoral and Boundaries Commission Act 9 of 2011 sec 5.

Commissioners resign from the IEBC, leaving only the Chairperson and two members, which is still the current status, mean the IEBC cannot constitute a valid committee. That said, during by-elections, the IEBC purportedly constituted an ECCEC even when it did not have sufficient members. It is nevertheless instructive that the court held on a different issue that the IEBC has the mandate to conduct elections, the issue of enforcement of the code did not arise.[36] The strain on the Commissioners would be addressed by operationalising the Peace Committees and reducing the quorum of the ECCEC to three members through a legislative amendment.

As observed earlier, a significant number of matters were dismissed for want of prosecution, which includes non-attendance of complainants. Due to the cost and time required to travel to Nairobi and the financial strain on the complainants, some did not manage to be present to prosecute their complaints. Operationalisation of Peace Committees would be a step in the right direction, as disputes would be addressed at the grassroots level, if local people were to serve on the committees; legislative interventions would be required for this, however. In a report produced in October 2020, the IEBC said that it appreciated the challenges to enforcing the Code including the membership and the qualifications of the chairperson of the ECCEC.[37] The Code has also been painted as ineffective with respect to punishing perpetrators of violence against women.[38]

DISPUTES ARISING OUT OF NOMINATIONS

The IEBC's mandate to register candidates for elections is spelt out in the Constitution.[39] The Elections Act echoes the Constitutional provisions and refers to nomination as meaning submission to the IEBC of the name of a candidate.[40] It is at this point that Returning Officers interact with political parties, political parties' candidates, and independent candidates to determine participation in elections. The IEBC's jurisdiction to adjudicate these disputes is drawn from Article 88(4)(e) of the Constitution and Section 74 of the Elections Act. The law demands that once lodged, disputes have to be determined within 10 days of the lodging, but if they relate to prospective nomination or election, they must be determined before the respective dates. The rationale is to ensure expeditious resolution of disputes to allow aggrieved parties an opportunity to contest elections. The Dispute Resolution Committee (DRC) comprises at least three members of the IEBC; the composition is not provided by a Statute but by the IEBC.

Disputes regarding nomination of candidate include allegations of an independent candidate being a member of a political party because he had failed to resign from a political party within the stipulated three months' period, that a political party candidate or an independent candidate did not have all the necessary qualifications including presentation of invalid documents, invalid party nomination processes, and that a party candidate is not a member of a political party. The law does not provide an exhaustive list of grounds on which complaints are based but the IEBC is at liberty to entertain any complaint as long as it raises triable issues.[41]

In 2017, the IEBC DRC heard and determined 350 disputes arising from decisions of the Returning Officers to register candidates for elections from 4 to 13 June 2017.[42] Save for the cited IEBC post-election evaluation report that appreciated the challenges faced during the dispute resolution period, at the point of writing this paper, I did not come across a report on the outcome of the cases or the scorecard of the IEBC.

36 *Kangwonyi v Independent Electoral & Boundaries Commission & another* [2018] eKLR http://kenyalaw.org/caselaw/cases/view/157852/
37 Electoral Law Reform: the IEBC experience https://www.iebc.or.ke/uploads/resources/y3m5nIJjMl.pdf (accessed 26 February 2021).
38 As above.
39 Constitution of Kenya art 88(4) (f).
40 Elections Act 24 of 2011 sec 2.
41 Rules of Procedure on Settlement of Disputes L.N 139/2012 rule 9.
42 Independent Electoral and Boundaries Commission Post Election Report https://www.iebc.or.ke/uploads/resources/V9UUoGqVBK.pdf (pg 106) (accessed 28 February 2021).

ROLE OF THE POLITICAL PARTIES DISPUTES TRIBUNAL

The Political Parties Disputes Tribunal (PPDT) is a quasi-judicial body made up of members appointed by the Judicial Service Commission who serve on part-time basis for a non-renewable term of six years.[43] It has the specific responsibility to settle disputes involving political parties.[44] Its jurisdiction includes determination of disputes between the members of a political party, between a member of a political party and a political party, between political parties, between an independent candidate and a political party, between coalition partners, and disputes arising from party primaries. All disputes lodged at the PPDT must be determined within three months from the date of lodging.[45] The Political Parties Disputes Tribunal (Procedure) Regulations of 2017 guide the procedure of the PPDT.[46]

Issues of significance to this chapter include complaints related to party nominations, party primaries, party lists, and other methods of picking party candidates. For purposes of the 2017 general election, the PPDT heard 306 disputes arising from party primaries.

SERVICE OF PLEADINGS

It is not the role of pleadings to hinder attainment of justice through exalting of procedure over substance.[47] The overwhelming focus on rigidity of pleadings does not aid justice.[48] In the same vein, service of pleadings is tailored to communicate the contents of pleadings by allowing parties an opportunity not to be condemned without being unheard. If and when everyone is in agreement, the role of service cannot be introduction of barriers to communication of pleadings. Kenya`s history is not short of rigid laws that failed to advance interests of aggrieved persons by insistence on personal service.[49] The regulations on the operations of the PPDT dictate either direct service or advertisement in a newspaper of national circulation when it comes to service on a person.[50] The tribunal is also guided by rules of procedure under both the Evidence and Civil Procedure Acts, with necessary modifications, while ensuring that its proceedings do not give undue regard to procedural technicalities.[51]

> “THE REGULATIONS ON THE OPERATIONS OF THE PPDT DICTATE EITHER DIRECT SERVICE OR ADVERTISEMENT IN A NEWSPAPER OF NATIONAL CIRCULATION WHEN IT COMES TO SERVICE ON A PERSON”

The PPDT decided that service through either an e-mail or WhatsApp is sound as long as one illustrates that other modes of service were not possible.[52] The Tribunal, ex parte, entertained a complaint served through WhatsApp and e-mail, because the complainant had been unable to physically locate the respondent. The complainant declared on affidavit his failed attempts to serve the respondent directly. He alleged that the

43 Political Parties Act 11 of 2011 sec 39.
44 Political Parties Act 11 of 2011 sec 40.
45 Political Parties Act 11 of 2011 sec 41(1).
46 A subsidiary legislation under the Political Parties Act 11 of 2011.
47 PM Bakshi`Pleadings: Role and Significance.” Journal of the Indian Law Institute 34, no. 3 (1992): 355-64. http://www.jstor.org/stable/43951448 (accessed on 5 May 2020).
48 As above.
49 *Kibaki v Moi* [1999] EKLR http://kenyalaw.org/caselaw/cases/view/279/
50 Political Parties Disputes Tribunal (Procedure) Regulations, 2017 (L.N. 67/2017) Regulation 10(2).
51 Political Parties Act 11 of 2011 Sec 41(4).
52 PPDT Complaint No. 58 of 2017.
53 *Obuya v Orange Democratic Movement Party & 2 others* [2017] eKLR.

respondent had committed to check his e-mail for the pleadings. On appeal, the High Court held that e-mail and WhatsApp are not recognized modes of service under the law.[53] In addition, the Court asserted that there was no evidence to show that the e-mail belonged to the respondent (at the PPDT), and the cell phone number at the centre of the WhatsApp service was not provided. It was the Court's view that there was no evidence to show that the respondent had been served. In a different case, the High Court held that WhatsApp is not only not a recognized mode of service — it raises questions of proof of delivery, acknowledgement of receipt of service, and proof of identity of the intended recipient.[54] Even so, the High Court is on record for accepting service through WhatsApp on the basis of efficient use of available judicial and administrative resources for expeditious resolution of electoral disputes.[55]

EDR bodies cannot ignore the costliness of advertisements in the daily newspapers, the strict electoral timelines, and political nature of disputes that make direct service impossible and even risky. There is need for a legislative intervention to allow service through WhatsApp, subject to the communication of contents of pleadings and satisfaction of attendant threshold.[56]

> "EDR BODIES CANNOT IGNORE THE COSTLINESS OF ADVERTISEMENTS IN THE DAILY NEWSPAPERS, THE STRICT ELECTORAL TIMELINES, AND POLITICAL NATURE OF DISPUTES"

JURISDICTION

The PPDT's jurisdiction has already been highlighted above. For some of these disputes, the PPDT can entertain them only after they have been determined by a party's internal dispute resolution mechanism (IDRM). Nonetheless, the PPDT has original jurisdiction with respect to disputes arising out of party primaries; they must have gone through an IDRM, as indicated under the Political Parties Act.[57] The specific mandate on party primaries was introduced in the year 2016, thus amending the substantive provision.[58] The memorandum of objects and reasons is silent on whether it was the intention of the amending Bill to exempt party primary disputes from IDRM, or whether the omission was accidental.[59] The PPDT has taken inconsistent and unfortunate stances towards this issue oscillating between IDRM having original jurisdiction and the PPDT having both original and appellate jurisdiction. It has held that its jurisdiction on party primaries can be invoked only when the IDRM process is over, although the High Court overturned this decision on the grounds that the statutory wording is clear, and there is no requirement to exhaust the IDRM route first.[60] The High Court stated that the PPDT's jurisdiction on party primaries is as stated in law and cannot be taken away from the PPDT, regardless of whether there had been an IDRM process.[61] The Court said there may be value in demanding submission of party disputes to IDRM, to promote alternative dispute resolution, and to avoid the PPDT being overburdened with such cases, yet the question that arises is at whose cost? Moreover, it cannot be valid to allege that Parliament forgot to subject such disputes to IDRM; neither the courts nor the PPDT are seers who can predict what the Legislature ought to have included. In a slightly different case, before introduction of the provision on party primaries, the PPDT's view was that it has

54 *Shallo v Jubilee Party of Kenya & another* [2017] eKLR. http://kenyalaw.org/caselaw/cases/view/137150/
55 *Chama Cha Mashinani Elections Board & 2 Others v Beatrice Chebomui* (2017) eKLR. http://kenyalaw.org/caselaw/cases/view/136311/
56 PPDT complaint No. 58 of 2017.
57 Political Parties Act 11 of 2011 sec 40(2).
58 Political Parties Amendment 2 Act of 2016.
59 As above.
60 PPDT Complaint 69 of 2017 *Joseph Mboya Nyamuthe v Orange Democratic Movement & another*, Election Petition Appeal 5 of 2017 *Joseph Mboya Nyamuthe v Orange Democratic Movement & 4 others* [2017] eKLR.
61 Election Petition Appeal 5 of 2017 *Nyamuthe v Orange Democratic Movement & 4 Ors* [2017] eKLR. http://kenyalaw.org/caselaw/cases/view/139798/
62 PPDT Complaint No. 29 of 2015 *Ibrahim Abdi Ali v Mohamed Abdi Farah & another.*
63 PPDT No.387 of 2017 *Ndegwa & Ors v Jubilee Party.* http://kenyalaw.org/caselaw/cases/view/141669
64 Constitution of Kenya art 90 (2)(c).
65 County Governments Act, 2012 sec 7(2) (a).

original jurisdiction to entertain a dispute between a member and a political party. This is so long as the member showed lack of will by a political party's IDRM to consider a complaint in good time.[62]

The limits of the jurisdiction on a dispute between a member and a political party have been tested, giving rise to other issues that we shall explore here.[63] The PPDT entertained a complaint that raised issue with the Jubilee Party's list for Nairobi City County: that the nominees were not qualified and that the list did not reflect the ethnic diversity of the people of Nairobi City County. The PPDT ordered the Jubilee Party to reconstitute its Nairobi List to reflect the ethnic diversity of the people of Nairobi City County and be in line with the laws. Before delving into jurisdiction, unlike the requirements on party lists for Parliament, it should be noted that the Constitution exempts county assembly party lists from reflecting the regional and ethnic diversity of Kenya.[64] The PPDT's decision was arguably in disregard of the Constitution. However, it may also be argued that the county list has to reflect the community and cultural diversity of the county.[65] The High Court found that the PPDT did not have jurisdiction to vet the nominees' qualifications, as that is the IEBC's role, since the IEBC is charged with the responsibility of vetting party lists, reviewing, accepting, or rejecting them.

> "IT IS GOOD LAW THAT WHERE THE LAW HAS ESTABLISHED A PARTICULAR FORUM FOR REDRESS ONLY THAT FORUM SHOULD BE USED AND NOT ANOTHER"

In a different setting, the PPDT admitted and sought to consider a dispute seeking to unseat a sitting member of a county assembly under the guise of resolving a dispute between members of a political party.[66] The complaint was lodged at the PPDT after declaration of election results and gazettement of the respondent. The complainant claimed that the process of nominating the respondent was flawed and had been flouted. The PPDT remarked that it had jurisdiction to interrogate the facts that gave rise to the circumstances in the complaint. The High Court asserted that even the IEBC, which has power to adjudicate on party lists, cannot address disputes after the election results had been declared.[67] The avenue to unseat a member of a county assembly is through the courts.[68] It is good law that where the law has established a particular forum for redress only that forum should be used and not another.

66 Salaon v Kirui & Ors PPDT No. 2 of 2018.
67 *Kirui & another v Salaon & another* (2018) eKLR. http://www.kenyalaw.org/caselaw/cases/view/150374
68 Elections Act 24 of 2011 sec 75.

ROLE OF INTERNAL DISPUTE RESOLUTION MECHANISM

Every political party is required to have an internal dispute resolution mechanism (IDRM).[69] The Political Parties Act envisages the IDRM hearing and determining disputes within parties (between members, or between a member and his or her party), such as the development of party lists, and also disputes between parties. It is also possible for the IDRM to determine disputes on party primaries.[70] The Elections Act demands that an IDRM is supposed to hear and determine all intra-party disputes arising from political party nominations within 30 days.[71] The Elections (Party Primaries and Party Lists) Regulations of 2017 categorically requires an IDRM's adjudication to respect rules of natural justice.[72] IDRM decisions may be appealed to the PPDT, and from there to the High Court on points of law, and on facts then on points of law to both the Court of Appeal and the Supreme Court.[73]

Although political parties have the duty to address nomination disputes internally before aggrieved members seek audience elsewhere, this has not always been the case, as some parties have not appreciated the role and essentials of IDRM.[74] This includes lack of a properly established organ on dispute resolution, frustration of the adjudication process by some party organs in terms of delays, and outright non-compliance with rules of natural justice. As a result, aggrieved party members approach the PPDT directly, which is legally apt, because the Tribunal has original jurisdiction on party primaries.[75] This, however, builds up to dysfunctional internal party mechanisms on resolving disputes. A functional and effective IDRM contributes to timely resolution of disputes, which will have further effect on the workload and nature of disputes filed at PPDT or IEBC.

Political parties cannot execute sound dispute resolution if their foundation is not aligned with democracy and ideals of good governance. A party with limited intra-party democracy cannot be expected to resolve disputes fairly. For instance, rules of all political parties in Kenya provide for use of direct nomination in certain situations. The proviso is intended to protect the overall interests of the party, including avoiding the financial cost of conducting a party primary, where there is only one person interested in the nomination. Where there are competing interests among party members, the use of direct nomination becomes a trigger of conflict, as it contains an aspect of favouritism. Parties need clear rules on when to employ alternative nomination methods like direct nomination. A person aggrieved by his or her party for using direct nomination cannot possibly have faith in the party organs to address his or her complaint unless detailed rules exist to instil fairness.

Where the general interaction and compliance of parties with existing laws is below par, the conduct of parties cannot be above par. "Above par" means effective participation of minorities and traditionally excluded groups in decision-making organs as opposed to performative inclusion, participation of members in formulating party rules, and powers of the party leaders as juxtaposed with other party members. Along these lines, reimagining the advent of parties in Kenya offers counsel on reforming parties on the aspects which will subsequently have an effect on IDRM. How did multi-party democracy become actualised in Kenya? The response to this question shows that there has been a negligible difference between practical intra-party democracy in the parties before and after enactment of the Political Parties Act of 2011. A reform agenda that seeks to reform flawed components of parties that were founded on personal interests and not democracy is bound to fail. Honest interrogation of history is therefore significant in ensuring that parties operate within the confines of the law — including the establishment and operationalisation of IDRM.

69 Political Parties Act No. 11 of 2011 Second Schedule para 23.
70 Political Parties Act 11 of 2011 sec 40.
71 Elections Act 24 of 2011 sec 13 (2A).
72 Elections (Party Primaries and Party Lists) Regulations L.N. 69/2017 Regulation 27(1) & 27(3).
73 Political Parties Act 11 of 2011 sec 41 (2).
74 https://www.undp.org/content/dam/kenya/docs/Democratic%20Governance/Final%20SOURCE%20BOOK%20%201ST%20NOVEMBER%2016%20(003).pdf (accessed 1 April 2020).
75 Political Parties Act 11 of 2011 sec 40(2).

EMERGING ISSUES AND THEMES DURING THE IEBC EDR PROCESS

VALIDITY OF THE MEMORANDUM OF UNDERSTANDING BETWEEN IEBC AND PPDT

The Political Parties Act establishes the PPDT with a broad jurisdiction, including settlement of disputes on party primaries and between members and their political parties. The IEBC, as stated elsewhere, has the power to settle all pre-election disputes, including nomination disputes. Even though nomination is defined in the Elections Act as the submission to the IEBC of the name of a candidate for election, the wording in Article 88(4) (e) of the Constitution and Section 74(1) of the Elections Act does not limit the IEBC from settling disputes arising out of the political parties' processes of selecting candidates. The PPDT's jurisdiction on party primary disputes was introduced through the Political Parties (Amendment) Bill of 2016 to address the challenge of concurrent jurisdiction with other bodies handling electoral disputes.[76]

Aware of the issue of forum shopping, IEBC and PPDT signed a Memorandum of Understanding (MoU) on 28 March 2017 to provide for the various types of disputes that each institution is meant to handle.[77] The MoU requires IEBC to settle disputes that relate to and directly affect the rights and abilities of party members and citizens to participate as candidates in the elections including:

a. Decisions of the returning officers regarding the registration of candidates;
b. The Constitutional and statutory qualifications of a member or a candidate nominated by a political party or an independent candidate; and
c. The Constitutional and statutory qualifications of women, youth, persons with disabilities, ethnic minorities and the marginalized candidates under Article 90 of the Constitution.

On the other hand, the PPDT is required to settle disputes that relate to instances where party members/citizens are denied/obstructed from exercising their rights within the political party, such as the preparations of party nomination lists for candidates in the general elections.

It is not debatable that the exercise of constitutionally accorded authority can only be constitutional if exercised within the parameters set and or contemplated in the Constitution. A deviation is an affront to the rule of law, regardless of whether or not the Constitutional Court has addressed the action or omission. It is in the interest of public bodies that exist on the strength of social contract to align with constitutionality, because they exercise their power on behalf of the people. Contrary action entitles the people to repudiate the contract. In addition, the ramifications of unconstitutional actions, even when there is no immediate adverse effect on the people, or even when done under the guise of protecting the interests of the people, are dire and certain. The history of Kenya and the world at large has no shortage of examples on the significance of the rule of law.

Having acknowledged the risk that faces the MoU, it is necessary to assert that the MoU made it possible for aggrieved persons to access justice. It is also notable that the number of complaints filed at the IEBC reduced drastically as compared to the 2013 general election experience, when IEBC heard more than 2,000 cases.[78]

76 At <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2016/PoliticalParties_Amendment_Bill2016.pdf> (accessed 1 April 2020).
77 Political Parties Disputes Tribunal ´MoU between PPDT&IEBC on Dispute Resolution Signed on 28th March 2017´ available at <http://ppdt.judiciary.go.ke/political-party-resources/> (accessed 1 April 2020).
78 At https://www.eisa.org/pdf/eh2014ken.pdf (accessed 2 March 2021).

JURISDICTION REGARDING POLITICAL PARTIES' PROCESSES OF SELECTING CANDIDATES

As the substance of the MoU between IEBC and PPDT indicates, there was no intention on the part of IEBC to settle electoral disputes of this type. Aggrieved persons nevertheless lodged complaints with the DRC.

In the case of IEBC Dispute Resolution Committee Complaint No. 315 of 2017, the DRC declined to entertain the dispute, citing lack of jurisdiction, based on the MoU and PPDT´s sole jurisdiction on party primaries. The complainant had alleged that he won the party primaries but his political party, Orange Democratic Movement, awarded the nomination certificate to his opponent.[79] On appeal, the Court of Appeal observed that the conferment of jurisdiction on the PPDT to hear and determine disputes relating to party primaries under the Political Parties Act does not outweigh the IEBC's jurisdiction to adjudicate a dispute arising from nominations provided such jurisdiction is properly invoked.[80] It also observed that the MoU cannot take away jurisdiction from the IEBC. Consequently, the court remitted the complaint back to the IEBC.

THE EFFECT OF SECTION 40 OF THE POLITICAL PARTIES ACT

The PPDT has both original and appellate jurisdiction to hear and determine party primary disputes. Party primary disputes can be lodged directly at the PPDT or as an appeal from the party's Internal Disputes Resolution Mechanism (IDRM). When one chooses to ignore the MoU, the PPDT still has jurisdiction. Nonetheless, the Political Parties Act cannot be employed by the IEBC to abdicate its duty, especially given that it derives its responsibility from the Constitution. Although the problem of forum-shopping exists, it cannot be solved by absconding duty and neglecting clear provisions of the law. A recommendation has been discussed below in this chapter.

JURISDICTION OF THE IEBC TO ENTERTAIN DISPUTES ON INTEGRITY OF CANDIDATES

Every person has the duty to implement the Leadership and Integrity Act, but the EACC has the specific responsibility of implementation. Regarding elections, the Act requires candidates to bind themselves under oath through a statutory declaration that they have the requisite integrity.[81] During registration of candidates for elections, the required documents for qualification include the statutory declaration.[82] It is instructive to use the MoU to point out that the IEBC had indicated that it would entertain disputes relating to qualifications of candidates (at registration for elections). As a result of these and its role to settle disputes, complaints have been lodged to challenge the integrity of candidates. The IEBC nonetheless dismissed the disputes, on the grounds of lack of jurisdiction on matters of integrity.[83] It is worth mentioning that where a person has been found in accordance with any law to have contravened Chapter Six of the Constitution, they can only be disqualified to contest elections if all possibility of appeal or review of the relevant decision has been exhausted.[84]

TIMELINES SET BY IEBC RELATING TO CANDIDATE NOMINATION

The DRC heard and determined complaints related to failure or inability of a candidate to present themselves before the Returning Officers with all required documents within the stipulated time.

The complainant in IEBC/DRC/NM/1/2017 alleged that the candidate presented his nomination papers to the County Returning Officer (CRO) in time, save for the delay in presenting the banker's cheque occasioned by a breakdown of the banker's cheque machine in Homa Bay. This, it was indicated, forced the candidate to pursue the services in Rongo Town, 30 kilometres away from Homa Bay.[85] The candidate claimed that the CRO declined to accept the fees in cash. In its decision, the DRC pointed

79 *Fredrick Odhiambo Oyugi v Orange Democratic Movement & 2 others* [2017] eKLR.
80 *Fredrick Odhiambo Oyugi v Orange Democratic Movement & 2 others* [2017] eKLR.
81 Leadership and Integrity Act 19 of 2012 sec 13(2).
82 As above.
83 *Aluochier v Kenyatta & 4 Others* IEBC/DRC/NM. http://kenyalaw.org/kl/fileadmin/pdfdownloads/2017ElectionPetition/Application_by_Isaac_Aluoch_Polo_Aluochier.pdf
84 Constitution of Kenya art 99(3).
85 IEBC/DRC/NM/1/2017 *Shem Odongo Ochuodho vs. Michael Kosgei Homabay County Returning Officer.*

out that Gazette Notice No. 2695, published on 17 March 2017, provided the timetable for nomination to the effect that the exercise was from eight o'clock in the morning to one o'clock in the afternoon, and then two o'clock to four o'clock in the afternoon.[86] Moreover, its reasoning was that the law requires that an application for nomination for candidature at a Senate election must entail a non-refundable nomination fee in banker's draft, a requirement that was also in the stated Gazette Notice. The DRC concluded its decision that the complainant's delay was inexcusable, as he was aware of the timelines and requirements.

Complaint No. IEBC/DRC/NM/24/2017 also centred on the failure of prospective candidates to meet requirements within the stipulated time.[87] The complainant who intended to contest elections as an independent candidate alleged that he had presented nomination papers on 29 May 2017, whereupon the list of 2,604 supporters was allegedly rejected, on the grounds that only 1,431 were registered voters. The Returning Officer instructed him to collect more signatures, and he managed to acquire another list of supporters on the same day, yet when he returned at 4.26 PM, the Returning Officer was not at the venue of nomination. The DRC dismissed the complaint by making reference to the four o'clock cut-off time and the requirement of two thousand supporters who must be registered voters in the respective county.[88] It was the DRC's view that the complainant had no excuse for not meeting the requirements within the set parameters.

The running theme in the DRC's decisions is its failure to take into account mitigating circumstances that would permit an exception to the IEBC's timetable. There is value in laws being certain to allow the citizenry and all persons the opportunity to know their entitlements and penalties if any. Public bodies should not have the leeway to move the goalposts, as there is the risk of any discretion being motivated by reasons averse to promoting the essence of public bodies, serving the public interest. Nonetheless, there ought to be principles to guide any flexibility in timelines to accommodate intervening circumstances, in cases where inflexibility would defeat the overall purpose of the law. An exception to rigid timelines is welcome, if there are valid reasons for failure to meet the deadline. The DRC's refusal to accommodate the complainants must be looked at through the lens of whether the timelines promote the IEBC's ability to conduct and supervise elections within the confines of constitutional principles. The election period has several time-bound activities that are possible only through adhering to strict timelines.

The Kenyan courts have addressed the issue of election timelines at length.[89] The High Court dictated that the purpose of timetables and cut-off dates/times, whether imposed by the IEBC or by law, is to facilitate the smooth running of the election process, as it allows for orderly elections, for all parties to prepare for elections, and for the preparation and distribution of ballots that are possible only if there are timelines.[90] A call was however made by the court that IEBC should take a tolerant approach, depending on the scenario presented and whether it amounts to exceptional circumstances. The inability to satisfy the requirements within the set time must be excusable. Along these lines, the High Court quashed the IEBC's decision in this case for failing to extend the time without considering the weight of the evidence presented; security reasons that made it impossible for the petitioner to present documents within the stipulated time.

INDEPENDENT CANDIDATES

A person who wishes to contest elections as an independent candidate must either resign from a political party at least three months before an election or must not have been a member of a political party. As proof, the IEBC requires a person who intends to contest elections as an independent candidate to obtain a clearance certificate from the Registrar of Political Parties.[91] The person is

86 Elections (General) Regulations L.N. 128/2012, L.N. 72/2017 Regulation 29.
87 IEBC/DRC/NM/24/2017 *Samuel Irungu Kabuchwa vs The County Returning Officer, Laikipia.*
88 Elections (General) Regulations L.N. 128/2012, L.N. 72/2017 Regulation 28(1).
89 Election Petition Appeal 98 of 2017 *Harun Mwadali Mwaeni v Independent Electoral & Boundaries Commission & another* [2017] eKLR.
90 As above.
91 Elections (General) Regulations L.N. 128/2012, L.N. 72/2017 Regulation 15(a).

further required to develop and submit a symbol to the IEBC at least 21 days before nomination day.[92] The symbol should not be obscene or offensive, a symbol of another candidate or a political party, or resemble the symbol of another candidate or political party or any other legal entity registered under any other written law. In addition, the person must submit signatures of supporters (for instance, an election for a governor requires 500 signatures).[93]

A complaint in the form of a letter dated 20 May 2017 was submitted to IEBC by a person who intended to contest elections as an independent candidate.[94] Timelines for exiting political parties had been provided in Gazette Notices Numbers 2692, 2693, 2694, 2695, 2696, and 2697.[95] The substance of the complaint included allegations that Section 32(1) of the Elections Act requires an independent candidate to submit a symbol to the IEBC at least 21 days before nomination day, which was 2 June 2017, and thus the deadline for submission of symbols by independent candidates was 13 May 2017. The candidate had resigned from the ODM on 8 May 2017, three months before the General Elections scheduled for 8 August 2017. He presented a clearance certificate, symbol, and a form for intention to vie as an independent candidate to the IEBC on 13 May 2017. The DRC observed that the law allows IEBC to set a nomination day.[96] There was more reliance on the requirement that a person who intends to vie as an independent candidate is to submit to the IEBC the symbol he intends to use during the election at least 90 days before the date of a general election or at least 21 days before the date appointed by the IEBC as the nomination day.[97] Strict timelines would have required the complainant to submit his symbol by 12 May 2017. The DRC further relied on the Court of Appeal's perception on timelines in respect to a case that related to timelines for filing cases. The Court had observed that timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any Court for whatever reason.[98]

PARTY NOMINATION RULES

Fielding candidates for elections through party nominations is at the core of a political party's functions.[99] Nominations form a part of the initial structural pillars towards free and fair elections. There is, therefore, the need to ensure that political parties conduct party nominations within the confines of the legal framework.

The regulation of political parties' nominations by the IEBC is anchored in the Constitution.[100] The power extends to regulation of the development of party lists by political parties for purposes of allocation of special seats.[101] Political parties, on the other hand, are required to nominate candidates in accordance with their respective party constitutions and nomination rules.[102] The party nomination rules must be in conformity with the guidelines or regulations issued by the IEBC, as demonstrated by a certificate of compliance issued by the IEBC. Non-conforming nomination rules are consequently rendered void.

For purposes of the 2017 general election, the IEBC issued a notice on 6 February 2017 requiring political parties to submit their nomination rules between 20 February 2017 and 2 March 2017 for review. The initial review was from 9 March 2017 to 13 March 2017 and a further review on later dates against a checklist derived from constitutional principles. Although not all political parties were compliant, none of the rules were rendered void by the IEBC. The reasoning was based on the enabling provisions of law having come into force late in time.[103] According to the law, the deadline for submission of nomination rules ought to have been 10 November 2016, being six months before the date of party nominations.[104]

92 Elections Act No. 24 of 2011 Section 32.
93 Elections (General) Regulations L.N. 128/2012, L.N. 72/2017 Regulation 32(1).
94 IEBC Dispute Resolution Committee Caroli Omondi v IEBC.
95 At <http://kenyalaw.org/kenya_gazette/gazette/volume/MTQ3Mg--/Vol.CXIX-No.35/> (accessed 1 April 2020).
96 Elections Act No. 24 of 2011 Section 2.
97 Elections Act 24 of 2011 sec 33(1).
98 *Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others* [2014] eKLR. http://kenyalaw.org/caselaw/cases/view/97404/
99 S Lars `Regulation of Political Parties and Party Functions in Malawi: Incentive Structures and the Selective Application of the Rules *International Political Science Review / Revue Internationale De Science Politique* 35, no. 3 (2014): 275-90 www.jstor.org/stable/24573400 (accessed 2 May 2020).
100 Constitution of Kenya arts 88(4) (d) & 90.
101 Constitution of Kenya Articles 97(1)(c), 98(1)(b), (c), (d), and 177(1) (b) & (c).
102 Elections Act 24 of 2011 sec 31 (1) (a).
103 Election Laws (Amendment) Act 2017.
104 Elections Act 24 of 2011 sec 27.

PARTY MEMBERSHIP LISTS

Political parties, and therefore party membership, are at the core of political involvement, even in the era of pronounced failures of parties and the advent of independent candidates.[105] Membership is so germane that closed party nominations must be preceded by submission of party membership lists to the IEBC.[106] The aspirants must also be members of the given political party at the time of submission of the list, to curb party-hopping and allow the IEBC time to prepare and conduct elections.[107]

The IEBC employed a Candidate Registration Management System (CRMS) to register candidates for elections.[108] The system permitted registration for elections only upon satisfaction of all requirements. An issue arose where the complainant was not registered for elections on grounds of being listed in two political parties, Jubilee Party and Maendeleo Chap Chap Party (MCCP).[109] The complainant claimed to have resigned from MCCP in good time in line with the IEBC's timelines. He sought refuge in a resignation letter addressed to MCCP, but the IEBC noted that the letter had not even been received by the ORPP to aid in his resignation claim. The DRC maintained that the listing by two parties disqualified him from being registered. The High Court upheld the DRC's decision, noting that it was the complainant's responsibility to ensure that his resignation from the party took effect.

The case highlighted above brings to light numerous issues. Political parties in Kenya have been on the spot for listing Kenyans as members with no regard to their knowledge or consent.[110] Further, resignation from a political party takes effect upon receipt of such notice by the respective political party.[111] The removal of one's name from a party register by the Registrar of Political Parties is an administrative action whose absence should not invalidate ones resignation from a party.[112] In the event of a dispute such as the one under reference, IEBC could have reached a different decision if the resignation letter had been submitted to the ORPP by the affected member as required under Section 14(3) of the Political Parties Act, 2011. As addressed under the recommendations section, the issue of double listing in more than one political party and ensuing disputes could be addressed if the ORPP submits party membership lists to the IEBC.

DISPUTES ARISING FROM USE OF PARTY LISTS

The present form of special seats in Parliament and county assemblies is not the same as nominated seats in the pre-2010 Constitution.[113] The changes include the concept of reserved seats for special categories and the process being an election conducted and supervised by the IEBC.[114] The Elections Act and subsidiary legislation provide the various stages in party list elections, including submission of party lists, review of party lists, publication of party lists, and allocation of seats.[115]

The DRC heard and determined 23 disputes, four of which were dismissed for want of prosecution, and one was withdrawn. A comprehensive record of the decisions of the DRC is contained in the IEBC Post-Election Evaluation Report.[116] Given that seats are allocated after elections, the pre-election disputes emerge following submission of lists and publication of the same by the IEBC. Some party members were unaware of the contents of the party lists until they were published in the newspapers by the IEBC and on the IEBC website.[117]

105 W. Wakoko `Enabling Alternatives for Political Parties` https://nairobilawmonthly.com/index.php/2020/04/01/enabling-alternatives-to-political-parties (accessed 4 May 2020).
106 Elections Act 24 of 2011 secs 28 &31(2) (D).
107 *Council of County Governors v Attorney General & Anor* Constitutional Petition 56 of 2017, [2017] eKLR. http://kenyalaw.org/caselaw/cases/view/134814/
108 At https://www.iebc.or.ke/uploads/resources/E9aCwKB0rO.pdf (accessed 4 May 2020).
109 *Kitheka Vs Constituency Returning Officer*, Kitui East IEBC/DRC/NM/28/2017
110 `Kenyan MP caught up in party list scam` *Daily Nation* 5 June 2012.
111 Political Parties Act 11 of 2011 sec 14 (2).
112 Political Parties Act 11 of 2011 sec 14 (3A).
113 At <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Independent-Review-Commission-on-the-General-Elections-held-in-Kenya-on-27th-December-2007.pdf> (accessed on 2 May 2020).
114 Constitution of Kenya art 90.
115 Elections Act 11 of 2011 sec 34-37.
116 Independent Electoral and Boundaries Commission Post Election Report https://www.iebc.or.ke/uploads/resources/V9UUoGqVBK.pdf (Pg 228-230) (accessed 28 February 2021).
117 At <https://www.iebc.or.ke/resources/?Party_list> (accessed 2 May 2020).

There was no dispute on the failure of political parties to submit comprehensive party lists nor the failure of IEBC to enforce this requirement. According to the Constitution, every political party is required to submit 98 party lists; 47 gender top-up lists for the 47 counties, 47 marginalised lists for the 47 counties, a list of 12 nominated persons to the National Assembly, and 3 lists for the Senate of 16 women, two youth, and two persons with disabilities.[118] Although the stated constitutional provision is couched in mandatory terms, the IEBC allowed parties to choose whether to submit all 98 party lists. Regardless of the practicability of the policy decision, entities which should implement laws cannot decide if and when to operate within the confines of laws. Failure by a party to submit party lists means that it forfeits its benefits if it emerges after an election that it could have been entitled to allocation of special seats had it submitted the lists. Still, the repercussions are not aligned with the need to ensure representation of special-interest groups. The IEBC should not be party to this; the law should be amended to state that political parties need not submit all 98 lists. The Narok Election Petition 6 of 2017, Sialo Natanya Tasur and another v IEBC and others is a product of the MCCP's failure to submit a comprehensive list for Narok County.[119] It emerged that had the party submitted a comprehensive list for Narok County, it could have been allocated a special seat.

The issue of voter registration arose before the DRC in connection with a party list.[120] The complainant alleged that the party list submitted by Jubilee Party for Nakuru County included nominees who were not registered within Nakuru County, contrary to the Jubilee Party's nomination rules. The DRC bench observed that if a registered voter is qualified to be a member of a county assembly, the electoral area of registration is immaterial.[121] It nevertheless noted that a party list submitted to the IEBC must conform to the constitution and nomination rules of the political party that submitted it.[122] The DRC therefore held that Jubilee Party had a duty to develop a party list that respects its own rules, and that the rules created a legitimate expectation that a Nakuru County party list was limited to persons registered in Nakuru County. The complaint raised several questions, including whether qualifications for single majority seats apply to the special seats. Was this a sound trajectory? Political parties have a duty to adhere to constitutional and statutory provisions.[123] In turn, in developing their constitutions and rules, they must uphold all laws, and avoid introducing rules that limit either the Constitution or the Elections Act of 2011. It may be argued that special-interest seats at the county level aim to reflect the composition of the county and therefore should be confined to persons registered as voters in the respective county. However, limiting rights of other voters through a party constitution does not satisfy the limitation conditions under Article 24 of the Constitution.

CAMPAIGN FINANCING

The IEBC has the mandate to regulate he amount of money that may be spent by or on behalf of a candidate or party in respect of any election.[124] Consequently, Parliament enacted the Election Campaign Financing Act of 2013 for various purposes, including regulation of contributions and expenditure.[125] The Election Campaign Financing Act of 2013 was not implemented for purposes of the 2017 general election, as it was suspended by Parliament.[126] The absence of campaign financing rules at least 12 months before an election, as required under Section 5 of the Election Campaign Financing Act, was among the reasons for suspension. The IEBC had, however, made steps towards implementation, including gazettement of contribution and expenditure limits.[127] There was therefore no pre-election dispute on this issue.

118 Constitution of Kenya art 90 (2) (a).
119 *Kapasar v Sialo Natanya Tasur & Ors* Election Petition Appeal 2 of 2018 [2018] eKLR. http://kenyalaw.org/caselaw/cases/view/157972/
120 *Gikonyo v Jubilee Party and IEBC*, IEBC/NM/PL/20/2017.
121 Elections Act 24 of 2011 sec 25.
122 Elections Act 24 of 2011 sec 34(6).
123 Political Parties Act 11 of 2011 First Schedule para 5& 6 (b).
124 Constitution of Kenya art 88 (4) (i).
125 Election Campaign Financing Act 42 of 2013 sec 12 & 18.
126 Election Campaign Financing Act 42 of 2013 sec 1A.
127 As above.

LESSONS, CHALLENGES, AND RECOMMENDATIONS

PROBLEMS WITH INTERNAL PARTY DEMOCRACY

Ideally, political party members ought to have access to party lists meant to be used in allocation of special seats and the criteria used to nominate party list members.[128] Political parties are required to abide by the democratic principles of good governance and also promote and practise democracy through regular, fair, and free elections within the party.[129] Nonetheless, the reality is different as most members learn of the content of party lists only when the IBC publishes them in the newspapers.[130] This means that their opportunity to interrogate the lists is limited. Besides, the prerogative to list nominees lies with the party, except when the priority of nominees has been prescribed by the law. An aggrieved member cannot therefore demand to be listed in a certain position and neither the IEBC nor the PPDT has power to dictate the priority of nominees on a list yet this forms part of the pre-election disputes.

ELECTORAL AMENDMENTS

Timely change in laws allows stakeholders, partners, and everyone in general to acquaint themselves with the duties and privileges under the law. This aids in effective and practical enforcement of the law. Late amendments, as was the case regarding vetting of political party nomination rules, defeat the law's purpose. A timely amendment includes respect for the principles of the Constitution on elections, thereby limiting undue advantage to any of the parties. Further, persons charged with the duty to enforce newly enacted laws require time to acquaint themselves with them. The Report of the Independent Review Commission on the 2007 general election recommended that all commissioners should have at least two years' experience before every election.[131] Electoral amendments should also be put into effect at least two years before a general election.

INEFFECTIVE REMEDIES

It is not in a complainant's interest to obtain a remedy that is unenforceable due to the framing of the order or lapse of time. The PPDT made judgments that included instructing the IEBC to include aggrieved persons on party lists, yet this is not within the mandate of the IEBC, but that of the political parties. There was occasion where the orders of the PPDT were time barred, and hence of no benefit to complainants. It is necessary to review EDR timelines and the courts to ensure the apt framing of orders. Further, there is need for limiting appellate stages with respect to appeals from IEBC and PPDT, to avoid a scenario of orders that cannot be implemented.

ADJUDICATION IN ABSENTIA

Resolution of disputes must be in open court. The open justice principle means that court proceedings should be conducted publicly or in an area to which litigants and members of the public have access and can be present if they so wish.[132] This is a pillar of transparency. On the other hand, hearings need not be in person, as long as no real or perceived risk is posed towards the rights of the parties; a party should, however, be notified and have a chance to file pleadings in support of their case even when they do not appear in person. Courts have observed that bodies whose procedures are laid down by statute are masters of their own procedure, provided they achieve the degree of fairness appropriate to their task. It is

128 Constitution of Kenya art 35 & Elections (Party Primaries and Party Lists) Regulations, 2017 regulation 5 (c).
129 Constitution of Kenya art 91 (1) (d).
130 Elections (General) Regulations, 2012 regulation 54(8).
131 At http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Independent-Review-Commission-on-the-General-Elections-held-in-Kenya-on-27th-December-2007.pdf (accessed 20 February 2021).
132 International Foundation for Electoral Systems 'Elections on Trial: The Effective Management of Election Disputes and Violations' May 2018 https://www.ifes.org/sites/default/files/ifes_managing_electoral_disputes_and_violations_final.pdf (accessed 14 May 2020).

up to them to decide how they will proceed, and there is no rule that fairness always requires an oral hearing.[133] The DRC has opined that, subject to other rules of natural justice, it can dispense with an oral hearing if the documents on record are sufficient for adjudicating a complaint.[134] In the EDR context, given the role of dispute resolution in meeting democracy, there is no justification to dismiss cases solely on grounds of non-attendance of complainants. The complaints lodged at IEBC and PPDT include affidavits and submissions; in the event that complainants are unable to be in court for one reason or another to prosecute their cases, these documents should be relied upon by the adjudicating body. The goal is to enable access to justice.

> "IN THE EDR CONTEXT, GIVEN THE ROLE OF DISPUTE RESOLUTION IN MEETING DEMOCRACY, THERE IS NO JUSTIFICATION TO DISMISS CASES SOLELY ON GROUNDS OF NON-ATTENDANCE OF COMPLAINANTS"

OPERATIONAL AND TECHNICAL CONSIDERATIONS

There are critical considerations that EDR bodies ought to put in place before adjudicating complaints. They include technical and logistical structures that contribute to lightening the workload of EDR bodies. The cases lodged are likely to be many and complex, yet the resources available may be limited. Beyond solving disputes, EDR bodies have a duty to ensure that litigants have an opportunity to present their cases. It is in this regard that timely preparation is key.

Factors of note include:

- **A functional Case Management System (CMS):**

  The IEBC acquired a CMS for various functions, including development of cause lists, filing complaints, and recording decisions, but the system was acquired close to the dispute resolution period, and due to the lean staff, it was used only for development of cause lists. It would have contributed to efficiency of the committees by offering quick access to information, audit trails, and ease of recordkeeping.

- **Devolution of DRC:**

  The IEBC intended devolution of the DRC and establishment of two types of panels for settling disputes; stationary and roving panels. The decisions to either devolve DRC or establish two panels did not see the light of day, so all complaints are adjudicated in Nairobi. This had an adverse effect on aggrieved persons, who could not afford travelling and sustaining themselves in Nairobi as they waited to be heard. This factor contributed to dismissal of cases on the basis of non-attendance.

- **Legal Support Network:**

  The IEBC used a list of prequalified lawyers to identify counsel to offer legal technical support in conjunction with its in-house lawyers. Their functions included research on legal issues, recording court proceedings, and developing draft Rulings for the IEBC´s interrogation, review, and approval. This contributed to expeditious decision making.

- **Appropriate venue:**

  The venue for hearing the cases was Milimani Law Courts in Nairobi, on the ground floor, due to its spaciousness to accommodate the media and

133 *R v Immigration Appeal Tribunal ex-parte Jones* [1988] I WLR 477, 481.
134 *Muriuki v Macharia* IEBC/DRC/NM/02/2018.

the public. Its suitability was further buttressed by existing ramps and wide doors to enable ease of movement by persons using wheelchairs and crutches. It is a best practice principle for courts to be accessible to everyone, including persons with disabilities.

- **Legal awareness:**

  IEBC Commissioners and select staff were taken through a two-part course on EDR under the guidance of the International Foundation for Electoral Systems (IFES). The first leg was from 28 March 2017 to 1 April 2017 and the second was 7 to 8 April 2017. The substance of the training included International Standards for an effective election dispute resolution mechanism. Among the standards of focus were a transparent right of redress, clearly defined election standards and procedures, an impartial and informed arbiter, a system that judicially expedites decisions, established burdens of proof and standards of evidence, meaningful and effective remedies, effective education of stakeholders, conduct of hearings, and contents of decisions. In addition, the sessions included simulation of cases. This calibre of exercise ought to be continuous and not pegged on an EDR period.

IDRM AND PEACE COMMITTEES

Strengthening and comprehensive operationalisation of IDRM and Peace Committees established under Para. 17 of the Second Schedule to the Elections Act are opportunities that ought to be harnessed.

A functional IDRM includes a dispute resolution panel that appreciates not only the electoral laws but also salient principles of natural justice. In addition, party constitutions and rules ought to have elaborate provisions on dispute resolution with clear timelines. There ought to be a penalty for parties which frustrate members from accessing justice within the party. It is nevertheless probable that not all parties can afford to hire personnel with a legal background or appreciate democracy-related issues. The IEBC and ORPP therefore have a gap to fill through offering training. A component of the Political Parties Fund may be redirected to building the capacity of parties on dispute resolution.

> “THERE OUGHT TO BE A PENALTY FOR PARTIES WHICH FRUSTRATE MEMBERS FROM ACCESSING JUSTICE WITHIN THE PARTY”

Peace Committees, on the other hand, are the grassroots level of adjudicating disputes. Different electoral areas are likely to have different triggers of violence or conflict. Rather than having IEBC address such issues at the headquarters level, a community-owned structure is more likely to be efficient. There is a need for the communities to have the ownership of the structure in terms of the composition including community leaders. To borrow a leaf from the sexual and gender-based violence cases in Kenya with respect to the role of community structures, some cases are not settled within the formal legal system but adjudicated upon by community elders.[135] However, regarding elections, dynamics of different areas could be used to determine the composition of peace committees.

Addressing issues at the grassroots level has the potential to reduce strain on the IEBC and the PPDT, hence overall efficiency.

LEGISLATIVE INTERVENTIONS

PLATFORM CERTAINTY

The blank cheque that allows complainants to lodge certain categories of complaints at either the PPDT or the IEBC is not beneficial as it creates inconsistency and uncertainty in terms of the orders issued. In addition, depending on the perception of litigants, one of the bodies is bound to be rendered

135 J Guyo & G Mwangi 'An Assessment of Sexual and Gender Based Violence in Wajir district, North Eastern Kenya Eastern Kenya' (2009) https://www.researchgate.net/deref/http%3A%2F%2Fdx.doi.org%2F10.13140%2F2.1.3519.2007 (accessed 1 March 2021).

obsolete, yet each is conceptually meant to have its own operating lane. A review of Section 74 of the Elections Act that provides for the IEBC to delegate party primary disputes as understood under the Political Parties Act to the PPDT would be a reprieve. Further, all party primary disputes ought to emanate from IDRM and appeals made at the PPDT, unless it is shown that the complainants were unable to get audience at the party level. Incentives for improved IDRM will encourage parties to conduct hearings within the context of the principles of fair trial. There ought to be a departure from rigid perception of punitive measures as a way to make parties comply with laws. Incentives may include a review of the funding criteria under the Political Parties Act, 2011 to benefit all parties with elected representatives.

> "THERE OUGHT TO BE A DEPARTURE FROM RIGID PERCEPTION OF PUNITIVE MEASURES AS A WAY TO MAKE PARTIES COMPLY WITH LAWS"

POWERS FOR REVIEW

There is a need to revise the IEBC's Rules of procedure to incorporate powers of review either on own motion or upon application by an aggrieved party. This would enable adjudicating bodies to review their orders or decisions. In practice, the DRC has exercised review powers to provide clarity.[136] In the case under reference, after review, the IEBC recrafted the decision to provide clarity.

DEMOCRATIC SPACE FOR INDEPENDENT CANDIDATES

As highlighted in this chapter, some of the requirements applicable to independent candidates, including the requirement for symbols, have no value yet they contribute towards pre-election disputes. They only serve to shrink the democratic space and heighten the preparatory election work. Legal review to eliminate bottlenecks on the participation of Independent candidates in elections will contribute towards effective EDR.

CAPACITY BUILDING

The IEBC, PPDT, political parties, and other relevant actors need to be given continuous training on EDR and emerging areas of law. Deliverables should include political parties devising and employing IDRM that respects rights of aggrieved persons and in which adjudicating bodies will not issue unenforceable orders.

136 *Musya & others v Khalif & Ors* IEBC/NM/PL/13/2017.

CONCLUSION

Redress of electoral complaints is a step towards addressing, if not minimising, electoral violence. A trusted and effective EDR system contributes to a free and fair election through effective remedies and affording aggrieved persons a platform to be heard. As seen through IDRM, trust cannot be built in the absence of transparency. It is also critical that decisions made in the pre-electoral period are final and timely for purposes of implementing court orders.

> “A TRUSTED AND EFFECTIVE EDR SYSTEM CONTRIBUTES TO A FREE AND FAIR ELECTION THROUGH EFFECTIVE REMEDIES AND AFFORDING AGGRIEVED PERSONS A PLATFORM TO BE HEARD”

There is value in capacity building of key players and timely introduction of new laws as the latter builds public trust. Effective laws and well-equipped public bodies that are trusted by the public are key to an efficient EDR system and consequently, the integrity of an election.

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CHAPTER 4

PRE-ELECTORAL PERIOD: ELECTION ENVIRONMENT LAW AND PRACTICE FOR RESTORING THE PROMISE OF AFRICAN ELECTIONS

DZIKAMAI BERE*

ABSTRACT

Elections are supposed to be empowering. They must be a tool that enables hopeful participation in the creation of a world of humanity's dreams. The reality in most African countries is that elections are a nightmare, usually associated with violence and fraud. They become a breeding ground for conflicts that will take decades to resolve. The human and economic cost is devastating. Restoring the promise of elections in Africa is an exercise that requires deep structural changes. At the centre of these processes are core principles, values, and virtues that accompany a democratic process. To unpack these matters, this chapter seeks to analyse jurisprudence and best practice on pre-election period and the election environment. The chapter looks at the role of the courts in election dispute resolution, the question of political violence, and its impact on participation. This is followed by an analysis of the rationale of such frameworks and any supporting mechanism. Mainly Zimbabwean and South African cases are used, mapping out the best practices and understanding their impact on elections. The chapter analyses the link between the pre-election environment and election outcomes. It discusses the infrastructure for promotion of a credible election, which includes peaceful dispute resolution. Particular attention is given to the judiciary and the role of information in activating participation especially of marginalised groups in Africa. The chapter concludes by making a set of recommendations aimed at bridging the gaps in law and practice in relation to the creation of a conducive pre-election environment.

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INTRODUCTION

> "When the electorate believes that elections have been free and fair, they can be a powerful catalyst for better governance, greater security and human development. But in the absence of credible elections, citizens have no recourse to peaceful political change. The risk of conflict increases while corruption, intimidation, and fraud go unchecked, rotting the entire political system slowly from within."[1]

The words above by Kofi Annan taken from the Foreword to the Report of the Global Commission on Elections, Democracy, and Security show both the promise and nightmare that elections can bring to a society. If managed well, elections carry the potential for empowering inclusive governance. But if poorly managed, elections can sow the seeds of highly destructive conflict. The key lies in the integrity of the process.

The Global Commission on Elections, Democracy, and Security (2012) defines a genuine election as "any election that is based on the democratic principles of universal suffrage and political equality as reflected in international standards and agreements, and is professional, impartial, and transparent in its preparation and administration throughout the electoral cycle."[2]

Several factors contribute to the realisation of genuine elections. This paper addresses some of the critical factors that contribute to preparing an election for a credible outcome or for a disastrous outcome. Among others, these include having an effective mechanism for dispute resolution and the ability of a pre-election environment to motivate popular and free participation. Another factor is the circulation of the necessary information that moves people to make decisions and take action. It is also in the pre-election environment that society must develop the necessary tools for inclusive participation. Equally important is the question of personal security. "How secure am I after casting my vote," the electorate always asks. This chapter addresses these five pillars, analyses the wisdom of the courts in Zimbabwe and South Africa regarding these matters, and makes some suggestions for bridging the divide.

"THIS CHAPTER ADDRESSES THESE FIVE PILLARS, ANALYSES THE WISDOM OF THE COURTS IN ZIMBABWE AND SOUTH AFRICA REGARDING THESE MATTERS, AND MAKES SOME SUGGESTIONS FOR BRIDGING THE DIVIDE"

Perhaps one of the problems with elections is that they are treated more as an event than as a process. This means important issues between elections are not given the attention they deserve.

1 K Annan EP de Leon & Ahtisaari M & MK Albright 'Deepening democracy: A strategy for improving the integrity of elections worldwide' Report of the Global Commission on Elections (2012).
2 As above.

Because this chapter focuses more on the pre-election environment, it is important to set out clearly the election cycle and emphasise that key reforms must happen before the election period. The Guidelines on Access to Information and Elections in Africa define the pre-election period as the period within an electoral cycle that includes processes such as legal reforms, planning and implementation, training and education, voter registration, and electoral campaigns. In that context, this paper looks at the environment surrounding the pre-election period. It is in this period that a lot of legal processes set an election into motion. These are processes like registration of voters, registration of candidates, proclamation of the election calendar, among others. Usually, this is the period when the courts are inundated with petitions regarding the electoral process. As political parties heat up their campaigns, many electoral violations are brought to both the criminal and civil courts. This is the arena which this chapter seeks to explore.

> “PERHAPS ONE OF THE PROBLEMS WITH ELECTIONS IS THAT THEY ARE TREATED MORE AS AN EVENT THAN AS A PROCESS. THIS MEANS IMPORTANT ISSUES BETWEEN ELECTIONS ARE NOT GIVEN THE ATTENTION THEY DESERVE”

STRUCTURE OF CHAPTER

This chapter is divided into three parts. Part one is this INTRODUCTION. Part two discusses the PILLARS OF A PRE-ELECTION ENVIRONMENT that promote a free and fair election. The pillars discussed here include mechanisms for dispute resolution, popular free participation, access to information, tools for inclusive participation, and personal security and democratic participation. Part three is the CONCLUSION.

PRE-ELECTION ENVIRONMENT PILLARS

MECHANISMS FOR DISPUTE RESOLUTION

Elections are a major driver of disputes, some of which escalate into "electoral violence." Violence becomes "electoral violence" because of its timing, goals, and outcomes.[3] It can be direct (physical harm), but it can also be cultural (like hate speech). Violence can also be structural (like failure by the police to bring perpetrators to book, thus spurring impunity). One of the most critical aspects of the pre-election environment is how societies design methods of resolving conflicts peacefully and effectively to avoid falling into violence. Although investments in transparency, institutional capacity, and impartial coverage are important, these do not eliminate the occasion of conflict and the associated risks. This is the reality of every human venture. It is therefore critical that in the pre-election period, mechanisms be put in place to ensure continuous resolution of disputes peacefully. This includes preventive methods like a Code of Conduct that prohibits hate speech.

> "ONE OF THE MOST CRITICAL ASPECTS OF THE PRE-ELECTION ENVIRONMENT IS HOW SOCIETIES DESIGN METHODS OF RESOLVING CONFLICTS PEACEFULLY AND EFFECTIVELY TO AVOID FALLING INTO VIOLENCE"

To take the example of Zimbabwe, it has put in place a dispute resolution mechanism specifically related to elections. This mechanism is centred around the drafting of specific laws and procedures, for adjudication by the courts. The mechanism is set up under provisions of the Constitution of Zimbabwe Amendment (No.20) Act 2013, as well as the Electoral Act. Section 93 of the Constitution sets out the procedure for handling disputes emerging from a presidential election. Section 161 of the Electoral Act [Chapter 2:13] established the Electoral Court to deal specifically with election disputes and review the decisions of the Zimbabwe Electoral Commission (ZEC). The Constitution, Electoral Act, Electoral Court Rules, and the Constitutional Court Rules read together constitute a compass that guides the Electoral Court and the Constitutional Court in relation to procedure in electoral petitions before these Courts. This is in addition to the form which the petitions themselves must adopt as well as the miscellany incidental to the prosecution of an election petition in Zimbabwe.[4]

In the case of *Makamure v. Mutongwiza & Ors*,[5] the court made the following observations:

> As the citizens of this country begin to exercise their democratic rights in the arena of electoral law, it is more than likely that there will be a dramatic increase in the number of election petitions. They will require, for their just resolution, the holding of election trials spanning several days and even weeks and to be heard expeditiously.

This effectiveness of the judiciary necessarily brings other issues into sharp focus, such as its independence, in the judicial appointment process and in their continuing tenure. This is in addition to such issues as the judiciary's capacity to resolve the disputes in a timely manner, depending on training, available human resources, and efficient case management procedures. Nonetheless, the role

3 UNDP 'Report on Elections, Violence and Conflict Prevention' (2011) 17. http://aceproject.org/electoral-advice/archive/questions/replies/190117228/266390805/Elections-Violence-and-Conflict-Prevention.pdf.

4 T Mutangi 'An Overview of the Practice and Procedure When Litigating Election Petitions in Zimbabwe' (2019) para 4, <https://zimlii.org/content/overview-practice-and-procedure-when-litigating-election-petitions-zimbabwe>.

5 1998 (2) ZLR 154.

of the courts in the electoral processes cannot be dismissed. Despite this, states must consider other complementary systems for dispute resolution before the conventional court contest. During the coalition government in Zimbabwe between 2009 and 2013, the Global Political Agreement (GPA) created a meta-mediation mechanism called the Joint Monitoring and Implementation Committee (JOMIC), composed of various political parties that were party to the agreement. The mechanism was in a way an extra-judicial conflict transformation mechanism to help resolve disputes related to political violence before they reach the courts.

It has been suggested that, ideally, the courts should mitigate against the risk of electoral violence by providing a dispute resolution mechanism through which aggrieved political contenders can seek redress.[6] This should include alternative dispute resolution (ADR) mechanisms and mediation platforms that operate with the force of law. The advantages of ADR approaches as part of the judicial and quasi-judicial approach to conflict transformation are that they are less expensive, are judicially sanctioned and are more conciliatory in approach.

This approach is relatively new, although various aspects of it have been implemented in different countries. In 2014, South Africa introduced Court-Annexed Mediation as part of efforts to enhance access to justice. Principles like those used in these mediation methods can be used to design a comprehensive platform to ensure that in the pre-election environment there is a solid dispute management process. This was attempted in a different way by the National Peace and Reconciliation Commission in Zimbabwe ahead of the 2018 elections. The Commission established a multi-party dialogue platform, and political parties were required to sign a Code of Conduct.

The problem with such platforms, however, is always the question of power balance and trust in the mechanism. A trusted and independent judiciary can help guarantee the process and firewall the mechanisms against capture by the dominant actors. This, of course, requires that the judiciary, which provides the platform for such interventions, is trusted by the parties and has the credibility to ensure that decisions and agreements from the platforms can be enforced at law. However, if other parties have no faith in the judiciary, the whole process remains fragile.

ENSURING POPULAR FREE PARTICIPATION

The popular saying goes, "Democracy is not rule by the majority. Rather it is rule by the majority who vote." This is true in many "so-called democracies," where the question of who governs is answered by the minority. Millions of people may, for instance, for one reason or the other, not take part in elections. This happens not because of a single event, but a culture that is shaped by several factors over time. It can be a culture of fear, exclusion, or disempowerment. It takes root mainly from seemingly harmless decisions and choices made over time.

In identifying the five major challenges to electoral integrity, the Global Commission on Elections, Democracy and Security, says one of the challenges is removing barriers — legal, administrative, political, economic, and social — to universal and equal political participation.[7]

In *Electoral Commission of South Africa v Speaker of the National Assembly and Others*,[8] the court spoke of the fundamental issue of participation:

> Behind the complexities of precedent and the intricate statutory machinery, lies a question of importance for every South African. How can this Court best ensure that the 2019 elections fulfil the promises the Bill of Rights makes about the franchise? These are, first, that every citizen is "free to make political choices," and second, that every citizen "has the right to free, fair and regular elections."

6 SM Burchard & M Simati 'The Role of the Courts in Mitigating Election Violence in Nigeria' (2019) 38 *Cadernos de Estudos Africanos* [Online]. <https://journals.openedition.org/cea/pdf/4407> pp123-144.
7 Annan et al (n 1).
8 *Electoral Commission of South Africa v Speaker of the National Assembly and Others* 2019 (3) BCLR 289 (CC).

The Global Commission recommended the removal of barriers to the participation of women, youth, minorities, people with disabilities, and other traditionally marginalised groups. This is in addition to taking affirmative steps to promote the leadership and broad participation of women, including through the judicious use of quotas. Free participation is hampered by many things, including *de facto* legal barriers. Dealing with such obstacles may be a matter for the courts. This could include issues to do with strengthening the rule of law to ensure that perpetrators of election-related crimes are held to account. This will include promotion of electoral justice to strengthen democratic participation. The judiciary thus plays an important role in ensuring that alleged perpetrators of violence brought before the courts are accorded a fair trial and dealt with as promptly as possible. Where electoral offenders evade justice, it creates impunity. This creates a further incentive for violence, a plague that undermines the credibility of any election. Where people doubt the credibility of a process, they are discouraged from participating.

> "WHERE ELECTORAL OFFENDERS EVADE JUSTICE, IT CREATES IMPUNITY. THIS CREATES A FURTHER INCENTIVE FOR VIOLENCE, A PLAGUE THAT UNDERMINES THE CREDIBILITY OF ANY ELECTION"

Popular participation requires building on several pillars of the culture of civic engagement. This rests on several aspects that courts are still to address in Africa, and some issues fall outside the purview of what courts can address. Some of the work is centred around the efforts of civil society to ensure that different sectors are mobilised to participate.

ENSURING ACCESS TO INFORMATION

The old cliché, "information is power," is true when it comes to elections. The African Union Guidelines on Access to Information and Elections in Africa state that the right of access to information guaranteed by Article 9 of the African Charter on Human and Peoples' Rights (the African Charter) is an invaluable component of democracy, as it goes a long way in facilitating participation in public affairs.[9]

The Guidelines proceed to state as follows:

> The importance of the right of access to information is underpinned by the fact that it is a cross-cutting right. It is a right that is necessary for the realisation of other human rights, including the right to participate in government directly or through freely chosen representatives, as guaranteed by Article 13 of the African Charter.[10]

Information plays a crucial role in the pre-election environment, as it shapes the quality of the participation. Information empowers the electorate to be well-informed about political processes and political contestants. The choice of a political candidate is not an intuitive process that happens on election day. It is a process that takes place over a long period of time, as the electorate interacts with information which enables them to decide not only whether to participate but also the choices they must make. The African Union Guidelines state that without access to accurate, credible, and reliable information about a broad range of issues before, during, and after elections, it is impossible for citizens to meaningfully exercise their right to vote in the manner envisaged by Article 13 of the African Charter.[11]

In the celebrated case of *Veritas & Others v ZBC & Others*,[12] the High Court in Zimbabwe found against state media for its biased coverage. The Court stated that the media is a critical player in an election, can make or break an election, and can foster democracy or stifle it.[13]

9 African Commission on Human and Peoples' Rights, Guidelines on Access to Information and Elections in Africa, Preface, November 2017.
10 As above.
11 Adopted by the Organisation of African Unity (OAU), 27 June 1981, Banjul, The Gambia. https://www.achpr.org/legalinstruments/detail (accessed 28 March 2021).
12 HMA 23/19 para 52.
13 African Charter (n 11).

In this case, applicants approached the court alleging, *inter alia*, that the state broadcaster's coverage of political parties was heavily biased in favour of the ruling party, in violation of provisions of the Constitution requiring impartiality by state-owned media. The Court found the conduct of the state broadcaster and state newspapers to be in material breach of the Constitution because they had not been impartial and free to determine the content of their broadcast. The court also held that the respondents had not afforded fair opportunity for presentation of divergent views and dissenting opinions. The Court noted that opinion pieces, especially in the print media, disgorge hate and inflammatory language, and ordered state media to exercise impartiality and independence in their editorial content. The Court also had this to say:

> The respondents are all critical players in any plebiscite. By the powers reposed and vested in them by law and social contract, they can individually or collectively make or break an election. They can foster democracy or stifle it. The framers of our constitution and our parliament were quite conscious of the need, among others, to safeguard multi-party democracy and combat one-party state governance.[14]

Although the judgment came out a year after the elections, it sets out important principles about the conduct of public media. It emphasises the importance of information management, as this determines how people may act and the perceptions that affect how the electorate will decide. This matter becomes more important in countries where there is no media plurality and the public depend on the information provided by the state media to make decisions.

However, there is another aspect of information management that needs to be understood. Although the *Veritas* case was about coverage, there is also the issue of disclosure. While coverage relates to general coverage of issues and candidates, disclosure is about candidates being transparent about their funding, allegiances, and loyalties. A South African case makes this clear.

In *My Vote Counts v Minister of Justice and Correctional Services*,[15] it was declared that information on the private funding of political parties and independent candidates is essential for the effective exercise of the right to make political choices and to participate in the elections. It was declared that information on private funding of political parties and independent candidates must be recorded, preserved, and made reasonably accessible. The Constitutional Court further said, "there is a vital connection between a proper exercise of the right to vote and the right of access to information. The former is not to be exercised blindly or without proper reflection." The Court cited the United Nations Convention Against Corruption and the African Union Convention on Preventing and Combating Corruption in support of the need for transparency in political funding, as a means to detect and discourage improper influence and corruption.[16] The Court went on to cite Ngcobo CJ (as he then was) in *President of the Republic of South Africa v M & G Media Limited*[17] who said that, "[I]n a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined."[18]

Most African constitutions provide for access to information as a right, inasmuch as that information is required for public accountability or the protection of a right. The African Charter on Democracy, Elections, and Governance requires state parties to ensure fair and equitable access by contesting parties and candidates to state-controlled media during elections.[19] This can be a standard that courts must insist on, not only during but also between elections, to ensure that access to information becomes a culture.

14 The Veritas Case (n 12).
15 *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC), para 35.
16 *My Vote Counts*, paras 49-51.
17 *President of the Republic of South Africa v M & G Media Limited* 2012 (2) SA 50 (CC) at para 10.
18 *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC) para 35.
19 Adopted by the Eighth Ordinary Session of the Assembly, 30 January 2007, Addis Ababa, Ethiopia.

Case law both in South Africa and in Zimbabwe supports the need to emphasise the obligation on public media to ensure the electorate receive balanced information, as an essential component to the full exercise of the right to vote. South Africa has gone a step further by insisting on full disclosure on the sources of funding.

But disclosure and transparency also need to be extended beyond political actors. They must include the standards and practices of state institutions that are charged with conducting the elections. Political parties in Zimbabwe have had to resort to litigation simply to get access to a voter roll. Until clear guidelines on promoting transparency within the pre-election period are developed and fully implemented, the integrity of the process continues to be doubted.

TOOLS FOR INCLUSIVE PARTICIPATION

It is one thing to have information about elections and to desire to participate, but it is another thing to have the tools and infrastructure that allow for participation. Effective participation in democratic elections is not only a matter of casting one's vote. It is everything around the election cycle, including the pre-election period. Many times, politicians and other elite groups can afford to pay for the infrastructure to carry their message to the people. But rarely does the message of the ordinary people find its way to the politicians. Developing tools that allow for participation of the marginalised and vulnerable is important in shaping an environment for inclusive participation. The groups that are usually excluded from or have a limited voice in this important process include women, ethnic and linguistic minorities, persons in detention, the elderly, the disabled, and displaced and diaspora communities.

PARTICIPATION OF WOMEN

Much can be done to remove obstacles to inclusive participation and smooth the path to the ballot for women. Genuine elections must see marginalised groups occupying both sides of the ballot; voting and being voted for. According to UN Women and the Inter-Parliamentary Union, only 24.9 percent of parliamentarians in the world are women.[20] In Zimbabwe, women candidates received only 11 percent of the 2018 election votes.[21] The reason why this happened is because few women participated as candidates. What keeps women away from the ballot in most African countries is violence and culture. Women who choose to participate in civic life face both physical and cultural violence. In May 2020, three vibrant young politicians for Zimbabwe's opposition MDC-A party were tortured severely for having participated in a protest.[22] Out of the hundreds of opposition supporters who gathered in Warren Park for the protest, assailants targeted the three women. This is a trend in many societies, where women are targeted because they are women. In addition, only just over half of political parties nominated any women candidates, with the two largest parties nominating only 8 percent and 10 percent women candidates, respectively.[23] General participation in civic activities is linked to participation in elections, because if a certain group is pushed out of civic life, they cannot suddenly be interested in electoral engagement, if they are not involved in other civic engagements.

For many women, tools that promote their inclusion must be tools for social transformation and empowerment. This goes beyond the electoral environment into the cultures and practices that disempower women. However, this does not mean that the pre-election environment is not an issue. The law can be a tool to offer protection to victims and provide safety nets for those willing to be more active.

PARTICIPATION OF PERSONS WITH DISABILITIES

Another marginalised group are persons with disabilities. The United Nations Convention on the Rights of Persons with Disabilities[24] underscores the equal rights of persons with disabilities to participate in political life. The exclusion of persons with disabilities comes from many fronts. It can be

20 Women in Politics: 2020 map, created by the Inter-Parliamentary Union and UN Women, as of 1 January 2020.
21 Research and Advocacy Unit (RAU) (2018), A Gender Audit of the 2018 Elections, September 2018. Harare: RAU, p. 9.
22 Zimbabwe Human Rights NGO Forum, "Forum Strongly Condemns Abduction and torture of MDC Alliance Youth Leaders, 16 May 2020, available at <http://kubatana.net/2020/05/16/forum-strongly-condemns-abduction-and-torture-of-mdc-alliance-youth-leaders/>.
23 RAU (n 21).
24 New York, 13 December 2006, United Nations Treaty Series, Vol. 2515 p.3.

the language used that excludes sign language and Braille or the arena of action that is unsafe for persons who require accessibility accommodations, or the loss of the secrecy of the vote for voters needing assistance. In *Mateta v ZEC & Others*,[25] the applicant sought to have the respondent compelled to print ballot papers in Braille or to provide a template ballot or other tactile voting devices and make them available for use by him and other voters with visual disabilities who wished to vote by secret ballot in the 2018 general election. The High Court dismissed the case on the ground that Braille literacy levels are low and because the ZEC allowed assisted voting by a person of the voter's choice. This case shows how sometimes neither the legislation nor the courts will take the extra steps needed to ensure inclusion of marginalised groups on equitable terms.

PARTICIPATION OF PERSONS IN PLACES OF DETENTION AND INCARCERATION

There is another group traditionally discriminated against, as they are alleged to be responsible for their condition. These are people in prisons. In many jurisdictions, convicted prisoners are disenfranchised. As an automatic consequence of their convictions and detention pursuant to sentences of imprisonment, prisoners lose their liberty, which consequently includes the liberty to participate in any civic activities. Some jurisdictions permit voting by prisoners with lesser sentences, or by remand prisoners awaiting trial.

This was the case with the Zimbabwean opposition activists, Tungamirai Madzokere and Last Maengahama, who petitioned the court demanding that they be allowed to exercise their voting rights.[26] In their application, the convicted prisoners were seeking an order compelling the Justice, Legal and Parliamentary Affairs Minister and the Zimbabwe Electoral Commission (ZEC) to register them on the national voters' roll and facilitate their voting on election day. It took more than a year for their case to reach the stage of a hearing, which took place two weeks before election day. The court reserved judgment in the matter, meaning that they were effectively disenfranchised.[27] Experts[28] have argued that although Zimbabwe's previous Constitution, the Lancaster House Constitution, denied the right to vote to prisoners serving sentences of more than six months, the present Constitution contains no such exclusion. Therefore, prisoners should have the same right as all other citizens to vote in elections. Although the courts have not ruled conclusively on this matter, in practice, prisoners have been blocked from participating in elections. Zimbabwe's election management body, the ZEC, has not provided prisoners with logistics to ensure that they, too, may register. As a result, prisoners were disenfranchised in the 2018 elections.

South African and Ugandan case law offer an interesting progressive perspective. In the August case[29] in South Africa, the applicants sought confirmation from the Constitutional Court that prisoners did indeed have the right to vote in the election. The applicants argued that the Independent Electoral Commission (IEC) had a duty to facilitate the voter registration of prisoners who were unable to register due to their imprisonment. The IEC had refused to undertake this responsibility unless ordered to do so by the Constitutional Court, since prisoners were viewed as "authors of their own misfortunes." In addition, it was argued that numerous logistical arrangements would have to be undertaken to register the prisoners. The Court relied on the provision of the Constitution that South Africa is, amongst others, founded on the value of universal adult suffrage and ruled that in the absence of any legislative disenfranchisement, prisoners retained their constitutional right to vote. The IEC was ordered to make all reasonable arrangements to enable prisoners to register and to vote. The Court stated "[T]he universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood."

25 HC 4349/18.
26 SC 8/12.
27 Kubatana, 'Zim Court Hears Prisoners' Petition to Vote', July 2018.
28 Veritas, Election Watch 18 of 2018. https://www.veritaszim.net/node/2431.

Another progressive case is from Uganda, the recent *Kalali Steven case*,[30] where the applicant successfully sought an order declaring that prisoners aged 18 years and above have the fundamental and inalienable right to be registered as voters and to vote pursuant to the Constitution. The High Court agreed that the exclusion of these Ugandans from the voters' registration exercise was illegal and a violation of their fundamental right to be registered as voters and participate in various voting exercises. The Court quoted Sachs J in the August case (see above) in which he relied on Cory J of the Canadian Supreme Court, to state that the right to vote is "so fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely every care should be taken to guard against disenfranchisement."

THE DIASPORA COMMUNITY

Another group that is often disenfranchised is persons in the diaspora. To take the Zimbabwean example, it is estimated that more than four million Zimbabweans reside outside the country, contributing about $1.1 billion per year in foreign currency remittances. Despite the government celebrating this economic contribution,[31] these four million people have remained disenfranchised. The Supreme Court was asked to adjudicate on the matter in the case of *Registrar General of Elections and Others v Tsvangirai*.[32] Several issues were put on the table. First was whether or not the Registrar General of Elections is obliged to make certain administrative arrangements to enable voters away from the constituencies in which they are registered to vote in other constituencies. On that issue, the court said:

> It is common cause that the first appellant, in his capacity as Registrar-General of Elections has directed that each voter on the common roll shall vote in his or her constituency in the forthcoming Presidential election. The respondent is not, in any way, challenging this decision. It is the failure of the first appellant to make adequate and reasonable arrangements for all voters registered on the common roll who would not be in their constituencies on the polling days which he alleges is unconstitutional. Providing for as many people to vote as possible is highly commendable. Failure to provide in the manner alleged is, however, not unconstitutional. The contention that the failure to provide the above facility amounts to the disenfranchisement of a voter is simply untenable. The voter does not lose his right to vote. He is disabled from exercising the right by being in a wrong constituency at the time he is expected to vote. The disability would not, in the circumstances, have resulted from any action by the Registrar-General.' The Constitution does not confer on a voter registered on the common roll the constitutional right to vote outside the constituency in which he is registered.

Second, the court was asked whether a citizen loses his or her right to vote upon loss of citizenship by operation of law, even if the person is legally a permanent resident. In other words, the issue was whether registered voters who ceased to qualify to be on the voter's roll by virtue of having lost or renounced their citizenship (following the ban on dual citizenship by law) remained eligible to vote on the ground that they are permanent residents. On that issue, the court interpreted the Constitutional provisions narrowly to hold that a person who was a citizen as of 31 December 1985 loses his or her right to vote on ceasing to be a citizen, and that being a permanent resident does not alter that. The category of permanent residents as of 31 December 1985 is interpreted narrowly to mean those who had not yet obtained citizenship but were eligible to do so, but not those who had lost their citizenship. The loss of vote or disenfranchisement upon cessation of citizenship is a loss by operation of law. In such cases, the constituency registrar, or anybody else for that matter, cannot reverse such a loss nor does he have any discretion in the matter. The law has taken its course, the voter has lost his or her right to vote by operation of the law and the loss cannot be revived in any way.

29 *August and Another vs Electoral Commission and Others* 1999 (3) SA 1 (CC).
30 *Kalali Steven v Electoral Commission and Attorney General* Misc. Cause No. 35 of 2018, Judgment June 2020, para 2.
31 The Herald, 16 March 2018, 'Diaspora remittances can spur economy'.
32 *Registrar General of Elections and Others v Tsvangirai*, SC 12/2002.

Third, the Court was asked whether it is possible to register for the presidential election on the basis of citizenship without needing to prove residency in a particular constituency. The Court held this would not be possible, and that residence in a particular constituency must be proved.

Most recently, the Zimbabwean courts were again asked to address the question of the diaspora vote in the case of *Gabriel Shumba & Others vs Minister of Justice & Others*.[33] In this case, the applicants approached the court challenging the exclusion of the diaspora vote. The Constitutional Court held that the law does not confer rights to a diaspora vote in general. The Constitution, it held, gives the right to vote to every Zimbabwean citizen of 18 years of age or over, but that right alone is not enough. It merely qualifies the citizen for registration as a voter, but the registration must be effected on a voter's roll, and that voters' roll must relate or "belong" to a given constituency. Thus, the Zimbabwean electoral system is constituency-based. The Constitution does not mandate the setting up of constituencies outside the borders of Zimbabwe, nor is there any legislative framework for diaspora voting. Those on government service overseas and their spouses are an exception; they are permitted to vote because of the nature of their job which has forced them out of the country.

The Constitutional Court noted that Gabriel Shumba had taken this issue to the African Commission on Human and Peoples' Rights in 2012. The Commission had ordered Zimbabwe to allow its citizens living abroad to be able to vote, based on the rights set out in the African Charter on Human and Peoples' Rights. However, the Constitutional Court held that it was not bound by that decision, because the African Charter has not been specifically incorporated into Zimbabwean law and therefore is not binding, according to s. 327(2) of the Constitution.

In South Africa, the courts have taken a different approach. The case in point is *Richter v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)*.[34] In this case, the South African Constitutional Court dealt with the question whether or not South Africans living abroad had the right to vote. Mr. Richter was a South African citizen, a registered voter, who was teaching in the United Kingdom but who intended to return to South Africa sometime after the upcoming election. The Applicant wanted to vote in the election whilst in the United Kingdom, without returning to South Africa. He could not do so, as the South African Electoral Act limited the right to a special vote (i.e., a postal vote) to people who were temporarily outside the country for a holiday, or for a business trip, or to participate in a sporting event. The Applicant argued that the restriction violated his right to vote under Section 19(2) and (3) of the South African Constitution.

The Constitutional Court upheld Mr. Richter's argument on the following grounds:

- The right to vote imposes an obligation on the State to take positive steps to ensure that it can be exercised.
- A citizen must be prepared to take reasonable steps to exercise the right to vote. For instance, he or she must be prepared to travel to a polling station and stand in a long queue. However, the burden imposed on voters must be reasonable and must not prevent a voter who is prepared to take those reasonable steps from exercising his or her vote.
- If a statutory provision prevents a voter from voting despite the voter's taking reasonable steps to do so, the provision infringes the right to vote enshrined in Section 19 of the South African Constitution and imposes a restriction that is not reasonably justifiable in a democratic society.
- To require registered voters who are living outside the country to return to the country to vote imposes an unreasonable obligation on them.
- Hence the restrictions on the right to a special or postal vote contained in the South African Electoral Act were unconstitutional.

33 *Gabriel Shumba & Others v Minister of Justice & Others*, CCZ 4/18.

The Court went on to point out that South African citizens abroad benefited the country through remittances and in other ways. The Court also referred to a survey in which it was found that 115 countries made provision for voting by absent voters and only 14 restricted their entitlement to vote on the basis of activity undertaken abroad by the absent voters. The Court emphasised the importance of exercising the right to vote: "[E]ach vote strengthens and invigorates our democracy. In marking their ballots, citizens remind those elected that their position is based on the will of the people and will remain subject to that will."

STEPS TOWARDS INCLUSION

Electoral laws need to be written and interpreted to promote inclusion rather than exclusion of voters. All the groups discussed in this section are marginalised groups. In the Electoral Institute for Sustainable Democracy in Africa's report on Promoting Inclusive Elections, AnaSofia Bizos writes that if African democracies are to be resilient and truly representative, vulnerable and marginalised groups must be enabled and encouraged to participate in the political processes of their home country, whether through the electoral process, governance or civil society.[35] The judiciary can play a progressive role in facilitating such a role.

> "ELECTORAL LAWS NEED TO BE WRITTEN AND INTERPRETED TO PROMOTE INCLUSION RATHER THAN EXCLUSION OF VOTERS"

The South African case law shows a different approach to the issue of promoting inclusive participation. More and more countries are developing approaches to recognise the rights of persons in detention and the participation of persons with disabilities, as well as overcoming barriers for participation of women. Recently, Zimbabwe approved principles for the transformation of the prison system towards a more human rights-centred approach, giving hope of positive traction in that direction. Where the executive is keen to place administrative obstacles in the way, the judiciary is encouraged to take a pro-human rights approach.

The cases in South Africa and Zimbabwe discussed above show that there is a need, ahead of the elections, to develop measures to ensure that marginalised groups are part of the political process. Although there is no argument being made against the participation of women and persons with disabilities, key challenges emerge on the diaspora and the persons in detention. The gaps between the Zimbabwean and the South African approaches can be bridged by paying attention to the regional standards. The excuse of limited resources should never be used to disenfranchise anyone, as the cost of a polarised society is much more devastating than the cost of enabling participation. The African Charter on Democracy, Elections, and Governance obliges state parties to recognise popular participation through universal suffrage as the inalienable right of the people.

PERSONAL SECURITY AND DEMOCRATIC PARTICIPATION

One issue that affects democratic participation is the question of personal security. In many countries, the pre-election period is characterised by violence and intimidation. Indeed, in some countries, elections are an act of war. Instead of delivering hopeful joy and expectation, they deliver fear and dead bodies. With a long legacy of violence, there is a lot of intimidation of voters and rivals. Exorcising the pre-election environment requires investments in strengthening the rule of law and combatting impunity. The trend in countries like Zimbabwe has been to undermine the rule of law by granting amnesty to perpetrators of political violence after every election.[36] This

34 *Richter v The Minister for Home Affairs and Others*, [2009] ZACC 3.
35 A Bizos 'Introduction, in Promoting Inclusive Elections, 2017' *Electoral Institute for Sustainable Democracy in Africa* https://www.eisa.org.za/pdf/symp2016paper2.pdf.p.5.
36 A Magaisa 'A Short History of Impunity and Political Violence in Zimbabwe' *The Big Saturday Read* https://www.bigsr.co.uk/single-post/2016/04/22/The-Big-Saturday-Read-Presidential-Amnesty-A-short-history-of-impunity-and-political-violence-in-Zimbabwe.

creates a vicious cycle of violence, in which the entire electoral cycle becomes poisoned by chronic violence. Courts can help break this vicious cycle by ensuring that perpetrators of violence do not enjoy its fruits in the form of election victory.

Combating the outbreak of election-related violence is fundamental to a country's long-term peace and stability. This process is complex, as it requires trust building and multi-stakeholder involvement. Addressing violence comprehensively means addressing all its forms, including threats and hate speech as well as physical violence, and its root causes as well as structural and cultural violence. Such an approach should bring in key actors including media, security sector, political parties, civil society, as well as law enforcement and the judiciary.

It has been argued that violence in the pre-election environment can influence the electoral outcome. This is more so where the violence is systematic. In Zimbabwe, the opposition candidate Morgan Tsvangirai in the *Buhera North* Election Petition (HH 67/2001) argued that statements made by the President, the Chairman of the War Veterans Association, and then Minister of Defence, Moven Mahachi had unduly influenced the outcome of the election and set the campaign of violence in motion. The Court, however, adopted a narrow interpretation in the matter, refusing to accept as evidence press reports to the effect of the violence on the electoral outcome. This approach has been criticised by human rights groups who argue that cases of such importance as electoral challenges, where there were damning testimonies of gross human rights violations, cry for active and brave judges. The judges must be ready and willing to develop the country's human rights jurisprudence so that it keeps in step with international standards.[37] The result has been the creation of a culture where political violence goes unchecked, and intimidation becomes a tool for campaigning, leaving the ordinary people vulnerable. In Zimbabwe, this has been cemented by the passage of a series of amnesty laws meant to protect law enforcement agencies from being held accountable for pre-election violence.

In the case of South Africa since 1994, elections have generally been peaceful until the formation of the Congress of the People (COPE) threatened the monopoly of the African National Congress (ANC).[38] From 1994, intimidation resurfaced in South African elections in various ways. Bruce[39] documents various forms of intimidation and manipulation in South African elections. These come in the form of vote buying, manipulation of food aid, denial of access to venues, disruption of meetings, violence and threats of physical harm, damage to property and denial of jobs and contracts beyond the election day. Bruce reports that police responses were generally ineffectual.[40] Not many cases have been brought to the courts on this basis.

In Zimbabwe, several cases have been brought to the courts alleging that election-related violence influenced an electoral outcome. Many of these cases have however, been decided on a technicality, denying the country an opportunity to develop electoral jurisprudence on the impact of violence on an election. In a recent Zimbabwean case, *Chamisa and 24 Others v Emmerson Mnangagwa*,[41] the opposition leader Nelson Chamisa raised allegations of undue influence, threats, injury, damage, harm or loss to voters, bribery and manipulation of food aid. These were alleged to have affected the integrity of the election.

In dismissing the application, the Constitutional Court adopted the following principles:

> Where the grounds for challenging the validity of an election result are allegations of irregularities committed by officers of the body charged with the responsibility of conducting the election or electoral malpractices committed by others who took part in the election process, the duty of a court is to satisfy itself by sufficient and clear evidence produced by the party bearing the onus of proof of the allegation that the alleged acts occurred. If a court finds as a matter of fact

37 Zimbabwe Human Rights NGO Forum 'Organised Violence and Torture in Zimbabwe in 2001' 2001 http://hrforumzim.org/wp-content/uploads/2010/06/Torture_Report_2001.pdf.
38 D Bruce 'Just singing and dancing? Intimidation and the manipulation of voters and the electoral process in the build-up to the 2014 elections' *Community Agency for Social Enquiry* (CASE) (2014).
39 As above.
40 As above 4.

> that the irregularities or electoral malpractices occurred, it must go further. It must make a finding on the question whether the irregularities or electoral malpractices were of such a nature and effect that they substantially undermined the ability of the electoral body to deliver a free, fair and credible election. Section 177 of the Act provides that, where the ground for seeking invalidation of an election is commission of a mistake or non-compliance with the provisions of the Act, it must appear to the court, after proof of the mistake or non-compliance, that as a result thereof the election was not conducted in accordance with the principles laid down in the Act and that such mistake or non-compliance did affect the result of the election.[42]

On the question of violence, the court stated that the applicant did not place this evidence before it. However, the principle was clear that even if such evidence had been put before it, it would have to be such that the transgression affected the result of the election.

This approach is problematic in many ways. First, it sets the bar for what is wrong and not what is right. In relation to human rights, courts are expected to provide the measure for good and give leaders a greater degree of responsibility in ensuring the protection of rights. Courts are expected to show zero tolerance to violence and electoral manipulation. Allowing a minimum level of violence in an election creates no incentive for respect for human rights. Rather, it creates an incentive for continuance of violence. What is more, the court also decided that where allegations of a criminal nature are made, the applicant bears the heavy onus of proving his case to the higher standard applied in criminal courts, *beyond a reasonable doubt*. There is no reason why such a standard must be applied in election petitions, which are by their nature civil cases. Instead, the time-honoured principle that civil cases must be decided on a balance of probabilities should surely apply in election petitions.

A 2019 Afrobarometer survey in Zimbabwe indicated that, for the majority of people, their political decisions are affected by experiences or threats of political violence. When one analyses the ACLED database, it shows that in Zimbabwe, incidences of violence spike up during elections. This may indicate that the violence is systematic, linked to major political events aimed at influencing electoral outcomes.

ROLE OF COURTS IN PROMOTING DEMOCRATIC PARTICIPATION

What role, then, can courts play in positively influencing the reduction of violence ahead of an election?

Burchard and Simati[43] state that successfully challenging an election outcome in the courts is related to a reduction in the lethality of violence in the next election, but only if the courts are generally perceived as trustworthy. Burchard and Simati conclude that in addition, building judicial capability and improving generalized trust in judicial institutions is key to reducing electoral violence. Burchard and Simati quote from a similar research study by Simati,[44] looking at the effect of courts on electoral violence conducted cross-nationally on African countries between 1990-2012. This study found that variation in judicial independence can influence both state actors and the opposition's choice to employ post-election violence, and that both the incumbent and the opposition are less likely to employ post-election violence in African countries that have independent judiciaries. However, in the absence of a trusted court system, political actors are more likely to revert to electoral violence either to influence the outcome of an election or in reaction to a concluded election. Where courts are reluctant to condemn violence, as in the *Buhera North* petition, political actors are most likely to offend against and political opponents who feel they have no judicial recourse are most likely to reciprocate with violence.

41 Chamisa and 24 Others v Emmerson Mnangagwa, CCZ 42-18.
42 As above 65.
43 Burchard and Simati (n 6 above) 123-144.
44 As above 132.

CONCLUSION

The law can be a tool for electoral empowerment or disempowerment. As more and more societies struggle to find ways of strengthening democracy through democratic participation, they resort to the development of legal frameworks that make the pre-election environment to contribute positively to delivering a credible election. This chapter has addressed five areas that are critical ingredients in promoting a conducive pre-election environment. Building capacity in the judiciary as an agent for peaceful resolution of conflicts in the pre-election period increases the chances of the courts to fairly handle disputes that may arise. This task is of course not simple, as a lot of work must be put into building the trust that the judiciary needs for actors to make a choice to use such platforms. Although other aspects like popular participation, personal security, access to information, and inclusive participation may seem distant from the judiciary, history has made the judiciary the arena where such rights issues are brought for clarity. It is important that African judges, in contributing to the advancement of electoral jurisprudence, be bold in embracing a pro-human rights approach. Governments are elected to serve the people. But because in some countries the electorate do not have the army and the police on their side to demand fair service, they depend on the judiciary to advance their interests. If the judiciary fails to play this role, democratic processes can easily become an arena for violence and the collapse of societies.

“AS MORE AND MORE SOCIETIES STRUGGLE TO FIND WAYS OF STRENGTHENING DEMOCRACY THROUGH DEMOCRATIC PARTICIPATION, THEY RESORT TO THE DEVELOPMENT OF LEGAL FRAMEWORKS THAT MAKE THE PRE-ELECTION ENVIRONMENT TO CONTRIBUTE POSITIVELY TO DELIVERING A CREDIBLE ELECTION”

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President of the Republic of South Africa v M & G Media Limited 2012 (2) SA 50 (CC) at para 10.

Registrar General of Elections and Others v Tsvangirai, SC 12/2002

Richter v The Minister for Home Affairs and Others, [2009] ZACC

Shumba & Others v Minister of Justice & Others, CCZ 4/18

CHAPTER 5

RESOLUTION OF PRE-ELECTION DISPUTES IN KENYA: A REVIEW OF EMERGING JURISPRUDENCE

MURIUKI MURIUNGI*

ABSTRACT

This chapter assesses emerging jurisprudence from Kenyan courts and other EDR forums on the resolution of pre-election disputes. There are various forms of pre-election disputes that form the subject of adjudication in EDR bodies and which have a bearing on the integrity and outcome of elections. These include, among others, political party nomination disputes; eligibility of voters and candidates to participate in elections; instances of electoral malpractice, including voter bribery and violence before elections or during nominations. This is in addition to whether a candidate has met the qualification criteria set in law to contest for a particular elected office. The review of emerging jurisprudence aims to help in documenting and critiquing existing knowledge and underlining the importance of pre-election disputes. This subject has received scant scholarly attention relative to post-election disputes. Such an assessment is also consistent with the emerging consensus that an election is not an event but a process.

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INTRODUCTION

It has been stated that an election is not an event but a process or continuum that commences from registration of voters to declaration of results.[1] This means that the pre-election period is as important as the voting itself. This is precisely because the voting process and the outcome of voting are a function of events that precede such voting. For instance, eligible voters who have not been registered as voters by the relevant electoral body and issued with voting cards cannot cast votes for their preferred candidates, however much they desire. Similarly, aspiring candidates for various electoral positions who have not been nominated by their political party or approved by the electoral body as independent candidates, as the case may be, cannot validly be elected into any elective office. Well aware of this fact, various players and political opponents do everything in their power to ensure that these pre-election processes are interfered with in their favour so as to disenfranchise a political opponent or the opponent's supporters. This state of affairs also accounts for a significant number of pre-election disputes reaching dispute resolution forums in Kenya, including the electoral body, the Political Parties Dispute Tribunal, and the election court in the form of election petitions.

This chapter assesses emerging jurisprudence from Kenyan courts and other dispute resolution forums on resolution of disputes in the pre-election period. These disputes, among others, take the form of disputes in relation to, or arising from, political party nominations; eligibility of voters and candidates to run for office; instances of electoral malpractice, including voter bribery and violence before elections or during nominations; and whether a candidate has met the qualification criteria set in law to contest for a particular elected office.

One of the areas that has been the subject of many pre-election disputes is nominations. Nominations have been defined as "a process through which candidates are identified for participation in an election, subject to them being properly qualified under the law, for the elective seat that they seek."[2] In this regard, nominations are of two kinds: one of them refers to internal party nomination process, in which aspiring candidates compete for a political party's ticket, while the one refers to registration by the electoral body to run for elective office. In this chapter, we apply the term nomination rather interchangeably to refer to both of these processes as the case may be. Suffice it to state that nominations are a critical component of the electoral process and must occur before any election can take place and are thus a central tenet of free and fair elections in a constitutional democracy. Indeed, the Constitution of Kenya provides that a presidential election stands cancelled if no candidate is nominated before the prescribed statutory period for filing of nomination papers.[3] The Constitution avails a framework and a yardstick within which nominations before elections are conducted. This is by providing for qualifications and disqualifications for nomination of candidates. Disputes commonly arise at the nomination stage within political parties, given the critical place and role that nominations play especially in a society with "ethnicised" political parties[4] and an ethnically-stratified voting class like Kenya.[5] The stakes are high in this context;

1 *Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR para 61. Also see, Judiciary Working Committee on Election Preparations, 'Pre-election Dispute Management: Between Judicial and Administrative Dispute Management Mechanisms' (September 2012) <http://kenyalaw.org/kl/index.php?id=1902> (accessed on 12 April 2020).

2 See the Supreme Court decision, *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR para 234.

3 Constitution of Kenya 2010, art. 138(8) a.

4 S Elischer, 'Ethnic Coalitions of Convenience and Commitment: Political Parties and Party Systems in Kenya' (2008) *GIGA Working Papers* 68/2008 < https://core.ac.uk/download/pdf/6862963.pdf> (accessed on 14 December 2019); Karuti Kanyinga, *Kenya: Democracy and Political Participation* (AfriMAP, Open Society Initiative for Eastern Africa, and the Institute for Development Studies, University of Nairobi, March 2014) 20.

5 F Holmquist & Mwangi wa Githinji, 'The Default Politics of Ethnicity in Kenya' (2009) 16(1) *The Brown Journal of World Affairs* 101. Here, the authors argue that the 2007-8 post-election violence in Kenya demonstrated the ethnic nature of the electorate's political identities and that the political class was divided on ethnic terms almost leading to state collapse. See also, Kenya Human Rights Commission, *Ethnicity and Politicization in Kenya* (KHRC: Nairobi, May 2018) <https://www.khrc.or.ke/publications/183-ethnicity-and-politicization-in-kenya/file.html> (accessed on 15 December 2019); Karen E Ferree, Clark C Gibson & James D Long, 'Voting behaviour and electoral irregularities in Kenya's 2013 Election' (2014) 8(1) *Journal of Eastern African Studies* 153, 155.

winning a political party nomination in some parties could virtually bring one to electoral victory.[6]

Political parties in Kenya are required by law to have their own internal dispute resolution mechanisms,[7] with the right of appeal to the quasi-judicial Political Party Disputes Tribunal,[8] or less commonly to the electoral management body, the Independent Boundaries and Electoral Commission (IEBC).[9] Indeed, there have been, in the past, instances of jurisdictional overlap and clashes between the IEBC and the Political Parties Dispute Tribunal. This is because the law appeared to vest both bodies with jurisdiction to handle pre-election disputes, thus encouraging forum shopping among litigants. This has since been settled by subsequent legislation and court pronouncements.[10] Decisions of the electoral body and the tribunal are still subject to the High Court's supervisory and judicial review powers if they merit such further input. In effect, various judicial and quasi-judicial bodies other than the election court have a significant influence on the electoral process before voting day.

Occasionally, in election dispute petitions that challenge electoral results, issues that would otherwise have been canvassed and adjudicated by the electoral body or the Political Parties Dispute Tribunal during a pre-election period are raised in election courts as a challenge to the results by petitioners for the first time. During adjudication of such election petitions, disputes have arisen in election courts regarding the timing of, and jurisdiction over, such issues. This is as to whether it is proper for a petitioner to fail to raise what are essentially pre-election issues before the mandated institutions and then wait to raise them for the first time at the election court. Although there had been varied debates on the subject, the Supreme Court of Kenya has since put an end to the debate. This has been done by formulating guiding principles on when pre-election disputes may be entertained by an election court. This was done in the case of *Sammy Ndung'u Waity vs. Independent Electoral & Boundaries Commission & 3 others*.[11] In this case, the Supreme Court of Kenya held that because pre-election disputes relating to nominations or eligibility go to the root of an election and can determine whether a petitioner succeeds or not, an election court can entertain pre-election disputes while determining an election petition. However, such pre-election disputes must be such that the petitioner was unaware of the facts forming the basis of the dispute or could not have been aware of them even upon exercise of due diligence, so as not to have raised them in a pre-election dispute body.

Against this backdrop of the significance of the pre-election environment in electoral democracy, this chapter explores the relatively understudied area of pre-election disputes resolution. In particular, the chapter considers the role and functions of the various pre-election bodies, including the internal mechanisms of political parties, the electoral body, the Political Party Disputes Tribunal, and the election court, insofar as it determines pre-election issues.

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STRUCTURE OF CHAPTER

This chapter is divided into five parts. Part one is this INTRODUCTION. Part two reviews the LEGAL AND INSTITUTIONAL FRAMEWORK FOR RESOLUTION OF PRE-ELECTION DISPUTES in Kenya. Part three ventures to analyse EMERGING JURISPRUDENCE FROM THE ABOVE HIGHLIGHTED PRE-ELECTION DISPUTE RESOLUTION BODIES and consider their impact on free and fair elections in a constitutional democracy. Part four is the CONCLUSION.

6 FO Wanyama & J Elklit, 'Electoral violence during party primaries in Kenya' (2018) 25(6) *Democratization* 1016. The authors argue that the intra-party violence associated with party primaries (political party nominations in Kenya) is a result of the nature of organization of political parties, which are organised around prominent political personalities who are identified with ethno-regional interests. The authors further argue that the intense competition for nomination tickets in these ethno-regional dominant political parties is because winning such tickets virtually guarantees electoral victory.

7 Political Parties Act 11 of 2011, sec 9, second schedule, paragraph 23.

8 Political Parties Act 11 of 2011, sec 40.

9 Constitution of Kenya 2010, art. 88(4) e.

10 See for instance *ODM v Edick Omondi Anyanga & Another* EPA 126 of 2017 [2017] eKLR.

11 *Sammy Ndung'u Waity vs. Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR, paras 62-98. One aspect of this challenge to the results of a governor's election was the petitioner's argument that the successful candidate was not lawfully nominated. The petitioner argued this was because he did not meet the criteria for being an independent candidate, having too recently resigned as a member of the Jubilee Party when he was unsuccessful in their primary election. The petitioner lost the appeal as the court found he was in possession of the relevant facts and could have brought his challenge before the election.

LEGAL AND INSTITUTIONAL FRAMEWORK FOR RESOLUTION OF PRE-ELECTION DISPUTES

The legal and institutional framework relating to resolution of pre-election disputes is to be found in a variety of laws. This includes the Constitution of 2010; the Elections Act of 2011 and the accompanying regulations; the Political Parties Act of 2011; the Independent Electoral Boundaries Commission Act of 2011; and other pieces of legislation.

THE CONSTITUTION

Article 81 of the Constitution provides for various principles that should undergird an electoral system. These include freedom of citizens to exercise their political rights through voting, universal suffrage based on equality of the vote and fair representation, and free and fair elections. Within the meaning of the Constitution, free and fair elections mean voting by secret ballot; elections that are 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. Parliament is enjoined by Article 82 of the Constitution to pass legislation to provide for several election-related matters. These include the following: delimitation of electoral units by the electoral body, nomination of candidates, continuous registration of voters, conduct and supervision of elections and referenda, and the progressive registration of citizens in the diaspora, including progressive realisation of the right of these citizens to vote. Pursuant to this constitutional provision, Parliament enacted the Elections Act of 2011, which is discussed elsewhere in this chapter. Article 83 of the Constitution delineates the requirements for registration as a voter. In first place, one must be an adult citizen, of sound mind, who has been convicted of an election offence in the preceding five years. In addition, this Article provides that a voter may be registered in only one registration centre, and that administrative arrangements should be made for voter registration and the conduct of the elections designed to facilitate an eligible citizens' right to vote or stand for election.

Article 86 of the Constitution is critical, as it lays down the principles that ought to be adhered to during voting. In particular, the electoral body is required to ensure that: a simple, accurate, verifiable, secure, transparent and accountable voting method is employed; the votes cast are counted, tabulated, and results announced in a prompt manner by the presiding officer at the polling station; results from polling stations are openly and accurately collated and announced promptly by the returning officer; and appropriate structures are put in place to avoid electoral malpractice. Importantly, Article 87 of the Constitution obliges Parliament to enact legislation to establish mechanisms to ensure the timely resolution of electoral disputes.

The IEBC, established under Article 88 of the Constitution, is given power to regulate the process by which parties nominate candidates for elections. Article 90(2) provides that the IEBC shall be responsible for the conduct and supervision of elections for nominated seats and ensuring that such names on the lists alternate between male and female to ensure gender parity (except in the case of the designated women's seats in the Senate). In addition, on the constitution and operations of political parties, Article 91 of the Constitution is clear that a political party shall not engage in or encourage violence or intimidation of members, supporters, opponents, or any other person; be founded on religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis; engage in bribery or other forms of corruption; establish or maintain a paramilitary force, militia or similar organisation; or accept or use public resources to promote its interests or its candidates in elections except as allowed by any other written law. Article 91(1)(d) provides that all political parties ought to abide by the democratic principles of good governance, and promote and practise democracy through regular, fair, and free elections

within the party. This requirement for internal party democracy is important in the nomination process. Given that political parties are the vehicles through which aspiring candidates capture political power, save for the few ones who contest successfully as independent candidates, compliance with these constitutional provisions on political parties are key to securing free and fair elections.[12]

Taken together, these provisions seek to ensure a level playing field for all candidates by proscribing bribery, violence, misuse of public resources by those already in power or coalescing around particular identities. Absent such provisions, there is potential for some candidates who have the financial muscle, or are in positions of power, to interfere with the democratic process by engaging in all those prohibited forms of misfeasance to their benefit. This would be detrimental to other candidates and to voters, thereby impacting negatively on democracy.[13]

Further, Article 92 of the Constitution mandates Parliament to enact legislation to provide for, among other things, the following: the role and functions of political parties; the registration and supervision of political parties; the reasonable and equitable allocation of airtime by state-owned and other categories of broadcast media to political parties generally and during election campaigns; regulation of freedom to broadcast to ensure fair election campaigning; establishment and management of a political parties fund; accounts and audits of political parties, and restrictions on the use of public resources to promote the interests of political parties.

These constitutional provisions largely speak to the pre-election environment and how the election process ought to be conducted during this period. This is because these provisions prescribe the conduct of voters, candidates, parties, the electoral body and election officials before and up to the voting day.

ELECTIONS ACT, NO 24 OF 2011

The Elections Act of 2011 was enacted pursuant to the Constitution to provide generally for various matters relating to elections and referenda. The Act contains a raft of provisions that may be considered relevant in the pre-election period. This is insofar as it provides for procedures and operations of pre-election dispute resolution bodies. In particular, the Act has provisions relating to registration of voters and determination of questions regarding such registration; nominations of candidates by political parties and qualifications and disqualifications for such nominations; nomination of independent candidates and party list members; dispute resolution by the electoral commission; resolution of election petitions; and regulation of airtime by broadcast media during election campaigns. In addition, the Act contains an electoral Code of Conduct in its Second Schedule and an enforcement committee mechanism. All these provisions relate to the pre-election period and have an impact on whether elections are free and fair. It is on this basis that specific provisions of the Act should be discussed.

Section 3 of the Act reiterates the constitutional right under Article 38(3) that every adult citizen has the right to vote during an election, so long as such citizen is registered in the Register of Voters. This Register of Voters is made up of a poll register in respect of every polling station, a ward register for every ward, and so on for every constituency and county. There is also a Register for Kenyans living outside Kenya. To actualise this right to vote, Section 5 of the Act provides for continuous registration of voters at all times, except during a 60-day period immediately preceding an election, and in the case of a by-election, between the date of declaration of a vacancy and the holding of such by-election. The IEBC is required to register any Kenyan citizen who has attained 18 years of age and has a valid identity card or passport, upon application for registration as a voter.[14] Relatedly, where there are contestations as to whether one

12 F Jonyo 'Assessing the Role of Political Parties in Democratization in Kenya: The Case of 2013 General Elections' (2013) Friedrich Ebert Stiftung Working Paper <http://erepository.uonbi.ac.ke/bitstream/handle/11295/85873/Jonyo_Political%20Parties%20and%20Democratization%20in%20Kenya%20-%20Fred%20Jonyo%202013.pdf?sequence=1> (accessed on 30 April 2020)

13 Konrad Adenauer Stiftung (KAS), *Voter Bribery as an Election Malpractice in Kenya: A Survey Report* (KAS, 2016) <https://www.kas.de/c/document_library/get_file?uuid=d95d9679-de9d-cfa9-0761-9b17bd5e3eea&groupId=252038> (accessed on 29 April 2020).

is eligible to vote, such as where people had duly applied to be registered as a voter but their names are not on the Register of Voters, they may submit a claim to the registration officer for their names to be included in the Register.[15] Such a determination will be made by the respective registration officer, and the decision thereon may be appealed to the Principal Magistrates Court on matters of both fact and law. The final appeal in this matter lies at the High Court, but on issues of law only.[16] Some election petitions and pre-election disputes have in fact revolved around the question of validity and maintenance of the Voter Registers.[17] Transfers of voters from one electoral area to another may only be done by the IEBC no later than 60 days before an election to protect the integrity of elections.[18]

The above provisions are crucial to the holding of free and fair elections, within the meaning of elections as a process. Failure to register otherwise qualified persons as voters, in effect, disenfranchises them. This concern is not idle, as there have been reported incidences of deliberate refusal or delays in registering voters in particular parts or regions, especially where those in power believe they do not have significant support in those areas.[19] This disenfranchisement may even extend to denial or delays in issuance of national identity cards to persons who are deemed not to support the regime in power so as to make them ineligible to vote.[20] Much as such incidences may appear a little removed from the electoral process on voting day, they determine elections and militate against free and fair elections in no insignificant way.

Section 13 in Part III of the Act provides for nomination of candidates by political parties. It provides that a political party may only nominate a candidate no less than 90 days before an election. Fundamentally, section 13(2)A of the Act is to the effect that political parties shall hear and determine all intra-party disputes arising from nominations within 30 days. This means that the law envisages the existence and actual use of internal party dispute resolution mechanisms in resolving nomination disputes in the first instance. The Act also provides for qualifications and disqualifications for nominations for all elective seats, including the President, the County Governor, Member of Parliament and Member of County Assembly.[21] In addition to this, Section 26 of the Act disqualifies all aspiring candidates from participating in a public fundraiser within a period of eight months before an election. Public officers are barred from contesting for elections; sitting elected public officers aspiring for elective office are required to resign from office at least six months before elections.[22]

There are also requirements for submission of party nomination rules, which must be done at least six months before nominations. This is in addition to party membership lists, which must be submitted to the IEBC at least 120 days before the date of election.[23] The submission of party membership lists is important, because only political party members have the power to nominate candidates.[24] Owing to the critical role of party nominations in deciding candidates nominated to run for elective office, the law mandates that the IEBC can conduct and supervise party primaries (nominations of political parties).[25] This is to ensure that such nomination exercises are also free and fair and adhere to the standards expected in a democratic election exercise. In fact, the IEBC can appropriate monies from its budget for supervising and conducting party primaries.[26]

The Act further provides that the number of voters per polling station shall not exceed 700.[27] This provision is meant to prevent disenfranchisement of some voters where there are too many voters,

14 Sec 5(3).
15 Sec 12.
16 As above.
17 *Odinga & Another v IEBC & 2 Others*, Presidential Election Petition 1 of 2017.
18 Sec 7.
19 E Kisiangani & M Lewela, *Kenya's Biometric Voter Registration: New Solution, New Problems* (ISIS Today, 2012).
20 Kenya National Commission on Human Rights, *An Identity Crisis? A Study on the Issuance of National Identity Cards In Kenya* (KNHCR: 2007) https://www.knchr.org/Portals/0/EcosocReports/KNCHR%20Final%20IDs%20Report.pdf (accessed on 29 April 2020).
21 Sec 22-25.
22 Sec 43 (5).
23 Secs 27 & 28.
24 Sec 29.
25 Sec 31(2).
26 Sec 31(2F).
27 Sec 38A.

in particular, polling stations that are in densely populated areas. Such population density may make it difficult for all voters to vote within the timelines provided on Election Day. The IEBC is also vested with the obligation of conducting continuous voter education to ensure that voters are able to exercise their political right to vote.[28] This is in view of a significant number of voters who may not be able to appreciate the technical process of voting. Relatedly, the IEBC is under a statutory duty under Section 104 of the Act to put in place appropriate infrastructure, including special voting booths and several polling officers, to ensure that persons with special needs, including persons with disabilities, can exercise their right to vote.

> "SUCH POPULATION DENSITY MAY MAKE IT DIFFICULT FOR ALL VOTERS TO VOTE WITHIN THE TIMELINES PROVIDED ON ELECTION DAY"

With respect to media coverage, which is a critical part of ensuring a level playing field for all candidates, Section 41 of the Act provides that the IEBC shall monitor the equitable allocation of airtime by state-owned media services, after consultations with the candidates and the media. In this regard, it is further provided that any political party participating in an election shall have access to state-owned media services during the campaign period. State-owned media is also expected to adopt the principle of total impartiality and refrain from any form of discrimination against any candidate.[29] In addition, all candidates and political parties participating in an election should be allocated reasonable airtime on all broadcast media during the campaign period.[30] In discharging its monitoring mandate, the IEBC has power to issue directives to the media in writing or even to prohibit media houses from transmitting information relating to an election.[31]

Part VII of the Act contains provisions relating to dispute resolution in both the pre-election period and in the post-election period by way of election petitions. Section 74 of the Act provides for settlement of pre-election disputes. It provides that, pursuant to Article 88(4)(e) of the Constitution, the IEBC shall be responsible for the settlement of certain electoral disputes. This includes disputes relating to or arising from nominations but excludes election petitions and disputes subsequent to the declaration of election results. These pre-election disputes should be determined within 10 days of lodging of such dispute. But where such dispute relates to a prospective nomination or election, it should be determined before the date of such nomination or election, as the case may be.[32]

The Elections Act also provides for the manner of presentation of election petitions to an election court. Notably, Section 76(2) and (3) provide that a petition questioning the return or an election on grounds of corrupt conduct or illegal practice, including the payment of money paid by the candidate whose election is questioned or their agent, may be filed within 28 days of the publication of election results in the Gazette. The importance of this provision for the purposes of this chapter, even though it relates to post-election petitions, is that it indirectly clothes the election courts with jurisdiction to determine some pre-election issues. This is because such corrupt practices commonly occur before an election. Indeed, the law envisages such a petition alleging corrupt or illegal practices even being presented as a supplemental petition, separate from an election petition founded on other grounds.[33] Under Section 87 of the Act, an election court has jurisdiction to make a finding on whether an electoral malpractice that is criminal in nature has been committed. The court can then direct that the order of such finding be transmitted to the Director of Public Prosecutions, who may take appropriate action based on the exercise of his or her prosecutorial discretion.

28 Sec 40.
29 Section 41(3).
30 Section 108.
31 Section 41(5 & 6).
32 Secs 74(2 &3).
33 Sec 76(5).

In addition, Section 110 of the Act makes it mandatory for all political parties and aspiring candidates to adhere to the Electoral Code of Conduct set out under the Second Schedule to be allowed to participate in elections. The Code of Conduct is meant to promote conducive conditions for the conduct of free and fair elections and a climate of political tolerance during campaigns and the entire electioneering period. Some of the measures contained in the Code of Conduct includes the following: publicly condemning acts of violence and intimidation and avoiding use of hate speech; refraining from any action involving violence or intimidation; ensuring that no arms or weapons of any kind are displayed or used during campaigns; refraining from campaigning in places of worship and burial ceremonies; cooperating and liaising in good faith to avoid political meetings clashing at the same venue at the same time; avoiding impeding the right of others to have reasonable access to voters for purposes of campaigning; refraining from attempting or actually abusing positions of power for political purposes; avoiding all forms of discrimination on any possible grounds in relation to political activity; not plagiarizing colours, symbols, or other identities of another political party or candidate; and not offering any rewards or penalties to voters to influence their decisions including attending a meeting, joining a political party or voting in a particular way, among others.[34]

THE ELECTION OFFENCES ACT, NO 37 OF 2016

The Elections Offences Act was enacted in 2016 as a separate statute, transplanting most of its provisions from the Elections Act of 2011. The various election offences, if proven, can potentially lead to a fine and/or imprisonment. If convicted of any of these election offences, a person is disqualified from being a candidate in any election for five years from the date of conviction. It is important to note that these election offences can be committed by political parties, candidates, or voters and all such incidences can influence the conduct of free and fair elections. The various election offences include multiple registration of voters; having more than one voter's card; multiple voting, campaigning on polling day, soliciting or receiving bribes to influence voting, hate speech targeting a candidate, selling or buying a voter's card, deliberately destroying a voter's card; impersonation of voters; destruction of campaign materials of an opponent; using another person's voter's card to vote; obstruction or barring of another voter from voting; and use of threats or force to either compel or prevent another from voting in a particular way, among others.[35] All these election offences serve either to disfranchise some voters; to give unfair advantage to some candidates or to disadvantage other candidates, thus impacting on free and fair elections. Proof of commission of any or all such offences to the required standard could lead to a nullification of election results, depending on the extent of effect of such offences on the electoral results.

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT, NO 9 OF 2011

This statute makes provision for the appointment and effective operation of the IEBC, which is an independent constitutional commission established under Article 88 of the Constitution. Section 4 of the Act reiterates the functions of the IEBC enumerated under Article 88(4) and Article 157(12) of the Constitution, including the settlement of pre-election disputes, including disputes arising from political parties' nominations, and investigation and prosecution of electoral offences. Its functions also include continuous registration of voters, regular revision of voters' roll, delimitation of constituencies and wards, and regulation of the process by which political parties nominate their candidates. This is in addition to registration of candidates for election, voter education, facilitation of observation and monitoring of conduct of elections, regulation of campaign financing, development of a code of conduct for candidates and voters in elections, and monitoring of compliance with legislation relating to political parties' nominations of candidates.

All the functions conferred on the IEBC by the Constitution have a direct bearing on election results and the integrity of such elections. In

34 Para 6 of the Code of Conduct.
35 Election Offences Act, Secs 3-11.

addition, virtually all these functions are discharged before elections and thus occur during the pre-election period. In view of this, it is safe to argue that the IEBC is an important body in the pre-election period and that its discharge of functions is at the core of achieving free and fair elections.

The law establishes the IEBC Dispute Resolution Committee established by IEBC, composed of IEBC Commissioners, and charged with handling disputes arising from internal political parties' nominations.[36] The Dispute Resolution Committee also hears and determines disputes relating to submitted party lists. A person wishing to contest the process of nominations at the Committee is required to have first exhausted the internal political party mechanisms and lodged an appeal with the Returning Officer, if need be. This serves the purpose of reducing instances of otherwise independent electoral bodies resolving what may be essentially political disputes. Most of the disputes that have been determined by the Dispute Resolution Committee have revolved around challenges to the authority of party officials, breach of internal party rules, disputes relating to voter registration, challenges relating to a candidate's membership of the relevant political party and claims that party nominations were not done within the statutory timelines.

Under Article 84 of the Constitution, all candidates and political parties are under an obligation to adhere to the electoral Code of Conduct. There is also the Electoral Code of Conduct Enforcement Committee, set up by the IEBC under the Electoral Code of Conduct to receive complaints relating to possible breaches of the Code of Conduct.[37] The Committee is composed of no less than five members of the Commission. The chairperson of the Committee must be a person qualified to hold office of a superior judge. The Committee can issue summons to a person, political party, or referendum committee against whom a complaint has been received as having infringed the provisions of the Electoral Code. In its proceedings, the Committee is not bound by provisions of the Criminal Procedure Code or the Evidence Act.

POLITICAL PARTIES ACT, NO 11 OF 2011

Part II of the Political Parties Act provides for registration and regulation of political parties. Specifically, the Act provides for requirements for a party to be registered as well as restrictions of public officers to serve in a political party. In Part IV, the Act provides for the establishment of the Office of Registrar of Political Parties, and Part V provides for the establishment and jurisdiction of the Political Parties Dispute Tribunal. The Office of the Registrar of Political Parties (ORPP) is established under Section 33 of the Political Parties Act of 2011 and is headed by a Registrar, assisted by three Assistant Registrars. The Registrar is mandated with the function of registering, regulating, monitoring, investigating, and supervising political parties to ensure compliance with the law.[38] In addition, the Registrar is vested with other functions. These include administering the Political Parties Fund, ensuring the publication of audited annual accounts of political parties, maintenance of register and symbols of political parties, investigating complaints under the Political Parties Act, and ensuring and verifying that no person is a member of more than one political party.[39] In effect, the Registrar plays a crucial role in monitoring and supervising operations of political parties in Kenya. Given the central role of political parties as vehicles to political power, the Registrar is indirectly a critical player in ensuring free and fair elections and a thriving democracy.

Section 23 of the Second Schedule to the Political Parties Act 2011 provides that all parties must have and outline their internal dispute resolution mechanism. Although the relevant statutory provisions are not prescriptive as to the content of such internal dispute resolution mechanism, guidance can be sought from Articles 91 and 92 of the Constitution. These provisions set out principles of such a mechanism. The principles include the following: promoting and practising democracy through regular, fair, and free elections within the party; respecting the right of all persons to participate in the political process, including

36 The IEBC Dispute Resolution Committee was established vide Section 109 of the IEBC Act and the Rules of Procedure of Settlement of Disputes made thereunder and published vide Legal Notice No.139 of 3rd December 2012.
37 Paragraph 15 of Schedule Two to the Elections Act of 2011.
38 Section 34.
39 Section 34.

minorities and marginalised groups; respecting and promoting human rights and fundamental freedoms, and gender equality and equity; and promoting the objects and principles of the Constitution and the rule of law.

The Political Parties Dispute Tribunal (PPDT) is established under Section 39 of the Political Parties Act of 2011 and is made up of members appointed by the Judicial Service Commission. The Tribunal is an external dispute resolution mechanism following the exhaustion of internal party mechanisms. The mandates of the Tribunal in law are to hear and determine disputes between a member and a political party, between members of a political party, between political parties, between an independent candidate and a political party, between coalition partners, appeals from decisions of the Registrar of Political Parties; and disputes arising out of party primaries.[40] All this exercise of jurisdiction by the Tribunal where one of the parties is a political party or a member of political party is subject to exhaustion of internal party mechanisms, except for disputes involving independent candidates and those arising out of party primaries, which may be taken directly to the Tribunal. The Tribunal is required to determine the above disputes within a period of three months following the lodging of such dispute.[41] Decisions of the Tribunal may be enforced in the same manner as those made by a Magistrates Court. In addition, an appeal lies from the Tribunal to the High Court on matters of fact and law, with a further appeal to the Court of Appeal and Supreme Court on issues of law only.[42]

Further, the First Schedule to the Act contains a Code of Conduct for Political Parties. Although not being strictly prescriptive as to the contents of parties' constitutions, the Second Schedule contains the Contents of Parties' Constitution or Rules to ensure that such rules cover important issues. The Third Schedule of the Act sets out the basic requirements of a coalition agreement, given the ubiquity of political coalitions among political parties to capture political power.

The courts have been clear that pre-election disputes including nomination disputes must be resolved by the pre-election dispute resolution bodies, which include political parties' internal dispute resolution mechanisms, the IEBC, and the Political Party Disputes Tribunal. Once these forums are exhausted, a pre-election issue including nomination disputes may reach an election court. Despite divided judicial opinion over this jurisdictional issue,[43] the Court of Appeal has clarified the matter. This was in the case of *Kennedy Moki v Rachel Kaki Nyamai & 2 others*.[44] The Court clarified that nominations are part of an election process and that an election may be challenged only by way of an election petition following declaration of results. Based on this, an election court can entertain what were essentially pre-election issues including nomination disputes.[45] Providing judicial construction to Article 88(4)(e) of the Constitution, the Court of Appeal held that this constitutional provision does not in any way oust the jurisdiction of an election court with respect to nomination disputes.[46] In addition, a person may approach the High Court under Articles 22 and 23 of the Constitution by couching a dispute as one involving a violation of the constitutional right to vote or exercise of any of their political rights provided for under Article 38 of the Constitution in the Bill of Rights. In such cases, the Court would be sitting not as an election court but as a constitutional court, and with a more expansive jurisdiction to deal with many issues. These include procurement of electoral materials and other disenfranchisement practices that can affect the outcome of an election, as illustrated in the next section on emerging jurisprudence.

40 Section 40.
41 Section 41(1).
42 Section 41(2).
43 See example, *Charles Ong'ondo Were v Joseph Oyugi Magwanga & 2 Others*, Homa Bay Election Petition 1 of 2013 where the Court held that an election court has no jurisdiction over pre-election issues while the converse was held in *William Odhiambo Oduol v Independent Electoral & Boundaries Commission & 2 Others* Kisumu Election Petition 2 of 2013.
44 Kennedy Moki v Rachel Kaki Nyamai & 2 others [2018] eKLR.
45 As above para 57.
46 As above para 58.

EMERGING JURISPRUDENCE ON PRE-ELECTION DISPUTES

This section reviews decisions made by the various dispute resolution forums discussed in the foregoing section and provides a critique of the jurisprudence with respect to its impact on democracy.

ROLE OF POLITICAL PARTIES IN ELECTORAL DEMOCRACY AND RESOLUTION OF PRE-ELECTION DISPUTES

In *Denis Wafula Okinda v Linus Ouma Asiba & 5 others*,[47] the complainant was an aspirant in the third defendant's party nominations for position of Member of County Assembly. He claimed that he had been declared winner in the nominations and consequently issued with a provisional nomination certificate as the valid winner. His nomination certificate was, however, nullified following a challenge by the first Defendant at the party's Internal Dispute Resolution Mechanism, which also barred the complainant from further political activities on grounds of having caused violence. Further, the party's internal mechanism had directed the returning officer to issue the nomination certificate to the first defendant instead. The Political Parties Dispute Tribunal, after finding that the claimant had been afforded a fair hearing in which he refused to participate even after due notice of hearing, upheld the decision of the party's internal dispute resolution mechanism. This was on the finding of violence and subsequent revocation of the nomination certificate. In dismissing the complainant's claim, the Tribunal affirmed that the party's internal dispute resolution mechanism gave effect to the right to a fair hearing with the opportunity to be heard.

The *Wafula Okinda* case should be contrasted with *Caroli Omondi v Hon. John Mbadi & 2 Others*.[48] In that case, the complainant successfully challenged the decision of the party to declare the first respondent the winner of the nominations for Member of Parliament at the party's National Appeals Tribunal (NAT). The NAT found that the nomination exercise could not have been said to have been above board and consequently proceeded to nullify the nomination results. Based on this, the NAT revoked the award of nomination certificate to the first respondent. The NAT further ordered the National Elections Board to conduct fresh nominations. The complainant, being dissatisfied with the decision of the NAT to call for fresh nominations, filed an appeal to the Political Parties Dispute Tribunal. In the appeal, the complainant sought for fresh tallying of results instead of fresh nominations. The complainant argued that the NAT had erred in its definition of what constituted ballot stuffing. He urged the NAT to adopt a definition which defined the practice as fraud, whereby a person who is permitted to vote submits multiple votes. The complainant sought refuge under Regulation 83 of the Elections (General) Regulations 2012. It was argued that given that the votes cast exceeded the registered voters in the area, the NAT ought to order a re-tally of the nomination results. This was to be by disregarding results from seven polling stations marred with irregularities and proceeding to declare the complainant the winner. In the response to the claim, the first Respondent submitted that, in compliance with the NAT decision to cancel the nomination and call for fresh nominations, the party decided to issue direct nomination to him, which is allowed under the party's constitution and rules. The third respondent, the Orange Democratic Movement, also claimed that the party had opted to issue a direct nomination to the first respondent. This was because he was an important member of the party and that timelines to submit nominated candidates to the electoral body were fast approaching. It was only with this that time would allow the conduct of fresh party primaries. The third respondent claimed that party primaries

47 [2017] eKLR, Complaint No. 24 of 2017. http://www.kenyalaw.org/tribunals/PoliticalTribunal/Denis_Wafula_Okinda_v_Linus_Ouma_Asiba_&_5_others_%5b2017%5d_eKLR.pdf (accessed on 12 April 2020).

48 [2017] eKLR, Complaint No. 42 of 2017.

under the Political Parties Act 2011 could either be an "election or selection" and that either of them sufficed for purposes of party primaries. In the circumstances, the respondents argued that the complainant's challenge to the new nomination process ought to have been made at the party's internal dispute resolution mechanism before moving to the Political Party Disputes Tribunal (PPDT).

The PPDT disagreed with the respondents and held that the respondents were merely seeking to circumvent the litigation process, as the new direct nomination of the first Respondent was made pursuant to the decision of the NAT, which was the party's internal dispute resolution mechanism, and from which no internal appeal was possible. Therefore, the PPDT found that it had jurisdiction. Further, the PPDT held that although there was provision for direct nomination of a candidate in the party's constitution, the correct procedure had not been followed in this case, as the Central Committee that issued the direct nomination was not the one that is given such powers by the party's constitution. As such, fresh nominations needed to be conducted. On the question of excluding or disregarding the nomination of results of the seven polling stations that were affected by irregularities, the PPDT reiterated its earlier decision in *William Chepkut v Jubilee Party and Another*[49] that fresh elections ought only to be called in respect of polling stations that are marred with irregularities. Consequently, the PPDT nullified the direct nomination of the first respondent for want of legal authority by the issuers of the direct nomination and ordered the conduct of fresh nominations in the seven polling stations where there had been irregularities.

This decision is critical in that it allowed for repeat nomination in areas where the will of the electorate had not been fully expressed owing to irregularities. Instances of direct nomination by political parties, while practical in a select few instances, can be subject to abuse by powerful players in a political party. This can impede free and fair elections and party democracy. This is because direct nomination privileges the nominee while disenfranchising voters and other candidates who are denied a chance to compete fairly on the strength of their ideas. Notably, the Political Party Disputes Tribunal in deciding on the issue of direct nomination remarked that given that the Party had conducted a nomination process through voting by members of the party, there was a legitimate expectation on the part of members that if the results were annulled, they would be allowed to express their will through a repeat of the nomination exercise.[50] In addition, restricting the fresh election to only those polling stations affected by irregularities would be fair to all candidates and minimise on costs and time. The PPDT's decision was subsequently affirmed by the High Court on a further appeal, which also stated that it would be unreasonable to subject voters in the various polling stations where there were no irregularities to a fresh nomination exercise.[51] The High Court in this case clarified that while sitting on appeal against decisions of the PPDT, its jurisdiction and powers were limited. This is unlike when sitting as an election court under Section 80 of the Elections Act, where it exercises the full powers of the High Court conferred on it by Article 165 of the Constitution. By this it has wider powers, including summoning and compelling attendance of witnesses as well as examining them.

Contrastingly, in *Samuel Owino Wakiaga v Cyprian Awiti & another*,[52] the PPDT affirmed the decision of the party (Orange Democratic Movement, the same party as in the *Caroli Omondi* case). This was where the party's National Executive Committee had issued a direct nomination to a nominee following an earlier nullification of nomination results. Citing compliance with the party's constitution, the PPDT held that it would not interfere with internal mechanisms and operations of a party where they are conducted pursuant to the party's governing rules and regulations, as had been done in this case.[53] This judgment was made despite objections by the complainant in this case that it had spent huge sums of money in campaigning but then been denied a chance for fresh nominations. This

49 Complaint No. 45 of 2017.
50 Para 57.
51 *Caroli Omondi v John Mbadi & another* [2017] eKLR, Election Petition Appeal No. 3 of 2017 <http://kenyalaw.org/caselaw/cases/view/137598/> (accessed on 12 April 2020).
52 [2017] eKLR, Complaint No. 52 of 2017 http://www.kenyalaw.org/tribunals/PoliticalTribunal/Samuel_Owino_Wakiaga_v_Cyprian_Awiti_&_another_%5b2017%5d_eKLR.pdf (accessed on12 April 2020).
53 Para 24.

was owing to the party's exercise of discretion to issue a direct nomination, which was done in conformity with the party's rules. However, when considered in light of the provisions of Article 91 of the Constitution, which requires political parties to uphold democratic principles and conduct free and fair elections, it is difficult to argue that this was achieved. In our view, the discretion to issue direct tickets to nominees ought to be exercised sparingly and only in exceptional cases as per parties' constitutions, because it is amenable to abuse by powerful political players to the exclusion of other candidates. Potentially, such a position can create perverse incentives for political party elites to favour their preferred candidates, even where such candidates are not popular with the electorate. In this regard, this has the potential to shield some candidates from being subjected to normal nomination and election processes that are the hallmark of free and fair elections.

> "POTENTIALLY, SUCH A POSITION CAN CREATE PERVERSE INCENTIVES FOR POLITICAL PARTY ELITES TO FAVOUR THEIR PREFERRED CANDIDATES"

Indeed, the Political Parties Dispute Tribunal has on other occasions emphasized the importance of ensuring that political parties are guided by Article 91 of the Constitution. This is in addition to being bound by democratic principles and rules of natural justice in nominations even where the party rules allow for direct nomination. For instance, in *Elijah Omondi v Orange Democratic Movement & Another*,[54] the PPDT stated thus at paragraphs 9 and 10:

> We note that Article 91 of the Constitution, which establishes political parties as agencies of the democratic process, requires political parties to abide by the principles of good governance and democracy. They must also promote the principles and objects of the Constitution including the national values and principles of governance. We agree with the Claimant and hold that the current Constitution engenders a culture of justification in which every decision by a political party must be justified. The culture of justification demands that a political party must supply an affected person with the reasons for the party's decision. It is only by supplying reasons that it can be ascertained whether or not the decision is reasonable and justifiable in an open and democratic society.

Moreover, in *Joshua Wakahora Irungu v Jubilee Party & another*,[55] the PPDT overturned the decision of the National Appeals Tribunal (NAT) of the party, which had found that nomination in a constituency was irregular and nullified the results. The NAT failed to order fresh nominations for that constituency, but instead excluded the results of that constituency and determined the winner based on results of the remaining two constituencies in that county. The NAT had justified this decision on the basis of the doctrine of necessity. It held that owing to time constraints, there was no time to conduct fresh nominations in time for presentation of the nominees to the electoral body. This was despite clear provisions in the party's rules requiring the holding of fresh nominations upon nullification of results. Noting that doing so had disenfranchised the people of the particular constituency and was irregular and unjustified, the PPDT held that fresh nominations ought to have been conducted. In the PPDT's view, even time constraints could not suffice to justify contravention of the express provisions of the Constitution, especially the right of the electorate to elect a representative of their choice.

According to the European Union Election Observation Mission Report[56] on the 2017 Kenyan general elections, the PPDT played a more significant role than in prior periods. The PPDT

54 *Elijah Omondi v Orange Democratic Movement & Another* Complaint 251 of 2017. [Not available online, though it is cited in other published decisions].

55 *Joshua Wakahora Irungu v Jubilee Party & another* Complaint 62 of 2017. http://www.kenyalaw.org/tribunals/PoliticalTribunal/Joshua_Wakahora_Irungu_v_Jubilee_Party_&_another_%5B2017%5D_eKLR.pdf

56 EU EOM, Final Report General Elections Kenya 2017 (January 2018) <https://www.europarl.europa.eu/cmsdata/212568/Kenya-general-elections_2017_EU-EOM-report.pdf > accessed 01 March 2021.

adjudicated more than 306 cases relating to party primaries and 235 cases relating to political party lists and out of these, 117 were appealed to the High Court, 32 to the Court of Appeal and two of the cases were appealed all the way to the Supreme Court.[57] The Tribunal also ordered a rerun of party nominations in at least eight cases and reconstitution of at least 19 party lists for failure to comply with the constitutional requirements of considering the marginalised categories.[58]

ROLE OF THE IEBC IN SUBMISSION OF PARTY LISTS BY POLITICAL PARTIES

Other disputes at the PPDT involved the submission of party lists to the IEBC as Article 177 (1)(c) requires for nominations to represent special interests and the marginalised. In *Margaret Adhiambo Oketch v Orange Democratic Movement*,[59] the PPDT considered a claim of such nature whereby the claimant contested the party list that had been submitted to the IEBC. Adhiambo claimed that her name as a nominee to represent the disabled had been omitted from the final list. Although she did not lead evidence at the PPDT to prove that her name had been omitted, the PPDT made important pronouncements with respect to the law relating to preparation and submission of party lists to the IEBC. Acknowledging that indeed it is the domain of political parties to prepare party lists, the PPDT was emphatic that the IEBC retains an oversight role over parties for the purpose of ensuring compliance with the Constitution, the law, and the party's own rules.[60] The PPDT stated that the IEBC may require a party to amend its party list to ensure that it complies with the law, meaning that whereas political parties have the right to prepare party lists, they do not have the final say. This supervisory and oversight role afforded by law to the IEBC in scrutinizing party lists to determine their compliance with constitutional principles ensures that political parties do not abuse their discretion, thereby expanding the democratic space.

EXERCISE OF POLITICAL RIGHTS TO VIE VERSUS PARTY HOPPING OR PARTY DISCIPLINE

Some cases have challenged infringement of the rights of voters. This was the case in *Joshua Wakahora Irungu v Jubilee Party & another* Constitutional Petition No. 56 of 2017.[61] This constitutional petition challenged the constitutionality of an amendment to the Elections Act that had the effect of restricting party hopping by a candidate after losing in the party nominations. The petitioner argued that this, in effect, infringed his constitutional right to associate and stand for election in a party of his choice. Although this was a constitutional court determining a petition alleging infringement of constitutional rights rather than an election court, it made important findings that impact on elections in a constitutional democracy. The court held that the said amendment was constitutional, as a member of party is not in any event required to be a member of more than one political party at the same time and that nothing prevents an individual from vying as an independent candidate. The court acknowledged that the amendment tended to restrict the right or interests of an individual in vying for an elective post in a party but held that the restriction was necessary and justifiable in the public interest of preventing party hopping and instilling party discipline. In making this point, the court remarked:

> The provision in question advances a compelling state interest to manage the electoral process efficiently as opposed to the individual interests of the petitioners who seem to be interested in looking for an opportunity to shift party allegiance after losing nominations. A law aimed at promoting the legitimate state interest in fair, honest and orderly elections is in my view consistent with the provisions of the constitution that require elections to be credible.[62]

57 As above 15.
58 As above.
59 Complaint No. 381 of 2017. http://www.kenyalaw.org/tribunals/PoliticalTribunal/381_Margaret_Adhiambo_Oketch_v_Orange_Democratic_Movement_[2017] eKLR.pdf (accessed on13 April 2020).
60 As above para 7.
61 *Joshua Wakahora Irungu v Jubilee Party & another* Constitutional Petition No. 56 of 2017.
62 As above 11.

THE JURISDICTION OF THE POLITICAL PARTY DISPUTES TRIBUNAL IN PRE-ELECTION DISPUTES

There have also been instances where courts have held that issues relating to whether one is eligible to be nominated by a political party cannot be determined by the PPDT in exercise of its functions under Section 40 of the Political Parties Act of 2011. This was the finding in *Republic v Chairman, Political Parties Disputes Tribunal & 2 others Ex Parte Susan Kihika Wakarura*.[63] The High Court held that the determination of eligibility, which required constitutional interpretation in this case, was a weighty issue and that the PPDT is only vested with jurisdiction to determine disputes between political parties and members. The court proceeded to state that the PPDT has jurisdiction only over disputes that are limited to a particular member and a particular political party, as opposed to those where the dispute potentially affects other persons who are not parties to the dispute.[64]

There have also been contests on the jurisdiction of the Political Party Disputes Tribunal and the IEBC to determine pre-election disputes. The Court of Appeal in *Joseph Ibrahim Musyoki v Wiper Democratic Movement- Kenya & another*[65] appears to have put to this to rest when it held that the Tribunal has power to determine disputes arising from party primaries and other disputes between members and political parties before the nomination stage. On the other hand, the Appellate Court held that the IEBC assumes jurisdiction once nomination has occurred. To provide clarity between the two processes, the court reverted to a statute, the Political Parties Act, which defines a party primary as the process by which a party elects or selects a candidate for an election but excluding a party list, while nomination is submission to the IEBC of the name of a candidate in accordance with the Constitution and statute.

RESOLUTION OF OTHER PRE-ELECTION DISPUTES SUCH AS PROCUREMENT OF ELECTORAL MATERIAL

Other pre-election disputes that have fallen for determination in the courts (albeit not election courts) have ranged from procuring of election materials and technology for use during elections to constitution of a technical committee to oversee elections.[66] For instance, in *Republic v IEBC & 3 Others ex parte Coalition for Reform and Democracy*,[67] the main opposition party challenged the IEBC's decision to award the tender for supply and delivery of ballot papers and election results declaration forms to a Dubai-based company known as Al Ghurair, without facilitating public participation in tendering. The High Court nullified the IEBC tender decision due to the lack of public participation, holding that it was important for the IEBC to consult all relevant stakeholders even before procuring technology, so as to maintain a perception of fairness and inspire confidence as a neutral arbiter and umpire.

However, the Court of Appeal overturned the High Court decision three days later.[68] The Court of Appeal found that there are exceptions to the general principle that public participation is required in all procurements by a public entity, one such exception being direct procurement as in this case. The Court of Appeal also noted that the High Court had been wrong to issue orders of certiorari and mandamus in this case, given the constitutional timelines within which the presidential and general elections are to be held. The High Court's orders could have threatened the political rights of millions of Kenyans, so the Court of Appeal overturned them.

These issues became particularly contested before the 2017 General Elections, largely owing to suspicions from the opposition that the party in power was seeking to compromise the results. The suspicion was that the ruling party was doing

63 *Republic v Chairman, Political Parties Disputes Tribunal & 2 others* Ex Parte Susan Kihika Wakarura [2017] eKLR.
64 As above Para 45.
65 *Joseph Ibrahim Musyoki v Wiper Democratic Movement- Kenya & another* [2017] eKLR. <http://kenyalaw.org/caselaw/cases/view/141677> (accessed on 12 April 2020).
66 See example *Kenneth Otieno v A-G & IEBC* Nairobi High Court Petition 127 of 2017.
67 *Republic v IEBC & 3 Others ex parte Coalition for Reform and Democracy* Nairobi High Court Miscellaneous Civil Application No. 637 of 2016.
68 Civil Appeal No 224 of 2017.

this by taking control of the electoral body and the procuring of election materials and technology.[69] Indeed, these concerns are not idle, as interference with procuring of ballot materials or technology used for voting or transmission of results can significantly compromise final election results. IEBC's Information Communication Technology (ICT) manager was killed a few weeks before the elections, yet he was the one in charging of securing the servers and electronic system, which gave these concerns more currency. This was coupled with allegations of possible tampering with the IEBC's servers. It is also worth noting that the ensuing presidential election petition that was annulled had the issue of technology as one of the main issues being litigated.[70]

> "IT IS ALSO WORTH NOTING THAT THE ENSUING PRESIDENTIAL ELECTION PETITION THAT WAS ANNULLED HAD THE ISSUE OF TECHNOLOGY AS ONE OF THE MAIN ISSUES BEING LITIGATED"

TIMELINES FOR RESOLUTION OF PRE-ELECTION DISPUTES

It needs be stated that the pre-election dispute resolution bodies acquitted themselves remarkably well in the period leading to the 2017 General Elections. The judiciary received more than 845 pre-election disputes, with the vast majority of them finalised within three weeks.[71] However, in the run-up to the 2017 general elections, there were cases of some pre-election disputes being resolved late in the day or so close to polling day that they were nearly impossible or impracticable to implement. For instance, there were incidences of disqualified candidates being reinstated by pre-election dispute resolution bodies after ballot papers had already been printed and technological devices such as the Kenya Integrated Electoral Management System already having been procured. Equally, there was also a nullification of the decision of the electoral body to procure election materials from a company named Al Ghurair. This was on account of lack of public participation on 7 July 2017, with the court ordering the electoral body to restart the tendering process exactly a month to elections which were scheduled for 8th August 2017.[72] This decision was reversed on 20 July 2017 by the Court of Appeal, which stated there was no need for public participation in direct procurement,[73] with the result that the electoral body resumed ballot printing only 18 days before Election Day. These difficulties arose largely because the law has not set any timelines within which election courts must resolve pre-election disputes. It should, however, be noted that Section 41(1) of the Political Parties Act requires the Political Parties Dispute Tribunal to resolve pre-election disputes within three months.

> "THESE DIFFICULTIES AROSE LARGELY BECAUSE THE LAW HAS NOT SET ANY TIMELINES WITHIN WHICH ELECTION COURTS MUST RESOLVE PRE-ELECTION DISPUTES"

69 This indeed informed the petition by the opposition in *National Super Alliance (NASA) Kenya v The Independent Electoral & Boundaries Commission & 2 Others*, Nairobi High Court Petition No. 328 of 2017 where the petitioner unsuccessfully sought to have identification of voters and transmission of results after learning that the electoral body had not procured the required technology and tested it prior to elections. The Court, in a decision further affirmed on appeal, while acknowledging that there is provision for use of technology in elections held that the same was not mandatory but was to serve as a complementary mechanism when the system failed.

70 See, *Raila Odinga & Another v IEBC & 2 Others*, Presidential Election Petition 1 of 2017.

71 Election Union Election Observation Mission, Republic of Kenya, *Democratic commitment demonstrated by the people of Kenya*, despite parties' forceful criticism of key institutions, Preliminary Statement issued on 10 August 2017, 5. <https://reliefweb.int/sites/reliefweb.int/files/resources/eu_eom_kenya_2017_preliminary_statement_final.pdf> accessed on 07 July 2020; EU EOM (n 59 above) 15.

72 *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR, Judicial Review 378 of 2017.

73 *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR, Civil Appeal No. 224 of 2017.

EVALUATION OF EFFECTIVENESS OF EDR MECHANISMS

Viewed in totality, the pre-election dispute resolution mechanisms in Kenya are increasingly playing a significant and more prominent role in electoral outcomes and overall electoral democracy. This is illustrated by the increased number of disputes adjudicated by these bodies, which in effect ultimately affect electoral results. In the 2017 elections, there was a prioritization of electoral disputes, including by pre-election dispute resolution bodies which resolved the ensuing disputes within a period of three weeks. The timely resolution of disputes, the perception of fairness and impartiality by litigants, and the collaboration with the judiciary through the Judiciary Committee on Elections and Judicial Training Institute contributed to enhanced effectiveness of these EDR mechanisms.

> "THE PRE-ELECTION DISPUTE RESOLUTION MECHANISMS IN KENYA ARE INCREASINGLY PLAYING A SIGNIFICANT AND MORE PROMINENT ROLE IN ELECTORAL OUTCOMES AND OVERALL ELECTORAL DEMOCRACY. THIS IS ILLUSTRATED BY THE INCREASED NUMBER OF DISPUTES ADJUDICATED BY THESE BODIES, WHICH IN EFFECT ULTIMATELY AFFECT ELECTORAL RESULTS"

The above successes notwithstanding, these various mechanisms have faced challenges, as highlighted by various stakeholders. For instance, there have been complaints about the limited accessibility to the IEBC Electoral Code of Conduct Enforcement Committee, which provides enforcement partly owing to costs and its centralised nature.[74] It has been stated that the Committee lacks clear procedures and issued inconsistent rulings and penalties. The Peace Committees provided for in the law have not been operationalized and have no sanctioning powers, thereby reducing their effectiveness.[75] With respect to the IEBC as a body, there still remains a trust deficit among a section of the public thereby making it imperative to enhance sustained consultations as well as transparency and accountability.[76]

At a more general level, some of the limitations of pre-election dispute resolution mechanisms raised by stakeholders include centralisation with the bodies predominantly within Nairobi and the use of courtrooms ,which have an intimidating presence; strict timelines for resolving pre-election disputes, especially because the events leading up to such disputes take place too close to elections; administrative, resource, and capacity constraints of the various bodies, including the limited number of members of the tribunals that have to serve the whole country as well as budgetary constraints; perceptions of bias among some members of the various pre-election dispute resolution bodies; and a lack of effective remedies capable of being granted by these bodies *vis-à-vis* the courts.[77]

74 EU EOM (n 59 above) 18.
75 As above.
76 As above.
77 L Thuo, Compendium of 2017 ELECTION PETITIONS: *Select Decisions Issues and Themes Arising from the 2017 Elections in Kenya* (ICJ Kenya: Nairobi, 2019) 10-12.

CONCLUSION

This chapter set out to explore the emerging jurisprudence on resolution of pre-election disputes from statute and the various dispute resolution bodies. This was with a view both to document the existing knowledge and critique this body of knowledge. The chapter has discussed the critical role played by various dispute resolution bodies and laws that undergird pre-election disputes. The discussion is premised on the understanding that an election is a process that commences before registration of voters and lasts at least until declaration of results. This is as opposed to the voting event. Based on this, it has been argued that the pre-election environment ought to be afforded more attention that it has in the past. The chapter began by providing a context into various pre-election issues that form the subject matter of disputes. It then ventured into examining the legal and institutional framework relating to resolution of pre-election disputes. This was followed with a review and analysis of various cases from the various pre-election dispute resolution forums. This gives the trajectory that electoral jurisprudence has taken. In the main, it is concluded that the emerging jurisprudence has clarified the roles and functions of the various bodies, thus reducing the jurisdictional overlap that prevailed before. More fundamentally, many of the decisions made are a significant step towards improving on the pre-election environment and thus, are a positive step in engendering electoral democracy.

“IT IS CONCLUDED THAT THE EMERGING JURISPRUDENCE HAS CLARIFIED THE ROLES AND FUNCTIONS OF THE VARIOUS BODIES, THUS REDUCING THE JURISDICTIONAL OVERLAP THAT PREVAILED BEFORE”

The above notwithstanding, it is also noted that there have been cases where political parties abuse their discretion and use the internal dispute resolution mechanisms to privilege favoured candidates as nominees. This is the case even where such candidates are not popular with the electorate. This has happened through the issuance of direct nominations which are usually allowed in the parties' constitutions and consequently affirmed by either the IEBC or the Political Parties Dispute Tribunal. In addition, the jurisprudence from some courts and the PPDT which appear to claim that an election court cannot inquire into the eligibility of a candidate to vie, on grounds that the same is the jurisdiction of pre-election bodies, is bad law, as it helps to sanction electoral fraud. In addition, there is need for legislative reforms to set timelines within which pre-election disputes must be resolved by all dispute resolution bodies.

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CHAPTER 6

NULLIFICATION OF ELECTION RESULTS AND THE STANDARD OF PROOF: EMERGING JURISPRUDENCE IN SELECTED SUB-SAHARAN AFRICA COUNTRIES

TARISAI MUTANGI*

ABSTRACT

This chapter is an inquiry into electoral dispute resolution, with particular focus on the emerging jurisprudence on the standard of proof required to annul an election in Africa. The inquiry is premised on the high failure rate of electoral petitions prevalent across the continent. Petitioners find it almost impossible to reverse an election result, based on allegations of electoral malpractice, fraud, or any other grounds allowed by the law of each country. The author makes several findings, one of which is that there is no consensus among sub-Saharan countries whether election proceedings are civil or criminal. This has a bearing on the standard of proof required. Second, there is consensus that the petitioner bears the onus to prove that the election was not conducted in accordance with the law or that there were irregularities and that such irregularities affected the result in a "substantial manner." This onus may shift to the respondent to rebut the petitioner's prima facie case, sometimes back and forth between the parties until one of the parties has established an answered case. Third, that there is no consensus on the standard of proof, with some jurisdictions using the balance of probabilities, others proof beyond reasonable doubt while a few use the "intermediate standard." The latter is between the civil and criminal standards of proof. Fourth, that there is general consensus that an election petition is sui generis, based on its importance to governance and exercise of political power. Other jurisdictions have rejected this approach, in preference of a human rights-based approach that makes the right to vote the primary consideration. The author concludes that there is no basis for elevating election petition proceedings to a level higher than any other proceedings. Where civil allegations are made, the petitioner should prove their case on the civil scale, but where criminal allegations are made, a higher standard is appropriate.

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INTRODUCTION

Democratic elections that are free and fair have long been accepted as lying at the heart of democratic governance. It is through democratic elections that people rule themselves through their freely chosen representatives. For this reason, democratic elections lead to representative democracy. At the core of democratic elections is the expression of the will of the people. Whenever an election is conducted, it is imperative that electoral management authorities strive to ensure that the election result is an accurate representation of the will of those who voted. In other words, electoral management bodies (EMBs), within their mandate to organise and manage regular, free and fair elections, should guarantee the integrity of the electoral process from its onset until the declaration of the result. This explains why there is immense public interest in the preservation of the integrity of the electoral process and the declaration of the election result. Where there is evidence of breaching the integrity of the electoral process, such a scenario results in politically charged disagreements. Invariably, disputes involving the results of an election in Sub-Saharan Africa stand are determined by a court of law or tribunal, be it of general or specialised jurisdiction.

> "IT IS THROUGH DEMOCRATIC ELECTIONS THAT PEOPLE RULE THEMSELVES THROUGH THEIR FREELY CHOSEN REPRESENTATIVES"

Election petitions are believed to have originated in England in the House of Commons. This took the form of a parliamentary inquiry into the substance of an electoral complaint.[1] The House of Commons was "the sole proper judge" of its members' returns, "without which the freedom of the election were not entire."[2] The inquiry process was adversarial in nature and devoid of any legal technicalities. In 1604, the Commons Committee, as the "sole and proper judge" entrusted with inquiring into elections petitions, had this to say:

> We avouch that the House of Commons is the sole proper judge of return of all such writs and of the election of all such members as belong to it, without which the freedom of election were not entire: And that the Chancery, though a standing court under your Majesty, be to send out those writs and receive the returns and to preserve them, yet the same is done only for the use of the Parliament, over which neither the Chancery nor any other court ever had or ought to have any manner of jurisdiction.[3]

Around 1868, through the Parliamentary Elections Act,[4] the jurisdiction to adjudicate proceedings was transferred to courts of law, with little changes in terms of procedure. This piece of legislation remains applicable in England to this day.[5] The reasons for this development were many, chief of which was that "It later became apparent that partisanship was eroding the credibility of the House decisions on elections and the ultimate diminution of public confidence in elections as a whole."[6] The transition was dramatic. At first, the judiciary was averse to accepting jurisdiction over election petitions. The famous and widely quoted words of the Chief Justice to the Lord Chancellor on 6 February 1868 deserve direct quotation:[7]

1 C O'Leary 'The Elimination of Corrupt Practices in British Elections' 1868-1911 (1961) 4.
2 Recently applied in the case of *R (on the application of Philip James Woolas) and The Parliamentary Election Court* [2010] EWHC 3169 (Admin).
3 Woolas Judgment, para 23.
4 Sometimes known as the Election Petitions and Corrupt Practices at Elections Act, 1868 or Corrupt Practices Act, 1868.
5 Recently applied in the case of *R (on the application of Philip James Woolas) and The Parliamentary Election Court* [2010] EWHC 3169 (Admin).
6 H 'Nyane, 'A Critique of Proceduralism in the Adjudication of Electoral Disputes in Lesotho' (2018) *Journal of African Elections* 1 at p4.
7 Woolas Judgment (n 124).

> This confidence will speedily be destroyed, if, after the heat and excitement of a contested election, a judge is to proceed to the scene of recent conflict, while men's passions are still roused... The decision of the judge given under such circumstances will too often fail to secure the respect, which judicial decisions command on other occasions. Angry and excited partisans will not be unlikely to question the motives, which have led to the judgment. Their sentiments may be echoed by the press. Such is the influence of party conflict that it is apt to inspire distrust and dislike of whatever interferes with party objects and party triumphs.

The "legal transplant" of the election petition procedure from parliament to courts presented an enduring "fundamental design problem."[8] The adversarial inquiry into proceedings does not do much to help the court establish the truth as compared to the inquisitorial procedure in which the court participates in the proceedings by directly interrogating the adduced evidence. Judges have expressed an unwillingness to interfere with election results in most if not all presidential election petitions cases in Africa, with a few exceptions being decided "in favour of the status quo and many cases dismissed on flimsy technical and procedural rules."[9]

> "JUDGES HAVE EXPRESSED AN UNWILLINGNESS TO INTERFERE WITH ELECTION RESULTS IN MOST IF NOT ALL PRESIDENTIAL ELECTION PETITIONS CASES IN AFRICA, WITH A FEW EXCEPTIONS"

The past years have witnessed a rise in the number of electoral disputes in African courts, including presidential election petitions. As a Ghanaian court held in *Akuffo-Addo v Mahama* (*Akuffo-Addo* case):

> Elections are complex systems designed and run by fallible humans. Thus, it is not surprising that mistakes, errors, or some other imperfection occurs during an election. Because absolute electoral perfection is unlikely and because finality and stability are important values, not every error, imperfection, or combination of problems supports an election contest, voids the election, or changes its outcome. This court must spend some time to determine whether votes affected by minor irregularities are nonetheless valid, and if so, separating them from the votes that are invalid because they are tainted by more serious irregularities.[10]

Accordingly, courts are called to perform, "the unenviable task of determining the ultimate outcome of the poll."[11] Challenging the validity of an election is essentially an act of democratic self-government meant to ensure free, fair, and credible elections.[12] Preservation of electoral intent and purity of elections hinges on the effective management of the electoral process, failing which there should be fair adjudication of electoral grievances. Electoral dispute resolution (EDR) or electoral justice is one of the areas where international law offers limited guidance. International law defers to national authorities to adopt electoral systems of their choice, with the condition precedent that such electoral systems should be capable of delivering an election that reflects the free will of voters.[13]

African countries south of the Sahara have adopted diverse electoral and political systems. However, a common feature is the settlement of electoral disputes in the courts of law, even though specific aspects of the adjudication process may vary.[14] Another common feature is that EDR is an

8 C O'Leary 'The Elimination of Corrupt Practices in British Elections' 1868-1911 (1961) 4.
9 O Kaaba 'The challenges of adjudicating presidential election disputes in domestic courts in Africa' (2015) 15. African Human Rights Law Journal 329-354 at p329.
10 Akuffo-Addo v Mahama Writ No. J1/6/2013, 29th August, 2013, 519. https://ghalii.org/gh/judgment/supreme-court/2013/3 (accessed on 15 May 2020).
11 O Kaaba (n 5).
12 Tsvangirai v Mugabe & Ors Judgment No. CCZ 1/17 10.
13 General Comment No. 25, United National Human Rights Committee, para 20.
14 C O'Leary (n 122) 4.

adversarial process where the aggrieved person, on any other person in whom the law vests legal standing, is entitled to initiate legal proceedings challenging the result of an election. Invariably, the complainant is required to place before the court or tribunal evidence with sufficient probative value to convince the court to a degree required by law that certain aspects of the electoral process were not executed as the law requires. In other instances, the petitioner alleges misconduct or offences of criminal nature that altered the outcome of an election. This means that the result does not reflect the will of the people who voted. On their part, respondents also need to pitch plausible defences to dispel the challenge and affirm the integrity of the election.

This chapter interrogates the standard of proof required to overturn an election result in Sub-Saharan Africa. It explores how judges across Africa have dealt with the complex question of standard of proof in the adjudication of election petitions. The chapter maps the diverse application and interpretation of standard of proof in electoral petitions to understand its impact on the administration of electoral justice in Africa. The importance of electoral justice cannot be overstated. The right to vote would be merely abstract without the opportunity to enforce it in the courts of law. Challenging the validity of an election is essentially an act of democratic self-government meant to ensure free, fair, and credible elections. Preservation of electoral intent and purity of elections hinges on the effective and fair adjudication of election grievances. Thus, the question of standard of proof in electoral cases, which plays a central role in adjudication of such disputes, is of paramount importance. The chapter studies various cases and literature on the notion of standard of proof and analyses the extent to which such practice is in tandem with international best practises.

STRUCTURE OF CHAPTER

This chapter is a random survey of the practice of a few countries in Sub-Saharan Africa. They include Ghana, Kenya, Malawi, Nigeria, Seychelles, Uganda, Zambia and Zimbabwe, with comparative references to non-African countries.

The chapter is divided into five parts. Part one is this INTRODUCTORY SECTION. Part two discusses the NATURE OF ELECTORAL PETITION PROCEEDINGS, alluding to some of the grounds on which these are based. Part three discusses the BURDEN OF PROOF, determining the question of who bears the responsibility to prove or disprove a case. Part four discusses the notion of STANDARD OF PROOF. The notion is defined; approaches of different jurisdictions are presented and discussed, with a synthesis and analysis given. Part five is the CONCLUSION.

THE NATURE OF ELECTORAL PETITION PROCEEDINGS

The issue of standard of proof may not be adequately investigated without a clear exposition of the nature of election petition proceedings. One of the issues is whether an election petition should be classified as a civil proceeding or as criminal proceedings. As will be discussed in detail later, this issue has vexed courts and practitioners alike. However, the answer to the question draws one nearer to the conclusion as to the appropriate standard of proof required to annul an invalid election. It is trite in the region that civil and criminal legal proceedings have different standards of proof. Parties engaged in civil proceedings have the obligation to prove their cases on a balance of probabilities, while in criminal proceedings, the state is required to prove its case beyond reasonable doubt. The latter standard is generally onerous to discharge because of the heavy evidentiary burden.

To put context to the discussion, it is important to note that electoral laws of most countries in Africa provide for electoral offences. These are offences committed either by a candidate, voter, or by the EMB officials. Electoral offences exist to preserve the integrity or purity of the electoral process. Criminal sanctions are inherently deterrent and contribute to the ensuring the free will of voters. Although some offences are also founded in tort or delict, many of them are criminal.[15] These include corrupt practices, false representation when registering as a voter, voting without the right to do so, and threatening voters with violence. Other offences include coercing for support and vote-buying. Many of these offences form part of the grounds for challenging the result of an election, such as where the winning candidate allegedly forged documentation of their educational qualifications or where votes were corruptly obtained. Both criminal and non-criminal allegations could be made in a single petition. This presents a practical legal difficulty of determining the nature of proceedings.

> "MANY OF THESE OFFENCES FORM PART OF THE GROUNDS FOR CHALLENGING THE RESULT OF AN ELECTION"

There are judicial decisions addressing this difficulty and some consider it settled. Electoral courts in some jurisdictions have referred to election petition proceedings as neither civil nor criminal but sui generis in nature.[16] In the *Abubakar* case the court held that they were, "in a class by itself" and that they were "different from a common law civil action," and that this legal position "is trite" and no longer "moot."[17] This view of Nigerian courts is also shared by Ghanaian courts. In *Akuffo-Addo & Ors v Mahama & Ors*,[18] quoting with approval the High Court of Trinidad and Tobago in *Peters v Attorney-General*,[19] the Court wrote a lengthy explanation regarding the extent of public interest in each election petition before concluding that:

> An election petition is quite unlike any of the initiating proceedings in the High Court. It is not a writ, or originating summons, nor is it in any way close to say a petition in bankruptcy or a petition for divorce which respectively have their own rules of procedure. In a sense, an election petition can be described as *sui generis*.[20]

15 Common electoral offences based in tort or delict include fraud and other forms of negligence or breach of duty of care.
16 Translated to mean 'in a class of its on'.
17 Available at <https://nigerialii.org/ng/judgment/supreme-court/2008/10-17> (accessed on 10 March 2020).
18 Writ No. J1/6/2013.
19 (2002) 3 LRC 32 C.A.
20 As above 101.

Faced with this enigma in *Benjamin Ogunyo Andama v Benjamin Andola Andayi & Ors*,[21] the Kenya Court of Appeal could not find the proper place to locate election petitions in Kenyan Law. The court could only hold thus:

> In our view, as has been said time and again, election petitions form their own category and are neither controlled by the Civil Procedure Act and Rules made thereunder, nor are they controlled by the Criminal Procedure Rules. They are neither criminal nor civil in nature. We may say there is an element of Public Law in them but even that is not all correct. They are a class of their own.[22]

Zimbabwean courts restated that election petition proceedings are *sui generis*.[23] The courts have come to this conclusion as they seek to explain and justify their conduct in sometimes adhering to the overly technical nature of election petition proceedings. This requires the petitioner to strictly comply with the form of a petition, its service, and entire course of adjudicating the dispute. The *sui generis* principle has also been the scapegoat for courts to adopt a narrow interpretation of their jurisdiction and powers to extend or expand timelines.[24]

> "THE *SUI GENERIS* PRINCIPLE HAS ALSO BEEN THE SCAPEGOAT FOR COURTS TO ADOPT A NARROW INTERPRETATION OF THEIR JURISDICTION AND POWERS TO EXTEND OR EXPAND TIMELINES"

However, as if answering the Kenyan Court of Appeal in the *Andama* case that found election petitions as "neither civil nor criminal: but in a class of its own, the Zimbabwean Electoral Court pronounced itself on this exact question in Mumbamarwo v Kasukuwere (Mumbamarwo case).[25] In this case, the Court was adjudicating on a petition alleging criminal conduct on the part of the respondent. The Court held as follows:

> Election petitions are essentially civil proceedings brought by one party against the winning candidate who is the Member of Parliament for that constituency. They are not criminal proceedings and any wording in the Act that seems to suggest to the contrary only serves to cause confusion and blurs the legal position... A court trying an election petition where the respondent is accused of committing corrupt or illegal practice sits as a civil court. In the absence of the Attorney General or his duly authorised representative, the court cannot in my view pronounce on the guilt or otherwise of the respondent.[26]

The Court went on to question the intention of the lawmaker for using language that implied criminal proceedings proper as creating "... a grey area for the court trying an election petition."[27] It declined an interpretation of the law that would lead to the conclusion that a court sitting to determine an election petition involving criminal conduct is called on to pronounce the guilt or otherwise of the respondent. It insisted that election petition proceedings are civil and never criminal, notwithstanding the issue the court is called upon to determine (criminal allegations). Demonstrating its commitment to this conclusion, the Court repeatedly invited the legislature "... to review the entire [Electoral] Act and see if it adequately prevents the mischief that it is set out to."[28]

21 *Benjamin Ogunyo Andama v Benjamin Andola Andayi & 2 Others* Civil Application No. 24 of 2013, High Court Election Petition No. 8 of 2013, [2013] eKLR.
22 At page 6 of *Benjamin Ogunyo Andama v Benjamin Andola Andayi & 2 Others* Civil Application No. 24 of 2013, High Court Election Petition No. 8 of 2013, [2013] eKLR.
23 *Chamisa v Mnangagwa* (CCZ 42/18) [2018] ZWCC 42 (24 August 2018), p2.
24 *Gore v Chimanikire* HH 47/2008, where the Electoral Court stated that, 'This court sitting as an electoral Court has no powers to condone any breach of the requirements as to time frames or as to manner of service that are stipulated in the Act'.
25 *Mumbamarwo v Kasukuwere* HH 8/2002.
26 As above 6.
27 As above.
28 The Electoral At has since been periodically amended with the latest amendment in May 2018. However, the amendments did not address the issues vexing the court at the time of the judgment.

In fact, the position taken by the Electoral Court has legal basis in the form of Section 173 of the Electoral Act. This provision empowers and, in a way, enjoins the Electoral Court to report cases of corrupt or illegal practices that arise in election petition proceedings. If on reasonable grounds, the court believes that such corrupt and illegal practices prevailed in an election, its registrar shall transmit a report to the Prosecutor General "with a view to the institution of any prosecution proper."[29]

It appears, though, that the question of whether election petition proceedings are civil or criminal has been partly addressed in Uganda in the case of *Besigye v Museveni & Anor*.[30] In this case, the Court of Appeal stated that "[a]n election petition is not a criminal proceeding," inviting the conclusion that it is a civil proceeding.[31] The Court went further to demonstrate its conclusion by referring to a provision in the law that precludes it from convicting a person of a criminal offence in the course of determining a petition.[32]

In Malawi, election petition proceedings challenging the result of the presidential election went to full trial for the first time in that country's history. In *Chilima & Another v Mutharika and Another*,[33] petitioners and respondents agreed to lay before the High Court the question that is the subject of this paper: "What is the standard of proof in the determination of electoral petitions filed under Section 100 of the PPEA [Presidential and Parliamentary Elections Act]?"[34] Although this issue is later addressed in detail below, it suffices for now to state that the Malawian Constitutional Court re-affirmed the almost universal characterisation of election proceedings and referred to them as "... a special breed of claims which are governed by the CPR, 2017."[35] The Court went on to state that this has a bearing on the burden of proof.

The preliminary conclusions that we can draw from this abridged survey of emerging jurisprudence in the region is that characterising election petition proceedings as *sui generis* is an approach that resonates in Sub-Saharan Africa. Although different language is used, it comes to the same conclusion, that election petitions are a unique type of litigation. Several jurisdictions have taken this approach, namely, that election petitions are neither civil nor criminal. In that regard, states are on the verge of reaching harmony of law or approach. Secondly, the prevalent position is that election petitions proceedings are civil in nature, even though they are not initiated in the same way as other civil claims. This position was cemented by legislation from some African sub-regions expressly divesting courts of the competence to pronounce the guilt or otherwise of a person while adjudicating on an election petition.[36]

> "RULES GOVERNING CIVIL CLAIMS ARE APPLICABLE *MUTATIS MUTANDIS* (SUBJECT TO NECESSARY CHANGES OR ADAPTATIONS) TO ELECTION PETITION PROCEEDINGS"

Third, rules governing civil claims are applicable *mutatis mutandis* (subject to necessary changes or adaptations) to election petition proceedings. The Nigerian Evidence Act is a case in point.[37] In no jurisdiction is evidence available to support the application of rules governing criminal procedure as applicable to election petition proceedings. Subtle as it may appear, such detail assists in rooting a case in civil proceedings. Now, it is timely to advance the discussion to consider the burden of proof.

29 Section 173(a) of the Zimbabwean Electoral Act, as amended in 2018.
30 *Besigye v Museveni & Anor* (Election Petition No.1 of 2001) [2001] UGSC 4 (6 July 2001).
31 As above 13.
32 See section 59 (7) of the Ugandan Presidential Elections Act, 2005. See similarly worded provision in section 61(7) of the Ugandan Parliamentary Elections Act, 2005 divesting the court of competence to pronounce on the guilt of a person when adjudicating on an election petition.
33 Constitutional Reference No.1 of 2019.
34 *Chilima* Judgment p.51.
35 As above.
36 As above 27.
37 The Evidence Act, Cap. E14 but now repealed by the Evidence Act, 2011.

BURDEN OF PROOF IN ELECTION PETITIONS

One of the key issues that courts considering election disputes have to confront is determining who bearers the burden of proof/persuasion.[38] Every finalised election is protected by a presumption of its validity.[39] The Supreme Court of Kenya asserted that this presumption has origins from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. The maxim that all acts are presumed to have been done rightly and regularly applies here.[40] Thus, the petitioner, "must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."[41] The emerging philosophy is that an election reflects the free will of voters, more importantly because voting and related rights are constitutional rights collectively referred to as political rights. A great deal of resources are deployed to facilitate the holding of a free and fair election. Such is the sacrifice that makes people cherish democracy and stirs immense public interest. This is heightened in a presidential election, where the whole territory is the constituency of voters.

Therefore, setting aside an election requires production of cogent evidence to prove that the whole process [conduct of a public body] was a farce and voters did not express their free will. It follows that one or more of the parties should carry this burden to prove that there were irregularities (non-compliance with the law) or that electoral offences (malpractices) were committed. They must also prove that such non-compliance or offences violated the free will of voters, which affected the election "in a substantial manner."

The electoral laws of every country provide for causes of action on which an electoral challenge should founded. These are the permissible grounds for challenging the result of an election. There seems to be consistency in terms of permissible grounds across the region. The grounds include non-compliance with electoral laws and victory by a candidate not qualified to stand for office. This is in addition to commission of electoral offences. Some jurisdictions restrict these grounds, whereas others maintain an open-ended list by deploying the language of "or any other cause whatsoever."[42]

THE PARTY WITH BURDEN OF PROOF

In conventional civil litigation, the litigant who alleges or the *plaintiff*, must prove the allegation supported by evidence of probative value. The common law concept of burden of proof (*onus probandi*) is a question of law. It is best described as the duty to establish a case or the facts upon a particular issue.[43] Bearing the burden of proof carries a positive obligation. Requiring the respondent or defendant to prove allegations would impose a negative burden, which would be difficult to discharge. Rebuttal of allegations is less onerous, as it serves to cast doubt on the plaintiff's allegations. In criminal proceedings, the defence case serves to cast doubt on the state case, thereby entitling the accused person to an acquittal on the grounds of reasonable doubt.

In Sub-Saharan Africa, the majority of countries are hesitant to subject these proceedings to the usual rules of civil procedure. In fact, several countries

38 *Nana Addo Dankwa Akufo Addo & 2 others v. John Dramani Mahama & 2 others* WRIT No. J 1/6/2013, p 57. In terms of Section 10 of the Ghanaian Evidence Act, 1975, burden of persuasion entails a party having the obligation '... to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court' while Section 11 of the defines burden of evidence as 'the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue'.

39 See decisions of Kenyan Court of Appeal in *George Mike Wanjohi v. Steven Kariuki & 2 Others* Petition No. 2A of 2014; [2014] eKLR; Supreme Court of Ghana in *Nana Addo Dankwa Akufo Addo & 2 others v. John Dramani Mahama & 2 others* WRIT No. J 1/6/2013.

40 In Latin the maxim is: *omnia praesumuntur rite et solemniter esse acta.*

41 *Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 Others*, Petition No. 5 of 2013; [2013] eKLR, para 195 - 196. The presumption of validity of an election (official duty) is codified in section 37 of the Ghanaian Evidence Act, 1975.

42 See section 100 of the Malawian Presidential and Parliamentary Elections Act, 2005; sections 167 of the Zimbabwean Electoral Act, 2005.

43 Auburn J, 'Burden of Proof' in Malik H (ed), Phipson on Evidence, 17th (ed), 2010, p 149–151.

have adopted rules of procedure exclusively dedicated to election petition proceedings, clearly marking a distinction between presidential and other election petition proceedings.[44] These rules of procedure and substantive electoral laws constitute complete codes for the determination of election petitions in each country. Some go to some degree of confusion in that procedural issues are provided for in substantive legislation. This has made election petition litigation a minefield for blooming lawyers, who often are deceived by rules of procedure, neglecting procedural issues, which are contained in substantive law.[45] In jurisdictions where courts generally embrace technicalities, such petitions are often dismissed before consideration of substantive issues.

> "THIS HAS MADE ELECTION PETITION LITIGATION A MINEFIELD FOR BLOOMING LAWYERS, WHO OFTEN ARE DECEIVED BY RULES OF PROCEDURE, NEGLECTING PROCEDURAL ISSUES, WHICH ARE CONTAINED IN SUBSTANTIVE LAW"

There seems to be consensus that the petitioner has the obligation to prove allegations[46] to the required standard in that jurisdiction and establish the grounds upon which they seek the court to nullify an election. The grounds may be civil or criminal in nature. The Seychelles Court of Appeal summed up the transition of the "petitioner should prove" principle from conventional civil litigation into domain of election petition proceedings and demonstrated its endorsement by other jurisdictions across African countries. In the case of *Wavel John Charles Ramkalawan v Electoral Commissioner and Others*,[47] it was held as follows:

> In the case of *Joseph Constantine Steamship Line Limited v Imperial Smelting Corporation* (1942) AC 154, it was held that the burden of proving their claim was upon the claimant, and this burden, they had failed to discharge with the result that the claim had to be dismissed. This rule has continued to apply in election petitions. Thus, in the case of *Opitz vs Wrzesnewskyj* (2012) SCC 55-2012-10-56, it was held that an applicant who seeks to annul an election bears the legal proof throughout. In the Ugandan case of *Col. Dr. Kizza Besigye vs Museveni Yoweri Kaguta and Electoral Commission* (2001) UGSC, it was held that the burden of proof in electoral petitions as in other civil cases is settled, it lies on the petitioner to prove his case to the satisfaction of the court.[48]

In the case of *Buhari and Ors v Obasanjo & Ors*, the Nigerian Supreme Court concluded that "the onus has not by any means shifted from the time-honoured law on evidence that the person who asserts a situation must prove."[49] The Constitutional Court of Zimbabwe recently held that "the onus and burden of proof ... therefore rests with the applicant and it is for him to prove..."[50] Thus, in the first instance, this burden falls on the petitioner. This is based on the rationale that it is the petitioner who seeks invalidation of the election. It appears that the petitioner's burden to prove their case is implied in the legal provisions providing for standard of proof. For instance, Section 59(6) of the Ugandan Presidential Elections Act provides that "the election of a candidate as

44 See illustratively, the Kenyan Elections (Parliamentary and County Elections) Petition Rules, 2013;
45 A case in point is that of the Zimbabwean Electoral Act, 2005, which contains a good deal of procedural issues even though there was also adopted the Electoral Court Rules of Procedure (1995).
46 See *Opitz v. Wrzesnewskyj* 2012 SCC 55; *Amama Mbabazi v. Yoweri Kaguta Museveni & 2 others* Presidential Petition No. 01/2016; *Abubakar v. Yar'adua* [2009] ALL FWLR (PT. 457)1 SC.
47 *Ramkalawan v Electoral Commissioner and Others* Constitutional Appeal SCA CP 1/2016 (c).
48 As above, para 90.
49 *Buhari v Obasanjo* (2005) CLR 7K, p70.
50 *Chamisa v Mnangagwa* (CCZ 42/18) Judgment No. CCZ 21/19 (24 August 2018 – full Judgment), p2. For the Namibian position, see generally *Itula & Ors v Minister of Urban and Rural Development & Ors* (A1-2019) [2020] NASC (5 February 2020).

President shall only be annulled … if proved to the satisfaction of the court." This is a positive obligation on the petitioner.[51]

BURDEN OF PROOF. DOES IT SHIFT?

The courts have also determined whether the burden of proof shifts to the respondent at any point of the election petition proceedings. In *Buhari v Obasanjo*,[52] the Nigerian Supreme Court held that indeed the burden shifts and the circumstances under which this happens. The Court stated as follows:

> In general, in a civil case, the party that asserts in its pleadings the existence of a particular fact is required to prove such fact by adducing credible evidence. If the party fails to do so, its case will fail. On the other hand, if the party succeeds in adducing evidence to prove the pleaded fact, it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence adduced, could not on the preponderance of the evidence, result in the court giving judgment in favour of the party.[53]

In 2017, the Kenyan Supreme Court reaffirmed what it referred to as "emerging jurisprudence" on the burden and standard of proof in election petition proceedings. In *Odinga & Anor v Independent Electoral and Boundaries Commission & Ors* case (2017 Odinga case),[54] the Court ruled that the petitioner's burden "remains constant throughout a trial." Nonetheless, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting" and "its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."[55] Similarly, in the *Chamisa* case, the Zimbabwean Constitutional Court did not shift the burden to the EMB based on the finding that the petitioner had not adduced evidence to support allegations of irregularities.[56] In particular, the Court insisted on the document known as the V11 Form, which was filled in with the total votes each candidate got at each polling station. The information was necessary for the Court to appreciate the disparities alleged by the petitioner.

More recently, in the *Chilima* case, the Malawian Constitutional Court held that "once a prima facie case has been made out, the evidential burden shifts to the respondent to disprove or rebut it. However, the petitioner still bears the legal burden of proof."[57] The Court reasoned that the justification of the shift is rooted in the right of access to courts. Without shifting the burden, "it would be a tall order for the poor and uneducated citizens to prove their rights and access justice in our courts."[58]

Therefore, it appears Africa Sub-Sahara jurisdictions follow the approach that once "credible, coherent, and cogent" evidence on these two legs of proof[59] has been set out (prima facie case), the burden shifts to the respondent to show either that there was no failure to comply with the law, or if there was any non-compliance, it did not affect the result of the election. This observation puts paid to allegations that petition proceedings are sui generis and fundamentally different from conventional civil litigation. In fact, on several occasions, courts across the sub-region have demonstrated the indelible link between established common law principles on civil litigation and modern election petition proceedings. The latter's feet are planted in the former, from which it draws its origin. Accordingly, treating election petition proceedings as "in a class of their own" has no material application to the burden of proof. It resides with the petitioner and only shifts to the respondent or as between the parties when the question is asked: which party stands to lose if no further evidence is produced?

51 *Mbowe v Elinfoo* (1967) EA 240 Georges, CJ in the Tanzanian High Court held that '… in my view it is clear that the burden of proof must be on the Petitioner rather than the Respondent, because it is he who seeks to have this election declared void'.
52 The Buhari Judgment (n 170).
53 As above 27.
54 *Odinga & Anor v Independent Electoral and Boundaries Commission & Ors.*
55 The *Odinga* Judgment (n 162) para 32.
56 The *Chamisa* Judgment (n 171) 84.
57 *Chilima* Judgment, para 1039.
58 *Chilima* Judgment, para 1040.
59 That is, non-compliance with laws or criminal offences and substantial effect on the result of the election.

STANDARD OF PROOF IN ELECTION PETITION PROCEEDINGS

This section is the pith of the current contribution. Electoral courts and tribunals across Africa continue to grapple with the question of the standard of proof required to nullify an election result. There is also a question of the applicable standard the burden of proof shifts. This part of the chapter clarifies the rationale behind the standard of proof in each country. These reasons explain the nature of election petition proceedings in contemporary constitutional litigation and their place in a democracy. These questions are far from being theoretical. Many of them have been put before the courts as agreed issues for determination in Africa and beyond.[60]

THE MEANING OF STANDARD OF PROOF

In the 2017 *Odinga* case, the Kenyan Supreme Court offered a summarised definition of "standard of proof," relying on *Black's Law Dictionary*,[61] defines it as "[t]he degree or level of proof demanded in a specific case" "in order for a party to succeed."[62] The essence of the definition is that a court presiding over a dispute needs to be satisfied with the evidence tendered. The evidence tendered needs to meet required legal standard to tilt the mind of the court to the conclusion sought by the party adducing or rebutting allegations. Only when such standard is met that the court is persuaded and the burden of proof shifts. The state of satisfaction is not the standard, but a result of adducing evidence which meets the standard required by law.

Generally, statute and common law in many African jurisdictions recognise two conventional standards of proof in legal proceedings, namely, proof beyond reasonable doubt and proof on a balance/preponderance of probabilities. The two standards are known as the criminal and civil standards, respectively. A litigant in civil proceedings is required to prove their case on a balance of probabilities, whereas the state or crown is expected to prove its case beyond a reasonable doubt in criminal proceedings. Although balance of probabilities is a standard falling within ordinary comprehension, the standard of "beyond reasonable doubt" is a bit complex. In *Abubakar & Ors v Yar'adua & Ors*,[63] the Supreme Court of Nigeria expanded on "reasonable doubt" as follows:

> Reasonable doubt which will justify acquittal is doubt based on reason and arising from evidence or lack of evidence, and it is doubt which a reasonable man or woman might entertain and it is not fanciful doubt, is not imagined doubt, and is not doubt that the court might conjure up to avoid performing unpleasant task or duty. (See Black's Law Dictionary (6ed), page 1265.) A reasonable doubt is an honest misgiving generated by the insufficiency of the proof, which reason sanctions as a substantial doubt. It is a doubt which makes the court hesitate as to the correctness of the conclusion which it arrives at. The principle of proof beyond reasonable doubt is necessary because of the constitutional presumption of the innocence of the accused, provided in section 36(5) of the Constitution.[64]

Proof on a preponderance of probabilities is reflected in the words of Lord Nicholls of Birkenhead who explained in *In re H (Minors) (Sexual Abuse: Standard of Proof)*[65] as follows:

60 For the Malawi experience, see the *Chilima* Judgment, para 24.
61 2017 *Odinga* Judgment para 143.
62 Black's Law Dictionary (9th Ed, 2009) 1535.
63 SC 72/2008.
64 See *Jim Nwobodo v. Onoh & 2 Ors.* (1984) 1 SCNLR, on definition of 'proof beyond reasonable doubt' as proof that precludes every reasonable hypothesis except that which it tends to support and verily it is a proof that is consistent with the guilt of the accused person or against whom the allegation has been made. Therefore, it can be said that for evidence to attain the height that could bring about a conviction it must exclude beyond reasonable doubt every other hypothesis or conjecture, proposition, or presumption except that of the guilt of the accused. If the evidence is wobbly, thematise or vague or is compatible with both innocence and guilt, then it cannot be described as being beyond all reasonable doubt.
65 In re *H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563.

> [S]ome things are inherently more likely than others... On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.[66]

The words of the Court could be interpreted to stress the point that in as much as a criminal allegation could be made before a civil tribunal, evidence ought to be adduced to substantiate the criminal allegations. However, in final analysis, the civil tribunal will weigh the evidence and make a finding based on what the "tribunal thinks is more probable than not." The next section reverts to the primary question of the standard of proof applicable in election petition proceedings.

APPLICABLE STANDARD OF PROOF

Reference has already been made to the origins of judicial adjudication of election petitions in "ancient" England.[67] Scholarship suggests that several African countries modelled their elections law on the inspiration of the English Parliamentary Elections Act.[68]

In *Erlam and Others v Rahman and Others*,[69] the petitioners alleged that the respondent had engaged in corrupt and illegal practices. The Court found that "in general terms, an election court is a civil court not a criminal court" and that "the general burden of proof both in respect of the charges of corrupt or illegal practices and in respect of the allegation of general corruption must necessarily rest on the Petitioner." It may, however, shift to the respondent in the event that the applicant has adduced evidence establishing a prima facie case. As to the standard of proof, accepting the binding decision in *R v Rowe, ex parte Mainwaring*,[70] the Court remarked that "it is settled law that the court must apply the criminal standard of proof, namely proof beyond reasonable doubt." The Court went further to make the finding that it would "apply the criminal standard of proof to the issue of whether there has been general corruption and the civil standard of proof to the issue of whether it may reasonably be supposed to have affected the result."[71]

This survey has revealed several important findings. The first is that the legislative framework of most countries does not provide for the standard of proof in election petition proceedings. This is with the result that courts formulate one or apply the usual standard for civil proceedings. Secondly, countries that treat election petitions as civil proceedings per se apply the ordinary standard of proof.[72] Thirdly, where criminal allegations are made, the practice of most countries is that the party that alleges is required to prove those allegations beyond a reasonable doubt. Fourthly, some countries have rejected that allegations in a petition could neither be proved on the ordinary standard nor highest standard. Rather, they have adopted the intermediate standard, which is one that is "higher than the balance of probabilities but lower than beyond reasonable doubt." The next section demonstrates the emerging and established jurisprudence as practiced in some countries in Sub-Saharan Africa.

PROOF BEYOND REASONABLE DOUBT/BALANCE OF PROBABILITIES

Zimbabwe is one of the countries that applies both civil and criminal standards of proof in election petitions. In the *Mumbamarwo* case, Justice Makarau reaffirmed that "in determining whether or not the petitioner has led sufficient evidence, the standard of proof used is proof beyond reasonable doubt."[73] The judge profusely protested against the approach of using the criminal standard of proof in all election petitions, stating that such an approach does not seem to be the intention of the legislature and that:

66 As above, p 586.
67 See Parliamentary Elections Act of 1868.
68 H 'Nyane 'A Critique of Proceduralism in the Adjudication of Electoral Disputes in Lesotho' (2018) Vol 17 (2) *Journal of African Elections* 5.
69 [2015] EWHC 1215 (QB).
70 [1992] 1 WLR 1059.
71 As above, paras 47 – 49.
72 In this case, a court treats election petition proceedings as traditional civil proceedings where the standard of proof is automatically one of balance of probabilities. Further, in such jurisdictions there is no hesitation in terms of application of ordinary rules of civil procedure to regulate these proceedings. Yet in other jurisdictions, they may recognise the proceedings as civil per se but then adopt civil rules of procedure specific to election petitions, affirming adherence to the sui generis nature of election petition proceedings.
73 *Mumbamarwo* Judgement, p7. See also in the same jurisdiction conclusion in *Matamisa v Chiyangwa* HH 48-01; *Farai Maruzani v Meeting Mbalekwa* HH 84/2001. It would appear these cases have become bad law in the aftermath of the Constitutional Court decision in the Chamisa case.

> [T]he petitioner alleging corrupt or illegal practices on the part of the respondent is made to assume the role and functions normally borne by the State and/or disciplinary authorities that have the investigation machinery, resources and the benefit of procedural and domestic rules to mount and prove a case beyond reasonable doubt.[74]

The Judge further expressed concern stating that "the procedures are largely unsuited to enhancing electoral morality and integrity as they reduce what ought to be an inquiry into an adversarial trial," which is one where "the best presented case and not necessarily what actually happened in the constituency is endorsed by the courts."[75] However, the Constitutional Court later settled the issue of standard of proof in the *Chamisa* case (full judgment of 2019). The standard of proof was one of the issues to be determined in that petition. After surveying the approach in other jurisdictions in Africa and beyond, the Court stated current Zimbabwean position as follows;

> Where the allegations of electoral malpractices do not contain allegations of commission of acts requiring proof of a criminal intent, such as fraud, corruption, violence, intimidation and bribery, the standard of proof remains that of a balance of probabilities. In allegations that relate to commission of acts that require proof of criminal intent, the criminal standard of proof beyond reasonable doubt would apply. There is no basis for departing from settled principles of standards of proof to hold a petitioner to a higher standard of proof in electoral petition cases simply by reason of their sui generis nature. In the view of the Court, there is no justification for an "intermediate standard of proof" to be applied in election petitions.[76]

A few points could be deduced from the finding of the Court above. First, proof beyond reasonable doubt is applicable where applicant makes allegations or irregularities of a criminal nature. These are allegations requiring proof of "criminal intent." Second, where a petition makes non-criminal allegations, the proof is discharged on a balance of probabilities. Third, both standards of proof are applicable to a petition that raises both criminal and civil allegations. Fourth, the Court accepted that petitions are sui generis but rejected the approach of other jurisdictions that hold that an intermediate standard is a consequence of the *sui generis* nature. The Court held that standards of proof (criminal and civil) are "settled," hence there is no need to "depart" from them. Finally, the finding made a case for concurrent civil and criminal jurisdiction of an electoral court or tribunal.

The survey did not reveal any diversity in terms of approach to this issue. Concurrent jurisdiction draws no controversy, because by their nature, electoral irregularities are both civil and criminal. Once a petitioner makes such allegations in a single election, the court has the competence to determine them both, albeit applying different standards of proof to each allegation, as is the case in Zimbabwe. However, the exercise of criminal jurisdiction that results in the conviction of a respondent during election petition proceedings is unacceptable and unnecessary. This is because the duty to prosecute individuals for commission of offences lies with the prosecuting authority of each country. This role is delegated to private individuals in defined circumstances such as private prosecution proceedings.[77] Therefore, it is appropriate, as is the case in Uganda and Zimbabwe, that an electoral tribunal is divested of the jurisdiction to determine the guilt of a respondent in the course of adjudicating on an election petition.

Jurisdictions[78] that use the "beyond reasonable doubt" standard of proof seem to consistently rely on the views of the Supreme Court of India such *Shri Kirpal Singh v Shri v Giri*.[79] The Indian Supreme Court held that:

74 *Mumbamarwo* Judgment, p8.
75 As above.
76 Chamisa (2019) Judgment, p94.
77 In common law jurisdictions, the prosecuting authority may make an independent decision to decline prosecuting for a number of reasons. In that case, the head of the prosecuting authority is required by law to issue a certificate of no interest in prosecution called *nolle prosequi* upon request by the victim of the alleged crime or their representative.
78 See Uganda (Besigye 2001) case relying on *Charan Lal Sahu and Others v Singh* (1985) LRC Const. 31; Zimbabwe (Chamisa case) relying on Tripathi v Supreme Court of India Writ Petition (Civil) No. 1232 of 2017; Jaising v Secretary General and Ors Writ Petition (Civil) No. 66 of 2018; Nedumpara and Ors v Supreme Court of India and Ors Writ Petition (Civil) No. 861 of 2018; and Center for Accountability and Systemic Change and Ors v Secretary General and Ors Writ Petition (Civil) No. 892 of 2018 and Zambia (Chiluba case) quoting with approval Motala v A-G [1993] 1 LRC 183, [1991] 4 ALL ER 683, [1992] 1 AC 281, UK HL;[1991] 2 ALL ER 312, UK CA.
79 1971(2) SCR 197; 1970(2) SCC 567.

> Although there are inherent differences between the trial of an election petition and that of a criminal charge in the matter of investigation, the vital point of identity for the two trials is that the court must be able to come to the conclusion beyond any reasonable doubt as to the commission of the corrupt practice.

In the matter of *Narayan Rao v Venkata Reddy & Another*,[80] the Indian Supreme Court restated that the charge of commission of corrupt practice has to be proved beyond reasonable doubt like a criminal charge, "but not exactly in the manner of establishment of the guilt in a criminal prosecution giving the liberty to the accused to remain silent."[81] This could be interpreted as referring to the intermediate standard, because proof is not expected to reach the criminal prosecution standard. Indian jurisprudence is respected and relied on by African judiciaries. Perhaps this is a result of self-identification with India as a developing country and a former British colony in terms of legal heritage. The other view is that Indian courts are regarded as illustriously resourceful when it comes to initiatives to increase access to justice for masses of people who would otherwise be unable to have their day in court.

PROOF BEYOND REASONABLE DOUBT AND INTERMEDIATE STANDARD

In the 2017 *Odinga* case, the Kenyan Supreme Court stated that "standard of proof" presented a huge controversy, with petitioners appealing to the court to ditch the position in the 2013 *Odinga* case. In that case, the Court had held that save where criminal allegations are made in a petition, the standard of proof in election cases is the intermediate one, above a balance of probabilities but below the one for criminal cases of beyond reasonable doubt.[82] After reviewing emerging jurisprudence on the issue, the Court concluded as follows:

> Various jurisdictions across the globe have adopted different approaches on the question of the requisite standard of proof in relation to election petitions. From many decisions, three main categories of the standard of proof emerge: the application of the criminal standard of proof of beyond reasonable doubt; the application of the civil case standard of "balance of probabilities"; and the application of an intermediate standard of proof.[83]

The Court concluded by quoting *M'nkiria Petkay Shen Miriti v. Ragwa Samuel Mbae & 2 Others*[84] with approval to the extent that "[f]rom the practice and history of this country, the standard of proof required in Election Petitions is higher than a balance of probabilities but not beyond reasonable doubt save where offences of a criminal nature are in question." The justification for such an approach being the "notion that an election petition is not an ordinary suit concerning the two or more parties," but "involves the entire electorate in a ward, constituency, county or, in the case of a presidential petition, the entire nation."[85]

In Uganda, Section 59(6) of the Presidential Elections Act of 2005, provides that a presidential election will be annulled "if proved to the satisfaction of the court." In *Mbabazi v Museveni*,[86] the petitioner brought allegations of non-compliance with electoral laws against the EMB on the one hand and allegations of electoral offences and/or illegal practices against the winning candidate. The Court affirmed that criminal allegations needed to be "proved beyond reasonable doubt," while the standard of proof required to satisfy the court that an EMB failed to comply with the electoral laws is "above balance of probabilities, but not beyond reasonable doubt."[87]

The Zambian approach appears to be the one exclusively applying the intermediate standard. In *Lewanika v Chiluba*,[88] the petitioner challenged

80 1977 AIR 208, 1977 SCR (1) 490.
81 As above, para 500F-G.
82 See 2013 *Odinga* Judgment, para 46.
83 See 2017 *Odinga* Judgment, para 144.
84 Civil Appeal No. 47 of 2013; [2014] eKLR.
85 2017 *Odinga* Judgement, para 150. By reaching this conclusion the Court essentially affirmed the 2013 Odinga decision that it remained good law.
86 *Amama Mbabazi v. Yoweri Kaguta Museveni & 2 others* PT. No. 01/2016.
87 *Mbabazi* Judgment, p13.
88 *Lewanika and Others v Chiluba*, SCZ 14 of 1998.

Chiluba's citizenship and alleged bribery, corrupt practices and a raft of irregularities. The Supreme Court of Zambia held that the standard of proof on "allegations of impropriety attributed to a respondent in a Parliamentary election petition before a High Court Judge requires to be proved to standard higher than a mere balance of probability." That is, one of high "convincing clarity."[89] It went on to justify the position, expressing the view that a high standard of proof has a deterrent effect on frivolous election challenges. It held that the outcome of election petitions implicates the "governance of a nation and the deployment of constitutional authority," thus imposing a rigorous burden on petitioners.

It appears that jurisdictions pursuing the "intermediate standard" have placed considerable reliance on findings of the respected judge *Lord Denning in Bater v Bater*.[90] In this case, Lord Denning opined that there may be "varying degrees of probability within the standard of proof" that we know in civil cases as balance of probabilities. Therefore, a degree of probability fluctuates between balance of probabilities and one beyond reasonable doubt. This, in a sense, is close to the most accurate definition of "intermediate standard." For instance, where fraud or an act of a criminal nature is alleged in a civil case, a higher degree of probability may be called for compared to an instance where the court considers delictual acts. Lord Denning could not, however, countenance any instance where that degree of probability in civil cases could go as high as the standard that is required in criminal cases. Thus, in *Hornal v Neuberger*,[91] Lord Denning stated: "the more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law."[92]

PROOF ON A BALANCE OF PROBABILITIES

In the Malawian case of *Chilima & Another v Mutharika and Another*,[93] the parties agreed to present the question of the standard of proof in the determination of electoral petitions.[94]

In Mauritius, the question of standard of proof in election petition proceedings came up for determination in 2008 before the Judicial Committee of the Privy Council in *Jugnauth v. Ringadoo and Others*.[95] The Privy Council was presiding over an appeal against the decision of the Supreme Court of Mauritius in a petition involving allegations of bribery. It held as follows:

> If that is right and the legislature was adopting the civil, as opposed to the criminal, standard of proof, then, even though what is in issue is whether or not the election should be avoided on the ground of bribery, there is no question of the court applying anything other than the standard of proof on the balance of probabilities. **In particular, there is no question of the court applying any kind of intermediate standard.** ... It follows that the issue for the election Court is whether the petitioner had established, on the balance of probabilities, that the election was affected by bribery in the manner specified in the petition.[96] (Own emphasis)

The Privy Council affirmed that election petition proceedings are civil in nature, as intended by the legislature. The Appellant had urged the court to adopt the intermediate standard as the appropriate standard of proof when criminal allegations are made. The Council re-affirmed the existence of only the criminal and civil standards, declining to entertain the possibility of the intermediate standard. In fact, as will be demonstrated below, this is the approach adopted by several African countries.

89 This decision was followed in *Michael Mabenga v Sikota Wina & Others* (SCZ Judgment No. 15 of 2003) [2003] ZMSC 25 (23 September 2003);
90 *Bater v Bater* (1950) 2 all ER 456.
91 [1957] 1 QB 247.
92 As above, p256. See *Regina v. Hepworth and Fearnley* [1955] 2 Q.B. 600, 603, [1955] 2 All E.R. 918 where Lord Goddard grappled as way back as the 50s on whether there could be two standards of satisfaction and difficulty inherently present in making a clear distinction between the well-known standards of proof, even for judges.
93 Constitutional Reference No.1 of 2019.
94 *Chilima* Judgment, p 51.
95 *Jugnauth v. Ringadoo and Others* [2008] UKPC 50.
96 As above, para 17.

In the *Akuffo-Addo* case, the Ghanaian Court held that "the standard of proof in especially election petitions, a species of a civil case, is on the balance of probabilities or preponderance of probabilities."[97] The Court went further to hold that "from the foregoing it seems to me that high standards of proof required in cases imputing election malpractice, appears to be the norm." The Court finally held, on the basis of the 2013 *Odinga* case, that "the threshold of proof should, in principle, be above the balance of probability."[98]

WILL HARMONY OR CONSISTENCY BE ACHIEVED ON APPLICABLE STANDARD OF PROOF?

This paper has demonstrated that, much as African judiciaries are keen to sharpen each other through judicial interaction, there is still disagreement among them as to the appropriate standard of proof to apply. There is no relenting given that during adjudication, parties besiege courts with a gamut of case law. Petitioners clamour for a lower standard of proof while respondents insist on a higher standard. Some courts have adopted the compromised threshold (intermediate standard) to neutralise the two traditional standards. There is a great deal of jurisprudence in support of all the three standards, with each court justifying its preference, thus dividing African judiciaries into three bands.

In spite of all this disharmony or diversity, the African Union Heads of State and Government (AU Assembly) pronounced a common position on the issue through the Preamble to the African Charter on Democracy, Elections and Governance (ACDEG),[99] where it provides as follows:

> **Seeking** to entrench in the Continent a political culture of change of power based on the **holding of regular, free, fair and transparent elections** conducted by competent, independent and impartial national electoral bodies. (Own emphasis)

The Preamble to the ACDEG represents a situation analysis or a context that is common to all African countries. This treaty is an embodiment of principles on democracy, elections, and governance[100] that are of common interest and require collective approach by state parties.[101] Democratic governance through regular free and fair elections leads to political stability. The ACDEG calls for a "political culture" where change of government is based on the "holding of regular, free, fair, and transparent elections." Chapter 7 is dedicated to democratic elections. In other words, the holding of regular, free, fair, and transparent elections should be a way of life. By extension, African Union human rights, democracy, and governance institutions will only recognise elections held to the standards set in instruments such as the ACDEG.

However, mindful of the practical challenges African countries may face in conducting elections to the expected regional standards, the ACDEG provides for principles to support EDR. This is by requiring states to "[e]stablish and strengthen national mechanisms that redress election related disputes in a timely manner."[102] This paper submits that this provision is an honest admission among AU member states that in as much as democratic elections are a common objective, some states will struggle to put in place "national mechanisms" to redress election-related disputes or will undermine these institutions for cynical political reasons.[103] With numbers of election-related disputes growing exponentially across Africa, the common approach in holding democratic elections and resolution of election disputes becomes more relevant.

EDR is part of the "national mechanisms" for resolution of electoral disputes. Although discussions on standard of proof may appeal

97 *Nana Addo Dankwa Akufo-Addo & 2 others v. John Dramani Mahama & 2 others* Writ No. J 1/6/2013, p 62.
98 As above, 123.
99 Adopted by the Eighth Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia, 30 January 2007 and entered into force entered into force on 15 February 2012.
100 Article 2(3) of the ACDEG provides for the following as one of the objectives of the treaty: 'Promote the holding of regular free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments', Article 2(13) provides for: 'Promote best practices in the management of elections for purposes of political stability and good governance'.
101 So far ratified by 34 African Union member states as at 30 June 2019. See <https://au.int/sites/default/files/treaties/36384-sl-AFRICAN%20CHARTER%20ON%20DEMOCRACY%2C%20ELECTIONS%20AND%20GOVERNANCE.PDF> (accessed on 17 May 2020).
102 ACDEG, art. 17(2).
103 It is commonplace that international treaties carry an enforcement framework such as a sanction regime for non-compliance. This would be invoked in the case of non-compliance. Yet in cases of full compliance, the provision lies in state.

only to practitioners, the standard is a critical tool courts use either to affirm or annul an election based on credible evidence. Through EDR, courts participate in the building of a "political culture" in which democratic elections are critical to transfer of political power. The common principles on democracy, elections, and governance embodied in the ACDEG might not be achieved if African judiciaries take a fragmented approach to resolution of electoral disputes by accepting diversity of approaches to EDR when they adopt different standards of proof. This paper submits that the mere adoption of the ACDEG symbolised the legislative purpose of harmonising democracy, elections, and governance standards across the continent. Although states are generally allowed room to decide how to comply with international obligations as a consequence of sovereignty, an EDR that is diversified to extent that different standards are applicable across national judiciaries cannot achieve the legislative purpose of ACDEG. With a diverse application of standard of proof, it would be the case that, in some parts of the continent, it is feasible to overturn an election result on good evidence, while it is almost impossible in other parts. Yet the ACDEG refers to "universal values and principles of democracy, good governance, human rights and the right to development."[104] The fragmented approach of each national judiciary taking its own path on standard of proof undermines the objective of universal principles. Ironically, judges have authored the confusion on the applicable standard of proof under the illusion of the sui generis characterisation. In fact, according to Hatchard, "[t]he confusion over the standard of proof in presidential petition cases is unnecessary and unacceptable."[105] There appears to be no context peculiar to a particular country that requires the judiciary of each country to adopt a particular standard of proof. There is need for procedural legal uniformity as the general rule, with exception allowed where particular country context demands such departure. The next section contains some of the reasons proffered by African courts to justify particular approaches to standard of proof in election petitions.

"THE FRAGMENTED APPROACH OF EACH NATIONAL JUDICIARY TAKING ITS OWN PATH ON STANDARD OF PROOF UNDERMINES THE OBJECTIVE OF UNIVERSAL PRINCIPLES"

It is further submitted that consistency among national judiciaries is necessary "to ensure predictability, certainty, uniformity and stability in the application of the law."[106] By extension, countries are in fact implementing and domesticating the ACDEG and other international norms on EDR by adopting electoral laws at the national level, or at least guided by these norms. A unified approach to international law ensures consistency and facilitates the "culture" of affirming or annulling election results based on good evidence, not "the best argued case," as the High Court of Zimbabwe lamented in the Mumbamarwo case.[107]

REASONS JUSTIFYING PARTICULAR STANDARDS OF PROOF

It cannot be gainsaid that African judiciaries use aspects of the three standards of proof in election petitions. These standards are applied individually or in combination with others. In any election petition where standards of proof are in "controversy," the courts determine the applicable standard. Yet, in some cases, courts do not provide reasons, other than that election petitions are in a class of their own, a clear sign that the confusion continues to reign. Africa courts have justified use of higher standards of proof on the bases that election petitions are *sui generis*, that they are serious matters, that they deal with constitutional questions, that the public invests much public interest in petitions, that petitions involve conferral of political or constitutional power, and that petitions involve political questions.

104 See ACDEG Preamble.
105 J Hatchard 'Election Petitions and the Standard of Proof' (2015) Vol 27 *Denning Law Journal* 291 at 301.
106 2017 *Odinga* Judgement, para 155. Although these attributes of law were promoted in that case in respect of national application of the law, they apply inter-country especially where governments of those countries have adopted common standards on democracy, elections and governance.
107 The *Mumbamarwo* Judgement, 9.

ELECTORAL PETITIONS ARE *SUI GENERIS* AND SERIOUS MATTERS

In the case of *Madundo v Mweshemi and A-G Mwanza*,[108] the Tanzanian High Court stated that:

> An election petition is a more serious matter and has wider implications than an ordinary civil suit. What is involved is not merely the right of the petitioner to a fair election, but the right of the voters to non-interference with their already cast votes, i.e., their decision without satisfactory reasons.

A Kenyan Court in *Sarah Mwangudza Kai v. Mustafa Idd & 2 Others* adopted this approach stressing that "election petitions are unique in many ways."[109] The Court held:

> It must be understood that election petitions are unique in many ways. Besides the fact that they involve the application of a special code of electoral laws, they can be classified as actions sui generis. This is because they are not actions in which an individual asserts a private civil right as in a civil claim. Petitions are basically instituted for the benefit of all voters in the affected electoral area and generally in the public interest.

The "many ways" the Court referred to include that it is a process of exercising constitutional rights, impugning the rights of voters over and above the petitioner's and immense public interest. Therefore, the law requires a higher standard of proof. In the *Lewanika* case, the court justified its preference to an intermediate approach, expressing the view that a high standard of proof has a deterrent effect on frivolous election challenges. It held further that the outcome of election petitions implicates the "governance of a nation and the deployment of constitutional authority," thus imposing a rigorous burden on petitioners. These reasons were analysed and rejected in the *Chilima* case on the basis that they were rooted in the wrong premise of elevating interests of wielders of political power rather than rights of the masses. Sealing the Kenyan reasons, the Court held in the 2017 *Odinga* case that "election petitions are not ordinary civil proceedings, hence reference to them as *sui generis*."[110]

In the *Besigye v Museveni* case, the Uganda Supreme Court held that a high standard of proof is required in election petitions because of the critical importance of the subject matter to the "welfare of the generality of the people of the country and their democratic governance."[111] Similarly, in the *Raila Odinga* case, the court expressed the view that the rationale for this higher standard of proof is based on the notion that an election petition is not an ordinary civil suit concerning two or more parties.

However, the irony is that there is no such law requiring a higher standard. It boils down to the interpretation of judges. Under common law jurisdictions, judges have room for judge-made law that comes as a consequence of interpretative competence. As such, judge-made law is recognised in these jurisdictions as a source of law. Unless the legislature sees the need to intervene, judicial pronouncements on certain issues are the law. Non-intervention by the legislature has perpetuated the disharmony in the debate on applicable standard of proof. All we know is what judges have said in the jurisdictions under study. The survey above has shown that some judges follow the "wisdom" of their colleagues, whereas others disagree and adopt their own approach. The recycling of reasons behind preferences in standard of proof has not led to clarity. Nyane submits that there is so much lack in articulation of the "intermediate standard" resulting in "opaqueness" of the high evidentiary rule.[112] As a result, this deficiency "reinforces the argument that the standard of proof is merely being used as a convenient mechanism to prevent/deter challenges to presidential elections."[113]

108 *Madundo v. Mweshemi & A-G Mwanza* HCMC No. 10 of 1970.

109 *Sarah Mwangudza Kai v. Mustafa Idd & 2 Others* Election Petition. No. 8 of 2013; [2013] eKL, para 57. See also John Kiarie Waweru v Beth Wambui Mugo & 2 Others [2008] eKLR and Milkah Nanyoki Masungo v Robet Wekesa Mwembe & 2 Others, Bungoma Election Petition No. 2 of 2013 where courts articulated the public interests nature of election petition proceedings as affecting the wider community of voters and that the right to vote is a constitutional right.

110 The *Odinga* Judgment (2017), para 153.

111 It may very well be that instead of putting the confusion over the standard of proof in election petitions in Uganda to an end, the court has compounded the confusion by adding a new standard of proof to the existing standards. Petitioners now have to consider, proof beyond a reasonable doubt, proof on a balance of probabilities, the intermediate proof that lies in between the two and the new proof to the satisfaction of the court.

112 H Nyane, H 'A Critique of Proceduralism in the Adjudication of Electoral Disputes in Lesotho' (2018) *Journal of African Elections* 1

113 As above.

> “THERE IS NO SUCH LAW REQUIRING A HIGHER STANDARD. IT BOILS DOWN TO THE INTERPRETATION OF JUDGES”

It is exceedingly difficult to understand why a petition becomes unique because it involves rights that go beyond the parties or that it has immense public interest. This is the essence of constitutional litigation. For instance, when people engage in constitutional interpretation challenging the validity of a law, they trigger the public interest. This is because every person has interest in redeeming the violation of the constitution. Accordingly, constitutional remedies are by their nature “community oriented” and go beyond the personal circumstances of a party to impact even persons that were not party to the proceedings. They are designed to vindicate the constitution as a whole.[114] Therefore, to isolate an election petition from other forms of constitutional adjudication misses the point. If election petitions are unique because they implicate the right to vote and change of political power, then most cases involving constitutional litigation are unique, yet their standard of proof has remained at the low end – balance of probabilities. It is submitted here that the veneration of a single legal proceeding over others is problematic.

ELECTION PETITIONS AFFECT THE LIBERTY OF A PERSON

The liberty of the person argument above applies in criminal cases, where jurisprudence shows that a high standard of proof is used because the liberty of the accused is at stake. Perhaps this applies to those jurisdictions where an electoral court can pronounce on the criminal culpability of a respondent. However, in jurisdictions such as Uganda and Zimbabwe, electoral tribunals do not have this power and can only place findings before the prosecuting authority for independent decision-making on prosecution.[115]

There is also an access to justice issue. The requirement for a standard of proof beyond reasonable doubt or above a balance of probabilities is an unnecessary burden on petitioners. This high standard of proof and the high costs of litigating election petitions tends to frustrate many losing candidates from electoral litigation. In the *Erlam* case, the Court held as follows:

> To bring an election petition as a private citizen requires enormous courage. If things go wrong and the petition is dismissed, the Petitioners face a potentially devastating bill of costs which, unless they are very fortunate, may well bankrupt them. There is no access to public funding: Parliament has left the policing of fair and democratic elections to the chance that concerned citizens will become involved at their own expense. Whether that is an appropriate and sufficient way to protect democracy is open to question.[116]

This means petitioners are on their own when prosecuting an election petition. They stand to suffer any consequences of loss. In spite of this “utmost importance” of a petition to public welfare and democratic governance, the State does not allocate any resources to support enforcement of electoral integrity that petitions seek to enforce. The higher evidential burden of proving a case on a higher standard needs more resources, which may include engaging an advocate and specialist witnesses. A petitioner would face difficulties to file a petition yet other litigants lodging constitutional applications are only required to prove to the “cheapest” standard of balance of probabilities.

Potential violation of the right to access to justice by demanding a higher standard was considered by the Constitutional Court of Malawi in the *Chilima* case, holding instead that:

114 See Curie I & de Waal J *The Bill of Rights Handbook* (2005) 196.
115 See section 59(7) of the Ugandan Presidential Elections Act, 2005. See similarly worded provision in section 61(7) of the Ugandan Parliamentary Elections Act, 2005 divesting the court of competence to pronounce on the guilt of a person when adjudicating on an election petition Section 173(a) of the Zimbabwean Electoral Act, 2004.
116 The *Erlam* Judgment, para 643.

> It will be a sad day for justice if courts in this Republic [Malawi] were to impose a higher standard of proof on the constitutional rights as to do so would stifle the people's right to access justice through the courts.[117]

ELECTION PETITIONS ARE BROUGHT ON CONSTITUTIONAL GROUNDS

In Zambia, the applicable standard of proof that is somewhere in between the preponderance of probabilities and proof beyond reasonable doubt to one that is like the Ghanaian approach, in which the standard depends on the nature of the allegations raised by the petitioner. The court enunciated the chief reason for this approach in the Lewanika case as follows:

> [W]here the petition had been brought under constitutional provisions and would impact upon the governance of the nation and deployment of constitutional power, no less a standard of proof was required.[118]

Three grounds are imbedded in the quotation, namely, "brought under constitutional provisions," "impact on governance," and "deployment of constitutional power." The difficulty of venerating one constitutional process over another has been dealt with in paragraph 4.4.1 above, especially where the constitution does not make such a distinction. The remaining two grounds were rejected by the Chilima case, after the respondent sought to use them to urge the court to prefer a higher standard of proof. The court held that to "demand a higher standard of proof than a balance of probabilities just because the petition was brought under constitutional provisions which would impact upon the governance of the nation and deployment of constitutional powers and authority misses the point." The Court found the "reasoning" focusing more, if not exclusively, "on the rights of those wielding the powers of State instead of taking a human rights-based approach that puts the rights and will of the people at the centre of democratic rights."[119]

The court could not have better articulated the inherent flaw in the higher standard argument. In many decisions justifying a higher standard on the importance of the election petitions to democratic governance, they did little to demonstrate the centrality of voters other than mentioning in passing that petitions go beyond a petitioner's rights. The Malawian court's sentiments endorse the view that voters' rights matter. Electoral malpractices and offences are meant to preserve the rights of voters. A petition to resolve a disputed election result serves to redeem voter's rights, even though it restricts competence to file a petition to 'aggrieved' losing candidates. This decision of the Malawi Court rightly elevates the rights of voters. Only "a human rights-based approach that puts the rights and will of the people at the centre of democratic rights" would achieve recognition of voters in EDR. Having been decided in 2020, the Chilima case is very recent. If jurisprudence on the subject matter continues to emerge, this is the path it should take the standard of proof in proceedings of constitutional importance such as election petitions should be on a balance or preponderance of probabilities.

"IN MANY DECISIONS JUSTIFYING A HIGHER STANDARD ON THE IMPORTANCE OF THE ELECTION PETITIONS TO DEMOCRATIC GOVERNANCE, THEY DID LITTLE TO DEMONSTRATE THE CENTRALITY OF VOTERS OTHER THAN MENTIONING IN PASSING THAT PETITIONS GO BEYOND A PETITIONER'S RIGHTS"

117 *Chilima* Judgment para 1057.
118 *Lewanika* Judgment, p 145.
119 *Chilima* Judgment, para 1052.

CONCLUSION

This chapter's key objective was to highlight the standard of proof in election petition proceedings across Africa south of the Sahara. To make that survey, it was necessary to review the nature of election petition proceedings in the framework of the dichotomy of civil and criminal proceedings. The first conclusion was that most countries classify election petition proceedings as civil in nature, with a few treating them as *sui generis*, thereby defying an exact classification. Second, the chapter established that all countries surveyed regard the petitioner as the bearer of the burden of proof to make out a prima facie case. If this case is made, the burden shifts to the respondent(s) until the matter is finalised. The petitioner is required to prove non-compliance with laws or malpractices and also that such non-compliance or malpractice affected the result in a material way. Third, perhaps the most contested issue in national judiciaries was standard of proof. There is a huge disagreement on the standard applicable in election petition proceedings. Three standards were identified: proof beyond reasonable doubt, proof on a balance of probabilities, and an intermediate standard — a combination of balance of probabilities and beyond reasonable doubt in a single petition. This revealed a fragmented approach to a common principle by African judiciaries. Many of the reasons proffered by African courts rooting for a higher standard ought to be disregarded. Election petitions are civil proceedings of a constitutional nature seeking to enforce the constitutional right to vote. Accordingly, there is no basis to elevate them to a unique status when other forms of constitutional enforcement are proven on the ordinary scale of balance of probabilities. A political culture of change of power through regular, free, fair and transparent elections propagated by the ACDEG is an issue of common interest to African countries. This objective could be achieved through a unified approach to key processes such as EDR. For what it is worth, a human rights-based approach that places voters' interests at the core of EDR stands a good chance of having more undemocratic elections being set aside thereby preserving the integrity of the electoral process in Africa and protecting the will of voters.

> "THERE IS A HUGE DISAGREEMENT ON THE STANDARD APPLICABLE IN ELECTION PETITION PROCEEDINGS. THREE STANDARDS WERE IDENTIFIED: PROOF BEYOND REASONABLE DOUBT, PROOF ON A BALANCE OF PROBABILITIES, AND AN INTERMEDIATE STANDARD — A COMBINATION OF BALANCE OF PROBABILITIES AND BEYOND REASONABLE DOUBT IN A SINGLE PETITION"

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CHAPTER 7

AN ANALYSIS OF THE JUDICIAL APPROACH TO THE STANDARD OF PROOF IN ELECTION PETITIONS IN ZIMBABWE AND A SUGGESTION FOR REFORM

GODFREY MUPANGA*

ABSTRACT

Until the Constitutional Courts handed down the full judgment in *Chamisa & Others v Mnangagwa*, the law on the standard of proof in election petitions in Zimbabwe was not very clear. There are judgments that suggest that the standard of proof in an election petition is proof beyond reasonable doubt. Electoral malpractices that are cited in an election petition must be proved beyond reasonable doubt. In other judgments, the courts in Zimbabwe have held that only electoral malpractices that are offences under the Act should be proved beyond reasonable doubt. Other electoral malpractices that are not criminal offences may be proved on a balance of probabilities. In this paper it is argued that an election petition implicates civil proceedings. The standard of proof in election petitions should be proof on a balance of probabilities. Raising the standard of proof in election petitions to the criminal proof beyond reasonable doubt is inconsistent with the ethos and spirit of the Constitution of Zimbabwe.

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INTRODUCTION

Until the Constitutional Court handed down the full judgment in the presidential election petition case of *Nelson Chamisa v Emmerson Dambudzo Mnangagwa & Others*,[1] attempting to come to grips with the subject of the standard of proof in election petitions in Zimbabwe was a very perplexing affair. In this case,[2] the court opened its discussion of the issue of the standard of proof in election petitions by acknowledging that currently, much controversy exists on this issue.

The Constitutional Court briefly engaged with the intermediate standard of proof, as applied in the Kenyan Supreme Court case of *Odinga and Anor v Independent Electoral and Boundaries Commission and Ors*.[3] The Constitutional Court summarily dismissed any suggestions of introducing the intermediate standard of proof to our electoral jurisprudence. The Court expressed the view that there is no justification for departing from the settled law on the two standards of proof and holding a petitioner to higher standard of proof, saying that "There is no justification for an 'intermediate standard of proof' to be applied in election petitions."'[4] It then went on to hold that in an election petition, grounds to void an election that amount to criminal offences should be proved to the criminal standard of proof beyond reasonable doubt, and grounds that are civil in nature should be proved on the civil standard of proof on a balance of probabilities. It is now settled that although an election petition is a civil proceeding, two standards of proof are applied, depending on the ground relied upon to void an election that needs to be proved.

However, even though in *Nelson Chamisa v Emmerson Dambudzo Mnangagwa & Others*, the Constitutional Court sought to settle the controversy on the standard of proof in elections petitions in Zimbabwe, it appears that the position that the Court took leaves a lot to be desired. A most awkward and head-spinning situation now exists where in a single case that is clearly civil in nature in which the outcome sought to be achieved is the nullification of election results, the parties had to shuffle between the criminal standard of proof and the civil standard of proof depending on the nature of the ground that they are addressing at any particular point in the case. Needless to mention that it is inherently contradictory to regard a court case as a private law issue between the parties and as a criminal law issue at the same time. The consistent and correct departure point in attempting to resolve an election petition is to consider it as a civil issue that engages with public law and human rights issues.

> "A MOST AWKWARD AND HEAD-SPINNING SITUATION NOW EXISTS WHERE IN A SINGLE CASE THAT IS CLEARLY CIVIL IN NATURE IN WHICH THE OUTCOME SOUGHT TO BE ACHIEVED IS THE NULLIFICATION OF ELECTION RESULTS, THE PARTIES HAD TO SHUFFLE BETWEEN THE CRIMINAL STANDARD OF PROOF AND THE CIVIL STANDARD OF PROOF"

1 *Nelson Chamisa v Emmerson Dambudzo Mnangagwa & Others* CCZ 21/2019.
2 As above.
3 Presidential Election Petition No. 1 of 2017 [2017] eKLR.
4 Per Malaba CJ in *Nelson Chamisa v Emmerson Dambudzo Mnangagwa & Others* CCZ 21/2019 at page 95 of the cyclostyled judgment.

It is argued in this paper that because looking at them as civil proceedings and through the public law and human rights lenses is the consistent and non-contradictory way of dealing with election petitions, it must follow as a matter of logic that this approach is the surest way to establish the right standard of proof. It is not only consistent and systematic, but desirable too, to regard an election petition as a public law matter that entails a serious engagement with human rights and fundamental freedoms. In *Nelson Chamisa v Emmerson Dambudzo Mnangagwa & Others*, the Constitutional Court confirmed that an election petition is a public interest matter.[5]

The Malawi High Court and Supreme Court decisions in the recent Malawi presidential election petition[6] demonstrate that taking a public law and human rights approach to election petitions systematically leads to the adoption of a civil standard of proof. This paper recommends the approach taken by the High Court of Malawi and confirmed by the Supreme Court of Malawi. In any case, the Electoral Court is not invited to convict and sentence any litigant in an election petition. One of the reasons why the Electoral Court does not convict or sentence a party to proceedings should be that the standard of proof required to interfere with a person's liberty is not achieved. What happens in such serious cases is simply the heightening of probabilities, not the standard per se, so that, as Lord Jonathan Parker put it in *Grobelaar v News International*, "the more serious the allegation the more cogent must be the evidence which is required to prove it on the balance of probabilities."'[7]

This paper also notes that the Constitutional Court is unlikely to alter its position in *Nelson Chamisa v Emmerson Dambudzo Mnangagwa & Others* any time soon, given the entrenchment of the doctrine of stare decisis in Zimbabwean jurisprudence. Admittedly, as the apex court, the Constitutional Court is not bound by its judgments. However, for purposes of achieving certainty in the law, the practice so far is that the Constitutional Court will not easily depart from its previous decisions. The Constitutional Court tends to stand by its decisions. A development of titanic proportions would need to have occurred before the Constitutional Court departs from its previous judgments. The issue now falls squarely on the lap of the legislature at the right time, when the programme of legislative reform to harmonise legislation with the 2013 Constitution is still ongoing. In the context of legislative reform to harmonise legislation with the 2013 Constitution, the legislature may now find it advisable to insert a provision in the Electoral Act [Chapter 2.13] stating that election petitions being civil proceedings, the standard of proof in such cases is the civil standard of proof on a balance of probabilities.

SKETCHING THE CONTROVERSY: THE LAW BEFORE CHAMISA V MNANGAGWA

Before the Constitutional Court definitively pronounced itself on the standard of proof in election petitions in Zimbabwe, what existed was jurisprudence from the High Court and criticism of adopting a criminal law standard of proof in civil proceedings. Some decisions did not seem to make a distinction of the applicable standard of proof, depending on the nature of the grounds relied upon to void an election. In these cases, the courts held that the importance of election petitions required a standard of proof higher than the normal civil standard.[8] In *Mumbamarwo v Kasukuwere*,[9] discussed in detail below, the court held that the criminal standard of proof was applicable, because election petitions are akin to disciplinary proceedings where the criminal standard of proof is applicable. Also, as shown in detail below, in several election petition cases, judges did not engage with the question of the standard of proof, expressing instead the view that allegations ought to be proved *to the satisfaction of the court*.[10]

5 The *Chamisa* Judgment (n 2) 36.
6 *Dr. Saulos Klaus Chilima and Dr. Lazarus Mccarthy Chakwera v Professor Arthur Peter Mutharika and The Electoral Commission*, Constitutional Reference 1 of 2019; *Professor Arthur Peter Mutharika and The Electoral Commission v Dr. Saulos Klaus Chilima and Dr. Lazarus Mccarthy Chakwera* MSCA Constitutional Appeal No. 1 of 2020.
7 *Grobelaar v News International* [2001] 2 All ER 437; [2001] WL 1489, 18 January 2001, at paragraph 239.
8 See for Example *Mugari v Tungamirai* ECH 30 – 2018.
9 HH 8 – 2002.
10 See for example decisions by Devittie J. in *Buhera North Election Petition Buhera North Election Petition* 2001 (1) ZLR 295 (H) and *Hurungwe East Election Petition* 2001 (1) ZLR 285.

Elsewhere, in neighbouring African jurisdictions such as Kenya and Uganda, it seemed that superior courts had developed a new standard of proof called the "intermediate standard" lying somewhere between the criminal standard of proof beyond a reasonable doubt and the civil proof on a balance of probabilities where no allegations of a criminal nature are relied upon.[11] In *Nelson Chamisa v Emmerson Dambudzo Mnangagwa & Others*, the Constitutional Court followed the approach adopted in the United Kingdom, where electoral laws for Zimbabwe as well as Kenya, Uganda and other African countries were extensively drawn from. In the United Kingdom, a suggestion has been made that the distinction between the criminal and civil standards of proof may be "in truth, largely illusory"[12] or "merely semantics."[13]

As noted above, in *Nelson Chamisa v Emmerson Dambudzo Mnangagwa & Others*, the Constitutional Court opens its brief discussion of the different standards of proof by taking note that a controversy exists as to what the standard of proof is in election petitions. In *Mumbamarwo v Kasukuwere*,[14] Justice Makarau agonised over the controversial standard of proof in an election petition. In that case, being bound by existing precedent and maintaining loyalty to the doctrine of stare decisis, she applied the beyond reasonable doubt standard of proof. In this case, the petitioner sought to rely on electoral offences in Part XX of the Electoral Act that are clearly criminal in nature as well as illegal practices and or irregularities in terms of Section 81(2) of the Act that are civil in nature. The court did not seem to make a distinction on the standard of proof applicable to malpractices constituting criminal offence and those constituting civil wrongs.

The suggestion that arises from the decision in the case of *Mumbamarwo v Kasukuwere* is that the standard of proof in any election petition is the criminal standard of proof beyond reasonable doubt. Her reasons for adopting the criminal standard of proof are two-fold and different from those cited by Justice Hungwe in *Mugari v Tungamirai*. First, adopting this approach "represents the approach that has been adopted by this court in trying other election petitions," thus displaying loyalty to the doctrine of stare decisis. Second, election petitions are all about "enforcing election morality and integrity." Therefore, election petitions seek to enforce "a code of behaviour on the part of candidates and their agents." Consequently, a criminal standard of proof as opposed to the civil standard of proof should be applied in election petitions, because they are "akin to disciplinary proceedings," where the standard of proof is proof beyond a reasonable doubt.[15]

However, to her credit, Justice Makarau made a very good case for retaining the balance of probabilities as the standard of proof in election petitions. Justice Makarau's argument is simple and straightforward. In her view, an election petition is a civil case. Therefore, the standard of proof in civil cases — that of proof on a balance of probabilities, should apply to election petition cases. Justice Makarau now sits on the Constitutional Court bench, but she does not seem to have affected the issue in the Constitutional Court case of *Nelson Chamisa v Emmerson Dambudzo Mnangagwa & Others*. It appears that judicial comity trumped a departure from practice to resolve an issue crying out for reform.

In a recent election petition case of *Mugari v Tungamirai*,[16] Justice Hungwe was emphatic that the standard of proof in an election petition is proof beyond a reasonable doubt. In his view, election results signify the sovereign will of the people. In dealing with challenges to election results, courts must be judicious and should tread carefully whenever the sovereign will of the people is threatened because of minor infractions of election rules. As a result, Justice Hungwe opined, although recognising that an election petition is a civil case, that imposing a more onerous standard of proof in election petitions than is the case in other civil

11 See for example, *Raila Odinga v The Independent Electoral and Boundaries Commission & 3 Others*, [2013] eKLR at paragraph 203, *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & Others*, Presidential Petition No. 1 of 2017, Amama Mbabazi v Yoweri Kaguta Museveni & Others.
12 Per Lord Bingham CJ in *B v Chief Constable of Avon and Somerset Constabulary*, [2001] 1 WLR 340, at pp. 353-354.
13 *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74.
14 HH 8 – 2002.
15 See discussion on page 6 of the cyclostyled judgment.
16 ECH 30 – 2018.

cases is eminently fair. Furthermore, the fact that some of the grounds relied on by the petitioner are, in fact, criminal offences justify resorting to a higher standard of proof.

Justice Hungwe considered not only the nature of the grounds constituting criminal offences that were relied upon to challenge the election result but the public importance of the matter to support the proof beyond a reasonable doubt standard in a case that is, without doubt, entirely civil in its nature. The school of thought represented by Justice Hungwe's reasoning considers that the standard of proof in any case must reflect the weight of the public interest that will be affected. Further support for this reasoning can be gleaned from the U.S. Supreme Court case of *Santosky v Kramer*,[17] where the court expressed the view that the standard of proof that it opted to adopt in that case properly reflected the relative severity of the outcomes of the decision in question.

As Justice Hungwe held in *Mugari v Tungamirai*:[18]

> In law and practice of evidence there are two broad categories of standard of proof; namely proof beyond a reasonable doubt and proof on a balance of probabilities. Proof beyond a reasonable doubt is the standard usually applicable to criminal cases, and proof on the balance of probabilities is the standard applicable in civil cases.[19]

As we can see, in this case again, in his otherwise lucid discussion of the issue, Justice Hungwe did not seem to distinguish between grounds constituting criminal offences and grounds that are civil wrongs. Neither did he consider the election petition before him akin to disciplinary proceedings.

In addition to failing to distinguish between criminal and civil grounds, the decisions in both *Mumbamarwo v Kasukuwere* and *Mugari v Tungamirai* do not seem to have countenanced the possibility of an intermediate standard of proof lying somewhere between the two poles of proof on a balance of probability and proof beyond a reasonable doubt where no allegations of a criminal nature are made in an election petition. It seems that the intermediate standard of proof has never reached our borders, because there does not seem to have been any case before *Nelson Chamisa v Emmerson Dambudzo Mnangagwa & Others*, where that standard of proof was discussed.

In earlier election petitions, there are cases where it appears that the courts avoided discussing the standard of proof that is required. For example, in *Buhera North Election Petition*, in describing the cogency of the evidence required to sustain an election petition, Justice Devittie speaks of "evidence of the highest probative value." Justice Devittie quotes, with approval, dicta in the *Wigan Election Petition*, where the presiding judge stated that allegations of electoral malpractices had to be "proved to my satisfaction, and beyond doubt" and he concludes that "allegations must be proved to my satisfaction." A similar theme manifests in the *Hurungwe East Election Petition*. In this case, the court held that an election would be considered void "only upon clear and satisfactory evidence," while quoting with approval dicta in the *Salford Election Petition*, where it was stated that "everything ought to be proved to him satisfactorily and beyond all manner of doubt."

In the abridged version of the decision in *Nelson Chamisa v Emmerson Dambudzo Mnangagwa & Others*,[20] delivered on 24 August 2018, the Constitutional Court seems to have avoided engaging with proof on a balance of probabilities and proof beyond a reasonable doubt, opting instead to simply state that the petitioner must prove his case *to the satisfaction of the court*. For a moment, looking at how things had developed in Kenya and Uganda, it seemed that the Constitutional court was introducing a new standard of proof in our jurisprudence. However, in the full judgment,[21] unlike the Supreme Court of Uganda, the Constitutional Court of Zimbabwe did not suggest that *proof to the satisfaction of the court* was another standard of proof that lies

17 455 US 745 (1982).
18 Presidential Election Petition (n 4).
19 Para 38 of the unreported judgment.
20 CCZ 42 – 18.
21 The *Chamisa* Judgment (n 2).

somewhere between proof beyond a reasonable doubt and proof on a balance of probabilities. In fact, the Constitutional Court dismissed the so-called intermediate standard of proof, holding that the sui generis nature of election petition cases did not justify burdening a petitioner with a higher standard of proof where the grounds relied upon are civil in nature.

In *Amama Mbabazi v Yoweri Kaguta Museveni*,[22] the Supreme Court of Uganda held that proof to the satisfaction of the court is below the standard of proof beyond a reasonable doubt, but above the standard of proof on a balance of probabilities. The Supreme Court of Uganda therefore places the standard of proof to the satisfaction of the court in between the two commonly known standards of proof in civil and criminal cases. The Supreme Court of Uganda relied on the wording of the provisions of the Presidential Elections Act to arrive at the standard of proof applicable in presidential election petitions.

In the event, the Supreme Court of Uganda held that in Uganda, the law which sets the standard of proof for presidential elections is Section 59 (6) of the Presidential Elections Act, which states that "the election of a candidate as President shall only be annulled … *if proved to the satisfaction of the court*." In the case of Uganda, it appears that the court relied on the relevant statute to establish the applicable standard of proof. All things considered, it appears that proof to the satisfaction of the court may not be considered as a new standard of proof in our jurisdiction.

It is argued that the controversy and thus the problem on the standard of proof in election petition cases in Zimbabwe remains a matter of debate for the following reasons. Although the Constitutional Court sought to provide clarity on the issue of the standard of proof in election petition, it does not seem to have satisfactorily resolved the controversies that exist in the law. First, it seems that even though a presidential election petition remains a constitutional matter, and therefore civil in its nature, a different standard of proof that is more onerous than the normal standard applicable in all other constitutional cases is called for where a ground relied on to seek the annulment of an election amounts to a criminal offence. This is notwithstanding the fact that the court in a presidential election petition does not sit to determine the criminal blameworthiness of the respondent before imposing criminal sanctions. All that the petitioner seeks, and the court is competent to impose, are civil sanctions such as nullification of the election and possibly the barring of the other party or anyone found culpable from participating in elections for a specified period of time. The nearest that the court comes to criminal law is in terms of Section 173 of the Electoral Act. In terms of this section, where the Electoral Court reports that any person is guilty of electoral offences or finds that corrupt or illegal practices extensively prevailed at the election, the Registrar of the Electoral Court is required to report to the Prosecutor General so that any necessary prosecution may be undertaken.

Second, there has now appeared a divergence in approaches in other notable jurisdictions in the region whose jurisprudence is particularly persuasive because their laws are drawn from the same English Law as Zimbabwe's. Notable jurisdictions, including Uganda, Kenya, and Zambia continue to adopt the intermediate standard of proof. Malawi, on the other hand, has broken ranks with the rest and declared that there is no justification for introducing the onerous standard of proof in a civil case, because that would be inimical to the enjoyment of human rights.

Third, elsewhere in the Commonwealth, the Privy Council of the House of Lords, whose decisions are persuasive in Zimbabwe, has also held in the case of *Jugnauth v. Raj Direvium Nagaya Ringadoo (Mauritius)*[23] that the rule in English law that in an election petition the criminal standard of proof should apply where the grounds relied on are criminal offences; and the civil standard should apply where the grounds relied on are civil in nature, is not applicable in Mauritius. But that is not because election petitions are sui generis or because the issues of the sovereign will of the

22 [2016] UGSC 4; Presidential Election Petition No. 1 of 2016.
23 *Jugnauth v. Raj Direvium Nagaya Ringadoo (Mauritius)* [2008] UKPC 50.

people that are dealt with in an election petition are very serious indeed. It is also not because of any human rights considerations. It is because, according to the Privy Council, even though the grounds in the relevant section of the statute in Mauritius such as bribery and treating amount to criminal offences and are by and large similar to the English statute, the law in Mauritius is worded slightly differently from the English statute.[24]

In Mauritius the relevant section of the statute states that an election petition may be presented to a judge in chambers "on the grounds that... the election was avoided by reason of bribery, treating...". In the English statute, the relevant section states that "A person shall be guilty of a corrupt practice if he is guilty of bribery." The Privy Council found that the law in Mauritius does not express the grounds on which an election may be nullified in the language of criminal law. It simply allows the court to nullify the election by reason of bribery or treating. The law in England, on the other hand, requires the court to find a person "guilty" of bribery or treating to nullify an election. Because the English statute uses the word "guilty," "the issue is the same for an election court as for any criminal court."[25] A cat is indeed thrown among the pigeons!

METHODOLOGY

This chapter adopts a desk research based on literature review, case analysis, and reference to foreign jurisprudence in analysing the law in Zimbabwe. Focus is paid to comparative aspects of the law in Commonwealth countries that include Uganda, Kenya, and the UK. Having recourse to comparable foreign jurisprudence fits well with the interpretative techniques that are urged under Section 331 of the Constitution of Zimbabwe read together with Section 46. The Constitution of Zimbabwe of 2013 requires that in developing the law, the courts should consider relevant foreign law, among others. This requirement is simply taken from the South African Constitution.[26]

In *Gramara (Pvt) Ltd & Anor v Government of the Republic of Zimbabwe & Others*,[27] the court was dealing with an issue of enforcement of a judgment of the SADC Tribunal. However, in the process, the Court had occasion to discuss enforcement of foreign judgments in a way that is relevant to the matter of considering foreign law in interpreting our domestic law. Patel J. (as he then was), referred to "considerations of international comity in a globalised world" as grounds for recognising the persuasiveness of judgments of foreign courts.[28]

Furthermore, Section 192 of the Constitution states that the law that is applicable in Zimbabwe "is the law that was in force on the effective date, as subsequently modified." This leads one to Section 89 of the old Constitution, which states the law that was in force on the date that the new Constitution came into force.[29] Unless the law has been subsequently modified, Section 192 of the new Constitution, read together with Section 89 of the old Constitution effectively makes our common law "*ad idem* with the common law of South Africa."[30] In the circumstances, South African decisions carry weighty value in Zimbabwe.

Just like South African law, English law occupies an important position in our electoral law. With regards to English law, the history of colonisation of Zimbabwe by Britain is relevant. This is what brought the influence of English law into our law. It also appears that our Electoral Act is modelled along the lines of the electoral laws in England. In fact, in the *Buhera North Election Petition*,[31] the Electoral Court found that our Electoral Act follows very closely the wording of the English Statute.[32] Justice Makarau made a similar observation in the *Mount Darwin South Election Petition* when she stated that, "Roman Dutch law, the foundation of

24 In Mauritius, the statute is Representation of the People Act 1958. The English statute is Representation of the People Act 1983.
25 *Jugnauth v. Raj Direvium Nagaya Ringadoo (Mauritius)*, at paragraph 12.
26 Section 39 of the South African Constitution.
27 *Gramara (Pvt) Ltd & Anor v Government of the Republic of Zimbabwe & Others*, HH 169 – 2009 [unreported].
28 As above 8.
29 Section 89 of the Lancaster House Constitution provides that apart from African customary law, the law applicable in Zimbabwe is the law that was in force at the Cape of Good Hope Colony on 10 June 1891 as subsequently modified by legislation passed by Parliament in Zimbabwe.
30 *Gramara (Pvt) Ltd & Anor v Government of the Republic of Zimbabwe & Others*, HH 169 – 2009, at page 7 of the cyclostyled judgment.
31 *Buhera North Election Petition* 2001 (1) ZLR 295 (H).
32 At p 303E.

the common law in Zimbabwe, has no principles governing elections to public office. The whole procedure of parliamentary elections is derived from English Statute law."[33]

To put it into context, the UK Electoral Commission has written that the modern system of election petitions in the UK was created in 1868 and has altered little since.[34] This could explain why our courts have frequently found guidance from 19th Century English decisions in deciding difficult questions that arise in election petition cases.

In Kenya, the Supreme Court has held that the petitioner who bears the burden of proof must adduce "cogent and credible evidence to prove those grounds to the satisfaction of the court." In the 2013 decision in *Raila Odinga v The Independent Electoral and Boundaries Commission & 3 Others*,[35] it seems that the court held that this means that where criminal allegations are made in an election petition, the criminal standard of proof beyond reasonable doubt should apply. Where the malpractices complained of are civil in nature, the standard of proof in election cases is the intermediate one: above a balance of probabilities but below the one for criminal cases of beyond reasonable doubt.

In the 2017 case of *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another*,[36] the petitioners submitted that in the 2013 decision, the court erred in adopting the intermediate standard of proof. Counsel for the petitioners argued that only two standards of proof existed, the criminal standard of beyond reasonable doubt and the civil standard of balance of probabilities. They invited the Court to find that the applicable standard of proof in the presidential election petitions is proof on a balance of probabilities. The Supreme Court declined the invitation and stuck to the intermediate standard. The court was alive to criticisms levelled against relying on a higher standard of proof. However, the court ventures to suggest a justification for adopting a higher standard of proof. "Electoral disputes are not ordinary civil proceedings hence reference to them as *sui generis*."[37]

In the UK, the practice is one that seems to be followed in many jurisdictions. It is to apply the criminal standard of proof beyond reasonable doubt where the electoral malpractices might lead to the conviction of a person in a criminal court and the lower standard of proof on a balance of probabilities when the malpractices complained of are civil wrongs in their nature. Thus, in *Lydia Emelda Simmons v Eshaq Khan*,[38] a petition in the local government election for the Central Borough Ward of Slough, Mawrey QC, the Commissioner who heard the petition, was content with applying the stricter criminal standard as "there was no controversy about the standard of proof the court must apply to the charges of corrupt and illegal practices. It is settled law that the court must apply the criminal standard of proof, namely proof beyond reasonable doubt."[39] In this case, however, attempts by counsel to invite the court to apply the less strict standard of proof on a balance of probabilities to prove allegations of "general corruption that did not involve the making of findings of corrupt or illegal practices against any named individual" were unsuccessful.[40] This is not, however, to suggest any shift in the practice of adopting the stricter criminal standard to prove malpractices of a criminal nature and the lesser strict standard in malpractices of a civil nature. According to the Commissioner, he found "much force" in the argument advanced by the petitioner's counsel, but opted to apply the criminal standard of proof for malpractices of general corruption in the "interests of personal consistency and from an abundance of caution."[41] That this is the practice in the UK can also be gleaned from the Appeal Court case of *R v Rowe, ex parte Mainwaring*[42] and the Commissioner's own decisions in the *Birmingham Election Petition*[43] case, both of which Mawrey QC heavily relied on, on this point.

33 *Godfrey Don Mumbamarwo v Saviour Kasukuwere (Mount Darwin South Election Petition)* HH – 8 – 2002 4.
34 The Electoral Commission, Challenging Elections in the UK, September 2012, available at https://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/150499/Challenging-elections-in-the-UK.pdf (accessed 25 June 2020).
35 [2013] eKLR.
36 The Presidential Election Petition (n 4).
37 As above, para 153.
38 [2008] EWHC B4 (QB).
39 As above, para 62.
40 As above, para 65.
41 As above, para 66.
42 [1992] 1 WLR 1059.
43 [2005] All ER 15.

The Court of Appeal decision in *Heinl and Others v Jyske Bank (Gibraltar) Ltd*,[44] and the House of Lords decision in Re H (Minors)[45] were not election petition cases, but they can shed some light on the treatment of the intermediate standard of proof applied in Kenya. In Heinl and Others v Jyske Bank (Gibraltar) Ltd, a case involving a director's fraudulent abuse of his fiduciary duty to a company, the majority of the Court of Appeal felt that a third standard of proof requiring a "high level of probability," lying somewhere between the conventional civil and criminal standards, applied when dishonesty was being alleged.

This standard was singularly dismissed by the House of Lords in the case of *Re H (Minors)*, where the court was involved with proof of allegations of sexual abuse of minor children by their stepfather. Lord Nicholls thought the proposition for an intermediate standard was attractive but expressed doubts whether in practice such a standard would add much to the present test in civil cases. Besides, it would cause confusion and uncertainty. The majority view was that there is no "sliding scale" or third standard in English civil proceedings and, subject to one or two specific exceptions, the balance of probabilities standard is the test, no matter how serious the allegation.[46]

In his discussion of the possibilities of an intermediate standard of proof, Lord Nicholls said that, "if the balance of probability standard were departed from, and a third standard were substituted in some civil cases, it would be necessary to identify what the standard is and when it would apply. Herein lies a difficulty. If the standard were to be higher than the balance of probabilities but lower than the criminal standard of proof beyond reasonable doubt, what would it be?"[47] He opted for keeping the two distinct standards in criminal and civil cases but found that the civil standard of proof on a balance of probabilities was pregnant with inherent flexibility. In the circumstances, Lord Nicholls found that the only alternative to the two standards of proof that seemed to commend itself was that "the standard should be commensurate with the gravity of the allegation and the seriousness of the consequences." Even with this formulation of the alternative to the two standards, Lord Nicholls' anguish is felt when he expresses doubts over going down this road. It was bound to cause much "confusion and uncertainty." In any case, would it make any difference or add much to the standard in civil cases?[48]

STRUCTURE OF CHAPTER

This chapter is divided into six sections. Section one is this INTRODUCTORY PART. Section two discusses the concept of standard of proof and its purposes and uses the common law to demonstrate the different forms of standard of proof. These include PROOF ON THE BALANCE OF PROBABILITIES AND PROOF BEYOND REASONABLE DOUBT. The section also discusses what appears to be exceptional approaches, use of the criminal standard of proof in civil cases and the approach in disciplinary cases. Section three discusses the concept of "PROOF TO THE SATISFACTION OF COURT," something that appears to be outside the realm of the common law but present in election cases. Section four gives a synthesis of what the APPROACH IN ELECTIONS CASES should be. Section five CONCLUDES the chapter.

44 [1999] Lloyd's Rep Bank 511.
45 [1996] 2 WLR 8 (HL).
46 As above, para 75 – 76.
47 As above, para 76.
48 As above.

STANDARD OF PROOF: ON A BALANCE OF PROBABILITIES AND BEYOND REASONABLE DOUBT

Using mostly the common law, this section discusses what the concepts of "standard of proof," "proof on a balance of probabilities," and "proof beyond reasonable doubt" mean. The section also discusses the circumstances under which the standard of proof applicable to criminal cases has been applied in civil cases including disciplinary cases.

The *standard of proof* refers to the quantum of evidence that should be adduced to establish the existence of facts that must be met by the party that bears the burden of proving particular facts in issue. In the common law, two forms of standard of proof have been used: *proof on the balance of probabilities* and proof beyond reasonable doubt. There has, however, been a demonstrated reluctance by judges to define the terms "beyond a reasonable doubt" and "on a balance of probabilities." In fact, in the case of *R v Chin*,[49] Lawton LJ decried attempts by judges to define the expressions "beyond a reasonable doubt" and "balance of probabilities." On those occasions, however, when judges have attempted to define these terms, the meanings of the two standards have been explained in many ways.

Several decisions from the United States jurisdiction are quite instructive in the way they capture the function and purpose of the different standards of proof. In the case of *In re Winship*,[50] it was held that the function of any standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Moreover, the standard of proof functions as a method of allocating the risk of erroneous judgment between the litigants. It also serves to indicate the relative importance society attaches to the decision made by the court in the case. Thus, the civil standard of preponderance of the evidence or balance of probabilities indicates both society's limited interest in the court's decision and a conclusion that the risk of an erroneous decision be borne by the parties in the action in equal shares.[51]

When the state commences a criminal prosecution that might result in a sentence of death by hanging or loss of liberty through long periods of incarceration, however, "the interests of the defendant are of such magnitude that historically, and without any explicit constitutional requirement, they have been protected by standards of proof designed to exclude, as nearly as possible, the likelihood of an erroneous judgment."[52]

BALANCE OF PROBABILITIES

In the United States of America courts, proof on a balance of probabilities is sometimes put across as the "preponderance of the evidence" or "clear and convincing evidence."[53] In *Re H and R (Child Sexual Abuse: Standard of Proof)*,[54] Lord Nicholls of Birkenhead expressed the view that "the balance of probability standard means that a court is satisfied that an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not." To discharge the burden of proof on a balance of probabilities, it has been held that "a mere scintilla of evidence" would be insufficient.[55] What is required to discharge this burden is "so much evidence that a reasonable man might accept it as establishing the issue."[56]

It is trite that the standard of proof that is applicable in civil proceedings is proof on a

49 (1976) 63 Cr App R 7.
50 In re Winship, 397 U. S. 358, 397 U. S. 370 (1970).
51 *Santosky v Kramer* 455 US 745 (1982).
52 *Addington v. Texas*, 441 U. S. 418, 441 U. S. 423-425 (1979).
53 Santosky v Kramer 455 US 745 (1982).
54 [1996] 1 FLR 80 @ 96B [1996] 2 WLR 8; [1996] 1 All ER 1; [1996] AC 563.
55 Per Hodson LJ in *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 at page 263.
56 Per Hodson LJ in *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 at page 263.

balance of probabilities. A judicial tribunal in a civil case is ordinarily satisfied with the existence of a fact if it finds that the preponderance of the evidence points to its existence. The balance of probabilities standard requires less certainty than proof beyond a reasonable doubt. The standard of proof in civil cases is lower than in criminal cases. Therefore the burden of proof in civil proceedings is lighter and easier to discharge than the burden in criminal proceedings.

However, it is a matter of "common sense" that the nature of the fact to be proved affects the process by which reasonable satisfaction is attained. Thus, in *Francisco v Diedrick*,[57] Alliot J found that the standard of proof in a civil case is the balance of probabilities "while bearing in mind that the allegation is of utmost gravity and can only be established by truly cogent evidence." Citing the decision of the House of Lords in *Re H and R (Child Sexual Abuse: Standard of Proof)*[58] and the speech of Lord Nicholls of Birkenhead, Alliot J expressed the view that in trying to arrive at a conclusion whether the standard of proof has been satisfied, the court inevitably carries out an assessment of the probabilities. In carrying out this exercise, the court will be guided by the fact that some things are more probable than others. Events that give rise to more serious allegations are less likely to have happened than those involving less serious charges. As a result, more cogent evidence is required in more serious allegations whose probability is less than where less serious allegations are raised. Providing an example, Alliot J. states that "fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury…"

From the above, the point being made is that because of the inherent improbability of fraud, much more cogent evidence should be marshalled before a court can find on a balance of probabilities that it did occur. Alliot J. made it clear that he did not mean that a higher standard of proof is required where the allegations are serious in a civil case. The standard remains proof on a balance of probabilities, but the inherent improbability of an event calls for more cogent evidence to be led. He stated:

> [T]his does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

Ungoed-Thomas J. expressed this neatly in *In re Dellow's Will Trusts* case:[59] "The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."[60]

In *Grobelaar v News International*,[61] Jonathan Parker LJ also summarised the standard of proof to the effect that the standard of proof in civil cases remains constant at proof on a balance of probabilities. But, "the more serious the allegation the more cogent must be the evidence which is required to prove it on the balance of probabilities."[62] Paul Robertshaw argues that this statement on the standard of proof is "somewhat unclear."[63] However, in the context of the discussion in this chapter and the conclusion reached, the law on the standard of proof in civil cases where the allegations are serious and concern criminal charges that might lead to a conviction in a criminal trial, could not have been stated in a better way.

What probably makes matters unclear is the view expressed in subsequent sentences where Lord Jonathan Parker makes the remark that:

57 *The Times* 3 April 1998; QBD 3 Apr 1998.
58 [1996] 1 FLR 80 [1996] 2 WLR 8, [1996] 1 All ER 1, [1996] AC 563.
59 [1964] 1 W.L.R. 451.
60 At p 455.
61 *Grobelaar v News International* [2001] 2 All ER 437; [2001] WL 1489, 18 January 2001.
62 At paragraph 239.
63 Paul Robertshaw, 'The Review Roles of the Court of Appeal: *Grobelaar v News International*, 2001 (64) The Modern Law Review 923.

> [T]he relevant question is whether the jury could, acting reasonably, on the balance of probabilities, and allowing for the fact that, given the seriousness of the allegations .... *The Sun has to prove its case to a higher standard*.[64]

As argued in this chapter, in civil cases, any expressions of the standard of proof that suggests that the case has to be proved to a higher standard, even if the allegations involved are of a serious nature, may be a source of confusion. The standard of proof in civil cases remains constant at the balance of probabilities. Any civil case must be proved to this standard, the seriousness of the allegations notwithstanding. What changes is the degree of probabilities within the standard so that "the more serious the allegation the more cogent must be the evidence which is required to prove it on the balance of probabilities."[65] As Lord Hoffman put it in *Secretary of State for the Home Department v Rehman*,[66] "It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian.

"AS ARGUED IN THIS CHAPTER, IN CIVIL CASES, ANY EXPRESSIONS OF THE STANDARD OF PROOF THAT SUGGESTS THAT THE CASE HAS TO BE PROVED TO A HIGHER STANDARD, EVEN IF THE ALLEGATIONS INVOLVED ARE OF A SERIOUS NATURE, MAY BE A SOURCE OF CONFUSION"

BEYOND REASONABLE DOUBT

Lord Denning's oft-quoted definition of "beyond reasonable doubt" is this: "if the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt..."[67] In the United States of America case of *United States v Hall*,[68] the court expressed the view that *proof beyond a reasonable doubt* entails that the jury must be certain about the accused's guilt. Proof beyond a reasonable doubt has also been explained by reference to the presumption of innocence that applies in criminal trials. In the Australian case of *Briginshaw v Briginshaw*,[69] Latham CJ held that a case is proved beyond a reasonable doubt if the evidence adduced "definitely displaced" the presumption of innocence. In all cases, however, the certainty that is required to discharge the burden is not an absolute one. According to Lord Denning, to prove a case beyond a reasonable doubt does not mean allowing even "fanciful possibilities to deflect the course of justice."[70]

Lord Denning's characterisation of *proof beyond reasonable doubt* has been followed in criminal cases in South Africa. But in those cases, the courts have gone further to clarify what reasonable doubt may constitute with reference to inherent probabilities. In the case of *Shackell v S*,[71] Brand AJA (as then he was) stated the following:

> A Court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.

64 *Grobelaar v News International*, para 121.
65 As above, para 239.
66 [2003] 1 AC 153, para 55.
67 *Miller v Minister of Pensions* [1947] 2 All ER 372 at page 373 – 374.
68 854 F 2d 1036, 1044 (7th Cir 1988).
69 (1938) 60 CLR 336 at 344.
70 *Miller v Minister of Pensions* [1947] 2 All ER 372 at page 373 – 374.
71 2001 (4) ALL SA 279 (SCA) at paragraph 30.

In jurisdictions that adopt jury trials, the judges' directions to juries can provide a glimpse into the various methods of spelling out *proof beyond a reasonable doubt* and proof on a balance of probabilities. In these jurisdictions, arguably, some of the simplest explanations of what the terms entail can be found in judges' directions to jurors. Consider this response by Starke J. to a request by the jury for further directions on "the point about probabilities" in a civil trial where the cause of action amounted to a crime:

> **The judge:** this is a civil action and being a civil action, unlike a criminal action, your duty is to decide it upon the balance of probabilities. That means to say, gentlemen—let me illustrate in this way the difference between a criminal action and a civil action: in a criminal action if you have what we call a "reasonable doubt," that is to say, the type of doubt that a reasonable man has, then you give the benefit of it to the prisoner and you acquit him, the reason for that being that under our law you give every chance to the prisoner. It is much more important from the point of view of criminal law that a hundred guilty men should escape than that one innocent man should suffer. So in a criminal trial you give the benefit of the reasonable doubt to the prisoner; you have to find him guilty beyond a reasonable doubt. But in a civil trial it is done on what we call the "balance of probabilities." If you decide that there is a preponderance of probability—probability gentlemen—in favour of the plaintiff's case, then you find for the plaintiff. By a preponderance of probability, that means that there is a greater weight of probability in his favour—then you find for the plaintiff. If not, you find for the defendant. Can I assist you any more?
>
> **Foreman of the jury:** No. I think it is clearly outlined to us now.[72]

In Zimbabwe, courts have also attempted to provide some reasoning for the distinction in the standards of proof in criminal and civil cases. In the case of *ZESA v Dera*,[73] McNally JA considered the consequences of a conviction following a criminal trial and the very nature of a criminal prosecution as opposed to a civil suit to explain why a higher standard of proof is required in criminal trials than civil trials. A conviction can result in death by hanging or long periods of imprisonment. At the very least, a conviction incurs stigma, as the convicted person forever carries with him the mark of a convict. Therefore, it is eminently fair to raise the standard of proof in such cases.

Regarding the nature of a criminal prosecution, McNally JA stated that when the state commences a prosecution, it attacks the integrity of an individual in its capacity as a representative of the whole society. Consequently, a conviction signifies censure of one's conduct by the society as a whole. It is, therefore, a result which demands a high degree of cogency in the evidence upon which the conviction stands. This reduces the probability of innocent people being erroneously convicted. Society prefers that "in the search for the truth, it is better that guilty men should go free than an innocent man should be punished."[74]

On the other hand, a judgment in a civil case is a resolution of a private dispute between individuals and has no bearing on societal convictions. Thus, in *Addington v Texas*,[75] it was held that the higher standard of proof reflects society's interest in avoiding erroneous convictions and an appreciation by society that the risk of an erroneous outcome is not shared with the accused individual but is borne entirely by the society.

Furthermore, according to Lord Denning, the standard of proof in criminal cases has developed out of the high regard that the law has for the liberty of the individual.[76] The other party in a criminal prosecution, the state, has no entitlement to rights. Compare this with a civil trial where the court must balance the rights and interests of the parties. In a civil trial, the court does justice when it is able to balance the competing interests and

72 *Helton v Allen* (1940) 63 CLR 691 at page 700 – 701.
73 1998 (1) ZLR 500 (S).
74 Per Slomowitz AJ in *S v Kubeka* 1982 (1) SA 534 (W) at 538G.
75 441 U. S. 418 (1979).
76 Davis v Johnson [1979] AC 264, [1978] 1 All ER 1132.

claims of the parties. Clearly, therefore, it is self-evident that a higher standard of proof is required in criminal prosecutions than in civil cases.

APPLYING THE CRIMINAL STANDARD IN CIVIL PROCEEDINGS

It seems that 19th Century English case law was rather inconsistent on the standard of proof to be maintained in a civil case, where the cause of action is based on allegations of a criminal nature. There are cases where the court ruled that the case must be proved *beyond a reasonable doubt* for judgment to be entered for the plaintiff. In other cases, a *proof on a balance of probabilities* standard was maintained. The cases of *Chalmers v Shackell*[77] and *Willmot v Harmer*,[78] on one hand, and *Doe d. Devine v Wilson*,[79] on the other as cited by Paul Robertshaw can be called on to prove the point that there was inconsistency in 19th Century English case law.[80]

In the *Chalmers* case, the allegations involved forgery, and in the *Willmot* case the allegations were of bigamy. Even though both were libel cases, in both cases, the court ruled that to discharge the burden of proof, evidence such as would be required in a criminal proceeding had to be led. In the *Doe d. Devine* case, however, which concerned forgery of a deed, the court ruled that the normal civil standard of proof on a balance of probabilities was applicable.

A passage from the speech of Lord Atkin in *People of New York v. Heirs of Phillips Deceased*,[81] an appeal to the Privy Council from Canada, where he laid down that there was a heavy onus on the plaintiffs and that it was necessary for them to prove their case as clearly as they would have in criminal proceedings has been oft cited as the cause for some of the confusion. The confusion here is over the standard applicable in civil cases where the cause of action arises from criminal conduct. But the confusion itself seems to have been caused by a misreading of Lord Atkin's speech. It does not seem that Lord Atkin intended to lay down that a rule of criminal law should be imported as applicable in civil proceedings. Robertshaw has also argued that Lord Atkin's remarks in this case were obiter.[82]

In the case of In *Re B (Children) (FC)*,[83] Lord Hoffman ventured to suggest a cause of the confusion that has led to the apparent error of applying the standard of proof in criminal cases to civil cases.[84] In his speech, Lord Hoffman singled out dicta in cases where courts have suggested a sliding scale of degrees or levels of persuasion within the standard of proof in civil cases. Such a sliding scale depends on the gravity of the misconduct in issue and the seriousness of consequences for a party that may arise as a result of the court's judgment. Lord Hoffman went on to put the cases where such dicta appear into three categories.

> "SUCH A SLIDING SCALE DEPENDS ON THE GRAVITY OF THE MISCONDUCT IN ISSUE AND THE SERIOUSNESS OF CONSEQUENCES FOR A PARTY THAT MAY ARISE AS A RESULT OF THE COURT'S JUDGMENT"

The first category includes civil cases where the courts seem to have considered that the criminal standard should be applied due to the enormity of the consequences of the proceedings. In this category, Lord Hoffman located dicta in *R v*

77 (1834) 6 C and P 475.
78 (1839) 8 C and P 695.
79 (1885) 10 Moo PCC 502.
80 Paul Robertshaw, 'The Review Roles of the Court of Appeal: *Grobelaar v News International*, 2001 (64) *The Modern Law Review* 923.
81 [1939] 3 All E.R. 952.
82 Paul Robertshaw, 'The Review Role of the Court of Appeal: *Grobelaar v News International*, 2001 (64) *The Modern Law Review*, 923.
83 2008 UKHL 35.
84 In *Re B (Children) (FC)* 2008 UKHL 35, at paragraph 5.
85 [1984] AC 74.
86 [2001] 1 WLR 340.
87 Per Lord Bingham CJ in *B v Chief Constable of Avon and Somerset Constabulary*, [2001] 1 WLR 340, at pp. 353-354.

Secretary of State for the Home Department, Ex p Khawaja.[85] In this case, the court made light weight of the distinction between the criminal and civil standards of proof, suggesting instead that the distinction between the two is merely semantic. Similarly, in *B v Chief Constable of Avon and Somerset Constabulary*,[86] the court also expressed the view that the flexibility of the civil standard of proof means that in serious cases, the difference between the criminal and civil standards of proof is "in truth, largely illusory."[87] However, there is a point that clearly commends itself in both cases. It is that even though, from a practical standpoint, the seriousness of the matter and the *a fortiori* higher levels of persuasion that are required virtually eviscerate the distinction between the two standards of proof, only the civil standard of proof should be applied in civil cases. There is no need whatsoever, to import the criminal standard into civil proceedings.

Clearly, therefore, the dicta that the courts have relied on do not support the practice of importing the criminal standard of proof into civil cases. It is clear from a correct reading of that dicta that even though in serious cases that might produce serious outcomes, the standard of proof on a balance of probabilities is applied with a very high level of strictness that makes the distinction between this standard and the standard of proof in criminal cases illusory, courts may not import the criminal standard of proof into civil cases. The standard that remains applicable in civil cases is the civil standard of proof on a balance of probabilities.

The second category, according to Lord Hoffman, relates to civil cases in which the fact in issue is "inherently improbable" wherein strong evidence should be adduced to persuade the court that it is more likely than not, that the fact in question occurred. In this category, Lord Hoffman put cases that include *R (McCann) v Crown Court at Manchester*,[88] which was followed in the case of *Re H (Minors)(Sexual Abuse: Standard of Proof)*.[89]

It was also followed in an earlier decision of the English Court of Appeal in the case of *Hornal v Neuberger Products Ltd*.[90]

However, the notion of inherent probability or improbability seems to have been made clearer by Lord Denning LJ in the case of *Bater v Bater*.[91] In criminal cases, as in civil cases, the proof must be proportionate to the enormity of a crime or fact in issue. Lord Denning LJ held that when considering allegations of fraud in a civil case, the court will "naturally require for itself a higher degree of probability" than that which it would require to establish negligence. The degree of probability must be "commensurate with the occasion," but, a civil court would never "adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature..."[92]

> "THE PROOF MUST BE PROPORTIONATE TO THE ENORMITY OF A CRIME OR FACT IN ISSUE"

In the *R (McCann)* case, Lord Steyn expressed the view that the seriousness of a matter inevitably called for a "heightened civil standard," which is virtually indistinguishable from the criminal standard. In the *Hornal* case, the court was dealing with an issue of fraudulent misrepresentation in a contract. Morris LJ held that "there is a difference of approach in civil cases," where different degrees of probability exist within the civil standard of proof on a balance of probabilities. When deciding as to the balance of probabilities, the court must give more weight to issues marked by gravity as opposed to those lacking in gravity. In undertaking this process, the court must put "the very elements of gravity" in the weighing scales.[93] In this case, while the court held that no great gulf existed between the criminal and civil standards, it made it clear that

88 [2003] 1 AC 787.
89 [1996] AC 563.
90 [1957] 1 QB 247.
91 [1957] P 35.
92 Per Lord Denning in *Bater v Bater* [1957] P 35 at p 37.
93 Per Morris LJ in *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, at p 266.

the standard of proof applicable in civil cases is the proof on a balance of probabilities "and not the higher standard of proof beyond all reasonable doubt required in criminal matters." Lord Hoffman also referred to the third category of civil cases where the judges appear to be confused whether they are dealing with the standard of proof or "the role of inherent probabilities in deciding whether the burden of proving a fact to a given standard has been discharged."[94]

Therefore, the dicta relied on by our courts to apply the criminal standard of proof in civil cases have been largely misconstrued. When, in the dicta, it seems that the courts required facts in civil cases to be proved beyond reasonable doubt, all that those courts were really saying is that the civil standard of proof is very flexible, requiring a more onerous degree of persuasion in grave matters than less serious ones. As Lord Denning put it in *Blyth v Blyth*, "...in proportion as the offence is grave, so ought the proof to be clear."[95]

DISCIPLINARY CASES: A SPANNER IN THE WORKS?

Could it be that the category of cases involving the disciplining of lawyers, where disciplinary tribunals require a higher standard of proof, might have also contributed a good part to the confusion? Cases of professional misconduct and discipline of lawyers may not be classified as criminal prosecutions. Even though the language in those cases includes terms that are familiar to criminal trials, including sentencing, they are not prosecutions at the instance of the state. Such cases are more civil than criminal in nature. Yet, it has been held that proof beyond a reasonable doubt is the standard that must be achieved for any charge of misconduct to hold.

In *ZESA v Dera*,[96] McNally JA made it quite clear that even though a higher standard of proof is required in cases before lawyers' disciplinary tribunals, it does not follow that this should be the standard to be applied in all disciplinary cases. Lawyers' disciplinary proceedings are radically different from the normal disciplinary proceedings, because when the Law Society takes any of its members before a disciplinary tribunal, it does so not as a directly interested party such as an employer, but it acts as a guardian of the public interest.

In doing justice, the disciplinary tribunal does not seek to balance the interests of the Law Society and the member that it charges. Rather, more like the state in a criminal prosecution, the Law Society does not suffer any losses if the disciplinary tribunal absolves the member of any wrongdoing. Therefore, in all other disciplinary proceedings, such as those involving employers and employees, the standard must remain the preponderance of probabilities, even if the allegations to be proved are of criminal conduct. Thus, as Justice McNally remarked, "it is a startling, and in my view, an entirely novel proposition, that in a civil case, the standard of proof should be anything other than proof on a balance of probabilities."[97] Of this rule of law on the standard of proof in civil cases, renowned jurists in the law of evidence have opined that there is no exception whatsoever.[98]

> "IF THIS RULE OF LAW ON THE STANDARD OF PROOF IN CIVIL CASES, RENOWNED JURISTS IN THE LAW OF EVIDENCE HAVE OPINED THAT THERE IS NO EXCEPTION WHATSOEVER"

94 In *Re B (Children) (FC)* 2008 UKHL 35, at paragraph 5.
95 *Blyth v Blyth* [1966] 2 WLR 634 at 650F.
96 1998 (1) ZLR 500 (S).
97 *ZESA v Dera* 1998 (1) ZLR 500 (S) at 503E.
98 LH Hoffman & D Zeffertt, *The South African Law of Evidence*, 4th Edition (1988)

THE "PROOF TO THE SATISFACTION OF THE COURT" DILEMMA

It is submitted that if, by standard of proof, it is meant "the degree of persuasion which the tribunal must feel before it decides that the fact in issue did happen,"[99] then proof to the satisfaction of the court may not be regarded as a standard of proof *per se*. Rather, the term appears to simply qualify the burden of proof. In this respect, while the standard is the degree or the extent to which the court must be persuaded, the burden of proof is the duty or obligation to persuade the court as to the existence or otherwise of a fact. Both the degree or extent of persuasion and the burden to persuade must be executed to the satisfaction of the court.

> "BOTH THE DEGREE OR EXTENT OF PERSUASION AND THE BURDEN TO PERSUADE MUST BE EXECUTED TO THE SATISFACTION OF THE COURT"

Thus, it is accurate to say that a party who bears the obligation of persuasion is required to discharge the obligation to the satisfaction of the court on a balance of probabilities in civil cases and beyond a reasonable doubt in criminal cases. In criminal cases, the court must be satisfied to a degree that is higher than in civil cases that the fact in issue did happen before deciding that the accused person is guilty. In civil cases, before the court rules in favour of a party, it must be satisfied that it is more likely than not that a fact in issue occurred.

The Rhodesian case of *Solanky Trading Company (Pvt) Ltd v Vissian*[100] sheds some light on the idea of adducing sufficient evidence to the satisfaction of the court. In this case, the requirement that a party must satisfy the court to discharge its burden of proof was described as the first principle of proof. The principle, according to Davies JA, is to the effect that "if one person claims something from another in a court of law, then he has to satisfy the court that he is entitled to it."[101] Surely, this must settle any lingering doubts as to whether, a law that says that the petitioner must prove his case *to the satisfaction of the court*, in an election petition, seeks to lay down a standard of proof.

In *Nelson Chamisa v Emmerson Dambudzo Mnangagwa*, the abridged version of the judgment held us in suspense for a moment by resorting to simply saying that the case must be proved to the satisfaction of the court. But even if the court had not addressed the matter in the full judgment and simply left it as it was in the abridged version of its decision, the Constitutional Court would appear to have undone the shackles of technicalities and set a new trend based on the ethos and express provisions of the Constitution. In the past, the Constitutional Court has failed to settle the real issues before it based on technicalities such as lack of onus by a petitioner and ripeness. In doing so, the Constitutional Court has been rightly criticised for abdicating its real duties and functions.

It is clear that the role of the Constitutional Court is not limited to simply resolving legal disputes and settling legal questions. Rather, it has a much wider role in the political set up of the state. Judge Rait Marute, the President of the European Court

99 In *Re B (Children) (FC)* 2008 UKHL 35, para 4.
100 1979 RLR 111.
101 *Solanky Trading Company (Pvt) Ltd v Vissian*, 1979 RLR 111 at 112G.

of Human Rights, has written that the functions of the Constitutional court should be viewed in a wider perspective with the lenses of ideals such as democracy, the rule of law, and constitutionalism.[102] The Constitutional Court has a role to play in entrenching the sound functioning of a state mechanism that is based on the principles of democracy, the rule of law, and human rights, now universally accepted as the most fundamental principles of a state.

Indeed, in express terms and in spirit, the Zimbabwean Constitution of 2013, is clear that the state is built on these fundamental principles. If one considers this wider role of the Constitutional Court, it becomes clear that avoiding the question of the standard of proof and adopting a simple non-contentious approach by the Court is desirable. The approach could simply be that the Court should just be satisfied with the evidence before it to come to a conclusion. Lord Scarman has expressed the view that the differences on the standard of proof is "not one of any great moment. It is largely a matter of words."[103] Similarly, Lord Denning expressed the view that the difference of opinion on the standard of proof "may well turn out to be more a matter of words than anything else."[104] In the end, everything having been said and done, the court must be satisfied with the evidence before it to find in favour of the petitioner. Moreover, "if a court a court has to be satisfied, how can it at the same time entertain a reasonable doubt?"

> "IN THE END, EVERYTHING HAVING BEEN SAID AND DONE, THE COURT MUST BE SATISFIED WITH THE EVIDENCE BEFORE IT TO FIND IN FAVOUR OF THE PETITIONER"

This might have been a crafty way for the Constitutional Court to unshackle itself from the fetters that may be imposed on it by matters of a technical nature.[105] By adopting this approach, the Court would have been seen as going straight to the heart of the matter to address the big elephant in the room regarding the legitimacy of the Government of President Mnangagwa that was in power then.

It will be remembered that the decision in the case of *Nelson Chamisa v Emmerson Dambudzo Mnangagwa* was made during a time of upheaval. Zimbabwe had just experienced a coup d'état in November 2017. To the credit of the coup plotters, the *coup d'état* was largely bloodless. No state of emergency was declared and no executive decrees were issued. More importantly, the removal of then-President Mugabe was supported by the majority of the population.

Nevertheless, the *coup d'état* threatened the constitutional democracy, the rule of law, and all the values underlying the Constitution of Zimbabwe of 2013. More important, the legitimacy of those who were claiming victory in this election was hanging by the thread. The atmosphere was pregnant with uncertainties, anxiety, and fears of the situation degenerating into violent confrontation. Short, and made with a promise to deliver a more detailed version in due course, the abridged version of the decision in the case of *Nelson Chamisa v Emmerson Dambudzo Mnangagwa* signalled the stamp of the existing fears of the state continuing to float in the sewer of illegalities, without a properly constitutionally established government. An immediate return to an unquestionable constitutional order was the overriding imperative for the Constitutional Court.

102 R Marute, 'The Role of the Constitutional Court in Democratic Society', (2007) XIII *Juridica International*, 8 – 13,https://www.juridicainternational.eu/public/pdf/ji_2007_2_8.pdf (accessed 25 June 2020).
103 *Khawaja v Secretary of State for the Home Department* [1983] 1 All ER 765, para 71.
104 *Bater v Bater* [1951] P 35.
105 Zuhtu Arslan (President of the Constitutional Court of Turkey), 'The role of the Constitutional Court in upholding the democratic state of law: The Case of Turkey', http://constitutionalcourt.gov.tr/files/pdf/baskanbey_konusma/30-11-2017.pdf (accessed 25 June 2020).

THE STANDARD IN ELECTION PETITIONS AND THE WAY FORWARD

The first point to emphasise here is that, as the common law stands today, only two standards of proof are known to our law. In criminal cases, the state must prove its case beyond a reasonable doubt for the court to return a guilty verdict, whereas in civil proceedings, the standard is that a party carrying the burden to prove the existence of a fact must adduce evidence that satisfies the court on a balance of probabilities. Nothing more, nothing less.

> "IN CRIMINAL CASES, THE STATE MUST PROVE ITS CASE BEYOND A REASONABLE DOUBT FOR THE COURT TO RETURN A GUILTY VERDICT, WHEREAS IN CIVIL PROCEEDINGS, THE STANDARD IS THAT A PARTY CARRYING THE BURDEN TO PROVE THE EXISTENCE OF A FACT MUST ADDUCE EVIDENCE THAT SATISFIES THE COURT ON A BALANCE OF PROBABILITIES"

The intermediate standard that is referred to by the courts in Uganda and Kenya has been rejected in English law. In *Dingwall v J. Wharton (Shipping) Ltd*,[106] Lord Tucker was "unable to accede to the proposition that there is some kind of intermediate onus between that which is required in criminal cases and the balance of probabilities" that is required in civil proceedings.

Also, in *Re H (Minors)*,[107] Lord Nicholls thought that the proposition for an intermediate standard was attractive but expressed doubts whether in practice such a standard would add much value to the present test in civil cases. Besides, it would cause confusion and uncertainty.

In the Zimbabwean law of evidence, there does not seem to have ever been an attempt to suggest that there could be an intermediate standard of proof that falls somewhere between proof beyond a reasonable doubt and proof on a balance of probabilities. As I have tried to show above, proof to the satisfaction of the court is not a standard of proof. Whether it is proof beyond a reasonable doubt or proof on a balance of probabilities, evidence that is adduced to be successful must be to the satisfaction of the court. The proof on a balance of probabilities in civil proceedings must be discharged to the satisfaction of the court and in a criminal case, the court will not convict, unless it is satisfied that the prosecution has proved its case beyond a reasonable doubt.

> "WHETHER IT IS PROOF BEYOND A REASONABLE DOUBT OR PROOF ON A BALANCE OF PROBABILITIES, EVIDENCE THAT IS ADDUCED TO BE SUCCESSFUL MUST BE TO THE SATISFACTION OF THE COURT"

As Makarau J. pointed out in the *Mount Darwin South Election Petition*,[108] an election petition remains a civil case. At no point does an election

106 [1961] *2 Lloyds Rep.* 213 at 216.
107 [1996] 2 WLR 8 (HL).
108 The Mumbamarwo Case (n 34) 5 – 6

petition morph into criminal proceedings. The reasons that are normally advanced for adopting a criminal standard are hardly convincing. Resorting to the normal civil standard of proof on a balance of probabilities does not reduce the importance of the case. Also, the fact that the acts constituting corrupt practices are criminal offences does not change the nature of an election petition from being civil proceedings to a criminal action.

> "RESORTING TO THE NORMAL CIVIL STANDARD OF PROOF ON A BALANCE OF PROBABILITIES DOES NOT REDUCE THE IMPORTANCE OF THE CASE"

The fact that the grounds for nullifying an election are couched in criminal law terms requires the criminal standard of proof to be followed, as suggested by the Judicial Committee of the Privy Council in *Jugnauth v. Raj Direvium Nagaya Ringadoo (Mauritius)*, persuades a little more than the other reasons. However, the requirement that the court should find the respondent "guilty" of a corrupt practice to nullify an election, should simply be interpreted in its ordinary grammatical meaning. The word "guilty" is used only as an adjective, to describe the respondent's state of mind. It follows that the court must find the respondent "at fault" or "in the wrong" or "blameable." The use of the word "guilty" should not be read as a verdict after a criminal trial. No criminal trial would have taken place. The outcome in an election petition is not criminal sanctions, such as a suspended sentence, probation, community service, a jail term, or a fine. The consequences of an order nullifying an election are not penal.

The wording of the Zimbabwean Electoral Act is quite revealing too. It provides, in Section 173(a), that where the Electoral Court finds a person guilty of any one of the corrupt practices outlined, "the evidence taken at the trial (of the election petition), shall be transmitted by the registrar of the Electoral Court to the Prosecutor-General with a view to the institution of any *prosecution proper*." Clearly, the Electoral Court does not conduct a "prosecution proper," even though the grounds relied upon may be criminal offences in nature.

Justice Makarau now sits on the Constitutional Court bench. It had been hoped that she would provide the leadership required to clear the controversy that remains on the standard of proof in election petitions. Justice Makarau concurred with the majority judgment in *Nelson Chamisa v Emmerson Dambudzo Mnangagwa*. Certainty? *Stare decisis*? Probably. Political correctness? Maybe. However, could Justice Makarau have written a short, but sharp, dissenting judgement on that one aspect of the standard of proof in election petitions? Justice Makarau might have dissented on the standard of proof without upsetting the applecart. There would have been no contradiction if she had concurred with the overall ruling, while expressing her view that the civil standard of proof should be applied in an election petition because it is a civil trial not a criminal trial. Her views as expressed in the *Mount Darwin Election Petition* could have been amplified by the fact that a presidential election petition is based on Section 93 of the Constitution of Zimbabwe. A Presidential election petition is a constitutional matter and therefore civil in nature.

> "A PRESIDENTIAL ELECTION PETITION IS A CONSTITUTIONAL MATTER AND THEREFORE CIVIL IN NATURE"

An election petition concerns a private dispute between two private parties. Sections 166 and 167 of the Electoral Act confirm the private nature of election petitions by providing that an election petition may be presented by any candidate in the election and a respondent in such a petition shall be the winning candidate whose election is being challenged. The way in which the definitions of a petitioner and a respondent are written tends to suggest that the list of petitioners and respondents in an election petition is closed. Restricting *locus standi* to the candidates in the concerned election equates an election petition with a private legal action.[109] In this respect, in an election petition the court is concerned with balancing the rights of the parties involved.

> "RESTRICTING *LOCUS STANDI* TO THE CANDIDATES IN THE CONCERNED ELECTION EQUATES AN ELECTION PETITION WITH A PRIVATE LEGAL ACTION.109 IN THIS RESPECT, IN AN ELECTION PETITION THE COURT IS CONCERNED WITH BALANCING THE RIGHTS OF THE PARTIES INVOLVED"

It follows, therefore, that being a civil case, the standard of proof in an election petition should be on a balance of probabilities. This proposition was eloquently put across by Justice Makarau. One would, however add one point to it. In ordinary civil proceedings, in English law, which is applied in most Commonwealth countries,[110] there exists within the standard of proof, "a sort of sliding scale according to the moral turpitude" of the defendant.[111] This means that within the balance of probabilities standard, there exist several degrees of the probabilities. Where the cause of action in a case arises from an act that constitutes a criminal offence or where the allegations are serious, the degree of the probabilities within the civil standard is higher than where the act is not a criminal offence. The degree of probabilities required to discharge the burden of proof on a balance of probabilities in a civil trial depends on the magnitude of the thing that is in issue. It is important to note that it is not the standard of proof that varies. The probabilities are the ones that vary while the standard of proof remains constant. What this simply means is that more cogent evidence needs to be marshalled in a case where the cause of action amounts to a criminal act than in other cases.

109 Electoral Commission, Challenging Elections in the UK, September 2012, available at https://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/150499/Challenging-elections-in-the-UK.pdf (accessed 25 June 2020).
110 Nii Lante Wallace-Bruce, 'The Standard of Proof for Crime in Civil Proceedings – A Ghanaian Perspective', (1993) 42 *International and Comparative Law Quarterly* 157.
111 Halford v Brookes [1991] 1 WLR 428; [1991] 3 All ER 559.

CONCLUSION

As a parting shot, perhaps a peek at the historical origins of the proof beyond any reasonable doubt standard might shed some more light on the inelegance of applying it to election petitions. A Yale Law Professor has written that the whole idea of reasonable doubt has its roots in the Christian moral theology of conscience.[112] The pre-19th Century legal approaches considered blood punishment, such as execution and mutilation, as the standard criminal punishment. Thus, convicting an innocent person was regarded as quite a grim sin. Pre-19th Century Christian judges and jurors are said to have taken this very seriously. Quite simply, a judge who convicted and sentenced an accused person to a blood punishment while experiencing "doubt" about guilt committed a mortal sin.[113]

The reasonable doubt standard is therefore said to have developed as a way of providing judges and jurors with an escape route to help them to steer clear of the perils of damnation of their souls when they died. So, according to Professor James Q. Whitman, contrary to current thinking, the origins of the concept of reasonable doubt have nothing whatsoever to do with the public interest or the desire to protect the rights of an accused person.[114] Rather, the concept developed as a device to address fears by judges and jurors of their souls being damned for committing the mortal sin of convicting an innocent person.

As long as their doubts about the guilt of the accused person were not reasonable, jurors felt reassured that they could vote to convict an accused person without risking their own salvation. Thus, the instruction to convict if guilt was proved beyond any reasonable doubt was developed for the purpose of putting jurors at ease and addressing the frightening consequences of committing the mortal sin of convicting an innocent person.

The approach adopted by the High Court of Malawi in the recent presidential election petition is one that we urge other jurisdictions to follow.[115] Although admitting that electoral petitions are a special breed of claims, the High Court of Malawi dismissed the intermediate standard, holding that relying on a standard of proof stricter than proof on a balance of probabilities would be inimical to a human rights approach. A human rights approach in this case meant placing emphasis on the rights of voters as opposed to the rights of the protagonists in the case. Adopting a stricter standard of proof would seriously curtail the common person's right of access to justice thereby closing the door to future litigation. Consequently, "electoral matters courts must demand a standard of proof that is commensurate with the occasion. Petitions just like any other civil matter must be proved by the petitioner on a balance of probabilities and nothing else."[116]

> "ADOPTING A STRICTER STANDARD OF PROOF WOULD SERIOUSLY CURTAIL THE COMMON PERSON'S RIGHT OF ACCESS TO JUSTICE THEREBY CLOSING THE DOOR TO FUTURE LITIGATION"

112 Whitman, James Q., 'The Origins of "Reasonable Doubt"', *Yale Law Faculty Scholarship Series*, March 2005. https://digitalcommons.law.yale.edu/fss_papers/1
113 As above.
114 As above.
115 *Dr. Saulos Klaus Chilima and Dr. Lazarus Mccarthy Chakwera v Professor Arthur Peter Mutharika and The Electoral Commission*, Constitutional Reference 1 of 2019.
116 As above para1056.

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Chilima & Chakwera v Mutharika and The Electoral Commission, Constitutional Reference 1 of 2019

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CHAPTER 8

KENYAN SUPREME COURT APPROACH TO HANDLING ELECTION RELATED DIGITAL THREATS: LESSONS FROM THE 2013 AND 2017 KENYAN ELECTIONS

MARYSTELLA AUMA SIMIYU*

ABSTRACT

This chapter examines the approach taken by the Kenyan Supreme Court in handling election petitions that raise questions regarding the impact of digital technologies on the integrity of the electoral process. The chapter uses the Kenya experience in the 2013 and 2017 elections and the judgments by the Supreme Court of Kenya in the presidential election petitions to draw lessons on the electoral jurisprudence on technology and elections. The author applauds the 2017 decision for upholding the statutory and constitutional standard for a genuine, free, and fair election. The chapter further discusses new and emerging digital threats to electoral systems and what Kenyan courts and relevant stakeholders need to do to ensure that they are well-equipped to effectively provide redress and jurisprudential guidance. The author particularly cautions against the growing effect of information disorder on the voting process, an aspect that is untested in Kenyan courts.

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INTRODUCTION

The adoption of election technology in many African countries was aimed at addressing the questionable levels of election integrity. This was a method to transition away from the manual systems that were vulnerable to human error and manipulation.[1] Flawed elections greatly undermined the realisation of not only the right to vote but the expectation that a vote counts and reflects the will of the people. This is what is envisioned in seminal human rights instruments including the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (Universal Declaration), and regional instruments such as the African Charter on Human and Peoples' Rights (ACHPR), and the African Charter on Democracy, Elections and Governance (ACDEG).[2] The right to vote is similarly guaranteed in the Constitution of Kenya and the Elections Act, which provided the framework for the use of technology in elections in Kenya.[3]

> "THE ADOPTION OF ELECTION TECHNOLOGY IN MANY AFRICAN COUNTRIES WAS AIMED AT ADDRESSING THE QUESTIONABLE LEVELS OF ELECTION INTEGRITY"

Kenya introduced election technology in the 2013 general election and similarly applied it in the 2017 election. In the 2013 election, the election technology was used for voter registration, voter identification, and results transmission.[4] However, there were serious concerns on the correctness of the resulting voter register, and the electronic system meant for voter identification and results transmission failed on election day.[5] Although the technology was better implemented in the 2017 election, questions surrounding the transparency of the procurement process for the technology and concerns around the accuracy of the voter register and efficiency of the results transmission system raised doubts on whether the process was indeed free and fair.[6]

> "QUESTIONS SURROUNDING THE TRANSPARENCY OF THE PROCUREMENT PROCESS FOR THE TECHNOLOGY AND CONCERNS AROUND THE ACCURACY OF THE VOTER REGISTER AND EFFICIENCY OF THE RESULTS TRANSMISSION SYSTEM RAISED DOUBTS ON WHETHER THE PROCESS WAS INDEED FREE AND FAIR"

These were questions that were raised in the presidential election petitions that were presented before the Supreme Court of Kenya (the SCOK) in both the 2013 and 2017 elections.[7] A central question before the SCOK was whether failure of the technology had a substantial effect on the

1 Ace Project 'Elections and technology' <http://aceproject.org/ace-en/topics/et/etc/default> (accessed 21 April 2020).
2 Art 13 ACHPR, Art 21 UDHR & Art 25 ICCPR.
3 Art 38 of the Constitution & sec 44 of Elections Act No 24 of 2011.
4 EU EOM 'Kenya general election 2013 final report' (2013) 12.
5 ELOG 'The historic vote: Elections 2013' (2013) 5 & 65 & EU EOM (Note 3 above) 1-2.
6 EU EOM 'Final report Republic of Kenya general elections 2017' (2018) 4-7.
7 *Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others* [2013] eKLR Petition 5, 3 & 4 of 2013 <http://kenyalaw.org/caselaw/cases/view/87380/> (accessed 22 April 2020) (Raila Odinga 2013) & *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR Presidential Petition No 1 of 2017 <http://kenyalaw.org/caselaw/cases/view/140716/> (accessed 22 April 2020) (Raila Odinga 2017).

outcome of the election.[8] In the 2013 judgment, the SCOK unanimously held that the election was free, fair, and credible, while in the SCOK's 2017 majority determination, the Court annulled the election, results basing a significant part of its judgment on the impact of the failure of the election technology on the verifiability and integrity of the final result.[9]

> "A CENTRAL QUESTION BEFORE THE SCOK WAS WHETHER FAILURE OF THE TECHNOLOGY HAD A SUBSTANTIAL EFFECT ON THE OUTCOME OF THE ELECTION"

The Kenyan judgment was hailed as a landmark judgment for being the first of its kind in Africa to annul presidential election results.[10] However, in the context of this chapter, the Kenyan judgment is an important foundation for jurisprudence on technology and elections. Courts should be more prepared to examine technical evidence not only on the conduct of the election but on the influence of technology on the wider public during the electioneering process. This is because of the fast-paced nature of technological developments and their influence in socioeconomic and political life.

STRUCTURE OF CHAPTER

This chapter is divided into four parts. The first is this INTRODUCTION. Part two discusses DIGITAL INFLUENCES AND THREATS to democracy and elections in the context of the 2013 and 2017 elections of Kenya. Part three discusses the background and context of the INTRODUCTION OF ELECTION TECHNOLOGY IN KENYA. The fourth part examines the TECHNOLOGICAL COMPONENT OF THE 2013 AND 2017 PRESIDENTIAL ELECTION PETITIONS and judgments and lessons from the two cases. It also considers the future of technology related electoral jurisprudence. Part five constitutes the CONCLUSION and recommendations.

8 Article 86 of the Constitution of Kenya.
9 Raila Odinga 2017 (n 7) para 400.
10 K Tamura 'Kenya Supreme Court nullifies presidential election' *New York Times* 1 September 2017 <https://www.nytimes.com/2017/09/01/world/africa/kenya-election-kenyatta-odinga.html> (accessed 22 April 2020).

DIGITAL TECHNOLOGY AND ELECTIONS

DIGITAL THREATS TO DEMOCRACY AND ELECTIONS

The impact of technology on the world's economic, social, and political existence cannot be gainsaid. However, as people increasingly seek digital solutions to life's problems, they need to approach this process with a conscious recognition that technology can have both positive and negative effects. Human rights research suggests the use of technology could hamper democratic development. A 2019 expert survey by Pew Research on the future impact of technology on core aspects of democracy revealed that 49 percent felt it would weaken them, 33 percent thought it would strengthen them, and 18 percent felt it would not have a substantive effect.[11] This is indicative of the uncertainty around the future impact of technology on democracy. However, with the fourth industrial revolution upon the world, the influence of technology is inescapable.[12] Stakeholders of democratic development must ensure that positive change is realised from this revolution.

On one hand, digital technologies have transformed the way people express themselves and access and distribute information thereby facilitating global connections. On the other hand, it has led to the spread of misinformation, disinformation, and mal information, collectively defined as information disorder.[13] People are inundated with information, and it is increasingly difficult to sift through this voluminous data to distinguish what is true from what is false. When information disorder is targeted towards democratic discourse and institutions, it skews public debate and distorts the authenticity of information. The weaponisation of information by malicious agents for political motives grossly contorts debate in the public sphere.[14] It endangers safe engagement in public discourse essential to decision making processes such as elections. The effects of digital disruption were witnessed in the Brexit vote, the 2016 American elections, and the 2017 Kenyan elections.[15]

Remote intrusion or hacking is another emerging concern in elections, especially with the increasing adoption of election technology in the administration of elections.[16] Hacking agents not only target personal information of political candidates but also election systems and accounts of stakeholders. Victims include Election Management Bodies (EMBs), parliaments, Civil Society Organisations (CSOs), and judiciaries. Whether this is done by domestic or foreign actors or even idle, mischievous trolls, these actions pose a real threat on public trust perceptions on the democratic process. Further, it puts at risk the data of voters, in a time when information has a highly attractive economic benefit.[17]

Surveillance technology is also causing waves in human rights discussions as a growing threat to democratic development. Although surveillance technology can be used for security purposes, it can and has been implemented unlawfully to monitor the media, opposition, human rights defenders, and CSOs. It has also been used to justify bogus government measures to curtail freedom of expression, access to information, and freedom of assembly and association.[18] These kinds of violations are particularly prevalent during elections.[19]

11 Pew Research Center 'Many tech experts say digital disruption will hurt democracy' <https://www.pewresearch.org/internet/2020/02/21/many-tech-experts-say-digital-disruption-will-hurt-democracy/> (accessed 22 April 2020).
12 WEF 'The Fourth Industrial Revolution: What it means, how to respond' <https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/> (accessed 23 April 2020).
13 C Wardle &H Derakhshan 'Information disorder: Toward an interdisciplinary framework for research and policy making' (2017) 20.
14 P Norris 'Revolution, what revolution? The internet and U.S. Elections, 1992–2000' in E Kamarck and JS Nye (eds) *Governance.com: Democracy in the Information age* (2002) 59-80.
15 Wardle & Derakhshan (n 13) 4.
16 ACE Project (n 1) & N Ismail 'Election hacking: Is it the end of democracy as we know it?' <https://www.information-age.com/election-hacking-end-democracy-123487698/> (accessed 23 April 2020).
17 YN Harari *21 lessons for the 21st century* (2018) 94.
18 HRC 'Surveillance and human rights: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression A/HRC/41/35' (2019) 3.
19 MS Simiyu *et al* 'Civil society in the digital age in Africa: Identifying threats and mounting pushbacks' (2020) CHR & CIPESA <https://www.chr.up.ac.za/images/researchunits/dgdr/documents/reports/Civil_society_in_the_digital_age_in_Africa_2020.pdf> (accessed 20 April 2020).

Another increasing concern in technology and human rights is network disruptions by authoritarian regimes under the guise of maintaining national security and public order and managing the spread of false news. These measures are especially prevalent during elections and public protests.[20] A 2019 report by the Collaboration on International ICT Policy in East and Southern Africa (CIPESA) revealed that at least 22 African countries have experienced some form of network disruption, including internet shutdowns.[21] Such measures grossly undermine the right of access to information and freedom of expression. Although Kenya has not experienced this, there have been threats from the government of such measures during the election periods, requiring stakeholders to remain extremely vigilant.[22]

A starting point for stakeholders to address digital threats to the democratic process is to analyse the existing international and national legislative framework to determine whether there are sufficient legal protections. Reference is made to the 2012 pronouncement by the UN Human Rights Council (HRC) that "the same rights that people have offline must also be protected online, in particular freedom of expression."[23] Therefore, the existing legislative framework provides an apt reference point.

> "A STARTING POINT FOR STAKEHOLDERS TO ADDRESS DIGITAL THREATS TO THE DEMOCRATIC PROCESS IS TO ANALYSE THE EXISTING INTERNATIONAL AND NATIONAL LEGISLATIVE FRAMEWORK TO DETERMINE WHETHER THERE ARE SUFFICIENT LEGAL PROTECTIONS"

LEGISLATIVE FRAMEWORK

The right to vote is protected in international legal instruments and national constitutions in most of the democratic countries in the world. Article 21 of the Universal Declaration provides as follows:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

In the same vein, the ICCPR provides that every citizen has the right and opportunity:

1. To take part in the conduct of public affairs, directly or through freely chosen representatives;
2. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and
3. To have access, on general terms of equality, to public service in his country.

At the normative level, the African continent has made strides to emphasise its commitment to the promotion and respect for the right to vote. In Article 3(g) of the Constitutive Act of the African Union, the promotion of "democratic principles and institutions, popular participation and good governance" is included as one of the objectives of the African Union (AU). Further, a key principle of the AU is the "respect for democratic principles, human rights, the rule of law, and good governance."[24]

20 B Taye 'Targeted, cut off, and left in the dark: The #KeepItOn report on internet shutdowns in 2019' (2019) 13.
21 CIPESA 'Despots and disruptions: Five dimensions of internet shutdowns in Africa' (2019).
22 Nation Correspondent 'IEBC says internet shutdown would affect results transmission' *Daily Nation* 21 July 2017 <https://www.nation.co.ke/news/IEBC-Internet-shutdown-affect-results-transmission/1056-4026734-b7484tz/index.html> (accessed 22 April 2020).
23 HRC RES/20/8 The promotion, protection and enjoyment of human rights on the Internet, June 2012.
24 Art 4(m) Constitutive Act of the AU.

Although the right to vote is not expressly stated in the ACHPR, Article 13 provides that, "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law." The African Charter on Democracy, Elections and Governance (ACDEG) further contributes to the corpus on election-related rights while taking into consideration the unique experiences in the African continent.[25] The ACDEG was conceived on the principles and objectives of the Constitutive Act of the AU.[26] The ACDEG's goal is to instil a political culture of democratic power transitions in Africa through "holding of regular, free, fair and transparent elections conducted by competent, independent and impartial national electoral bodies."[27] This stemmed from an appreciation of the history of regime change in Africa, particularly before the third wave of democratisation. Regime change was not strongly grounded on democratic transitions.[28] This necessitated the need to improve the quality of elections in Africa.

> "THE ACDEG'S GOAL IS TO INSTIL A POLITICAL CULTURE OF DEMOCRATIC POWER TRANSITIONS IN AFRICA THROUGH "HOLDING OF REGULAR, FREE, FAIR AND TRANSPARENT ELECTIONS CONDUCTED BY COMPETENT, INDEPENDENT AND IMPARTIAL NATIONAL ELECTORAL BODIES"

However, as of 2020, the ACDEG had 46 signatories and 34 ratifications. Kenya is only a signatory.[29] As per Article 17 of the ACDEG, state parties commit to hold transparent, free, and fair elections. It is because of this position that this chapter puts a spotlight on state commitment to "establish and strengthen national mechanisms that redress election related disputes in a timely manner."[30] These may include electoral commissions, political party dispute tribunals, and the judiciary.

Pursuant to the principles of the universality, indivisibility, interrelatedness, and interdependence of human rights, the right to vote is closely connected to other rights. In the context of the digital age, and in line with the standard of free expression of the will of the people, freedom of expression, the right of access to information, and the right to privacy are important in enabling the right to vote and promoting election integrity.[31] Freedom of expression and the right to access information are protected under Article 19 of the ICCPR and Article 19 of the Universal Declaration. In the African context, these rights are guaranteed under Article 9 of the ACHPR. Kenya has ratified both the ICCPR and ACHPR. Further, the African Commission has added to this anthology with the Model Law on Access to Information for Africa, the Guidelines on Access to Information and Elections in Africa, and the 2019 revised version of the Declaration of Principles on Freedom of Expression and Access to Information in Africa. These instruments take into consideration the unique effects of the digital age on the exercise of human rights and fundamental freedoms.

Although the ACHPR is silent on the right to privacy, the ICCPR under Article 17 and the Universal Declaration under Article 12 provide the requisite recourse. However, given the increased concerns around data protection in the digital age, and in this context, data protection of voters, countries need to take more serious measures to anchor data protection on strong legislative provisions,

25 The African Commission adopted the ACDEG on 30 January 2007. It entered into force on 15 February 2012.
26 Preamble of ACDEG.
27 Preamble of ACDEG.
28 Preamble of ACDEG.
29 AU 'Status List' <https://au.int/sites/default/files/treaties/36384-sl-AFRICAN%20CHARTER%20ON%20DEMOCRACY%2C%20ELECTIONS%20AND%20GOVERNANCE.PDF> (accessed 23 April 2020).
30 Article 17(2) ACDEG.
31 W Benedek & MC Kettemann 'Freedom of expression online' in M Susi (ed) *Human rights, digital society and the law: A research companion* (2019).

and establish and strengthen the necessary implementing bodies. Kenya enacted its data protection legislation in November 2019.[32]

ELECTION TECHNOLOGY

There has been an increase in the adoption of digital technology in the national administration of elections.[33] This has largely been motivated by the desire to improve the conduct of elections and to manage the weaknesses of manual electoral systems. The adoption of technology has been used in the management of large databases and in complex parts of the voting process. This includes biometric technology for voter registration, voter identification, and voter verification.[34] According to the Information and Communications Technology (ICT) database developed by International Institute for Democracy and Electoral Assistance (IDEA), at least 30 African countries use digital registration, scanning technologies, or mobile and internet technology in their voter registration process.[35] In some cases, countries have gone as far as adopting e-voting and e-counting technologies. Technology has also revolutionised the results transmission process with the adoption of mobile technology and the internet to send results from the polling stations swiftly to result compilation centres.[36]

As several authors have advised, stakeholders need to objectively weigh the opportunities and risks presented by the integration of technology in election processes.[37] On one hand, technologies have been touted as having the ability to increase the efficiency of election processes and reduce cases of fraud such as ballot stuffing, double voting, and ghost voters.[38] Alternative voting systems, such as remote voting, may provide easier access for persons with disabilities or other voters who are unable to physically access voting stations.[39] However, it also comes with an increased expense for the purchase, management, and storage of the technology.[40] Further, new cases of fraud have emerged that render election technology vulnerable to hacking, not only from internal actors but also from foreign agents who may seek to influence the results of an election.[41]

> “NEW CASES OF FRAUD HAVE EMERGED THAT RENDER ELECTION TECHNOLOGY VULNERABLE TO HACKING, NOT ONLY FROM INTERNAL ACTORS BUT ALSO FROM FOREIGN AGENTS WHO MAY SEEK TO INFLUENCE THE RESULTS OF AN ELECTION”

Cheeseman, Lynch, and Willis warn that in the absence of political will and sustained resource and institutional capacity to integrate technology effectively in elections, the process is likely to be ineffective.[42] Further, there should be a realistic acknowledgement that election technology is not an all-encompassing solution for all the challenges faced in an electoral system. Some electoral problems are inimical to credible elections and cannot be rectified by technology.[43] Such practices may include bribery, discrimination against women and minorities, runaway campaign financing, and suppression of free media, civil society, opposition parties, and other dissenting voices. Other practices include limiting the independence

32 Act No 24 of 2019 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2024%20of%202019> (accessed 20 April 2020).
33 N Cheeseman *et al* ‘Digital dilemmas: The unintended consequences of election technology’ (2018) *Democratization* 1.
34 ACE Project (n 1).
35 IDEA ‘If electoral register is created by the EMB, what type of technology used for collecting registration data?’ <https://www.idea.int/data-tools/question-countries-view/737/Africa/cnt> (accessed 21 April 2020).
36 IDEA ‘Are official election results processed by an electronic tabulation system?’ <https://www.idea.int/data-tools/question-view/747> (accessed 21 April 2020).
37 A Evrensel *Voter registration in Africa: A comparative analysis* (2010); A Gelb & A Diofasi ‘Biometric elections in poor countries: wasteful or a worthwhile investment?’ (2016) 435 Working Paper & Cheeseman et al (n 34).
38 P Wolf et al *Introducing biometric technology in election* (2017).
39 B Goldsmith ‘Electronic voting & counting technologies. A guide to conducting feasibility studies’ (2011) 6.
40 Goldsmith (n 40) 7-12.
41 ACE Project (n 1) & Ismail (n 16).
42 Cheeseman (n 34) 4.
43 N Cheeseman *Democracy in Africa: Successes, failures and the struggle for political reform (2015); N Cheeseman Institutions and democracy in Africa: How the rules of the game shape political development* (2018) & N Cheeseman & B Klaas *How to Rig an Election* (2018).

and competence of electoral dispute resolution mechanisms. Addressing such challenges is largely determined by the political culture, respect for the rule of law, constitutionalism, and effectiveness of the regulatory and administrative framework.

> “ADDRESSING SUCH CHALLENGES IS LARGELY DETERMINED BY THE POLITICAL CULTURE, RESPECT FOR THE RULE OF LAW, CONSTITUTIONALISM, AND EFFECTIVENESS OF THE REGULATORY AND ADMINISTRATIVE FRAMEWORK”

Before adopting new technologies for election processes, countries and particularly the EMBs have to deliberate seriously over which technology is most appropriate for the country's electoral needs. Considerations include the requisite legislative framework, presence of the necessary infrastructure, availability of the necessary skills, and public attitudes.[44] EMBs need to answer these questions comprehensively and ensure that the process for adopting new technologies is transparent and inclusive. To do so, EMBs need to hold broad stakeholder engagements with the legislature, judiciary, civil society, private sector, donors, and the general public. This not only helps achieve the goals of transparency and inclusivity but also helps stakeholders understand their role in upholding electoral integrity.

Ultimately, whatever technology is settled on must ensure the principles that anchor a process that reflects the will of the people are realised. These principles include universal and equal suffrage, secret balloting, and an environment free from intimidation, coercion, and undue influence.[45] Further, the system should be accurate, transparent, and verifiable. Options such as internet voting have been criticised for endangering secrecy of the vote, reducing transparency and auditability, increasing electoral expenditure, and complicating logistical and organisational arrangements.[46] Africa is especially disadvantaged in this regard, given challenges of widespread poverty, digital divide, illiteracy and poor infrastructure.[47] As of 2020, only Namibia has implemented e-voting technologies.[48]

Election dispute mechanisms are particularly important to restoring the integrity of the electoral process when voting technologies fail or other digital threats interfere with the conduct of elections. This duty often falls on the judiciary. As African countries have increasingly adopted election technology, judicial officers have been forced to confront technological evidence in the settlement of disputes. This has been witnessed in Kenya, Ghana, and Nigeria, where the petitioners questioned the implications of technological failures on the integrity of the vote.[49] This chapter will focus on the Kenyan experience.

> “ELECTION DISPUTE MECHANISMS ARE PARTICULARLY IMPORTANT TO RESTORING THE INTEGRITY OF THE ELECTORAL PROCESS WHEN VOTING TECHNOLOGIES FAIL OR OTHER DIGITAL THREATS INTERFERE WITH THE CONDUCT OF ELECTIONS”

44 Ace Project (n 1).
45 General Comment 25 ‘The right to participate in public affairs, voting rights and the right of equal access to public service.
46 Goldsmith (n 40) 7-12.
47 ITU ‘Measuring digital development: Facts and figures 2019’ (2019) 2 <https://www.itu.int/en/ITU-D/Statistics/Documents/facts/FactsFigures2019.pdf> (accessed 24 April 2020) & Goldsmith (n 40) 9.
48 EISA ‘Electronic voting and the 2014 Namibian general elections’ (2014).
49 *Nana Addo Dankwa Akufo-Addo & 2 others v John Dramani Mahama & another* Civil Motion J8/31/ 2013; Raila Odinga 2013 (n 7); Raila Odinga 2017 (n 7) & NCSSR *General election in Nigeria- Compendium of petitions* (2017).

BACKDROP OF THE INTEGRATION OF TECHNOLOGY IN KENYA

The history of elections in Kenya reveals the reasons why there was a need to opt for digital processes as opposed to manual systems. A comprehensive adoption of election technology in Kenya's elections was introduced for the 2013 general elections; the fifth elections held since the re-introduction of multiparty rule in 1992.[50] In 2002, the EMB had used technology to a limited extent by adopting Short Message Service (SMS) to send results to the tallying centre.[51] The decision to adopt election technology in Kenya was motivated by the history of elections marred by allegations of vote rigging through ballot stuffing. This is in addition to blatant manipulation of election results, all of which were made easier by the manual voting process.[52] The government of the time had also become adept at using divisive tactics such as politically orchestrated ethnic clashes to divide voters who were perceived as opposition supporters. The executive ruthlessly exploited its power to suppress criticism through arbitrary arrests, detention, torture, and voter suppression in opposition strongholds.[53]

The 2002 elections were seen as a new dawn for Kenyan politics, as the 24-year rule of President Daniel Moi came to an end, and the baton for the top office was passed to Mwai Kibaki, who was nominated by the National Rainbow Coalition (NARC). However, strife arose within NARC, leading to the alliance's collapse in 2005.[54] Soon thereafter, an indelible moment in Kenya's history emerged from the highly contentious 2007 election. It was characterised by widespread rigging, general electoral mismanagement, and post-election violence. This led to the death of more than 1,000 Kenyans and the displacement of approximately 500,000 people.[55]

The now defunct and disbanded Electoral Commission of Kenya (ECK) grossly mismanaged the process to such an extent that the true winner of the presidential election remained unclear. This state of uncertainty was reflected in various post elections polls such as the USA Gallup poll, which found that 70 percent of Kenyans thought the election was dishonest, only 23 percent felt it was honest, and 7 percent were unsure.[56] This reflected Kenyans' lack of confidence in the institutions responsible for the administration of the elections.[57]

The 2007 post-election violence was also an indictment on the judiciary, given that the public took to the streets rather than the courts for justice.[58] The Independent Review Commission (IREC) was tasked with investigating the post-election violence and recommending measures to help Kenya revamp its electoral management system. IREC recommended that Kenya integrate information technology in the administration of its elections to improve the management of the voter database as well as vote counting, tallying, and transmission of election results.[59]

Digital technologies have also provided new frontiers for the exercise of freedom of expression and access to information in Kenya. During the disputed 2007 election period, the gradually developing field of social media platforms, including Facebook, Twitter, and blogs, grew in relevance. These platforms were used as avenues for divisive

50 Kenya holds elections every five years. After the reintroduction of multiparty rule in 1992, the next elections were held in 1997, 2003 and 2007.
51 Ace Project 'Kenya election history 1963-2013' (2015) 12.
52 DM Anderson 'Kenya's elections 2002: The dawning of a new era? (2003) 102 *African Affairs* 338.
53 HRW 'Kenya' <https://www.hrw.org/reports/2002/kenya2/Kenya1202-01.htm> (accessed 24 April 2020). Canada: Immigration and Refugee Board of Canada 'Restoration of multiparty government and Kenyans of Somali Origin (1992) https://www.refworld.org/docid/3ae6a80a28.html (accessed 24 April 2020).
54 Ace Project (n 52) 12.
55 A Jacobs 'Nairobi burning: Kenya´s post-election violence from the perspective of the urban poor' (2011) 1.
56 M Rheault & B Tortora 'In Kenya, most ethnic groups distrust 2007 election' (2008) <https://news.gallup.com/poll/111622/kenya-most-ethnic-groups-distrust-2007-election.aspx> (accessed 22 April 2020).
57 TP Wolf "Poll poison'? Politicians and polling in Kenya's 2007 election' in P Kajwang & R Southall (eds) *Kenya's uncertain democracy: The electoral crisis of 2008* (2009) & M Cowen & L Laakso 'An overview of election studies in Africa' (1997) 35 *The Journal of Modern African Studies* 734-736.
58 P Waki 'Report of the Commission of Inquiry into Post Election Violence (CIPEV)' (2008) 460-461.
59 Waki (n 59) 138, 158 & 162.

rhetoric as well as counter-peace narratives.[60] Traditional media was under fire for stocking ethnic hatred that further aggravated post-election violence.[61] Digital media therefore became a welcome alternative, especially after the Minister of Internal Security banned all live broadcasts after the ECK chairperson announced the results of the presidential elections. This led to increased activity in the blogosphere to complement the information churned out to the Kenyan public, including raw images of ethnic confrontations, police encounters, and protest management tactics. The online platforms also portrayed the eeriness of deserted streets as Kenyans waited for a return to normalcy.[62]

> "TRADITIONAL MEDIA WAS UNDER FIRE FOR STOCKING ETHNIC HATRED THAT FURTHER AGGRAVATED POST-ELECTION VIOLENCE"

Online media was also an important source of information to counter sensationalised reporting from the local and international media.[63] The 2007-2008 political crisis inspired the development of the highly impactful Ushahidi platform that used crowdsourcing to document violent and peace-building incidences across Kenya in 2008. This was done using tools such as SMS messaging and web technologies.[64] As Nyabola puts it, "the 2007 election created the conditions for Kenya's most seismic social and digital change."[65]

IMPACT OF TECHNOLOGY ON THE 2013 ELECTION

The 2013 election was the first election in which Kenya adopted a new, comprehensive election technology system. This was done in line with IREC's recommendation for Kenya to overhaul its electoral management system. The move was enhanced by institutional reforms ushered in by the promulgation of the 2010 Constitution. This dispensation increased confidence in the possible improvement of the electoral environment. However, the 2013 elections were a tough test for the relevant institutions, including the EMB, political party system, and dispute resolution mechanisms. This, among others, resulted from the large number of candidates who contested in the presidential and legislative elections in the new devolved system, adding up to 12,776.[66]

The IEBC was in charge of rolling out the new election technology that had cost $106.2 million.[67] Biometric technology was introduced for voter registration, voter identification and results transmission.[68] The introduction of the election technology was grounded in the Elections Act.[69] However, some of the amendments to the Elections Act were made too close to polling day, thereby complicating the IEBC's preparation process. These late amendments were also contrary to international best standards, which require that changes to fundamental aspects of electoral laws be made at least one year before the election date.[70] To some extent, the IEBC failed to meet the standard set out under Sections 44(3) and 44(4) of the Elections Act, which provided as follows:

60 G Maina 'New technology for peace in Kenya' in AÓ Súilleabháin (ed) *Leveraging local knowledge for peacebuilding and state building in Africa* (2015) & White African 'A list of bloggers covering the Kenyan elections and its aftermath' <https://whiteafrican.com/2008/01/02/a-list-of-bloggers-covering-the-kenyan-elections-and-its-aftermath/> (accessed 22 April 2020).

61 KHRC 'The democratic paradox: A report on Kenya's 2013 general elections' (2014) 8.

62 EU EOM 'Kenya, 27 December 2007 final report on the general elections' (2008) 2 & E Zuckerman 'Kenya: Citizen Media in a time of crisis' <http://www.ethanzuckerman.com/blog/2008/06/20/kenya-citizen-media-in-a-time-of-crisis/> (accessed 22 April 2020).

63 N Nyabola *Digital democracy analogue politics* (2018) 27.

64 Ushahidi is a Kiswahili word meaning 'testimony' <https://www.ushahidi.com/about> (accessed 22 April 2020).

65 Nyabola (n 64) 23.

66 EU EOM 'General elections 2013: Final report' (2013) 2 & IEBC '4th March 2013 general election data.pdf' iii <https://www.iebc.or.ke/docs/4TH%20MARCH%202013%20GENERAL%20ELECTION%20DATA.pdf> (accessed 23 April 2020).

67 Gelb & A Diofasi (n 38) 8.

68 C Schulz-Herzenberg *et al* 'The 2013 general elections in Kenya: The integrity of the electoral process' (2015) 2.

69 Sec 44(1) Elections Act No 24 of 2011.

70 COE 'Code of good practice in electoral matters guidelines and explanatory report' (2002) 10 & Lynch 'Unrealistic timelines to blame for Kenya's electoral shortcomings' The East African 3 February 2017 <https://www.theeastafrican.co.ke/oped/comment/Unrealistic-timelines-blame-for-Kenya-electoral-flaws/434750-3798034-ecoaogz/index.html> (accessed 23 April 2020).

3. The Commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.
4. The Commission shall, in an open and transparent manner:
   a. procure and put in place the technology necessary for the conduct of a general election at least one hundred and twenty days before such elections; and
   b. test, verify and deploy such technology at least sixty days before a general election.

The challenges faced by IEBC in the implementation of the technology can largely be attributed to lack of adequate preparation and incompetence. First, the procurement process of the biometric voter registration (BVR) kits was marred by transparency challenges that called into question the credibility of the IEBC and the voters' roll. Through both error and corruption, Kenya lost more than $37 million in the procurement of the BVR kits.[71]

> "THE CHALLENGES FACED BY IEBC IN THE IMPLEMENTATION OF THE TECHNOLOGY CAN LARGELY BE ATTRIBUTED TO LACK OF ADEQUATE PREPARATION AND INCOMPETENCE"

To a small extent, the biometric registration of voters was a success, with the registration of 14,352,545 voters out of an initial target of 18 million voters.[72] However, the process saw the disenfranchisement of approximately 3 million voters, mainly from minority communities, for failing to produce a national ID card.[73] The disenfranchisement also occurred because the IEBC failed to meet the timelines for the registration process.[74] The delay in the purchase of the BVR kits affected the registration period as well as the time set aside for verification and compilation of the register.[75] On polling day, the Electronic Voter Identification (EVID) system meant for voter identification and verification failed in more than 50 percent of the polling stations. This necessitated the IEBC to revert to manual systems[76]

Technology also helped facilitate public debate during the 2013 election period. Many stakeholders approached the election with cautious awareness of the disruption wrought by the 2007 elections. Peace messaging was implemented through news reporting and electioneering.[77] In 2012, the rebranded Communications Commission of Kenya (CCK) released regulations on mass messaging to curb hate speech. The regulations required prior screening and approval of bulk messages with political content.[78] Internet service providers were required to install a program called the Network Early Warning System (NEWS) to monitor internet activity and limit cyber threats.[79]

However, traditional media were accused of exercising self-censorship to the extent of compromising their role as watchdog and public educator in the electoral process.[80] To fill this gap, social media was used for information dissemination and public engagement.[81] Be that as it may, political discourse laced with negative ethnic connotations was especially rife on Facebook and Twitter.[82]

71 W Ayaga 'Report: Sh4b lost in biometric voter registration tender' *Standard Digital* 25 June 2014 <https://www.standardmedia.co.ke/article/2000125913/report-sh4b-lost-in-bvr-tender> (accessed 23 April 2020) & C Ombati 'Chickengate scandal suspects James Oswago and Trevy Oyombra arrested, to appear in court' *The Standard* 8 February 2017 <https://www.standardmedia.co.ke/article/2001228648/chicken-gate-scandal-suspects-james-oswago-and-trevy-oyombra-arrested-to-appear-in-court >(accessed 23 April 2020).
72 IEBC '4th March 2013 general election data' iii <https://www.iebc.or.ke/docs/4TH%20MARCH%202013%20GENERAL%20ELECTION%20DATA.pdf> (accessed 23 April 2020).
73 EU EOM (n 4) 2.
74 EU EOM (n 4) 2.
75 ELOG (n 5) 42-43.
76 ELOG (n 5) 60 & EU EOM (n 4) 2.
77 KHRC (n 62) xiii.
78 Freedom House 'Freedom of the net 2013: A global assessment of internet and digital media' (2013) 452.
79 Freedom House (n 79) 452-453.
80 KHRC (n 62) 8-9.
81 As above.
82 As above.

INFLUENCE OF TECHNOLOGY IN THE 2017 ELECTION

The 2017 election saw the IEBC reinforce the technological aspects of the electoral system with the introduction of the Kenya Integrated Electoral Management System (KIEMS).[83] The 2017 election budget of $499 million made it one of the most expensive elections in the world.[84]

> "THE 2017 ELECTION BUDGET OF $499 MILLION MADE IT ONE OF THE MOST EXPENSIVE ELECTIONS IN THE WORLD"

It was hoped that the KIEMS would ensure that the voting process was "simple, accurate, verifiable, secure, accountable and transparent," as required under Article 86 of the Constitution. The new electoral management system was aimed at performing four major functions: voter registration, voter identification, voter verification, and results transmission.[85] More important, to reduce instances of fraud, the results relaying system was meant to simultaneously send polling station results to the Constituency Tallying Centre (CTC) and the National Tallying Centre (NTC). This aspect of the election had been emphasised in the *Maina Kiai* Court of Appeal decision, which held that the polling station results were final and not subject to alteration at other tallying levels. The court specifically declared:[86]

> It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion. It sounds ill that a contrary argument that is so anathema and antithetical to integrity and accuracy should fall from the appellant's mouth.

The 2017 election period also saw the increase of political discourse and online political campaigns. The campaign tactics of the Uhuru Kenyatta campaign team, orchestrated by Cambridge Analytica and Harris Media, raised concerns around the misappropriation of people's data. Targeted messaging was rife online, including ominous messaging on YouTube, Facebook, and Twitter using the hashtag TheRealRaila and the counter positive messaging for #UhuruforUs. These campaigns were amplified through Google Adwords.[87] The 2017 online political discourse therefore saw questionable campaign tactics and increased circulation of disinformation and misinformation.

> "THE 2017 ONLINE POLITICAL DISCOURSE THEREFORE SAW QUESTIONABLE CAMPAIGN TACTICS AND INCREASED CIRCULATION OF DISINFORMATION AND MISINFORMATION"

83 *IEBC KIEMS* <https://www.iebc.or.ke/election/technology/?KieMS> (accessed 24 April 2020).

84 Treasury 'Pre-election economic and fiscal report' (2017) 10 <http://www.treasury.go.ke/fiscalreport2017/PREELECTION%20ECONOMIC%20AND%20FISCAL%20REPORT%202017.pdf> (accessed 24 April 2020) & The East African 'Kenya poll one of the most expensive in the world' *Daily Nation* 17 July 2017 <https://www.nation.co.ke/news/Kenya-holds-one-of-the-most-expensive-elections/1056-4018144-10vpg41/index.html> (accessed 24 April 2020).

85 IEBC *KIEMS* (n 84).

86 Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR Civil Appeal No 105 of 2017 <http://kenyalaw.org/caselaw/cases/view/137601/> (accessed 23 April 2020) (Maina Kiai case).

87 Aptantech 'Harris Media, a US-based firm, created 'The Real Raila' hate website for Jubilee' <https://aptantech.com/2017/12/harris-media-a-us-based-firm-created-the-real-raila-hate-website-for-jubilee/> (accessed 25 April 2020).

ELECTION TECHNOLOGY AND THE JUDICIARY

THE ROLE OF THE JUDICIARY IN ELECTIONS

In any constitutional and legislative ecosystem, the judiciary plays an essential role in the protection of human rights and fundamental freedoms. As Yash Pal Ghai aptly puts it:[88]

> Fundamental human rights have to be preserved, placed beyond all possibilities of encroachment by the State. Further, this system has to be effective and, therefore, there is the essential requirement of the provision for judicial review, with the powers given to the courts to enforce the Constitution even against the government.

The acknowledgement of courts as important "institutions of control," especially against the excesses of the executive and the legislature, has been widely emphasised in literary texts.[89] At the core of liberal democracy is the exercise of the right to vote through periodic elections that are free, fair, and genuine.[90] When disputes arise from the conduct of an election, perceptions of independence and effectiveness of the judiciary influence whether civilians will seek the courts as avenues for adjudication of disputes or rather opt for alternative dispute resolution mechanisms. In some cases, sections of the population may opt for violent protests, as witnessed on a large scale in Kenya's 2007 election.[91] The effective resolution of electoral disputes through the court system is therefore crucial to protecting democratic governance.[92] It is unfortunate, however, that in Africa, the public trust in the judiciary as a strong institution for resolving electoral disputes has been lacking.[93] The independence, impartiality, and competence of the judiciary is a strong determinant of public trust. It is also what dictates whether approaching the judiciary will lead to any substantive justice.[94]

The history of the independence and competence of the Kenyan judiciary, particularly in delivering electoral justice, has been questionable. The 2010 Constitution kick-started the reform process of key institutions including the judiciary. Although the Kenyan judiciary has struggled to be seen as an independent arbiter, the Government has in many ways sought to limit this independence.[95] Lodging a presidential election petition with the courts, particularly during the Moi era, was usually an effort in futility. In fact, the election petitions that were instituted following the 1992 and the 1997 elections in Kenya were dismissed on technicalities.[96] The 2013 presidential election petition was the first to go to full trial.

The 2013 election period was also an important moment in electoral dispute resolution in Kenya, with recourse being sought from other electoral dispute resolution mechanisms, such as the revamped EMB and the Political Parties Dispute Tribunal created in the previous electoral cycle. This election period was further evidence of the institutionalisation of the role of the courts in electoral dispute resolution, which is a notable democratic trend in other Global South countries. Prempeh calls this the judicialization of elections crediting it as one of the "fruits of the third wave of democratisation."[97]

88 YP Ghai 'Constitutions and the political order in East Africa' (1972) 21 *The International and Comparative Law Quarterly* 403-404.
89 JP McAuslan 'The evolution of public law in East Africa in the 1960's (Part II)' in *Public Law* (1970) 564 & C Palley 'Rethinking the judicial role-The judiciary and good government' (1969) 1 Zambian Law Journal.
90 General Comment 25 (n 46).
91 It should be noted that Kenya has experienced pre and/or post-election violence in successive elections since the introduction of multi-party rule. For more on this see S Dercon & R Gutiérrez-Romero' Triggers and characteristics of the 2007 Kenyan electoral violence' (2012) 40 *Word Development.*
92 LA Nkansah 'Dispute resolution and electoral justice in Africa: The way forward' (2016) 41 *Africa Development* 99.
93 IM Fall *et al* 'Election Management Bodies in West Africa: A comparative study of the contribution of electoral commissions to the strengthening of democracy' (2011).
94 HJ Steiner & P Alston *International human rights in context: Law, politics, morals* (1996) 711-712.
95 M Mutua 'Justice under siege: The rule of law and judicial subservience in Kenya' (2001) 23 *Human Rights Quarterly* 96-118.
96 *Kibaki v Moi & 2 others* (2008) 2 KLR 351 Election Petition No 1 of 1998 High Court at Nairobi; *Moi v Matiba & 2 others* (2008) 1 KLR Civil Appeal No 176 of 1993 Court of Appeal at Nairobi & L Awuor & M Achode 'Comparative analysis of presidential election petitions In Kenya and other jurisdictions' (2013) http://kenyalaw.org/kenyalawblog/comparative-analysis-of-presidential-election-petitions-in-kenya-and-other-jurisdictions/.
97 HK Prempeh 'Comparative perspectives on Kenya's post-2013 election dispute resolution process and emerging jurisprudence' in C Odote & L Musumba (eds) *Balancing the scales of electoral justice: 2013 Kenyan election disputes resolution and emerging jurisprudence* (2016) 150.

THE 2013 PRESIDENTIAL ELECTION PETITION

The 2013 election was the first conducted following the promulgation of the 2010 Constitution. It has been praised for its progressive provisions and strong bill of rights. Article 38 (2) of the Constitution provides as follows:

> Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for:
> **a.** any elective public body or office established under this Constitution; or
> **b.** any office of any political party of which the citizen is a member.

The Constitution further lays out a mechanism for the resolution of electoral disputes in Kenya. On the determination of presidential election petitions, Article 140 provides thus:

1. A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.
2. Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.
3. If the Supreme Court determines the election of the President elect to be invalid, a fresh election shall be held within sixty days after the determination.

On 14 March 2013, Uhuru Kenyatta was declared the winner of the presidential election, with 50.07 percent of the total votes. Mr. Raila Odinga was a close second, with 43.31 percent of the total votes.[98] These votes represented a high voter turnout of 86 percent.[99] A majority of the international and local observers acknowledged that despite the breakdown of the election technology, the conduct of the 4 March 2013 elections in Kenya was largely free and fair. The weight of these assertions was put to test when three separate presidential petitions were instituted at the SCOK disputing the presidential election results.[100]

Although the petitions raised several issues, this chapter focuses on the technological aspect, which formed a salient part of two of the petitioners' arguments.[101] Two facets of the election technology were canvassed in the petition. Firstly, the IEBC's failure to maintain a credible and verifiable voter register in violation of the constitution and electoral laws,[102] and second, the failure of the EVID and Results Transmission System (RTS).

On the credibility of the voter register and its effect on the presidential results, the petitioners emphasised that the adoption of a BVR system was aimed at delivering a credible register that would eliminate cases of multiple voting, ghost voting, and inflated votes.[103] Also in issue were inconsistencies between the number of registered votes in the Principal Register of Voters and the total number declared by the IEBC on releasing the results. This belied claims that IEBC delivered a final and credible register.[104] It was the petitioners' assertion that it was an impossibility to have a free, fair, and genuine election in the absence of an accurate register.[105]

In response to this, the respondents explained that although there was a Principal Register from the BVR process, an additional register was developed for persons who, due to disability, the nature of work or their age, were unable to participate in the BVR process. Further, another register emerged after the clean-up process to remove double registrations and those who did not meet registration requirements. They concluded that any alternations made by the IEBC to the register were made in compliance with election regulations and to ensure no eligible voter was disenfranchised.[106]

98 IEBC (n 73) 86.
99 As above.
100 The Odinga case 2013 (n 7).
101 The chapter focuses on the arguments in Petition 4 of 2013 brought by Gladwell Wathoni Otieno and Zahid Rajan, and Petition 5 of 2013 filed by Raila Odinga.
102 Arts 38(3), 81(d), 83(2), 86 and 88(4) of the Constitution, secs 3, 4, 5, 6, 7 and 8 of the Elections Act, 2011 and the Elections (Registration of Voters) Regulations, 2012. Also see Raila Odinga 2013 (n 7) para 10.
103 Odinga case 2013 (n 7) para 43.
104 Odinga case 2013 (n7) para 44.
105 Odinga case 2013 (n7) para 47.
106 Odinga case 2013 (n7) paras 70-75 & Regulation 12 (3) of the Elections (Registration of Voters) Regulations, 2012.

On the failure of the electronic system, the petitioners argued that the IEBC's decision to resort back to manual systems after the complete failure of the electronic systems on polling day was in contravention of the election laws. They contended that the law had set a mandatory requirement for electronic transmission of results that was not met by the IEBC.[107] They further argued that the absence of electronic transmission of the polling station results tainted the verification process of the results. They argued that the manual fallback was a gimmick to facilitate manipulation of votes in favour of the ultimate winners of the presidential election.[108] They further claimed that the procurement process of the election technology was illegal and tainted by government interference, leading to the purchase of faulty equipment. Consequently, this led to the failure to accurately count millions of votes.[109] The petitioners' case also alleged foul play when the electronic transmission was operational, claiming that the results maintained a consistent gap between the two leading candidates, which was a scientific impossibility.[110]

The respondents countered that contrary to the petitioners' assertions, the law envisioned a manual electoral process, as opposed to an electronic one. The decision to employ election technology was a discretionary one, and it was therefore within the IEBC's power to revert to a manual system.[111] Although they did not dispute that there were failures in the election technology, they contended that the failure did not fundamentally alter the outcome of the election.[112] Further, the electronic system could not have altered the vote counting process, because it was not designed to count votes in the first place.[113] These technological aspects were examined alongside claims of material irregularities in the tallying of the votes of presidential candidates.

"THESE TECHNOLOGICAL ASPECTS WERE EXAMINED ALONGSIDE CLAIMS OF MATERIAL IRREGULARITIES IN THE TALLYING OF THE VOTES OF PRESIDENTIAL CANDIDATES"

SCOK'S DETERMINATION

The Court considered different arguments by the parties. Whereas the petitioners envisioned the act of voting holistically as the preparations and actions throughout the election cycle, the respondents strongly highlighted the voting act on polling day as central to determining the credibility of the process.[114] A key reference point for the SCOK was Section 83 of the Elections Act, which provides as follows:

> No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of that election.

The Court acknowledged the centrality of technology in the arguments of the case and the effect of its failure on the security of the process and outcome of the election.[115] Further, the SCOK noted that technology is rarely perfect and is subject to improvement. In this vein, the SCOK agreed with the respondents that in the event of failure of the technology, the move by the IEBC to revert back to manual systems was in fact a logical one.[116] In this case, the alternative manual system

107 Sec 39 of the Elections Act 2011 No 24 of 2011 as read with Regulation 82 of the Elections (General) Reulations, 2012.
108 Odinga case 2013 (n 7) paras 105-107.
109 Odinga case 2013 (n7) paras 108-109.
110 Odinga case 2013 (n7) para 111.
111 Raila Odinga 2013 (n 7) paras 113-114 & rules 59 and 60 of the Elections (General) Regulations, 2012, which state: '59(2) A voter shall cast his or her vote by the use of a ballot paper or electronically.... "60. Where the Commission intends to conduct an election by electronic means, it shall, not later than three months before such election, publish in the Gazette and publicise through electronic and print media of national circulation and other easily accessible medium guidelines that shall apply in such voting."
112 Odinga 2013 case (n 7) para 118.
113 Odinga case 2013 (n7) para 120.
114 Odinga case 2013 (n7) paras 127-128.
115 Odinga case 2013 (n7) para 231.
116 Odinga case 2013 (n7) para 235.

was in the form of the manual register or "the Green Book." Although the Green Book was not provided by law, it was a primary document used in the compilation of the final voter register.[117] The SCOK noted that there was no backup for this manual system and strongly recommended that the IEBC address this anomaly.[118] In disputing the petitioners' assertion that illegality and injustice resulted from the use of manual systems, the SCOK noted:[119]

> From case law, and from Kenya's electoral history, it is apparent that electronic technology has not provided perfect solutions. Such technology has been inherently undependable, and its adoption and application has been only incremental, over time. It is not surprising that the applicable law has entrusted a discretion to IEBC, on the application of such technology as may be found appropriate. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process.

On the credibility of the voter register, the Court accepted the responses of the respondents to the arguments raised by the petitioners. It concluded that whatever irregularities that were seen were not so substantial as to affect the credibility of the final results. The Court also felt the petitioner had not adduced sufficient evidence to support the claim of premeditated intention to favour a particular candidate. The SCOK therefore upheld the election of Uhuru Kenyatta as president.[120]

THE 2017 PRESIDENTIAL ELECTION PETITION

Following the 2017 election, the SCOK was again faced with another presidential election petition. The question of the influence of technology on the credibility of the election was also raised. The 2017 election saw Uhuru Kenyatta and Raila Odinga face off as the two top contending candidates for the presidency. Kenyatta clinched the win with 54.27 percent of the votes against Odinga's 44.74 percent. In the petition filed by Mr Odinga and his running mate Kalonzo Musyoka, they alleged that the IEBC had gravely mismanaged the conduct of the election in violation of the precepts of the Constitution and electoral laws. They argued that the election was neither free nor fair.[121] The technological aspect of the election was examined under the contention that there were illegalities and irregularities in the way the IEBC transmitted the election results.

The petitioners firstly asserted that the IEBC failed to meet the deadlines set by the Elections Act for the procurement, testing, piloting, and rollout of the election technology.[122] Second, the IEBC contravened the decision in the *Maina Kiai* case in the collation and transmission of the results. This, it was argued, arose from the fact that when the IEBC declared the final results, it did not have the election results from more than 10 000 polling stations. The IEBC's Chief Executive Officer (CEO) Ezra Chiloba admitted this in a briefing.[123] Further, the petitioners argued that the notice by the IEBC of polling stations outside the network coverage was published late, in contravention of the election regulations and contradicting the official report by the Communications Authority of Kenya (CA).[124]

The respondents countered that the election was in compliance with the Constitution and relevant laws and that the deployment of the technology was done in accordance with the law. They emphasised that the transmission met legal requirements and the determination in the *Maina Kiai* case. It was only for the polling stations that lacked network coverage that alternative arrangements for transmission were adopted.[125] They also contended that the legal evidentiary weight was in the polling station and constituency result forms and not the electronic results on the KIEMS.[126] They further asserted that even though not all forms were

117 Odinga case 2013 (n7) para 255.
118 Odinga case 2013 (n7) para 236.
119 Odinga case 2013 (n7) para 237.
120 Odinga case 2013 (n7) para 307.
121 Odinga case 2013 (n7). Particularly the petitioners made reference to Articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the Constitution of Kenya and the Elections Act.
122 Odinga case 2013 (n7) para 25.
123 Odinga case 2013 (n7) paras 24 & 27-28 & Kiai (n 87).
124 Odinga case 2013 (n7) para 43 & regulation 21-23 of the Elections (Technology) Regulations 2017.
125 Odinga case 2013 (n7) para 58.
126 Odinga case 2017 (n 7) para 61.

present in the IEBC results portal at the time of the announcement, the IEBC was in possession of the forms.[127] For the polling stations not covered by network, the presiding officers were required to move to connected areas, thus occasioning the delay. They also added that even if the electronic transmission was flawed, the physical forms were delivered to the constituency tallying centre. They also pointed out that there was a significant margin of votes between the top two candidates, such that the challenges occasioned by the system could not be the basis of annulling the elections.[128]

Regarding arguments on the challenges of the results transmission system and its effects on the credibility of the process, the petitioners asserted that the consistent 11 percent gap between the results of Kenyatta and Odinga was proof of an anomaly or in support of the conclusion that the results were doctored.[129]

THE SCOK'S ANALYSIS

The SCOK acknowledged the history in Kenya's flawed electoral processes that led to the integration of technology in the electoral process, and the implication of this past on Kenya's democratic development.[130] The Court made an interim order requiring the IEBC to provide the petitioners with all the scanned and transmitted copies of the polling station results. This was in addition to the constituency tallying centre results. However, the IEBC failed to fully comply with the order.[131] Secondly, the court ordered the IEBC to provide the petitioners with access to its servers, but the respondents mischievously bypassed it by stating that such access would compromise the security of the server. The Court overruled this decision noting that, given the cash expended on the technology, security measures should have been a critical component.[132] This led to the SCOK's conclusion that had the IEBC complied with these orders, it would have countered the arguments by the petitioners regarding hacking of the system and manipulation of the results, leaving the Court to draw adverse inferences.[133]

For the areas without coverage, the Court was at pains to accept the respondent's justification. The majority decision stated that effective alternative measures should have been made, hence, such failure to electronically transmit the results was illegal.[134] Further, if the presiding officers had moved to areas with adequate coverage and sent the results, this would have occasioned a delay of a few hours and not complete lack of transmission.[135] The majority decision also made reference to the IEBC's admission that it did not have all the returns when it declared the presidential results.[136] This was found to be unlawful, together with the failure to comply with the requirement for simultaneous transmission to the constituency tallying centre and national tallying centre. This called into question the credibility of the election.[137] It was in large part the reason why the majority found that the election was not conducted in accordance with the law and did not meet the principles of transparency or verifiability.[138] This was also supported by other evidence of substantial illegalities and irregularities in the conduct of the election that called into question whether the final result was indeed a free expression of the will of the people.[139]

In reaching its decision, the Court made constant reference to the spirit of the Constitution and electoral laws. The majority decision ordered fresh presidential elections, and this was a first in Africa, and still a rarity in the world. It faithfully used the Constitution as its lighthouse. The majority decision noted in this regard that:[140]

127 Odinga case 2017 (n 7) para 63.
128 Odinga case 2017 (n 7) paras 221 & 222.
129 Odinga case 2017 (n 7) para 217.
130 Odinga case 2017 (n 7) paras 230 and 231.
131 Odinga case 2017 (n 7) para 267.
132 Odinga case 2017 (n 7) para 277.
133 Odinga case 2017 (n 7) para 279.
134 Odinga case 2017 (n 7) paras 269-271.
135 Odinga case 2017 (n 7) para 271.
136 Odinga case 2017 (n 7) para 273.
137 Odinga case 2017 (n 7) para 279.
138 Odinga case 2017 (n 7) para 303.
139 Odinga case 2017 (n 7) para 379. The petitioners also accused President Uhuru Kenyatta, the 3rd respondent, of unduly influencing the conduct of the elections by intimidating and coercing public officers. They further argued that the 3rd respondent acted with impunity by using his incumbency to improperly influence voters. The petitioners also questioned the large number of rejected votes that amounted to 2.6 percent of the total votes, arguing that their rejection affected the final results. They called for the SCOK to reconsider the determination from the Raila 2013 decision that rejected votes should be excluded from the final count.
140 Odinga case 2017 (n 7) para 400.

> Have we in executing our mandate lowered the threshold for proof in presidential elections? Have we made it easy to overturn the popular will of the people? We do not think so. No election is perfect and technology is not perfect either. However, where there is a context in which the two Houses of Parliament jointly prepare a technological roadmap for conduct of elections and insert a clear and simple technological process in Section 39(1C) of the Elections Act, with the sole aim of ensuring a verifiable transmission and declaration of results system, how can this Court close its eyes to an obvious near total negation of that transparent system?

LESSONS FROM THE PETITIONS ON JURISPRUDENCE ON TECHNOLOGY AND ELECTIONS

The differences in the 2013 and 2017 SCOK judgments reflect the progressive development of electoral jurisprudence in Kenya.[141] The decisions are especially important in the wake of increased adoption of digital technology as a critical aspect of electoral processes. Although the technological component of the election was a cornerstone of the arguments presented before the Court, its foundation was the laws of Kenya and evidence of illegality and irregularity in the electoral process.

> "THE DIFFERENCES IN THE 2013 AND 2017 SCOK JUDGMENTS REFLECT THE PROGRESSIVE DEVELOPMENT OF ELECTORAL JURISPRUDENCE IN KENYA"

In both cases, the standard of proof remained higher than the civil standard of a balance of probabilities and lower than the criminal standard of beyond reasonable doubt. A common reference point in the 2013 elections was Section 83 of the Elections Act, which was inspired by the common law decision in *Morgan and others v Simpson*.[142] The section states:

> No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.

In departing from the 2013 decision, the 2017 majority judgment held that invalidation of an election was not predicated on proving both aspects of non-compliance with the law and effect on the final result. If there was strong evidence of sufficient non-compliance with the law, then it could be sufficient grounds for invalidation, and if the non-compliance substantially affected the election results, it similarly would be adequate evidence to annul the election results.[143]

Arguably, the 2017 decision was truer to statute law provisions as well as the constitutional standard prescribed under Article 81 for free and fair elections which are transparent and conducted "in an impartial, neutral, efficient, accurate and accountable manner." The 2017 decision also upheld the IEBC's constitutional obligation to ensure that the voting method is "simple, accurate, verifiable, secure, accountable and transparent."[144] Although the constitution does not explicitly state that the violation of this article is sufficient ground for vitiating an election, it sets the standard for which an election needs to meet to be rightfully declared as free and fair. The way IEBC administered the technology failed to ensure that the voting method was simple, accurate, verifiable, secure, accountable, and transparent, therefore calling into question whether the final results were indeed a genuine reflection of the will of the people.

141 M Azu 'Lessons from Ghana and Kenya on why presidential election petitions usually fail' (2015) 15 AHRLJ.
142 *Morgan and others v Simpson and another* (1974) 3 All ER 722.
143 Odinga case 2017 (n 7) paras 203 & 211.
144 H Evelyn & W Wanyoike 'A new dawn postponed: The constitutional threshold for valid elections in Kenya and section 83 of the Elections Act' in in C Odote & L Musumba (eds) *Balancing the scales of electoral justice: 2013 Kenyan election disputes resolution and emerging jurisprudence* (2016) 98.

Even before dissecting the court's decisions, it is important to remain painfully aware of the reasons why Kenya adopted election technology in the first place. As seen above, Kenya has a history of fraudulent elections. The repeated failure by the relevant institutions to deliver genuine elections compromised the ability of Kenyans to exercise their right to vote. This culminated poignantly in the unforgettable 2007 post-election violence. Election technology was aimed at restoring faith in the conduct of the election by protecting it from fraudulent electoral malpractices. However, the poor administration of the technology by the IEBC and lack of political will hampered the achievement of this objective.

In 2013, the court rightfully acknowledged that technology is not perfect, and Kenya was finding its feet in the election technology game. On the determination of the credibility of the 2013 voter register, the Court's decision is questionable. The decision to accept that the IEBC could have three different registers as opposed to an amalgam of the BVR and the Special Register can be faulted. In fact, the Green Book can rightfully be seen as a poor attempt to rename the notorious black books of the pre-2010 era that had been a pernicious source of electoral malpractice. The IREC had recommended their complete destruction.[145] Although it makes sense for the IEBC to revert to a manual register to allow for voter identification and verification in the wake of technological failure, it was unfortunate that the Green Book did not inspire much confidence on its integrity and accuracy.

The quality and strength of the evidence adduced by the parties to a case is an important determinant and guide for the judiciary to make its final determination. This places a critical responsibility on the parties to ensure that their case is grounded on relevant laws and strong evidence. In this case, much of the critical evidence was with the IEBC. This was especially crucial in the 2017 election petition. The IEBC's failure to allow proper scrutiny of its documents and access to its servers in blatant violation of the court's orders created perceptions of bias and lack of transparency. It is a logical conclusion that had the IEBC no impropriety or illegality to hide, it would not have prevented the petitioners from accessing particular evidence that was solely in its possession and had the power of exonerating the IEBC from allegations of hacking or interference with the election technology.[146]

"THE IEBC'S FAILURE TO ALLOW PROPER SCRUTINY OF ITS DOCUMENTS AND ACCESS TO ITS SERVERS IN BLATANT VIOLATION OF THE COURT'S ORDERS CREATED PERCEPTIONS OF BIAS AND LACK OF TRANSPARENCY"

Another observation from the 2013 and the 2017 cases is the paucity of skills within the petitioners' team to conclusively decipher technological evidence in their possession. This was witnessed before the institution of the petition when, in a press conference, Mr. Odinga's team alleged that it had acquired evidence of unauthorised access to the IEBC's systems. However, Mr Odinga's team, as well as the analysts and journalists who were present were at pains to interpret the technical data, connect it with electoral fraud, and prove its authenticity.[147] This begs the question: even with access to the servers, would the technological evidence be well presented to the court for the judiciary to conclude that the claim of interference was, in fact, legitimate?

Paradoxically, the implementation of the election technology led to new concerns around the manipulation of technology to facilitate electoral fraud. With the 2022 elections fast approaching, Kenya should approach the question of the security

145 Waki (n 59) 78.
146 Odinga case 2017 (n 7) paras 277-279.
147 N Cheeseman et al (n 34) 13 & S Wambua 'Election 2017: Raila Odinga says IEBC database hacked and results altered' 9 August 2019 *Standard Digital* <https://www.standardmedia.co.ke/article/2001250797/election-2017-raila-odinga-says-iebc-database-hacked-and-results-altered> (accessed 26 April 2020).

of its electoral system cautiously. The IEBC's failure to avail access to the necessary evidence resulted in an important aspect of the election process being left unanswered. If the system was hacked and with the evolving sophistication of technology, the Kenyan electoral system is still vulnerable to remote intrusion. This will obliterate the gains of election technology and magnify its "black box" disadvantage that reduces the transparency of the process. This interim period before the 2022 elections is essential for relevant stakeholders to engage with the developments in technology and human rights, as well as best practices in relation to integrating technology in elections. This should help electoral stakeholders to better address possible digital threats on the electoral process.

Another positive lesson from the approach of the 2017 petition is the decision to look at the election process holistically as opposed to disjointed aspects that culminate in a major event being the voting process.[148] Election technology had an impact on major parts of this process from voter registration, identification, verification, and results transmission. The weight of irregularities and illegalities related to these aspects therefore cannot be ignored. This is because it goes to the heart of principles of simplicity, accuracy, verifiability, security, accountability, and transparency. Although the incompetence and ill preparedness of the IEBC had much to do with the breakdown of the election technology in 2013 and 2017, it was necessary to hold the institution to a much higher standard in the 2017 election. It was vital that the SCOK not let IEBC get away with the same mistakes of 2013. The IEBC would not be allowed to compromise efforts towards addressing electoral fraud. It is also imprudent for Kenya, a developing country, to be ranked among countries that have spent the most amount of money in their elections, yet still struggles to deliver genuine, free, and fair elections.

Kenya's case reinforces calls to ensure that rollout of election technology has the requisite political will and resource and institutional capacity to ensure its effectiveness.[149] Although the Kenyan government invested heavily in the technology, the political will to deliver a free, fair, and credible process that did not favour the incumbent, and institutional capacity to implement the election technology were lacking. Kenya was also faced with the challenge of urban-rural digital divide and absence of equitable distribution of infrastructure needed for nationwide adoption of election technology. These elements were necessary for voter registration, identification, and verification, and results transmission. These anomalies called into question the simplicity, accuracy, verifiability, security, accountability, and transparency of the process. Other countries seeking to adopt or expand the use of election technology in a context that lacks proper and equitable access to the internet should learn from the Kenya experience.

"KENYA'S CASE REINFORCES CALLS TO ENSURE THAT ROLLOUT OF ELECTION TECHNOLOGY HAS THE REQUISITE POLITICAL WILL AND RESOURCE AND INSTITUTIONAL CAPACITY TO ENSURE ITS EFFECTIVENESS"

Another lesson from the Kenya experience is that election technology alone cannot guarantee election integrity. Kenya still has to address concerns around bribery, coercion, and intimidation of voters; participation of vulnerable and disadvantaged groups; campaign financing; misuse of state resources; independence, impartiality, and competence of electoral institutions; and timely access to credible information. These issues are critical to enhancing the freeness, fairness, and credibility of elections.

148 Odinga case 2017 (n 7) para 224; JF Likoti 'Electoral Management Bodies as institutions of good governance: Focus on Lesotho Independent Electoral Commission" (2009) 13 *Review of South African Studies* 126 & R Dahl *On democracy* (1998).

149 Cheeseman et al (n 34) 4.

CONCLUSION AND RECOMMENDATIONS

Kenya's sordid electoral past and its grave implications on democratic development and the lives of its people was a strong motivation towards the adoption of election technology. However, challenges arising from this integration have placed a great responsibility on the corridors of justice to determine the validity of elections that were marred by technological hitches. This was the duty assigned to the Supreme Court of Kenya after the 2013 and 2017 presidential elections.

Although the SCOK delivered different decisions on the influence of technology on elections, it is clear that there is a growing appreciation that the administration of election technology can determine whether the final results are a genuine reflection of the will of the people. This is especially so, if the conduct of the election is substantially affected by irregularities and contravenes the very law that anchored the application of technology in the electoral process. The judiciary is rightfully guided by law and evidence. As the defenders of constitutionalism and the rule of law, the judges could not make light of blatant repeated disregard for the law as witnessed in the development of the voter register and the results transmission in the 2017 elections. Further, it could not allow the IEBC's contempt of court in withholding important technological evidence go unaddressed. The 2017 judgment that vitiated the results of the presidential election for gross illegalities and irregularities upheld the election standard envisioned by statute and the Constitution of Kenya.

However, the judiciary should remain cognizant of evolving digital threats that might very well shape future electoral jurisprudence through sustained knowledge and skill building. In particular, the judiciary should be aware of the deliberate manipulation of information in online media to an extent that distorts public debate on elections and improperly influences the electorate. This is especially concerning when such measures are orchestrated by powerful political actors and foreign agents. A gnawing legal question is whether there can truly be free expression of the will of the people devoid of improper influence when controlled online media creates a zombie electorate manipulated by political and economic personages who manage the flow of information.

> "A GNAWING LEGAL QUESTION IS WHETHER THERE CAN TRULY BE FREE EXPRESSION OF THE WILL OF THE PEOPLE DEVOID OF IMPROPER INFLUENCE WHEN CONTROLLED ONLINE MEDIA CREATES A ZOMBIE ELECTORATE MANIPULATED BY POLITICAL AND ECONOMIC PERSONAGES WHO MANAGE THE FLOW OF INFORMATION"

WHAT NEXT FOR THE 2022 ELECTION?

Whether Kenya will learn from the 2013 and 2017 elections and avoid a repeat of the drawbacks it experienced is yet to be seen. However, with technology still influencing the electoral parlance, the judiciary and other stakeholders should remain vigilant in their respective capacities. Stakeholders should enhance their knowledge and skills in the digital field through capacity building training. This training should also emphasise the implementation of best practices in digital security. In addition, stakeholders such as the judiciary, civil society, and the EMB should ensure that their systems are well protected from cyber threats.

Effective systems security ensures that important and sensitive information is not vulnerable to unauthorised access.

> "EFFECTIVE SYSTEMS SECURITY ENSURES THAT IMPORTANT AND SENSITIVE INFORMATION IS NOT VULNERABLE TO UNAUTHORISED ACCESS"

An aspect of technology and election that was not examined under the 2013 and 2017 elections is the influence of information disorder. The ability of disinformation and misinformation to manipulate the voting process is a growing concern in both developed and developing democracies. This is linked with the safety of electoral data and how it can be manipulated by malicious agents. Increasingly, the electorate is inundated with false information and targeted messaging that amplifies echo chambers. Unless there is a deliberate effort to seek out contrary opinions, confirmation bias, as enhanced by filter bubbles, stifles meaningful public debate. This aspect was marginally discussed in the context of the 2017 elections.[150] However, it is important to analyse critically whether an election can truly be free and fair, representing the free expression of the will of the people, if the information ecosystem is overwhelmed by false information that skews public discourse. The principle of free elections devoid of violence, intimidation, improper influence or corruption as envisioned by Article 81 of the Constitution is grossly undermined if the information accessible to the public is created with the aim of manipulating the electorate.

This concern is a motivation towards the growing regional and national legislation on freedom of expression and access to information during elections in the digital age. In particular, the Guidelines on Access to Information and Elections in Africa include both the media and online media platform providers as crucial actors in the electoral process. These have responsibilities to ensure that the public has access to credible information to guide their decision-making process.[151] Internet shutdowns are strongly discouraged under the Guidelines. However, in the event that they are implemented, they should be in line with international standards on limitation of rights that require such restrictions to be provided by law, used in pursuit of a legitimate aim, be proportionate and necessary.[152] This provision is, however, problematic as internet shutdowns patently infringe on human rights and fundamental freedoms and reverse democratic gains.

> "THIS PROVISION IS, HOWEVER, PROBLEMATIC AS INTERNET SHUTDOWNS PATENTLY INFRINGE ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND REVERSE DEMOCRATIC GAINS"

The revised Declaration of Principles on Freedom of Expression and Access to Information in Africa emphasises the right of access to the internet as important in the exercise of freedom of expression and access to information. States are encouraged to eschew unlawfully and unjustifiability interfering with the exercise of these rights.[153] At the national level, the Computer Misuse and Cybercrimes Act and the Data Protection Act can provide guidance on addressing digital threats that may affect the conduct of elections and jeopardize the security of voters' data.[154] However, it should be noted that as of April 2020, the constitutionality of the Computer

150 B Ekdale & M Tully 'African elections as a testing ground: Comparing coverage of Cambridge Analytica in Nigerian and Kenyan newspapers' (2019) 40 *African Journalism Studies* 27.
151 Art 29 Guidelines on Access to Information and Elections in Africa.
152 Arts 26 & 27 Guidelines on Access to Information and Elections in Africa.
153 Part 3 Declaration of Principles on Freedom of Expression and Access to Information in Africa.
154 Computer Misuse and Cybercrimes Act No 5 of 2018 http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%205%20of%202018 (accessed 27 April 2020) & Data Protection Act 24 of 2019 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2024%20of%202019> (accessed 27 April 2020).

Misuse and Cybercrimes Act is under review at the Court of Appeal. The appellants are calling into question 26 sections that put at risk fundamental human rights and freedoms including freedom of expression, access to information and the right to privacy.[155] However, the judiciary and the legislature should be cognizant of the digital threats presented by unauthorised or illegal access to electoral systems and the protection of voters' data.

However, efforts by the judiciary to effectively prepare for their role in the 2022 elections, including improving their digital knowledge and skill capacity, is endangered by efforts by the executive to undermine the judiciary. Attempts to slash the budget allocation for the judiciary, failure to appoint new judges, and frustrating operational activities are problematic. They have been seen as a contemptuous move by the Kenyatta government to make true its threat to "revisit" the judiciary following the landmark decision that overturned the 2017 presidential election results.[156] As 2022 approaches, it is important that stakeholders of the democracy of Kenya take active measures to ensure the government respects the rule of law and ceases to interfere with the judiciary.

> "AS 2022 APPROACHES, IT IS IMPORTANT THAT STAKEHOLDERS OF THE DEMOCRACY OF KENYA TAKE ACTIVE MEASURES TO ENSURE THE GOVERNMENT RESPECTS THE RULE OF LAW AND CEASES TO INTERFERE WITH THE JUDICIARY"

155 *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others*; Article 19 East Africa & another (Interested Parties) [2020] eKLR Petition No 206 of 2019 http://kenyalaw.org/caselaw/cases/view/191276/ (accessed 27 April 2020) & BAKE 'Notice of Appeal' https://www.blog.bake.co.ke/wp-content/uploads/2019/10/Notice-of-appeal.pdf (accessed 27 April 2020).

156 K Cheruiyot 'Treasury restores Judiciary funds after CJ Maraga's outcry' The Star 7 November 2019 https://www.the-star.co.ke/news/2019-11-07-treasury-restores-judiciary-funds-after-cj-maragas-outcry/(accessed 27 April 2020).

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