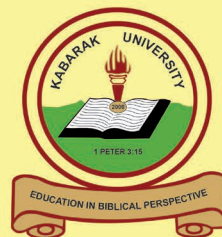


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Developing Jurisprudence beyond the Horizon: A Critique of the Supreme Court of Kenya Decision in Raila Amolo Odinga & Another v IEBC & Others (2017)

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Abstract

This paper scrutinises the Supreme Court decision that nullified Kenya's presidential election in 2017. It emphasises that, thanks to judicialisation of politics in Kenya's current constitutional era, the judiciary is placed at the centre of resolving electoral disputes. Basing arguments on articles 20 and 38 of the 2010 Constitution, the paper draws attention to the shortfalls in the Supreme Court's reasoning in its decision to nullify the election. It is suggested that, a proper right-centric approach, one that is conscious of the people's sovereign will in a political democratic process, would have led the court to question whether the election result expressed the will of the electorate. Thus, it is argued that the precedent's standard on nullification of an election has proved inadequate and has eroded the institutional integrity of the Court. With an eye on the next general elections, recommendations are made on how the Supreme Court may improve this condition.

Key words: Judicialisation, Elections, Right-centric, Electoral Dispute

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1. Introduction

Antecedent to the reading of the majority verdict on the morning of 1st September 2017, Chief Justice David Kenani Maraga aroused the conscience of the nation pronouncing, ‘...the greatness of a nation lies in its fidelity to the Constitution and strict adherence to the rule of law, and above all, the fear of God’.¹ The Chief Justice then read to an anxious nation the Supreme Court’s majority decision which nullified the August 2017 presidential election. This decision would jurisprudentially and politically break new ground not only in Kenya but across Africa. In addition to being a first, it elicited both political and legal debate tailored in two flavours, criticism or praise. While its enthusiasts celebrated rebirth of a democracy, critics denounced it as politics disguised in legal jargon.

The August 2017 election having been nullified on the finding of irregularities and non-compliance with the Constitution, a repeat presidential election took place in October of 2017. The Supreme Court was once again called upon to adjudicate in a second petition. In contrast to its ruling in *Odinga v IEBC 2017*, the Court found the second presidential election of 2017 free and fair, having been conducted in accordance with the Constitution and electoral laws.²

The dust of electoral disputes and appeals arising out of the 2017 general election having finally settled, this article evaluates whether the Court lived up to the expectation of transformative adjudication envisioned by the Constitution.³ Appreciating the thin line that sometimes exists between law and politics, the paper also endeavours to purify this legal contribution from any intemperance of raw and partisan politics. Further, the authors appreciate that, often times, subtle politics find refuge in pure formalism. Fortunately, the antidote was long prescribed by Justice Cardozo: ‘[W]e all need to utter [a prayer] at times when the demon of formalism tempts the intellect with the lure of the scientific order’.⁴

The paper begins with a reflection on the promise of transformative constitutionalism and highlights the part played by courts in the transformative enterprise. In the context of increased judicialisation of politics, the next section examines the decision on two planes. First, the interpretation of electoral disputes as right-centric

¹ *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 4 Others & Attorney General & Another* [2017] eKLR (*Odinga v IEBC 2017*).

² *John Harun Mwau & 2 Others v Independent Electoral and Boundaries Commission & 3 Others* [2017] eKLR (*Mwau v IEBC*).

³ Constitution of Kenya.

⁴ Daniel A Farber & Suzanna Sherry, *Judgment Calls, Principle and Politics in Constitutional Law* (OUP 2009).

causes and second, fidelity to article 38 and the will of the people. It finds that though the Supreme Court largely lived up to this expectation, it fell short in two respects. First, measured against the dictates of article 20(3) of the Constitution, the majority stretched itself too far. Secondly, the decision eroded the institutional integrity of the Supreme Court thanks to poorly reasoned arguments and the inconsistent application of the precedent in the election petition appeals that followed it since. The paper concludes with recommendations to remedy these shortcomings.

2. Transformative Constitutionalism and the Judicialisation of Politics

The rebirth of Kenya's independence on 27 August 2010 was based on a promise of a transformative Constitution.⁵ The transformative aspect of this promise was the understanding that Kenya would retain from the past that which was defensible. The rebirth signalled a decisive break from, and a ringing rejection of, that part of the past that was disgracefully authoritarian, insular and repressive towards a firm commitment of a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution.⁶ Juxtaposed with the 1969 Constitution, the philosophical rubric of the current Constitution was fundamentally altered. Simplified, at the core of this transformative charter is sovereign will. At the soul of that sovereign will are the people, and central to the people are their rights.⁷ Kenya's Constitution is resoundingly, right-centric.

Klare informs us that the central mission of a transformative Constitution is the transfiguration of a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.⁸ Measured against our historical context, such an enterprise is a huge reape that falls outside the normal confines of 'reform' to a somewhat 'mild revolution' grounded in legal reform.⁹ The constitutional promise therefore envisioned the Kenyan polity as a form of social democracy built upon a transformed legal system.¹⁰

⁵ Willy Mutunga, *The 2010 Constitution of Kenya and its Interpretation: Reflections from The Supreme Court Decisions*, Public Lecture presented at the University of Fort Hare Inaugural Distinguished Lecture Series October 16, 2014.

⁶ *S v Makwanyane* 1995 3 SA 391(CC).

⁷ See dissenting opinion of Ndungu J, *Odinga v IEBC 2017* (n 1).

⁸ Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal on Human Rights 146.

⁹ *Ibid.*

¹⁰ Jackson B Ojwang, *Ascendant Judiciary in East Africa, Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (Strathmore University Press 2013) 39.

In every respect, transformative constitutionalism as a concept is not neutral or apolitical. This hypothesis can be defended on at least two fronts. First, the very process of enacting a transformative Constitution is a political one giving forth to a legal document. Secondly, the Constitution abridges the past to the future through the present. It is therefore a 'memory' document memorising our regrettable past to fuel fires of transformation. History as a field of force is principally politics.

Consequently, when courts engage transformative constitutionalism in adjudication, judicialisation of politics often looms large. Chiefly, this is because judges have to invoke judicial discretion in their labour to render determinate, indeterminate legal materials. As Farber and Sherry observe, when it comes to judicial discretion, it is either the heavens or the abyss, the heavens being judicial fiat and the abyss raw politics.¹¹ Conscious of this truism, the Constitution, therefore, deliberately provided the yardstick to guide courts in constitutional rights' adjudication to ensure that its transformation promise does not abort at the hands of a 'politician masquerading as a judge'. Article 20(3) enjoins Kenyan courts to interpret the Constitution and 'develop the law to the extent that it does not give effect to a right or fundamental freedom.'¹²

One of the major observations that can be made following the promulgation of the Constitution of Kenya is the enhanced role of the judiciary in the process of democratisation and in politics more broadly. The enlarged role of judiciary in political process is not a uniquely Kenyan experience. As noted by Davis, one of the striking elements of emerging democracies¹³ is the increased influence or engagement of judiciary in politics.¹⁴ As in Kenya, judiciaries in such countries are charged to be the custodians of the new constitutional order. Thus, they often engage in matters that ordinarily lie in the province of the executive, parliament and other political bodies. The enlarged role of the judiciary is mainly attributed to greater confidence that the people have placed on the judiciary and the erosion

¹¹ Farber and Sherry (n 4) 3.

¹² Article 20(3)a of the Constitution.

¹³ Emerging democracies are states in which governments have assumed power through a more legitimate process than those in restricted systems. Restricted systems of government are found in states that have dominant ruling political party that controls of levers of power, access to media and the electoral process in a way that limits challenge to its political hegemony. For example: Uganda, Angola and Cameroon. In emerging democracies, there is a dominant political party, a weak rule of law and free but unfair elections. For example: Nigeria, Kenya and Burundi. See Albert C Nunley, African Elections Data Base 2004-2012 (2012). Available at <http://africanelections.tripod.com/terms.html> accessed on 3rd June 2020.

¹⁴ Dennis Davis, *Democracy and Deliberation: Transformation and the South African Legal Order* (Juta 1999) 47.

of confidence in other arms of government.¹⁵ In this context judiciaries are seen as crucial players in the strengthening of democracy.

Essentially, the increased role of courts in political process has resulted in what is termed as judicialisation of politics. For avoidance of doubt, judicialisation of politics is not a phenomenon that is manifested solely in emerging democracies. Judicialisation of politics has been a constant feature in mature democracies like the United States (US), Germany and Canada.¹⁶ In these countries, judiciaries have been involved in addressing hotly contested political issues. Examples include the US presidential election of 2000, the political Quebec and Canadian Federation and Germany's place in the EU.¹⁷

As stated by Barboza and Kozicki, the increased role of courts in issues that have largely been viewed as falling within the precincts of the legislature and the executive due to judicialisation of politics has been conflated with the 'generic idea of judicial activism.'¹⁸ However, the two terms are not synonymous. Hirschl describes judicialisation of politics as 'the reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversies'.¹⁹ Accordingly judicialisation falls within three categorisations: the abstract category where legal discourse, jargon, rules and procedures are extended to political sphere and policymaking processes; expansion of the province of courts to public policy space through constitutional revisions or judicial review; and the reliance on the court to determine issues in pure politics or 'mega politics'.²⁰

Judicialisation of mega politics, which is of relevance to this paper, is manifested through the exercise of judicial oversight in electoral processes i.e. judicial scrutiny of pre-electoral processes, elections, plebiscites or referenda. This means the Constitution places the judiciary at the core of critical and hotly contested political questions in a society. Other areas that are covered by mega politics include judicial scrutiny of core executive prerogatives in foreign affairs,

¹⁵ Oscar Sang, 'The Separation of Powers and New Judicial Power: How the South African Constitutional Court Plotted its Course' (2013) 3 *Elsa Malta Law Review* 96; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003) 2.

¹⁶ Ran Hirschl, 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide' (2006) 75 *Fordham Law Review* 721, 722.

¹⁷ *Ibid.*

¹⁸ Estefania Queiroz Barboza and Katya Kozicki, 'Judicialization of Politics and the Judicial Review of Public Policies by the Brazilian Supreme Court' (2013) 13 *Diritto e questioni pubbliche* 407, 410.

¹⁹ Ran Hirschl, 'The Judicialization of Politics' in Robert E Goodin (ed), *The Oxford Handbook of Political Science* (OUP 2011).

²⁰ Hirschl, (n 17).

national security, and fiscal policy, determination of questions of legitimate regime change like the case of constitutional certification in South Africa, transitional and restorative justice and defining nations through courts such as the political future of Quebec and the Canadian Federation.²¹

The question that follows is the effect of judicialisation of politics. One of the key effects of judicialisation is the transformation of political questions into legal questions.²² Thus constitutional or legal considerations and rhetoric take a new and often a decisive role in the execution of ordinary legislative and executive processes.²³ Increasingly, it is not unusual to witness legislatures world-over debate or allude to the constitutionality of their actions. Often, the legislature, the executive and other policy making agencies have to anticipate the response of the courts in the event that their actions are subjected to challenge before courts.²⁴ Thus judicialisation of politics reshapes the legislative, executive and judicial roles.

Essentially, like other socio-legal phenomena, judicialisation of politics across the world is a consequence of multiple factors that shape different countries. According to Barosso, among the multiple factors that have contributed to judicialisation of politics is the 'inescapable fact, a circumstance that is based on constitutional and institutional design adopted in many democratic states and dynamics of politics.'²⁵ For example, in Kenya and South Africa, the constitutional design adopted engenders constitutional supremacy which has inevitably resulted in judicialisation of politics. Courts in both countries have the mandate to hear and determine constitutional challenges on the questions touching on constitutionality of the actions taken by the legislature, executive, independent commissions and other policy making organs.

Notably, the idea of constitutional supremacy is not a new one. The idea of constitutional supremacy, which is antithesis to Westminster parliamentary supremacy, was first adopted in the 1987 by the US Supreme Court in the case of *Marbury v Madison*.²⁶ Constitutional supremacy places the oversight or scrutiny

²¹ Ran Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts' (2008) 11 Annual Review of Political Science, 9-13.

²² John A Ferejohn, 'Judicializing Politics, Politicizing Law' (2002) 61 Law and Contemporary Problems 41, 42.

²³ Ibid.

²⁴ Ibid.

²⁵ Luis Roberto Barroso, 'Counter-Majoritarian, Representative and Enlightened: The Roles of Constitutional Courts in Democracies' (September 4, 2017) available at <https://ssrn.com/abstract=3096203> or <http://dx.doi.org/10.2139/ssrn.3096203>, 6.

²⁶ 5 U.S. 137 (1803).

of political processes within the province of courts. This is a consequence of the fact that courts are the final interpreters of a constitution and the determination of whether or not actions by political actors are on all fours with the constitution lies with courts. Since the adoption of constitutional supremacy in the *Marbury* case, the idea has been embraced throughout the world, particularly after the Second World War, when concern for human rights was heightened.²⁷ Human rights began to have an influence over conduct of internal affairs of states and started to function as a touchstone against which political and policy processes are measured.²⁸

In addition to the supremacy of the constitution, judicialisation of politics was fuelled by the recognition of a robust and independent judiciary as a central component of protection and consolidation of good governance, rule of law and human rights in contemporary democracies. In essence, while the centrality of an independent and independent judiciary to democracy and subsequent judicialisation of politics is evident in both emerging democratic states and mature democracies, the debates on the merits and demerits should be informed by different contextual factors. This is mainly demanded by the different political terrains within which courts in emerging democratic states and mature democracies operate.

As noted by Ginsburg, courts in unstable environments (emerging democracies) 'find themselves in more risky positions, but may also be called upon to perform essential governance functions when other institutions are weak or ineffective.'²⁹ In this context, the notion of counter-majoritarian difficulty is not the foremost concern but the need to establish a robust court and the strengthening of old ones to serve as the bastions of democracy, checking the excesses of dysfunctional institutions.³⁰ As highlighted by Landau, the political and democratic dysfunction within which courts in new democracies function is manifested by the likelihood of return to authoritarianism, lack of accountability by political players and absence of a constitutional culture.³¹

Because of political and democratic dysfunction in emerging democracies, Landau points out that the drafters of constitutions and the judiciaries established under these constitutions are not pre-occupied with the classic counter-majoritarian

²⁷ Barboza and Kozicki, (n 19) 407.

²⁸ Ibid.

²⁹ Tom Ginsburg, *Courts And New Democracies: Recent Works* (2012) Chicago Law School Public Law and Legal Theory Working Paper No. 388, 2.

³⁰ Ibid.

³¹ Ibid 1505.

difficulty or the dilemma that comes with the judiciary exercising its power in a manner that reshapes politics.³² The major concern is ‘how to make democratic institutions work.’³³ Therefore, the power of courts is enhanced to ensure that they play a *dynamic* role in shaping the political space in emerging democracies.³⁴

In Kenya, the people in an attempt to respond to Kenya’s repressive past and unaccountability of political institutions, promulgated a supreme Constitution that provides a robust bill of rights and an empowered judiciary which derives its authority from the people. To enhance democracy, the Constitution further provides for the subjection of political processes, and specifically electoral matters, to judicial scrutiny. This effectively judicialises politics in the country. The active engagement of the judiciary in Kenya in political and particularly electoral disputes is a drift from abstract theorisation of what courts *should do* to a concrete and empirical assessment of what courts *actually do*.

Since the promulgation of the 2010 Constitution two general elections have been held in 2013 and 2017. Because of the contentious character of elections in the country, the judiciary as an impartial arbiter of such disputes as per the Constitution was called upon to intervene. In 2013, 188 election petitions were filed by various parties.³⁵ In 2017, 388 elections petitions were filed which is more than 100 percent of the election petitions filed in 2013.³⁶ In 2013, there were only 30 pre-election disputes filed while in 2017 there were 540 pre-election disputes.³⁷ Thus, the 2017 elections were strikingly ‘the most litigated and judicialised in the country’s history.’³⁸

As noted by Kanyinga and Odote, the litany of disputes in the 2017 elections also came with controversy because those who lost disputes viciously attacked the judiciary.³⁹ While the losers attacked the judiciary, the winners praised it. The judiciary was damned if it did and damned if it did not.⁴⁰ Despite the attacks,

³² Ginsburg (n 30).

³³ Ibid.

³⁴ Ibid.

³⁵ The Kenya Section of the International Commission of Jurists, *ICJ Compendium of 2017 Election Petitions: Select Decisions Issues and Themes Arising from the 2017 Elections in Kenya* (ICJ Kenya 2019), iii.

³⁶ Ibid.

³⁷ Karuti Kanyinga and Collins Odote, ‘Judicialisation of politics and Kenya’s 2017 elections’ (2019) 13 *Journal of Eastern African Studies* 235.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid 236.

Kanyinga and Odote aptly point out that the courts ‘made decisions independent of any party and candidate, and played such a critical role in the elections that it ultimately overshadowed the IEBC.’⁴¹ This left the judiciary in the middle of politics as every aspect of the election process was subject to litigation. Thus, the judicialisation of politics is not pejorative but rather part of the transformative enterprise engendered in the Constitution. As such, when courts in Kenya are invited to settle political controversies, their engagement in such controversies is not suspect but critical to the realisation of transformative constitutionalism in the country.

Pursuant to the power donated by the Constitution, the Supreme Court has not shied away from hearing and determining electoral disputes. Indeed, in 2017, by annulling the election of a sitting president, the Supreme Court as the apex court demonstrated the capacity of the judiciary to act as an independent institution that is capable of defending the quality of democracy in Kenya.⁴² Indeed, defending the quality of democracy in Kenya which obviously amounts to judicialisation of politics, is in line with the text, spirit and the tenor of the Constitution. Essentially, ‘the role of a judge in a democracy is to protect the constitution and the democracy itself.’⁴³ This is applicable to both the new democracies and the old and well-established ones.⁴⁴

Despite the bold step to defend democracy, the Supreme Court lacked the capacity to sustain the legitimacy of the election. The Court was met with vicious criticism from the government and was not in a position to guarantee the implementation of much of the required reforms before the ‘fresh’ presidential election.⁴⁵ The President, in particular, viciously attacked the judges and threatened to ‘fix’ the judiciary.⁴⁶ He dismissed the power of the Supreme Court to ‘deny him victory on the basis of what he termed a technicality.’⁴⁷ As Cheeseman *et al* fittingly point out, while the constitution has reshaped the conduct of politics in Kenya, the political interests and long history of political pacts will continue to shape

⁴¹ Kanyinga and Odote, (n 38).

⁴² Nic Cheeseman, Karuti Kanyinga, Gabrielle Lynch, Mutuma Ruteere and Justin Willis, ‘Kenya’s 2017 Elections: Winner-takes-all Politics as Usual?’ (2019) 13 *Journal of Eastern African Studies*, 3.

⁴³ Aharon Barak, ‘A Judge on Judging: The Role of a Supreme Court in a Democracy’ (2002) Faculty Scholarship Series Paper 3692 19, 36-37.

⁴⁴ *Ibid.*

⁴⁵ Cheeseman *et al* (n 43).

⁴⁶ Kanyinga and Odote (n 38).

⁴⁷ *Ibid.*

the nature of elections in the country.⁴⁸ This will certainly fuel judicialisation of politics in the country as political actors will seek to protect their interests.

In this context of increased judicialisation of politics, the Supreme Court has been called upon to hear and determine whether the presidential elections are free, fair and transparent, to interpret right-centric electoral clauses and maintain fidelity to article 38 on the right to vote, and finally to ensure that electoral disputes are in line with the will of the people.

3. The Right-Centricity of Electoral Causes

One of the foundational cornerstones of Kenya's new political order is the principle of democracy. This principle has not only precipitated judicialisation of politics but also the entrenchment of several forms of democracy. While the Constitution recognises three forms of democracy - representative, participatory and direct democracy - one of its primary aims is to establish, strengthen and safeguard representative democracy. The primacy of the right to vote must therefore be understood as giving effect to the broad constitutional commitment to democracy by guaranteeing the enforceable right to participate in representative politics - the new political order.⁴⁹

This promise of a new political order is premised on the credence of this basic tenet: that the establishment of both the national and county government will be on the basis of a free, fair and credible election based on universal suffrage. That as a result, a government of the people, by the people, and for the people shall be the natural consequence. It is on the basis of this faith and hope that the citizens rise up early and persevere long queues to exercise their most basic political right, the right to vote.

Explaining the foundation of 'fundamental rights' jurisprudence, Tribe notes that certain 'particular forms of expression, action, or opportunity perceived as touching more deeply and permanently on human personality are "constituents of freedom"'.⁵⁰ The right to vote falls under this category for good reasons. As Kirkpatrick quipped:

⁴⁸ Cheeseman et al (n 43).

⁴⁹ Ndung'u J (n 8).

⁵⁰ Joshua A Douglas, 'Is the Right to Vote Really Fundamental' (2008) 18 Cornell Journal of Law and Public Policy 143.

A democratic system rests ultimately on the belief that each man is the best judge of his own interests and that he should have, through the ballot box, a voice in choosing those who govern him. “Voting is the fundamental political right of citizens in a democracy. The right to vote is the right to influence officials and policy. To be denied the vote is to be denied the guarantee that one’s interest will be taken into account when policy is made.

It is in this light that the right to vote ought to be appreciated. In addition to being a substantive right under the Bill of Rights, the right to vote epitomises self-governance. Moreover, while this right advances very ‘critical’ interests of the voter, it also justifies the imposition of duties on others. The balance between the interests of a voter and imposition of duties on others, under the utilitarianism principle, automatically carves a large overlap between legal and moral standards. The fundamentality of the right to vote therefore transcends legal entitlement. The right to vote is also a moral right.⁵¹

Understood thus, elections are not to be taken frivolously or flippantly. They harbour the forum within which voters exercise their most basic political right. An electoral result announced by electoral officials is thus both a manifestation and representation of the plurality of exercise of this right, lying at the epicentre of Kenya’s democratic character as a Republican state. It wraps the plurality of the will of voters, their inalienable sovereignty. At the heart of an election petition is this right to vote in free and fair elections. The thrust of the foregoing is that an election cause is a *right-centric cause*. A determination of an electoral dispute cannot therefore be mechanically disposed of without paying due regard not just to the letter or spirit but also the conception of the Constitution itself: the sovereignty of the people.⁵²

3.1 *The Spurious Conflict between ‘The Right to Vote’ and ‘General Principles of Electoral System’*

As a departure from the 1969 constitution which assumed a minimalistic constitutional thought and philosophy, the 2010 Constitution adopts a ‘thick’ conception such that in addition to establishing specific quantised rights and legal

⁵¹ Ludvig Beckman, ‘Is there a Moral Right to Vote?’ (2017) 20 *Ethical Theory and Moral Practice* 885.

⁵² Ndung’u J (n 8).

rules, it also contains large materials of values and principles.⁵³ The Supreme Court appreciated this conception in the *Gender Case* where it observed:

... A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards *express safeguards* and *public commitment*. But the *Kenyan Constitution fuses this approach with declarations of general principles and statements of policy*. Such principles or policy declarations signify a *value system*, an *ethos*, a *culture*, or a *political environment* within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions.⁵⁴

On the aspect of elections, the 2010 Constitution assumes a fused style where it marries express constitutional safeguards and general principle declarations. Under article 38 of the Bill of Rights, the Constitution enshrines the right to vote as a political right in a substantive form. This right appears in three facets: political parties' participatory rights, the rights to be registered as a voter and the right to vote in free, fair and regular elections based on universal suffrage and free participate expression of the will. These facets are elaborated and emboldened in flesh by values and principles enunciated under the general principles for the electoral system, specifically articles 81-87 of the Constitution.

As a result of this value-imbued conceptualisation of article 38, a false dichotomy seems to have arisen in applying article 38 and general principles in electoral disputes determinations. The anatomy of the antinomy between the *right to vote* and the *general principles of the electoral system* feeds from the disharmonic reading and application of the said principles to the right to vote. As a result, a false conflict has emerged in the sense that instead of fortifying the right to vote, the general principles appear to overburden that right, sacrificing the core value of its enjoyment at the altar of form and administrative lapses in the process of elections.⁵⁵

This issue is not peculiar to this jurisdiction. In most jurisdictions that have adopted modern and thick constitutions like the 2010 Constitution, their constitutional courts have had to grapple with both conflicting fundamental rights and the question on the proper and appropriate treatment that should be

⁵³ See Walter Khobe Ochieng, 'The Jurisdictional Remit of the Supreme Court of Kenya Over Questions Involving the "Interpretation and Application" of The Constitution' forthcoming in Kabarak Journal of Law and Ethics.

⁵⁴ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, para 54.

⁵⁵ Ndung'u J (n 8).

accorded to general guiding principles as juxtaposed with crystallised constitutional entitlements with immutable constitutional safeguard. In the current context, if courts world over have successfully resolved disputes between conflicting fundamental rights, conflicts between constitutional rights and principles ought to attract less friction in their resolution.

In making a case for drawing lessons from resolution of conflicts between conflicting fundamental rights to the lower intensity conflict between fundamental rights and general principles, Justice Ndung'u⁵⁶ called us to Martin's commentary of Rawls' Theory of Justice⁵⁷ which posits:

...The weight of a right is a determination, sometimes explicit and sometimes not, sometimes quite exact and sometimes rather imprecise, of how it stands with respect to other normative considerations and whether it would give way to them or they to it, in cases of conflict.

Furthering Martin, Derya in her paper⁵⁸ problematises the balancing act that goes into resolving conflicting constitutional entitlements. She then correctly advocates for proportionality as an essential judicial tool of resolving such conflicts in tailoring a judicial outcome concordant with the dictates of a constitution. She observes:

The discretion that the judges enjoy when applying the balancing method is a part of their duty as the guardians of law. One general rule, which embraces all of the situations in which a conflict occurs and gives a common technique to resolve them all, cannot possibly be formulated. Even if a single solution was to be formulated, it would not serve justice in each situation, since every case has its own specific circumstances. Also the discretion of the judges is not without any limits; they have to follow the principle of proportionality. The answer to the question, how to resolve conflicts between fundamental constitutional rights, is, at the end quite simple.

However, not all claims are equal before the law. As contrasted with conflict between competing fundamental rights that are afforded equal treatment, a conflict of a fundamental right and a principle is dissimilar because fundamental rights must be accorded a higher status than principles and values. Therefore, principles and values ought to be applied to conform to fundamental rights and not vice versa.

⁵⁶ Ibid.

⁵⁷ Rex Martin, *Rawls and Rights* (University Press of Kansas 1985).

⁵⁸ Nur Kayacan, Derya, 'How to resolve Conflicts Between Fundamental Constitutional Rights' (2016) 2 Saar Blueprints available at: http://jean-monnet-saar.eu/?page_id=67.

This is what disabuses the perceived conflict as a spurious one. In her dissenting opinion, Justice Ndung'u correctly observed:

Thus even if there may appear to be a perception that a competing rights situation exists – that is between article 38 and 81 and 86 - there must be a balancing and an application of proportionality to effect a judicial outcome that serves the dictates of the Constitution. One must recognize that not all claims will be equal before the law: some claims have been afforded a higher legal status and greater protection than others. While there are many situations in which rights, principles, and values may seem to conflict or compete, when evaluating situations of competing rights, human rights, especially those provided in a Bill of Rights and will usually hold a higher status than principles and values. This rationale is further underlined by the architecture of our Constitution, which actually ring-fences the Bill of Rights from amendment which may be made *only through referendum* by the people of Kenya unlike the principles in articles 81 and 86, which may be amended by elected leaders in Parliament. This plebiscite protection in itself - places the Bill of Rights - higher in the pecking order of competing provisions in the Constitution. The principle therefore should complement the right not vice versa.⁵⁹

Other jurisdictions have also exposed this spurious nature of the conflict between fundamental rights and general principles. The Supreme Court of India in *State of Madras v Champakam Dorairajan*⁶⁰ observed that fundamental rights enshrined in a constitution assume a higher rank in the constitutional order as compared to directive principles such that the latter have to conform to the fundamental rights under the subsidiarity principle.

The chapter of Fundamental Rights is sacrosanct and not liable to be abridged ...except to the extent provided in the appropriate article in Part III. The directive principles of State policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights. In our opinion, that is the correct way in which the provisions found in Parts III and IV have to be understood. However, so long as there is no infringement of any Fundamental Right, to the extent conferred by the provisions in Part III, there can be no objection to the State acting in accordance with the directive principles set out in Part IV, but subject again to the Legislative and Executive powers and limitations conferred on the State under different provisions of the Constitution.

In a subsequent decision, the same court further held that directive principles cannot dilute, let alone abridge, fundamental rights under the constitution. The Court held:

⁵⁹ Ndung'u J (n 8), para 38.

⁶⁰ AIR 1951 SC 226.

It is wrong to invoke the Directive Principles as if there is some antinomy between them and the Fundamental Rights. The Directive Principles lay down the routes of State action but such action must avoid the restrictions stated in the Fundamental Rights. It cannot be conceived that in following the Directive Principles the Fundamental Rights can be ignore...⁶¹

In the pecking order of the constitutional schema, fundamental rights enjoy a primordial conception and rank higher than principles and values. Therefore, it naturally falls that the rightful place of values and principles in the holistic application of the constitution is facilitative and complementary of the fundamental rights. Principles and values cannot be applied to overburden constitutional rights. To hold otherwise is to slide in to the category that the Indian Supreme Court chastised thus:

While the world is anxious to secure Fundamental Rights internationally, it is a little surprising that some intellectuals in our country, whom we may call “classe non classe” after Hegel, think of the Directive Principles in our Constitution as if they were superior to Fundamental Rights. As a modern philosopher (1) said such people ‘do lip service’ to freedom thinking all the time in terms of social justice “with ‘freedom’ as a by-product”. Therefore, in their scheme of things Fundamental Rights become only an epitheton ornans...

3.2 Adopting a Right-Oriented as Opposed to an Outcome-Oriented Approach

The first misstep of the Supreme Court in *Odinga v IEBC 2017* was the adoption of an outcome oriented approach instead of a right-oriented approach. Recognising that an election draws on article 38 and therefore is a right-centric cause, it follows that a presidential election petition seeking to overturn the *plebiscite will* of the electorate is as a matter of constitutional principle, a right-centric cause.⁶² This understanding delineates the core role of the Supreme Court in an election petition as that of enforcement of the electorates’ right to vote as ring-fenced under article 38. The decision whether to validate or invalidate a presidential election result becomes a secondary consideration as it must draw from a determination of whether the quality of the right to vote has been affected by the conduct and result of the election so impugned.

This demands that the Supreme Court adopts a right-centric rather than an outcome-oriented approach that relegates the voter to spectatorship. This approach

⁶¹ *Golak Nath v The State of Punjab* AIR 1643, 1967 SCR (2) 762 (1967).

⁶² See concurring opinion of Ndung’u J in *Mwau v IEBC* (n 2).

requires a court as a matter of necessity to question whether the will of the people is apparent above the aspersions of petitioners and respondents. However, in *Odinga v IEBC 2017*, the Supreme Court focused its assessment on the electoral result with respect to the litigants' respective cases, assessing whether overarching principles of the Constitution were followed in declaring the winning candidate. The attendant challenges of such an approach are self-evident.

First, only a right-centric approach is capable of giving force to the dictates of article 20(3) of the Constitution which demands expansion of the frontiers of fundamental rights to the greatest extent possible. When the voter is placed at the centre of an electoral dispute determination, a court will be obliged to adopt an article 20(3) approach through which the principles that underlie an election are interpreted to facilitate rather than overburden the elector's right to vote and sovereign will.

Second, it is very easy for a Court buried in an outcome oriented approach to be carried away by the private interests of the litigants before it. The danger is that given the high-voltage politics that underlie elections, an outcome oriented approach is denied the necessary objective safeguards as a determination on either side will be treated as a political favour towards either of the parties. However, in a right-oriented approach, the Supreme Court is objectively insulated from such destructive political intrigues as the winning or losing party is only a direct consequence of the validity or otherwise, of the plebiscite vote in an election.

Third, elections are essentially snapshots, as recognised by the Supreme Court of Connecticut in *Bortner v Town of Woodbridge*:

An election is essentially – and necessarily a snap shot. It is preceded by a particular election campaign, for a particular period of time, which culminates on a particular date, namely, the officially designated Election Day. The snapshot captures, therefore, only the results of the election conducted on the officially designated Election Day. It reflects the will of the people as recorded on that particular day, after that particular campaign, and as expressed by the electors who voted on that date. Those results, however, although in fact reflecting the will of the people as expressed on that day and no other, under our democratic electoral system operate nonetheless to vest power in the elected candidates for the duration of their terms. That is what we mean when we say that one candidate has been “elected” and another “defeated.” Moreover, that snapshot can never be duplicated. The campaign, the resources available for it, the totality of the electors who voted in it, and their motivations, inevitably will be different a second time around...⁶³

⁶³ 250 Conn 241 (1999).

Therefore, validating or invalidating an electoral result should not be considered flippantly. Care must be given to ensure that a court is not substituting a different snapshot of the electoral process where the one conducted on the designated election day is still valid. Only a right-oriented approach that places the voter at the centre of an election dispute will guarantee this. An outcome oriented approach often times muddles priorities such that it is possible for a court to lose itself and invalidate an electoral result on the account of post-ballot irregularities that did not affect the quality of the plebiscite vote in the ballot.⁶⁴

4. A Court's Fidelity to Article 38: Resolving Electoral Disputes in Line with the Will of the People

Article 1(1) of Kenya's Constitution reads, 'All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.' Appearing as the first substantive article in the Constitution of Kenya 2010, the 'people's sovereign power' takes primacy in Kenya's present constitutional dispensation.⁶⁵ In view of this primacy, any organ exercising the sovereign power of the people under delegated authority carries a serious responsibility. The judiciary and independent tribunals are one set of State organs designated to exercise the Kenyan people's sovereign power under the Constitution.⁶⁶ Courts have been consistently called upon to exercise that power in electoral dispute resolution. The transformative nature of Kenya's current democratic era places high expectations on elections. Elections are expected to deliver representative and participatory democracy, and to do so in the best of conditions. Electoral disputes, thus, are key moments to uphold this sovereign power of the people, which is elevated and buttressed in the Constitution itself.

Article 38 extensively sets out the content of political rights in Kenya, including the right to vote.⁶⁷ This article also specifically protects 'the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors'.⁶⁸ The will of the voters, or representatively speaking, the people, is recognised as one of two conditions or provisos for free, fair and regular elections. Unfortunately, this proviso has received insufficient attention

⁶⁴ See *John Oroo Oyioka & Another v Independent Electoral and Boundaries Commission & 2 Others* [2013] eKLR.

⁶⁵ M Kiwinda Mbonenyi and J Osogo Ambani, *The New Constitutional Law of Kenya: Principles, Government & Human Rights*, (Claripress, 2012), 39.

⁶⁶ Article 1(3)(c) of the Constitution.

⁶⁷ Article 38 of the Constitution.

⁶⁸ Article 38(2) of the Constitution.

and scrutiny in assessments of Kenya's elections since 2010. Commentators have tended to judge electoral performance on the first of those provisos in article 38, that is, whether universal suffrage was upheld and/or whether the election met an objective standard of being 'free and fair'.⁶⁹ Courts too, at the behest of litigants, have focused their attention on the process of the election, paying little regard to whether the vote result expressed the will of the electors.⁷⁰

Based on this dominant approach in the courts, this part aims to highlight the inadequacies of the current Supreme Court precedent when measured against article 38's protection of the will of the people.⁷¹ It is argued that divergent aspersions on the place of the will of the people have contributed to vastly different interpretations of the standard required for nullification of an election. The discussion suggests that fidelity to article 38 requires courts to ask whether a vote result expressed the will of the electors. It follows then, that resolving electoral disputes in line with the will of people makes scrutiny of the election's results a major consideration in the resolution of a dispute. Putting article 38 in focus would demand courts to more closely scrutinise an election result, and perhaps, only consider nullification a remedy where the will of the people is denied. The discussion wishes to highlight that in nullifying the presidential election of 8th August 2017, the Supreme Court did not pay sufficient attention to article 38. Since then, the Supreme Court and other superior courts have paid more attention to the will of the people, and resultantly, nullified few election results. Therefore, the current precedent is inadequate, and calls for a reconsideration. Developing a clear judicial precedent on the standard required at law to necessitate nullification of an election result would contribute to legal certainty and predictability, two desirable qualities in electoral matters.

4.1 *Inadequacy of the Judicial Precedent in Odinga v IEBC 2017*

Courts bear a high responsibility to resolve disputes of this nature. In doing so, they rely on the law drawn from the Constitution, statutes,⁷² their judicial expertise

⁶⁹ See Article 81(e) of the Constitution.

⁷⁰ The will of the people has been explored more recently, for example in Walter Khobe Ochieng, 'Protecting the Integrity of the Electoral Process: The Promise of the Maina Kiai Judgment' (2018) 3 *Kabarak Journal of Law and Ethics* 1.

⁷¹ *Odinga & IEBC 2017* (n 1).

⁷² The statutory framework is provided by the following: the Elections Act 2011, the Election Offences Act, 2016, the Political Parties Act 2011, the Independent Electoral and Boundaries Commission Act 2011, the Elections Campaign Financing Act 2013, The Supreme Court Act and Publication of Electoral Opinion Polls Act.

as well as the experiences of other states. In recognition of that responsibility, it can also be said that not all issues raised in an electoral dispute can be, or should be, resolved by the court hearing the dispute. There should be room for other organs of the state, and more so, the voice of the people to be called upon.

For disputes in presidential elections, Kenya's constitution places a special responsibility on the Supreme Court.⁷³ The Supreme Court bears constitutional power to hear petitions challenging the election of a President-elect, to make a ruling on whether a Presidential-elect has been validly elected and to be the final arbiter in petitions of this kind.⁷⁴ Jurisdiction is given only to the Supreme Court to resolve disputes on presidential elections.⁷⁵ In one sense this is an immense burden in a constitutional democracy like Kenya, where elections are considered incredibly high stakes. Local attention on and pre-occupation with elections, so-called 'election fever' is both inspiring when seen through a lens of active democracy, and adversely, discouraging when measured against participatory democracy outside of elections.

Judged against article 38, the current judicial precedent setting the test on the standard for nullification of an election demonstrates its inadequacy in three ways. First, the precedent has not been consistently applied since its establishment.⁷⁶ Second, the precedent in of itself fails to sufficiently consider article 38.⁷⁷ Third, the precedent does not address a major shortfall in the electoral law which establishes the standard for nullification of an election.⁷⁸ A discussion on the three follows.

4.1.1 Inconsistent Application of the Legal Standard for Nullification of an Election

Ideally, a good precedent stands the test of time. It is clear, its reasons are well understood (even if over time), and its defining principle is quite logically transferred to cases with similar circumstances. Looking at the way the precedent set by the Supreme Court in 2017 has been applied in subsequent electoral dispute cases, it is difficult to reconcile the varying interpretations with these standards. As a three year old precedent, the incidences of varying interpretations or dispersions make it even more discouraging.

⁷³ Article 140 of the Constitution.

⁷⁴ *Ibid.*

⁷⁵ Article 163(3)(a) of the Constitution.

⁷⁶ The Carter Center, Report on Legal Issues from Kenya 2017 Presidential Election (The Carter Center 2019).

⁷⁷ Article 38 of the Constitution.

⁷⁸ Section 83 of the Elections Act.

The standard for nullification of an election is stipulated by the Elections Act and the ruling in *Odinga v IEBC 2017*. The Elections Act sets out under section 83 the circumstances under which an election ‘shall be declared void by reason of non-compliance with any written law’. Under the statute, an election should not be nullified if:

1. ...it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law

or

2. that the non-compliance did not affect the result of the election.

In *Odinga v IEBC 2017*, the Supreme Court specified that a petitioner need only establish one of the two circumstances above. Hence, if it can be shown that the election was not conducted in compliance with the principles in the Constitution or the electoral laws, the election can be nullified purely on that ground. The onus is on a petitioner to demonstrate that the non-compliance is ‘substantial’.⁷⁹ This is the prevailing standard at law.⁸⁰

It is well known that section 83 was subject of an amendment bill passed by Parliament in the time between the first presidential election in 2017, and the fresh election.⁸¹ The bill amended section 83 to make the provision conjunctive, meaning a petitioner would need to prove that the election was not conducted in line with the constitutional and statutory principles *and* that that non-compliance affected the election.⁸² The amendment was struck down as unconstitutional in a later case.⁸³ However, barring the political reasons for its proposal and passing, a look at the resolution of electoral disputes in the courts since 2017 suggests that this amendment’s construction was not that far-fetched.

A Carter Center analysis of decisions in election petitions since the *Odinga v IEBC 2017* judgment reveals that Kenyan courts have ‘interpreted and applied’ the standard inconsistently.⁸⁴ This includes the Supreme Court itself, the first appellate court, the Court of Appeal, as well as the High Court. Mostly worryingly, some of

⁷⁹ Violations relate to the principles of transparency and accountability.

⁸⁰ The Carter Center (n 77) 18.

⁸¹ Election Laws Amendment Bill, 2017. The Bill passed on 11 October 2017, before the repeat election on 26 October 2017.

⁸² The Carter Center (n 77) 1.

⁸³ *Katiba Institute, African Center for Open Governance and 2 others v Attorney General and National Assembly on Electoral Reform in Kenya*, [2018] eKLR.

⁸⁴ The Carter Center, (n77) 2.

the Supreme Court's decisions do not follow its precedent. Instead, the court turns to consider whether an electoral law violation affected the results. Further, elections have been nullified in only a minute number of cases in spite of 'substantial' violation of electoral principles.⁸⁵ From a total of 299 election petitions, only 2 resulted in a nullification by the courts warranting a by-election.⁸⁶ Considering the special status of the Supreme Court under the Constitution, a more consistent approach needs to be established. In order to explore a more robust approach, it is important to break down the current precedent, and highlight cases where it has not been applied as per espoused by the Supreme Court.

Scrutiny of the reasoning for the decisions in election petitions shows that the standard is 'difficult to apply'.⁸⁷ Two observations stand out. First, courts have applied both conjunctive and disjunctive reasoning based on section 83 and *Odinga v IEBC 2017*. Second, while lower courts did recognise the correct standard as that set in *Odinga v IEBC 2017*, in reality, courts are not aligned on what constitutes a 'substantial' violation of the law.⁸⁸ On one extreme, some courts interpreted any violation as substantial, while others did not. To make up the gap between substantial and insubstantial, some courts turned to scrutinising the results. In some cases where the margin of victory was narrow, a minor violation could be found to be substantial.⁸⁹ However, in others, even what would be expected to be major violations were found not substantial enough. The judgments suggest that the pure incidence of violence or having a higher number of cast votes than the number of registered voters does not automatically negate a substantial violation.

One example is the case concerning Gatundu North constituency where the Court of Appeal's ruling was upheld by the Supreme Court.⁹⁰ The Court of Appeal faulted the High Court for not taking stock of the overwhelming margin of victory which they found to be 'an explicit manifestation of the will of the people'.⁹¹ This points to a conjunctive rather than disjunctive application of the *Odinga v IEBC 2017* precedent, by both the Court of Appeal and the Supreme Court. Similarly, in the Embakasi East constituency case, the High Court had nullified the election results following recorded violence. Cognisant of limiting factors in that violence

⁸⁵ Ibid.

⁸⁶ Ibid 19.

⁸⁷ Ibid 18.

⁸⁸ Ibid, (n 77) 10.

⁸⁹ The Carter Center (n 77) 11.

⁹⁰ *Clement Kungu Waibara v Annie Wanjiku Kibe & Another* [2018] eKLR

⁹¹ The Carter Center (n 77) 12.

occurred in one polling station and that the proved errors in process did not affect the two front runners, it is notable that the High Court had tried to evaluate the election based on the entirety of the electoral process.⁹² However, the Court of Appeal reversed the High Court's decision, reasoning that 'the violence must affect not only the voting but the final result of the election' and from where it sat, 'the will of the people of Embakasi East constituency was clear beyond peradventure'.⁹³ The Supreme Court upheld the Court of Appeal's decision.

On the other hand, in a case concerning Lamu constituency, the Supreme Court chose not to address the issue of results despite a narrow victory. The court reasoned that the issue could not be scrutinised due to a procedural error, the late submission by the petitioner and the lack of opportunity for the respondent to reply. This is unfortunate because the issue turned on 216 votes where the margin of victory was only 58 votes. The 216 votes were from a polling station which had only 213 registered voters. The Court of Appeal had earlier found that the failure by the returning officer to disregard the 216 votes was a substantial violation of section 83(1)(b) of the Consolidated Election Regulations, and one that 'ultimately affected the integrity of the election'. If the 216 votes had been discounted, the margin of victory would not exist.⁹⁴

These detractions do not inspire confidence in the ability of courts to apply consistent reasoning in resolving what truly are high stakes disputes. Trust is also diminished in the electorate whose sovereign power is being exercised by the courts. From the above examples, even where major non-compliance of electoral law occurs, the Supreme Court has been unwilling to nullify election results, 'arguing that the non-compliance did not affect the outcome of the election'.⁹⁵ This throws in to question whether the current precedent is sustainable. Inadvertently, the Supreme Court has cast doubt on its disjunctive reasoning, instead opening the way for bringing in a conjunctive construction. Regrettably, the varied decisions appear '*ad hoc*' and as a result, not capable of being justified by widely applicable reasoning.⁹⁶

⁹² Ibid 14.

⁹³ Ibid 15.

⁹⁴ Ibid 12.

⁹⁵ The Carter Center (n 77) 19.

⁹⁶ Elisha Zebedee Ongoya, 'Protecting the Integrity of the Electoral Process, or, Obfuscating the Electoral Process?' (2018) 3 *Kabarak Journal of Law and Ethics* 11, 13.

4.1.2 Failure to Sufficiently Consider the Will of the People

As shown above, in disputes before them, courts have seen it necessary to question whether the will of the people is apparent above the aspersions of petitioners and respondents. By scrutinising the impact of violations of law on the election results, courts have in practice elevated the will of the people in line with article 38.⁹⁷ It is here that the Supreme Court's precedent appears insufficient in recognising the important place of the will of the people. The Supreme Court focused its assessment on the entirety of the electoral process, assessing whether overarching principles of the Constitution were followed. There are a number of reasons which call for such an approach to have a broader outlook.

First, in applying a Bill of Rights provision, courts are obligated in the Constitution to adopt an interpretation 'that most favours the enforcement' a right.⁹⁸ It can be argued that such an interpretation of article 38 necessitates the will of the electors to be evident in an election.

Second, a court must promote 'the values that underlie an open and democratic society...'⁹⁹ An election, including a democratic one, is premised on articulating the will of the people. Citizens vote with the express assurance that their will, as allowed by the electoral system, is to prevail. By their nature, elections in democracies have winners and losers, and are undoubtedly political. At this juncture, it is important to reflect on the type of electoral system in Kenya. Kenya has moved from a first-past-the-post plurality system, to a hybrid two-round system. Both are majoritarian systems although the former is a much more extreme form than the latter. No doubt, the current system is an upgrade from the last, being more desirable because it requires a winning candidate to attain a minimum of 50%+1 votes, plus, at least 25% of total votes in 24 out of the 47 counties.¹⁰⁰ Still, Kenya's electoral system upholds majoritarianism.¹⁰¹ Courts are therefore called in to resolve a political dispute. This political dispute revolves around who the people have selected as the next President. It is this that warrants a court to take 'a broad

⁹⁷ Article 38 of the Constitution.

⁹⁸ Article 20(3)(b) of the Constitution.

⁹⁹ Article 20(4)(a) of the Constitution.

¹⁰⁰ Article 138(4) of the Constitution.

¹⁰¹ Who consists of 'the majority' or how a majority is arrived at is a different question beyond the scope of this paper. It may be useful to note that in pursuit of a 'majority', political party alliances appear to be the go-to strategy since 2010.

view' in an electoral dispute.¹⁰² In recognition of the people's sovereign power, the Supreme Court ought to ask whether there were any strong signs of 'popular intent' and 'popular will'.¹⁰³ In addition, courts should be careful to ensure the overall public interest is not outdone by the private rights and interests of the parties in the case.¹⁰⁴ This falls within the court's remit to facilitate political change as desired by the people.¹⁰⁵ Keeping this in mind, it makes sense to therefore question whether a violation of electoral law affected the popular intent or will. This was the juridical threshold adopted by the Supreme Court in Kenya's first Presidential election petition in 2013. It appears to be a more persuasive reasoning, because it hinges ultimately on whether the eventual result can be shown to be, or not to be the will of the electors. This is important because it recognises the place of the legal test in 'consolidation of democratic governance'.¹⁰⁶ Safeguarding the will of the people ought to be paramount. For this reason, the current precedent is narrow and constricted, to the extent that does not sufficiently take stock of the will of the people. It leans too heavily on procedural aspects, an approach which can be attributed to the Constitution's attention to procedural elements.¹⁰⁷

Third, courts are called upon to consider the particular circumstances in a given case. It is well established that Kenya's election environment is high pressured and high stakes. Ongoya describes electoral process in Kenya as an 'environment of heat and dust', presenting difficult dynamics for courts attempting to resolve disputes.¹⁰⁸ Above all, the position of the President as head of government represents the ultimate seat of power. Nullification of an election is a tremendous conclusion, and requires a repeat of the election. It is difficult to reconcile the two Supreme Court judgments of 2017, considering that in 60 days the electoral commission was found to have made enough of a change in the conduct of the election to render it passable under the law. Speculating on the likelihood of this feat, an optimist may conclude that the electoral management body (EMB) did well to procedurally address the irregularities in the August 8 election. Given the poor scorecard billed

¹⁰² JB Ojwang, 'Electoral Justice in Kenya: Resolving Disputes in a New Democratic Dispensation' in Kimani Njogu and Peter Wafula Wekesa (eds), *Kenya's 2013 General Election* (Twaweza Communications 2015), 311 & 318.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid* 311.

¹⁰⁵ Ochieng (n 71) 5.

¹⁰⁶ Ojwang, 'Electoral Justice in Kenya' (n 103) 318.

¹⁰⁷ Muthomi Thiankolu, 'Role of the Courts in Ensuring Free and Fair Elections in Kenya: A Tale of Fifty-Six Years of Legal Sophistry and Intellectual Dishonesty' (2019) 4 *Kabarak Journal of Law and Ethics* 53, 65.

¹⁰⁸ Ongoya (n 97) 18.

in the Supreme Court's first judgment, a pessimist might be doubtful. Acknowledging that Kenya is yet a young democracy, taking stock of the electoral process improvements made since 2007 and appreciating there is still a distance to go in order to realise the full vision of electoral democracy, it would be unreasonable to anticipate anything close to a nearly perfect election process. In either case, a perfected process is capable of being measured against the will of the people.

4.1.3 Addressing the Shortfall in Section 83 of the Elections Act

In an electoral dispute, a court of law has a multifaceted role. At face value, disputants call upon the court in question to resolve their particular dispute. Resolution includes prescribing a remedy, making appropriate orders for the realisation of pronounced remedies and where necessary, clarifying an issue of law. Issues clarified ought to be matters that are within the court's power. Where such clarification does not fall within the court's jurisdictional power, the court ought to direct where best or how best that clarity can be provided by another forum.

The Supreme Court recognises these roles, and has made an attempt to meet expectations. For one, the presidential election disputes of 2017 have been resolved. Nevertheless, the Supreme Court did not go far enough to clarify how to interpret the standard required at law for nullification of an election by a court. This is apparent from the original judgment and the inconsistent application of its conjunctive reasoning in later cases. Specifically, clarity is needed to guide courts in cases where a violation of the constitution is factually proved in court, especially where there is no evidence to show the violation affected the election result. This means elucidating the scope of both "substantial" and "non-substantial" violations of the Constitution and the law.¹⁰⁹ In weighing up whether to carry out this exercise, the Supreme Court may well take stock of its role in the democratisation process, and in doing so, also recognise its own limitations. As a voice of the people's sovereign power, in theory it can provide guidance within the confines of its delegated powers. However, it may be worth appreciating how the will of the people speaks for itself through the vote, and thus, use the vote itself (as reflected in an election result) as the tiebreaker. If a violation offsets the will of the electors, a nullification and fresh election would be proportionate. However, if it does not, it may be more proportionate to pronounce a different remedy that deals with the violation and violators directly.

¹⁰⁹ The Carter Center (n 77) 19.

In Kenya's constitutional framework, there are other organs called upon to remedy shortfalls in the country's laws. Many would not trust Parliament to fairly and impartially intervene on electoral matters.¹¹⁰ It should be remembered however, that Parliament remains the chief agent of the people. To properly embed a crucial principle in law, statutory amendment is a robust means, objectively speaking.

4.2 A Desirable Way Forward: Developing Reliable Precedents and Democracy Beyond Elections

With just over two years to the next scheduled General Election, the current times are opportune to revisit shortfalls in electoral standards. The courts are not alone here, as ultimately, the management of the election lies with the electorate, their representatives and the EMB as umpire. What is within the power of the Supreme Court, however, is to bring forth useful guidelines on the application of its precedents. That includes the two 2017 ones,¹¹¹ as well as the previous 2013 precedent which was distinguished in 2017.¹¹² If at all possible, a Supreme Court should develop a consistent approach to resolving electoral cases.¹¹³ This would have the twin success of addressing the prevailing divergent interpretations of the *Odinga v IEBC 2017* precedent and giving all courts facing electoral disputes a practical and robust framework to apply. Further, the assurance of legal certainty is highly valuable in a young democracy, and one which has sustained a level of democratisation since the advent constitutional transition in 2010. Kenya still requires its courts to be stalwarts against abuse of power by the state and citizens. The Supreme Court ought to lead with resilient and reliable precedents. As democratisation is a progressive process, the Supreme Court should increasingly build better interpretations.

4.2.1 Consistent Application and Departure from Previous Decisions

As already highlighted, the positioning of the Supreme Court as the court of last instance is of historical significance in the development and steady growth

¹¹⁰This is particularly because of the 2016 amendment bill.

¹¹¹*Odinga v IEBC 2017* (n 1); *Mwau v IEBC 2017* (n 2).

¹¹²*Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR (*Odinga v IEBC 2013*).

¹¹³Ojwang noted that this was a 'hallmark' which the first Supreme Court held itself to, (n103) 319.

of stable jurisprudence. In the past, the then Court of Appeal did not adopt a consistent approach in following precedent. This was worsened by the fact that there were different independent Court of Appeal benches. Each Court of Appeal would seemingly, mechanically select, pick and apply precedents that suited their respective immediate occasion.¹¹⁴ The result was an incoherent stream of authorities that turned jurisprudence on its head.

The 2010 Constitution came to remedy that by not only designating a single bench as the Supreme Court and the final appellate Court but also constitutionalised the common law principle of *stare decisis*.¹¹⁵ The effect of article 163(7) was to designate the Supreme Court as the layer of ‘Bedrock Principles’ and/or ‘Super Precedents’¹¹⁶ that not only unlocks the transformative goods of the constitution but also gives guidance on the constitutional principle of transformative adjudication, to ensure that the transformative vision does not abort due to a disjointed and unconcerted approaches to judicial interpretation.

Whereas the Supreme Court is not bound by its own precedents, to give effect to the character of the Constitution as a transformative charter of good governance imperatively requires it to strike a proper balance between *stability* and *predictability* of the law on the one hand and *flexibility* necessary for legal reform on the other hand. Otherwise, it does not reflect well for the Supreme Court to pronounce a constitutional interpretation as one thing today and another tomorrow, as the resultant instability and unpredictability has enormous effects on the Courts below it, which as a matter of constitutional dictum, have to be governed by its precedents.

To the credit of the Supreme Court, it delineated clear rules at the earliest opportunity to guide it and future judges of the Supreme Court on when and how the Supreme Court ought to depart from its own judgments.¹¹⁷ However, in *Odinga v IEBC 2017*, the Supreme Court seems to have abandoned the standards without properly rationalizing them in the dictates of the *Jasbir Singh Rai* decision.¹¹⁸ A few instances are worth noting.

First, contrary to a constant stream of its earlier decisions flowing from *Odinga v IEBC 2013*, the majority decision in *Odinga v IEBC 2017* elevated the principles

¹¹⁴ See the concurring opinion of Mutunga CJ in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate of & 4 Others* [2013] eKLR.

¹¹⁵ Article 163(7) of the Constitution.

¹¹⁶ Farber and Sherry (n 4).

¹¹⁷ *Rai v Estate of Rai*, (n 112).

¹¹⁸ *Ibid*.

under article 81 and 86 of the Constitution to the status of fundamental rights. The effect was that instead of applying the said general principles to facilitate the enjoyment and thus enforcement the political rights under article 38, the same were applied to overburden the said rights.

Second, as noted, the departure from the conjunctive reading of section 83 of the Elections Act, although justified, ought to have been accorded a more robust approach. It was casual of the majority to just assert that ‘...Section 83 of the Elections Act was not in direct focus in the 2013 Raila Odinga case...’ and then continue to fundamentally alter standards that it had affirmed in more than eight cases¹¹⁹ arising out of the *Odinga v IEBC 2013* decision.¹²⁰ The Supreme Court may not have considered at great depth the proper import of section 83 in *Odinga v IEBC 2013* but building on it, this became the central focus in the *Munya 2* decision¹²¹ where the Supreme Court affirmed a conjunctive reading as opposed to disjunctive reading of section 83 albeit the difference in semantics of the language.

The effect of this cavalier attitude towards precedent is that, in addition to the attendant instability and unpredictability it abounds, this inconsistency provides a fertile ground for the lower Courts to engage in “shirking,” where they frame the facts, so as to avoid one precedent for the other.¹²² Indeed the lower courts have not only done that but were actively lobbied to do so by Justice Ndung’u:¹²³

Having been part of the inaugural Supreme Court and having steadily and consistently settled the law on elections, the interpretation of Section 83 by the Majority will unleash jurisprudential confusion never before witnessed. Unfortunately, we are part of the common law system, encumbered by rules requiring lower Courts to pay due deference to the Courts above. Parliament must therefore untie the hands of Courts below by clarifying the meaning of section 83 of the Elections Act. That is the only way that we can avert a crisis of jurisprudence in such a sensitive area of law, as elections. [697A] *However, in the meantime, lower Courts are not without an option. The decision by the Majority is one given in a presidential election and which does not usurp the jurisdiction of the lower Courts in electoral disputes....the Supreme*

¹¹⁹ See *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others* [2014] eKLR, *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others* [2014] eKLR, *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others* [2014] eKLR, *Frederick Otieno Outa v Jared Odoyo Okello & 4 Others* [2014] eKLR, *Hassan Ali Joho & Another v Suleiman Said Shabbal & 2 Others* [2014] eKLR, *Aramat v Lempaka & Others* and Supreme Petition No.5 of 2014.

¹²⁰ *Odinga v IEBC 2013* (n 113).

¹²¹ *Munya v Kithinji* (n 120).

¹²² Frank B Cross and Emerson H Tiller, ‘Understanding Collegiality on the Court’ (2008) 10 U PA J CONST L 257.

¹²³ *Odinga v IEBC 2017* (n 1) paras 696-697A.

Court cannot roll over the defined range of the electoral process like a colossus. The Court must take care not to usurp the jurisdiction of the lower Courts in electoral disputes. It follows *that the annulment of a Presidential election will not necessarily vitiate the entire general election. And the annulment of a Presidential election need not occasion a constitutional crisis, as the authority to declare a Presidential election invalid is granted by the Constitution itself.*

In fact, the confusion arising out of different standards had the effect of the upsurge of election disputes up to the appellate level in 2017 as compared to 2013 general elections. The effect of the foregoing on the institutional integrity of the judiciary cannot be gainsaid. Indeed, application of different standards in these electoral disputes led to corruption related allegations against most courts. The unmitigated effect was one of undermining the institutional integrity of the system and the courts, and, the erosion of public confidence in the judiciary.

4.2.2 Building Collegiality Even Where Consensus is not Possible

The 2010 Constitution pays great attention to the Supreme Court. Article 163 anchors the Court as the premiere of the transformative project, when it grants it a very special and unique role as the chief and final custodian of the Constitution. This is appreciated from the backdrop of the chaotic past marked with jurisprudential incoherence. Jurisprudential incoherence denies precedent of its fundamental features of legitimate legal rules-predictability, stability, consistency, and non-arbitrariness.¹²⁴ This in turn not only undermines public confidence of the court system but could also degenerate a society into anarchy.

The Supreme Court therefore has been bestowed with not only the specific role of steadying our jurisprudence towards stability, predictability and coherence but also cultivating confidence in the institution of both the Supreme Court and the judiciary. The conduct of the Supreme Court in grand cases such as presidential election petitions is paramount in reengineering the historically injured image of the institution of judiciary. Granted, it is not sustainable to build consensus in all cases due to philosophical and ideological heterogeneity of the justices. However, it is imperative that the any differences are kept within the realm of jurisprudential and institutional collegiality, such that even where there are dissenting opinions, the judgment remains on the objective.

¹²⁴Cross and Tiller (n 123).

However, this cannot be said of the Supreme Court conduct in the 2017 presidential election petition. First, the dissenting opinions openly painted a picture of a Court without a commitment to collegiality. For instance, in his dissent, Justice Ojwang' remarked that ... So proximate to the moment of delivery of the Supreme Court's decision in this pivotal case, did I learn that I fell on the minority side...

While this may at first appear harmless, coming from a judge that sits on the Bench with other justices, it may mean that the justices never held plenary discussions with a view to building a consensus. Either that or there was a change of mind by some justices very late after consensus had been reached. The speculations abound. Such conduct inevitably would infer judicial unaccountability which undermines the institutional integrity of a Supreme Court.

Further, Justice Ndung'u in several instances accuses the majority of non-verification of physical evidence submitted in court. It would be expected in exercising its exclusive original jurisdiction in a presidential election petition, the Supreme Court ought to conduct a thorough fact-finding as a factual prerequisite as an interpretation of the law devoid of complete and exhaustive factual examination is by itself, an insufficient basis upon which to make the final determination.¹²⁵ Whereas the bench is at liberty to disagree to disagree on how to treat, apply or admissibility or otherwise of factual evidence laid before it, it does not have much room when it comes to availability or otherwise of such evidence. Otherwise, what are we to make of one judge asserting they confirmed that certain forms had been signed while other contests having seeing such forms, yet the evidence was laid to the two justices at the same time and manner? These examples are embarrassing and put the Supreme Court at a very precarious position.

Squaring such empirical factual issues at the plenary reduces diversity in the Supreme Court and brings it towards a path of consensus and objectivity. Otherwise, failure to do this provides a fertile ground for 'issue creation' of questions not presented in the briefs and 'issue suppression' whereby the Court ignores questions presented to them.¹²⁶

¹²⁵ See concurring opinion of Ndung'u J in *Mwau v IEBC 2017* (n 2).

¹²⁶ Cross and Tiller (n 123).

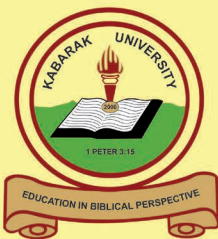
4.2.3 Democracy Beyond Elections

Beyond elections, there is need to look at democracy more wholesomely. Elections in Kenya are high stakes for a variety of interrelated reasons.¹²⁷ However, those stakes can be countered by delivering other democratic gains along the road of democratisation. Two crucial avenues are decentralised governance and socio-economic development. Devolution offers a promising route to local and regional democracy and development, while universal socio-economic development will improve the basic condition of the average voter. Thus, the two can enable the Kenyan electorate to better harness its sovereign power.

5. Conclusion

Kenya heads to another general election in August 2022. If the democratic space remains a highly contested one as it has been since 2010, it makes sense to anticipate a good number of election petitions. Taking stock of the *Odinga v IEBC 2017* precedent and its subsequent application, the current state of affairs on the standard required to nullify an election result, jurisprudentially speaking, is wanting. As shown, the judicialisation of politics makes the resolution of electoral disputes particularly challenging for the Supreme Court. Nevertheless, it is a role to be embraced and discharged in accordance with articles 20 and 38 of the Constitution. This would require a right-centric approach, and a view to reaching decisions that put the will of the electorate at the centre. As a bastion of the Constitution, it may be prudent for the Court to provide a suitable way forward before the next general election, or, brace itself.

¹²⁷ See for example, Sekou Toure Otondi, 'Explainer: What's Behind the High Stakes in Kenya's Presidential Election' (The Conversation, 8 May 2017) available at <<https://theconversation.com/explainer-whats-behind-the-high-stakes-in-kenyas-presidential-elections-77109>> accessed on 3rd June 2020.



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