Role of the Courts in Ensuring Free and Fair Elections in Kenya: A Tale of Fifty-Six Years of Legal Sophistry and Intellectual Dishonesty

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Abstract

Although the Judiciary has made many decisions that are consistent with the ideal of free and fair elections in the last fifty-six years, its dominant approach to electoral dispute resolution generally entails making superficially sound but disingenuous and deeply flawed decisions. This 'clever' approach, referred to as 'legal sophistry' in this article, generally entails an inflexible emphasis of legal and procedural technicalities; eschewing or suppressing serious genuine questions regarding the validity and integrity of elections; disingenuous adoption of discreditable case law from countries that practice pseudo or sham democracy; and manipulation of the law in favour of incumbency. Legal sophistry is inconsistent with the transformative agenda of the 2010 Constitution, which, *inter alia,* requires the Judiciary

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to promote the values and principles embodied in the Constitution and determine (electoral) disputes without undue regard to technicalities of law and procedure. Legal sophistry undermines the ideal of free and fair elections in at least three significant ways. First, it encourages electoral fraud and malpractice. Secondly, it leads to absurd or unjust outcomes, such as judicial affirmation of flawed elections. Lastly, legal sophistry undermines democracy, the rule of law and public confidence in the courts as honest arbiters of political disputes. The entrenchment of legal sophistry as the Judiciary's dominant approach to electoral dispute resolution has defied constitutional, legal and institutional reforms specifically designed to end it. The resilience of legal sophistry may be attributed to the factors that have influenced the evolution of the Judiciary from its inception to date, especially colonial legacy, corruption, patronage politics, impunity and the institutional degradation of the pre-2010 years.

1. Introduction

This article examines the contribution of Kenyan courts ('hereinafter, 'the Judiciary') in promoting free and fair elections. It argues that while the Judiciary has made many decisions that are consistent with the ideal of free and fair elections in the last fifty-six years, its dominant approach to electoral dispute resolution generally entails making superficially sound but disingenuous and deeply flawed decisions. In summary, this 'clever' approach, referred to as 'legal sophistry' in this article, generally entails inflexible emphasis of legal and procedural technicalities; eschewing or suppressing serious genuine questions regarding the validity and integrity of elections; disingenuous adoption of discreditable case law from countries that practice pseudo or sham democracy; and manipulation of the law in favour of incumbency.

The article is organised as follows: Part 1 gives an overview of the evolution of the Judiciary, the factors that have influenced that evolution and Kenya's experience with electoral democracy. Part 2 examines general principles of electoral dispute resolution and the rise of legal sophistry as the dominant approach to electoral dispute resolution in Kenya. Part 3 examines the role of the Supreme Court in promoting free and fair elections in Kenya. Part 4 sets out the conclusion.

1.1 Evolution of the Judiciary

The origins of the Judiciary, like most other Kenyan public institutions, can be traced to British colonial rule.[1] The Judiciary began as part of, and was complicit in, the colonial enterprise of systematic emasculation, pillage, oppression, exploitation and dehumanisation of native peoples. The objectives of colonialism were inherently incompatible with a judicial system that accorded all ethnic and racial groups the standards of fairness, impartiality, equality and justice that we know today.[2] The founding institutional philosophy of the Judiciary, therefore, was inconsistent with contemporary ideals of constitutionalism, democracy, rule of law, equality and justice to the extent that the origins of the Judiciary are traced to colonialism.[3] Although colonialism formally ended many years ago, its legacy can

[1] For a superb analysis of the historical evolution of the Judiciary, see James Thuo Gathii, *The Contested Empowerment of Kenya's Judiciary, 2010-2015: A Historical Institutional Analysis* (Sheria Publishing House 2016).

[2] Jill Cottrell Ghai (Ed), *Judicial Accountability in the New Constitutional Order* (International Commission of Jurists-Kenya 2016) 32.

[3] Ibid.

be discerned from the Judiciary's contemporary approaches to election petitions and other politically-sensitive disputes.

There are two discernible but seldom acknowledged features of the Judiciary's colonial legacy. The first is institutional indifference to democratic legitimacy and accountability, directly traceable to the inception of the Judiciary as an institution for advancing the interests of a privileged minority. The Judiciary's insularity to popular democratic sentiment is most frequent in cases relating to: elections; human rights violations, and judicial review of executive action. Secondly, the colonial inception of the Judiciary coincided with imposition of a foreign legal system that was disdainful of the culture, norms, traditions and values of native African peoples.[4]

Two other factors, besides the colonial legacy, might also explain the rise and entrenchment of legal sophistry as the dominant approach to electoral dispute resolution in Kenya.[5] These are ill-informed constitutional amendments and the repressive *de jure* single-party state rule.[6] These two factors emasculated the Judiciary by, *inter alia,* tinkering with security of tenure for judges and creating an exceedingly powerful executive (often referred to as 'imperial presidency').[7] The combined impact of these two factors — among others — led to serious institutional decay of the Judiciary:[8]

> The [imperial] president would appoint the chief justice and other judges often on the basis of political considerations and specifically to serve the interests of the government and powerful politicians…from independence in 1963, the courts and judges had become instruments of political control on election matters… judges lacked the willingness to make decisions against the president who had appointed them…[in] 1986, and with the aim of ensuring that judges remained loyal to the appointing authority (i.e. to the president) and other powerful political elites, the government removed the security of tenure for judges. This made them vulnerable and fearful of losing their positions, and thus unlikely to make decisions independent of and against the government.[9]

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[4] Kenyan laws, for instance, contain a condescending (and arguably racist) rule that requires the Judiciary to subject African customary laws to a repugnancy test based on western notions of morality and justice. See e.g. the 2010 Constitution, art. 159 (3) (b) and the Judicature Act, s 3 (2).

[5] James Thuo Gathii, *The Contested Empowerment of Kenya's Judiciary* 18-20.

[6] Muthomi Thiankolu, 'The Constitutional Review Cases: Emerging Issues in Kenyan Jurisprudence' (2005) 2 East African Law Journal 122.

[7] Ibid 124-128.

[8] Jill Cottrell Ghai (Ed), *Judicial Accountability* (n 2) 32-33.

[9] Karuti Kanyinga and Collins Odote, 'Judicialisation of Politics and Kenya's 2017 Elections' (2019) Journal of Eastern African Studies <*https://www.tandfonline.com/doi/pdf/10.1080/17531055.2019.1592326?needAccess=true&*> accessed 20 March 2019.

The Judiciary increasingly became an institution characterised by Judges that had 'taken bribes, done the bidding of the government, regardless of the law' between 1964 and 2008.[10] Judges often 'twisted the law to benefit the rich or the powerful.'[11] The degradation of the Judiciary also led to appointment of 'less than distinguished lawyers as judges,' incompetence and endemic corruption.[12] The institutional decay was so grave that 'independence of the Judiciary had ceased to be a reality some years before 1988.'[13] As at 2008, the institutional decay of the Judiciary was so grave, and public confidence in the institution so low, that the political opposition refused to refer the disputed 2007 presidential election to the courts.[14]

Kenya has taken many steps, and considered many proposals, some extremely radical and controversial, to address the problems of colonial legacy, corruption and institutional degradation of the Judiciary. In 1998, an internal investigatory committee concluded that the Judiciary had a high incidence of both petty and grand corruption.[15] In 2002, the Kenyan Chapter of the International Commission of Jurists appointed a panel of experts, comprising judges from commonwealth countries, to conduct investigations into allegations of corruption and other forms of malfeasance within the Judiciary. The panel reported that it was shocked by allegations of corruption, unaccountability, partiality and other forms of malfeasance against the Judiciary.[16] The then Chief Justice, who had been accused of complicity in human rights violations during the *de jure* single party rule, angrily dismissed the panel as follows:[17]

> They are experts for what, on what and about what? A visitor cannot come here, stay at a lavish five-star hotel and tell me that my judicial system is at crossroads after only two days of entertainment.

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[10] Yash Pal Ghai and Gill Cottrell Ghai, *Kenya's Constitution: An Instrument for Change* (Katiba Institute, 2011) 108-109.

[11] Ibid.

[12] Ibid. See also Abdul Majid Cockar, *Doings, Non-doings and Mis-doings by Kenya Chief Justices, 1963-1998* (Nairobi Zand Graphics 2012).

[13] Jill Cottrell Ghai (Ed), *Judicial Accountability* (n 2) 33.

[14] Judiciary Committee on Elections, *The Judiciary Bench Book on Electoral Dispute Resolution* (The Judiciary 2017) 2-3. See also Muthomi Thiankolu, '*Resolution of Electoral Disputes in Kenya: An Audit of Past Court Decisions*' in Godfrey Musila (Ed), *Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence* (Law Society of Kenya 2013) 58.

[15] Jill Cottrell Ghai (Ed), *Judicial Accountability* (n 2) 33.

[16] Ibid 34-35.

[17] Peter Mwaura, 'The Strange Disease that Afflicts Judges' *Daily Nation* (Nairobi, 26 December 2014) <*https://mobile.nation.co.ke/blogs/The-strange-disease-that-afflicts-judges/1949942-2570054-format-xhtml-dc5wc7z/index.html*> accessed 7 March 2019.

In 2003, a newly-elected government appointed a committee, led by a High Court Judge, to implement a controversial 'radical surgery' of the Judiciary.[18] The radical surgery was characterised by violations of due process, and appeared like a scheme to purge judges appointed by the previous regime.[19] It resulted in forced resignations of the Chief Justice and twenty-three senior judges, and dismissal of eighty-five magistrates on accusations of corruption and other forms of malfeasance.[20]

A protracted twenty-year constitutional reform process, which began after the fall of the Berlin Wall and gained momentum following the post-election violence of 2007-2008, re-established the Judiciary as an independent and powerful arm of government.[21] The proponents of the constitutional reform process grappled with two proposals for reversing institutional decay of the Judiciary. The first entailed dismissal of all judges and magistrates, irrespective of fault, and a requirement for those who desired to continue serving in the Judiciary to reapply for their jobs.[22] The second, eventually adopted as part of Constitution of Kenya, 2010 (hereinafter, 'the 2010 Constitution'), entailed the vetting of all serving judges and magistrates for suitability to continue holding office.[23]

The 2010 Constitution transformed the Judiciary in many fundamental ways. These included: formal recognition of judicial authority as deriving directly from the people;[24] strong emphasis on institutional and decisional independence of the Judiciary;[25] establishment of an independent body for the recruitment, promotion and discipline of judicial officers;[26] and introduction of transparent and competitive recruitment procedures for judges and magistrates.

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[18] Jill Cottrell Ghai (Ed), *Judicial Accountability* (n 2) 35. Many people perceived the radical surgery of the Judiciary as the brainchild of Hon. Kiraitu Murungi, the then Minister for Justice and Constitutional Affairs (currently, the Governor of Meru County).

[19] Jill Cottrell Ghai (Ed), *Judicial Accountability* (n 2) 35.

[20] Ibid. The casualties of the radical surgery included Justice Richard Kwach, the chair of the Kwach Committee. Hon. Kiraitu Murungi, the Justice Minister who had spearheaded the radical surgery, was subsequently forced to resign after getting implicated in one of the biggest corruption scandals in Kenya's history (commonly known as the Anglo-Leasing scandal). In 2011, Hon. Mutula Kilonzo (deceased as at the time of writing this article) wryly told Parliament: 'Never again shall this country allow the radical surgery of 2003, where both the doctor, the patient and the surgeon died.'

[21] James Thuo Gathii, *The Contested Empowerment of Kenya's Judiciary* xi-xii.

[22] Government of Kenya, '*Final Report of the Committee of Experts on Constitutional Review*' (Government Printer 2010) 75-76.

[23] Ibid. For a judicial opinion on the vetting process, see *Judges and Magistrates Vetting Board & 2 Others v Centre for Human Rights and Democracy and 11 Others* [2014] eKLR.

[24] The 2010 Constitution, arts. 1 (3) (c) and 159 (1).

[25] Ibid arts. 160 and 168.

[26] Ibid arts. 166 (1), 171, 172 and 173.

The political context in which the Judiciary has operated after the adoption of the 2010 Constitution has been defined by five main characteristics. The first is backlash from the state and politicians opposed to the emergence of a powerful and independent judiciary.[27] The second is 'judicialisation of politics,' which generally refers to a tendency to litigate disputes that are essentially political or moral (rather than legal) in character.[28] The third is 'politicisation of the judiciary,' which generally refers to efforts by political operators to capture the judiciary and influence court decisions; and enhanced influence of political considerations in judicial decision making.[29] The fourth is 'judicialisation of elections' or 'judicially settled election contests,' which occurs when election losers, fearing economic and political marginalisation, turn to the courts in the hope of overturning electoral outcomes.[30] Lastly, the post-2010 era has been characterised by resilience of legal sophistry as the dominant approach to electoral dispute resolution, in spite of significant legal and institutional reforms specifically designed to end it.

The following excerpt aptly captures the political environment in which the Judiciary worked as at the time of writing this article: [31]

> These attacks on the judiciary by politicians, both in government and the opposition, placed the courts in the middle of the political arena. This resulted in increased 'politicisation' of the judiciary as parties competed to influence the decision of the courts and the courts in turn gained political centrality in reviewing electoral decisions by others…[the government and the opposition] repeatedly played a game of chess with the courts…

Legal sophistry (and dominance of the executive over the Judiciary) seriously undermined public confidence in the Judiciary as an honest arbiter of political disputes, especially between 1963 and 2007. The tragic events that followed the disputed 2007 presidential election revealed that legal sophistry could easily lead to large-scale civil strife and, consequently, undermine the long-term viability of the Kenyan nation-state. This reality greatly influenced the text and structure of the 2010 Constitution, which is arguably more obsessed with elections than any other constitution.[32]

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[27] James Thuo Gathii, *The Contested Empowerment of Kenya's Judiciary* 69-81.

[28] Judicialisation of politics began to take shape in the early 2000s. For an early account of the emergence of this phenomenon in Kenya, see Muthomi Thiankolu, '*The Constitutional Review Cases; Emerging Issues in Kenyan Jurisprudence*' [2005] 2 East African Law Journal 122.

[29] Karuti Kanyinga and Collins Odote, 'Judicialisation of Politics and Kenya's 2017 Elections' (2019) Journal of Eastern African Studies <https://www.tandfonline.com/doi/pdf/10.1080/17531055.2019.1592326?needAccess=true&> accessed 20 March 2019.

[30] Ibid 3.

[31] Ibid 2.

[32] The 2010 Constitution, arts. 38, 81-91, 105 and 140.

1.2 Kenya's Painful Experience with Electoral Democracy

Most Kenyan elections have been controversial or violent, or both.[33] The 1966 election (commonly referred to as 'the little general election'), held only three years after the grant of independence, was driven by foreign interests and, specifically, ideological differences between capitalist-leaning and communist-leaning factions.[34] The ruling party's main challenger, the Kenya Peoples Union (KPU), was registered on the eve of nominations for the election, six weeks after making the application for registration.[35]

The 1983 election (often called 'the snap election' because it was held fourteen months ahead of the scheduled date) sought to 'clean the system' by purging the country's political leadership of persons perceived to have supported the abortive military coup of 1982 or opposed the president.[36] The 1983 election was not, therefore, a democratic election. Moreover, the 1983 election coincided with repression of alternative political views, and a constitutional amendment that made Kenya a single-party state.

The 1988 general election was characterised by a bizarre voting method, in which electors queued behind their preferred candidates.[37] The election officers included civil servants, who appeared to have been instructed to ensure victory for candidates who did not oppose the repression and human rights violations of the single-party state rule.[38] The queue voting method frustrated fair determination of the ensuing electoral disputes, as the courts could not subsequently ascertain whether the returned candidate had the longest queue of electors. The repressive single-party state rigged the election by declaring preferred candidates as winners even where such candidates had the shortest queues of electors.

The 1992 and 1997 general elections were marred by ethnic violence and forced displacement of ethnic groups perceived to be aligned to opposition parties.

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[33] Government of Kenya, '*Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007*' (Government Printer 2008) x. See also Collins Odote and Linda Musumba (Eds), Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence (IDLO 2016) 2-3

[34] George Bennet,' Kenya's 'Little General Election' (1966) 22 (8) *The World Today* 336, 337.

[35] Ibid 342.

[36] Alan Cowell, 'Kenya's President Calls Early Elections' *New York Times* (New York, 18 May 1983)<https://www.nytimes.com/1983/05/18/world/kenya-s-president-calls-early-elections.html> accessed 06 March 2019.

[37] Government of Kenya, '*Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007*' (Government Printer 2008) 36.

[38] Heidi Evelyn and Waikwa Wanyoike, 'A New Dawn Postponed: The Constitutional Threshold for Elections in Kenya and Section 83 of the Elections Act,' in Collins Odote and Linda Musumba (Eds), Balancing the Scales of Electoral Justice 78, 86.

The ethnic violence and displacement appeared to have been instigated and sponsored by state operators, to ensure victory for the incumbent president and the ruling political party. The 2007 general election, arguably the most infamous of all Kenyan elections, was marred by outright fraud[39] and large-scale ethnic violence, the latter of which threatened the viability of the fractious Kenyan nation-state.

The 2013 and 2017 general elections were marred by allegations of outright fraud. The 2017 general election was particularly characterised by (*inter alia*): violence and extrajudicial killings; protracted litigation; the assassination of a key officer of the electoral management body; and a boycott of the repeat presidential election by the main opposition candidate and his political coalition.

Kenya, therefore, has had a sad and painful experience with electoral democracy: [40]

> Kenya's political history has been characterized by large-scale electoral injustice. Through acts of political zoning, privatization of political parties, manipulation of electoral returns, perpetration of political violence, commercialization of electoral processes, gerrymandering of electoral zones, highly compromised and incompetent electoral officials, and a host of other retrogressive scenarios, the country's electoral experience has subjected our democracy to unbearable pain, and has scarred our body politic. As a result, free choice and fair competition, the holy grail of electoral politics, have been abrogated, and our democratic evolution, so long desired, has staggered and stumbled, indelibly stained by this unhygienic environment in which our politics is played.

Kenya's sad experience with electoral democracy has not, generally speaking, spurred the Judiciary to make decisions that encourage ethical conduct on the part of contestants and the Independent Electoral and Boundaries Commission (the IEBC). Instead, the Judiciary has encouraged electoral fraud and malpractices, through legal sophistry.

The Supreme Court has acknowledged the Judiciary's perennial failure to promote free and fair elections in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others.*[41] As asserted by Njoki Ndung'u SCJ:[42]

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[39] The Constitution of Kenya, 2010, arts. 38, 81-91, 105 and 140. Government of Kenya, '*Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007*' (Government Printer 2008) 71.

[40] *Gatirau Peter Munya v Independent Electoral and Boundaries Commission & 2 Others* [2014] eKLR, para 246 (Mutunga CJ).

[41] [2014] eKLR.

[42] At para 217.

> For many years, the courts were part of the problems impeding electoral justice, where potential petitioners were unable to serve their powerful opponents, or where they did, files would mysteriously disappear or reappear after the required filing deadlines had already passed. These issues are well documented in several reports by the International Commission of Jurists (Kenya) and other election monitoring groups, where they list the judicial system in this country, in the past, as having committed several electoral injustices, including courts insisting that Petitions must be personally signed by the Petitioner; where the Court held that a petition must be served personally upon the Respondent…; or courts requiring high security for costs to the detriment of those who are unable to raise this amount; or courts taking inordinate amount of time to dispose Petitions; or unreasonable delays, resulting in ineffectual decisions and dismissal of petitions on grounds of technicality.

Although the above quote may give the impression of a Supreme Court that is committed to the ideal of free and fair elections, the decision in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others*[43] embodied extreme legal sophistry. Specifically, the decision purported to punish a litigant for the Judiciary's administrative failure to expeditiously avail typed proceedings to the appellant, resulting in late filing of his appeal at the Court of Appeal. Moreover, the decision in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others* appeared to have been procured by bribery.[44]

2. The Role of the Judiciary in Promoting Free and Fair Elections

2.1 General Principles

Democratic government is based on (*inter alia*) the idea of regular elections that are based on universal suffrage and free expression and respect of the will of electors.[45] Free and fair elections confer democratic legitimacy to governments and political organs of the state. Although judicial power derives from the people, most democracies are characterised by unelected courts that enjoy institutional, decisional and financial independence from the political organs of government.[46]

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[43] [2014] eKLR.

[44] See Nzau Musau, 'Secrets of Justice Philip Tunoi Tribunal Report to President Uhuru' *The Standard* (Nairobi, 04 December 2016) <*https://www.standardmedia.co.ke/article/2000225681/secrets-of-justice-philip-tunoi-tribunal-report-to-president-uhuru*> accessed 01 April 2019.

[45] Government of Kenya, '*Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007*' (Government Printer 2008) 11.

[46] Judiciary Committee on Elections, *The Judiciary Bench Book on Electoral Dispute Resolution* (The Judiciary 2017) 5. See also *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR, paras 299-300.

The rationale for judicial independence (and apolitical or unelected judges) is to enable courts to fairly, impartially and effectively perform critical roles that are *sine qua non* for the existence of genuine democracy. Those roles include review of the constitutionality or legality of government action, adjudication of disputes among citizens, adjudication of disputes between citizens and the state and for purposes of this article, ensuring that contestants for political office abide by the constitution and laws relating to elections.

Generally, the role of the courts with regard to free and fair elections is to fairly, impartially and expeditiously determine electoral disputes. The courts cannot effectively perform this role if they are beholden (or perceived to be beholden) to politicians or any partisan political interests.[47] Equally, the courts cannot effectively administer electoral justice if they engage (or are perceived to engage) in 'clever' but dishonest intellectual sophistry at the expense of proper adjudication of electoral disputes.

Electoral dispute resolution often entails a delicate balance between two competing goals. The first is avoidance of decisions that reward or encourage (or which are perceived to reward or encourage) electoral fraud or malpractice. The second is fidelity to the true remit of adjudication and, specifically, avoidance of decisions that usurp citizens' sovereign democratic right to choose their leaders or unjustifiably invalidate citizens' clear democratic choices under the guise of electoral dispute resolution: [48]

> The office of President is the focal point of political leadership, and therefore, a critical constitutional office. This office is one of the main offices which, in a democratic system, are constituted strictly on the basis of majoritarian expression… As a basic principle, it should not be for the Court to determine who comes to occupy the Presidential office; save that this Court, as the ultimate judicial forum, entrusted …with the obligation to assert the supremacy of the Constitution and the sovereignty of the people of Kenya…, must safeguard the electoral process and ensure that individuals accede to power in the Presidential office, only in compliance with the law regarding elections.

[47] On the role of courts in ensuring free and fair elections, see O'Brien Kaaba, 'The Challenges of Adjudicating Presidential Election Disputes in Domestic Courts in Africa' (2015) 15 (2) *African Human Rights Law Journal* 329, 331-334.

[48] *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR, paras 299-300.

The interplay of the two competing goals embodied in the above dictum is the subject of a rule of restraint that appears, with slight variations, in election laws of many countries: [49]

> 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.

2.2 *Fifty-Six Years of Adjudication by Legal Sophistry and Intellectual Dishonesty*

The Judiciary has made many decisions that are consistent with the ideal of free and fair elections, especially between the years 2008 and 2012.[50] The Judiciary's best decisions in this regard are arguably those in *Manson Oyongo Nyamweya v James Omingo Magara and 2 Others and Raila Amolo Odinga & Another v IEBC & 2 Others*.[51] These two decisions, and a few others, insisted on strict compliance with core values and principles for the conduct of free and fair elections.[52] Specifically, the decisions in in *Manson Oyongo Nyamweya v James Omingo Magara and 2 Others and Raila Amolo Odinga & Another v IEBC & 2 Others* emphasised substantive electoral justice and the need to ensure that the results declared by the electoral management body are vindicated by a forensic audit of ballots and other official election documents.

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[49] The Elections Act, s 83. Parliament amended this legal provision following the nullification of the 2017 general election. The amendment appeared to give statutory anchorage for a controversial and wrong interpretation adopted by the Supreme Court in the 2013 presidential election. The High Court declared the amendment unconstitutional, in *Katiba Institute & 3 Others v Attorney General & 2 Others* [2018] eKLR.

[50] The 2008-2012 decisions were arguably informed by the shock of the large-scale violence that engulfed Kenya following the opposition coalition's refusal to refer the disputed 2007 presidential election to the courts. The 2008-2012 decisions may also have been inspired by radical views that had emerged on reformation of the Judiciary, discussed in the preceding parts of this article.

[51] See *Manson Oyongo Nyamweya v James Omingo Magara and 2 Others [2009] eKLR and Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR. The decision in *Manson Oyongo Nyamweya v James Omingo Magara and 2 Others* was considered by many as the beginning of the end of legal sophistry as the dominant approach to electoral dispute resolution. Its promise came to an abrupt end in 2013, when the Supreme Court significantly raised the threshold for nullification of elections, in *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR.

[52] See also the decisions in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others*, Civil Appeal (Nairobi) No. 228 of 2013, *Richard Kalembe Ndile & Another v Patrick Musimba Mweu & 2 Others*, Election Petitions (Machakos) Nos. 1 and 7 of 2013) and the dissenting opinion in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others*, Supreme Court Petition No. 18 of 2014, at para 217-218.

Although the Judiciary has made many decisions that are consistent with the ideal of free and fair elections, the Judiciary's dominant approach to electoral dispute resolution, however, generally entails making superficially sound but disingenuous and deeply flawed decisions. This 'clever' approach, referred to as 'legal sophistry' in this article, generally entails inflexible emphasis of legal and procedural technicalities, eschewing or suppressing serious genuine questions regarding the validity and integrity of elections, disingenuous adoption of discreditable case law from countries that practice pseudo or sham democracy and manipulation of the law in favour of incumbency.[53]

Legal sophistry undermines the credibility and integrity of elections in at least three main ways. First, it encourages electoral fraud and malpractice. Secondly, it leads to absurd or unjust outcomes, such as judicial affirmation of flawed elections. Lastly, legal sophistry undermines democracy, the rule of law and public confidence in the courts as honest arbiters of political disputes.

As stated, the 2010 Constitution is unusually preoccupied with operational and procedural aspects of conducting elections and electoral dispute resolution. The preoccupation can be traced to the recommendations of the Kriegler Report.[54] The preoccupation can also be attributed to a national resolve to reverse the rise of legal sophistry as the dominant approach to electoral dispute resolution. The text of the 2010 Constitution embodies, in many ways, Kenyan citizens' collective censure against the Judiciary and, specifically, disapprobation of the rise of legal sophistry as the dominant approach to electoral dispute resolution.

Legal sophistry pervades most aspects of electoral dispute resolution in Kenya. It frequently manifests itself in decisions relating to *locus standi,* execution of documents, service of pleadings, timelines, burden and standard of proof and security and payment of costs. The ensuing sections of this part of the article highlight how the Judiciary has handled some of these issues.

[53] Muthomi Thiankolu, 'The Supreme Court's Approach to the 2017 Presidential Election Petitions' (Law Society of Kenya Colloquium on the 2017 Presidential Election Petitions, Nairobi January 2018).

[54] Government of Kenya, '*Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007*' (Government Printer 2008).

2.2.1 Locus standi

Election petitions are generally disputes *in rem,* characterised by a public interest that overrides private adversarial interests of litigants.[55] The ordinary rules of standing, which require complainants to demonstrate a tangible 'personal interest' in the subject of litigation, therefore, are generally inappropriate for electoral dispute resolution. The Judiciary, however, often insisted that a litigant must demonstrate *personal interest* as a precondition for filing an election petition.[56] The relevant rulings were anchored on a provision of the repealed constitution, which restricted the right to challenge the validity of an election to the Attorney General or persons who were entitled to vote in the election.[57] The 2010 Constitution foreclosed further insistence on this approach to *locus standi* in electoral disputes by giving 'every person' a right to institute legal proceedings to enforce the Bill of Rights or any provision of the Constitution,[58] obliging courts to adopt a liberal and purposive interpretation of the Constitution,[59] and decreeing that 'every citizen' has a right to free and fair elections.[60]

2.2.2 Execution and Filing of Pleadings

Kenyan law permits legal practitioners and other authorised representatives to sign court documents for and on behalf of litigants.[61] The Judiciary, however, has struck out election petitions signed by duly authorised representatives for want of 'personal signature' by the petitioner.[62] Notably, the Judiciary has struck out election petitions signed by dully authorised legal practitioners,[63] even though Kenyan law

[55] *Joho v Nyange & Another* (No. 3) [2008] 3 KLR (EP) 500.

[56] See e.g. *Jaramogi Oginga Odinga & 3 Others v Zachariah Richard Chesoni & Another* [2008] 1 KLR (EP) 432; [1992] eKLR, in which the High Court held that the leaders of opposition parties had no locus to raise complaints regarding voter registration and the integrity of the chairperson of the electoral management body.

[57] The Constitution of Kenya, 1969 s 44. The government reissued a revised version of the independence constitution in 1969, to ensure coherence after multiple amendments. Some commentators refer to the reissued version as the 1969 Constitution.

[58] The 2010 Constitution, arts 22 (1) and 258 (1).

[59] Ibid arts 20 (3) and 259.

[60] Ibid art. 38. For authorities upholding every citizen's right to challenge elections, see *Sarah Mwangudza Kai v Mustafa Idd Salim & 2 Others [2013] eKLR; John Harun Mwau & Others v IEBC & Others* [2017] eKLR; and *David K Ole Nkedianye & 2 Others v Joseph Jama Ole Lenku & 4 Others* [2017] eKLR.

[61] See e.g. the Civil Procedure Rules, Order 2 Rule 16.

[62] See e.g. the decisions in *Jahazi v Cherogony* [2008] 1 KLR (EP) 273*, Moi v Matiba & 2 Others* [2008] 1 KLR (EP) 622 and *Wamboko v Kibunguchi & Another* [2008] 2 KLR (EP) 477.

[63] See e.g. *Jahazi v Cherogony* [2008] 1 KLR (EP) 273.

treats legal practitioners as officers of the court.[64] The most controversial decision on 'personal signature' of election petitions involved a petitioner who had suffered a stroke (following torture by the state). The stroke left the petitioner paralysed, and made it impossible for him to sign the election petition.[65] The petitioner's wife signed the petition for him, pursuant to a valid power of attorney.[66] The Court of Appeal struck out the election petition for want of 'personal' signature and held that nothing turned on the electoral commission's acceptance of the petitioner's nomination papers, similarly signed on his behalf through the same power of attorney.[67]

The Judiciary also often struck out election petitions filed or signed by advocates without current practising certificates.[68] In other words, the Judiciary punished litigants for mistakes of advocates, even where the former had no notice or means of establishing whether the latter held a valid practising certificate. The relevant decisions were absurd in three respects. First, they entailed bizarre reasoning to the extent that a lay person could draw and file an election petition or any other legal pleading. It is inconceivable, as a matter of basic logic, to hold that a pleading drawn and filed by a lay person is legally valid but one drawn and filed by a professionally trained advocate is void merely for want of a current practising certificate on the part of the advocate. Secondly, the core concern of the Advocates Act, which sets out the requirement for a practising certificate, is professional regulation rather than legal validity of documents. In other words, conferment of legal validity to documents is not a core objective of the Advocates Act. Lastly, although the Judiciary purported to act as it did to discourage the 'illegality' of advocates filing pleadings without taking out a current practising certificate, the relevant decisions unjustifiably punished innocent litigants, and the general public, by foreclosing a merit adjudication of serious questions regarding the validity and integrity of disputed elections.

Three developments have taken place regarding the Judiciary's persistent insistence on 'personal' signature of election petitions and the filing of such petitions by advocates who do not hold a current practising certificate. First, the Elections (Parliamentary and County Elections) Petition Rules, 2017 allow election petitions

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64 The Advocates Act, s 55.

65 *Moi v Matiba & 2 Others* [2008] 1 KLR (EP) 622.

66 Ibid.

67 Ibid.

68 See e.g. *Dobson Chiro Mwahunga v Independent Electoral and Boundaries Commission & 2 Others* [2013] eKLR; *John Langat v Kipkemoi Terer & 2 Other*s [2013] eKLR; *Wilson Nginga Kimotho v Independent Electoral and Boundaries Commission & 2 Others* [2013] eKLR; *Abraham Mwangi Njihia v Independent Electoral And Boundaries Commission & 2 Others* [2013] eKLR.

signed by 'the petitioner or a person authorised by the petitioner.'[69] Secondly, the Supreme Court recently reversed judicial precedents that automatically invalidated court documents filed by advocates without a current practicing certificate.[70] Lastly, Parliament recently amended the Advocates Act to preclude the Judiciary from invalidating documents drawn by advocates who have no practicing certificate:[71]

> (2) Notwithstanding any other provisions of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practising certificate.
>
> (3) For the purpose of this section, "legal document" includes pleadings, affidavits, depositions, applications, deeds and other related instruments, filed in any registry under any law requiring filing by an advocate.

2.2.3 Service of Pleadings

The Judiciary summarily dismissed countless election petitions between 1997 and 2013 for want of 'personal service.' The Judiciary invented the controversial rule (on personal service) in *Kibaki v Moi*,[72] a dispute relating to the 1997 presidential election. The then prevailing rules allowed service of election petitions either personally or by notice in the official government *gazette*. The petitioner served the respondent, an incumbent president, through the official government *gazette*. The Judiciary disingenuously twisted the law, and struck out the election petition for want of personal service. Notably, the Judiciary held that the requirement of personal service applied even in situations of virtual impossibility of such an endeavour: [73]

> Section 20 (1) of the Act does not prescribe any mode of service and in those circumstances, the courts must go for the best form of service which is personal service…[It] had been contended that the 1st Respondent in his capacity as the president is surrounded by a massive ring of security which is not possible to penetrate. But as the Judges of the High Court correctly pointed out, no effort to serve the 1st Respondent was made and repelled…we are satisfied the three learned Judges of the High Court were fully justified (*sic*) in holding that as the law now

[69] The Elections (Parliamentary and County Elections) Petition Rules, 2017, reg 8 (4) (b). See also the Elections (Parliamentary and County Elections) Petition Rules, 2013, reg 8 (3) (a).

[70] *National Bank of Kenya Ltd v Anaj Warehousing Ltd* [2015] eKLR. Applied in *Timamy Issa Abdalla v Independent Electoral and Boundaries Commission & 3 Others* [2018] eKLR. In *Pius Njogu Kathuri v Joseph Kiragu Muthura & 3 Others* [2018] eKLR, the High Court, however, held that the Supreme Court's decision does not apply to affidavits commissioned by unqualified advocates.

[71] The Advocates Act, s 34 B (as amended by Statutory Law (Miscellaneous Amendments) Act No. 11 of 2017.

[72] *Kibaki v Moi (No. 3)* [2008] 2 KLR (EP) 351.

[73] Ibid, 376-377.

> stands only personal service will suffice in respect of election petitions…[even though] it may be unjust…

The decision in *Kibaki v Moi* encouraged incumbents to evade or otherwise frustrate personal service, safe in the knowledge that the Judiciary would disingenuously strike out election petitions for want of such service. In fact, the Judiciary elevated the rule in *Kibaki v Moi* to a dogma of electoral dispute resolution between 1992 and 2013. This created a loophole for evading meritorious adjudication of serious genuine grievances relating to the freeness, fairness, credibility and integrity of elections. Further, the Judiciary inflexibly insisted on the rule in *Kibaki v Moi* even in cases where failure to effect personal service did not prejudice incumbents in any appreciable way. This resulted in absurd outcomes and, specifically, decisions that tended to uphold flawed elections. Overall, the Judiciary's pedantic insistence on the rule in *Kibaki v Moi* eroded public confidence in the Judiciary as an honest arbiter of political disputes.[74] Notably, the Judiciary refused to overrule the decision in *Kibaki v Moi* even when confronted with the perverse incentives created by the rule on 'personal service' of election petitions:[75]

> The 1st Respondent and his lawyers made strenuous and concerted efforts to personally serve the Appellant; they proved the efforts they had made to personally serve him but they were unable to physically get hold of him and serve him because he was hiding from them… Should the decision in *Kibaki v Mo*i be over-ruled? I think there is no occasion for me to do so in this appeal even if I were minded to do so. I would myself decline to over-rule the decision for several reasons…

The Judiciary's pedantic obsession with personal service of election petitions ultimately led to an unusual development: the inclusion of an essentially procedural rule in the country's Constitution. The 2010 Constitution provides that an election petition 'may be direct or by advertisement in a newspaper with national circulation.'[76] The Judiciary, however, occasionally strikes out election petitions for want of proper or timely service in spite of this constitutional edict.[77]

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[74] The Court of Appeal, which was the apex Court in Kenya until 2012, strongly censured trial judges who attempted to depart from or otherwise mitigate the injustice of the controversial rule on personal service of election petitions. See e.g. Kibaki v Moi *(No. 3)* [2008] 2 KLR (EP) 351, 358-359.

[75] *Mohamed v Bakari & 2 Others* [2008] 3 KLR (EP) 54 (Riaga Omollo JA).

[76] The 2010 Constitution, art. 87 (3).

[77] See e.g. *Rozaah Akinyi Buyu v Independent Electoral & Boundaries Commission & 2 Other*s [2013] eKLR; *Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 Others* [2013] eKLR; *Kiplagat Richard Sigei & 2 Others v Independent Electoral and Boundaries Commission & Another* [2017] eKLR; *Aluodo Florence Akinyi v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR; *Jacob Thoya Iha v Independent Electoral & Boundaries Commission & 2 Others* [2017] eKLR.

The Judiciary has watered down clear provisions of the 2010 Constitution, which require a broad, liberal and purposive approach to constitutional interpretation and construction, and held that the 2010 Constitution only forbids '*undue*' regard to legal and procedural technicalities.[78] Specifically, the Judiciary has held, *inter alia*, that constitutional edicts on administration of justice without undue regard to legal and procedural technicalities:[79] bear no meaning cast -in-stone and which suits all situations of dispute resolution;[80]that service is 'a fundamental step' that goes into the root of an election petition;[81] and that failure to serve an election petition (or belated or improper service) cannot be excused as an irregularity.[82] In summary, the Judiciary has considerably undermined the transformative agenda of the 2010 Constitution on electoral justice in general and service of election petitions in particular, by implicitly creating a leeway for '*due*' regard to legal and procedural technicalities.

2.2.4 Timelines

The rise of legal sophistry as the dominant approach to electoral dispute resolution in Kenya frequently manifests itself in decisions relating to timelines. The controversies generally revolve around extension of timelines for filing and serving election petitions, filing and serving appeals and depositing security for costs.

Prior to 2010, many election petitions remained undetermined deep into the life of Parliament, or until close to the next electoral cycle, rendering any judicial decision perfunctory. The 2010 Constitution sought to reverse this legacy in two broad ways. First, the 2010 Constitution obliged the Judiciary to hear and determine presidential election petitions *within fourteen days* of the date of filing, and all other election petitions *within six months* of the date of filing.[83] Secondly, the 2010 Constitution required Parliament to enact legislation to 'establish mechanisms for timely settling of electoral disputes.'[84] The 2010 Constitution did not specify, however, whether the six-month period for the hearing and determination of Parliamentary and County election petitions covered both trial and appellate

[78] *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR.

[79] The Constitution of Kenya, 2010 arts 20 (3), (4), 159 (2) (d) and 259.

[80] *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR, para 218.

[81] *Rozaah Akinyi Buyu v Independent Electoral & Boundaries Commission & 2 Others* [2013] eKLR

[82] Ibid.

[83] The Constitution of Kenya, 2010 arts 140 (2) and 105 (2).

[84] Ibid art. 87 (1).

stages of litigation. Parliament filled the lacuna through an amendment to the Elections Act, which required the High Court and the Court of Appeal to hear and determine appellate proceedings within six months from the date of filing of the appeal.[85] Although the amendment provided the required clarity, it effectively increased the timeframe for resolution of electoral disputes from the six months set out in the constitution to one year.

The Supreme Court (and the Judiciary generally) frequently invokes the constitutional edict on timely resolution of electoral disputes to disguise its perennial inclination to summarily dismiss election petitions, favour incumbency and eschew a merit review of impugned elections.[86] The Supreme Court achieves this by disingenuously blaming the Court of Appeal for failure to give effect to the constitutional edict on timely resolution of electoral disputes.[87] The relevant decisions are paradoxical and dishonest because the Supreme Court seldom observes the constitutional edict on timely resolution of electoral disputes when exercising appellate jurisdiction. In *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 5 Others*[88] for instance, the Supreme Court took nine months to determine an appeal against a decision of the Court of Appeal on a gubernatorial election.

The Judiciary has struck out countless election petitions, or refused to exercise jurisdiction, on the ground that the complainant failed to take critical steps within prescribed timelines. The most controversial line of decisions in this regard relates to timelines within which aggrieved persons must file (and serve) election petitions. Parliament enacted a rule, pursuant to the 2010 Constitution, requiring aggrieved parties to file election petitions 'within twenty eight days after the date of publication of the results of the election in the Gazette.'[89] The Judiciary disingenuously declared the rule unconstitutional and held that the twenty-eight day window began to run from the date the returning officer issued a certificate of election to the successful candidate.[90] The Judiciary also applied the declaration

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[85] The Elections Act, 2011, ss 75 (4) (b) and 85A (1) (b).

[86] See e.g. *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR; *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* [2014] eKLR; *Anami Silverse Lisamula v The Independent Electoral & Boundaries Commission & 2 Others* [2014] eKLR; *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others* [2014] eKLR; and *Lemanken Aramat v Harun Meitamei Lempaka & 2 Others* [2014] eKLR.

[87] Ibid.

[88] [2019] eKLR. The Supreme Court's decision in this case is arguably the most controversial and absurd, as it upheld the election of a governor who did not have the minimum educational qualifications for election.

[89] The Elections Act, s 76 (1) (a) (as originally enacted).

[90] *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* [2014] eKLR.

of unconstitutionality retrospectively, contrary to the conventional approach to statutory interpretation that preserves the validity of acts done in good faith pursuant to existing laws.[91] The idea underlying the conventional approach, which finds statutory expression in section 23 (3) of the Interpretation and General Provisions Act, is to avoid undue hardship to citizens who genuinely rely on the law through ex-post repeal or declarations of unconstitutionality.[92] The Judiciary appeared callous and indifferent to the undue hardship entailed in a retrospective application of the declaration of unconstitutionality, by summarily dismissing election petitions filed by litigants who had genuinely relied on the date of publication of election results in the official *gazette* as originally enacted by Parliament.[93]

The Judiciary's handling of the issue of the time within which aggrieved persons must file (and serve) election petitions arguably offends the doctrine of separation of powers. The constitutional mandate to set the time within which an aggrieved person must file an election petition lies with Parliament, not the courts. Specifically, the Constitution empowers Parliament to establish mechanisms for the timely resolution of electoral disputes. This unarguably includes a power to determine the date from which the time for filing an election petition begins to run. The Judiciary, however arrogated to itself a power to set a different date by disingenuously invalidating the date set by Parliament in the absence of a clear violation of any constitutional provision.

The second major controversy relating to timelines revolves around the prescribed time for filing (and serving) appeals. The Elections Act provides allows persons aggrieved by a decision of an election court to file an appeal 'within thirty days' of the trial court's decision.[94] A competent appeal must contain a typed record of the proceedings of trial court.[95] In practice, the Judiciary seldom avails typed proceedings to litigants within thirty days. The Judiciary has often refused to excuse delays attributable to its own failure to avail typed proceedings within thirty days.[96]

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[91] M*ary Wambui Munene v Peter Gichuki King'ara & 2 Others* [2014] eKLR.

[92] The Interpretation and General Provisions Act, s 23 (3).

[93] *Mary Wambui Munene v Peter Gichuki King'ara & 2 Others* [2014] eKLR; *Anami Silverse Lisamula v The Independent Electoral & Boundaries Commission & 2 Others* [2014] eKLR; *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others* [2014] eKLR; and *Lemanken Aramat v Harun Meitamei Lempaka & 2 Others* [2014] eKLR.

[94] The Elections Act, 85A (1) (a).

[95] The Court of Appeal Rules, 2010, rule 87.

[96] See e.g. *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others* [2014] eKLR and *Richard Nyagaka Tong'i v Chris N. Bichage & 2 Others* [2015] eKLR.

2.2.5 Burden and Standard of Proof

Electoral disputes are usually characterised by informational asymmetry between the complainants and the IEBC. The IEBC usually has better access to, and often exclusive custody of, evidence required to prove election irregularities and malpractices. Although the IEBC is a party to every election petition, it ought not to adopt an adversarial or partisan stance in such petitions. The rationale for this is simple: an adversarial or partisan stance is inconsistent with the IEBC's constitutional mandate to conduct free and fair elections. Consequently, the IEBC should readily avail information and documents to the election court, irrespective of which party such information and documents favour: [97]

> The idea that parties invest in electoral processes in their entirety, including in anticipation of a petition, does not relieve the electoral management agency of its constitutional obligations. Nothing could imperil our democracy more than an electoral agency that is contaminated by bias, infected with incompetence, and afflicted by a virulent virus of minimal public accountability…The constitutionally-mandated agency for electoral management, the IEBC, must demonstrate competence, impartiality, fairness, and a remarkably high sense of accountability to the public... It must embrace high disclosure standards, and must avoid conduct such as hoarding of information and data that the public has the right to, both as a matter of course, and also as a matter of Article 35 of the Constitution. Materials that are in the possession of the IEBC are not private property; they are public resources…The IEBC, therefore, must demonstrate an instant readiness to respond to public concerns, whenever these are raised, and to maintain a public-accountability posture at all times.

The informational asymmetry that naturally exists between the IEBC and election petitioners points to the need for a predominantly inquisitorial approach to electoral dispute resolution. In other words, the predominantly adversarial approach that characterises ordinary civil litigation is inappropriate for electoral dispute resolution. Kenyan election laws contain many provisions pointing to the need for an inquisitorial approach to electoral dispute resolution. Specifically, Kenyan election laws) empower election courts to order scrutiny and recount *suo moto,*[98] provide for accurate, verifiable, secure, accountable and transparent

[97] *Gatirau Peter Munya v Independent Electoral and Boundaries Commission & 2 Others* [2014] eKLR, paras 251-252 (Mutunga CJ).

[98] The Elections Act, s 82 (1).

elections and require the IEBC to store and submit relevant documents to election courts.[99]

The Judiciary invariably insists on conventional rules as to the incidence of the burden of proof in spite of frequent informational asymmetry between the IEBC and complainants.[100] Further, the Judiciary often asks complainants to prove electoral fraud to the criminal standard of proof (i.e. beyond reasonable doubt), or to an indeterminate standard between the civil and criminal standards, yet electoral disputes are essentially legal in character.[101] The Judiciary also insists, without any theoretical, logical or policy justification, that complaints relating to whether a president-elect has met the minimum numerical thresholds (i.e. more than half of the votes cast an election and twenty-five percent of the votes cast in at least twenty-four counties) must be proved beyond reasonable doubt.[102]

2.2.6 Security and Payment of Costs

Kenyan law requires complainants to deposit security for costs within ten days of filing an election petition.[103] This requirement is unique to election petitions, as it does not generally apply to other types of disputes filed in the courts. The prescribed security for costs is one million shillings (about US$10,000.00) for presidential election petitions, five hundred thousand shillings (about US$5,000.00) for Parliamentary and gubernatorial election petitions and one hundred thousand shillings (about US$1,000.00) for county assembly election petitions.[104]

Although section 78 (3) of the Elections Act gives election courts discretion on the issue of security for costs, the Judiciary usually strikes out election petitions where the petitioner either fails to deposit the security for costs or deposit the security within the prescribed time.[105] Moreover, the Judiciary strictly insists on

[99] The 2010 Constitution, arts. 81 and 86; the Elections Act, ss 44 and 44A and the Elections (Parliamentary and County Elections) Petitions Rules, 2017, Rule 16.

[100] See e.g. *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR.

[101] *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR, para 152.

[102] *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR, para 203.

[103] The Elections Act, s 78.

[104] Ibid.

[105] See e.g. *Kiplangat Richard Sigei & 2 others v Independent Electoral and Boundaries Commission & Another* [2017] eKLR; *Said Buya Hiribae v Hassan Dukicha Abdi & 2 Others* [2013] eKLR; *Kumbatha Naomi Cidi v County Returning Officer Kilifi & 3 Others* [2013] eKLR; and *Simon Kiprop Sang v Zakayo K. Cheruiyot & 2 Others* [2013] eKLR. For decisions upholding judicial discretion to excuse non-payment or late payment of the security for costs, see *Fatuma Zainabu Mohamed v Ghati Dennitah & 10 Others* [2013] eKLR; *Charles Maywa Chedotum & Another v IEBC & 2 Others* [2013] eKLR; F*atuma Zainabu Mohamed v Ghati Dennitah & 10 Others* [2013] eKLR; and *Charles Ong'ondo Were v Joseph Oyugi Magwanga & 3 Others* [2013] eKLR.

deposit of security for costs even though the requirement for the security is arguably unconstitutional.[106] Specifically, the Judiciary has traditionally downplayed or dismissed questions on whether the requirement to deposit security for costs violates fundamental rights and freedoms relating to, *inter alia*,: discrimination, access to justice and fair trial.[107] Further, the Judiciary adopted a procedural rule requiring security of costs for election petition appeals even though the substantive law (i.e. the Elections Act) does not require security for costs for appeals.[108]

The Judiciary often condemns unsuccessful election petitioners to pay exorbitant litigation costs. Electoral disputes determined by the Judiciary between 2008 and 2012, for instance, were generally characterised by outrageously extravagant cost orders.[109] In *William Kabogo Gitau v George Thuo & 2 Others*,[110] for instance, the Deputy Registrar of the High Court taxed party-party costs at more than Kenya Shillings twenty-four million (about US$240,000.00). The award, and similar others, stoked concerns about sustainability of election petition costs and their impact on the right of access to justice. The ensuing controversies constrained the Judiciary to adopt rules on capping of costs awardable at the conclusion of the trial of an election petition.[111]

The Judiciary's general approach to the issue of costs (which is exacerbated by a requirement for huge deposits as security for costs), however, is still arguably unconstitutional for creating unreasonable fetters on the right of access to justice.[112] The Judiciary, however, has generally eschewed the issue of interplay between the requirement for costs and the fundamental right of access to justice even in cases that offered opportunities for judicial pronouncement on the issue. In *Karanja Kabage v Joseph Kiuna Kariambegu Ng'ang'a & 2 Others*, for instance, which revolved around the problem of runaway costs and failure of the election court to cap costs, the Court of Appeal failed to address the constitutionality of the rule on deposit of hefty sums as security for costs.[113]

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[106] See *Ndyanabo v Attorney General* [2002] TZCA 2, in which the Court of Appeal of Tanzania declared the requirement for security for costs unconstitutional.

[107] See e.g. *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR.

[108] The Court of Appeal (Election Petition) Rules 2017, Rule 27.

[109] *William Kabogo Gitau v George Thuo & 2 Others* [2008] eKLR.

[110] [2008] eKLR.

[111] See e.g. the Elections (Parliamentary and County Elections) Petitions Rules 2017, Rule 30 (1) (b).

[112] On the right of access to Justice, see the 2010 Constitution, art 48. The Tanzanian Court of Appeal declared statutory rules requiring election petitioners to deposit security for costs unconstitutional, for being an unreasonable impediment to access to justice. For further insights, see *Ndyanabo v Attorney General* [2002] TZCA 2.

[113] *Karanja Kabage v Joseph Kiuna Kariambegu Ng'ang'a & 2 Others*, Civil Appeal (Nairobi) No. 301 of 2013.

2.2.7 Preference for Incumbency

The Judiciary generally decides electoral disputes in favour of incumbents even where there are serious questions about the integrity of elections. The preference for incumbency can be discerned from, *inter alia*, the discriminatory manner in which the Judiciary enforces legal and procedural technicalities. Specifically, although the Judiciary invariably strikes out election petitions for non-compliance with legal and procedural technicalities, it invariably accommodates incumbents (and the IEBC) whenever they fail to comply with such technicalities.[114]

3. Role of the Supreme Court in Promoting Free and Fair Elections

3.1 Special Role and Status of the Supreme Court

There are many justifications, few of which are highlighted here, for dedicating a section of this article to the role of the Supreme Court. First, the Supreme Court has handled many electoral disputes since its establishment in 2012. Secondly, the Supreme Court's decisions bind all other Kenyan courts and tribunals.[115] The Supreme Court's decisions, therefore, decisively influence the Judiciary's overarching philosophy and approach towards the issue of free and fair elections. Thirdly, and as will shortly become clear, the Supreme Court's decisions on electoral disputes generally embody extreme legal sophistry and intellectual dishonesty, are often inconsistent and contradictory, create incentives for electoral fraud and malpractice, generate more legal and political controversy than sound jurisprudence and undermine the ideal of free and fair elections. Further, the Supreme Court has faced significant credibility crises due to its handling of electoral disputes and other politically sensitive cases. Lastly, and perhaps more importantly, the Supreme Court has a special statutory mandate to, *inter alia*:

[114] See e.g. the decisions in *Richard Nyagaka Tong'i v Chris Munga N. Bichage & 2 Others*, Supreme Court Petition No. 7 of 2014, in which the Supreme Court extended time in favour of the incumbent, contrary to its usual staunch refusal to extend time in favour of the losing candidate. See also the decision in *Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others*, High Court (Meru) Election Petition No. 1 of 2013. The Court allowed respondents to an election petition to file their responses outside the timeframes prescribed by the then applicable rules yet, as we have seen, the Judiciary has always ruled against petitioners who fail to comply with prescribed time frames.

[115] The Constitution of Kenya, 2010, art. 163 (7).

(a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya;

(b) provide authoritative and impartial interpretation of the Constitution;

(c) develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth;

(d) enable important constitutional and other legal matters…to be determined having due regard to the circumstances, history and cultures of the people of Kenya…[116]

The special statutory mandate of the Supreme Court is incompatible with legal sophistry or any approach to electoral dispute resolution that suppresses or eschews genuine complaints relating to the integrity of elections, decides cases on legal or procedural technicalities, leads to absurd outcomes, or creates incentives for electoral fraud and malpractices. The Supreme Court has handled most electoral disputes in a manner that is inconsistent with its special mandate as the apex court. The relevant decisions suggest that the Supreme Court considers itself infallible and exempt from accountability merely because it is the apex court.

3.2 Presidential Election Disputes

The post-election violence of 2007-2008 gave impetus to the hitherto stalled constitutional reform process. The creation of a special court for expeditious resolution of presidential election disputes was one of the main agendas of the constitutional reform process.[117] The drafters of the 2010 Constitution, therefore, perceived the determination of presidential election disputes as the main role of the Supreme Court.[118]

The Supreme Court had handled two main presidential election disputes as at the time of writing this article.

3.2.1 The 2013 Presidential Election Disputes

The 2013 presidential election disputes generally revolved around alleged failure of the IEBC to conduct the election in accordance with the principles set

[116] The Supreme Court Act, s 3.

[117] Government of Kenya, '*Final Report of the Committee of Experts on Constitutional Review*' (Government Printer 2010) 55.

[118] The Constitution of Kenya, 2010, arts 140 (1) and 163 (3) (a).

out in the 2010 Constitution.[119] In summary, those principles require the IEBC to use a simple, accurate, verifiable, secure, accountable and transparent electoral system; establish appropriate structures and mechanisms to eliminate electoral fraud and malpractice; and conduct free and fair elections which are by secret ballot, free from violence, intimidation, improper influence or corruption.[120]

The complainants in the 2013 presidential election disputes claimed that the IEBC had, *inter alia*,: used multiple unofficial voter registers; manipulated the counting and tallying of votes; irregularly procured election technology and materials relied on a biometric voter identification technology that failed within moments of launch; and procured the electronic election result transmission system from a supplier who was supplying a similar product to a political party that was contesting the election. [121]

The Supreme Court's decision, which is arguably a classic study in legal sophistry, 'aroused more contestation than closure.'[122] The Supreme Court dismissed the cases on legal and procedural technicalities. The Supreme Court's main holding was that persons seeking to invalidate an election must prove a serious breach of electoral laws, *and* that the breach had affected the result of the election:[123]

> We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections… This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta*: all acts are presumed to have been done rightly and regularly.

The above dictum has several fundamental shortcomings. The requirement to prove *both* breach of election laws and an effect on the result of the election, for instance, is inconsistent with a plain reading of the 2010 Constitution and the Elections Act, 2011.[124] The dictum is also inconsistent with the conventional legal threshold for nullification of elections in the common law world. Under the

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[119] Ibid arts 81 and 86.

[120] Ibid.

[121] *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR.

[122] Karuti Kanyinga and Collins Odote, 'Judicialisation of Politics and Kenya's 2017 Elections' (2019) Journal of Eastern African Studies <https://www.tandfonline.com/doi/pdf/10.1080/17531055.2019.1592326?needAccess=true&> accessed 20 March 2019 6.

[123] *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR, para 196.

[124] The 2010 Constitution, arts. 38, 81 and 86; the Elections Act, s. 83.

conventional threshold, a serious breach of election laws or principles governing the conduct of elections is sufficient, in and of itself, to warrant the nullification of an election. In other words, an inquiry into the result of an election is irrelevant where the election does not conform to the basic principles relating to the conduct of the election.[125] Equally, a trivial breach of election laws (or principles governing the conduct of elections) that affects the result is sufficient, in and of itself, to warrant the nullification of the election.[126]

The Supreme Court's approach to the 2013 presidential election is apt to produce absurd outcomes. Specifically, the Supreme Court's approach can validate an election that is inconsistent with core principles, such as freeness, fairness, transparency and verifiability, on the ground that the breach of such principles did not affect the result.[127] Further, the Supreme Court appeared to extol judicial practices of countries that are not truly democratic. Lastly, the dictum disingenuously invokes an English common law maxim that is inconsistent with the context, history, practice and circumstances of Kenya. The lived reality in Kenya is that elections are seldom 'rightly and regularly' done. The maxim *Omnia praesumuntur rite et solemniter esse acta,* therefore, is irrelevant to the prevailing political culture in Kenya—except arguably when turned on its head.

The Supreme Court also held that the petitioners did not adduce sufficient evidence, and that the voters roll was an amalgam of multiple documents. The decision as to lack of evidence was bizarre in at least two ways. First, the Supreme Court had thrown out an 800-page affidavit, which contained evidence of electoral fraud and malpractice, on legal and procedural technicalities.[128] Secondly, the Supreme Court disingenuously suppressed the impact of irregularities disclosed by a scrutiny it had conducted *suo moto,* which effectively reduced the successful candidate's votes below the minimum constitutional threshold.[129] The decision on the Register of Voters, on the other hand, was not only bizarre but also antithetical to the ideal of free and fair elections. Specifically, the decision created a leeway for the IEBC to conjure up, *ex post*, different documents and claim that each of them

[125] *Morgan and Others v Simpson and Another* [1974] 3 All ER 722.

[126] Ibid.

[127] Some critics contend that is exactly what happened in *2013*. See e.g. Wachira Maina, 'Verdict on Kenya's Presidential Election Petition: Five Reasons the Judgment Fails the Legal Test' *The East African* (Nairobi, 20 April 2013) <*https://www.theeastafrican.co.ke/oped/comment/Five-reasons-Kenya-Supreme-Court-failed-poll-petition-test/434750-1753646-5dfpys/index.html*> accessed 22 March 2019.

[128] *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR, paras 214-2018.

[129] Ibid paras 169-172 and 302-333.

was part of the voters register. The decision also unwittingly (or perhaps wittingly) created incentives for ballot stuffing, a perennial problem with Kenyan elections:[130]

> Bluntly put, the Court's decision on this point [of the register of voters] has kicked open the door to future election fraudsters. In rejecting the petitioners' argument that there must be a Principal Register, the Court holds that there is no single document called the "Principal Register of Voters." …This, surely, is a non sequitur…On the Court's holding, the voters register of the future will be what the IEBC says it is at whatever stage of the election. Indeed, this is what IEBC appears to have been doing all along these past three months. Four documents [with different figures] have been called Voters Register...[131]

The catastrophic failure of biometric voter identification and electronic result transmission technology, almost immediately after the commencement of the election was a major issue in the 2013 presidential election disputes. The technology, which cost taxpayers tens of millions of dollars, was meant to provide a safeguard against fraud.[132] The Supreme Court attributed the failure of the technology to 'competing interests involving impropriety, or even criminality' on the part of IEBC Commissioners and staff and, consequently, ordered that 'this matter be entrusted to the relevant State agency, for further investigation and possible prosecution of suspects.'[133] The Supreme Court, however, also disingenuously absolved the IEBC of any wrongdoing with regard to the catastrophic failure of technology:

> We take judicial notice that, as with all technologies, so it is with electoral technology: it is rarely perfect, and those employing it must remain open to the coming of new and improved technologies.[134]

The Supreme Court's holdings regarding the catastrophic failure of technology are somewhat contradictory, as they leave readers wondering whether the failure was attributable to inherent unreliability of technology or malfeasance on the part of IEBC Commissioners and staff. Either way, the decision of the Supreme

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[130] Karuti Kanyinga and Collins Odote, 'Judicialisation of Politics and Kenya's 2017 Elections' (2019) Journal of Eastern African Studies <https://www.tandfonline.com/doi/pdf/10.1080/17531055.2019.1592326?needAccess=true&> accessed 20 March 2019 8.

[131] Wachira Maina, 'Verdict on Kenya's Presidential Election Petition: Five Reasons the Judgment Fails the Legal Test' *The East African* (Nairobi, 20 April 2013) *<https://www.theeastafrican.co.ke/oped/comment/Five-reasons-Kenya-Supreme-Court-failed-poll-petition-test/434750-1753646-5dfpys/index.html>* accessed 22 March 2019.

[132] Government of Kenya, '*Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007*' (Government Printer 2008) 138.

[133] *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR, para 234.

[134] Ibid para 233.

Court embodied legal sophistry and intellectual dishonesty to the extent that it affirmed the validity of an election which, by its own conclusion, was characterised by 'competing interests involving impropriety, or even criminality' on the part of IEBC Commissioners and staff.[135]

3.2.2 The 2017 Presidential Election Disputes

There were two main disputes regarding the 2017 general election.[136] The first generally revolved around vote counting and tallying, and electronic transmission of election results from constituency and county tallying centres to the national tallying centre.[137] In summary, the complainants contended that the IEBC had conducted the election so badly that it failed to comply with the governing principles established under Articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the 2010 Constitution.

The specific complaints regarding the first 2017 presidential election were that the IEBC had, *inter alia,*: allowed third parties to hack and fraudulently manipulate the IEBC's servers to produce a pre-determined outcome; used election declaration forms that lacked statutorily prescribed security features; and released fraudulent results in which the votes cast in the presidential election exceeded those cast for other elections by more than half a million. A scrutiny of result declaration forms and the IEBC server, with which the IEBC refused to fully cooperate, confirmed the veracity of the complaints.[138]

The Supreme Court held — by a majority of four and two dissents — that the IEBC had committed substantial illegalities and irregularities that went to the heart of the election; no court properly applying its mind to the evidence and the law could, in good conscience, ignore the illegalities and irregularities; and the presidential election was vitiated by non-compliance with the principles set out in Articles 10, 38, 81 and 86 of the 2010 Constitution as well as in the electoral laws.[139] Notably, the Supreme Court held that the threshold for nullification of elections was two-fold and disjunctive:[140]

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[135] Ibid para 234.

[136] *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR and *John Harun Mwau & 2 Others v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR.

[137] *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR.

[138] Ibid paras 342-378.

[139] Ibid paras 378-386.

[140] Ibid para 389.

> In this judgment, we have settled the law as regards Section 83 of the Elections Act, and its applicability to a presidential election. We have shown that contrary to popular view, the results of an election in terms of numbers can be overturned if a petitioner can prove that the election was not conducted in compliance with the principles laid down in the Constitution and the applicable electoral law.

The nullification of the 2017 presidential election, the first such decision in Africa and only the fourth in the world, attracted praise from many people, and severe criticism from the incumbent president and politicians aligned to his party.[141] Although many of the criticisms were unfounded, the decision of the Supreme Court was coloured by legal sophistry to the extent that it failed to censure any specific person for the 'illegalities and irregularities' that led to the nullification of the election.

The second presidential election dispute in 2017 revolved around the repeat presidential election.[142] Many dramatic events preceded the repeat presidential election. The dramatic events, which extensively featured in the ensuing election petitions, included threats, intimidation and vilification of the Judges of the Supreme Court;[143] serious internal conflicts within the IEBC; and abrupt resignation and flight into exile of an IEBC Commissioner.[144] They also included a public statement by the Chairperson of the IEBC to the effect that he could not guarantee a credible election;[145] bizarre manoeuvres—on the part of both the Judiciary and political operators—to either postpone or ensure the holding of the

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[141] Karuti Kanyinga,Collins Odote, 'Judicialisation of Politics and Kenya's 2017 Elections' [2019] Journal of Eastern African Studies <https://www.tandfonline.com/doi/pdf/10.1080/17531055.2019.1592326?needAccess=true&> accessed 20 March 2019 10-11.

[142] The Supreme Court nullified the first presidential election in 2017, in a decision delivered on 1st September 2017 and elaborated in a full judgment on 20th September 2017. See *inter alia* Kimiko de Freytas-Tamura, 'Kenya Supreme Court Nullifies Presidential Election' *New York Times* (New York, 1 September 2017) https://www.nytimes.com/2017/09/01/world/africa/kenya-election-kenyatta-odinga.html accessed 25 March 2019 and Mercy Asamba, 'Reasons why Presidential Election was Declared Invalid, Court gives Full Verdict' *The Standard* (Nairobi, 20 September 2017) <*https://www.standardmedia.co.ke/article/2001255107/reasons-why-presidential-election-was-declared-invalid-court-gives-full-verdict*> accessed 25 March 2019.

[143] Exemplified by a threat by the incumbent president that the executive would 'fix' the Judiciary and a shooting incident involving the official car of the Deputy Chief Justice.

[144] John Ngirachu, 'Roselyn Akombe Resigns from Poll Agency' *Daily Nation* (Nairobi, 18 October 2017) <*https://www.nation.co.ke/news/IEBC-commissioner-Roselyn-Akombe-resigns/1056-4144480-7lyoqhz/index.html*> accessed 24 March 2019.

[145] Patrick Langat, 'Wafula Chebukati: I can't guarantee credible poll on October 26' *Daily Nation* (Nairobi, 18 October 2017) <*https://www.nation.co.ke/news/Wafula-Chebukati-on-repeat-presidential-election/1056-4145232-oyj67sz/index.html*> accessed 24 March 2019.

repeat presidential election;[146] extreme (and in some cases, lethal) violence on the part of both state and non-state operators; and a boycott by the main opposition candidate and his supporters.[147]

The main legal issue in the second presidential election dispute in 2017, which was inexorably linked to the dramatic events described in the preceding paragraph, was whether the IEBC had conducted the repeat presidential election 'in strict conformity with the Constitution and the applicable election laws,'[148] as directed by the Supreme Court in the decision that nullified the first presidential election.[149] The Supreme Court upheld the election, in a decision that appeared, on the facts of the case, like a major step-down from the lofty ideals embodied in the decision to nullify the first presidential election.

The decisions of the Supreme Court regarding the 2017 presidential elections were, in many ways, a great improvement on the discreditable decision on the 2013 presidential election. The 2017 decisions, however, were equally characterised by elements of legal sophistry and intellectual dishonesty. This can be discerned from, *inter alia*,: the failure to sanction any specific person for the illegalities and irregularities that led to nullification of the first presidential election; the extremely different approaches the Supreme Court adopted on the issue of scrutiny in the two petitions; and the Supreme Court's feigned aloofness to several disconcerting matters that, if properly considered, would easily have led to nullification of the repeat presidential election.[150] The disconcerting matters, all of which were in the public domain, and which were raised in petitions challenging the repeat presidential election, included: the IEBC's failure to strictly comply with the Judgment of the Supreme Court; a boycott of the repeat election by the main opposition coalition; violence and intimidation from both state and non-

[146] Sam Kiplagat, 'Quorum Hitch, Poll Officers Ruling put Judiciary on the Spot' *Daily Nation* (Nairobi, 29 October 2017) <*https://mobile.nation.co.ke/news/Supreme-Court-Quorum-hitch-ELECTION/1950946-4160358-qouvrw/index.html*> accessed 24 March 2019.

[147] Reuters, 'Boycott, Shooting and Tear Gas Mar Kenya Election Re-run' <*https://www.cnbc.com/2017/10/27/kenya-presidential-election-re-run-marred-by-boycott-shooting-tear-gas.html*> accessed 24 March 2019.

[148] John Harun Mwau & 2 Others v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR.

[149] Raila Amolo Odinga & Another v IEBC & 2 Others [2017] eKLR, para 405.

[150] In summary, the repeat presidential election was characterised by (*inter alia*): the IEBC's failure to strictly comply with the Judgment of the Supreme Court; a boycott by the main opposition coalition; violence and intimidation from both state and non-state actors; partisan divisions within the IEBC; and vilification and intimidation of Supreme Court Judges by the President of the Republic of Kenya and politicians aligned to the President's party.

state actors; manifest partisan divisions within the IEBC; and vilification and intimidation of Supreme Court Judges by the incumbent president and politicians aligned to the president's coalition.

3.3 Parliamentary and County Election Disputes

The Supreme Court's decisions on Parliamentary and county elections have often, almost always, attracted severe criticism and controversy.[151] The criticisms and controversies generally revolve around the Supreme Court's tendency to arbitrarily expand its appellate jurisdiction; invoke legal sophistry; make inconsistent decisions; affirm flawed elections; and reverse sound decisions from the Court of Appeal.[152]

3.3.1 Elastic and Contentious Appellate Jurisdiction

The Supreme Court has three types of jurisdiction. The first, and arguably the most important, is to hear and determine disputes relating to presidential elections.[153] The second is to hear and determine appeals from decisions of the Court of Appeal in cases involving interpretation or application of the constitution;[154] and matters of general public interest that transcend the private adversarial interests of specific litigants.[155] The right of appeal under the first category is automatic. A litigant who seeks to appeal under the latter category, however, must first obtain a certificate to the effect that the case meets the applicable admissibility threshold.[156] Lastly, the Supreme Court has a jurisdiction to issue advisory opinions on matters relating to devolution and county governments.[157]

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[151] See e.g. Muthomi Thiankolu, 'Standards of Review and Resolution of Electoral Disputes in Kenya: A Review of the Jurisdiction of the High Court; The Court of Appeal; and the Supreme Court' in Collins Odote and Linda Musumba (Eds), Balancing the Scales of Electoral Justice 114, 132-148; James Otieno-Odek, 'Transmutation of Kenya Superior Court Jurisdiction: From Pyramidal to Hour-Glass Jurisdictional System' (Law Society of Kenya Annual Conference, Mombasa, August 2014); Ahmednasir Abdullahi, 'The Limits of Prescriptive Reforms: The Struggle and Challenges of Judicial Reforms in Kenya, 2002 to 2010' (Annual Judges Conference, Mombasa, August 2015); George Kegoro, Who's Smarter Now? Questions Linger as Supreme Court Halts Appeal Rulings Daily Nation (Nairobi, 19 July 2014) *<https://mobile.nation.co.ke/news/Whos-smarter-now-Questions-as-Supreme-court-halts-Appeal/-/1950946/2390742/-/format/xhtml/-/gnxjh7z/-/index.html>* accessed 21 March 2019.

[152] Ibid.

[153] The 2010 Constitution, arts. 140 (1) and 163 (3) (a).

[154] Ibid art. 163 (4) (a).

[155] Ibid art. 163 (4) (b).

[156] Ibid art. 163 (4) (b) and (5).

[157] Ibid art. 163 (6).

The Supreme Court, therefore, does not have a general appellate jurisdiction. Most stakeholders, including the Supreme Court, initially accepted this basic truism.[158] Early decisions of the Supreme Court affirmed the idea that its appellate jurisdiction is narrow and highly circumscribed:[159]

> In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.

The Supreme Court initially disavowed attempts to expand its appellate jurisdiction through: Parliamentary enactments, statutory interpretation, or 'judicial craft or innovation.'[160] Subsequently, however, the Supreme Court made several radical, inconsistent and 'gluttonous' departures from this narrow approach to its appellate jurisdiction, especially in electoral disputes.[161]

The Supreme Court had, as at the time of writing this article, invented many inconsistent and irreconcilable rules on its appellate jurisdiction. The first disavows casual invocation of the appellate jurisdiction of the Supreme Court, the rationale being that other courts have professional competence to resolve complex questions of law, leaving only cases of 'jurisprudential moment' for further and final input from the Supreme Court.[162] The second is that election laws and regulations are 'normative derivatives' of the principles embodied in the Constitution, and that a court that interprets them cannot disengage from the Constitution.[163] This rule effectively permits litigants to challenge decisions of the Court of Appeal at the Supreme Court as of right, even where such decisions had little or nothing to do with the interpretation of the 2010 Constitution.[164] The third rule, which is

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[158] See eg Jackton Boma Ojwang, 'Supreme Court of Kenya: Insider's Perspective on the Emerging Groundwork'<*http://kenyalaw.org/kl/index.php?id=4158*> accessed 21 March 2019.

[159] *Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others* [2012 eKLR, para 30. See also *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* [2012 eKLR para 15.

[160] *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, para 68. See also *In the Matter of the Interim Independent Electoral Commission* [2011] eKLR, para 30.

[161] Muthomi Thiankolu, 'Standards of Review and Resolution of Electoral Disputes in Kenya: A Review of the Jurisdiction of the High Court, the Court of Appeal and the Supreme Court' in Collins Odote and Linda Musumba (Eds), *Balancing the Scales of Electoral Justice* 134.

[162] *Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others* [2012 eKLR, para 30. See also *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* [2012 eKLR para 15.

[163] *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* [2014] eKLR, para 77 (Ojwang and Wanjala SCJJ).

[164] Ibid para 69. All the litigant needs is to demonstrate is that 'the conclusions which led to the determination of the issue [at the Court of Appeal], put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.'

inconsistent with the second rule, is that the issue of constitutional interpretation or application must have arisen at the Court of Appeal, and that the appellant 'must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter.'[165] The fourth rule, which is partly inconsistent with the third rule, requires appellants to demonstrate that the issue of constitutional interpretation or application was 'a central theme of constitutional controversy' in the lower courts:

> The Articles of the Constitution cited by a party as requiring interpretation or application by this Court must have required interpretation or application at the trial Court, and must have been a subject of appeal at the Court of Appeal… [T]he Article in question must have remained a central theme of constitutional controversy in the life of the cause…[T]he said constitutional provision must have been a subject of determination at the trial Court…a party must indicate to this Court, in specific terms, the issue requiring the interpretation or application of the Constitution, and must signal the perceived difficulty or impropriety with the Appellate Court's decision.[166]

The fifth rule says that the appellate jurisdiction of the Supreme Court in electoral disputes is limited to 'matters of law' only.[167] A sixth rule, which is inconsistent with the fifth, allows the Supreme Court to not only consider matters of fact but also admit fresh evidence in exercise of its appellate jurisdiction in electoral disputes.[168]

The multiple conflicting jurisdictional rules that the Supreme Court has invented make it impossible for any legal practitioner or litigant to form a reasoned opinion on the admissibility of any specific electoral dispute or other politically-sensitive appeal. A leading (and controversial) legal practitioner recently made the following submission before the Supreme Court:[169]

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[165] See eg *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* [2015] eKLR;*Richard Nyagaka Tong'i v Chris Munga N. Bichage & 2 Others* [2015] eKLR;*Lawrence Nduttu & 6000 Others v Kenya Breweries Limited & Another* [2012] eKLR.

[166] *Zebedeo John Opore v Independent Electoral and Boundaries Commission & 2 Others* [2018] eKLR.

[167] *Chris Munga N Bichage v Richard Nyagaka Tong'i, Independent Electoral and Boundaries Commission & Robert K Ngeny* [2014] eKLR, para 48.

[168] *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others* [2019] eKLR.

[169] *Republic v Ahmad Abolfadhi Mohammed & Another,* Supreme Court Petition No. 39 of 2018 [2019] eKLR (ruling on contempt 15 March 2019). For an analysis of the Supreme Court's controversial and ever-expanding appellate jurisdiction in electoral disputes, see Muthomi Thiankolu, 'Standards of Review and Resolution of Electoral Disputes in Kenya: A Review of the Jurisdiction of the High Court; The Court of Appeal; and the Supreme Court,' in Collins Odote and Linda Musumba (Eds), *Balancing the Scales of Electoral Justice*.

> This Court is exercising illegitimate political power without any lawful jurisdiction… [W]e wish to state in the most emphatic manner that the Court is biased against the respondents, lacks impartiality, and the very minimum ingredient of independence from the State and its agents…This Court is a jurisprudential train wreck! It is incoherent. It is unpersuasive. It is unfaithful to the Constitution and is churning out constitutional interpretations that are at best, counterfeit. This Court sees no limit to its jurisdiction and power. Its jurisdiction is infinite and interminable…. [T]his Court sometimes appears jurisprudentially like a headless chicken…you change so many times, you bend with every breeze…

The Supreme Court has issued many conflicting decisions on many aspects of elections and electoral dispute resolution. Specifically, the Supreme Court has made two or more irreconcilable decisions on, *inter alia*, the appellate jurisdiction of the Supreme Court in electoral disputes (discussed in the preceding section), the appellate jurisdiction of the Court of Appeal in electoral disputes the admissibility pre-election disputes and the scope of and implications of irregularities disclosed by scrutiny or recount of votes.

3.3.2 Appellate Jurisdiction of the Court of Appeal

Comparatively, the Court of Appeal usually makes better decisions than the Supreme Court in electoral disputes. Differently put, the Court of Appeal generally makes decisions that are more consistent with the ideal of free and fair elections than the Supreme Court. The Supreme Court, however, routinely reverses sound Court of Appeal decisions through legal sophistry, on the pretext that the latter court exceeded its appellate jurisdiction.[170] The relevant decisions tend to revolve around a controversial, and arguably unconstitutional, provision of the Elections Act that restricts the appellate jurisdiction of the Court of Appeal to 'matters of law only.'[171] In *Gatirau Peter Munya v Independent Electoral and Boundaries Commission & 2 Others,* which reversed the decision of the Court of Appeal for delving into matters of fact, the Supreme Court appeared to equivocate on whether the Court of Appeal could consider facts: [172]

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[170] George Kegoro, Who's Smarter Now? Questions Linger as Supreme Court Halts Appeal Rulings Daily Nation (Nairobi, 19 July 2014) <*https://mobile.nation.co.ke/news/Whos-smarter-now-Questions-as-Supreme-court-halts-Appeal/-/1950946/2390742/-/format/xhtml/-/gnxjh7z/-/index.html*> accessed 21 March 2019.

[171] The Elections Act, s 85A.

[172] *Gatirau Peter Munya v Independent Electoral and Boundaries Commission & 2 Others* [2014] eKLR, paras 82-92.

> [82] …a petition (*sic*) which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted...
>
> [92] It is not for this Court to issue edicts to the Court of Appeal on how it should exercise its [appellate] jurisdiction. The process of evaluating evidence is not a mechanical one; and we agree with learned counsel…that in considering "matters of law," an appellate Court is not expected to shut its mind to the evidence on record. We are unable, thus, to hold that, by the mere fact of having considered matters of fact, the learned Judges of Appeal acted in excess of jurisdiction.

The problem with the above dictum, and many other relevant Supreme Court judgments, is that it is ambivalent. Specifically, it creates a leeway for the Supreme Court to whimsically decide, on a case by case basis, the circumstances and extent to which the Court of Appeal can consider matters of fact. Further, although the Supreme Court often censures the Court of Appeal for re-examining the probative value or 'calibrating' evidence adduced before an election court, the Supreme Court itself invariably re-examines the probative value and 'calibrates' such evidence. Indeed, the Supreme has, in at least one highly controversial decision, admitted fresh evidence in a final election petition appeal.[173] It is inconceivable that the restriction of appellate jurisdiction to 'matters of law only' applies to a first appellate court (i.e. the Court of Appeal) but not a second appellate court (i.e. the Supreme Court).

3.3.3 Admissibility of Pre-Election Disputes

Pre-election disputes (e.g. those relating to nomination and eligibility of candidates) must, generally, be referred to the IEBC or the Political Parties Disputes Tribunal (PPDT) before recourse to litigation.[174] The Supreme Court held, in Advisory Opinion No. 2 of 2012, that an election is a process rather than an event.[175] Consequently, the Supreme Court further held, the rule requiring referral of pre-election disputes to the IEBC or the PPDT does not oust the jurisdiction the courts to entertain such disputes: [176]

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[173] *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 5 Others* [2019] eKLR.

[174] Judiciary Committee on Elections, *The Judiciary Bench Book on Electoral Dispute Resolution* (The Judiciary 2017) 32-34.

[175] *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012) eKLR, para 100.

[176] Ibid.

> A Presidential election, much like other elected-assembly elections, is not lodged in a single event; it is, in effect, a process set in a plurality of stages. Article 137 of the Constitution provides for "qualifications and disqualifications for election as President" – and this touches on the tasks of agencies such as political parties which deal with early stages of nomination; it touches also on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute would still have clear bearing on the conduct of the Presidential election.

The Judiciary entertained many pre-election disputes and annulled many elections based on irregularities in nomination and other pre-election stages, based on the rule in Advisory Opinion No. 2 of 2012.[177] In *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 5 others*, however, the Supreme Court controversially held, in a decision that upheld a flawed election, that election courts have no jurisdiction to entertain 'pre-election' disputes.[178]

3.3.4 Scrutiny and Recount of Votes

The Supreme Court has made many conflicting decisions on scrutiny and recount of votes. Generally, the conflicting decisions revolve around whether a petitioner must establish a basis for an order for scrutiny or recount; the courts can nullify an election on account of errors and irregularities disclosed by scrutiny or recount; and the scope of scrutiny and recount.

The Supreme Court had ordered scrutiny or recount *suo moto* in all the presidential election disputes it had handled as at the time of writing this article. The Supreme Court had also generally upheld the power and discretion of election courts to order scrutiny or recount of votes *suo moto*. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others,* however, the Supreme Court held that scrutiny and recount do not lie as a matter of course, and a party desiring such a remedy must not only establish the basis for it but also specify the polling stations in which scrutiny or recount is to be conducted.[179]

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[177] Judiciary Committee on Elections, *The Judiciary Bench Book on Electoral Dispute Resolution* (The Judiciary 2017) 33-34.

[178] *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 5 Others* [2019] eKLR.

[179] *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, para 153.

The second controversy on scrutiny and recount relates to whether an election court is bound to consider the irregularities and malpractices disclosed by the scrutiny and recount. In 2013, the Supreme Court ignored serious errors and irregularities revealed by scrutiny of votes cast in the presidential election. In 2017, the Supreme Court nullified the presidential election on account of errors and irregularities disclosed by scrutiny. The Supreme Court, however, refused to consider the errors and irregularities disclosed by scrutiny of the votes cast at the repeat presidential election.

3.3.5 Inclination to Incumbency

The Supreme Court (and the Judiciary) generally invokes legal sophistry to ensure outcomes that favour incumbency. Although the Supreme Court has a knack for reversing sound decisions of the Court of Appeal, it invariably upholds such decisions whenever they favour incumbency. In other words, incumbents seldom lose electoral disputes. Indeed, the Supreme Court has only issued two decisions against incumbents, and countless decisions against non-incumbents, since its establishment in 2012.

4. Conclusion

This article has examined the contribution of the Judiciary in promoting free and fair elections, and the rise and entrenchment of legal sophistry as the dominant judicial approach to electoral dispute resolution in Kenya. Legal sophistry generally entails making superficially sound but disingenuous and deeply flawed decisions. Based on the matters discussed in this article, it can safely be concluded that legal sophistry is inconsistent with constitutional role of the Judiciary in promoting free and fair elections. Legal sophistry is also inconsistent with the transformative agenda of the 2010 Constitution, which (*inter alia*) requires the Judiciary to promote the values and principles embodied in the Constitution and determine (electoral) disputes without undue regard to technicalities of law and procedure.