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1. INTRODUCTION

An overview of developments in Africa over the last two decades (after the democratic reforms of the 1990s) reveals a growing commitment by governments to hold periodic elections. However, the quality and credibility of elections held in the recent past have ignited the debate on the role of elections in the democratization process. The inescapable question in this debate is whether elections, by themselves, are synonymous with democracy. The crucial role that elections play in efforts to entrench democratic governance within the continent cannot be overemphasized. However, a consensus has emerged, that periodic elections, while an important element of democracy, are not by themselves, a guarantee for sustainable democracy.1

In Africa, the significance of elections in the democratic process is evidenced by several regional legal instruments that have been adopted to promote elections as a means of enhancing democratic governance in Africa. These legal instruments include: The African Charter on Human and Peoples’ Rights (adopted in 1981), the Declaration on the Principles Governing Democratic Elections in Africa (adopted in 2002), and the African Charter on Democracy, Elections and Governance (adopted in 2007). The prominent place accorded to elections is because of their democratization and conflict prevention potential. Elections are able to help minimize conflict and enhance democratization by providing a platform for an electorate to participate in government, they create in them a sense of ownership over the political process and thereby reduce political tension. However, when elections are mismanaged, they can foment violence and derail democratization. The post-2007 electoral violence in Kenya, 2008 in Zimbabwe and 2010 in Ivory Coast, perfectly illustrates the conflict generating capability of elections.

Despite many one-party regimes having been abolished after the democratisation wave of the early 1990s, challenges of holding free and fair elections persist. The doubtful character of the quality of elections in the continent has implications on how judicial intervention in electoral disputes in Africa should be conceived. It is an observable phenomenon that increasing election fraud is consistent with declining quality of election, which in turn leads to a high rate of disputed elections in courts.2 This is so because if election fraud becomes widespread, it tends to reduce the quality of elections, thereby increasing the likelihood of election disputes in courts.

The judiciary’s impartiality, competence, and independence are very crucial in electoral disputes adjudication because the acceptance or rejection of its decision as legitimate has

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ramifications for whether democratization is advanced or not. Where the judiciary is perceived to be compromised, its involvement in resolving presidential election disputes has sparked violent conflict, for example, Cote d’Ivoire’s Constitutional Council’s proclamation of Laurent Gbagbo as the winner of the 2010 presidential elections, contrary to the announcement of the Electoral Management Body (EMB) that Alassane Ouattara had won the elections.

2. CONCEPTUALISING CREDIBLE ELECTIONS, ELECTORAL CYCLE AND ELECTORAL JUSTICE

The term credible elections gained prominence following the first elections in the 1990s after the advent of multi-party politics in Africa. According to the various literature, the origin of the terminology is traceable to the term “free and fair” which was an ambitious and a higher threshold for assessing elections in different parts of the world. Following the end of the Cold War, the classic literature focused on demarcating the core elements of democratic theory and identified “free and fair elections” as one of its variables. However, in practice, attaining the purity associated with free and fair elections became a pipe dream. In its various elements, credible elections denotes an election that is held substantially in accordance with the provision of the law and which is largely perceived by the citizens to be fair.

Electoral Cycle is the complimentary and interrelated phases that collectively make up the electoral process. As defined by the International Institute for Democracy Assistance (IDEA), the electoral cycle is the step by step processes that begin with the promulgation of electoral laws, and include processes such as the delimitation of constituencies, voter registration, procurement of electoral materials, party nominations, campaign, election day activities and concludes with the resolution of electoral disputes. In its various conception, electoral cycle anticipates conclusion and finality in electoral process.

Analysis of elections in the continent especially in Kenya, Democratic Republic of Congo (DRC), Chad, Gabon, and Zimbabwe has led to a new phenomenon called the “Inconclusive Electoral Cycle.” The inability to remedy and cure shortcomings and challenges that are prevalent in the major phases of an electoral process, and importing the same to the new electoral cycle, aptly defines the term inconclusive electoral cycle. This lead to a situation where a country is permanently in an electioneering mood, and contextual issues in one election, are not addressed and recur in the next one. Since the first multi-party election in Kenya in 1992, the country has permanently been in a campaign period making it difficult to close the electoral cycle with finality. Professor Nic Cheeseman argues that since 1990, Kenya has been embroiled in an almost continuous election campaign that is recalibrated, but not actually brought to an end, by the elections themselves. A major characteristics of inconclusive

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electoral cycle, is that electoral reforms are either outrightly stalled or skewed leading to biased electoral outcomes⁷, (Kenya, Nigeria, DRC, Zimbabwe, Zambia and Uganda).

The emergence of electoral authoritarianism and the rise to illiberal democracy led to the quest for electoral justice⁸. By definition, electoral justice denotes an electoral process that substantially conform to the legal and constitutional framework for elections and that are reflective and responsive to the will of the electorates. The principle of equality of the vote (every vote counts), underlie the justification for electoral justice⁹. At the core of electoral justice is the existence of effective Electoral Dispute Resolution (EDR) mechanism, undertaken by the Judiciary. A genuine possibility of redress to election disputes can only be achieved if at least three factors are embedded in the electoral adjudication process, namely; The process must be fair and perceived to be fair by litigants and the public; transparency based on known rules and legal principles; finality and expeditious resolution of disputes without any delay.

3. THE NEXUS BETWEEN HUMAN RIGHTS AND ELECTION DISPUTES RESOLUTION (EDR)

The nexus between elections and human rights is now a settled principle. The right to participate in the electoral process either as a candidate or as a voter, is inextricably linked to established human rights principles and normative framework. The affirmation of the nexus between election and human rights is aptly captured in the Universal Declaration on Human Rights, Article 21 which states that “The will of the people shall be the basis of authority of government, this will shall be expressed in periodic and genuine elections which shall be by universal suffrage and shall be held by a secret vote or by equivalent free voting procedures. The International Covenant on Civil and Political Rights (ICCPR), in Article 25, not only affirms article 21 of UHDR, but also underscore the obligations on state parties to uphold democratic elections¹⁰.

UDHR outlines, fundamental rights and freedoms applicable to elections that were later enshrined in the ICCPR, including the freedom of thought and conscience; freedom of opinion and expression; the right to peaceful assembly and association; the right to an effective remedy, equality before the law and freedom from discrimination; the right to take part in the government of one’s country; and the right to equal access to public service.

The convergence point between elections, democracy and dispute resolution is founded on the concept of constitutional liberalism. As defined by Fareed Zakaria, the concept denotes a political system marked not only by free and fair elections, but also include the rule of law, separation of powers, and the protection of civil liberties of speech, assembly, religion and the

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¹⁰ Article 25 (3) of the ICCPR states that “Every Citizen has a right to vote or to be elected at genuine and periodic elections, which shall be by universal or equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the voters”. 
right to information\. Constitutional liberalism locates the role of the judiciary as the custodian for the rule of law, which also forms the basis for EDR. Effective EDR is only possible when prerequisites, such as the availability of effective remedies, an independent judiciary and the possibility to be heard in a fair trial with due process guarantees are respected.

International commitments require states to have an effective and fair election dispute resolution mechanism. Article 2(3)(a) of the International Covenant on Civil and Political Rights (ICCPR), requires State Parties to the covenant, to ensure an effective remedy for breach of rights. These fundamental rights include rights such as the right to vote and be elected at genuine periodic elections listed under article 25 of the ICCPR. The right to an effective remedy for violation of rights is also enshrined in the Universal Declaration of Human Rights, at Article 8.

General Comment No. 25 of the Human Rights Committee at Paragraph 20 further notes that, “[t]here should be … access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes”. ICCPR, Article 14 states that all persons shall be equal before the courts and tribunals.

Available remedies for electoral disputes in the legal framework should be examined with respect to their effectiveness. In general, to be effective, remedies should be capable of discontinuing an ongoing violation, making reparations to individuals whose rights have been violated, bringing to justice perpetrators of the violation and preventing similar infringements in the future.

At the African Regional level, the African Charter on Human and Peoples' Rights (also known as the Banjul Charter) at article 7(1) (a) the right to have their cause heard against acts of violation of fundamental rights. These rights include the right provided for in Article 13 (1) of the African Charter on Human and Peoples' Rights, which states: “Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law”.

Furthermore, Article 17 (2) and (4) of the African Charter on Democracy, Elections and Governance states: “State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union’s Declaration on the Principles Governing Democratic Elections in Africa.

To this end, State Parties shall:

(2) Establish and strengthen national mechanisms that redress election-related disputes in a timely manner.

(4) Ensure that there is a binding code of conduct governing legally recognized political stakeholders, government and other political actors prior, during and after elections. The code

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12 General Comments are authoritative interpretations of the provisions of human rights treaties provided by the treaty bodies which oversee the treaties' implementation. The Human Rights Committee is the treaty body responsible for the ICCPR.
shall include a commitment by political stakeholders to accept the results of the election or challenge them in through exclusively legal channels.”

The dictum by Justice Njoki S. Ndung’u in her Dissenting Opinion in *Raila Odinga (2017) Election Petition* underscores the place of human rights in EDR. She observes thus:

> “An election cause is a right-centric cause. At the heart of a Petition challenging the results of a presidential election is the right to vote in free and fair elections. This right is at the epicenter of Kenya’s democratic character as a Republican state.”

It thus follows that to be in line with international human rights commitments and practice, an EDR framework must be rooted in law, it must provide for an appeal from decisions of the EMB. Broadly, EDR mechanisms should have clear demarcation of the levels of authority and jurisdictions between courts and electoral bodies. These mechanisms should be accessible to every individual and political party and be prompt within the timeframe of the election. The process should not be costly. It should be transparent and easy to follow having specified forms and clear deadlines.

It follows that the right to a fair and public hearing within a reasonable time, before an independent and impartial tribunal stands at the very core of EDR. This also includes the right to present legal arguments and to be represented by a lawyer of one’s choice and the right to be promptly and officially informed of any decision taken. The complainant and individuals whose rights and interests will be directly affected by an election dispute must be given an opportunity to be heard.

### 3.1 Rights that are Often at Stake in Election Disputes

In every democratic system, human rights protect democracy because freedom and political rights are prerequisites for electoral contestation. This is due to the need for informed participation, and all the electorates have a right to get information about the candidates because they will represent their views. Various international organisations, among them the United Nations Office for the High Commission on Human Rights (OHCHR), The United Nation Declarations of Principles for International Election Observation and the Code of Conduct, the National Democratic Institute, NDI, and the Carter Center, have developed a criteria to assess the prerequisite rights inherent in the electoral process.

Unpacking the UHDR, ICCPR, ACDEG, and other International and Regional Instruments demonstrate that freedom rights and political rights are often at stake in election disputes resolution. Freedom rights are important given that the participants in electoral contestation have to be able to express themselves, to present themselves to the electorate, to create a distinct profile for themselves, and to make the electorates familiar with their political program, hence the importance of the freedom of expression, freedom of assembly, freedom of association, right to access information, and right to fair hearing and equality before the law. Political rights are also considered to be significant and guaranteed by the electoral law and correspond to the fundamental rights where freedom of speech and expression incorporates the right to choose
that ensure the participation of the citizen. This also applies to the case of those countries that have entrenched the right to free and fair elections, for example in Kenya\textsuperscript{13}.

Accordingly, the right to vote, the right to be a candidate, the right to form political parties, the right to hold public meetings, the right to criticize government, the right to hold public office, the right to access information, the right to free and fair elections, are the rights that are often subject to adjudication in election petitions. Amongst these political rights, the right to vote, the right to be candidate, and the right to free and fair elections, are often the most contested in EDR processes as these political rights are treated as electoral rights.

The right to contest election or to be elected, to represent the people is inalienable right in democratic countries except in certain conditions where the law of the state prohibit for offences. The right is a corollary to the right to vote and most of the countries grant this privilege of contesting election to different legislative bodies without any discrimination.

### 3.2 Modes of Electoral Dispute Resolution in Africa

Electoral laws establish different systems for the resolution of electoral disputes. Resolution of electoral disputes is done both at the pre-election as well as post-election stage. Pre-election disputes normally focus on occurrences during the electoral cycle before the actual elections, while post-election disputes are done pursuant to the declaration of results. To complement the judicial approach to electoral disputes resolution, a number of countries, notably, Ghana and South Africa, have adopted Alternative Dispute Resolution models that involve the Inter Parties Advisory Committee (IPAC), and the Multi-Party Liaison Committee (MPLC).

Electoral frameworks and administrative practices for election complaints adjudication must be based on the unique cultural, political and legal traditions in each country. No single approach or model works everywhere.

Different systems can be distinguished as follows:

- Systems for the resolution of electoral disputes which are based on a system of judicial appeals (which can be used to challenge the planning, undertaking and results of both legislative and presidential elections);
- Systems for the resolution of electoral disputes which are carried out by political institutions (congresses or representatives which can review whether the elected officials’ history can be considered legal or not, and by ruling over electoral appeals), and
- Those which can be seen as alternative systems of resolution of electoral disputes.

Therefore, based on the methods and institutions established by modern electoral legislation, there are two core distinguishable models of resolution of electoral disputes: political systems are those carried out by political assemblies, and judicial systems are those carried out by

\textsuperscript{13} Article 38, Constitution of Kenya 2010
judicial or by quasi-judicial institutions. In addition, there are alternative systems for the resolution of electoral disputes usually adopted by countries that have experienced post-election conflicts. Such systems involve the intervention of international agencies empowered to resolve electoral disputes. (Examples include Kenya in 2008, Zimbabwe 2008, and Cote d’Ivoire 2010-2011)

Judicial systems can be also be distinguished from each other. The criteria to do so is based on the nature of the Court empowered to handle electoral disputes brought before it. There are systems in which ordinary courts (i.e. the judicial branch of government) review electoral disputes (Examples include: Kenya, Uganda, Nigeria, Zimbabwe, Ghana, Zambia, Malawi).

In some other places, specialized tribunals (external or internal to the Judicial Branch of Government) undertake such a responsibility (such is the case of so-called electoral courts or tribunals prevailing in Latin America, this is not common in Africa). However, an example of a specialized electoral tribunal for a segment of electoral disputes can be seen in the case of Kenya’s Political Parties Disputes Tribunal and the Electoral Management Body (IEBC) that have been exclusive jurisdiction to handle pre-election disputes to the exclusion of the judiciary.

In other jurisdictions, constitutional courts are empowered to sort out electoral disputes (this is common in Francophone Africa, civil law countries e.g. Democratic Republic of Congo, Cameroon, Cote D’Ivoire). It is important to note that the idea of vesting the powers to sort out electoral disputes in non-ordinary courts is aimed at preventing ordinary judges from getting involved in political disputes or being subject to political parties’ pressure. The Independent Electoral Commission Act of South Africa establishes a special Electoral Court to deal with electoral disputes. However, in most jurisdictions in Africa, a special division of the High Court is established for the purposes of adjudicating electoral disputes.

Determination of presidential election disputes in countries such as Kenya, Ghana, Uganda, Nigeria, Zambia, DRC, among others is vested on the Supreme Court which enjoys exclusive original jurisdiction in the determination of such disputes. As the apex court, the decision of the Supreme Court is final.

Whichever systems are adopted, it is important that the legal framework is clear because, ambiguous or conflicting jurisdictions among courts and administrative bodies are confusing and unfair to political parties, candidates, the news media and the voting public. For example, systems that allow the choice of venues to appeal may result in counterproductive results including duplication, dual appeals, institutional rivalry and ‘forum shopping’.

4 JUDICIAL INTERVENTIONS AND EMERGING ELECTORAL LAW JURISPRUDENCE IN AFRICA

Overview of Judicial Intervention in Election Petitions in Africa
Court involvement is an essential element of the entire electoral cycle. The courts “ensure that each action, procedure and decision related to the electoral process is in line with the law”.\textsuperscript{14} Electoral dispute resolution (EDR) systems are thus an integral part of the architecture of democracy. Providing a peaceful means for the resolution of electoral grievances, such systems help mitigate the risk that disgruntled candidates and voters will resort to violence. EDR systems also provide an independent assessment of the compliance of the election with the relevant constitutional standards and related electoral laws. More generally, when electoral violence is not a pronounced risk, dispute resolution mechanisms can confer credibility on electoral processes and their results, thus helping to improve public confidence in democratic institutions.

Because of the competitive nature of elections, both pre- and post- election disputes are almost inevitable. It is therefore essential to have in place a credible and transparent system to address allegations of electoral malpractice. Whilst electoral commissions often have general responsibility for the settlement of disputes prior to the election itself, the traditional approach in most countries is for post-election challenges to be brought to the appropriate court by way of an election petition.

In recognition of this and in order to resolve electoral disputes in a civil manner, constitutions and legislations in most African countries provide for the judicial challenge of election results, particularly Presidential election results. Good examples include article 44 of the 1991 Constitution of the Republic of Sierra Leone; article 104(1) of the 1995 Constitution of Uganda; section 139(1)(a) of the 1999 Constitution of the Federal Republic of Nigeria; article 64(1) of the 1992 Constitution of Ghana; and article 140(1) of the 2010 Constitution of Kenya.

However, Tanzania seems to be the only African country with a constitutional provision that ousts the jurisdiction of the judiciary from hearing challenges to presidential elections. The Tanzanian constitution categorically states, at Article 41(7) Constitution: “When a candidate is declared by the Electoral Commission to have been duly elected in accordance with this Article, then, no court of law shall have any jurisdiction to inquire into the election of that candidate.” Such a provision can only assume that elections will always be impeccable, something which is of course at variance with the African experience. This is a blatant denial of the possibility of seeking judicial redress in case of a grievance. Even where grievances may be ill-founded, the offer of a possible judicial remedy provides a peaceful means of venting frustration instead of resorting to violent protests.

Following these guarantees of access to justice by the enumerated constitutions, there is a burgeoning practice in Africa whereby losing candidates in presidential and other electoral contests challenge the validity of electoral results declared by Election Management Bodies (EMBs). This has been brought about by the increased competitive nature of elections, especially presidential elections; the development of politics of rights in the continent; and the continuing spread of democratization across the continent.

One prominent reason, amongst those enumerated earlier, for increased involvement of the courts in adjudication of presidential election disputes that needs to be emphasized is the competitive nature of most presidential elections in Africa due to the fact that most African states have adopted presidential systems of government. In a presidential democracy, the president wields substantial powers, and the influence that comes with the office makes it very attractive. However, even after the post-1990s democratization wave, African leaders are not ready to let go of power. Rachel Ellett argues that in Africa “the new leaders of the continent … are systematically obstructing the liberalization of the political system in an effort to remain in power as long as possible…” 15 thereby “choking off the channels of political change….” 16 The consequence is that election rigging becomes commonplace in most presidential democracies. Under this condition, candidates or parties disadvantaged by the process usually approach courts for electoral justice.

In recent years, there has been a substantial increase in the filing of presidential electoral disputes for purposes of resolution by the courts. This trend which can be observed across the continent has placed courts at the centre of the resolution of presidential election disputes as well as other electoral disputes. Some of the countries that have so far contributed to the current jurisprudence in Africa in presidential election disputes are Kenya, Zambia, Malawi, Namibia, Nigeria, Uganda, Sierra Leone, Ghana, and Zimbabwe.

There have been many decisions on the presidential election petitions that have been heard by the courts. Some of the recent and most famous in that regard have come from Abubakar v Yar’Adua filed in Nigeria (2008) 1 SC 77 (Nigeria), Nana Akufo-Addo v John Dramani Mahama (Writ No. J1/6/2013) (Ghana), Movement for Democratic Change v The Chairperson of the Zimbabwe Electoral Commission (Case CCZ71/2013) (Zimbabwe), Besigye v Yoweri Museveni (2007 UCSC 24) (Uganda), Anerson Kambela Mazoka and 2 others v Levy Patrick Mwanawasa and 2 others (SCZ/EP/01/02/03/2002) (Zambia), Sierra Leone People’s Party v National Electoral Commission and others (S.C. Civ. App. No. 2/2011) (Sierra Leone), Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others, Petition 5, 3 & 4 of 2013 (Kenya), Amama Mbabazi v Museveni & Ors (PEP No. O1 OF 2016) [2016] UGSC 3 (Uganda), Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others, Presidential Petition 1 of 2017 (Kenya), John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others, Petition 2 & 4 of 2017 (Consolidated) (Kenya), and Chamisa v Mnangagwa & 24 Others (CCZ 42/18) [2018] ZWCC 42 (Zimbabwe).

Despite increased court visibility in election contests, the failure rate of election disputes in the continent remains high and its effect on body polity is contested. In all those countries, with the exception of the Raila Odinga (2017) judgment by the Supreme Court of Kenya, none of the Courts where the presidential election dispute was referred annulled the presidential election results as declared by the EMBs.

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There are interrelated explanations why the courts consistently fail to upturn presidential elections in Africa. These will be discussed below.

4.1 Distinguishing Electoral Irregularity and Illegality: Examining the Threshold for Invalidating a Presidential Elections

One of the central doctrines in the adjudication of election petitions is the time-honoured doctrine of substantial effect which originates from British electoral law. Presently it is embodied in the United Kingdom Representation of People Act (1983) under section 23(3), thus:

“No parliamentary election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the parliamentary elections rules if it appears to the tribunal having cognizance of the question that— (a) the election was so conducted as to be substantially in accordance with the law as to elections; and (b) the act or omission did not affect its result.”

This doctrine seems to reverberate throughout electoral legislation in most African countries. However, African judiciaries often abuse the doctrine in order to maintain the status quo rather than preferring substance over form, which is the thrust of the doctrine. For instance, Kaaba notes that ‘the substantial effect rule has worked in the most disingenuous way in Africa to uphold elections fraught with major irregularities and fraud’.17

Most African judiciaries often misapply the oft-quoted principles of this doctrine as outlined by Lord Denning in the celebrated decision in Morgan v Simpson (1974). This was the petition concerning the local election for the Greater London Council in 1973. It so happened that 44 ballot papers were inadvertently not stamped by election officials and as such not counted. The candidate who was declared a winner had a majority of 11, and if the uncounted papers were included the rival would have won by 7 votes. The defense of the election management body was, as usual, that the omission was a small technical error which might not invalidate an election by the principle of substantial effect. The court disagreed and made three very important guidelines in the application of this principle. The guidelines are that:

- if the election was conducted so badly that it was not substantially in accordance with the election law, the election would be vitiated, irrespective of whether or not the result was affected.
- if the election was so conducted that it was substantially in accordance with the law as to elections, it would not be vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election.

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• even though the election was conducted substantially in accordance with the law as to elections, if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election would be vitiated.

These principles have been subjected to prevarications, misinterpretations, and, often at times, misuse by African judiciaries. Before an election is invalidated, both conditions of “non-compliance with the provisions of law” and “affect substantially the result of the election” must exist together. It is not enough to establish evidence of fraud, but such evidence must “affect substantially the result of the election” to warrant invalidation or annulment by the court. What constitutes “non-compliance” that “did not affect substantially the result of the election” remains the prerogative of the judge. How the court interprets and applies this section in election matters has been appalling, particularly when the judiciary is known to be very weak and overtly dependent on the executive arm of government, as it exists in many African countries.

Four cases from Nigeria, Uganda, Zambia, and Ghana elucidate the problematic approach on interpretation of this clause in Africa.

One, the Supreme Court of Nigeria in Buhari v. Obasanjo (2003) admitted evidence of election frauds to include “massive fraud,” “violence,” “inflation of election results,” EMB’s refusal to tender before the tribunal the certified true copies of the Presidential polls, among others. Despite this, the court ruled that the extent of these frauds was not sufficient to cancel the entire poll.

Two, Kizza Besigye vs. Yoweri Kaguta Museveni (2006) decided by the Supreme Court of Uganda, the judges were unanimous that the election was vitiated by disenfranchisement of voters by unlawfully deleting their names from the voters’ register; wrongful counting and tallying of results; bribery; intimidation; violence; multiple voting; and ballot stuffing. By a majority of four to three judges, the court held that the failure to comply with the provisions and principles in statutes did not affect the election in a substantial manner. By a majority of five to two, the court held that although there were illegal practices and other offences, these were not committed by the respondent or his agents, nor were they committed with his knowledge or approval. The substantial effect was the main issue around which the petition revolved and was mainly resolved. The majority dismissed the petition, holding that in determining if the irregularities and malpractices affected the results in a substantial manner, numbers were the sole measuring yardstick. That is, the court could only be moved if “the winning majority would have been reduced in such a way as to put the victory of the winning candidate in doubt.” Since there was nothing indicating that the margin of 1,580,309 votes between respondent and petitioner would have been significantly reduced, the election therefore stood.

Three, Anderson Kambela Mazoka and others vs. Levy Patrick Mwanawasa and others (2002), by the Supreme Court of Zambia was a case brought following the 2001 Zambian general elections. In the Zambian situation, the substantial effect rule was not a statutory requirement but one which was effectively legislated into existence by the Supreme Court in the first ever presidential election petition that followed the 1996 general election. The Supreme Court of
Zambia admitted that there were many flaws in the electoral process, which included the use of the national intelligence in a partisan way, the unlawful use of public resources by the incumbent party and abuse of resources from parastatal companies. While this case was decided in similar ways as the Ugandan case of Besigye v Museveni (2006), it differs significantly in that the substantial effect rule here was expanded to include wide geographical spread of irregularities, in addition to the numbers.

Four, Nana Addo Dankwa Akufo-Addo and others vs. John Dramani Mahama and others (2013) a decision by the Supreme Court of Ghana was a case that arose from the 2012 Ghanaian elections. Although the majority gave various reasons for upholding the election, the common theme was that even if there were these noted anomalies, the election itself was “conducted substantially in accordance with” the Constitution and other laws. But such jurisprudence should be worrying. The anomalies were contrary to the Constitution and other laws, and thus could not just be wished away. Taking them into account meant that the declared winner did not really win the election.

The approach that African courts have taken with respect to the clause of “non-compliance with the provisions of law” and that “did not affect substantially the result of the election” is a giant jurisprudential step backwards. Politicians regularly cash in on these legal gaps to perpetuate electoral frauds because what the winner needs to do is to produce evidence that the election was held in accordance with the law. The simple way to do so is to produce the result of the election. The mere fact of providing “the result of the election,” even if it is from the moon, makes the election result valid which does not approximate to free and fair principles of elections. The court will simply rule that, even though there were cases of election fraud, but such fraud does not substantially affect the result of the election.

It seems inappropriate in a modern democracy to saddle a litigant who has proved substantial breach of electoral laws and/or corruption, to also prove that they had an effect on results. Every voter in a modern democracy is surely entitled to an honest, fair and transparently democratic election. It would certainly not be appropriate for a successful candidate to be heard to say: “I accept I was elected following widespread fraud carried out in my favour but, if you cannot demonstrate to a court that the fraud affected the result, my election stands.”

The Supreme Court of Kenya in the Raila Odinga (2017) judgment deviates from this jurisprudence found in other African countries and correctly restates the role of the Court, which is fidelity to the Constitution and the law. In what is perhaps the Court’s greatest contribution to electoral jurisprudence, it adopted the correct application of the “substantial effect” doctrine. Often election results are affected by honest mistakes, incompetence of election officials, corruption, fraud, violence, intimidation, and other irregularities. Some of these irregularities may be minor and inconsequential. However, many others are significant and bear on the fairness and legitimacy of an election.

The Supreme Court of Kenya interpreted section 83 of the Elections Act on the threshold for invalidating a presidential election result as requiring an election to comply with the principles laid down in the Constitution in order to be valid. Crucially, the court found that the test in
section 83 of the Elections Act required a disjunctive reading, i.e., that one prove either non-compliance with election law or that there were irregularities that affected the election result.

This means that a petitioner can succeed in voiding an election where they satisfactorily prove either that the conduct of the election substantially violated the principles laid down in the Constitution and other written laws on elections or that the election was marred by irregularities and illegalities that affected the result of the election, even though it was conducted substantially in accordance with the principles laid down in the Constitution and other written laws on elections. However, the Court was keen to maintain that not every irregularity would invalidate an election result. It read the words ‘if it appears’ as contained in section 83 of the Elections Act as implying a requirement that any irregularities be substantial.

4.2 Procedural Technicalities Vs Substantive Law.

Adjudication is a formal and institutionalised method of reasoned conflict resolution. Its goal is to settle disputes fairly and on the basis of applicable laws. In order to decide cases fairly and render substantive justice, courts need procedural or technical rules to guide the handling of the cases before them. In a way, it can be said that courts fly on two wings of rules: substantive and technical or procedural rules. Those rules that apply to the fairness or merits of the case are considered substantive rules and those that govern the manner of resolving a dispute are considered technical or procedural. Procedural rules and technicalities are manifestly “handmaids rather than mistresses” of substantive justice.

In modern societies, people submit their conflicts to courts in order that courts may look at their merits, without unduly being fettered by technicalities, and have the cases decided fairly. Judges, therefore, have a duty to do substantive justice. In some countries, this has been made a Constitutional norm. The recently enacted Constitutions of Kenya, Zambia, and Zimbabwe for example, require that “justice shall be administered without undue regard to procedural technicalities.”

A review of presidential petitions across Africa, however, reveals a disappointing record of courts that “shy away from this sacred duty by hiding behind technicalities.” Often presidential petitions have been struck out by courts on flimsy and curable technicalities, without considering the merits of the case. When an aggrieved petitioner is sent away from the court, without consideration of merits, that often shatters their confidence in the justice system and negates both the rule of law and consolidation of democracy.

Examples of how the judiciary in Africa has usually avoided doing substantial justice in presidential election cases and dismissed them on flimsy procedural technicalities include the following:

One, Mwai Kibaki Vs. Daniel Toroitich Arap Moi (1998) the petition was thrown out by the Kenyan Court of Appeal on procedural technicalities to do with the service of the petition. The petitioner had served the petition by way of publication in the government Gazette, since the respondent had not furnished details of his advocates as provided for in the rule. The petitioner did not effect personal or direct service because the respondent, as president “is surrounded by a massive ring of security which is not possible to penetrate.”
Two, Kenneth Stanley Matiba vs. Daniel Toroitich Arap Moi and others (1993), the High Court of Kenya struck out a presidential election petition on account of failure by the petitioner, who had suffered stroke, to sign the petition in person.

Three, Rally for Democracy and Progress and others vs. Electoral Commission of Namibia and others (2010) the Petition was thrown out by the Namibian High Court Section 10 of the Namibian Electoral Act (1992) required that election petitions could only be presented within 30 days of the results being announced. The petitioner presented their petition on the 30th day at 1630hrs and, therefore, within the statutory requirement. The Registrar of the High Court accepted the petition. However, a rule of court did not allow filing of process any day after 1500hrs. Because the petition was filed after 1500hrs, the court held that the petition was invalid for being filed out of time, and therefore, there was no valid petition to adjudicate on in the eyes of the law.

Four, John Opong Benjamin and others vs. National Electoral Commission and Others (2013), the Supreme Court of Sierra Leone struck out the petition holding that it was filed out of time due to delay in payment of costs (despite the fact that the petition itself was filed within stipulated timelines) and for not complying with the need to indicate the contacts for lawyers in a separate notice to be filed at the court’s registry as required.

Legal technicalities such as refusal of the Judge to admit some sensitive exhibit thereby excluding substantial evidence or even when a sensitive exhibit is admitted, such evidence is ignored in the course of judgment.

4.3 Burden and Standard of Proof

Given that the allegations by the unsuccessful presidential candidate(s) often include charges of criminal or quasi-criminal conduct on the part of the respondent(s), a key issue in every case concerns the burden and standard of proof to be applied by the court.

On the burden of proof, the ordinary tenets of the law of evidence are that the person who makes the allegation must have proof. In Odinga v Independent Electoral and Boundaries Commission and Others, (2013) and (2017) cases the Supreme Court of Kenya, and the Supreme Court of Ghana in case of Akufo-Addo v Mahama (2013) as regards the burden of proof, adopted the approach of the Uganda Supreme Court in the Besigye v Museveni [2001]. In the Ugandan case it was held that the burden of proof in election petitions lies on the petitioner to prove not only that there had been non-compliance with the law but also that such failure affected the validity of the election itself.

The onus is therefore on the petitioner to prove electoral irregularity. However, ‘once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election...then the evidentiary burden shifts to the respondent... to adduce evidence rebutting that assertion’ (Raila Odinga case 2017). The onus of rebuttal then shifts to the election

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management body to demonstrate that the election was substantially conducted in compliance with the law.

Under this approach, the legal burden of proof of evidence placed substantially on the petitioner(s). However, where the material evidence required include essential election data like voters registered, used and unused ballot papers, result sheets, and other materials which are at the custody of EMB the evidential burden should be imposed on the EMB and not the petitioner.

Alongside the notion of the burden of proof is that of the standard of proof. Here there is a divergence of opinion as to the appropriate standard and this is well-illustrated by the presidential petition cases in the continent.

In ordinary common law practice, the standard of proof in civil matters is on the balance of probabilities. This is a lower scale than used in criminal matters; the criminal scale is higher as it requires proof beyond reasonable doubt. There is a raging controversy on whether the standard in election petitions is a civil or criminal standard. This controversy is based on the fact that more often than not, there are quasi-criminal allegations made in election petitions such as bribery, fraud, corruption and undue influence. In ordinary litigation, allegations about violations of electoral law are civil and therefore proof would ordinarily require the lower (civil) standard of proof. But this is complicated by the quasi-criminal allegations that often accompany the civil allegations.

The Kenyan Supreme Court jurisprudence is much more helpful in solving this conundrum. The court in the landmark decision in Odenga v Independent Electoral and Boundaries Commission (2017) struck a sensitive balance between the criminal standard (beyond reasonable doubt) and the civil (balance of probabilities) standard. The court convincingly posited that: “... where no allegations of a criminal or quasi-criminal nature are made in an election petition, an “intermediate standard of proof”, one beyond the ordinary civil litigation standard of proof on a balance of probabilities, but below the criminal standard of beyond reasonable doubt, is applied”.

The court was building on the jurisprudence it had started in 2013 in the case of Raila Odinga v Independent Electoral and Boundaries Commission (2013), where the court had already started to hint that the standard of proof in elections disputes is slightly higher than the civil standard but below the criminal standard; the court should therefore maintain a very sensitive balance between these two scales.

The rationale for this approach is twofold; firstly, it is because of the quasi-criminal nature of some of the allegations which often inhere in elections petitions. Secondly, it is because of the principle of omnia praesumuntur rite et solemniter esse acta (the presumption of correctness or validity of an election). There is an existing rebuttable presumption that when people have voted, such election is valid and must be given effect.

Two earlier decisions from Commonwealth African courts had supported this approach. In Lewanika and Others v Chiluba (1999) the petitioners had alleged that there was bribery, fraud and other electoral irregularities in a presidential election in Zambia and sought its nullification.
Ngulube, CJ, giving the judgment of the court, stated: “... we wish to assert that it cannot be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher that on a mere balance of probability…… where the petition has been brought under constitutional provisions and would impact upon the governance of the nation and the deployment of the constitutional power and authority, no less a standard of proof is required. It follows also the issues raised are required to be established to a fairly high degree of convincing clarity”.

Similarly, in Besigye v Museveni (2001) the unsuccessful presidential candidate had alleged that the respondents were responsible for a series of offences and other illegal electoral practices. Odoki CJ having referred to the decision of Lord Denning in Bater v Bater (1951) with approval, asserted that in election petitions the “standard of proof is very high because the subject matter of the petition is of critical importance to the welfare of the people of Uganda and their democratic governance”.

As regards the application of an intermediate standard, there are several inter-related arguments to support its adoption. Firstly, given their subject matter, presidential petition cases are “peculiar civil proceedings” meriting special treatment. Secondly, it is argued that judges must avoid the “political question” for the national Constitution has entrusted the people with the task of electing their President. Thus imposing a high standard of proof on petitioners can be seen as a way of ensuring that the most sensitive of “political questions” is avoided as well as any “counter-majoritarianism” arguments whilst offering judges some protection from undue political pressure or concerns as to their independence.

The question of what constitutes the appropriate “intermediate standard” is not explored in any of the cases. Instead various phrases are suggested including a “fairly high degree of convincing clarity”, “above the balance of probability”, and a “very high standard of proof”. Such opaqueness concerning this so-called “high evidential hurdle” is liable to seriously impact on those with a meritorious case and reinforces the argument that the standard of proof is merely being used as a convenient mechanism to prevent/deter challenges to presidential elections.

However, there is a different approach. In the well-known case of Jugnauth v Ringadoo and Others, (2003) the Judicial Committee of the Privy Council affirmed the decision of the Supreme Court of Mauritius, nullifying the election of the appellant, a Member of Parliament and Minister of the Government. Lord Rodger of Earlsferry, giving the judgment of the Board emphasised that “there is no question of the court applying any kind of intermediate standard” and accordingly: “It follows that the issue for the election court was whether the petitioner had established, on the balance of probabilities, that the election was affected by bribery in the manner specified in the petition.”

This view is reflected in the Akufo-Addo -vs.- Mahama case (2013) where the majority of the judges of the Supreme Court of Ghana adopted the approach of Atuguba JSC who was content to apply section 12 of the Evidence Act 1975 of Ghana which provided that the standard of proof is by a “preponderance of probabilities”. In doing so, he emphasised that “The standard of proof in especially election petitions, a species of a civil case, is on the balance of
probabilities or preponderance of probabilities”. (A similar view was taken by Justices Owusu, Dotse, Baffoe-Bonnie, and Akoto-Bamfo in their separate opinions)

Regarding the embrace of the ‘balance of probabilities” approach by the Supreme Court of Ghana, it is worth noting that an election court is widely (and arguably correctly) viewed as being a civil court. From this perspective the imposition of a lower standard of proof is justified. Whilst a person found to have been involved in electoral malpractice may face serious consequences, including being disqualified from participation in future elections, an election court does not impose criminal penalties. This is a matter for a criminal court which is very different animal, especially given the application of the right to a fair trial provisions and the restrictive rules as to the admissibility of evidence.

4.4 Appellate Jurisdiction of the (Apex) Supreme Courts in Election Petitions for other Elective Offices

The rationale for the requirement of timeous resolution of election petitions is that, whilst everyone has a right to seek recourse from the courts for any grievance, post-election litigation has the potential to ‘harm the ideals of finality, certainty, and legitimacy in the election process’. In fact, there are scholars who strongly recommend measures to discourage post-election litigation completely or, at least, impose measures to disincentivise it. The proposed measures range from finality clauses, strict procedures and heavy costs for such litigation.

This need for timeous resolution of election disputes has implication for how apex courts approach the question of whether they have second or third appellate jurisdictions in down-stream electoral contests. Uganda and Ghana have taken an approach that bar second appeals in electoral disputes while the Kenyan Supreme Court has tended to take up appellate jurisdiction in second appeals in electoral disputes.

The Supreme Court of Kenya in Zebedeo John Opore v Independent Electoral and Boundaries Commission & 2 others, (2018) and in Gitarau Peter Munya v Dickson Mwenda Kithinji (2014) has held that it has jurisdiction in second appeals in down-stream elections tried before the High Court and subsequently appealed to the Court of Appeal in first appeals.

It is noteworthy that a second or third appeal goes against the need for expeditious resolution of electoral disputes. A second or third right of appeal negates the ethos of timeous resolution of electoral dispute.

In Ghana, the High Court has the jurisdiction to hear cases concerning the validity of election of a Member of Parliament by virtue of Article 99 (1) of the 1992 Constitution of Ghana. Article 99(2) of the Constitution further provides that ‘[a] person aggrieved by the determination of the High Court... may appeal to the Court of Appeal’. The Supreme Court of Ghana In Re Parliamentary Election for Wulensi Constituency: Zakaria v. Nyimakan (2003-2004) has held that the import of the said Article 99(2) of the Constitution of Ghana is that an appeal against

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the decision of the High court on the validity of the election of Members of Parliament ends at the Appeal Court and cannot go beyond to the Supreme Court of Ghana. Within the contexts of parliamentary election petition, the right of appeal ends at the Court of Appeal. Consequently, Article 131(1) of the 1992 Constitution of Ghana which provides for the right of appeal from the judgement of the Appeal Court to the Supreme Court in respect of criminal and civil matters does not apply to the Appeal Court’s decisions on parliamentary election. This is a denial of the constitutional right of the aggrieved to have their grievances pursued up to the highest court of the land.

Similarly, for Uganda, the Supreme Court of Uganda has adopted a similar approach to that in Ghana. In Baku Raphael Obudra & Another v Attorney General (2005) the Supreme Court held that the Section 67(3) of the Parliamentary Elections Act, 2001 that provides that appeals to the Court of Appeal are final in electoral causes was not unconstitutional.

The point is that delays in the resolution of electoral disputes create uncertainty in the transitional process. Thus, where a contested position is being disputed in court it creates uncertainty for the one who had been declared the winner by the election results and also the electorates as well the one who is disputing the declared result. Expeditious resolution of election petitions by the courts is imperative for orderly democratic transitions.

4.5 Finality of the Presidential Votes Declared at the Polling Station and the Role of EMB in the Verification of Results at the National Level

The Kenyan Court of Appeal in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others, (2017) held that the constituency presidential election results were final once declared and announced by the respective returning officers. It followed that such a declaration by the constituency returning officer was not subject to alteration by any person or authority other than the election court. The court held that the results declared by constituency returning officers are final and can only be challenged in an election court. The Court of Appeal found that to suggest that that a law empowered the Chairperson of the IEBC to correct, alter, modify, or adjust the results electronically transmitted to the national tallying centre from the constituency was to donate an illegitimate power. Such a law would introduce opaqueness and arbitrariness to the electoral process. The constitutional role of the IEBC under article 138(10) of the Constitution is limited to tallying all the results received from constituency returning officers country-wide.21

The approach adopted by the Kenyan Court of Appeal helps curb the common accusation that EMB’s in African countries tinker and alter electoral results in favour of incumbent presidents or political parties. The recently concluded election in DRC is a case in a point.

4.6 Scrutiny

One of the key features of an electoral court which often eludes courts in Africa is that it has the discrete feature of inquisitorial adjudication. The common law practice of adjudication of disputes is ordinarily adversarial, whereby the court sits passively to hear the case of each party before it within strict rules and procedures. An election court is an exception to this practice. It is not bound by the strict procedures and rules of evidence that are common with ordinary adjudication; it goes even beyond the evidence already provided by the parties to inquire into the substance of the allegations made.

Many a time the best evidence in electoral disputes is to be found in electoral materials such as used ballot papers, which invariably are in the hands of the respondents. Thus, it is virtually impossible that the petitioner can approach a court of law already armed with evidence which is in the hands of the opponent. This is the problem confronted by the petitioner in the most recent Zimbabwean case of Nelson Chamisa v Emerson Mnangagwa and Others (2018). The court dismissed the petition on the grounds, inter alia, that the petitioner failed to discharge the burden of proof by producing primary evidence in the form of ballots and V11 Forms. This position of the court does not accord with the principles of the adjudication of electoral disputes. The court ought to have been inquisitorial and called that kind of evidence it considered crucial for deciding the petition in a just and fair manner; rather than being adversarial and expecting the petitioner to produce evidence that is for all intents and purposes in the hands of the respondents.

Petitioners challenging the outcome of election results often face the pragmatic challenge that many a time the best evidence in electoral disputes is to be found in electoral materials such as used ballot papers and the forms used for declaration of the result, which invariably are in the hands of the Electoral Commission. Thus, it is virtually impossible that a petitioner can approach a court of law already armed with evidence which is in the hands of the opponent. One of the solutions devised in EDR jurisprudence to deal with this challenge is the use of the mechanism of scrutiny of electoral materials. By making an order of scrutiny, a court sanctions a court supervised forensic investigation into the validity of an election.

The Supreme Court of Kenya in both the Raila Odinga (2013) and (2017) Election Petitions held that an election court could, on its own motion (suo moto) or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court would determine. It should however be stressed that the legal principle governing scrutiny of votes is that, when there is evidence of tampering or interference with the election materials, then scrutiny should not be ordered.

4.7 Timeframe for Lodging and Resolving Presidential Petitions.

Judicial system is a public resource that must be managed so as to ensure that the right of the public to have access to a court to resolve their disputes is not empty rhetoric. It is often said that justice delayed is justice denied, hence it is essential that electoral disputes are resolved within reasonable time.
Failure to expeditiously resolve presidential election disputes has the effect of plunging a country’s business environment into a state of uncertainty, reduces investor confidence in the political stability of a state, and causes investors to delay investment decisions. Apart from the huge economic implications of delayed determination of presidential election disputes, delays in bringing closure to presidential election disputes can have far reaching political consequences: increased political tensions, deepening of polarization, and impeding social cohesion.

However, experiences from at least Ghana, Nigeria, and Sierra Leone have shown that an inordinately long period of time is spent on the resolution of presidential election petitions. The blame for the tardiness can be apportioned to courts and also to the absence of fixed timetables for the determination of presidential election petitions in the constitutions or legislations of these countries.

On the other hand, stringent timelines for filing and resolving presidential election disputes in Kenya, Zimbabwe, and Zambia while have worked to ensure expeditious resolution of justice, have also brought with it questions of the quality of justice rendered by the courts. In these three countries, a petitioner is required to file a presidential election petition within 7 days of the declaration of results, and the courts are required to hear and determine the petition within 14 days of filing. While Kenya and Zimbabwe have been able to hear and determine Presidential Election Petitions within 14 days after filing, this has not been the experience for Zambia.

*Hakainde Hichilema and Another v Edgar Lungu and others (2016)* a case filed followed the Zambian general elections of 2016 brought these concerns to the fore. The Zambian Constitutional Court was unable to hear and determine the presidential election petition within the stipulated 14 days. This was caused mainly due to poor case and time management by both the court and the parties to the dispute. According to the judges in the majority, once the time limit set for the petition lapsed, then the petition stood dismissed on that technicality.

The position in Ghana is different. It is only the timelines for the institution of presidential election disputes that is stipulated in the constitution. According to article 64(1), a presidential election petition must be filed in the Supreme Court within 21 days after the declaration of presidential election results. Beyond this, the Ghanaian Constitution is silent on the time by which the dispute must be determined. For example, in the *Nana Akufo-Addo case*, the Petition was filed on 28th December 2012 and judgment was delivered on 29th August 2013, thus it took the Supreme Court of Ghana 8 months to deliver the judgment. Clearly this state of the law cannot be ideal.

Another concern is that unlike in Kenya, Zimbabwe, and Zambia, in countries like Ghana and Nigeria, the institution of a presidential election dispute does not preclude the person whose victory is challenged from being sworn in as president. The swearing in of the person whose victory is disputed creates an unlevel playing field as the petitioners must contest against a sitting president. Furthermore, it defeats the essence of the challenge, which is determine whether the president-elect has the legitimate mandate of the electorate to lead the country.
4.8 Costs

Imposition of large sums in costs against losing litigants in election petitions is considered to be punitive and an impediment to the realisation of the right to access justice. Ordinarily, the award of costs is a matter at the discretion of the court. As in all other cases, such discretion has to be exercised judiciously and is dependent on a number of factors including the complexity of the matter at hand, the time consumed in preparation for and during trial among other factors.

Supreme Court of Kenya in the Raila Odinga (2013), (2017) and Mwau & Njonjo (repeat presidential election petition 2017) recognized the public interest nature of presidential election petitions and did not award costs against the losing parties. The same was the approach of the Supreme Court of Uganda in Amama Mbambazi v Museveni & Others, 2016).

However, in a deviation from this approach, the Constitutional Court of Zimbabwe in Nelson Chamisa v Emmerson Mnangagwa (2018) awarded costs against the losing petitioner.

It is important to emphasise that where the courts take the approach of awarding costs against the losing party, the court should endeavour to strike a balance between recovery of costs by the successful party and ensuring that access to justice is not hampered. Costs should not to be prohibitive, debarring legitimate litigants from moving the judicial process. This is so given that inordinately high costs were likely to compromise the constitutional right of access to processes of justice. In sum, award of costs should not bear a punitive profile but should to be guided by principles of fairness, and ready access to motions of justice.

4.8 Adjudicating the Role of Technology in Elections.

The deployment of electoral technology is the new fad in the management of elections in Africa: Biometric Voter Registration has been used in Kenya, Uganda, Tanzania, Nigeria, South Africa, Rwanda and recently in DRC. With the exception of South Africa, the degree to which technology is actually operational and effective in securing electoral integrity in these countries varies. Other forms of technology usually deployed in the electoral process include, Results Transmission System, Results Identification electronic servers among others.

In Africa, the justification for the use of technology was necessitated by years of bad elections, electoral manipulation and other forms of electoral malpractices. Technology was therefore used to cure decades of electoral ills. The jury is however still out whether technology, in and of itself, is a cure for human error. Electoral technology is intended to serve the twin objectives of enhancing efficiency and transparency and accountability in the electoral process. Thus efficiency and transparency must be seen as two mutually reinforcing elements and not exclusive.

A comparative look at recent EDR processes in countries such as Kenya, Nigeria, Sierra Leone, Liberia, Ghana and DRC demonstrate serious challenges in terms of the precise of of technology in elections as well as adjudicating on the utility of technology by the African
Courts. In Kenya for example, dissatisfied with the presidential results in 2013, where the EVIDs and RTS failed, Raila Odinga approached the Supreme Court in the case of Raila Odinga (2013) main argument was based on the failure of technology during the election process. The Supreme Court in dismissing the petition argued that technology in Kenyan election was relevant for the purposes of enhancing efficiency and did not replace the manual system but complemented it. In this regard, the Supreme totally missed the transparency and accountability objectives for the deployment of election technology\(^\text{22}\).

During the 2013-2017 electoral cycle, Kenya embarked on massive investment in technology that also saw the creation of a new legal framework for the use of technology in elections. The new legal framework imposed an obligation on IEBC to use technology in transmission of the presidential results. Willful failure and negligence by IEBC to use technology during the 2017 elections, massive variation of the results led to the Supreme Court departing from its 2013 judgement and found that IEBC had indeed contravened the law.

During the 2012 elections of Ghana, voting in some parts of the country was forced to enter a second day due to failure of some biometric voter verification devices which caused delays at some polling stations. Similar challenges contributed to the extension of voting into a second day in Nigeria’s 2015 elections, although not widespread. Again, during the 2016 Ghana general elections, the Electoral Commission had to abandon electronic transmission of results and resort to manual collation, with the Commission explaining that its electronic systems may have been compromised. In the process, there was a long period (several hours) of silence on the part of the Commission, which had initially been providing periodic updates on the elections. This created some anxiety among sections of the public.

There is fear that electronic election is not safe and susceptible to hacking. In the US, which is the pioneer of election technology, the November 7 2016 elections were alleged to have been hacked by the Russians. In Kenya, the opposition coalition claimed that the election system was hacked to manipulate the electoral results which was vehemently denied by the IEBC. Ireland in 2017 dropped its plans to use voting machines on the ground of insecurity.

While many countries continue to hold regular elections in a bid to enhance democracy, the credibility of the elections has become a subject of concern. However, technology alone cannot solve electoral malpractices especially in emerging democracies. Critics of election technology have argued that influential actors seek to fetishize technology and promote the digital fallacy that technology can improve electoral quality and democracy.

Ultimately, the threshold for deploying and utilizing technology must meet the constitutional threshold. This is the decision that the German Constitutional Court reached when the question of ICT in elections was referred to it. In sum, technology only works if there is a working ethical and legal framework designed to go with it. Technology itself is morally neutral and

can stop electoral fraud only when four basic conditions are met. One, the electronic database must have integrity. Two, the link between the database and voter identification system at the polling station must be sound. Three, officials at the station polling station must know how to use the technology. Finally, the support infrastructure- reliable power supply, good connectivity and security- must be in place. If these conditions are not met, electoral technology will turn out to be mere extravagance.

5 CHALLENGES OF ELECTORAL JUSTICE IN AFRICA AND POSSIBLE SOLUTIONS

Judiciary in Africa face considerable challenges in the resolution of electoral disputes, below are some of the challenges.

5.1 Constitutional, Legal and Institutional Framework for Elections in Africa

The challenges of holding credible elections has persisted in Africa since the restoration of multi-party politics in the early 1990s. While a number of countries have, since 1990, held elections that met the credibility threshold, majority of countries in the continent have shuttled between outright electoral authoritarianism and electoral façade held for the purposes of ticking the democratic box for periodic elections\(^\text{23}\). In many African states, the interface between the imperial neopatrimonial regimes, the overwhelming hold of ruling parties on the electoral process, and weaknesses in the constitutional, legal and institutional framework for elections, present imminent problems in consolidating electoral democracy, and effective functioning of Elections Management Bodies (EMBs)\(^\text{24}\). The net effect of the foregoing is the re-emergence of electoral violence as a new manifestation of conflict in the post-cold war Africa\(^\text{25}\).

Based on various election observation reports, majority of countries in Africa now profess multi party political dispensation, and have made provision for the representation of the people in their constitutional and legal frameworks. Paradoxically, the constitutional and legal frameworks have not translated into credible elections, and more often than not, lack effective mechanisms for the resolution of disputes. Weaknesses in the legal framework for elections in Africa is traceable to the narrow objective that characterized the clamour for the restoration of multi-party politics. While the reintroduction of pluralistic politics was a celebrated affair, the overarching goal that defined the struggle was the repeal of constitutional provisions that had outlawed multi party politics, while leaving intact the retrogressive clauses that had perpetuated the single party dictatorships.\(^\text{26}\)

On a positive note however, constitutions enacted post the “the second liberation”, notably, In South Africa and Kenya, are regarded as both transformative and progressive. The


\(^{26}\) Khadiagala G, Reflections on the Causes, Courses and Consequences of Election Violence in Africa’ in Matlosa K, Khadiagala G and Shale V (eds), *When Elephants Fight: Preventing and Resolving Election-Related Conflicts in Africa* (EISA 2010)
transformative nature of these constitutions are inherent in their value based approach as evidenced by the elaborate chapters on the Bill of Rights, reconfiguration of state through devolution/federalism, transparency and accountability and detailed provisions on the representation of the people. To strengthen the constitutional, legal and institutional framework for elections, the following solutions can considered:

- Need for comprehensive constitutional review and electoral law reforms. The new constitutional framework should be neo liberal in nature incorporating transformative and progressive provisions.
- Strengthening election management and administration (EMBs).
- Domestication of international and normative framework for elections and human rights, among them, UHDR, ICCPR, ACDEG.
- Strengthening legal framework for Election Dispute Resolution (EDR)- Judiciary.
- Strengthening constitutionalism and the rule of law as a mitigation to electoral authoritarianism and impunity.

5.2 Judicial Independence and the Doctrine of Separation of Powers

Following the annulment of the Kenyan presidential elections by the Supreme Court, President Uhuru Kenyatta, went on a public rage and threatened the Supreme Court with “revisiting the matter” once the repeat presidential election had been dispensed with. Soon after Edgar Lungu, the President of Zambia, advised the Zambian Judiciary not to follow “the misguided example of the Kenyan judiciary” in determining the Presidential dispute in his country. While the two cases appeared isolated, the relationship between the judiciary and other arms of government namely; the Executive and the Legislature, has been a thorny issue in Africa since independence.

The doctrine of separation of powers and judicial independence is at the core of constitutional democracy and deal with allocation of power and constraints of the same by imposing appropriate checks and balances27. In its various conception, separation of power operates to define the Executive, Judiciary, and the Legislature as equal and co-arms of government. However in practice, the Judiciary has been on the receiving end at the hands of overbearing Executive and the Legislature. During the single party regimes in Africa, the doctrine of separation of powers was undermined by the incumbent presidents through centralization of powers in the executive and emasculation of the judiciary and the legislature.

On a positive note, the recent transformative constitutions establish strong accountability frameworks and empower Judiciary to review legislative and executive actions. The jurisdiction to determine the constitutionality of state actions, interpretation of the constitution and especially the Chapter on the Bill of Rights is vested in the Judiciary. Strong, effective and independent Judiciary is necessary to safeguard rights and freedoms including upholding credible and democratic elections.

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To insulate the Judiciary from the Executive, there is need to establish the Judicial Service Commission as an independent constitutional commission to deal with relevant issues affecting the Judiciary including appointments and tenure of office.

5.3 Budgetary Constraints

One of the challenges that still face Judiciary in Africa is lack of funds characterized by budgetary cuts and constraints. Judiciary all over the world rely on the Executive for financial appropriation. Comparatively across Africa, studies have shown that one of the most effective tool to undermine the independence of the Judiciary is to impose budgetary cuts and restrictions. In Kenya for example, in 2018 financial year, the Judiciary submitted a budget of Kshs 31 Billion (USD 310 million), however the amount allocated for the Judiciary was Kshs 14.5 billion which was effectively 50% of the amount the Judiciary had requested. Financial constraints undermine judicial independence and the overall administration of Justice, including electoral dispute resolution.

- To guarantee financial autonomy, a consultative process of budget making involving the executive and the legislature should be considered.
- Establishment of the Judiciary Fund possibly drawn directly from the consolidated fund.

5.4 Deep State and State Capture.

While used interchangeably, state capture and deep state denotes different but interrelated meanings. State capture is defined as a systemic political corruption in which private interests significantly influence state’s decision to their own advantage. Deep state on the other hand, is a clandestine network of cartels entrenched inside the government, bureaucracy, intelligence agencies and other governmental entities. The deep state controls state policy behind the scene while elected or appointed officials remain mere figureheads. In transitional democracies, (which comprise majority of African countries), deep state and state capture define an emerging form of corruption that is both systemic and entrenched. Deep state and state capture are governed by two factors; the fear of losing power and greed for primitive accumulation.

The foregoing makes elections in Africa a high stake game where the price of winning or losing is very high. One of the consequences of heightened stakes in the electoral process is the capture and control of all electoral institutions including EMBs and the judiciary. In Kenya, Nigeria, Uganda, and DRC, the election observer reports noted that, the prevalence of deep state and state capture was so entrenched and permeated the entire political, social and economic fabric. Since the advent of multi-party politics in Africa, the manifestation of deep state and state capture has dominated the electoral process and routinely determine and influence the electoral outcome. In South Africa for example, the threat posed by State Capture

28 See Wachira Maina, ‘State Capture during the 2017 elections in Kenya, Published by the Africa Center for Open Governance (Africog)
29 See for example the African Union, European Union International election observation reports in these countries.
recently led to the Constitutional Court directing the newly elected African National Congress (ANC) President Cyril Ramaphosa to appoint a Judiciary led inquiry into state capture, system of patronage, corruption and influence peddling under President Jacob Zuma regime.

5.5 Corruption
Endemic and systemic corruption rampant in Africa has not spared the Judiciary. Corruption undermine administration of justice and destroy the faith and confidence on the vary institution that should safeguard the rule of law and promote good governance. High stake elections in Africa that involve big money, improper influence on the Judiciary to give favourable outcome, undermine the consolidation of electoral democracy.

- Need to put in appropriate mechanism to deal with and address corruption in the Judiciary.

5.6 Training of Judicial Officers on EDR
Electoral Dispute Resolution is *sui generis* that involve resolution of complex and competing dynamics in the electoral process. As a result, the jurisprudence that has emerged is that EDR is located somewhere in between criminal and civil proceedings. While judicial officers are well trained and command good knowledge of the constitution and the statutory framework for elections, resolution of electoral disputes require specialized induction on the political context, electoral cycle, legal and institutional framework for elections. Unfortunately, most countries in Africa have not invested in specialized training of electoral courts when the EDR process is initiated.

Perhaps the best case study in this context is the practice in Kenya, where a permanent committee of the Judiciary, called the Judiciary Committee on Elections (JCE) has been established and work to train and prepare judges and magistrates in between elections. A part from training of judges, JCE also develop comprehensive IEC materials that judges use as a guide to facilitate a unified and consistent approach in the decision making process. In the run up to 2017 general elections for example, JCE developed comprehensive Bench Book that outlined constitutional and statutory framework for elections taking into consideration the electoral cycle approach. JCE also develop comprehensive Case Digests that analysed and documented electoral law jurisprudence that applied during the 2017 elections. JCE also convened and participated stakeholders forums and contributed to the electoral reforms agenda.

- It is recommended that the concept of JCE should be replicated in other African countries with modification taking into consideration the political and legal contexts.

6. ELGIA EDR PROJECT
Electoral Law and Governance Institute for Africa (ELGIA), is a continental organization, headquarteried in Nairobi, Kenya, working to strengthen and consolidate constitutional democracy, good governance, rule of law, and electoral processes in Africa. As an electoral
and governance institute, ELGIA works with continental and sub-regional organizations among them the African Union, East African Community (EAC), Southern Africa Development Community (SADC) and ECOWAS. Premised on the reality that stable democratic countries enjoy progressive and transformative constitutional, legal and institutional framework, ELGIA seeks to strengthen governance and political institutions through technical assistance, capacity building, advocacy and research. ELGIA programmes in Kenya focus on the following thematic areas; Strengthening the Electoral Processes and Election Management and Administration; Institutional Strengthening of Governance Institutions (Parliament and Political Parties); Electoral Justice and Electoral Dispute Resolution (Support to the Judiciary); Electoral Conflict Prevention and Management; and Devolution and Local Government.

Using the electoral cycle approach, ELGIA EDR Project in Kenya, aims at supporting institutions engaged in electoral dispute resolution both at the pre-election and post-election stage. To this end, ELGIA works with EDR institutions to strengthen and enhance their capacities to effectively deal with electoral disputes. Among the institutions include; the Political Parties Dispute Tribunal (PPDT), Office of the Registrar of Political Parties, Independent Electoral and Boundaries Commission (IEBC), and the Judiciary Committee on Elections, JCE. Specifically, ELGIA implements the following activities;

- Strengthening the constitutional and legal framework for elections and EDR including constitutional development, law review and election sector law reforms.
- Strengthening the capacity of the political parties internal dispute resolution mechanisms.
- Technical Assistance to Political Parties Dispute Tribunal (PPDT) in the resolution of party disputes.
- Support to the Judiciary Committee on Elections on effective dispute resolution mechanisms.
- Establishing Alternative Dispute Resolution mechanisms and in particular Conflict Mediation Panels to deal with electoral violence mitigation and prevention.
- Research and publication on EDR processes and procedures.

7 CONCLUSION

Where elections have been affected by anomalies and results are disputed, aggrieved parties have looked to the judiciary as an institution of last hope to seek redress. The judiciary is thus faced with the unenviable task of determining the ultimate outcome of the poll. In these circumstances, the essence of judicial intervention has always been to promote democratic culture, strengthen the confidence of the people in the democratic process, and promote constitutionalism and due process in the political system.

Consequently, in order to protect the right to choice in an election, and to promote and safeguard democracy, the judiciary must be perceived as competent, honest, learned and independent. Such a judiciary plays a transformative role in democracy as an impartial referee or umpire in the democratic game.

The following recommendations can enhance the role of courts in electoral adjudication:

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- It is imperative that specific time frames are stipulated in constitutions for the determination of presidential and other election disputes. But in order not to sacrifice efficiency for expedition, the time lines must be reasonable.
- Judiciary’s should adopt administrative reforms that would ensure presidential and other electoral disputes are given priority over other matters in court hearing cause lists.
- Although there is sound policy basis for invalidating election results only where electoral laws have been flagrantly violated as to affect the credibility and integrity of elections, it is equally important that the judiciary shows fidelity to constitutional values and principles that underpin universal suffrage.
REFERENCES


