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Judicial Review and Presidential Elections in Africa

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I. INTRODUCTION

During the 1876 American presidential election, the Democrat Samuel Tilden and the Republican Rutherford B Hayes both claimed victory to the highest executive office in the land. The Democratic-controlled House of Representatives and the Republican-controlled Senate established an Electoral Commission composed of some members of each house and Supreme Court Justices to resolve the presidential election dispute. The 15-member Electoral Commission finally decided in favour of Hayes by an eight-to-seven vote and made him President. In the 2000 presidential election dispute between George W Bush and Al Gore, however, the Supreme Court alone decided who should be the President of the US in a five-to-four vote. One key difference between these two presidential election disputes is the increasing role of the Supreme Court in American democracy and the attendant expansion of its judicial power.¹ But the expansion of judicial power is a global phenomenon and part of what Ran Hirschl characterises as ‘new constitutionalism’ based on juristocracy.² Courts around the world today decide on fundamental moral, political, and policy matters that could define and

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¹ See WH Rehnquist, *Centennial Crisis: The Disputed Election of 1876* (New York, Vintage, 2005).

² R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA, Harvard University Press, 2007).

divide polities, including on elections such as *Bush v Gore*.³ With the reintroduction of democratic constitutions in the 1990s, courts in Africa, some more than others, have been playing an important role as legal and constitutional arbiters, ranging from judging the constitutionality of constitutional amendments⁴ to adjudicating presidential election disputes.

In 2017, the Supreme Court of Kenya nullified the presidential election result in which the incumbent President Uhuru Kenyatta was declared the winner of the presidential race. In 2020, the Supreme Court of Malawi also affirmed the nullification of a disputed presidential election decided by the High Court. While these are cases where the courts nullified a presidential election outcome, there are also several examples in which they affirmed a contested result, such as, for example, in Ghana, Namibia, Zambia, and Zimbabwe, to mention but a few.⁵ There are also several presidential election petitions that courts have struck down before considering the merits on procedural grounds. Presidential elections are usually challenged in Africa, and today, more than ever, there is a greater likelihood that courts will decide on these contested elections. This means that presidential elections may require the contesting parties to undertake not only election campaigns and promises to obtain the votes of their citizens, but also to prepare a legal argument to convince courts that they won the election in a free, fair, and democratic process or that they lost the election because of some election-related illegalities or irregularities. In election periods, courts then may have to be ready to solve any possible election disputes, not least because these require a timely resolution. For better or worse, there is an increasing trend toward the judicialisation of presidential elections on the continent.

While the jurisprudence on presidential election disputes in Africa is still developing, courts have used two major doctrines for adjudicating such disputes thus far. The first, which is applied in many jurisdictions, is the ‘substantive impact doctrine’, adopted by courts such as

³ See R Hirschl, ‘The Judicialization of Mega-Politics and the Rise of Political Courts’ (2008) 11 *Annual Review of Political Science* 93, 100; AJ Jacobson and M Rosenfeld (eds), *The Longest Night: Polemics and Perspectives on Election 2000* (Berkeley, University of California Press, 2002).

⁴ See *David Ndi and Others v Attorney General and Others*, Petition No E282 of 2020 (High Court of Kenya).

⁵ See OB Kaaba and CM Fombad, ‘Adjudication of Disputed Presidential Elections in Africa’ in CM Fombad and N Steytler (eds), *Democracy, Elections, and Constitutionalism in Africa* (Oxford, Oxford University Press, 2021) 361–99.

the Supreme Courts of Ghana, Zimbabwe, and Namibia, where a disputed presidential election result would be annulled only if the violations of electoral laws and regulations would substantively affect the electoral process and the electoral result. The second, which is new to the continent, is what I called the ‘process-outcome doctrine’, adopted by the Supreme Courts of Kenya and Malawi, where a disputed presidential election result would be annulled either because the violations of electoral laws and regulations have negatively impacted the integrity of the electoral process, or they have affected the result of the election. This chapter explores how courts resolve presidential election disputes using the substantive impact and the process-outcome doctrines and suggests why a more dynamic judicial doctrine may be necessary for the institutional security and legitimacy of the judiciary, as well as the maintenance of the general political and institutional stability necessary for sustainable democracy. But first, the chapter discusses the reasons, drivers, and dynamics behind the judicialisation of presidential election disputes in Africa.

II. THE JUDICIALISATION OF PRESIDENTIAL ELECTIONS

The end of political pluralism and the institutionalisation of one-party systems in the two- or three-decades following independence made military coups the major mechanisms of transfer of power in Africa. While the opening of the political space for multi-party competition with the third wave of democratisation in the 1990s enabled the peaceful transfer of power in many African countries, elections in several other countries did not bring about a transfer of power.⁶ Although many constitutions have term limit provisions, several African leaders have managed to change or evade them through ‘constitutional coups’, ie, via amendments approved by Parliament or the judiciary or in national referenda, to remain in power.⁷ The military has even returned to politics in a number of countries.⁸ Thus, the judicialisation of presidential elections

⁶ T Lodge, ‘Alternation and Leadership Succession in African Democracies’ (2013) 24 *Irish Studies in International Affairs* 21–40.

⁷ See F Reyntjens, ‘Respecting and Circumventing Presidential Term Limits in Sub-Saharan Africa: A Comparative Survey’ (2020) 119 *African Affairs* 275.

⁸ For instance, in Niger (2010), the Central African Republic (2013), Egypt (2013), Mali (2012 and 2020), Guinea Bissau (2012), Burkina Faso (2015), Zimbabwe (2017), Sudan (2019 and 2021), and Guinea (2021).

is one of the emerging trends in electoral politics in *some* African countries. It will be useful to explain the reasons for the judicialisation of presidential elections in these countries before discussing how courts resolve such election disputes and how this may, in turn, impact democratic consolidation in these countries in the long term.

There is no one single explanation for the judicialisation of presidential elections in Africa. But we can at least identify three major factors that have led to this phenomenon: those related to the empowerment of courts to adjudicate election disputes, the motivations of petitioners, and the broader socio-political context. As judicial review and the rights revolution have provided the institutional framework for courts to proactively protect these rights by checking legislative and executive (in)action,⁹ the constitutional empowerment of courts as final arbiters of election disputes has enabled them to check whether presidents are elected in a free, fair, and democratic process. The adjudication of electoral disputes, be it parliamentary or presidential, is one of the main tasks of constitutional review institutions in many African countries.¹⁰ Additionally, many African constitutions have introduced formal mechanisms to ensure the personal and institutional independence of the judiciary, at least in terms of constitutional design.¹¹ Nonetheless, the practical independence of the judiciary is neither an essential element (although very useful) for the judicialisation of presidential elections, nor is such judicialisation a marker of democratic consolidation. But the existence of formal judicial review power over elections and the conduct of periodic elections are necessary conditions for the judicialisation of presidential elections in Africa.¹² In other words, formal constitutional institutions and rules impact and structure electoral politics. For example, it is very unlikely to see presidential election petitions in Tanzania, because their Constitution prohibits the court from hearing such petitions, or in Eritrea, because there have been no presidential elections

⁹ R Hirschl, 'The Judicialization of Politics' in RE Goodin (ed), *The Oxford Handbook of Political Science* (Oxford, Oxford University Press, 2011) 264.

¹⁰ B Kante and HK Prempeh, 'Other Competencies of Constitutional Review Institutions', in M Böckenförde et al., *Judicial Review Systems in West Africa: A Comparative Analysis* (International IDEA, 2016) 101–05.

¹¹ HK Prempeh, 'Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa' (2006) 80 *Tulane Law Review* 57–58.

¹² On the purpose of periodic elections, see N Cheeseman, G Lynch and J Willis, *The Moral Economy of Elections in Africa: Democracy, Voting and Virtue* (Cambridge, Cambridge University Press, 2021).

there to begin with since the country was founded in 1993.¹³ However, despite the executive dominance over the judiciary,¹⁴ every presidential election in Nigeria since 1999, except for the one in 2015, has been contested in court and the petitions dismissed each time. Similarly, every presidential election in Kenya since the adoption of the 2010 Constitution has been contested in court and the results either affirmed or nullified by it, and the emergence of an independent judiciary is an important factor in this judicialisation.¹⁵

The existence of judicial review power over presidential elections requires one or more motivated petitioner(s) to activate the judicialisation process. While courts in many African countries are not simply a rubber stamp for the executive or total bystanders in national political affairs, we also know that judicial independence and public confidence in African judiciaries are not strong, at least not yet. This means that petitioners may have different motivations in choosing the judicial route to resolve presidential election disputes and we could identify three main motivations here. First, like any other litigation,¹⁶ presidential election contenders and/or their political parties may think that they have a reasonably winnable case before a court of law. They may believe that the conduct of the presidential election violated constitutional and electoral laws and regulations and that they have evidence to prove the allegedly committed illegalities and irregularities.¹⁷ If they could present a strong legal case and supporting evidence, they may think that the court has no option but to nullify the election result. But they will never know this without filing a petition to the court. In two such instances, the court decided in favour of the petitioners: in Kenya in 2017 and in Malawi in 2020.

Second, although petitioners may not have a reasonable expectation of winning the case, either because of reasons related to the independence of the judiciary or issues related to the strength of their legal argument and their supporting evidence, they may still go to court

¹³ Art 41(7) of the Constitution of the United Republic of Tanzania.

¹⁴ BA Gebeye, *A Theory of African Constitutionalism* (Oxford, Oxford University Press, 2021) 158–63.

¹⁵ See K Kanyinga and C Odote, 'Judicialisation of Politics and Kenya's 2017 Elections' (2019) 13 *Journal of Eastern African Studies* 235.

¹⁶ See E Spier, 'Litigation' in AM Polinsky and S Shavell (eds), *Handbook of Law and Economics*, Vol 1 (Amsterdam, Elsevier, 2007).

¹⁷ See also LA Nkansah, 'Dispute Resolution and Electoral Justice in Africa: The Way Forward' (2016) 41 *Africa Development / Afrique et Développement* 97, 121–22.

with the objective of exposing the illegalities and irregularities in the conduct of the presidential elections.¹⁸ By doing so they could maintain the momentum of their political base, expose the unfairness of the election to the public, and alert and mobilise civil society, the media, and international development partners about the state of presidential elections in their respective countries, which could create better conditions for the next election.¹⁹ Even when the courts declined to invalidate the disputed presidential election results, as happened, for example, in Ghana (2012), Kenya (2013), and Namibia (2020), they found a number of illegalities and irregularities in the conduct of the elections that could cast some doubt on the fairness and legality of the elections, which, in turn, could impact the legitimacy and credibility of the electoral winner. Additionally, these decisions have led either to electoral reform, as in Ghana, the undertaking of some prospective corrective measures, as in Namibia, or a change of judicial doctrine, as in Kenya.²⁰ Moreover, some of the petitioners eventually became presidents in the following elections, such as Nana Akufo-Addo of Ghana and Muhammadu Buhari of Nigeria. Hence, regardless of the judicial outcome, presidential election petitions play an important role in the electoral politics of different states.

Third, and finally, petitioners, especially in countries which have undertaken new constitutional or judicial reforms, such as Kenya,²¹ may want to test if the judiciary can perform its constitutionally allocated duties and if it could play some role in important national political and policy matters.²² As courts are strategic actors, which want to maintain and enhance their constitutional role and their national political significance and international reputation, they

¹⁸ See also *ibid.*

¹⁹ See JT Gathii, 'Implementing a New Constitution in a Competitive Authoritarian Context: The Case of Kenya' in T Ginsburg and AZ Huq (eds), *From Parchment to Practice: Implementing New Constitutions* (Cambridge, Cambridge University Press, 2020) 230; Y Dotan and M Hofnung, 'Legal Defeats—Political Wins: Why Do Elected Representatives Go to Court?' (2005) 38 *Comparative Political Studies* 75.

²⁰ See RE Van Gyampo, 'The State of Electoral Reforms in Ghana' (2017) 52 *Africa Spectrum* 95.

²¹ Kanyinga and Odote (n 15) 238–39; Gathii (n 19) 226–27.

²² See Gathii (n 19) 226–27; T Ginsburg, 'Courts and New Democracies: Recent Works' (2012) 37 *Law & Social Inquiry* 720.

may consider presidential election petitions as important sites of dialogue, which could further encourage similar petitions in the future.²³

The existence of formal judicial review power over elections and the different motivations of the petitioners alone may not set the judicialisation of presidential elections in motion. The judicialisation of politics, as Hirschl observed, requires some enabling socio-political context that is conducive to and supportive of courts as major decision-making bodies.²⁴ The prevailing socio-political dynamics in each country at a given time could either encourage or discourage presidential contenders to file a petition. The 2017 Kenyan presidential election is an interesting case in this regard. Two days after the voting had ended, international election observation missions had declared that the election was largely free, fair, and credible and that the incumbent President Uhuru Kenyatta had won the election.²⁵ They urged the main presidential contender Raila Odinga to concede defeat. But when Odinga rejected such calls, these election observation missions, along with other nations, especially the US and the EU, pressured him to seek redress from the Supreme Court rather than resorting to mass protest.²⁶ There were also similar calls within the country, especially from church, business, and civil society leaders, that Odinga should follow the legal processes to resolve the dispute.²⁷ After the 2007 post-election violence, which was a *raison d'être* for the adoption of the 2010 Constitution, Odinga could not easily disregard the legal processes for resolving election disputes and resort to mass protest, which could invite similar or even greater post-

²³ Hirschl (n 9) 266–67; T Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge, Cambridge University Press, 2003) 73.

²⁴ Hirschl (n 9) 268–70.

²⁵ D Kahura, 'See No Evil: How International Election Observers Lost Credibility During the August Elections', *The Elephant*, 21 September 2017, www.theelephant.info/features/2017/09/21/see-no-evil-how-international-election-observers-lost-credibility-during-the-august-elections/ (accessed 2 March 2022).

²⁶ S Owino and H Misiko, 'NASA Gives into Pressure over Election Petition Case', *Daily Nation*, 18 August 2017, nation.africa/kenya/news/nasa-gives-in-to-pressure-over-election-petition-case-439424?view=htmlamp (accessed 2 March 2022).

²⁷ T Gathii (n 19) 228–29.

election violence. Moreover, the memories of the 2007 post-election brutality remained alive,²⁸ and could have formed a reminder for the presidential contenders to resort to the Supreme Court, which is the last line of defence against post-election clashes and political instability. On the other hand, Goodluck Jonathan of Nigeria could have challenged the 2015 presidential result (as Buhari did each time he lost a presidential race), but instead he conceded defeat in an unprecedented way in Nigerian political history, partly because the country was in a state of dangerous political and security dynamics and, consequently, may not have sustained further electoral warfare in courts.²⁹ Thus, the prevailing peace and security situation, public opinion, and international pressure could affect a presidential contenders' decision on whether or not to take the judicial route to resolve a disputed election result.

In sum, formal judicial empowerment, motivated petitioners, and the broader socio-political dynamics trigger, facilitate, and structure the judicialisation of presidential elections. Now we turn to exploring how courts apply the substantive impact and process-outcome doctrines to resolve a disputed presidential election, which, in turn, reveals their views on democracy.

III. JUDICIAL DOCTRINES FOR ADJUDICATING PRESIDENTIAL ELECTION DISPUTES

A. The Substantive Impact Doctrine

In outlining the principles for annulling election results, the Supreme Court of Ghana noted that '[f]or starters I would state that the Judiciary in Ghana, like its counterparts in other jurisdictions, does not readily invalidate a public election but often strives in the public interest,

²⁸ D Branch, 'The Fire Next Time: Why Memories of the 2007-8 Post-Election Violence Still Remain Alive', *The Elephant*, 29 July 2017, www.theelephant.info/features/2017/07/29/the-fire-next-time-why-memories-of-the-2007-8-post-election-violence-still-remain-alive/ (accessed 2 March 2022).

²⁹ K Busari, 'Why I Conceded Defeat to Buhari in 2015 – Jonathan', *Premium Times*, 27 October 2017, www.premiumtimesng.com/news/top-news/247451-i-conceded-defeat-buhari-2015-jonathan.html (accessed 2 March 2022); T Cocks and B Felix, 'Nigerian President Warns Against Bloodshed Ahead of Saturday's Vote', *Thomson Reuters*, 27 March 2015, www.reuters.com/article/us-nigeria-election-idUSKBN0MN19620150327 (accessed 2 March 2022).

to sustain it'.³⁰ Similarly, the Constitutional Court of Zimbabwe observed that '[i]t is not for a court to decide elections; it is the people who do so. It is the duty of the courts to strive in the public interest to sustain that which the people have expressed as their will'.³¹ Similar attitudes of the judiciary toward the nullifications of presidential election results are widely shared across the region. In many countries, the court's 'idea of democracy' largely builds on and defends the applicable law of democracy in each jurisdiction with the citation of some comparable foreign case law. In Anglophone Africa in particular, where presidential election disputes are most prevalent, the law regulating election nullification is based on either the received common law or statutory law informed by the principles of the common law. The so-called 'substantive impact doctrine' is the primary legal and jurisprudential tool for many courts to resolve presidential election disputes.

While the substantive impact doctrine may have some peculiar features in different jurisdictions, as we shall see below, its essential element is included in *Halsbury's Laws of England*, as follows:

No election is to 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 appropriate elections rules if it appears to the tribunal having cognizance of the question that the election was conducted substantially in accordance with the law as to the elections, and that the act or omission did not affect the result.³²

According to the substantive impact doctrine, an election will be nullified only when the illegalities and/or irregularities in the conduct of the election have a substantive or adverse impact on the election and election result. Their existence alone may not lead to the invalidation of the said elections. Hence, a petitioner challenging a presidential election result must prove, first, the existence of illegalities and/or irregularities in the conduct of elections and, second, that these have affected the election result. At the core of the substantive impact doctrine is the burden of proof expected from the petitioner(s) and the discretionary powers of judges in identifying permissible and impermissible violations of constitutions, electoral laws, rules, and regulations. A brief analysis of some recent presidential petition cases from Ghana, Zimbabwe,

³⁰ *Nana Addo Dankwa Akufo-Addo & Others v John Dramani Mahama & Others* (Writ J1/6/2013) [Supreme Court of Ghana] 40.

³¹ *Nelson Chamisa v Emmerson Dambudzo Mnangagwa and Others* (CCZ 21/19) 136.

³² HS Giffard Halsbury and JPH Mackay of Clashfern, *Halsbury's Laws of England*, 4th edn (London, LexisNexis Butterworths, 2007) para 670.

and Namibia suffices to show how the substantive impact doctrine is applied in presidential election disputes in Africa.

Since 1992, Ghana has held presidential elections every four years, and has changed the incumbent party three times, which is a pioneering example of the peaceful democratic transfer of power on the continent. The 2012 presidential election result, however, was ultimately affirmed by the Supreme Court applying the substantive impact doctrine. A few days after the conclusion of the presidential election, the Electoral Commission declared John Dramani Mahama, the incumbent President, who had 5,574,761 votes (50.70 per cent), as President of the Republic. But Nana Addo Dankwa Akufo-Addo, the main opposition presidential contender, who received 5,248,898 votes (47.74 per cent), challenged the election result before the Supreme Court, along with his running mate and the chairperson of his party. The main grounds for their petition were over-voting, voting without biometric verification, the absence of the signature of a presiding officer, the duplication of serial numbers on the pink sheets and of polling station codes, and the presence of unknown polling stations.³³ The petitioners asked the court to declare that John Dramani Mahama was not validly elected but instead to declare Nana Addo Dankwa Akufo-Addo as the validly elected President and to make the necessary consequential orders to this effect. In a nutshell, the petitioners argued that: (i) there were violations of electoral laws and regulations in the conduct of the 2012 presidential elections which substantively affected the result of the elections, as well as that; (ii) the voting in 11,916 polling stations was vitiated by gross irregularities and malpractices, and that elections were conducted in some unknown locations that were not part of the 26,002 polling stations prepared for the presidential elections, which fundamentally affected the validity of the results of the elections in those polling stations. They contended that there were 4,670,504 unlawful and irregular votes and if these were annulled, it would be Mr Akufo-Addo, not Mr Mahama, who would satisfy the requirements of the law to be declared as the President of Ghana. The respondents denied all the allegations and claimed that the election was conducted in conformity with the applicable laws and regulations.

As in *Bush v Gore*, *Nana Addo Dankwa Akufo-Addo and Others v John Dramani Mahama and Others* sharply divided the Supreme Court. In a five-to-four vote, the court decided that Mr Mahama was the validly elected President. In reaching this decision, the court

³³ *Nana Addo Dankwa Akufo-Addo & Others v John Dramani Mahama & Others* 3.

focused on the three grounds of the petitioners, namely the allegations of over-voting, voting without biometric verification, and the absence of the signature of a presiding officer, while excluding the other grounds because either it found no merit in considering them or it did not consider them to have any substantial effect on the declared results.³⁴ After consulting its own case law related to constitutional and statutory interpretation and some foreign election cases, the court adopted the substantive impact doctrine.³⁵ The majority found that while there were instances of over-voting and voting without biometric verification, these instances did not adversely impact the outcome of the election result. Similarly, the Court held that although the signature of a presiding officer in polling stations is a constitutional requirement and the absence of such a signature amounts to a constitutional violation, this in and of itself cannot invalidate the otherwise sacred votes of citizens. The Court further stated that:

[T]he underlying purpose of the signatures of the presiding officer and the polling agents on the pink sheets is to provide evidence that the results to which they relate were those generated at the relevant polling station in compliance with the constitutional and other statutory requirements, otherwise each ‘signature in itself has no magic about it’.³⁶

The absence of such a signature is an administrative error that has been corrected in some collation centres and can still be corrected by the order of this Court.³⁷ As the petitioners did not question the authenticity of the results which did not bear the presiding officer’s signature, the Court observed, invalidating those votes on this technical ground might amount to crushing ‘substantive justice’.³⁸ The majority concluded that the election was conducted in substantial compliance with the electoral laws and regulations and that the results of the election did reflect the will of the Ghanaian people.

The minority, however, found that the illegalities and irregularities in the conduct of the 2012 presidential election were substantial and that these affected the results of the election. Many in the minority held the view that the evaluation of the impact of the nullified votes was such that neither Mr Mahama nor Mr Akufo-Addo had obtained the necessary 50 per cent plus

³⁴ *ibid* 4.

³⁵ *ibid* 40–45.

³⁶ *ibid* 18.

³⁷ *ibid* 37.

³⁸ *ibid* 18.

one valid vote threshold to be President of the Republic according to Article 63(3) of the Constitution. Justice Anin Yeboah, for his part, stated that:

[I] would have readily proceeded to grant the reliefs sought in its entirety but the ONLY problem is that from the available evidence, the widespread violations, omissions and malpractices appeared to be of such proportions that it would not be proper for me to declare the first petitioner as winner of the elections in controversy in terms of the reliefs sought. I find the malpractices, omissions and violations enormous which rock the very foundation of free and fair elections as enshrined in our constitution which was itself breached through over-voting, lack of presiding officer's signature and lack of biometric verification which takes its validity from Article 51 of the very constitution.³⁹

For different reasons, the minority was convinced that the election was not conducted in substantive compliance with the law and that the election did not produce a winner that could be declared as President-elect according to the Constitution.

In the absence of a clear statutory law on election nullification, as Justice Adinyira also noted,⁴⁰ the Court followed the substantive impact doctrine to strike some balance between democracy and the rule of law. Given the burden of proof expected from the petitioners and the discretionary power of the judges, as noted above, the substantive impact doctrine often largely defers to electoral management bodies on issues related to the conduct of elections. But even if one accepts the views of the minority, a rerun of the election may have been the more suitable order under the circumstances. This could have required, as the Court observed from the outset, the consideration of some other legitimate public interests, which are no less fundamental than the rerun of elections, such as public finance and the impact that such a decision may have on the political dynamics of the country.⁴¹ Despite the sharply divided views on the judgment, however, the Court noted that the petition exposed the need for electoral reform and recommended some areas for reform.⁴²

Nelson Chamisa v Emmerson Dambudzo Mnangagwa and Others is another case of a presidential petition where the Constitutional Court of Zimbabwe applied the substantive impact doctrine. On 30 July 2018, Zimbabwe held presidential, parliamentary, and local

³⁹ *ibid* 505.

⁴⁰ *ibid* 144.

⁴¹ See also M Azu, 'Lessons from Ghana and Kenya on Why Presidential Election Petitions Usually Fail' (2015) 15 *African Human Rights Law Journal* 150, 165.

⁴² *Nana Addo Dankwa Akufo-Addo & Others v John Dramani Mahama & Others* 48.

elections. On 3 August 2018, the Electoral Commission declared Emmerson Dambudzo Mnangagwa, the incumbent President, who received more than half of the votes cast, as the duly elected President of the Republic. Nelson Chamisa, the opposition candidate, challenged the validity of the election results before the Constitutional Court on more than 18 grounds, which ultimately revolved around two main arguments: (i) that the election was not free, fair, and credible; and (ii) that there were illegalities, irregularities, or malpractices in the conduct of the elections.⁴³ The petitioner asked the court to declare that the 2018 presidential election was neither conducted in accordance with the law nor was it free and fair, and to declare him as the duly elected President instead of Emmerson Dambudzo Mnangagwa. Unlike the case in Ghana, the Court unanimously dismissed the petition on evidentiary grounds.

The Court asked the petitioner to prove: (i) the alleged illegalities and irregularities in the conduct of the election; and (ii) whether these had affected the result of the election. These two tests, which constitute the substantive impact doctrine, unlike Ghana, are found in section 177 of the Electoral Act, which reads:⁴⁴

An election shall be set aside by the Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the Court that, (a) the election was not conducted in accordance with the principles laid down in this Act; and (b) such mistake or non-compliance did affect the result of the election.

After considering the evidence before it, the Court decided that the petitioner even failed to prove the first test, that is, the alleged illegalities and irregularities, with ‘clear, sufficient, direct and credible evidence’ and it found it unnecessary to consider the second test, that is, whether these had affected the result.⁴⁵ This passage from the judgment is instructive of how the Court rendered such a decision:

Without the primary evidence, the applicant did not have proof of the reality of what actually transpired on the day of the vote. He did not have the evidence that is required by the law as cogent evidence for challenging the validity of a Presidential election result...⁴⁶ The applicant did not so much rely on the allegation that the Presidential election was not free, fair and credible on the basis of the generalised and unproved allegations he made against the

⁴³ *Nelson Chamisa v Emmerson Dambudzo Mnangagwa and Others* 47–48.

⁴⁴ See Electoral Act consolidated as at 28 May 2018, available at www.veritaszim.net/node/2424 (accessed 2 March 2022).

⁴⁵ *Nelson Chamisa v Emmerson Dambudzo Mnangagwa and Others* 135.

⁴⁶ *ibid* 99.

Commission. The essence of the case was that the applicant was the winner of the Presidential election. That is the allegation he failed to prove.⁴⁷

Like the Supreme Court of Ghana, the Constitutional Court of Zimbabwe made references to some foreign election petitions, but ultimately resolved the case relying on the Electoral Act that enshrines the substantive impact doctrine.

Panduleni Filemon Bango Itula and Others v Minister of Urban and Rural Development and Others is the latest case from Namibia where the substantive impact doctrine was applied. Like the previous cases, this case offers an interesting context in the application of the substantive impact doctrine. All the petitioners in this case were candidates in the 2019 presidential election, and they asked the Supreme Court to set aside this election and order a new one without undue delay. The main basis for their petition was constitutional and related to section 97 of the Electoral Act of 2014, which deals with the use of voting machines in elections. The Minister of Urban and Rural Development excluded section 97(3) and (4) from application when this Act was promulgated as law in 2014. Section 97(3) requires the use of a verifiable paper trail along with the voting machines and section 97(4) provides that in a case where the results of the paper trails and the results of the voting machines do not match, the results of the paper trails will be accepted as the election outcome. The petitioners argued that both the selective implementation of section 97 of the Electoral Act by the Minister of Urban and Rural Development and the use of voting machines in the 2019 presidential election without a paper trail by the Electoral Commission were unconstitutional.⁴⁸ They also alleged that there were several irregularities related to the voting machines during the election. The respondents argued that the petitioners were unreasonably delayed in challenging the selective implementation of section 97.⁴⁹ The 2014 presidential election was conducted under similar circumstances and some of the applicants who participated in that election did not challenge its legality. Additionally, the respondents submitted that the lawfulness of voting machines without a paper trail was already confirmed by the decision of the High Court in *Maletzky & Others v Electoral Commission of Namibia & Others* 2015 (2) NR 571 (HC) and that this

⁴⁷ *ibid* 135.

⁴⁸ *Panduleni Filemon Bango Itula and Others v Minister of Urban and Rural Development and Others* (A 1/2019) [Supreme Court of Namibia] 4.

⁴⁹ *ibid* 5.

remained the law on this matter as there had been no challenge to this decision.⁵⁰ They also denied the allegation of irregularities related to the voting machines.

Although the Supreme Court concluded that the selective implementation of section 97 by the Minister of Urban and Rural Development was unconstitutional, it found the Electoral Commission's decision to conduct the election without the paper trails acceptable, and, consequently, declined to invalidate the presidential election. In selectively implementing section 97, the Court noted that the Minister not only exercised a power that belongs to the legislature, but also undermined the whole purpose of voting machines as additional, not sole, safeguards for conducting free and fair elections. If the Minister's decision was unconstitutional, the Court asked whether this determination could lead to the invalidation of the presidential election. Here the Court applied the 'materiality test', ie, the substantive impact doctrine, as included in section 115 of the Electoral Act, which provides:

No election may be set aside by any competent Court by reason of any mistake or non-compliance with this Part, if it appears to the Court that the election in question was conducted in accordance with the principles laid down therein and that the mistake or noncompliance did not affect the result of the election.

The issue became whether the conduct of the election without paper trails, which is unconstitutional, had adversely impacted the election and its outcome. The Court found that it had no adverse impact as '[t]he applicants have not shown that the absence of a verifiable paper trail has adversely affected their fundamental right to vote particularly with reference to irregular use of voting machines or their unreliability'.⁵¹ The Court held that the Electoral Commission not only conducted the election in accordance with the applicable law at the time, but also executed its duty without any wrongdoing.

However, unlike the courts in Ghana and Zimbabwe, the Supreme Court of Namibia has gone beyond the substantive impact doctrine in exercising its discretionary power: it put the actions and conducts of the petitioners before the election on trial to test their commitment to and responsibility for participating in democratic elections. If the absence of a paper trail is an important and fundamental issue for the applicants, the Court observed, they should have challenged it before and after the 2015 and 2016 elections, or even much ahead of the 2019 elections. The applicants filed their petition on the eve of the election, only a month before the

⁵⁰ *ibid.*

⁵¹ *ibid* 40.

elections. By doing so, the Court alluded to the fact that the applicants failed to perform their duty to act in a timely manner, which would have created an opportunity to remedy any potential violations of law in the conduct of the elections.⁵² The Court noted in particular that ‘[t]he first applicant, whilst pursuing the remedies provided for in the Act, could also have done so far more expeditiously after becoming aware of the lack of a paper trail and not have waited more than three weeks before launching his application to the Tribunal, given the far reaching relief sought by him – of interdicting the elections’.⁵³ Essentially, the court as a referee expected all presidential contenders to play a ‘fair game’, but the applicants did not play this game fairly. The Supreme Court added these ‘fair play’ criteria in its application of the substantive impact doctrine when it affirmed the election result and ordered a prospective relief about the use of paper trails along with voting machines in future elections.

Although there could be some reasonable disagreements about how each of these three cases are decided, the courts relied on their respective electoral laws or the received common law to affirm their respective disputed presidential election results. We could make three general conclusions from these cases. First, the fact that all parties accepted these court decisions means that there is some sort of commitment to the rule of law in each of these countries, which we should not take for granted. On a continent where political actors use violence or the threat of such to solve a political problem or to achieve a political objective, the rejection of these brutal means and the acceptance of court decisions by the opposition presidential candidates are reasons for celebration. Moreover, this also shows that courts play an important role in resolving election disputes. Second, while there is a long-established bias in Africa that courts decide in favour of incumbents, these cases reveal that we must also pay serious attention to the claims of the opposition as well. For example, while the opposition candidates in Ghana and Zimbabwe claimed that the elections were marred by serious illegalities and irregularities, they still wanted their respective courts to declare them the winners of such elections. In a similar vein, while the opposition candidates in Namibia had ample time, even years, to challenge the selective implementation of section 97, they approached the Court at the last minute. Like the incumbents, the opposition may also want to win by all available means. Hence, decisions on the affirmation of election results may not be

⁵² *ibid* at 44–45.

⁵³ *ibid* 45–46.

necessarily biased, and we must give them the recognition and attention they deserve. Third, and finally, as noted in the last section, beyond a mechanical application of the substantive impact doctrine, courts may have to adopt a more dynamic doctrine that maintains their institutional security and legitimacy and positions them to play a key role in the democratic experimentation of their respective countries. This is because the mechanical application of the substantive impact doctrine not only normalises electoral illegalities and irregularities, which could hinder the potential of progressive and incremental democratic consolidation, but it also undermines the legitimacy and the credibility of the judiciary for it to be considered as another arm of the incumbent.⁵⁴

B. The Process-Outcome Doctrine

While the substantive impact doctrine is the dominant one, there is a new and emerging doctrine for resolving presidential election disputes in Africa. As this doctrine takes electoral processes and electoral outcomes on their own seriously, it could be called a ‘process-outcome doctrine’. According to the process-outcome doctrine, a presidential election could be invalidated if the illegalities or irregularities in the said elections undermined the integrity of the electoral process or affected the electoral result. The judicial philosophy that animates the process-outcome doctrine is that democracy is not only about results but is also about the processes through which such results are gained. In this doctrine, electoral processes are as fundamental as electoral outcomes and a presidential election could be nullified on violations related to electoral processes alone. Hence, a court that applies a process-outcome doctrine acts as ‘a guarantor of democracy’, thereby being willing to intervene to defend its version of democracy, more than a court that applies the substantive impact doctrine. Accordingly, although the burden of proof remains with the petitioner and a presidential election could not be invalidated for minor infractions, as in the substantive impact doctrine, the petitioner here does not have to prove that the illegalities or irregularities have affected both the process and the result of the election: proving either of these would suffice to invalidate the election. Thus, a court that applies the process-outcome doctrine is more likely to nullify a presidential election than a court that applies the substantive impact doctrine. As this doctrine was invented by the

⁵⁴ See also Kaaba and Fombad (n 5) 375–80.

Supreme Court of Kenya and followed by the courts in Malawi, we will examine how these courts develop and apply this doctrine in their respective presidential petition cases.

So far, every presidential election in Kenya after the adoption of the new Constitution in 2010 has been litigated at the Supreme Court. Although the parties and the facts in the 2013 and 2017 presidential petitions are strikingly similar, the Supreme Court adopted a different judicial outlook and doctrine.⁵⁵ In 2013, the Supreme Court viewed its role primarily as an ‘oversight body’⁵⁶ where judicial restraint is a virtue in Kenya’s new democratic experimentation and, consequently, deployed some interpretative tools that could sustain rather than disturb the outcome of the election. But in 2017, the Court considered its role as ‘a guarantor of democracy’ where judicial intervention is necessary to realize the constitutional vision of democracy. For this, the Court developed the process-outcome doctrine to test whether the 2017 presidential election was conducted in accordance with the Constitution and all other electoral laws and regulations.

On 8 August 2017, Kenya held its second presidential election under its new 2010 Constitution. On 11 August 2017, the Independent Electoral and Boundaries Commission (IEBC) declared Uhuru Kenyatta the winner of the election. However, Raila Odinga and his running mate rejected the IEBC’s declaration and filed a petition before the Supreme Court. They challenged the declared result on several grounds, which revolved around two main allegations: the election was not held in accordance with the principles laid down in the Constitution and electoral laws, and there were several illegalities and irregularities in the conduct of the election. The petitioners, among others, alleged that the IEBC failed to conduct the election in a ‘simple, accurate, transparent, verifiable, secure and accountable’ manner, as provided in the Constitution and the Elections Act, and that the IEBC failed to promptly verify and simultaneously electronically transmit the results from polling stations to the Constituency Tallying Centers and National Tallying Center as required by the Elections Act.⁵⁷ Because the

⁵⁵ On why it changed its views, see R Stacey and V Miyandazi, ‘Constituting and Regulating Democracy: Kenya’s Electoral Commission and the Courts in the 2010s’ [2021] *Asian Journal of Comparative Law* 1.

⁵⁶ *Raila Odinga and Others v Independent Electoral and Boundaries Commission of Kenya and Others* [2013] eKLR, Petition 5 of 2013, para 310.

⁵⁷ *Raila Odinga & Another v Independent Electoral and Boundaries Commission & Others* [2017] eKLR, Presidential Petition 1 of 2017, para 218.

IEBC disregarded the Constitution and the Elections Act by making itself ‘a law and institution unto itself’ in the conduct of the election, the petitioners argued, the result did not reflect the will of the people and should be nullified.⁵⁸ The respondents, however, claimed that the election result did reflect the will of the majority and even if there were some irregularities, these did not affect the result of the election enough to warrant nullification. In an unprecedented judgment on the continent, the Court in a four-to-two vote nullified the declared result of the 2017 presidential election and ordered a rerun election.

To arrive at this judgment, the Supreme Court, unlike its counterparts in Ghana, Zimbabwe, and Namibia, started its analysis by noting that elections are not only about numbers, but also about processes. In its own words, ‘[e]ven in numbers, we used to be told in school that to arrive at a mathematical solution, there is always a computational path one has to take, as proof that the process indeed gives rise to the stated solution. Elections are not events but processes’.⁵⁹ As a result, the Court held that the electoral processes for casting, counting, verifying, and transmitting a vote are as important as the result of the election itself.⁶⁰ This is precisely why, the Court noted, the Elections Act established an integrated electronic electoral system that should be ‘simple, accurate, verifiable, secure, accountable and transparent’, which are ‘the selfsame constitutional principles’ included in Articles 10, 38, 81 and 86 of the Constitution.⁶¹ After considering the evidence before it, the Court held that the failure of the IEBC to verify the results before its chairperson declared them violated Article 138(3) (c) of the Constitution, and its failure to electronically and simultaneously transmit the results from all the polling stations to the National Tallying Centre violated section 39 (1C) of the Elections Act.⁶² The Court further held that ‘[t]hese violations of the Constitution and the law call into serious doubt as to whether the said election can be said to have been a free expression of the will of the people as contemplated by Article 38 of the Constitution’.⁶³ For these reasons, the Court found that the 2017 presidential election was not conducted in accordance with the

⁵⁸ *ibid* para 214.

⁵⁹ *ibid* para 224

⁶⁰ *ibid* para 227.

⁶¹ *ibid* para 237.

⁶² *ibid* para 292.

⁶³ *ibid* para 292.

principles laid down in the Constitution and electoral laws. On this basis alone, the Court held, ‘we have no choice but to nullify it’.⁶⁴

A court that applies the substantive impact doctrine will not stop with the finding of illegalities and irregularities. As discussed in the previous section, it will examine whether these illegalities and irregularities have affected the election result. However, the Supreme Court of Kenya did not find it necessary to investigate the impact of these violations on the election result. Even when the Court examined the impact of the other illegalities and irregularities on the election result, it stated that:

[T]he correct approach... is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.⁶⁵

It held that the quality of the electoral process is as important as the quantity of the electoral outcome.⁶⁶ The Court asked ‘what if the numbers are themselves a product, not of the expression of the free and sovereign will of the people, but of the many unanswered questions with which we are faced’.⁶⁷ It found that the illegalities and irregularities committed by the IEBC ‘were of such a substantial nature that no Court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can, in good conscience, declare that they do not matter, and that the will of the people was expressed nonetheless’.⁶⁸ Regardless of their impact on the election result, the Court found that the 2017 presidential election did not meet the requirements of the law in that it was neither simple nor accurate and verifiable. The Court therefore declined to validate it and ordered a rerun election.

If the 2017 presidential election did not pass the *Wednesbury* unreasonable test in the sense that ‘no Court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can, in good conscience, declare that they do not matter, and that the will of the people was expressed nonetheless’, the Supreme Court

⁶⁴ *ibid* para 303.

⁶⁵ *ibid* para 373.

⁶⁶ *ibid* para 378.

⁶⁷ *ibid* para 378.

⁶⁸ *ibid* para 379.

in the 2022 presidential petition noted that the petitioners did not prove to the required standard whether the alleged illegalities and irregularities affected the presidential election result or the integrity of the electoral process. As in 2017, the Court applied the process-outcome doctrine in adjudicating the 2022 presidential petition but reaffirmed the electoral result.⁶⁹The decisive factor in the resolution of the 2022 presidential petition was the standard of proof. The Court has adopted an ‘intermediate standard’ of proof, which is ‘higher than the civil standard of balance of probabilities, but lower than the criminal standard of proof beyond reasonable doubt’ to adjudicate presidential election petitions since 2013.⁷⁰ While the process-outcome doctrine favours the petitioner more than the respondent in its quest for ensuring greater compliance with the rule of law in the conduct of presidential elections, the adoption of an ‘intermediate standard’ of proof rather than the civil standard of balance of probabilities (adopted by many courts on the continent) puts more burdens to the petitioner in Kenya. Although the Court in the 2022 presidential petition concluded that ‘the irregularities and illegalities cited by the petitioners were not proved to the required standard, or at all’,⁷¹ the adoption of an ‘intermediate standard’ of proof meant that it would sustain a presidential election even if there were some illegalities and irregularities that affect either the presidential election result or the integrity of the electoral process based on the civil standard of balance of probabilities. Such higher standard of proof, in turn, meant that the Supreme Court of Kenya (unlike as it first appears) could be tolerant of electoral illegalities and irregularities more than any court on the continent in some respects.

*Saulos Klaus Chilima and Other v Arthur Peter Mutharika and Other*⁷² is another case where the High Court of Malawi, sitting as a Constitutional Court, applied the process-outcome doctrine to resolve a presidential petition. On 21 May 2019, Malawi held presidential, parliamentary, and local elections. On 27 May 2019, the Electoral Commission declared Arthur Peter Mutharika, the incumbent President, who gained 1,940,709 votes, as the duly elected

⁶⁹ *Odinga & 16 others v Ruto & 10 others*, [2022] KESC 56 (KLR) PRESIDENTIAL ELECTION PETITION E005, E001, E002, E003, E004, E007 & E008 OF 2022, para 301.

⁷⁰ *ibid* para 287.

⁷¹ *ibid* para 297.

⁷² *Saulos Klaus Chilima and Other v Arthur Peter Mutharika and Other* (2019) [Constitutional Reference No 1 of 2019] (High Court of Malawi).

President of Malawi. Dissatisfied with the outcome of the election, Saulos Klaus Chilima (who received 1,018,369 votes) and Lazarus McCarthy Chakwera (1,781,740 votes) separately petitioned the High Court seeking nullification of the presidential election. The petitioners challenged the declared result on account of several irregularities during the conduct of the presidential election, especially related to the count, audit, and transmission of results from polling stations to tallying centres, all of which, according to them, affected the integrity of the electoral process and outcome. They argued that the tampering of votes and the absence of the signatures of presiding officers, among other irregularities, meant that the 2019 presidential election was not duly conducted in accordance with the applicable laws on election and, therefore, should be nullified. The Court consolidated the two petitions and decided in their favour by invalidating the presidential election result and ordering a rerun election, which the Supreme Court upheld on appeal.⁷³

The High Court, like the Supreme Court of Kenya, applied the process-outcome doctrine to resolve the presidential petition. While the judgment of the Supreme Court of Kenya could be a source of inspiration to the courts in Malawi, the Elections Act in Malawi also created possibilities for them to choose the process-outcome doctrine. Unlike the Election Acts of Zimbabwe and Namibia, which prescribe the substantive impact doctrine to adjudicate a presidential petition, the Elections Act in Malawi is silent about the judicial doctrine that should be applied to resolve such petitions. Section 100 of the Elections Act, which deals with presidential petitions, regulates only the procedural matters regarding such petitions. Even if the courts could still follow the road taken by the Supreme Court of Ghana, they found the substantive impact doctrine inappropriate as they consider electoral processes as important as electoral outcomes.⁷⁴ In this regard, the Supreme Court noted that ‘[a]n election can only be free, fair and credible if it fully complies with the dictates of the constitution and applicable electoral laws as well as principles of transparency and accountability’.⁷⁵ By applying the process-outcome doctrine, and after examining the evidence before it, the Court found that the systematic and widespread irregularities and anomalies in the conduct of the presidential

⁷³ *Saulos Klaus Chilima and Other v Arthur Peter Mutharika and Other* (2020) [MSCA Constitutional Appeal No 1 of 2020].

⁷⁴ *ibid* 84–85.

⁷⁵ *ibid* 85.

election had affected both the electoral process and electoral outcome.⁷⁶ Moreover, the Court noted that the declared result could even be nullified on the irregularities that affect the electoral process or the electoral outcome.

While the courts in Malawi followed the Supreme Court of Kenya in applying the process-outcome doctrine, they have followed a different path related to the standard of proof in presidential election petitions. Unlike the Supreme Court of Kenya,⁷⁷ which considers election petitions as *sui generis* in nature and, consequently, applies an ‘intermediate standard of proof’, the courts in Malawi adopt the balance of probabilities. The justification for this according to the Supreme Court is that ‘[s]etting the standard too high for a petitioner to substantiate his grievance in such a matter might well impinge on the average Malawian’s right to access justice when his constitutionally based rights have been violated’.⁷⁸ This makes the courts in Malawi more willing to intervene and, concomitantly, nullify a presidential election more than any other court on the continent. In other words, they demand a higher degree of compliance with the rule of law than any other court in the conduct of a presidential election.

Despite differences in their standard of proof, courts in Kenya and Malawi pay more attention to the procedural and substantive aspects of democracy more than courts in Ghana, Zimbabwe, and Namibia. Their nullification judgments show the potential and limits of judicial review in Africa. On the one hand, by virtue of these judgments alone, the courts in Kenya and Malawi could not only inspire public confidence in them, which, in turn, could enhance their credibility and legitimacy, but they could also send a signal to the executive and administrative institutions and politicians to respect the Constitution and the rule of law in the performance of their duties and in the exercise of their powers related to and beyond elections. Indeed, these judgments have enhanced the national prestige and international reputation of the courts in the two countries.⁷⁹ As these courts have strongly asserted their position as the third branch of

⁷⁶ *Saulos Klaus Chilima and Other v Arthur Peter Mutharika and Other* (2019) paras 1478–79

⁷⁷ *Raila Odinga & Another v Independent Electoral and Boundaries Commission & Others* (2017) paras 148–53.

⁷⁸ *Saulos Klaus Chilima and Other v Arthur Peter Mutharika and Other* (2020) 39.

⁷⁹ See, eg, D Pilling, ‘Malawi court decision is a victory for African democracy’, *Financial Times*, 4 February 2020, available at www.ft.com/content/89670eee-4739-11ea-aeb3-955839e06441 (accessed 2 March 2022); K de Freytas-Tamura, ‘Kenya Supreme Court Nullifies Presidential Election’, *The New York Times*, 1 September 2017,

government, the other branches and institutions could pay serious attention to their actions and modes of operation. This is simply because a court that invalidates a presidential election could be more willing to intervene in other matters, especially in protecting or enforcing constitutional rights and correcting the abuse of power. On the other hand, the judiciary as the least dangerous branch has inherent limitations to enforcing its decisions as it lacks a ‘purse or a sword’. The enforcement of its decisions depends on other institutions and broader socio-economic and political factors at a given time. Even worse, the judiciary may face a backlash that could challenge its institutional security and independence. All these are important considerations in the exercise of judicial power.

In this regard, while the judgment of the Supreme Court of Kenya is jurisprudentially groundbreaking, it did not have an impact on the 2017 presidential election, as Odinga boycotted the rerun election, alleging that the IEBC was unfit to conduct a free and fair election. Yet, the nullified election cost Kenya ‘\$1 billion in aggregate’, making it one of the most expensive elections in Africa.⁸⁰ In addition, the Supreme Court has been attacked by the incumbent President and his associates and has been increasingly politicised ever since its nullification judgment.⁸¹ Furthermore, in a dramatic turn of events, the March 2018 handshake between Kenyatta and Odinga ushered in the so-called ‘Building Bridges Initiative’ (BBI) that aims to transform the political landscape of Kenya and its new constitutional order.⁸² Once fierce political opponents, Kenyatta and Odinga have joined together in rewriting the 2010 Constitution through the Constitution of Kenya Amendment Bill, 2020, which the Supreme Court struck down as unconstitutional. While Kenyan judges brilliantly and skilfully defended their Constitution from what they called unconstitutional constitutional amendment or

available at www.nytimes.com/2017/09/01/world/africa/kenya-election-kenyatta-odinga.html (accessed 2 March 2022).

⁸⁰ AL Dahir, ‘Kenya is set to hold one of the most expensive elections in Africa’, *Quartz Africa*, 18 July 2017, qz.com/africa/1030958/kenyas-elections-will-cost-1-billion-in-government-and-campaign-spend/ (accessed 2 March 2022).

⁸¹ See K Kanyinga and C Odote, ‘Judicialisation of Politics and Kenya’s 2017 Elections’ (2019) 13 *Journal of Eastern African Studies* 235.

⁸² See the details of the BBI www.bbi.go.ke (accessed 2 March 2022).

dismemberment, they and their constitutional order have been under a lot of pressure following the political and constitutional developments since the 2017 nullification judgment.⁸³

In contrast, the judgment of nullification in Malawi has been jurisprudentially and practically successful. It is practically successful because, unlike Kenya, the chairperson of the Electoral Commission, which ran the disputed presidential election, resigned due to criticisms by the opposition and the new chairperson was determined to conduct a credible rerun election. Additionally, and even most importantly, unlike Kenya, the military in Malawi stood with the people rather than with those in power. These conditions have facilitated the rerun election in Malawi, which the opposition presidential candidate won.⁸⁴

Why the nullification judgments have different impacts in Kenya and Malawi in the rerun election is a cautionary tale that courts should not mechanically apply the process-outcome doctrine. But they should adopt a more dynamic doctrine grounded in their national contexts at a given time.

IV. CONCLUSION: TOWARDS A DYNAMIC JUDICIAL DOCTRINE FOR ADJUDICATING PRESIDENTIAL ELECTION DISPUTES

A presidential election petition is no ordinary petition. As Ran Hirschl observed in his comment on *Bush v Gore*, ‘short of the Supreme Court declaring war, it would be difficult to imagine the court making a more momentous decision on behalf of the American populace’.⁸⁵ In its long history, the American Supreme Court made this kind of decision only once. But courts in Africa make such momentous decisions more often. While the substantive impact and process-outcome doctrines are both legally defensible, the former is favourable to the respondent,

⁸³ See, eg, S Maombo, ‘Uhuru has ‘list of hate’, Mutunga says over six judges’, *The Star*, 8 June 2021, www.the-star.co.ke/news/2021-06-08-uhuru-has-list-of-hate-mutunga-says-over-six-judges/ (accessed 2 March 2022).

⁸⁴ See also N Cheeseman, ‘Can the Courts Protect Democracy in Africa?’, *The Africa Report*, 21 May 2021, www.theafricareport.com/90612/can-the-courts-protect-democracy-in-africa/ (accessed 2 March 2022).

⁸⁵ R Hirschl, ‘Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend’ (2002) 15 *Canadian Journal of Law & Jurisprudence* 191, 217.

whereas the latter is favourable to the petitioner. As a presidential election petition has a personal and public dimension, the decision to apply one or the other doctrine has serious consequences from the outset regarding who should or should not be the President of the Republic. On the one hand, courts that apply the substantive impact doctrine are usually perceived as incumbent-friendly and are accused of normalising electoral illegalities and irregularities, and, on the other, courts that apply the process-outcome doctrine are blamed for subverting the people's will. Moreover, even when one considers the process-outcome doctrine as a more fitting doctrine for its high expectation of compliance with the law in the conduct of a presidential election, judgments based on this doctrine could risk non-compliance or may not have a practical impact on the election, as the Kenyan case clearly shows. Hence, courts should adopt a dynamic judicial doctrine that maintains and enhances their institutional security and legitimacy and sustains the democratic trajectory of their respective states.

A turn to a dynamic judicial doctrine is not only necessitated by the sui generis nature of presidential election petitions, but also the role of courts in non-established democracies. As Tom Daly argues, courts in non-established democracies (as in Africa) are expected to both *judge* and *facilitate* the democratisation process, that is, to 'both assess what is required to support the democratization process at any given point and to judge when the democratization context requires a different approach'.⁸⁶ This *double role of judging and facilitating the democratisation process* essentially requires a dynamic judicial role⁸⁷ that both responds to the needs of the time and simultaneously advances the constitutional vision of democracy in the long term. In presidential election petitions especially, a dynamic judicial doctrine and judicial role are extremely necessary given presidential contestants' capacity and willingness to both advance and hinder the democratisation process, including the role of the judiciary in it.

A dynamic judicial doctrine for the adjudication of presidential election disputes, then, may have to involve a two-tiered adjudicatory process.⁸⁸ The first process involves the court's role of judging. In a constitutional democracy, the role of the court is to resolve disputes in a

⁸⁶ T Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders* (Cambridge, Cambridge University Press, 2018) 1.

⁸⁷ See Landau, 'A Dynamic Theory of Judicial Role' (2014) 55 *Boston College Law Review* 1501.

⁸⁸ See also R Mann, 'Non-Ideal Theory of Constitutional Adjudication' (2018) 7 *Global Constitutionalism* 14–15.

manner that maintains the coherence of the legal system as a whole and in a way that protects the Constitution and democracy.⁸⁹ In this role, courts should strive to reach a constitutionally and legally principled outcome in the disposition of the case before them. Here, for example, courts may consider either the substantive impact or the process-outcome doctrines, or another doctrine that best fits with their own constitutional, legal, or other jurisprudential considerations. But this is not and should not be the end of the adjudicatory process. After reaching a principled outcome in its *judging role*, the second process for the court is to consider its *facilitating role* in the democratic building process. In this role, among others, the court may consider the impact of the principled outcome on its institutional security and legitimacy and the democratic trajectory of the state in the short and long terms. In its *facilitating role*, the court is more a partner than an arbiter that collaborates with the other branches and institutions in the practice of constitutional democracy. This requires the court to account for some practical factors and, concomitantly, make some empirical calculations as part and parcel of the adjudicatory process. In this regard, the Namibian Supreme Court's use of a 'fair play' criterion along with the substantive impact doctrine is an example of how courts could include other important factors in the adjudicatory process. Beyond being a Hercules or a Sisyphus, as Yvonne Tew observed in the context of Asia,⁹⁰ courts in Africa need to strike a proper balance between constitutional principle and empirical reality in a way that maintains and enhances their institutional security and legitimacy and sustains the democratic building process.⁹¹

⁸⁹ A Barak, *The Judge in a Democracy* (Princeton, Princeton University Press, 2006) chs 1–2.

⁹⁰ See Y Tew, *Constitutional Statecraft in Asian Courts* (Oxford, Oxford University Press, 2020).

⁹¹ See R Dixon, 'Strong Courts: Judicial Statecraft in Aid of Constitutional Change' (2021) 59 *Columbia Journal of Transnational Law* 298–363; Mann (n 88).