



The Effect of Transformative Constitutionalism on Constitutional Interpretation in Kenya: An Analysis of Presidential Election Petitions

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CHAPTER ONE: INTRODUCTION

1.1 Background

Kenya's history of rampant constitutional abuse is well documented. During this period of abuse, as Professor Githu Muigai demonstrates, Kenyans could not look towards the courts as the jurisprudence emanating from them endorsed notions as dangerous as that of a president being above the law. The same jurisprudence also illustrates the judiciary's willingness to use technical reasons to dismiss cases on substantive rights.

The judiciary was particularly unreliable on constitutional issues that touched on elections. For instance, the case of *James Aggrey Orenge v Daniel Toroitich Arap Moi*. In this case the James Orenge contended that the declaration of Moi as the winner of the 1992 Presidential elections could not be valid. This was because Moi had already served two terms as president and a further term was 'prohibited by Section 9(2) of the Constitution.' In a highly controversial decision that has been termed as 'illogical and toward a specific political goal', the court declared Moi as validly elected.

This type of constitutional interpretation which clearly favoured the incumbent president was not uncommon as can be illustrated by the cases of *Kenneth Stanley Njindo Matiba v Daniel Toroitich Arap Moi*, *Daniel Toroitich Arap Moi v John Harun Mwau* and *Mwai Kibaki v Daniel Toroitich Arap Moi*. The consensus among scholars was, and is, that these decisions were superbly flawed and subversive of the constitution.

To address these problems the people of Kenya promulgated a new Constitution on 27th August 2010. At this juncture, it is important to state that there was a raft of measures that were introduced by the 2010 Constitution to reform Kenya's electoral systems. Some going as far as stating that the president has to be sworn in during public. However, this paper is limited to the electoral reform introduced with regard to the judiciary in the Constitution.

The Constitution introduced specific measures to ensure the independence of the judiciary as well as ‘principles to guide the exercise of judicial authority.’ The drafters wanted to avoid a repeat of the kind of constitutional interpretation seen in the election cases alluded to above.

The 2010 Constitution has been hailed as a transformative constitution being the ‘culmination of almost five decades of struggles that sought to fundamentally transform the backward economic, social, political, and cultural developments in the country.’ According to Roux, the popularity of the idea transformative constitutionalism can be attributed to Karl Klare. He illustrates this with the number of papers citing Klare’s paper ‘Legal Culture and Transformative Constitutionalism’. He terms transformative constitutionalism as, ‘a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction’.

Any transformative constitution, such as the Kenyan Constitution, calls for ‘constitutional interpretation that is committed ‘to establishing a society based on democratic values, social justice and fundamental human rights.’ This commitment to establishing a society based on democratic values is especially important in determining the constitutional issues in presidential election petitions.

However, in the election cases since the promulgation of the new Constitution the same issues of constitutional interpretation have arisen. In the 2013 case *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others* (hereafter *Raila Odinga 2013*), for instance, there were fundamental shortcomings. One such shortcoming is that the court was persuaded by the arguments of IEBC’s lawyers that the issue was more political than legal citing the US supreme court case *Bush v Gore*. This is an illustration of this paper’s central argument; that the court was not guided by the framework of transformative constitutionalism which calls for constitutional adjudication to acknowledge its political character.

Another important criticism of the Court in regard to the 2013 case is that it focused too much on procedural technicalities like declining a 900 page affidavit because it was filed out of time.

The second presidential electoral petition post 2010 would occur in the aftermath of the August 2017 presidential elections and it was once again *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* (2017) eKLR(hereafter *Raila Odinga 2017*). The decision in this case was to nullify the August 8 presidential election and it received praised for advancing the rule of law, not giving undue regard to procedural technicalities and for demonstrating a commitment to constitutionalism. A far cry from the 2013 decision.

The third presidential election petition in the post 2010 era would occur following a repeat presidential election petition of October 26 2017. The parties involved this time round were *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 3 others* (2017) eKLR.(hereafter *Harun Mwau 2017*) In this case, the Court upheld the election in what has been termed as reversing the advancement made in *Raila Odinga 2017* as the ‘judges hid behind procedural and technical matters.’

1.2 Statement of the Problem

In their role in constitutional interpretation, the judiciary plays an integral part of the project of transformative constitutionalism. However, the jurisprudence emanating from the three presidential election petitions since 2010 does not clarify what constitutes a constitutional election. In other words, it is unclear what the legal standard for a free and fair election is under the 2010 constitution because of the inconsistent approaches the Court has taken in the adjudication of presidential election petitions.

1.3 Justification

Presidential elections in Kenya are usually highly competitive and subject to a lot of controversy. Often our courts have had to decide a presidential election petition and the judgments from those cases have also been clouded in controversy. It is therefore important to provide a way in which these decisions can be improved.

From an academic perspective, this paper seeks to contribute to furthering understanding on transformative constitutionalism and constitutional interpretation in Kenya.

1.4 Aims and objectives

The aim of this paper is to investigate the effect of transformative constitutionalism in constitutional interpretation of presidential election petitions post 2010.

1.5 Objectives

1. To investigate the framework of transformative constitutionalism, its brief history and its role in constitutional Interpretation.
2. To evaluate the impact of transformative constitutionalism on constitutional interpretation in the presidential election petitions since 2010.
3. To evaluate constitutional interpretation of presidential election petitions in Kenya, particularly the standard for a constitutional election.

1.6 Research questions

1. What is transformative constitutionalism and has it helped/hurt interpretation in presidential election petitions?
2. Is there a clear legal test for the constitutionality of an election that has been established in the jurisprudence of presidential election petitions since the new constitution was adopted? / What is the threshold for a constitutional election under the Constitution of Kenya?
3. What effect has adopting a framework of transformative constitutionalism have on establishing a clear legal test for the constitutionality of an election?

1.7 Hypothesis

The framework of transformative constitutionalism can improve constitutional interpretation of presidential election petitions in Kenya. It can do this by providing a historical and purposive

approach to interpretation which will clarify the standard for an election that is valid under the Constitution.

1.8 Literature review

This literature review shall be in done in the following way. First shall be to review the literature on transformative constitutionalism. Second is to review the literature on constitutional interpretation and where possible this section will show the connection between the two. This part will highlight the gaps in the literature that this research intends to fill.

The most important issue for this paper is the relationship between constitutional interpretation and transformative constitutionalism. In Kenya there have not been many studies on the link between these concepts. The closest to such a link is a paper by Eric Kibet and Charles Fombad on ‘Transformative Constitutionalism and the adjudication of constitutional rights in Africa’ where they analyse how in the past, failures of constitutionalism in Africa was partly due to courts being complicit.

They then call for ‘a new judicial attitude’ and ‘judicial consciousness’ in order for the goals of transformative constitutionalism to be achieved. A gap left by their research that this paper seeks to fill is the question of what theories of constitutional interpretation were being utilised during the period of being complicit to the failure of constitutionalism and what theories of constitutional interpretation are needed in the era of transformative constitutionalism.

The idea of transformative constitutionalism was given prominence by Karl Klare where he described it as, ‘a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.’ For Van Marle, transformative constitutionalism is, ‘an approach to the Constitution and law in general that is committed to transforming political, social, socioeconomic and legal practices in such a way that it will radically alter existing assumptions about law, politics, economics and society in general.’

As with many ideas, transformative constitutionalism has its critics. Sanele Sibanda argues that transformative constitutionalism, despite ‘claiming radical far-reaching means and ends, has established limited intellectual and programmatic horizons focused on litigation.’ He argues that it is an inadequate framework as it does not go beyond the courts and lawyering.

Karl Klare had already responded to this in his seminal work by explaining why he chose to focus on courts when writing on transformative constitutionalism by explaining that: 1.) The negotiated political foundation upon which democratic transition in South Africa rests includes promulgation of a justiciable/Bill of rights and 2) that much of what jurisprudence teaches us about adjudication applies also to other forms of legal practice.

Moving to constitutional interpretation, Githu Muigai writing in the pre-2010 era suggests that constitutional interpretation is one of the more difficult tasks that the judiciary is called upon to do. He argues that a consistent methodology of constitutional interpretation based on sound constitutional theory is absolutely essential for the legitimacy of a constitutional democracy. He calls for a reconciling of the goals of the Constitution and the methods of constitutional interpretation.

Muthomi Thiankolu also agrees that the issue of constitutional interpretation and the proper approach to it has been a controversial one. In his paper he traces landmark rulings in Kenya from independence to 2007 to see if there was a consistent theory of interpretation being applied by our courts. He finds that there was a lack of consistency in the philosophy that guides constitutional interpretation in Kenya.

The first presidential election petition under the new constitution was *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others* (2013) eKLR. It was a landmark in many ways, most notably being that it was the first presidential election petition to be heard on its merits. The agreement among the parties and the court was that there were four issues for determination. In this literature review two are highlighted. The first was whether the third and fourth Respondents (Uhuru Kenyatta and William Ruto) were validly elected and declared as President-elect and Deputy President-elect respectively, in the presidential election held on March 4, 2013, the Court

stated that this was the crux of the case and secondly, the Court was to determine whether the presidential election held on March 4, 2013 was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the Constitution and all relevant provisions of the law.

The importance of this case was not lost on the Court as it stated, ‘the first landmark case bearing on the early steps to consolidate and set in motion the gains of a progressive and unique Constitution.’ This paper investigates the 2013 case to see whether its legal reasoning provided reliable jurisprudence on what constitutes a constitutional election under the 2010 Constitution.

One of the most scathing criticisms of the case was that the court did not rely on the constitutional principles and instead relied on ‘backward Nigerian authorities’ in making some of the determinations. Furthermore, the Courts approach to interpreting the petition has been criticised for being limited as it viewed the presidential election as a political process. Here a framework of transformative constitutionalism would have helped as it is a framework which requires constitutional adjudication to acknowledge its political character.

In 2017, the same parties met again in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* (2017) eKLR. The agreement of issues for determination was as follows; ‘(i) Whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the Constitution and the law relating to elections. (ii) Whether there were irregularities and illegalities committed in the conduct of the 2017 Presidential Election. (iii) If there were irregularities and illegalities, what was their impact, if any, on the integrity of the election.’

1.9 Research methodology

The research will mainly be an analysis of primary, secondary and tertiary sources of literature. It draws upon the knowledge put forward by diverse and relevant sources including news sources (newspapers and internet sources), statutes, constitutions, text books, journal articles, books, chapters in edited books and judicial decisions

1.10 Limitations of the study

The study is limited to presidential election petitions in Kenya. The second major limitation is that the methodology will purely rely on primary and secondary literature.

1.11 Chapter breakdown.

This proposal shall serve as chapter 1 of the dissertation. Chapter 2 shall serve as the framework chapter. It shall give a background on the transition to transformative constitutionalism by both Kenya and South Africa. It will also explore transformative constitutionalism and its role with constitutional interpretation.

Chapter 3 investigates what the threshold for a free and fair election under the constitution is by analysing the three presidential election petitions in the post 2010 era. Chapter 4 argues for the use of a framework of transformative constitutionalism to provide clarity and consistency when interpreting the legal standard for what constitutes a valid election under the Constitution. Chapter 5 offers conclusions and recommendations.

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CHAPTER 2 : CONCEPTUAL FRAMEWORK

2.1. Introduction

This chapter provides a context through which to understand the role of transformative constitutionalism in constitutional interpretation in Kenya. Specifically, constitutional interpretation in the determination of presidential election petitions in the post 2010 era. It first provides a background of the transition to a transformative constitution in South Africa. This is important as Kenya heavily borrowed from the South African experience. The background will therefore provide useful insight into the drafter's intentions. The chapter then discusses Kenya's own transition into a transformative constitution to see what informed some of the decisions made with respect to electoral reform. Finally, the chapter explains the role of transformative constitutionalism as framework in guiding constitutional interpretation in presidential election petitions.

2.2 South Africa's transition to a transformative constitution

South Africa's transition to a transformative constitution began with the interim constitution of 1993. What makes the transition remarkable is that it moved South Africa from a racist authoritarian regime to a democratic regime governed by the will of the majority irrespective of gender and race. Chapter three of the interim constitution, which is the Bill of Rights, best captures this when it declares itself to be 'a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.'

Following the elections of 1994 and two years of deliberation a more nuanced version of the interim constitution was produced in 1996. The South African constitution has been hailed as a transformative charter in many instances by the Constitutional Court of South Africa (the highest court in South Africa). From *State v Makwanyane* to *Republic of South Africa v Grootboom* the Court has held that the South African Constitution is a transformative constitution.

The features of this transformative constitution are very similar to our own in Kenya. Some of these features are an expansive bill of rights that include socio-economic rights, an independent judiciary and new enforcement mechanisms such as the human rights commission.

However, this paper will focus on the judicial reform introduced in that Constitution. This is because this paper's main interest is constitutional interpretation. In South Africa as in Kenya, judges were appointed directly by the president prior to the 1996 Constitution but have since been appointed only on the recommendation of the Judicial Service Commission. This exact same measure was introduced by the 2010 Constitution in Kenya.

This is important for South Africa as previously the judiciary was a preserve of the white minority and they had preserved apartheid through the courts. The judicial make up in Kenya was similar in terms of being selected by a minority and being used to uphold the existing power structures. This can be seen in the judges who decided the presidential election petitions in the pre 2010 era were directly selected by the president and therefore were serving the president's interests.

Etienne Mureneik captures this move towards a stronger judiciary perfectly. He explains that South Africa was moving away from a culture of authority to a culture of justification. The culture of authority was parliamentary sovereignty where a small minority made law without any justification to the courts.

Mureneik posited that if South Africa was to move away from this culture of authority, the constitution was to be the bridge to the culture of justification where every exercise of power is to be justified and 'the leadership given by government rests on the cogency of its decisions not the fear inspired by the force at its command.'

Mureneik argues that the bill of rights was to foster the culture of justification. In this paper, it is argued that historically the justification given for infringement of political rights, which are now part of the bill of rights, was insufficient. Thus the reasons for a more expansive bill of rights, which includes political rights in article 38 introduced in 2010 was to foster the same culture of justification in Kenya.

Karl Klare explains the focus on judges for this culture of justification and the link between this culture of justification and transformative constitutionalism. He says the focus on judges exists for three reasons but the most instructive one for this paper is that the negotiated political foundation upon which democratic transition in South Africa rests is the promulgation of a justiciable/Bill of rights. Given the lack of a proper electoral dispute resolution system for presidential elections in the pre-2010 era and the disastrous effects of that, an argument can be made that Kenya also made a focus on the judiciary a foundation to peaceful electoral dispute resolution.

Karl Klare tasks judges with moving beyond just mere justification and into a framework of transformative constitutionalism. By transformative constitutionalism he means, ‘a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.’

This section was meant to get some insight into the reasons behind some of things in south Africa’s move from undemocratic era to the era of transformative constitutionalism. This is because Kenya borrowed heavily from South Africa’s constitution and getting the background to their transition may help to better understand our own. Some of the insights gotten from this brief background was why there was a lot of focus on the judiciary and they needed a strong and independent judiciary ; they were moving towards a culture of justification, like we did/were.

2.3 Kenya’s Transition to Transformative Constitutionalism

Kenya promulgated its new constitution on 27th August 2010. As with South Africa, the highest court in the land in Kenya, the supreme court, has declared the 2010 Constitution to be transformative in the case *Speaker of the Senate and Another v Attorney-General and 4 Others*. As alluded to earlier the features of the two constitutions are strikingly similar. The focus here is on the judicial reform and the bill of rights.

Kenya's expanded and comprehensive bill of rights includes political rights; which are the focus of this paper. Article 81(e) provides that the electoral system should comply with the principle of free and fair elections. Article 38(2) provides that every citizen has the right to free, fair and regular elections based on universal suffrage and article 38(3) which provides that every adult citizen has the right to be registered as a voter. The Supreme court in *Raila Odinga 2013* found that these two rights give rise to every other subsequent procedure such as constitutional creation of the IEBC, and this highlights the importance of the two articles.

It is no surprise therefore that one of the main reliefs sought in *Raila Odinga 2013* was a declaration that the right to a free and fair election was violated. Furthermore, among the four main issues agreed for trial, chief among them was whether the presidential election was conducted in a free and fair and transparent manner in accordance with the Constitution

From the above we can see that the court acknowledges that free and fair elections was a main tenet of the new transformative constitutionalism era that the country was in. This was no coincidence given the country's history with elections. An important part of the background to Kenya's transition to a transformative constitution is the recognition of the divisive and violent nature of some of the Country's past elections.

The court's recognition of the importance of the right to a free and fair elections is also important because of how unreliable it has been as a method of election dispute resolution in the pre-2010 era with bad decisions in the *Matiba case* where a petition was dismissed for technical issues with an affidavit and in the *Orengo case* where the election of Moi was upheld despite him having already served two terms as per the constitution. These are instances where the Courts upheld elections which were not free and fair.

Thus, with this background, the chapter proceeds to link the problem in the paper with the theory of transformative constitutionalism in the next section. It will also hope to show why the theory of transformative constitutionalism is a possible solution.

2.4 Transformative constitutionalism and Constitutional Interpretation Kenya

This section first shows that the Constitution of Kenya being a transformative constitution calls for a particular kind of interpretation, particularly in presidential election petitions. It illustrates

with some examples from the post 2010 presidential election petitions how such an interpretation helped or how a lack of it was damaging.

2.4.1 Legal provisions that make the case for transformative constitutional interpretation

The Supreme Court of Kenya addressed the issue of interpretation in its advisory opinion in *the Matter of the Kenya National Commission on Human Rights*,¹ stating that the Constitution requires a holistic interpretation. This kind of interpretation, the Court proceeded, calls for a contextual analysis of a constitutional provision. Such provision has to be read in line with other constitutional provisions.

This is reflected in Article 20 of the Constitution, which states that while interpreting any part of the Constitution or applying any part of the Bill of Rights, courts of law must ensure that their interpretation does not affect any right or fundamental freedom provided for in the Constitution.

Article 159, provides that, in interpreting the law, the courts must protect and promote the purposes and the principles of the Constitution. These purposes and principles are enshrined in the Preamble, Article 10, in Chapter 6. They all reflect the historical, economic, social, cultural and political realities and aspirations of Kenyans.

Article 259 provides that any constitutional interpretation shall be such that it promotes the purposes and the values enshrined in the Constitution, advance the rule of law and human rights and fundamental freedoms in the Bill of Rights. Such interpretation has to also contribute to good governance and facilitate the development of the law. Article 259 sums up by declaring that any provision of the Constitution shall be interpreted in this way. Section 3 of the Supreme Court Act provides for the same.

All these provisions can be said to make the case for a transformative interpretation of the Constitution.

2.4.2 Karl Klare's transformative constitutional interpretation and its application to Kenya's situation

The question of the kind of interpretation necessitated by transformative constitutionalism has also been addressed by Karl Klare in his seminal work; legal culture and transformative

constitutionalism. He has in mind constitutional interpretation which ‘acknowledges and fulfils the duty of interpretive fidelity and yet is engaged with and committed to ‘establishing a society based on democratic values, social justice and fundamental human rights.’ He also calls for this kind of constitutional adjudication to acknowledge it’s political character.

This question of the political nature of constitutional adjudication came up in *Raila Odinga 2013*. Counsel for the respondents urged the Court that the issue was more political than legal and therefore the Court should exercise restraint and the Court was persuaded by this argument. This is an instance where the framework of transformative constitutionalism could have improved constitutional interpretation. This is because as stated above, the framework requires the acknowledgement of the political nature of adjudication. Furthermore, transformative constitutionalism requires a commitment to establishing a society based on democratic values thus where there are irregularities that undermine democratic process, such as the presidential election, the court should not exercise restraint merely because it is supposedly a political issue more than it is a legal one.

This approach was repeated in *Raila Odinga 2017* by the very same respondents urging the court that its role in presidential elections is a limited one as that is a political process. However this time round the Court rejected the argument, stating that Constitution recognizes that all power resides in the people and that therefore an election should reflect the will of the people by adhering to the principles in the Constitution. . It concluded this point by saying that for as long as the Constitution grants the Court powers to overturn an election it will do so in the appropriate situation. This is an example of transformative constitutional interpretation as the court was not just sticking to interpretive fidelity rather it was committed to, to borrow Klare’s words, ‘to transform the country’s political institutions’.

In *John Harun Mwau 2017*, the question of the court showing restraint as the question before it was a political matter was not brought up. However, in her concurring opinion, Justice Njoki Ndung’u addressed the issue in looking at the question of jurisdiction of the court. Citing the case of *Anami Silverse Lisamula v. The Independent Electoral and Boundaries Commission and Two Others*, she noted that the Constitution allows the supreme court to evaluate political questions.

It is interesting to note that in *Raila Odinga 2013* and *John Harun Mwau 2017* the word transformative is not mentioned even once whereas in *Raila Odinga 2017* the court recognises several times that the Constitution is a transformative charter. It would seem that the recognition that the Constitution is a transformative charter was in the minds of the judges in one case and not in the others and with strikingly different outcomes in the Judgements.

In this paper, it is argued that the Court has not shown a consistent methodology of constitutional interpretation in the three presidential election petitions. It is also argued that no clear legal test for the constitutionality of an election has emerged from the three presidential election petitions. There therefore emerges a need to investigate whether the framework of transformative constitutionalism can be the solution to these problems. This is tackled in the next chapter.

2.5 Conclusion

This chapter has argued that a transformative constitution like Kenya necessitates a certain kind of interpretation to achieve its goals. To achieve this, it first looked into the background of the South African Constitution and the Kenyan one. This is important as a big part of transformative constitutionalism is a recognition of historical context. Furthermore, the background provided useful insight into why transformative constitutionalism focuses on the judiciary. The chapter then provided examples from the presidential election petitions on how a framework of transformative constitutionalism could have helped constitutional interpretation.

CHAPTER 3: THE THRESHOLD FOR A FREE AND FAIR ELECTION UNDER THE 2010 CONSTITUTION

3.1 Introduction

This chapter investigates whether the Supreme Court of Kenya has established a threshold of what constitutes a constitutional presidential election. As already intimated in the preceding chapters, this paper argues that a framework of transformative constitutionalism in interpretation can help establish what the threshold is. The chapter demonstrates how the jurisprudence emanating from the three judgements do not provide much clarity on the threshold of a constitutional election. This is achieved by analysing the 3 presidential election petitions are analysed separately, and in the chronological order they took place, to see what they establish as a test for the constitutionality of a presidential election. This provides a base to which to show in chapter 4 how transformative constitutionalism can *transform* this situation, so to speak.

3.2 Analysing the threshold set by the court in the *Raila Odinga 2013* decision

This was the first of the presidential election petition in the new constitutional era. As per the 2010 Constitution's requirements any such petition would be heard by the Supreme Court of Kenya. A number of petitioners were filed challenging the conduct of the 2013 presidential elections and the court chose to consolidate the petitions, naming Raila Odinga the first petitioner.

There were four issues agreed for trial. Firstly whether Uhuru Muigai Kenyatta and William Samoei Ruto had been validly elected and declared as President-elect and Deputy President-elect respectively, in the Presidential elections held on the 4th of March, 2013. Secondly, whether the Presidential election held on March 4th, 2013 was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the Constitution and all relevant provisions of the law. Thirdly, whether the rejected votes ought to have been included in determining the final tally of votes in favour of each of the Presidential-election candidates by the 2nd Respondent. The fourth

and final issue was of what declarations the Court should grant based on the determination of the issues.

To get what the threshold for a constitutional election is as per the *Raila Odinga 2013* decision, this chapter looks at the four main issues above in light of the court's approach to; 1. The burden and standard of proof required, 2. The proper role of the court; the issue of judicial restraint and 3. Admission of evidence. These three things are a major part of this paper's central argument on what the 2010 constitution sought to change about presidential election petitions.

3.2.1 The Burden and Standard of Proof

The Court stated that the burden of proof is concerned with whose duty it is to place evidence before the court while standard of proof is concerned with, what weight the Court should place on the material fact that is placed before it.

In this petition, the matter of what had to be proven revolved around section 83 of the Elections Act 2011. The section reads; No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of that election.

The petitioners relied on the English case of *Morgan v Simpson* to support their submission with regard to what had to be proved and the standard to which it had to be proved. In the cited case it was held that an election would be invalid either where the irregularities were such that its conduct was not substantially in accordance with the law or where the election results were affected. Thus it would be enough that the election was not conducted properly and there would be no need to show that this affected the election results.

The Court was not persuaded by this argument however, instead it held that the petitioners bear the burden of proving that there were substantial irregularities *and* that these irregularities affected the result of the election. In coming to this decision, the court heavily relied on a number of Nigerian authorities urged onto it by the respondents like *Buhari v Obasanjo* and *Ibrahim v*

Shagari and others. On standard of proof, the court settled on a standard higher than the civil standard but lower than the criminal standard.

Some scholars have criticized the above position taken by the Court on the issue of burden and standard of proof as placing petitioners with insurmountable obstacles. It has also been said that it frames petitioners ‘not as concerned citizens pursuing good governance but as hostile prosecutors who have to prove their case to the highest standard.’ This paper agrees with these criticisms and as will be shown in chapter four a framework of transformative constitutionalism would have led to better decision on these issues. A lot of the legal reasoning will be shown to not square with the transformative goals of the constitution.

3.2.2 The proper role of the court; the issue of judicial restraint

In coming to the decision on standard of proof, the court was persuaded by respondent’s counsel on judicial restraint. Counsel for respondents cited *Bush v Gore* urging the court to not intervene where the electorate made their choice and to implement a standard of proof higher than the criminal standard. Ultimately, the court did not settle on *higher* than the criminal standard but set the standard above civil standard. It is evident however that this decision was influenced by the attitude of restraint urged onto them.

There is further evidence of judicial restraint being urged onto the court with counsel for the respondents citing ‘perfect peace’ during the election, ‘high turn outs’ and thus the result reflected the will of the people and it had to be upheld. Counsel for the respondents proceeded to urge the court that the ‘Country is in a sensitive stage of establishing the institutions of democracy and constitutionalism’ and this required public confidence in the judiciary which ‘can only be nurtured through restraint. Counsel supported his arguments with once again citing *Bush v Gore* where it was held that ‘restraint was paramount in issues political in nature’. This will also be analysed in chapter four as it does not square with the goals of transformative constitutionalism.

The Court did not decide the question of what principle should guide the court but settled on ‘an insightful judicial approach’ which shows ‘fidelity to the constitution and of any law that reflects the object and purpose of the constitution’.

3.2.3 Admission of evidence and time limits

As discussed in chapters one and two, one of the biggest issues in the presidential election petitions was the use of technicalities in procedures to undermine petitioners. A prime example is *Matiba v Moi* where the petition was struck out for want of a personal signature. Thus, the 2010 constitution set to cure this with the introduction of article 159(2)(d) which provides that justice shall be administered without undue regard to procedural technicalities.

Fast forward to *Raila Odinga 2013* and the same issue was before the court in different forms. The petitioners tried to introduce an affidavit after the initial petition which detailed substantial irregularities across the country which the court made an order to exclude from the proceedings. The court justifies the rejection of this affidavit as a requirement for a ‘disciplined trial process.’ Petitioners also sought orders for a forensic audit for of IEBC’s electronic system but these orders were also rejected for the same reasons.

It would seem the court privileged expediency over substantive matter as they stated, ‘it is clear expedition is of the essence’. They cited article 140 of the Constitution which sets the time limits of determining the presidential election petitions. In chapter four, it will be shown how a framework transformative constitutionalism would deal with seemingly conflicting article 140 and article 159 but suffice to say here that expediency would not be a goal of a transformative charter like the 2010 constitution when it comes over substantive matter.

3.3 Analysing the threshold in the first 2017 presidential election petition

This was the second presidential election petition of the new constitutional dispensation. It was filed challenging the results of the August 2017 presidential elections. The supreme court would hear the case and they crystallised the main issues for determination as follows; (i) Whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the Constitution and the law relating to elections, (ii) Whether there were irregularities and illegalities committed in the conduct of the 2017 Presidential Election, (iii) If there were irregularities and illegalities, what was their impact, if any, on the integrity of the election?, (iv) What consequential orders, declarations and reliefs should the Court grant, if any?

As with the 2013 case, this chapter analyses the 2017 election thematically looking at; 1. The burden and standard of proof required and 2. The proper role of the court; the issue of judicial restraint.

3.3.1 The Burden and Standard of Proof

The issue the Court faced here was whether to overturn the precedent set in *Raila Odinga 2013* on this matter. As explained above, in that case it was held that a petitioner would have to show that there were substantial irregularities in the election *and* that these irregularities affected the results of the election.

Counsel for the respondents urged the Court to not depart from this and to adhere to the rule of *stare decisis*. He added that the Court was created to develop jurisprudence and the Raila Odinga 2013 case had settled the law on burden and standard of proof as regards elections in Kenya. The attorney general also argued in support of the interpretation in Raila Odinga 2013 as regards burden and standard of proof citing the Supreme Court of Ghana. Counsel for the petitioners, on the other hand, did not make substantive submissions on the burden and standard of proof.

The Court ultimately reversed the decision that a petitioner has to prove both that there were substantial irregularities *and* that the irregularities affected the petition. Unlike in the 2013 case, the Court was guided by constitutional principles in interpreting section 83 of the elections act, citing articles 10, 38, 86 and 103 in their analysis. The Court stated that the interpretation of statutes must be harmonized with the values in the Constitution and thus settled that the provision sets a disjunctive test; the petitioner need only show that *either* that there were substantial irregularities *or* the election results were affected. Either can void the election. And it did void the election in this scenario.

This paper argues that the application of constitutional principles provided an improvement in the determination of this issue unlike the 2013 presidential election.

3.3.2 The proper role of the court; the issue of judicial restraint

In this case, as in 2013, the respondents urged the court to exercise restraint and that its role is a very limited one as a presidential election is political process. The respondents' arguments were identical to the ones they made in 2013 using the same case law of *Bush v Gore* to support their arguments. This is no surprise as some scholars are of the opinion that the urging of judicial restraint upon the court was one of the reasons the 2013 presidential election was upheld.

However, this time round the Court rejected the argument, stating that Constitution recognizes that all power resides in the people and that therefore an election should reflect the will of the people by adhering to the principles in the Constitution. . It concluded this point by saying that for as long as the Constitution grants the Court powers to overturn an election it will do so in the appropriate situation. This is an example of transformative constitutional interpretation as the court was not just sticking to interpretive fidelity rather it was committed to, to borrow Klare's words, 'to transform the country's political institutions'. This will be further analysed in chapter four.

3.4 Analysing the threshold in the second 2017 presidential election petition

This presidential election petition revolved around the repeat presidential election which was a result of the first presidential election being declared null and void. The Court found that there were 9 issues for determination, however most relevant to the chapter is ; did the election conducted on 26th October, 2017 meet the constitutional threshold of a free and fair election under Article 81 of the Constitution?. Other relevant issues to be analysed are; 1) was the Presidential election held on 26th October, 2017 "marred with illegalities and irregularities?" if so, what are their effects on the validity of the election?; 2) what is the effect of the Election Laws (Amendment) Act, 2017 on the conduct of the Presidential election held on 26th October, 2017? is Section 83 of the Elections Act (as amended) unconstitutional? . These two will be analysed together.

On the first issue of the constitutional threshold for a free and fair election under article 81 of the Constitution, the petitioners argued that because fresh nominations were not conducted before the fresh election then the election did not conform with the constitution. The petitioners pointed to parliamentary elections where fresh nominations are conducted whenever those elections are

declared null and void while the respondents argued that since the supreme court did not find fault in the nominations when it voided the elections there was no need to conduct a new round of nominations.

The Court's analysis was appreciative of the importance of nominations, going as far to say that it is 'a critical component of an electoral process without which there is no election.' The Court then analysed section 14 of the Elections Act which provides for when nominations are to be held for presidential election. Although section 14 states 'whenever a presidential election is to be held', it also goes further to specifically mention all the instances where a presidential election is contemplated in the constitution bar one; a fresh election under article 140(3). This according to the Court was not 'oversight but arose from a proper appreciation of the law.' The Court found that there was no fresh nomination needed by taking a purposive reading of the Constitution which it found 'intended an unbroken governance process'. This paper argues that this is an instance of transformative constitutionalism being applied, and a further analysis on this will be in the next chapter.

The next issue on section 83 of the elections is where there has been an inconsistency in the determination in *Raila Odinga 2013* and *Raila Odinga 2017*. Whereas in *Raila Odinga 2013* the Court found that there have to be irregularities *and* the irregularities have to affect the outcome of the election, the Court found that only one of the two have to be present to nullify an election.

Now the same issue was presented to the Court for the third time in *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others* (2017) eKLR. The petitioners this time presented a number of alleged illegalities and irregularities around the election including; i) the nominations were not properly conducted, ii) arbitrary relocation of polling stations, iii) returning officers and presiding officers who acted without authority, iv) discrepancies between the voter turnout in the biometric system and the form 34As, v) a lack of a secure and accurate voters register.

The Court stated that the legal position on the effect of the irregularities remains the same as *Raila Odinga 2017*. However, this time went on to add that 'not every irregularity is enough to invalidate

an election’ and that ‘the irregularities have to be of a profound nature as to affect the actual result for the Court to nullify the same.’ This paper argues that it is very dishonest of the Court to say the legal position remains the same as *Raila Odinga 2017* only to add a caveat that makes the position clearly very different. Furthermore the way the court scrutinized some of the irregularities was not properly done and it can only be described as one scholar did as ‘legal sophistry’. The analysis of the issue of irregularities will be in chapter four as the paper argues on how transformative constitutionalism would have improved the interpretation in that instance.

3.5 Conclusion

This chapter has analysed the threshold for what constitutes a constitutional election in Kenya by taking a close look at the three presidential election petitions post 2010. As illustrated the three decisions by the Supreme Court set different thresholds for a constitutional election. The next chapter argues for a framework of transformative constitutionalism to be applied for there to be consistent jurisprudence on the threshold for a constitutional presidential election.

CHAPTER 4: THE EFFECT OF TRANSFORMATIVE CONSTITUTIONALISM ON THE THRESHOLD FOR FREE AND FAIR ELECTIONS IN KENYA

4.1 Introduction

This chapter tests the following hypothesis: a framework of transformative constitutionalism can help bring clarity to what the threshold should be for free and fair elections under the 2010 constitution.’ As demonstrated in chapter 3, the Supreme Court of Kenya in three presidential election petitions since the dawn of the new constitutional dispensation has set varying thresholds for what is a free and fair election in Kenya. This chapter looks into the impact that the framework transformative constitutionalism can have if applied in the interpretation of the constitutional issues that arise in presidential election petitions. It will demonstrate that for clarity on the threshold for a free and fair election, the judges will have to interpret the Constitution in a manner

that meets its transformative goals. To achieve this, the chapter takes a look at the individual presidential petitions to demonstrate how a framework of transformative constitutionalism may have improved the decision in each instance.

4.2 The 2013 Presidential election petition

This petition, *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* (2013) eKLR was the primary claim in a set of three separate petitions that were consolidated by the Supreme Court which were challenging the national elections of 4 March 2013. The importance of this case was not lost on the Supreme Court as it stated that the case was ‘of the greatest importance because it is the first landmark case bearing on the early steps to consolidate and set in motion the gains of a progressive and unique Constitution, which was promulgated on 27 October 2010.’ This paper agrees with this and argues that the Supreme Court in this case did not achieve its goal because of the interpretation of constitutional issues and other issues in the case were not in line with transformative constitutionalism. In this section, the paper demonstrates how a framework of transformative constitutionalism would have improved the decision.

4.2.1 Impact on the decision on admission of evidence and time limits

The first issue that a framework of transformative constitutionalism would have led to an improvement in is the interpretation of the issue on admission of evidence and time limits. As discussed in chapter 3, the Supreme Court in this case rejected an affidavit from the petitioners which detailed substantial irregularities across the country. The court cited a need for a ‘disciplined trial process’ and that ‘expedition was of the essence’.

On this crucial issue, the framework of transformative constitutionalism would have improved the decision in the following way. As some scholars have argued, a transformative constitution requires that it be interpreted with a historical consciousness. If the judges were to interpret the issue on the admission of the affidavit with a historical consciousness they would take into consideration that rejection of evidence for technical reasons was something that was used in the previous constitutional dispensation to undermine petitioners. A prime example is *Matiba v Moi* where the petition was struck out for want of a personal signature.

Thus, the judges would then recognise that article 159(2)(d) of the Constitution, which provides that justice shall be administered without undue regard to procedural technicalities, was put in

place by the drafters with the issue before them in mind. This paper argues that if this type of legal interpretation, having in mind historical consciousness, is what is required under a transformative constitution and would have led to a better outcome in this instance.

4.2.2 Impact on the decision on burden and standard of proof

This paper argues that a framework of transformative constitutionalism would have led to a better decision on this second issue in *Raila Odinga 2013* as well. As discussed in chapter 3 the Court held that the petitioners bear the burden of proving that there were substantial irregularities and that these irregularities affected the result of the election. In coming to this decision, the court heavily relied on a number of Nigerian authorities urged onto it by the respondents like *Buhari v Obasanjo* and *Ibrahim v Shagari and others*.

The first problem here, as has been pointed out by a number of scholars, is that there was a glaring lack of analysis of the relevant constitutional articles on this issue. The second problem is the court's recital of the old common law maxim *omnia praesumuntur rite et solemniter esse acta*, i.e. that acts of public bodies are presumed to have been done rightly and regularly. This presumption of regularity sits uneasily with the transformative nature of the constitutional order inaugurated under the 2010 Constitution for a number reasons.

Firstly, as alluded to above interpreting a transformative constitution requires historical consciousness and this presumption ignores Kenya's history of electoral fraud. Secondly, the Court's stringent requirements that a petitioner shows irregularities along with proof that it affected the results of the election goes against what the 2010 Constitution tries to accomplish, because it does not take into consideration the emphasis placed on a fair and proper process in the Constitution and allows the end to justify the means.

If the Court had applied the framework of transformative constitutionalism, it would have approached the interpretation of this issue with consciousness of the electoral injustices in Kenya's past and thus understood the intentions of the drafters better. This would have led to a decision that squares up to the lofty goals of the 2010 Constitution.

4.2.3 Impact on the decision on the proper role of the Court; the issue of Judicial Restraint

On this issue the Court held that it would follow ‘an insightful judicial approach’ which shows ‘fidelity to the constitution and of any law that reflects the object and purpose of the constitution’. A possible response by those in transformative constitutionalism is to the idea of fidelity of the constitution is one by Karl Klare where he says that we can ‘conceive practices of constitutional interpretation that acknowledge and fulfil the duty of interpretive fidelity and yet that are engaged with and committed to establishing a society based on democratic values, social justice and fundamental human rights.

This paper argues that the court’s interpretation of the issue at hand does not meet the above test despite its ambiguous claim of taking an insightful judicial approach. This is because the Court seems to have been persuaded by the respondents arguments on judicial restraint as the Court reproduced the respondents arguments without criticism. Of particular interest is the Courts restatement of the respondents citation of *Bush v Gore* urging the court to not intervene where the electorate made their choice and to implement a standard of proof higher than the criminal standard.

Under the transformative constitutional framework, standard of proof would not to be chosen from the options used in other jurisdictions would be determined within the local legal and historical context and this would lead to better decisions. Furthermore the urging of the court not to intervene frames the courts as usurpers of the electorate’s power whereas the drafters intended the Court as a purposeful safeguard against fixing elections which has tainted a large part of Kenya’s history as a democracy.

This paper argues that this attitude of judicial restraint urged onto the court led to the court taking a more limited role than the Constitution intended and that if a framework of transformative constitutionalism was applied the court would have taken upon a better role and this would have led to a better decision.

4.3 The first 2017 presidential election petition

Unlike in the 2013 election, this time the Court would nullify the presidential election of August 2017 on a holding of four to two finding that the presidential election held on 8 August 2017 was not conducted in accordance with the Constitution and applicable law, rendering the declared result invalid, null and void.

In contrast to the widespread criticism that the Supreme Court faced for their judgment of the 2013 presidential petition, the decision to nullify the presidential election of August 8 2017 has received a lot of praise from the global community as well as the scholarly community. It was also significant in that it was the first time that an African Court had nullified a presidential election. In this section, this paper argues that it was the impact of transformative constitutionalism that led to the acclaim of this decision as opposed to the criticism of four years later.

One of the main criticisms of the Court in *Raila Odinga 2013* was the focus on flaws in procedural technicalities which led to additional evidence being disallowed and in *Raila Odinga 2017* the Court recognized this criticism and allowed documents to be filed out of time. This paper argues that the Court not focusing on procedural technicalities was the first impact of transformative constitutionalism on *Raila Odinga 2017*. This is because firstly the Constitution, which is the transformative document, provides expressly that there should not be undue regard to procedural technicalities. Secondly transformative constitutionalism requires a historical consciousness and interpreting the constitution on this issue in a manner that takes into consideration our history, where rejection of evidence was something that was used in the previous constitutional dispensation to undermine petitioners, would be the best way to give effect to a transformative Constitution.

The second impact that transformative constitutionalism had on *Raila Odinga 2017* is on the question of the proper judicial approach. Some scholars argue, and this paper agrees with them, that the Court in *Raila Odinga 2013* was persuaded by arguments of the respondents' counsel on judicial restraint. Unlike in *Raila Odinga 2013*, where the Court decided on a rather ambiguous 'insightful judicial approach' when faced with arguments of judicial restraint and will of the people, the Court in *Raila Odinga 2017* was more categorical in its rejection of arguments on

judicial restraint stating that as long as the Constitution grants the Court powers to overturn an election it will do so in the appropriate situation.

This is an impact of transformative constitutionalism because judicial restraint is mostly incompatible with transformative constitutionalism as Klare has argued that this kind of caution might cause constitutional transformation to suffer. On the other hand, judicial activism, the opposite of judicial restraint, is more compatible with transformative constitutionalism. This is because transformative constitutionalism requires judges to play an active and innovative role to ensure constitutional provisions are given effect in a way that leads to positive transformation of our societies. This not to say judges should not adhere to the Constitution but, as one judge puts it, that they should seek to interpret laws in a way that promotes the rights and freedoms in the Constitution.

Despite the praise that *Raila Odinga 2017*, there has been some criticism of the decision. Some scholars have argued that the Court wrongly focused on an outcome oriented approach as opposed to a right centric approach. They argue that the decision to invalidate an election should be based on whether the quality of the right to vote as in article 38 was affected rather than assessing whether overarching principles of the Constitution were followed in declaring the winning candidate.

From their argument one can discern a potential impact that transformative constitutionalism could have had on *Raila Odinga 2017*. They argue that the Constitution of Kenya is right-centric and in order to guide judges in achieving its transformative promise, the drafters added article 20(3) which allows for judges to develop the law to the extent that it does not give effect to a fundamental right, in this case article 38. They argue that because the Court focused on the overarching principles rather than a right-centric approach the powerful force that article 20(3) of the Constitution could not come into force. Thus, the impact of a framework of transformative constitutionalism in this instance would have come if an analysis of the right to vote was conducted by the judges in this scenario which would have allowed them to use article 20(3). This paper argues that even if that might not have changed the outcome of the case, it would have to a more satisfactory decision in that regard.

In conclusion, this section has shown how a framework of transformative constitutionalism led to better decisions in constitutional interpretation of some key issues in *Raila Odinga 2017* as compared to *Raila Odinga 2013*. It has also discussed some criticisms of *Raila Odinga 2017* and how a framework of transformative constitutionalism would have an impact on them. In the next section, the paper discusses the second presidential petition of 2017.

4.4 The Second 2017 presidential election petition

This section looks at where transformative constitutionalism impacted the decision in the second presidential election petition of 2017 and the instances it could have been embraced and was not. The first impact of transformative constitutionalism in this case was on the decision on the issue of whether the fresh election failed to conform with the Constitution because there were no fresh nominations conducted for that election.

The Court held that there was no fresh nomination needed by taking a purposive reading of the Constitution which it found ‘intended an unbroken governance process’. As former chief justice Willy Mutunga has noted, a transformative Constitution like Kenya’s needs purposive interpretation in order to achieve its transformation goals. Therefore the decision this is an instance of where transformative constitutionalism led to a good decision.

Now to an instance where a framework of transformative constitutionalism would have an impact on the decision. The Court was faced with an issue that was present the previous two presidential petitions on interpretation of section 83 of the Elections Act. As discussed in chapter 3 the Court in *Raila Odinga 2013* that a petitioner needs to prove that there were substantial irregularities and the irregularities affected the outcome of the election. It reversed this position in *Raila Odinga 2017* making it such that a petitioner need only to prove that there were substantial irregularities and not necessarily show that it affected the outcome of the election.

In this petition *John Mwau 2017* the Court would change its position for a third time stating that the ‘irregularities have to be of a profound nature as to affect the actual result for the Court to nullify the same.’ Despite this holding, the Court was still adamant the legal position on the effect

of the irregularities remains the same as *Raila Odinga 2017*. This is especially curious as they seem to be very different positions as *John Mwau 2017* adds the requirement of the result being affected while *Raila Odinga 2017* does not.

In spite of the holding in *John Mwau* the prevailing standard for nullifying an election remains the disjunctive interpretation of Section 83 of the Elections Act as in *Raila Odinga 2017*. The disjunctive reading of Section 83 of the Elections Act has been upheld by the High Court when it struck down the Election Laws Amendment Bill (2017) which sought to make section 83 conjunctive.

In striking the down the bill, the High Court stated, ‘that there was no constitutional compulsion or rationale in amending section 83 of the Act to remove the disjunctive word ‘or’ and introduce the conjunctive word ‘and’ so that only where there are failures in complying with the constitution and election laws and they substantially affected the results should an election be annulled. Removing the twin test for annulling faulty election results negates the principles of electoral system in the Constitution. And allowing such an amendment would be to ignore constitutional principles in our transformative Constitution that there should be free, fair, transparent and accountable elections.’

Thus from this passage, the impact that transformative constitutionalism would have had on *John Mwau 2017* can be seen. This paper argues that the holding on the issue of section 83 in *John Mwau 2017* is inconsistent with the goals of our transformative Constitution and that if this issue was interpreted using the framework of transformative Constitutionalism would have to a decision more in line with those goals.

4.5 Conclusion

This chapter has looked into the impact that the framework transformative constitutionalism would have had if applied in the interpretation of the constitutional issues that arose in the three presidential election petitions since 2010. The chapter has provided an analysis of how a framework of transformative constitutionalism may have made the decisions closer to the goals of the Constitution in each instance. In the next chapter, conclusions and recommendations from the findings are made.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter serves as the conclusion for this paper. It has three objectives. Firstly, it summarises what the paper set out to investigate. Secondly, this chapter will give a summary of the findings that this paper has arrived at. Thirdly, it will give recommendations on the way forward.

5.2 Initial Problem

This paper started by demonstrating that there has been inconsistent jurisprudence emanating from the Supreme Court with regard to resolution of presidential election disputes. This inconsistent jurisprudence leads to a state of affairs where the standard required to nullify an election is unknown. This is not a desirable situation since legal certainty in a young democracy is highly valuable. In solving this problem, the paper was guided by the following hypothesis: That a framework of transformative constitutionalism can improve constitutional interpretation of presidential election petitions in Kenya. It can do this by providing a historical and purposive approach to interpretation which will clarify the standard for an election that is valid under the Constitution.

5.3 Conclusions

5.3.1 That there has been an inconsistent judicial approach to presidential election petitions

This paper by analysing the three presidential election petitions found that there has been a different threshold for nullifying/invalidating an election each time. The paper also found that in each case, the Court took a different approach to key issues such as the burden and standard of proof required, the proper role of the court and on admission of evidence and time limits.

5.3.2 That a use of the framework of transformative constitutionalism can help improve the interpretation of presidential election petitions

This paper also found that in instances where a framework of transformative constitutionalism was used in interpretation, the decisions squared better with the goals of the Constitution and oft received wide praise from scholars and the global community.

5.4 Recommendations

5.4.1 Application of the framework of transformative constitutionalism in interpreting presidential election disputes

The first recommendation is that the Supreme Court apply the framework of transformative constitutionalism in interpreting presidential election disputes. This will enable the Court to have a consistent approach in resolving this dispute unlike the varying jurisprudence that has emanated from it on this issue. Applying the framework of transformative constitutionalism would solve the problem of different standards being used in different election disputes. This framework means historical and purposive approach to interpretation as demonstrated in chapter four. A case in point is the admission of evidence where a historic and purposive approach, if used, would have brought consistency and decisions in line with the goals of the Constitution.

In future cases, the Court should take cognizance of the role the drafters had in mind when interpreting the key issues in these cases and use the framework of transformative constitutionalism so that the goals of the Constitution are met. In particular the role of being an institution that plays a key role in inducing social, political and economic transformation in Kenya.

This paper acknowledges the limitations

5.4.2 Calling for Civic education on judicial independence

The second recommendation is that civic society, including Non-governmental organizations and the law society of Kenya should take a bigger approach on educating the public on the importance of judicial independence. As seen in the paper, the Judiciary plays an important role in resolution of political disputes and an independent judiciary is critical if it's going to continue to play this role. This education of the public is especially important given the possibility of a referendum challenging the independence of the judiciary. If judicial independence is successfully undermined it is likely that the Court will not be as brave when making decisions on presidential election petitions.

The link between civic education and judicial independence is that if the public is sufficiently educated on the issue they will not vote to undermine it when it comes up during the referendum.