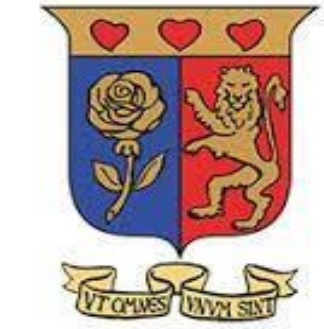

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Systematic Interpretation Vs Judicial Activism: The Position of the Kenyan Supreme Court in Presidential Election Cases

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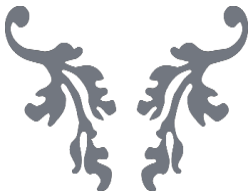

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Declaration

I, SEMAFUMU TREVOR do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Abstract

The 2010 Constitution came with lights of hope for many Kenyans. It brought a myriad of changes in the country's jurisprudential landscape. One such change is the fact that it is one of the few constitutions in the world that provide for a method in which it has to be interpreted. This is reflected in a number of its provisions, specifically Article 259. 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, facilitate the development of the law. The Kenyan Supreme Court has gone to clarify that this method of interpretation demands that, in interpreting any constitutional provision, such provision has to be interpreted in connection with other provisions of the constitution. This is further supported in literature where some argue that the method of interpretation that the 2010 Constitution requires has made it such that it is not enough to just refer to foreign case law or a definition from Black Law dictionary and just transplant this in Kenya. It is this method of interpretation that the 2010 Constitution requires that this dissertation refers to as 'systematic interpretation'. The author contrasts systematic interpretation with judicial activism. Judicial activism is an attitude of constitutional interpretation whereby judges take into account consideration that are outside the constitution to interpret the law (examples include political, moral and economic considerations). The ultimate purpose of this dissertation is to suggest whether it is systematic interpretation or judicial activism that the Kenyan Supreme Court has relied on in presidential election cases.

I. Chapter One: Introduction

i. Background

As stated by the Supreme Court of Kenya in its advisory opinion in *the Matter of the Kenya National Commission on Human Rights*,[1] 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. It is this kind of interpretation that this author refers to as 'systematic interpretation'. [2]

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.[3] Another provision solidifying a systematic interpretation of the Constitution is Article 159, which provides that, in interpreting the law, the courts must protect and promote the purposes and the principles of the Constitution.[4] These purposes and principles are enshrined in the Preamble,[5]Article 10,[6] in Chapter 6,[7] and many other parts of the Constitution. They all reflect the historical, economic, social, cultural and political realities and aspirations of Kenyans.

The culmination of a systematic interpretation of the Kenyan Constitution is provided for under Article 259 of the Constitution and Section 3 of the Supreme Court Act. 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, facilitate the development of the law. Article 259 sums up by declaring that any provision of

[1] (2014) eKLR
[2] (2014) eKLR
[3] Article 20(3)(a) *Constitution of Kenya* (2010).
[4] 159(2)(e) *Constitution of Kenya* (2010).
[5] Preamble, *Constitution of Kenya* (2010).
[6] Article 10, *Constitution of Kenya* (2010).
[7] Chapter 6, *Constitution of Kenya* (2010).

the Constitution shall be interpreted in this way.[8] Section 3 of the Supreme Court Act of Kenya provides for the same.[9]

It is in this respect that former Kenyan Chief Justice Willy Mutunga maintains that, given the theory of constitutional interpretation that the Constitution provides and requires, reference to Black Law or foreign case law is in and of itself not enough to be the basis upon which the interpretation of a constitutional provision is based. [10] He equally maintains that it is not simply the Bill of Rights that should be used as the cornerstone of legal appropriateness but the Constitution as a whole. [11]

ii. Statement of Problem

There exists today a trend by many supreme courts around the world to a method of constitutional interpretation known as judicial activism. Judicial activism, simply put, is a departure from an accepted constitutional interpretive methodology that is provided for in the Constitution. It stands in stark contrast with systematic interpretation, which holds that a constitutional provision must be interpreted by making logical connections between it and other constitutional provisions. It is against any departure from the system, that being the Constitution. This dissertation intends to critically answer the question whether the Supreme Court of Kenya has embraced judicial activism or whether it has stuck to a systematic interpretation in presidential election cases.

iii. Statement of objectives

1. To explore judicial activism and systematic interpretation as applied by the Supreme Court of Kenya;
2. To make the conclusion whether or not the Supreme Court has embraced judicial activism in presidential election cases or whether it has stuck to systematic interpretation.
3. To use legal certainty as a tool to appraise the relevance of a consistent method of interpreting a constitution;
4. To provide a conclusion of the study.

[8] Article 259 (3) *Constitution of Kenya* (2010).
[9] Section 3, Supreme Court Act (No 36 of 2016).
[10] Mutunga W, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions' 13.
[11] Mutunga W, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions' 5-6.

iv. Hypothesis

1. A systematic interpretation of the Constitution is better for legal certainty;
2. Judicial activism fosters legal uncertainty; and
3. A systematic interpretation of the Constitution is legitimate in Kenya.

v. Research questions

1. What was the reasoning for the decision of the Kenyan Supreme Court in Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others, (2013)?
2. What was the reasoning for the decision of the Kenyan Supreme Court in Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017)?
3. Was the Supreme Court leaning towards judicial activism or systematic interpretation in these two cases?
4. Why is legal certainty important in a jurisdiction?
5. Is systematic interpretation of the Constitution better than judicial activism?

vi. Significance of the study

The 2010 Constitution under Article 259 provides for a systematic way through which it has to be interpreted. It is important to know whether the Supreme Court has stuck to this legitimate method of interpretation because, being the highest court in the land, its decisions are binding on all other courts. This means that if the Supreme Court deviates from the systematic interpretation that the constitution requires, all courts below it will be bound by its decisions. It is therefore important to know whether the Court has been consistent with systematic interpretation or judicial activism in its presidential election cases decisions. It is equally important to know which methods of constitutional interpretation guides a court of law in arriving at its decision because many people, even in the legal profession, focus on the outcomes of a case that was in court instead of equally focusing in the reasoning of the court that led to such outcomes. Many people have failed to focus on and answer the question: was the reason of the court legitimate? Was it in line with the Constitution?

vii. Literature review

Presidential elections never used to be challenged in Kenya because the judiciary was paying more attention than it should have been doing to procedural technicalities. For instance, there were requirements that the petitioners should personally a president in power with court orders. Because of this many presidential candidates did not have confidence in the judiciary as a platform through which to adjudicate election disputes. It is this status of being that was partly the cause of the election violence in 2007, which was settled though an international mediation because the judiciary was not trusted to be independent.[12]

This situation changed from August 2010, with the coming into force of a new Constitution. The 2010 Constitution of Kenya provided immense powers to judiciary, and the Supreme Court for that matter, in order to guarantee judicial independence. However, as many authors have reported, there were still issues as to the way in which the interpretation of the Constitution is to be done in matters such as presidential election cases. [13]

The Kenyan Section of the International Commission of Jurist (ICJ Kenya) and Journalists for Justice (JFJ) have argued that there were fears that the interpretation of the Constitution could still be guided by ethnical considerations because the first Supreme Court judges that served on the Supreme Court's bench right after the promulgation of the 2010 Constitution represented the 5 largest tribes in Kenya; namely, the Kikuyu, the Luyia, the Luo, the Kalenjin and the Kamba.[14]

The first presidential election petition case after the promulgation of a new constitutional dispensation was Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others, 2013. As advanced by the ICJ Kenya, the constitutional interpretation adopted by the majority decision relied heavily on Section 83 of the Elections Act without giving due consideration to constitutional provisions on the validity of an election, specifically Articles 81

[12] The Kenyan Section of the International Commission of Jurist (ICJ Kenya) and Journalists for Justice (JFJ), '60 days of independence: Kenya's judiciary through three presidential petitions' Laikipia Town Houses, 2019, 16.
[13] The Kenyan Section of the International Commission of Jurist (ICJ Kenya) and Journalists for Justice (JFJ), '60 days of independence: Kenya's judiciary through three presidential petitions', 16.
[14] The Kenyan Section of the International Commission of Jurist (ICJ Kenya) and Journalists for Justice (JFJ), '60 days of independence: Kenya's judiciary through three presidential petitions', 16.

and 86 of the Kenyan Constitution.[15] One may conclude that this decision disregarded the fact that the constitution of Kenya is at the apex of all legal norms in Kenya and that these norms are to derive their validity from the Constitution.

The question concerning Section 83 of the Elections Act has been summarised by Harrison Otieno into whether qualitative and quantitative perspectives are either disjunctive or conjunctive in determining the legal validity of an election. This section is to be read in 2 parts. The first reads that an election has to be in line with constitutional requirements. This part is qualitative and is separated from the second part by the conjunction 'and'. [16]

The second part reads that if there is non-compliance with the Constitution, such 'non-compliance' has to affect the results of an election for it to be declared invalid. This is the quantitative part of the test. If one is to go by constitutional standards, the conjunction 'and' should be read as 'or' for Section 83 to be in line with the Constitution. And this is what was done in the 2017 presidential election case.[17]

Evelyn and Wanyoike also argue that, in deciding the case on the basis of this way of interpreting the Constitution, the judiciary did not appreciate Kenyan history. They also argued that this way of interpretation ignored the fact that the Constitution puts in place standards that are to be conformed with by the IEBC in conducting elections.[18]

John Harrington and Ambreena Manji have argued that the 2013 case was mainly decided with 2007 post-election violence and that it was inconsistent with the transformation sought with the 2010 Constitution in terms of reforming a judiciary that is not controlled by the executive. This is because, these two authors argue, substantive questions of law as provided for in the Constitution were given lip service to and much of the focus of the Court was on procedural

[15] Thuo L, 'Compendium of 2017 election petitions: Select decisions issues and themes arising from the 2017 elections in Kenya' 4 *ICJ Kenyan section*, 2019, 282-283.
[16] Otieno H, 'The fulcrum for the invalidation of Kenya's 2017 presidential election: Section 83 of the elections Act' Oxford Human Rights Hub 18 October 2017 -< ' https://ohrh.law.ox.ac.uk/the-fulcrum-for-the-invalidation-of-kenyas-2017-presidential-election-section-83-of-the-elections-act/.> 5 January 2020.
[17] Otieno H, 'The fulcrum for the invalidation of Kenya's 2017 presidential election: Section 83 of the elections Act' Oxford Human Rights Hub 18 October 2017 -< ' https://ohrh.law.ox.ac.uk/the-fulcrum-for-the-invalidation-of-kenyas-2017-presidential-election-section-83-of-the-elections-act/.> 5 January 2020.
[18] Evelyn H and Wanyoike W,'A new dawn postponed: The constitutional threshold for valid elections in Kenya and Section 83 of the Elections Act' in Odote C and Musumba L (eds) *Balancing the scales of electoral justice: resolving disputes from the 2013 elections in Kenya and the emerging jurisprudence* ,2016, 101.

technicalities. The decision, in their opinion, brought to life the imperial executive branch of government that the 2010 Constitution came to dismantle.[19]

Reviewing Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others of 2013, Onyango P has also ably demonstrated that the court was influenced in this case by external political pressure. [20]

viii. Research design

a. Research methodology

This dissertation relies on an interpretative analysis of literature, legislation and case law to arrive at sound conclusions.

b. Limitations

This study is limited to presidential election cases that have been decided so far by the Kenyan Supreme Court and it only focuses on Kenya. It does not provide any qualitative research finding. All the arguments advanced by the author are based on quantitative research which requires the review of the literature that is available on the subject matter under study.

c. Chapter breakdown

1. Chapter Two: Chapter Two uses legal certainty as a theoretical framework to that support the relevance of a systematic interpretation of the constitution and it also demonstrate why Kenya should prefer a systematic method of interpretation over judicial activism.
2. Chapter Three: Chapter Three examines in details what systematic interpretation and judicial activism are all about.
3. Chapter Four: Chapter Four provides the reasonings of the Supreme Court decisions in both Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others, (2013) and in Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017).

[19] Harrington J and Manji A, 'Restoring leviathan? The Kenyan supreme court, constitutional transformation, and the presidential election of 2013'2(9) Journal of East African Studies, 2015. See -< https://www.tandfonline.com/doi/full/10.1080/17531055.2015.1029296> on 5 January 2020.
[20] See generally Onyango P, 'Judicial activism and disenchantment of legal formalism in Kenya' Academia.

4. Chapter Five: Chapter Five makes the determination as to whether or not the Kenyan Supreme Court has been guided by systematic interpretation or judicial activism in presidential election cases.
5. Chapter Six: Chapter Six provides the conclusion of the study.

II. Chapter Two: Theoretical Framework (Legal certainty)

Despite the meaning of the rule of law being different things for different people, there is a consensus in literature that one of the core ingredients of the rule of law is legal certainty.[21] This has been recognised for instance by legal philosophers such as Dicey who have argued that it is the responsibility of courts of law to guarantee legal certainty as it is for courts of law to ensure that people's rights are enforced. He equally maintained that the lawmaker shall make rules that are clear and that do not work retrospectively.[22]

This is true for a country such as Kenya since the drafters of the Constitution under Article 259 provided for a method of interpretation that shall guarantee legal certainty in the country and it is now the responsibility of courts of law in the country,[23] especially the Supreme Court, to guide the country towards legal certainty. Focus is on the Supreme Court here because it is the highest court in the country and its decisions are binding on other courts.[24]

It is therefore not surprising that 'legal certainty' as a principle of law has gained momentum in almost all modern legal systems.[25] Legal certainty has gained popularity as a mechanism of doing away with legal uncertainty.[26]Legal certainty involves allowing the citizens to know in advance how the authorities will react to their decisions or behaviour. And, this is very key for dispute resolution because people such as lawyers, judges and citizens will have known beforehand which arguments to prepare in order to make a case for their position. This preparedness of what the law applicable to a particular position is leads to predictability of the law because it is clear that legal certainty intervenes in guiding people's behaviour in the

[21] Maxeiner, J, 'Some realism about legal certainty in the globalization of the rule of law', 31 (1) *Houston Journal of International Law*, 2008, 30.
[22] Popelier, P, 'Legal certainty and principles of proper law making' 2(3) *European Journal of Law Reform*, 2000, 327.
[23] Article 259, Constitution of Kenya (2010)
[24] Chapter X, Constitution of Kenya (2010)
[25] Popelier P, 'Five Paradoxes on Legal Certainty and the Lawmaker', *2 Legisprudence*, 2008, 47.
[26] Popelier P, 'Five Paradoxes on Legal Certainty and the Lawmaker', 47.

running of their private affairs. Predictability will be assured because legal certainty allows people to know the meaning of the laws.[27]

Strictly speaking, when it is clear to all the parties to a case what is the law applicable to their dispute will be, then one can speak of legal certainty. In this way, legal certainty is said to be present when legal scholars, judges and lawyers and even citizens can be in a position to know what the consequences of their acts or omissions may be with respect to the law.[28]

It is in this way that Rodriguez maintained that legal certainty ties legal argumentation and reasoning with the shared values of a community and such values are to be enshrined in such a community's laws. The supreme law in any community is usually its constitution. This is how legal certainty is in line with a systematic interpretation of the law because it requires laws not to be understood outside of what has been agreed upon by the people of a certain country, laws are in line with their shared values as enshrined in the Constitution. It is equally true that what they have agreed upon or their shared values may be expressed by their representatives such as Members of Parliament.[29]

In short, legal certainty is all about clarity and precision of the law and this in turn guarantees predictability.[30] And there are many advantages that come with predictability of the law. Predictability of the law guarantees that people's legal expectations are met. What this does is that it increases people's confidence in the legal system because even public authorities are bound by the law and cannot arbitrarily disregard what the law has put in place and on the basis of which an individual has made their decision or directed their behaviour.

Legal certainty therefore establishes a conducive relationship between the law and time because a government official cannot just decide to disregard the law that one has been taking as a basis upon which to make their decisions. It is then correct to say that legal certainty requires the stability of the law because a government official cannot just decide to arbitrarily create a law that is applicable to any behaviour, action or omission that a person has made before the coming into force of such action. Further, it is worth noting that this stability

[27] Betea S, 'Certainty, Reasonableness and Argumentation in Law' *School of Law The University of Edinburgh,* 2004, 465.
[28] Comanducci P, 'Aarnio and the Problem of Legal Certainty', 26 *Rechtstheorie,* 1995, 28.
[29] Rodriguez M, 'The principle of legal certainty and the limits to the applicability of EU law' Bruylant, 116. 119.
[30] Rodriguez M, 'The principle of legal certainty and the limits to the applicability of EU law' 116.

demands that there be a legitimate legal expectation that a law has to change; it cannot just be changed arbitrarily. [31]

It is also important to note that legal certainty also requires a proper publication of rules for people to be aware of them. And such rules shall not be ambiguous; they should ensure certitude of the law, which in turn clears out any arbitrariness that may come from the public authorities as stated above.[32]

Of all legal scholars, Lon Fuller is perhaps the most celebrated with regard to the documenting the advantages of legal certainty. In his groundbreaking work 'the internal morality of the law', he provided 8 key features that a law needs to have for it to be within the bounds of legal certainty.[33] These are explained below,

a. The generality of the laws

Fuller is of the view that the generality of the laws requires that laws shall be general and that they should be targeting only a specific portion of the population. The 'generality of the laws' requirement demands that laws be applicable to all people within a jurisdiction irrespective of their status or origin. Discrimination shall not be shown anywhere.[34] With respect to this principle, the Supreme Court of Kenya cannot choose to apply systematic interpretation, as required by the Constitution, only in certain cases. Such an application shall be uniform through all cases.

b. The promulgation of the laws

According to this requirement, Fuller is of the view that laws must be promulgated or publicized so that everyone can see them and know them. By publicity of the laws, he went on to state, laws must be accessible to everyone. Publicity was really key in his opinion because it is there to help people plan their activities according to the laws of their country.[35] This is properly done in Kenya as all cases decided by courts of law are reported and made available online for everyone to access them. This is done with the help of the National Council for Law Reporting.[36]

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[31] Rodriguez M, 'The principle of legal certainty and the limits to the applicability of EU law', 118.
[32] Rodriguez M, 'The principle of legal certainty and the limits to the applicability of EU law', 118.
[33] Lon Fuller, 'Morality of the law' Sections from Lon Fuller's Morality of the law, *Yale University press*, 1969, 18-27.
[34] Murphy C, 'Lon Fuller and the moral value of the rule of law' 24 Law and Philosophy, 2005, 240.
[35] [35] Lon Fuller, 'Morality of the law' 18-27.
[36] See -<http://kenyalaw.org/kl/> on 2 November 2019.

c. That the laws shall not be retroactive

Here, the idea was that laws shall be forward-looking, assuring people to guide their future behaviour. Therefore, no one should be punished because of a law that is applying to an act or an omission which, at the time of the commission or omission was not in contravention with the law as the law came later after that commission or omission took place.[37] This is where the Supreme Court shall avoid relying on a law that is not captured by the systematic interpretation that the constitution requires. This interpretation, as explained in this work, requires that logical connections must be made between constitutional provisions when a judge is interpreting a single constitutional provision or a particular case with respect to its constitutionality.

d. That the laws shall be clear and consistent

By the fact that the laws shall be clear and consistent, Fuller meant that people should be able to easily identify what is prohibited, permitted or required by the law. Furthermore, Fuller maintained there was a need for the laws to be consistent in the sense that they are not contradictory. This is to say that one law should not conflict with another law. One law should for instance not forbid what another law requires.[38] Bringing this requirement to Kenya, when the Supreme Court is guided by systematic interpretation as provided for under the Constitution, the only logical conclusion is that there will be consistency among Supreme Court cases, then people can be able to predict the law. Such consistency will be even observed in courts that are below the Supreme Court in the hierarchy of courts in Kenya.

e. That the laws do not impose obligations that citizens may be unable to perform or obligations are changed every now and then

Fuller also advanced the argument that the laws shall not impose obligations on citizens which are practically impossible to perform. Furthermore, Fuller states that it is in the benefit of a legal system that laws remain constant.[39] There is a risk for the Supreme Court of Kenya to fall into this if there is no responsible transplant of foreign case law or jurisprudence in the Kenyan context.

f. That any government actions are in line with the laws that have been laid down beforehand

[37] Lon Fuller, 'Morality of the law' 18-27.
[38] Lon Fuller, 'Morality of the law' 18-27.
[39] Lon Fuller, 'Morality of the law' 18-27.

Here, Fuller advanced the argument that there is a need for congruence between the law as stated in a legal document and the way in which it is to be enforced by public officials. This also requires that the legislature or the drafters of laws are expected to pass laws that are capable of being enforced.[40] This requirement if one applies it to the subject matter under study, one may argue that the Supreme Court shall not deviate from Article 259 of the Constitution which provides for a way in which the Constitution is to be interpreted.[41]

Fuller has really demonstrated the advantages of having legal certainty in a given jurisdiction. However, legal certainty as a legal principle has also faced a myriad of criticisms. Some scholars such as Popelier have argued that any belief in legal certainty can only amount to unrealistic expectations.[42] And the reason for this, she argued, is the fact that legal uncertainty is inevitable in a legal system for many reasons, some of which are enumerated below:[43]

First, she argues that words making up a law are most often ambiguous and even if they are not, there will exist many versions of interpretation of the same law. Therefore, to this extent, it is very hard to maintain that legal certainty is a good that can be achieved. Then, she went on to argue that not all possible circumstances that may arise in society are captured by the law. She concluded by saying that the lawmaker should always be in a constant need to evaluate the law and adjust it for it to fit the changing demands of society and as such, legal certainty is not possible.[44]

In the same vein, another scholar, Leinster, argues that legal certainty may be an erroneous principle since it focuses specifically on the status quo and fails to take into account that laws may need to be amended or abolished.[45] Yet another scholar, Julius Paul, also advances the view that the idea of legal certainty is simply utopian since the law is in essence what courts of law interpret it to be and anything else. This includes the law as was enacted by parliament is just a guess; it is for the court to tell us what the law means. To make Leinster's observation short, the law is what courts of law say it is.[46]

However, one may agree that legal certainty in as far as systematic interpretation of the constitution is concerned (see Article 259 of the 2010 Constitution of Kenya) already answers

[40] [40] Lon Fuller, 'Morality of the law' 27.
[41] Article 259, Constitution of Kenya, (2010)
[42] Popelier P, 'Five Paradoxes on Legal Certainty and the Lawmaker', *2 Legisprudence*, 2008, 47.
[43] Popelier P, 'Five Paradoxes on Legal Certainty and the Lawmaker', 50-51.
[44] Popelier P, 'Five Paradoxes on Legal Certainty and the Lawmaker', 50-51.
[45] Popelier P, 'Five Paradoxes on Legal Certainty and the Lawmaker', 50-51.
[46] Julius Paul, 'Jerome Frank's Attack on the Myth of Legal Certainty', 36 *Nebraska Law Review*, 1957, 547.

these criticims. The reason for this is that a legitimate law should not be what the Court say, because a systematic way of interpreting the Constitution already provides how laws are to be interpreted and in Kenya this is Article 259 of the Constitution. In this regard, a judge is not at liberty to give to a law any meaning that sounds fit for him or her. Therefore, in Kenya it is illegitimate to say that the law is anything that the judge says it is. In as much as courts of law are of last instance; they shall operate within the bounds of the Constitution.

To the critique that legal certainty only caters for the status quo, this is the way the argument on judicial activism has gained prominence in the world today. In the United States of America (US) for instance, it has been argued that it might not be of sense to go by a systematic interpretation of the Constitution yet the US Constitution was promulgated more than two centuries ago.[47] However, this argument cannot practically hold true for Kenya whose Constitution is not even ten years hold.[48] One may therefore conclude that legal certainty is a sound and logical theoretical framework of supporting the interpretation of the Constitution in Kenya, which the Constitution itself wants to be systematic.

III. Chapter Three: A Detailed Analysis of Systematic Interpretation

The question as to how judges are supposed to interpret the constitution has been hotly debated in scholarship. The reason for this has been lack of consensus on whether judges should

[47] Humphreys, R, 'Constitutional Interpretation', *Dublin University Law Journal*, 1993, 62.
[48] 'The constitutional implementation process' Kenya Law Reform Commission -< http://www.klrc.go.ke/index.php/projects/on-going-projects/555-the-constitutional-implementation-process> on 25 November 2019.

interpret the law outside of it or whether any interpretation that they do must fall within the bounds of the law. It is therefore important to know which methods of interpretation guides the court in finding that a particular act, omission or policy is inconsistent with the Constitution. Because, in interpreting the Constitution, the judges simply say that they have been enforcing the Constitution.[49] Yet, sometimes the Constitution does not provide straight-forward answers. This part looks in greater details into what has been referred to as systematic interpretation and what has been referred to as judicial activism.

i. Systematic Interpretation

Systematic interpretation of the constitution is method of interpretation that has been devised in continental Europe; it is a continental European tradition.[50] This is a genuine method of searching for the meaning of the law in a legal text such as the Constitution as it considers the legal context in which such law is found. This means that the judge has to look at the links that exist between that law and other laws in the legal context in which it is found. A judge has to make sure that they establish all logical connections that such a law may have with all other laws that exist in the context or the system in which it is found. Therefore, a systematic method of interpretation is a kind of interpretation that stand against resorting to non-legal means in interpreting the law. Such non legal means may include but are not limited to considerations that are fall outside of the legal context in which the law to be interpreted is found or simply focusing on what the law to be interpreted could mean in ordinary language. Systematic interpretation is also against relying on extra-legal technical expressions such as medical expressions, scientific expressions or financial expressions while interpreting the law. It is also worth noting that systematic interpretation stands against resorting on extra-legal values while interpreting the law. Such values include political, economic and moral values when they are not embedded in the Constitution.[51]

Systematic interpretation seems to favor textual interpretation as it is this kind of interpretation that tells us best what was the intention of the framers of the constitution.[52] This is the kind of interpretation demanded by judges who have been labelled as the originalists and the reason is,

[49] Padjen I, 'Systematic Interpretation and the Re-systematization of Law: The Problem, Co-requisites, a Solution, Use' Springer Nature B.V. 2019,4.
[50] Padjen I, 'Systematic Interpretation and the Re-systematization of Law: The Problem, Co-requisites, a Solution, Use', 4.
[51] Padjen I, 'Systematic Interpretation and the Re-systematization of Law: The Problem, Co-requisites, a Solution, Use', 4.
[52] Dworkin R, 'The arduous virtue of fidelity: Originalism, scalia, tribe, and nerve' 65(4) Fordham Law Review, 1997, 1250.

as the words suggest, they try their level best to go with the original intent of the framers.[53] As per the continental European tradition, systematic interpretation, as noted above, requires that a legal provision that is to be interpreted be read together with other legal provisions that are in the same legal context with it. However, regard may be paid to external factors only if it is not possible to interpret it within the legal context, maybe because of a lack of clarity.[54] But this is very unlikely to occur because systematic interpretation is usually provided in a system of legal context where it is to serve the role of a metric of judging whether an interpretation is in line with the Constitution. It is in this respect that Humphreys refers to it as scientific method of interpreting the law because it provides all the steps that a judge has to follow in interpreting a legal provision.[55] The method of interpretation being a scientific one, it is therefore always possible to find an interpretation which fits any scenario and that is as per the tenets of the constitution. Systematic interpretation therefore takes away the judges' discretion of filling in gaps that may suggest to find in law, to get out of the legal context in which a particular provision is found so as to interpret it by using extra legal means or to simply interpret a provision according to their selfish desires.[56]

In simple words therefore, systematic interpretation, as the words indicate, presupposes a relationship between a legal provision and a system. The system is to provide the means through which the logical foundation and the knowability of the legal provision is to be based. Such system therefore guarantee that laws are coherent.[57] In the case of Kenya, this system is provided for under Article 259 of the Constitution which provides for the way in which a law has to be interpreted,[58]

The origin of systematic interpretation is traceable back to the Code of Napoleon of 1804. This code was based on the presumption that the Code in and of itself was complete and self-sufficient. Even if there was no clarity as to the interpretation of a certain matter, the judges were discouraged to give up as the Code itself, being self-sufficient provided for a system which was to guide matters of interpretation.[59] It is worth noting that it was illegitimate to

[53] Dworkin R, 'The arduous virtue of fidelity: Originalism, scalia, tribe, and nerve', 1250.
[54] Padjen I, 'Systematic Interpretation and the Re-systematization of Law: The Problem, Co-requisites, a Solution, Use', 4.
[55] Humphreys, R. F. (1993). Constitutional Interpretation. Dublin University Law Journal,71-72
[56] Caroccia, F. (2016). Rethinking the juridical system systematic approach, systemic approach and interpretation of law. Italian Law Journal, 69
[57] Caroccia, F. (2016). Rethinking the juridical system systematic approach, systemic approach and interpretation of law. Italian Law Journal,66
[58] Article 259, Constitution of Kenya (2010).
[59] Caroccia, F. (2016). Rethinking the juridical system systematic approach, systemic approach and interpretation of law. Italian Law Journal,68

separate interpretation from the system. The reason for this was simple: the system was the upon which interpretation had to be done. And in case of a doubt, the judge could still arrive to an interpretation that is in line with the system. This was through making logical links between the legal provisions that are found in one legal context such as a constitution.[60] The system made it such that a judge could only interpret a law in a neutral manner and without giving into political considerations.[61]

It is important to bear in mind that there exist two types of systematic interpretation, one is French and the other is German. In the French parlance, systematic interpretation includes considerations that encompass the legal context, the purpose and the history of the given legal provision presented before the judges to be interpreted.[62] In the German parlance, the only thing to be considered is the legal context and the history and the purpose of a given legal provision are not to be taken into consideration.[63]

The type of systematic interpretation provided for under the 2010 Constitution of Kenya is in line with the French version of systematic interpretation. This is seen in Article 259 of the Constitution. 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.[64]

ii. Judicial Activism

As alluded to in the preceding subchapter, the domain of constitutional law has been marked by several theories of constitutional interpretation. There are however many people who advocate for a consistent theory to guide constitutional interpretation.[65] This group seems to make a strong case because consistent theory of constitutional interpretation paves the way for

[60] Caroccia, F. (2016). Rethinking the juridical system systematic approach, systemic approach and interpretation of law. Italian Law Journal, 69.
[61] Humphreys, R, 'Constitutional Interpretation', 62.
[62] Padjen I, 'Systematic Interpretation and the Re-systematization of Law: The Problem, Co-requisites, a Solution, Use', 4.
[63] Padjen I, 'Systematic Interpretation and the Re-systematization of Law: The Problem, Co-requisites, a Solution, Use', 4.
[64] Article 259, Constitution of Kenya (2010).
[65] Yongo C, 'Constitutional interpretation of rights and courts powers in Kenya: Towards a more nuanced understanding' *African Journal of International and Comparative Law*, 2019, 203.

fidelity to and respect for the law since such a theory makes the law predictable.[66] This is systematic interpretation of the law, which was described above in details.

The interpretative attitude that has deviated from systematic interpretation is what has come to be known as judicial activism. The term was first introduced in the public domain via a magazine Article that he published in 1947.[67] He identified that the US Supreme Court Justices could be classified as 'judicial activists' or 'champions of self-restraint'. [68] The former, he argued, were concerned with using judicial power to enforce their own understanding of the common good of society while the latter believed in upholding conclusions that they do not personally support so long as such conclusion was the intent of the legislature. As such, one may fairly conclude that judicial activists take court as a tool of achieving needed social goals but the champions of self-restraint leave this to other branches of the government.[69]

Despite the above description, consensus has never been reached in literature as far as defining judicial activism is concerned. The recurring trend has been to come up with a taxonomy of judges' interpretative methods that may be said to fall under judicial activism.[70] William Marshall, for instance, has come up with seven indices of judicial activism:[71]

i. Counter-Majoritarian Activism: This is when courts take the decision not to confine themselves by the decision taken by democratically elected branches such as the legislature.
ii. Non-Originalist Activism: This is when courts take it upon themselves to depart from the notion of originalism while adjudicating cases. Such notion may be grounded in a strict obedience to the text or in preparatory documents.
iii. Precedential Activism: This is with reference to departing from the law as developed by case law.
iv. Jurisdictional Activism: This occurs where a court issues a judgement; yet, it has no power to do so.
v. Judicial Creativity: This is when a court creates new theories of constitutional interpretation or rights, hence departing from the spirit of the Constitution.

[66] See generally Fuller L, 'Positivism and Fidelity to Law: A Reply to Professor Hart' *71(4) Havard Law Review*, 1953.
[67] Schlesinger A, 'The Supreme Court', *FORTUNE*, 1947, 208.
[68] Keenan D. Kmiec, 'The Origin and Current Meanings of Judicial Activism', 1445-1446.
[69] Keenan D Kmiec, 'The Origin and Current Meanings of Judicial Activism',1446-1447.
[70] Ernest A, 'Young, Judicial Activism and Conservative Politics', *73 Colorado Law Review*, 2002, 1144.
[71] William P. Marshall, 'Conservatives and the Seven Sins of Judicial Activism', 73 *Colorado Law Review*, 2002, 1219-1220.

vi. Remedial Activism: this is the use of structural interdicts to ensure that other branches of government are monitored by a court which requires them to take some positive steps to remedy a certain wrong.

vii. Partisan Activism: This refers to the use of judicial power in order to advance the political interests of a party.

It is important to note that a court's decision that is non-activist in one respect may still be activist in another.[72]

In Kenya, the indices of judicial activism described above have been noted before the promulgation of the 2010 Constitution. Before 2010, the judiciary's approach to constitutional interpretation has not been coherent and consistent. It has proven to be unprincipled, ad hoc, vague and pedantic. In trying to strike a balance between the political and legal nature of the constitution, judges' interpretation of constitutional provisions has been mainly informed by personal preferences, political pressures and technical precision.[73] Concern was raised about the generally restrictive approach to constitutional interpretation which the High Court had adopted, especially in the area of human rights litigation; this, it was suggested, has hampered the growth of proper jurisprudence, case law or precedence in this area.[74] However, the 2010 Constitution came with many jurisprudential innovations, one of which was to provide for a systematic way through which the Constitution has to be interpreted. This is mainly captured in Article 259 of the Constitution. This Article stands against any interpretation which is not in line with the Constitution or the purpose behind a certain constitutional provision. A judge cannot therefore interpret the 2010 Constitution of Kenya by basing their reasoning on the considerations that are not captured in the Constitution.[75]

It is however equally important to bear in mind that judicial activism may be relevant in certain contexts. Decisions such as Brown v. Board of Education have been largely celebrated in scholarship yet they were activist decisions in many respects. In *Brown*, it was found that having separate public schools for black and white students went against the Constitution of the USA. Instead of merely pronouncing this finding, they went on to devise structural interdicts as a tool that would allow the court to monitor the implementation of the

[72] William P. Marshall, 'Conservatives and the Seven Sins of Judicial Activism', 1220.
[73] Muigai G 'Political jurisprudence or neutral principles', 3.
[74] See the Working Draft of the Final Report of the Constitution of Kenya Review Commission, 21 October 2004, para. 7.3.4, p. 106.
[75] Article 259, Constitution of Kenya, 2010.

desegregation process. This was by giving the government timeframes within which this had to be done and how the government had to report to Court throughout the whole process.[76]

As Stuart Taylor rightly points out, judicial activism refers to decisions to take as constitutional practices that were not approved or contemplated by the drafters of the Constitution but which came to be continuously viewed as constitutional by the majority of the American people of a country.[77] One may agree that this is understandable in the US given that the country has promulgated in the year 1787 and,[78] therefore, many things have surely happened in society which were not captured by the drafters of the Constitution 200+ years ago.[79] However, the Constitution of Kenya is early 10 years old for judicial activism in terms of living up to changing circumstances to be justified.[80]

It is therefore understandable and perhaps cogent that in the US certain scholars state that judges should be focusing on the shared values of the people in a certain time because the US Constitution, as stated above, is very old and may not have captured things to do for instance with technological development.[81] However, judicial activism may not be a constitutional good because it goes against the essence of constitutionalism: that there shall be a law that is to limit the powers of each arm of government, including the judiciary. Therefore, in case a society's values change, there shall be a campaign on this to call for a referendum and reflect such a change in the text of the Constitution. Otherwise, the idea of a government that is supposed to be limited will collapse because judges will be playing with the law as they see fit.[82] Judicial activism would be in this way violating the principle of separation of powers which is one of the corner stones of any constitutional democracy.[83]

Further, as shown in the preceding paragraphs and despite the age of a constitution, judges may just choose to impose their policy preferences on society and there will not be any elections which may hold them accountable for such an act of choosing which may not be in consonance with the Constitution.[84] The danger with this kind of judicial activism as Edward McWhinney warns us is that in as much as judges are well versed with the law, they are not well equipped

[76] Brown v Board of Education (1954), The Supreme Court of the United States.
[77] Stuart Taylor Jr., The Tipping Point, NAT'L J., June 10, 2000, 1816.
[78] *Constitution of the United States of America* (1787).
[79] Strauss D, 'The living constitution' 27 September 2010 -<https://www.law.uchicago.edu/news/living-constitution> on 11 November 2019.
[80] *Constitution of Kenya* (2010).
[81] Graglia, L, 'Constitutional interpretation', 44(2) *Syracuse Law Review*, 1993, 632.
[82] Graglia, L, 'Constitutional interpretation', 634.
[83] Graglia, L, 'Constitutional interpretation', 63.
[84] See generally William P. Marshall, 'Conservatives and the Seven Sins of Judicial Activism'.

to objectively understand community values and to translate them into constitutional provisions.[85]

IV. Chapter Four: Looking at the reasonings of the Kenyan Supreme Court in Presidential Election Cases

So far, Kenya has known 2 presidential petitions that have been decided by the Kenyan Supreme Court; namely, Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others, (2013) and Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017). This Chapter looks into each of these cases and provides the reasons for the Court's decisions so that the following Chapter can make a determination as to whether such decisions were in line with judicial activism or the systematic interpretation that is required by the 2010 Constitution of Kenya.

i. Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others, (2013)

In *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others*, the Supreme Court of Kenya was for the first time put to task to adjudicate on the threshold of a valid election. It was argued that such threshold is provided for in Kenya via the common law case *Morgan and Others v. Simpson and Another*. In this case the element at issue was the fact that some ballots were rejected, 44 times in 18 polling stations to be precise.[86]

The reason for the rejection was that polling officers did not stamp each one of the ballots that were rejected. The trial court maintained that since the elections were conducted in conformity with electoral laws and despite there being mistakes, those mistakes were only minimal and could not have affected the outcomes of the elections. The matter went on appeal where the Court of Appeal held that although the elections were substantially conducted in accordance with the law, the rejected ballot papers had an impact on the outcome of the elections.[87]

Based on the Morgan case, it was argued that an election may be declared as null and void if any, or both, the following circumstances occur. First, if it is proven that there were irregularities. Second, whether those irregularities being so trivial or so monumental, it must

[85] McWhinney E, 'The Supreme Court and the Dilemma of Judicial Policy-Making', *39 Minnesota. Law Review*, 1955, 843.
[86] *Morgan and Others v. Simpson and Another* (1974).
[87] *Morgan and Others v. Simpson and Another* (1974).

be shown that they have affected the results.[88] This case was relied upon to show the court how this English common law case has found its way in the Kenyan jurisprudential landscape. He then cited Section 83 of the Kenyan Elections Act which states that an election must be declared null and void if either of the following is satisfied: if the election was conducted in accordance with the law and the principles laid down in the principles of the Constitution or any other written law or if failing to comply with such principles or written law did not affect the outcomes of the elections.[89]

The Court agreed with this reasoning of the petitioner holding that looking at the evidence presented before it, there is no proof of grave irregularities in the management, process or mode of participation in election. Further, the Court held that, where there are minimal irregularities, there was no proof showing that such minimal irregularities affected the outcome of the elections. It is following this reasoning that the Court did not allow the petition.[90]

It is also worth noting that in this case the Supreme Court said that the standard of proof to be applied in election cases is the general common law principle stating that 'he who alleges must prove'. Simply put, all acts are presumed to have been rightly and regularly done unless there is proof of the contrary.[91] As such, it was for the petitioner, and not the respondent or the Independent Electoral Boundary Commission (IEBC), to prove any irregularities that were observed in the elections.[92]

Furthermore, it is important to note that to determine which balance of proof the Supreme Court held has to be applied in election cases, it looked at foreign jurisprudence on this matter; namely, Mauritius, Canada, India and Zambia.[93]

Looking at Mauritius, the Court made reference to *Jugnauth v. Ringadoo and Others* [2008] UKPC 50. In this case, the Judicial Committee of the Privy Council, in agreement with the Supreme Court of Mauritius, held that the instructions that the Court has received from the legislature were such that whether or not there was bribery in an election must be proven on a

[88] *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others*, (2013) eKLR, para 179.
[89] Section 83 of the Elections Act, 2011 (No 24 of 2011)
[90] *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others*, (2013) eKLR, para 305-308.
[91] *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others*, (2013) eKLR, para 196.
[92] *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others*, (2013) eKLR, para 196.
[93] *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others*, (2013) eKLR, para 198-202.

balance of probabilities and that there was no reason of considering any standard that was higher than this.[94] This position has also been reflected in Canada, the Court stated.[95]

Looking at India, the Court made the finding that in other jurisdictions a standard that is high than the simple balance of probabilities has been adopted. This was in refence to the Indian Supreme Court case *Shri Kirpal Singh v. Shri V.V. Giri* (1970), where it was held that given the fact that undue influence was a criminal offence in India, it must be proven by way of the standard of proof required in criminal cases even if the case at hand was an election case. Therefore, the Court held that this had to be proven beyond reasonable doubt.[96]

In Zambia, the Court learned from *Lewanika and Others v. Chiluba* (1999) that the Supreme Court of Zambia adopted the intermediate standard of proof, one that is between a balance of probabilities and beyond any reasonable doubts. This case concerned a presidential candidate who was challenged on the basis that he did his parents were not neither Zambian by birth nor by descent. The case was also brought against him on the ground of bribery and corruption that he was accused of ridding on during the electoral process. The Supreme Court was of the view that one cannot help but admit that parliamentary elections must be decided on a balance that is higher than that of probabilities.[97]

It however in *Anderson Kambela Mazoka and Two Others v. Levy Patrick Mwanawasa and Two Others* SCZ/EP/01/02/03/2002, another Zambian case,[98] which court the attention of the Supreme Court of Kenya. In this case, it was held that the standard of proof in election cases shall be determined on the basis of the subject matter involved. Put in other words, the degree of proof shall be dependent on what is being pleaded.[99]

It was after the analysis of the above cases that the Court got to the Conclusion that it is free to adopt any standard of proof so long as it could do so in line with the Constitution. It is in this

[94] *Jugnauth v. Ringadoo and Others (2008).*
[95] *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others*, (2013) eKLR, para 198.
[96] *Shri Kirpal Singh v. Shri V.V. Giri* (1970)
[97] *Lewanika and Others v. Chiluba* (1999)
[98] *Anderson Kambela Mazoka and Two Others v. Levy Patrick Mwanawasa and Two Others* (2002*).*
[99] *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others*, (2013) eKLR para 202.

way that it decided to go by the intermediate standard of proof, which is one between the balance of probabilities and below the criminal standard of beyond reasonable doubt.[100]

Furthermore, the petitioners argued that there were discrepancies between the number of registered voters when the registration closed and the number that was gazetted. When the register closed the number was of 14,333,339 registered voters but what was gazetted was 14,352,455. The Supreme Court reiterated that these are minor anomalies and that they did not affect the outcome of elections. Importantly, the supreme court stated that the petitioner failed to prove that there was *mens rea* on the part of the respondent in occasioning these anomalies. The petitioners failed to show that such anomalies occurred owing to a certain act that was premeditated by the respondent in order to assure the respondent a win.[101]

ii. *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017)*

In this case, the issues for determination before the Court were whether the 2017 presidential election was carried out in conformity with the principles laid down in the Constitution, whether there were irregularities observed during elections and finally whether such irregularities affected the outcome of the elections.[102]

The Court did not rush directly into settling these questions. First, it found it wise to determine two preliminary matters; namely, to state which standard and burden of proof are to be satisfied in an election petition and to state whether votes that were rejected are to be counted in deciding whether a candidate is in line with the 50+1 votes threshold required by the Constitution.[103]

On the question regarding the burden of proof, the Court was guided by the general common law principle of he who alleges must prove and state that it was the responsibility of the petitioners to bear the burden of proving that there was no conformity with the principles laid down in the Constitution and the elections Act and that such lack of conformity with these

[100] *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others*, (2013) eKLR, para 203.
[101] *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others*, (2013) eKLR para 256.
[102] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR, para 1.
[103] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR.

principles and this Act affected the outcome of the elections. However, the Court went on to state that this evidentiary burden could shift to the other party depending on the way in which the party bearing it would go about discharging it.[104]

With respect to the standard of proof, the court did not deviate from its reasoning in the 2013 presidential election petition *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others.* Just like in 2013, even in this case the Court chose to look at the jurisprudence developed by other countries in terms of standard of proof and found that there are three types of standards; namely, the criminal standard of beyond any reasonable doubt, the civil cases standard which is on a balance of probabilities and the intermediate standard which standard between the balance of probabilities and the criminal standard of beyond any reasonable doubt. The court, looking at the public importance that presidential elections attract, maintained that the intermediate standard is what was fit for this case.[105]

The other point of determination was the threshold of invalidating an election. Here, the petitioners prayed that the Court moves away from its finding in the 2013 *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* where it held that the test of invalidating an election is that the petitioners have to prove that there was not only lack of conformity with the law but also it must be proved that that lack of conformity affected the outcome of the election. The petitioners argued that this was such a very high threshold to make it impossible for anyone to challenge the constitutionality of any election in the country.[106] The Law Society of Kenya even joined in suggesting that Section 83 of the elections Act should not be applicable where there is a violation of the Constitution.[107]

In response to this, the Court took time to analyse Section 83 of the Elections Act by looking at the history behind it. The Court had to look at Section 28 of the National Assembly and Presidential Elections Act, which Section 83 replaced and it also looked at Section 37 of the Representative of the People Act of the United Kingdom and the way it was understood by the

[104] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR.
[105] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR.
[106] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR..
[107] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR.

Court in Morgan v Simpson. It worth noting that the Supreme Court of Kenya agreed with the Simpson decision in 2013, holding that for an election to be invalidated it must be proven that there was both a lack of compliance with the law and that such non-compliance affected the outcomes of elections.[108]

The Supreme Court found that this English Supreme Court case was not disjunctive; it was conjunctive. It therefore went ahead to overrule its 2013 decision reasoning and agreed with the petitioners that the proper test under Section 83 of the Elections Act should be disjunctive. This means that it could suffice if the petitioners prove either that the elections were not carried out in compliance with the law or such lack of compliance affected the outcomes of the elections.[109]

The Court found that the irregularities and illegalities committed by the Chair of the IEBC were so gross as to require only an invalidation of presidential elections results. The Supreme Court here provided a definition of what it understands by 'illegality' and 'irregularity'. Illegality was defined as the breach of the substance of a specific law and irregularity was defined as a violation of a specific regulation or administrative arrangement.[110] It is in this respect that the Court found that the fact that Form 34C which the IEBC used to declare election outcomes was not the original one was an irregularity.[111]

On the basis of the above, the Supreme Court held that the principles laid down in the Constitution and the Elections Act were not abided by. Of particular interest of the courts were Articles 10, 38, 81 and 86 of the Constitution as well as Sections 39, 44 and 83 of the Elections Act.[112] Article 10 of the Constitution provides the national values and the principles of governance.[113] Article 38 grants every citizen the right to freely make any political choices and this right includes forming or participating in the forming of a political party each citizen is

[108] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR
[109] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR
[110] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR
[111] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR
[112] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR
[113] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR

entitled to elections that are free, fair, and regular based on a universal suffrage.[114] Article 81 provides the general principles that are to govern an electoral system in Kenya[115] and 83 speaks of registration as a voter.[116] Section 34 of the Elections Act speaks of the determination and the declaration of results.[117] Section 44 speaks of the way in which technology is to be used in elections[118] and Section 83 speaks of the failure to conform with the law during elections.[119]

V. Chapter Five: Did the Supreme Court Apply Systematic Interpretation in Election Cases or Did it Apply Judicial Activism?

It is important to bear in mind that Article 81 of the Kenyan Constitution provides the criteria that has to be met for a presidential election not to be invalidated. These are discussed in subsequent chapters. But, the decision that the Supreme Court of Kenya adopted in the 2013 presidential election case this being Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others, 2013, seems to have been mainly determined on the basis of Section 83 of the Elections Act of Kenya and not the Constitution of Kenya.

Section 83 provides that an election provides a conjunctive test of invalidating elections in Kenya. It states that for an election to be declared invalid it has to be proven that there were irregularities in the election and these irregularities, it must be proven, must affect the outcomes of the elections.[120] Section 83 is similar to a provision in the National Assembly and Presidential Elections Act (NAPEA), which the Elections Act repealed in 2011. This is Section 44 of NAPEA which provides that both the following have to be proven for an election to be declared invalid:[121]

[114] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR
[115] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR
[116] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR
[117] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR
[118] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR
[119] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR
[120] Section 83, Elections Act (No 24 of 2011).
[121] Section 44, *National Assembly and Presidential Elections Act* (No 7 1998).

a. That there was non-compliance with the law, it does not matter how minimal such lack of compliance was;[122] and
b. Such non-compliance affected the outcomes of the elections.[123]

It is interesting to note that Section 44 of the NAPEA received the English common law tradition established in the case of Morgan and others v Simpson and another, which was the English courts interpretation of their own Act, the Representation of the People's Act, which under Section 37 declared that an election shall never be declared invalid only if there was lack of conformity with the law and such lack of conformity did not affect the outcomes of the elections.[124]

One can fairly conclude that relying on the Morgan case in Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others in 2013 went against the systematic interpretation that the 2010 Constitution of Kenya requires under Article 259, which reads 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, facilitate the development of the law.[125] The Kenyan Supreme Court has gone further to clarify that this method of interpretation demands that, in interpreting any constitutional provision, such provision has to be interpreted in connection with other provisions of the constitution.[126] Therefore, it is not enough to just refer to foreign case law, it has to be contextualized within the 2010 Constitution.[127]

The Supreme Court found in Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others in 2017 it used this disjunctive test provided for by the Morgan case. It therefore went ahead to overrule its 2013 decision reasoning and agreed with the petitioners that the proper test under Section 83 of the Elections Act should be disjunctive. This means that it could suffice if the petitioners prove either that the elections were not carried out in compliance with the law or such lack of compliance affected the

[122] Section 44, *National Assembly and Presidential Elections Act* (No 7 1998).
[123] Section 44, *National Assembly and Presidential Elections Act* (No 7 1998).
[124] Section 37, Representation of the People Act (1949).
[125] Article 259, Constitution of Kenya (2010).
[126] In *the Matter of the Kenya National Commission on Human Rights* (2014) eKLR.
[127] Mutunga W, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions' 13.

outcomes of the elections.[128] It is this kind of approach that falls with the requirements of the Constitution which simply wants the following under Article 81:[129]

'The electoral system shall comply with the following principles-

a) Freedom of citizens to exercise their political rights under Article 38;

b) Not more than two-thirds of the members of elective public bodies shall be of the same gender;

c) Fair representation of persons with disabilities;

d) Universal suffrage based on the aspiration for fair representation and equality of vote; and

e) Free and fair elections, which are-

i. By secret ballot;

ii. Free from violence, intimidation, improper influence or corruption;

iii. Transparent; and

iv. Administered in an impartial, neutral, efficient, accurate and accountable manner'

A reading of the above Article clearly shows that having the test for holding an election invalid a test that is similar to the one developed in the Morgan case (that there must be proof of both lack of compliance with the law and proof of how such lack of compliance has gone on to affect the results of the elections) will be inconsistent with the Constitution. Article 81 says for example that it is enough to show that there was improper influence in the electoral process for an election to be declared invalid. It is stated nowhere in the reading of Article 81 of the Constitution that for example such an improper influence has to affect the outcomes of the elections for the elections to be declared invalid.[130]

To sum up this point, on the question as to what is the standard of nullifying elections in Kenya, it seems to be clear to the author that in Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others, 2013, the Supreme Court's answer to this question was based on judicial activism.[131] However, in Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others in 2017, the Supreme Court decision seems

[128] Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR.
[129] Article 81, Constitution of Kenya (2010).
[130] Article 81, Constitution of Kenya (2010).
[131] Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others, (2013) para. 306.

to have been in line with the systematic interpretation of the Constitution as required under Article 259 of the 2010 Constitution of Kenya.[132]

As thought by Professors Luis Francheschi and PLO Lumumba, Article 81 of the Constitution is the bedrock of the validity of any election in Kenya because it provides for a framework within which an election has to be conducted for it to be declared consistent with the Constitution.[133] Some of the key ingredients within the framework laid down by Article 81 of the constitution with respect to elections are 'transparency and accountability'.[134] This leads the author to his other critique of the presidential cases that are under study here. Article 86 of the Constitution provides for the following:

'At every election, the Independent Electoral and Boundaries Commission shall ensure that-

a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
d) appropriate structures and mechanisms to eliminate electoral malpractice put in place, including the safekeeping of election materials

One may agree with the author that this constitutional provision places the burden of proving whether an election in accordance with the Constitution on the IEBC. The provision states that the IEBC 'shall ensure'.[135] It is therefore logical that the IEBC proves that elections are conducted as per the dictates of Article 86 of transparency and accountability.[136]

However, the Court, both in Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others, 2013[137] and Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others in 2017[138] was guided by the general English common

[132] Article 259, Constitution of Kenya (2010)
[133] PLO Lumumba and L Franceschi, *The Constitution of Kenya, 2010: An Introductory Commentary* (2014) 315.
[134] Article 81, Constitution of Kenya, (2010).
[135] Article 81, Constitution of Kenya, (2010).
[136] Article 86, Constitution of Kenya, (2010).
[137] eKLR (2013).
[138] eKLR (2017).

law rule that 'he who alleges must prove', hence placing the burden of proving that all of or part the requirements of Article 81 were not abided by the IEBC; yet, the Constitution seems to place this obligation on the IEBC by stating that the IEBC 'shall ensure'.[139] It was for the IEBC for instance to prove that the election was 'fair'.

Again, on the question of bearing the burden to prove whether there was any contravention with Article 81, the Supreme Court in both Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others, 2013[140] and Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others in 2017[141] seems to have been guided by considerations that are outside of Article 81 of the Constitution, which provides for a systematic interpretation. Going by the general common law principle of he who alleges must prove was not a responsible transplant of foreign law into the Kenyan legal landscape. Another point to consider is the fact that in Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others, 2013, the Court was of the view that the petitioner must not only prove that there were irregularities, he or she must prove also that the defendant had *mens rea* in committing such irregularities. [142] The author is of the view that this amounts to judicial activism since nowhere in Articles 81 and 86 of the Constitution, which lay down the framework within which an election has to be conducted, there is a requirement of proving the mens rea for there to be an irregularity.[143]

Lastly, the author observe that it was not legitimate for the Supreme Court in both cases to be guided by foreign case law in order to determine which burden of proof has to be satisfied in election cases. For this, in Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others, 2013,[144] the court looked at standards of proof as have been applied in Mauritius, India, Canada and Zambia and got to the conclusion that the standard of proof to be applicable in an election case shall be dependent on the subject matter that is at dispute in the electoral process. This same position was adopted by the Court 4 years later in Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others in 2017.[145]

[139] Article 81, Constitution of Kenya, (2010).
[140] eKLR (2013).
[141] eKLR (2017).
[142] Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others, 2013 para. 256.
[143] Articles 81 and 86, Constitution of Kenya, (2010).
[144] eKLR (2013).
[145] eKLR (2017).

The Constitution requiring that elections shall be fair.[146] To prove this, one may agree that the civil balance on probabilities is enough and not the intermediate standard of proof or the criminal standard of beyond any reasonable doubt. Therefore, even on the question of the standard of proof that is applicable in election cases, the author is of the opinion that the Supreme Court both in 2013 and in 2017 was guided by judicial activism and not the systematic interpretation that is required by the 2010 Constitution of Kenya.

[146] Article 81, Constitution of Kenya (2010)

VI. Chapter Six: Conclusion

i. Introduction

This Chapter provides a general summary of this dissertation. It does this by restating firstly the problem that this dissertation was focusing on. Then, it reminds the reader of the 3 hypothesis that it came with in order to resolve that problem. After this, this Chapter is going to briefly explain the results that this dissertation got to while testing these hypotheses. The Chapter will conclude by suggesting the way forward that future research may adopt.

ii. Initial problem

This dissertation intended to critically answer the question whether the Supreme Court of Kenya has embraced judicial activism or whether it has stuck to a systematic interpretation in presidential election cases. It is worth reminding the reader that judicial activism implies departing from the way in which a constitution wishes to be interpreted by relying on factors that are outside constitutional requirement. Systematic interpretation, on the other hand, implies that the interpretation of a constitutional provision has be done by making logical connections between such provision and other constitutional provisions.

iii. Hypotheses

Three hypotheses were guiding this dissertation in critically answering the question whether or not the Supreme Court of Kenya has embraced judicial activism in presidential election petitions cases. One was that a systematic interpretation of the Constitution is better for legal certainty. The other was that judicial activism fosters legal uncertainty; and the third was that **a** systematic interpretation of the Constitution is legitimate in Kenya.

iv. *Findings*

This research has found that two presidential election cases have been so far entertained in Kenya. One is Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others, 2013. And the other is Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others, 2017.

In the 2013 case, there was clear evidence of judicial activism because the Court failed to reconcile Section 83 of the Elections Act, on which it relied, with the Constitution of Kenya, especially Articles 81 and 86.

In both cases, the 2013 case and the 2017 case, there was reliance on judicial activism when the courts went by the general common law principle of he who alleges must prove was not a responsible transplant of foreign law into the Kenyan legal landscape. This seems to go against the Constitution as this research has shown because the Constitution places on the IEBC the obligation that elections are conducted in line with the Constitution. It logically follows that it is for the IEBC to prove that it conducted elections in line with the Constitution.

The other finding of this work is that it was not legitimate for the Supreme Court in both cases to be guided by foreign case law in order to determine which burden of proof has to be satisfied in election cases. For this, in Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others, 2013, the court looked at standards of proof as have been applied in Mauritius, India, Canada and Zambia and got to the conclusion that the standard of proof to be applicable in an election case shall be dependent on the subject matter that is at dispute in the electoral process. This same position was adopted by the Court 4 years later in Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others in 2017.

v. Directing future research

This dissertation has been focusing on only presidential elections cases in Kenya by trying to see whether judicial activism or systematic interpretation has been relied upon in their adjudication. The same may be done with respect to another type of cases such religious-freedom cases for example and in any country.

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