

**BEYOND THE EXHAUSTION REQUIREMENT: WHEN COURTS MUST HEAR  
PRE-ELECTION DISPUTES IN KENYA**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,  
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By

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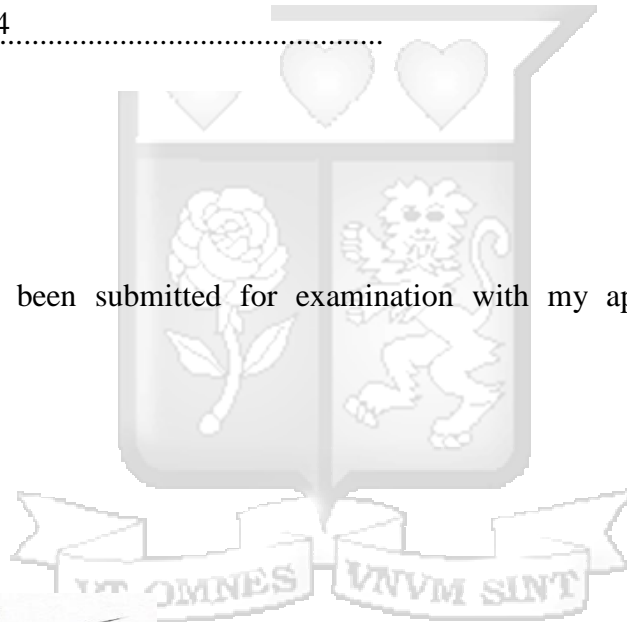
## DECLARATION

I, **EMMANUEL KARANJA KAHERO**, 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: 6<sup>th</sup> March, 2024 .....

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



Signed:  .....

**CECIL ABUNGU YONGO**

## **ABSTRACT**

*My study focuses on the analysis and determination of whether parties can invoke the jurisdiction of the courts, bypassing the exhaustion requirement. I observed how several parties would go to court to present pre-election disputes, and would be turned away.*

*My study employed a qualitative research approach, examining relevant legal provisions, case law and scholarly works. Through this research, my study has established that pre-election disputes can involve fundamental rights, obligating courts to entertain them. While courts should respect the separation of powers, particularly the independence of the IEBC, the Constitution elevates upholding rights above this principle when infringement is alleged. Additionally, the Constitution, particularly regarding the right to a free and fair election, necessitates constitutional courts' involvement in pre-election disputes with potential rights violations.*

*Based on these findings, the research proposes recommendations for judges, legislators, the electoral body in Kenya (IEBC), parties who may experience pre-election disputes and legal practitioners. These recommendations suggest that courts could consider employing case-by-case discretion when deciding whether to entertain pre-election disputes, considering factors like the strength of legal arguments, shifting the burden of proof from the party seeking non-exhaustion to the party advocating for strict exhaustion, and the potential irreparable harm that may be suffered by the parties.*

*The study further recommends that legislators could consider clearly defining the scope of alternative dispute resolution mechanisms and outlining specific situations where non-exhaustion is acceptable. These could be based on dispute complexity, potential harm involved, and inclusion of a "futility clause" for evidently biased or unreasonable delays by the specialized tribunals.*

## **LIST OF ABBREVIATIONS**

**ICCPR** – International Covenant on Civil and Political Rights.

**IEBC** – Independent Electoral and Boundaries Commission.

**IEBC DRC** – Independent Electoral and Boundaries Commission Dispute Resolution Committee.

**KANU** – Kenya African National Union.

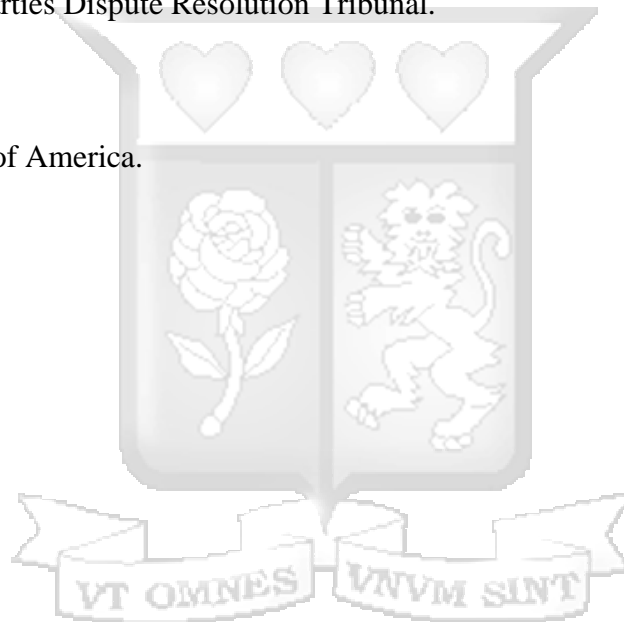
**NASA** – National Super Alliance.

**PNU** – Party of National Union.

**PPDRT** – Political Parties Dispute Resolution Tribunal.

**UN** – United Nations.

**USA** – United States of America.



## LIST OF CASES

*Andrew Okiya Omtata Okiiti & Others v Attorney General* [2012] eKLR.

*Andrew Toboso Anyanga v Mwale Nicholas Scott Tindi & 3 others* [2017] eKLR.

*Democratic Alliance v The President of the Republic of South Africa & 3 Others*

*Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & 10 others* [2013] eKLR.

*Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] eKLR.

*Fredricks & others v MEC for Education and Training, Eastern Cape & others*

*Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* [2015] eKLR.

*Joseph Oyugi Magwanga & another v Independent Electoral and Boundaries Commission & 3 others* [2018] eKLR.

*Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR.

*Kenneth Stanley Njindo Matiba v Daniel Toroitich arap Moi* [1994] eKLR.

*Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] eKLR.

*KKB v SCM & 5 others* [2022] eKLR.

*Marbury v Madison* [1803].

*McCarthy v Madigan* [1992].

*Michael Wachira Nderitu & 3 others v Mary Wambui Munene aka Mary Wambui & 4 others* [2013] eKLR.

*Muka & another v Malala & 12 others; Commission for University Education & 2 others* [2022] eKLR.

*Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

*Mwau v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR

*Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.

*Poe v Ullman* [1961].

*Republic v Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR.

*Sarah Mwangudza Kai v Mustafa Idd Salim & 2 others* [2013] eKLR.

*Speaker of National Assembly v Karume* [1992] eKLR.

*Trusted Society of Human Rights v The Attorney-General and Others* [2012] eKLR.

*Wahome v Attorney General & 2 others* [2021] eKLR.

*Wilfred Manthi Musyoka v Machakos County Assembly & 4 others* [2018] eKLR.

*William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR.



## **LIST OF LEGAL INSTRUMENTS**

*Constitution of Kenya (2010) eKLR.*

*Elections Act (No. 24 of 2011) eKLR.*

*International Covenant on Civil and Political Rights, 16 December 1966.*



## **1.0 INTRODUCTION**

### **1.1 Background**

The literal meaning of judicial review is revision of a verdict or ruling coming from a lower level court, by a grander court. However, this judicial review concept has a more practical implication in public law in a legal system like Kenya's, which is a system bearing the concept of a limited government. Judicial review in Kenya dates back to the colonial period, where one of its theoretical foundations is drawn from the British legal system, which has largely been imprinted onto Kenya's legal fabric. This foundation focuses on the judicial review jurisdiction of the courts, which is justified by the impression that public bodies, while exercising their public power, should not act on such powers beyond their scope. This view has been long-standing over the years as the courts have been trying to prevent other arms of the government from acting *ultra vires*.

It is important to note that judicial review's culture of justification is mitigated by the doctrine of justiciability, where the boundaries of judicial review are established. These boundaries outline when and under what circumstances a court can exercise its power to review actions by public bodies. The doctrine of justiciability is important because it helps to ensure redirection of matters for hearing and determination to existing alternative channels, which are better suited to resolve these matters, rather than taking the common avenue, which is lodging the matter in a court of law. This upholds the principle of separation of powers, where courts refrain from overstepping their authority, causing interference in the undertakings of other government branches.

A scenario where this arises is in pre-election disputes, for instance in the 2013 Kenyan case of *Michael Wachira Nderitu v Mary Wambui Munene*. One of the bones of contention was whether the Court has the jurisdiction to entertain the application that had been brought before it.<sup>1</sup> One ought to note that in as much as a Court, in this instance the High Court, has an extensive jurisdiction,<sup>2</sup> this jurisdiction is extensive but does not exist in a space to be utilized any time a party wishes to request a Court to answer a certain 'question'.<sup>3</sup>

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<sup>1</sup> *Michael Wachira Nderitu & 3 others v Mary Wambui Munene aka Mary Wambui & 4 others* [2013] eKLR.

<sup>2</sup> Article 165, *Constitution of Kenya* (2010).

<sup>3</sup> *Andrew Okiya Omtata Okoiti & Others v Attorney General* (2012) eKLR.

Therefore, in the Mary Wambui case, Justice Majanja argued that the persistent issue in cases which have been brought before courts where there exist alternative and adequate mechanisms to deal with these specific issues, or where there exist tailored organs to hear and determine these disputes should cease. The court's jurisdiction cannot be invoked until the existing avenues have been exhausted.<sup>4</sup> The Court further relied on Article 88(4e) of the Constitution of Kenya where it is stated that any issue of qualification to vie for a parliamentary seat is not an issue for deliberation by Kenya's High Court, but by the procedures as well as the avenues provided by law, applicable to the electoral procedure.<sup>5</sup>

Further illustrating this point, a Kenyan case from 2013, *Diana Kethi Kilonzo v Independent Electoral & Boundaries Commission (IEBC)*, exemplifies another instance of a pre-election dispute. In this case, the petitioner challenged a decision by the Independent Electoral and Boundaries Commission (IEBC), arguing that the commission had overstepped its legal authority.<sup>6</sup> The Court held that the preliminary deliberation by the IEBC, as well as the decision they arrived at was an "exclusive constitutional mandate", and that IEBC conducted itself properly. Consequently, the Petitioner's claim was dismissed.

In these cases, courts endorsed resolving these matters through alternative methods even when legal avenues existed. This reinforces the principle that courts should only intervene after all other dispute resolution options have been explored.

## **1.2 Problem Statement**

In this instance where pre-election disputes take the spotlight, there is an existing trend where parties lodge valid applications to court but on the other hand, these parties have turned a blind eye to exhaustive exploration of alternative measures for resolution of the disputes in question as provided in law. This practice has undermined these alternative mechanisms which have a mandate in law to handle these disputes. In addition to this, with regards to the principle of separation of powers, courts refrain from overstepping their authority when parties consistently approach them to invoke their jurisdiction. With an increased number of cases where the result will be redirection to an avenue that has been designed by law to determine the matter, resources (both the courts' and the parties') are lost over the course of the matter's

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<sup>4</sup> *Michael Wachira Nderitu & 3 others v Mary Wambui Munene aka Mary Wambui & 4 others* [2013] eKLR.

<sup>5</sup> Article 88(4e), *Constitution of Kenya* (2010).

<sup>6</sup> *Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & 10 others* [2013] eKLR.

determination, and a lose-lose situation ensues. Therefore, from these preliminary discussions, my study will seek to analyse and determine whether parties can invoke the courts' jurisdiction for determination of their matters despite non-exhaustion of alternative mechanisms provided by the law.

### **1.3 Research Questions**

1. What is the nature of pre-election disputes with regards to the constitutional rights in the Constitution of Kenya (2010)?
2. What is the implication on the doctrine of separation of powers when courts determine pre-election disputes that are within the purview of another independent body?
3. Does the Constitution of Kenya (2010) require constitutional courts to hear pre-election disputes on first instance where constitutional rights are implicated?

### **1.4 Research Objectives**

1. To assess what is the nature of pre-election disputes with regards to the constitutional rights in the Constitution of Kenya (2010).
2. To evaluate the implication on the doctrine of separation of powers when courts determine pre-election disputes that are within the purview of another independent body.
3. To determine whether the Constitution of Kenya (2010) requires constitutional courts to hear pre-election disputes on first instance where constitutional rights are implicated.

### **1.5 Hypothesis**

Despite the presence of alternative mechanisms for resolving disputes, there are compelling arguments for allowing parties to directly invoke courts' jurisdiction, particularly in pre-election matters. Pre-election disputes often have significant implications for fundamental rights enshrined in the Constitution. After all, the court's primary function is to uphold the Constitution, including the Bill of Rights. Furthermore, Article 22(1) of the Kenyan Constitution guarantees every citizen the right to seek legal recourse when a right or fundamental freedom in the Bill of Rights is threatened, violated, or infringed upon. Given that pre-election disputes often centre on political rights, which are fundamental rights, courts have a clear obligation to hear and determine these matters.

### **1.6 Justification**

When courts turn away parties, ordering them to exhaust the alternative mechanisms provided for in law, the parties face repercussions such as incurring financial implications with regards to legal fees paid over the course of the pre-election dispute. Moreover, with regards to the

aforementioned principles that courts and tribunals are required to follow, i.e., justice being administered without undue regard to procedural technicalities, this principle is foregone when parties are turned away by courts. This study will be useful to judges during determination of pre-election disputes, as well as researchers who will be working on the same.

### **1.7 Conceptual Framework**

The Constitution of Kenya has conferred judicial authority upon the various courts and tribunals that have been established by the Constitution of Kenya.<sup>7</sup> However, there are provisions which discuss the extent to which courts and tribunals shall act on their judicial authority, i.e., the High Court's jurisdiction is limited on matters whose purview is reserved exclusively for the Supreme Court of Kenya.<sup>8</sup> Such limits, which may be similar to or different from the aforementioned one, do not only extend to the High Court, but to other courts and tribunals too. These constellations of constraints are termed as justiciability.<sup>9</sup> This doctrine of justiciability implements a vision which outlines the roles of the different courts and tribunals in Kenya's system of government. This vision states that the courts and tribunals simply exist to solve disputes.

The doctrine of justiciability has been viewed as “notoriously difficult” to define.<sup>10</sup> It is viewed much as a judicial tool as a legal doctrine. In the case of *Poe v Ullman* (1961) that was decided in the United States Supreme Court, Justice Frankfurter said:

*“Justiciability is of course not a legal concept with fixed content or susceptible of scientific verification. Its utilisation is the resultant of many subtle pressures, including the appropriateness of the issues for decision ... and the actual hardship to the litigants of denying them the relief sought.”*<sup>11</sup>

Justice Frankfurter's statements have implications pointing out the methodology that ought to be used to understand justiciability, with the first methodology being referencing the word to itself, i.e., justiciability is a closed system of judges regarding themselves;<sup>12</sup> Invoking the term ‘justiciability’ confines the courts to themselves on what they consider to be their proper

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<sup>7</sup> Article 159, *Constitution of Kenya* (2010).

<sup>8</sup> Article 165 (5a), *Constitution of Kenya* (2010).

<sup>9</sup> Siegel J., ‘A theory of Justiciability’ 86(1) *Texas Law Review*, 2007, 76.

<sup>10</sup> Barton T., ‘Justiciability: A Theory of Judicial Problem Solving’ 24(3) *Boston College Law Review*, 1983, 506.

<sup>11</sup> *Poe v Ullman* (1961) The Supreme Court of the United States.

<sup>12</sup> Barton T., ‘Justiciability: A Theory of Judicial Problem Solving’, 506.

judicial sphere.<sup>13</sup> Essentially, this means that justiciability consists of statements that have been made by judges about the propriety of judges making statements about anything. From this point of view, we see the doctrine's perspective from the closed system- that of the judges.

Therefore, understanding this doctrine better requires a perspective beyond the closed system. It is important that attention is turned to the kind or nature of questions that the courts are usually asked upon determining justiciability. There exists a group of doctrines which fall under the rubric of justiciability- ripeness, standing, and mootness.<sup>14</sup> The doctrine of ripeness ensures a claim isn't brought prematurely, the doctrine of mootness seeks to ensure courts don't expend time and effort on cases where the issue at hand is no longer relevant, and the doctrine of standing ensures that the person bringing the lawsuit (the plaintiff) has a personal stake in the outcome and is the proper party to raise the issue.<sup>15</sup>

In the case of *Marbury v Madison*, two key principles on judicial review, the “who” and “when” principles were developed,<sup>16</sup> i.e., “who” will decide the particular “case or controversy” at hand, and “when” will the courts be eligible to be involved in determining the questions posed. These principles pointed to the foundation for the principle of judicial review, whereby courts have the authority to interpret the Constitution and determine whether any laws or actions taken by the executive branch conform to the Constitution.<sup>17</sup> In my opinion, the key principles on judicial review go hand in hand, and with this arises the doctrine of justiciability or non-justiciability.

The big contention in justiciability in this context is dispute resolution through courts vis-a-vis administrative tribunals. While both handle legal matters, the hardest question is not whether courts or tribunals are generally better suited for dispute resolution, but rather which forum is more appropriate to determine the question at hand.<sup>18</sup> Upon determination on justiciability based on the kind of questions that courts are asked, there will be a clearer understanding on why, and in what kind of cases do judges: (i) out-rightly refuse to adjudicate a particular issue; (ii) functionally decline to adjudicate a case and thereafter invoking one of their prudential

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<sup>13</sup> Pugh G., ‘The Federal Declaratory Remedy: Justiciability, Jurisdiction and Related Problems’ 6(1) *Vanderbilt Law Review*, 1952, 85.

<sup>14</sup> Tsen Lee E., ‘Deinstitutionalizing Justiciability’ 105(3) *Harvard Law Review*, 1992, 606.

<sup>15</sup> Tsen Lee E., ‘Deinstitutionalizing Justiciability’, 606.

<sup>16</sup> Monaghan H., ‘Constitutional Adjudication: The Who and When’ 82(7) *The Yale Law Journal*, 1973, 1365.

<sup>17</sup> Monaghan H., ‘Constitutional Adjudication: The Who and When’, 1365.

<sup>18</sup> Summers R., ‘Justiciability’ *Cornell Law Faculty Publications*, 1963, 533— < [Justiciability \(cornell.edu\)](http://Justiciability.cornell.edu)> on 1 December.

doctrines<sup>19</sup> of no standing or ‘ripeness’; (iii) preside over a case, but employ a certain standard or rule which allows the court to avoid making any meaningful inquiry; (iv) adjudicate a case, but seem to adjust the matter to suit their drives; and (v) adjudicate a case, but in doing so appear to step out of their traditional role of adjudicators.<sup>20</sup>

Nevertheless, the concept of justiciability in Kenya which our courts adhere to is usually one that reflects on the primary principle of courts being resolving disputes arising between parties, not deciding academic questions of law.<sup>21</sup> Therefore, for this study, I will attempt to rationalise the doctrine of justiciability from different perspectives, i.e., encompassing elements of mootness, standing, and ripeness; appropriateness of remedies, and institutional or substantive perspectives, particularly, elements of democracy and separation of powers, or a mixture of them.<sup>22</sup>

## **1.8 Literature Review**

### **1.8.1 What is the nature of pre-election disputes with regards to the constitutional rights in the Constitution of Kenya (2010)**

An election dispute is a discrepancy which results from electoral irregularity, non-conformity, or malpractice.<sup>23</sup> These disputes are inevitable due to human interaction during electoral processes.<sup>24</sup> Pre-election disputes can be classified into the following overlapping categories: disputes specifically within and between political parties; disputes arising from the nomination of candidates; electoral offences and illegal practices; and voter registration disputes.<sup>25</sup> These disputes fall under the political facet of human rights. These political rights, e.g., right to vote, right to vie for an office, and many other rights of the same nature ought to be accorded to individuals who are citizens of a particular country.<sup>26</sup> These disputes ought to be resolved by courts or tribunals to uphold the rule of law.

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<sup>19</sup> Prudential doctrine refers to a legal principle based on a court’s discretion that could be used to determine whether a case should be dismissed based on a variety of factors.

<sup>20</sup> Barton T., ‘Justiciability: A Theory of Judicial Problem Solving’, 508.

<sup>21</sup> Ouma S., Prof. Mwaura K., and Dr. Gichuki N., ‘A New Judicial Review: Defining the Interface between Political and Judicial Power in the Constitution of Kenya’ 7(1) *Kenya Law Review*, 2019, 125.

<sup>22</sup> McGoldrick D., ‘The Boundaries of Justiciability’ 59(4) *International & Comparative Law Quarterly*, 2010, 985.

<sup>23</sup> Mozaffar S. and Schedler A., ‘The Comparative Study of Electoral Governance: Introduction’ 23(1) *International Political Science Review*, 2002, 6.

<sup>24</sup> Mozaffar S. and Schedler A., ‘The Comparative Study of Electoral Governance: Introduction’, 6.

<sup>25</sup> Ojienda T. and Adude L., ‘Electoral Dispute Resolution Mechanisms in Kenya’ 8(3) *Journal of Conflict Management and Sustainable Development*, 2022, 59.

<sup>26</sup> Janoski T. and Gran B., ‘Political Citizenship: Foundations of Rights’ in Isin E., and Turner B. (eds), *HANDBOOK of CITIZENSHIP STUDIES*, 1<sup>st</sup> Edition, SAGE Publications Ltd, United Kingdom, 2002, 13.

Wesley Hohfeld, an American jurist, posits that no right can exist without a strictly corresponding duty.<sup>27</sup> These duties require cooperation which is legally binding.<sup>28</sup> Prior to the promulgation of the 2010 Constitution of Kenya, it was quite difficult to assert these rights, particularly against private persons and bodies.<sup>29</sup> The 2010 Constitution of Kenya has provided an avenue for assertion of constitutional rights against private bodies and individuals.

Therefore, as aforementioned, non-conformity is one of the causes of an election dispute. Non-conformity speaks to the compliance of individuals with electoral laws, which is an absolute requirement during the entire election period. By virtue of the said individuals having political rights, in the event there is a pre-election dispute, the aggrieved consider that this is a result of a breach of their rights.<sup>30</sup> Therefore, individuals who believe their rights have been infringed during the pre-election process can utilize the legal system, i.e., a court or a tribunal, to seek a remedy. This is because pre-election disputes concern legal rights, and courts or tribunals are the appropriate avenues to address such grievances.

### **1.8.2 On whether the doctrine of separation of powers faces implications when courts determine pre-election disputes that are within the purview of another independent body**

The separation of powers doctrine incorporates certain principles that Van der Vyver poses and borrowed from Montesquieu (traditional model). First, there's a clear division of power among the legislative, executive, and judicial branches. Second, the principle of personnel separation restricts individuals from holding positions in more than one branch concurrently. Third, a system of checks and balances is established, where each branch has specific powers designed to limit the actions of the others, promoting some sort of equilibrium within the government. Finally, there's a functional separation between the branches, preventing them from overstepping their bounds or interfering with each other's designated roles.<sup>31</sup>

The traditional model of this doctrine has undergone scrutiny due to its compelling nature in several democratic systems across the world,<sup>32</sup> and this has resulted in attempts to

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<sup>27</sup> Morss J., 'The Legal Relations of Collectives: Belated Insights from Hohfeld' 22(2) *Leiden Journal of International Law*, 2009, 291.

<sup>28</sup> Janoski T. and Gran B., 'Political Citizenship: Foundations of Rights', 16.

<sup>29</sup> Yongo C., 'Constitutional Interpretation of Rights and Court Powers in Kenya: Towards a More Nuanced Understanding' 27(2) *African Journal of International and Comparative Law*, 2019, 222.

<sup>30</sup> Ochieng J., Nyaga B. and Muriuki P., 'Mediation of Election-Related Disputes in Kenya: Challenges, Opportunities and Way Forward' 11(2) *Alternative Dispute Resolution*, 2023, 189.

<sup>31</sup> Van der Vyver JD, 'Political Power Constraints in the American Constitution' *South African Law Journal*, 1987, 13.

<sup>32</sup> Landau D. and Bilchitz D., 'The evolution of the separation of powers in the global south and global north', Elgar Online, 2018, 2.

reconceptualise it.<sup>33</sup> Kavanagh posits that this reconceptualization should promote a division of labour and power, rather than a strict separation of functions between the various arms of government.<sup>34</sup> This is because the traditional model is viewed as too simplistic and impractical, as there is always an overlap between the functions of the different arms of government, i.e., both the legislature and the judiciary have a role in law-making.

These overlapping functions may blur distinctness between the arms of government and seem like all is being merged into one entity. While there may be an overlap in functions, *desideratum of distinctness*<sup>35</sup> is hinged on the manner in which each branch exercises these functions. An example would be how the legislature represents the will of the people, while the judiciary provides authoritative interpretations and applies laws in specific cases.

The legal system establishes a unique balance through a concept akin to precedent, where courts possess the authority to review actions. This review power can encompass pre-election challenges presented to the courts. A critical question emerges: does this authority create tension with the separation of powers principle? As long as courts retain this review function, there's a potential for conflicts over jurisdiction.<sup>36</sup> However, does this amount to interference with the doctrine of separation of powers?

In my opinion, increased judicial involvement in pre-election disputes overseen by the IEBC could be seen as strengthening the rule of law. Courts would offer a crucial avenue for legal challenges and function as reliable mechanisms to ensure adherence to electoral regulations..<sup>37</sup> Therefore, courts performing 'not-necessarily overreaching' functions as they have jurisdiction over cases involving fundamental rights or freedoms in the Constitution's Bill of Rights, i.e., political rights, maintains the current status quo on the doctrine of separation of power. Though harmless, a few eyebrows may be raised as to the precedent set by allowing courts to preside over pre-election disputes.

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<sup>33</sup> Stephenson M., 'Does Separation of Powers Promote Stability and Moderation?' 42(2) *The Journal of Legal Studies*, 2013, 331.

<sup>34</sup> Kavanagh A., 'The Constitutional Separation of Powers', in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law*, Online Edition, Oxford University Press, United States, 223.

<sup>35</sup> Kavanagh A., 'The Constitutional Separation of Powers', 232.

<sup>36</sup> Kibet E., and Wangeci. K., 'A Perspective on the Doctrine of the Separation of Powers based on the Response to Court Orders in Kenya' *Strathmore Law Review*, 2016, 227  
—<<https://press.strathmore.edu/uploads/journals/strathmore-law-review/SLR1/1SLR1-12%20A%20Perspective%20on%20the%20Doctrine%20of%20Separation%20of%20Powers%20Based%20on%20the%20Response%20to%20Court%20Orders%20in%20Kenya%20by%20Emmanuel%20Kibet%20and%200Kimberly%20Wangeci.pdf>> on January 2016.

<sup>37</sup> Mbote K., 'Kenya: Justice Sector and the Rule of Law' in Akech M. (eds) *Kenya Justice Sector and the Rule of Law*, 1<sup>st</sup> Edition, The Open Society Initiative for Eastern Africa, Nairobi, 2011, 22.

### **1.8.3 On whether the Constitution of Kenya (2010) requires constitutional courts to hear pre-election disputes on first instance where constitutional rights are implicated.**

For this subheading, I will draw upon four key provisions enshrined within the Kenyan Constitution of 2010. Notably, the Bill of Rights within the Constitution outlines a comprehensive framework of political rights for citizens. Among these rights is the right of any adult citizen to stand for public office, or for a position within their affiliated political party, without facing unreasonable limitations. Additionally, if elected, they have the right to hold that office. Furthermore, the Constitution emphasizes that all individuals are entitled to enjoy the rights and fundamental freedoms outlined in the Bill of Rights to the fullest extent possible, as long as it aligns with the inherent nature of that specific right or freedom.

From these two provisions, we see the Kenyan Constitution's Bill of Rights (2010) empowering courts to act as guardians of these fundamental rights. This translates to judicial intervention whenever someone's rights are violated or threatened. Interestingly, the Bill of Rights' application extends beyond state actions, encompassing situations involving private entities and/or individuals.<sup>38</sup>

This is seen in Kenya where the High Court has the responsibility determine whether a right or freedom enshrined within Kenya's Bill of Rights has been denied, violated, infringed, or even threatened.<sup>39</sup> Lastly, Kenya's Constitution states that courts and tribunals which are guided by the purpose and principles that are found within the Constitution shall be protected and promoted.<sup>40</sup> One of these principles is upholding the rule of law constitutional principle as stated in Article 10(2a) of Kenya's Constitution. The former Chief Justice of Kenya, Dr. Willy Mutunga has insisted that it is not just the Bill of Rights which is to be used as a benchmark of legal appropriateness,<sup>41</sup> hence the relation of all the aforementioned constitutional provisions.

The rule of law is equated with the idea of a 'government of laws, not of men',<sup>42</sup> suggesting that all actions conducted should be within the confines of the law. In determining whether a question should be brought before a court, a scholar, Keith Lesar suggests the immediacy and

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<sup>38</sup> Gardbaum S, 'The "Horizontal Effect" of Constitutional Rights' 102 (3) *Michigan Law Review*, 2003, 388.

<sup>39</sup> Makau S., 'JUSTICE IN THE WAKE OF DISOBEDIENCE OF COURT ORDERS BY THE KENYAN LEGISLATURE: A THREAT TO THE PRINCIPLE OF SEPARATION OF POWERS IN THE CONSTITUTION' published LLB Thesis, Moi University, 14.

<sup>40</sup> Mutunga W., 'Elements Of Progressive Jurisprudence In Kenya: A Reflection' Kenya Law – < [Elements Of Progressive Jurisprudence In Kenya: A Reflection | Kenya Law](#)> on 31 May 2022.

<sup>41</sup> Mutunga W., 'Elements Of Progressive Jurisprudence In Kenya: A Reflection' Kenya Law – < [Elements Of Progressive Jurisprudence In Kenya: A Reflection | Kenya Law](#)> on 31 May 2022.

<sup>42</sup> Mbote K., *Kenya: Justice Sector and the Rule of Law*, 22.

certainty of the threatened injury should be taken into consideration.<sup>43</sup> Alongside this, Lesar also suggests the need to pay keen attention to the nature of the threatened injury- where the personal rights or liberties are involved, the courts should act swiftly to combat the unconstitutionality.<sup>44</sup> Ideally, individuals should be able to bring a question for determination before a court in the event their rights are either infringed, threatened, or violated. Therefore, in my opinion, constitutional courts in Kenya have an obligation to hear pre-election disputes on first instance where rights are implicated.

## **1.9 Methodology**

For my study, in assessing the nature of pre-election disputes with regards to the constitutional rights in the Constitution of Kenya (2010), I shall use a historical analysis. This is to show the development of rights of an individual in Kenya from the post-independence period till date, and how this development has affected the current rights. I shall also use a critical analysis to study what other scholars have stated with regards to the nature of political rights arising from pre-election disputes. These rights could be inherent to human beings, or granted by a specific law or authority. I shall rely on primary sources of law, particularly case law and statutes, in analysing the development of rights of an individual in Kenya. I shall also use secondary sources such as journal articles to extract information regarding the nature of rights and politics of constitutional changes.

Secondly, to determine the extent of the implications present with regards to the doctrine of separation of powers when courts preside over pre-election disputes which are under the purview of another independent office, a critical analysis will be used. I shall first investigate and assess the philosophy of *trias politica*, whilst examining the functions of the different government arms, as well as the lightly discussed possible fourth arm of the government involving independent offices and tribunals. This approach shows the extent to which the different government bodies act, and their scope of action, giving rise to the separation of powers. I shall use secondary sources, e.g., journal articles and books to study the doctrine of separation of powers and the different government functions. With an analysis of these functions, there is a possibility of an overreaching function by the courts, Special attention will be accorded to the judiciary and the independent offices and tribunals, where the concept of

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<sup>43</sup> Lesar K., 'Timing of Judicial Review under the Administrative Procedure Act' 56(5), *California Law Review*, 1968, 1507.

<sup>44</sup> Lesar K., 'Timing of Judicial Review under the Administrative Procedure Act', 1509.

justiciability will be scrutinised, to check whether there is any harm to the doctrine of separation of powers.

Finally, in evaluating whether the Kenyan Constitution requires constitutional courts to hear pre-election disputes on first instance where constitutional rights are implicated, I shall employ, once again, critical analysis as well as a deductive approach. I shall show a pattern of cases which have lodged pre-election disputes at the courts and the parties' cases have been deliberated and determined. I believe there are principles, doctrines and rationale that the courts have relied on in determining these cases, and as a result, parties have not been turned away for having the subject matter as a pre-election dispute. I will further investigate the same and their correspondence to secondary sources such as books and journal articles to scrutinise the rationale behind the courts' decisions, both for those that turn away pre-election disputes, and those that entertain them.

### **1.10 Chapter Breakdown**

Chapter one will involve the preliminaries of my study- the research objectives, conceptual framework, hypothesis, and justification for my study, thus laying down a foundation for my subsequent chapters. Chapter two will assess what the nature of pre-election disputes is with regards to the constitutional rights in the Kenyan Constitution.

Chapter three will investigate and determine the extent of the present implications with regards to the doctrine of separation of powers when courts preside over pre-election disputes which are under the purview of another independent office; it will assess whether the judiciary oversteps its functions, and lastly, chapter four of my study will evaluate whether the Kenyan Constitution requires constitutional courts to hear pre-election disputes on first instance where constitutional rights are implicated. Lastly, chapter five of my study will offer recommendations on how parties could best invoke the jurisdiction of the courts despite non-exhaustion of alternative mechanisms provided by law.

## **2.0 THE NATURE OF PRE-ELECTION DISPUTES IN THE CONSTITUTION OF KENYA (2010)**

### **2.1 Introduction**

In this chapter, my study will examine what the nature of pre-election disputes with regards to the constitutional rights in the Kenyan Constitution is. To do so, it will begin by studying the history of pre-election disputes in Kenya. Thereafter, I shall discuss the different dynamics of pre-election disputes, i.e., who it affects, the different kinds of pre-election disputes, underlying factors behind the pre-election disputes, and the regulatory framework in place to resolve such disputes. Lastly, I shall provide the rationale behind regarding pre-election disputes as constitutional rights implications.

### **2.2 A history of election disputes in Kenya**

Back then in 1992, *Kenneth Matiba v Daniel Moi* was the very first electoral dispute that was brought before a court in Kenya.<sup>45</sup> Hoping to challenge the then president's election – President Moi, the Applicant moved to the High Court, which proved to be futile as the Applicant's case was unsuccessful as a result of a procedural technicality. A dispute arose from the 1997 Kenyan presidential election, echoing the country's previous experience with contested results. Mwai Kibaki, who had lost the race to incumbent president Daniel arap Moi, challenged the outcome. However, his legal challenge was thwarted by a procedural irregularity. Unlike the prevailing election petition rules at the time, Kibaki's team obtained a signature on the petition through a power of attorney, which proved to be a critical misstep. This technical error ultimately led the court to dismiss the case.<sup>46</sup>

The judiciary back then was particularly unreliable on constitutional issues involving elections as they favoured the incumbent president, President Moi, especially with the appointment of a chief justice, Zachaeus Chesoni, who was pro-government during the Moi regime.<sup>47</sup> Chesoni was the former chair of the 1997 presidential and parliamentary elections too. This appointment led to a loss of confidence, not only in the electoral body back then, but also the judiciary and the government at large, as it served to cater for the former president's interests. Additionally, the previous Constitution of Kenya prohibited a president from serving for more than two terms

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<sup>45</sup> *Kenneth Stanley Njindo Matiba v Daniel Toroitich arap Moi* [1994] eKLR.

<sup>46</sup> Muriuki P., Nyaga B., 'Ochieng J.B., Mediation of Election-Related Disputes in Kenya: Challenges, Opportunities and Way Forward', 186.

<sup>47</sup> Mutua M., 'Justice Under Siege: The Rule of Law and Judicial Subsistence in Kenya' 23(1) *Human Rights Quarterly*, 2001, 112.

in office, each term being a maximum of five years.<sup>48</sup> Despite contention from rivals that Moi's election as the president was invalid, the judiciary upheld his win.

In 2007, a third election dispute relating to the credibility of the presidential election ensued. The contentious outcome sparked a wave of violence unlike anything the country had ever seen. Lives were lost, hundreds were displaced, livelihoods were destroyed, and property worth colossal value was lost.<sup>49</sup> Amidst the chaos, both presidential contenders, Mwai Kibaki and Raila Odinga, agreed to participate in a mediation process led by the then United Nations (UN) Secretary-General Kofi Annan. By establishing a Prime Minister position to ratify the agreement, this action paved the way for a coalition government of national unity,<sup>50</sup> which in turn facilitated and led the clamour for constitutional reform in 2010. The 2010 Constitution sought to establish a trustworthy electoral system amongst other reforms as a means to prevent future conflicts and violence.<sup>51</sup>

From this short history of election disputes in Kenya, my focus on these three cases is to show how the courts and the electoral body failed at the highest level during elections – the presidential elections. A trickle-down deduction would insinuate that any electoral dispute which would be appealed all the way to the Supreme Court would face the same failure as the presidential elections. From the foregoing, we have observed how institutional rot, as seen in the electoral body as well as the courts, previously contributed to a loss of trust due to strategic exploitation by political actors. However a new leaf was turned when the Judiciary, which has the mandate of safeguarding the supreme law of the land, had its independence restored.<sup>52</sup> With this independence restored, it is less likely that there will be strategic exploitation by political actors. This is important as it shows a progression in utilizing constitutional courts for determination of electoral disputes.

### **2.3 Dynamics of pre-election disputes**

In Kenya, the responsibility for resolving pre-election disputes, which occur before the conduction of elections or declaration of results, is a multi-pronged approach. This means the courts, the IEBC, and political parties all play a role in addressing these challenges.<sup>53</sup> The

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<sup>48</sup> Article 5(9), *previous Constitution of Kenya* eKLR.

<sup>49</sup> Opondo P. A., 'Ethnic politics and post-election violence of 2007/8 in Kenya' 6(4) *African Journal of History and Culture*, 2014, 59.

<sup>50</sup> Lijphart A., 'Constitutional Design for Divided Societies' 15(2) *Journal of Democracy*, 2004, 96.

<sup>51</sup> Opondo P. A., 'Ethnic politics and post-election violence of 2007/8 in Kenya', 59.

<sup>52</sup> Article 160, *Constitution of Kenya* (2010).

<sup>53</sup> The Judiciary of Kenya, *Bench Book on Electoral Dispute Resolution*, 2<sup>nd</sup> Edition, The Judiciary, Kenya, 2022, 55.

International Covenant on Civil and Political Rights (ICCPR), Article 25, which Kenya is a party to,<sup>54</sup> mandates that everyone, regardless of their background, has the right to actively participate in their government. This includes voting, running for office, as well as joining the public service under equal conditions. Any limitations placed on these rights must be fair, objective, and clearly defined by law. Importantly, these rights can only be restricted in very specific situations, and even then, the reasons must be demonstrably fair and objective, not based on personal bias or discrimination.<sup>55</sup>

people who experience pre-election disputes are citizens of Kenya – those vying for public offices, and those voting for candidates vying for election offices. These pre-election disputes refer to, but are not limited to, disputes regarding questions of validity of party nominations, commission of election malpractices, qualification for elective office, voter registration, and campaign violations.<sup>56</sup> They are briefly described as follows:

### **2.3.1 Party nomination disputes**

Nomination is the process through which political parties select candidates who will be representing the respective party during the elections. Nomination of candidates involves both the political parties and the IEBC, which deals with clearance of the individual.<sup>57</sup> From these two, disputes arising from nomination could arise out of either phase – that of the political parties, or IEBC.<sup>58</sup>

### **2.3.2 Eligibility and Qualification for elective office**

The eligibility and qualifications for an elective office are spelt out in Kenya's Constitution,<sup>59</sup> as well as the Elections Act.<sup>60</sup> Seeing as the qualifications are for various positions, and they are different, I shall focus on what disqualifies candidates seeking to be nominated for an elective office. These disqualifications are: Citizenship, which is a prerequisite. One is required to be a Kenyan citizen by birth (for presidential and deputy presidential elections) and/or

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<sup>54</sup> —<[Human Rights Committee reviews Kenya on its implementation of the International Covenant on Civil and Political Rights \(knchr.org\)](https://www.knchr.org)> on 4 February 2024.

<sup>55</sup> The Judiciary of Kenya, *Bench Book on Electoral Dispute Resolution*, 65.

<sup>56</sup> The Judiciary of Kenya, *Bench Book on Electoral Dispute Resolution*, 55.

<sup>57</sup> Muriuki P., Nyaga B., Ochieng J.B., 'Mediation of Election-Related Disputes in Kenya: Challenges, Opportunities and Way Forward', 193.

<sup>58</sup> The Judiciary of Kenya, *Bench Book on Electoral Dispute Resolution*, 82

<sup>59</sup> Article 137, Article 180(2), and Article 99 *Constitution of Kenya* (2010).

<sup>60</sup> Section 22-24, *Elections Act* (No. 24 of 2011).

registration (parliamentary and county elections);<sup>61</sup> being of unsound mind; serving a sentence of imprisonment of at least 6 months, etc.<sup>62</sup>

### 2.3.3 Voter Registration

These pertain to conflicts related to the qualifications, identification, and enlistment of voters. In the 2017 Kenyan case of *Mwau v IEBC*, the Supreme Court emphasised the significance of accurate voter registration as a fundamental aspect of electoral law that upholds the right to vote. These disputes encompass issues like voter register inspection, instances of individuals names missing despite their registration, relocating a voter to a different electoral unit, modifying a voter's information, and the disqualification of a voter.<sup>63</sup>

### 2.3.4 Campaign Violation

Campaigns in Kenya during the election period are often accompanied by harsh attacks and tactics against opponents, due to the high stakes involved. Consequently, instances of violence, hate speech, and destruction of election materials emerge. These actions are classified as electoral offences in Kenya, carrying significant consequences like arrest, prosecution, and potential conviction.<sup>64</sup>

The law has established two separate dispute resolution mechanisms: one which is internal to each political party, referred to as the Political Parties Dispute Resolution Tribunal (PPDRT), and another established within the IEBC, known as the IEBC Dispute Resolution Committee (IEBC DRC).<sup>65</sup>

From these disputes, we can observe that the rights in contention here are the right to vote, right to vie for an elective office, and right to campaign for a political party, amongst other rights.<sup>66</sup> These rights are political in nature,<sup>67</sup> and are protected by the Constitution of Kenya under the Bill of Rights.<sup>68</sup> A significant contributor to these disputes appears to be

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<sup>61</sup> The Judiciary of Kenya, *Bench Book on Electoral Dispute Resolution*, 69.

<sup>62</sup> The Judiciary of Kenya, *Bench Book on Electoral Dispute Resolution*, 69.

<sup>63</sup> Muriuki P., Nyaga B., Ochieng J.B., 'Mediation of Election-Related Disputes in Kenya: Challenges, Opportunities and Way Forward', 194.

<sup>64</sup> Muriuki P., Nyaga B., Ochieng J.B., 'Mediation of Election-Related Disputes in Kenya: Challenges, Opportunities and Way Forward', 194.

<sup>65</sup> Cheruiyot K., 'Solving the Jigsaw Puzzle: The Jurisdiction of IEBC Dispute Resolution Committee and the Political Parties Dispute Resolution Tribunal in the Resolution of Electoral Disputes and Malpractices in Kenya' Social Science Research Network, 2022, 2.

<sup>66</sup> Article 38(3c), *Constitution of Kenya* (2010).

<sup>67</sup> Ojienda T. and Adude L., 'Electoral Dispute Resolution Mechanisms in Kenya', 57.

<sup>68</sup> Article 38, *Constitution of Kenya* (2010).

discrepancies with established electoral regulations. When evaluating claims of nonconformity with electoral laws, the onus falls on the party making the claim to demonstrate both the specific law that was violated,<sup>69</sup> and how this alleged violation impacted the validity of the announced outcome.<sup>70</sup>

#### **2.4 The rationale behind regarding pre-election disputes as constitutional rights implications**

Political rights are considered citizenship rights.<sup>71</sup> Citizenship rights originate from the guarantee of legal and political protections which citizens of a particular jurisdiction hold.<sup>72</sup> While citizenship grants rights and protections, it also comes with responsibilities for the citizens to engage with and contribute to the collective good and the political system. This is because all citizenship rights are fundamentally legal and political in nature. They are established through government legislation, executive orders, and legal decisions. In essence, these legal and political frameworks create the foundation for many other citizenship rights.

There are legal theories which support recognition and enforcement of these political rights. One of them is liberalism, which puts a strong emphasis on the individual. There are several theories of liberalism, but my main focus will be on the position of rights and obligations. According to this theory, the relationship between rights and obligations is usually contractual, or one of immediate reciprocity. Essentially, for each right, there is generally an equal and corresponding obligation.<sup>73</sup> In this instance for electoral laws, an individual has the right to run for an elective office.<sup>74</sup> The resulting obligation would be that the individual fulfils all the requirements, granting him eligibility to run for the position in question. Additionally, the state has an obligation to ensure that the individual's right to run for an elective office is not compromised, i.e., via potentially baseless pre-election disputes.

Amongst these citizenship rights, civil rights are also classified under them. The Kenyan Constitution guarantees all individuals freedom and personal security. This right encompasses protection from violence inflicted by any entity, be it a government official or a private citizen.<sup>75</sup> In addition to political rights, these rights (civil rights) tend to be violated in Kenya,

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<sup>69</sup> Section 83, *Elections Act* (No. 24 of 2011).

<sup>70</sup> *Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.

<sup>71</sup> Janoski T. and Gran B., 'Political Citizenship: Foundations of Rights', 15.

<sup>72</sup> Janoski T. and Gran B., 'Political Citizenship: Foundations of Rights', 13.

<sup>73</sup> Janoski T. and Gran B., 'Political Citizenship: Foundations of Rights', 19.

<sup>74</sup> Article 38(3c), *Constitution of Kenya* (2010) eKLR.

<sup>75</sup> Article 29(c), *Constitution of Kenya* (2010) eKLR.

especially during the electoral period. Why bring these rights into the picture in an attempt to give a rationale behind regarding pre-election disputes as constitutional rights infringement? When widening the scope on the general consequences of pre-election disputes, civil rights too are involved.

In Kenya, political parties tend to be personal and self-serving to certain individuals, rather than institutional, and this has severely affected their aptitude to establish regular procedures and structures for conducting their activities.<sup>76</sup> Political parties have turned into ethno-regional organisations, which have consequently resulted in chaotic and uncontrolled candidate selection processes, sometimes leading to outbreaks of violence.<sup>77</sup> This shows how political unrest in Kenya has affected civil rights too.

An example would be in the 2007 general elections, in the Party of National Unity (PNU), disputes over the Kamukunji nomination results led to an arbitration meeting, which in itself turned violent. Brian Otieno Weke assaulted Simon Ng'ang'a, the alleged winner of the nomination. Similarly, still in Kenya African National Union (KANU), former and deceased Member of Parliament John Serut faced physical assault by a mob when he tried to claim his clearance certificate after losing the Mount Elgon nomination vote. These examples highlight the widespread issue of violence plaguing the nomination process across multiple parties.<sup>78</sup>

Kenya's judiciary has been entrusted with the task of protecting fundamental rights and individual liberties<sup>79</sup> – these social and political rights included. This involves upholding the rule of law, which is a constitutional principle. The judiciary upholding the rule of law ensures that no individual can be lawfully punished or deprived of their property unless they have violated a clearly defined law, proven in a standard legal proceeding before established courts.<sup>80</sup> Additionally, the rule of law further prescribes that no one, regardless of their status or position, transcends the legal system. All individuals, irrespective of rank or condition, are subject to the same laws and answerable to the established courts.<sup>81</sup>

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<sup>76</sup> Elklit J. and Wanyama F., 'Electoral violence during party primaries in Kenya' 25(6) *Candidate nomination, intra-party democracy, and election violence in Africa*, 2017, 1022.

<sup>77</sup> Elklit J. and Wanyama F., 'Electoral violence during party primaries in Kenya', 1022.

<sup>78</sup> Elklit J. and Wanyama F., 'Electoral violence during party primaries in Kenya', 1026.

<sup>79</sup> Mbondenyi M. and Ambani J., *THE NEW CONSTITUTIONAL LAW OF KENYA: Principles, Government and Human Rights*, 1<sup>st</sup> Edition, LawAfrica Publishing, Nairobi, Kenya, 2013, 61.

<sup>80</sup> Mbondenyi M. and Ambani J., *THE NEW CONSTITUTIONAL LAW OF KENYA: Principles, Government and Human Rights*, 49.

<sup>81</sup> Mbondenyi M. and Ambani J., *THE NEW CONSTITUTIONAL LAW OF KENYA: Principles, Government and Human Rights*, 50.

This law that is above every individual prescribes that every individual should be allowed to enjoy their political rights as well as their civil rights, without any infringement, unless justifiable. This shows the importance of recognizing citizenship rights as constitutional rights, and safeguarding them. More importantly, in the event an institution, such as the IEBC, performs a critical role in upholding fundamental rights, the judiciary must be particularly vigilant in ensuring its proper execution.<sup>82</sup> While these institutions derive their authority from legislation and function within the broader framework of administrative bodies, their rulings are nonetheless subject to rigorous legal review to ensure that their decisions comply with established legal principles, adhere to fair procedures, and ultimately reach conclusions that are reasonable and justified in light of the relevant facts and circumstances.<sup>83</sup>

In further arguing whether pre-election disputes should be regarded as constitutional rights implications, it is important to look at similar elements that are present in other constitutional right implications cases. These elements are first, there needs to be the existence of a right. Secondly, there needs to be an action or inaction by a state actor or an entity. Third, this inaction or action by a state actor or an entity needs to have infringed on the right in question, and finally, such infringement is unjustifiable under Article 24 of the Constitution of Kenya, i.e., defined by law, reasonable and justifiable, necessary to achieve a legitimate aim (e.g., public security), or proportionate to the aim being achieved.

In a 2021 Kenyan High Court case, *Wahome v Attorney General*, the court relied on the definition of what a constitutional matter is in the case of *Fredricks & others v MEC for Education and Training, Eastern Cape & others* that was decided in the Constitutional Court of South Africa. The Constitutional Court stated that a constitutional matter involves any dispute surrounding the consistency of an action or law with the Constitution. The roles, powers, and responsibilities of state actors and entities too are also brought into question. This action or inaction by state actors or entities ought to touch on anything related to interpreting, applying or defending the rights present in the Bill of Rights.<sup>84</sup>

As illustrated in a 2022 Kenyan High Court case, *KKB vs SCM & Others*, the Petitioner contended that their fundamental right to human dignity, enshrined in Article 28 of the Kenyan

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<sup>82</sup> Miyandazi V. and Stacey R., ‘Constituting and Regulating Democracy: Kenya’s Electoral Commission and the Courts in the 2010s’ 16 *Asian Journal of Comparative Law*, 2021, 193 – <[\\*constituting-and-regulating-democracy-kenyas-electoral-commission-and-the-courts-in-the-2010s.pdf](#)> on 7 February 2024.

<sup>83</sup> Miyandazi V. and Stacey R., ‘Constituting and Regulating Democracy: Kenya’s Electoral Commission and the Courts in the 2010s’, 198.

<sup>84</sup> *Wahome v Attorney General & 2 others* [2021] eKLR.

Constitution, was breached due to being compelled into a marital union with the first Respondent.<sup>85</sup> The Petitioner in this instance invoked Article 22(1) of Kenya's Constitution in this case. This article empowers individuals to initiate legal proceedings when they believe a right or freedom in Kenya's Bill of Rights has been infringed upon, violated, denied, or threatened.<sup>86</sup> The Court stated that the key matter in this case was whether the marriage was valid, and if it existed.<sup>87</sup> The court thereafter held that the issue in this case is not an explicit right stated in the Bill of Rights, and was dismissed.

Conversely, a 2017 Kenyan High Court case (*Kenya National Commission on Human Rights v Attorney General*), centred on a potential violation of refugees' rights. The case examined whether the government's closure of Kakuma and Dadaab, bypassed due process. Article 47, of Kenya's Constitution, guarantees the right to fair administrative actions. This right entails swift, efficient, lawful, and procedurally just handling of administrative matters by the government.<sup>88</sup> The Court decided that shutting down the camps by the government was a violation of Article 47's right owed to the refugees.<sup>89</sup> This right is expressly stated and preserved in the Bill of Rights. There was a government action that infringed on this right, consequently rendering the matter as a constitutional issue.

In the above two cases discussing constitutional issues, we can observe that the court pays keen attention to what the Constitution expressly states, and what right is conferred to individuals. In the event such a right is infringed, threatened or violated, the individual has a right to institute court proceedings,<sup>90</sup> and the Court has a duty to determine whether the the right or fundamental freedom in the Bill of Rights has indeed been denied.<sup>91</sup> In the context of pre-election disputes, having established that they involve political rights conferred upon individuals by Article 38 of the Constitution of Kenya, it is important that these political rights implications are accorded the same weight that other rights are being accorded, as they are part and parcel of Kenya's Bill of Rights.

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<sup>85</sup> *KKB v SCM & 5 others* [2022] eKLR.

<sup>86</sup> Article 22(1), *Constitution of Kenya* (2010).

<sup>87</sup> *KKB v SCM & 5 others* [2022] eKLR

<sup>88</sup> Article 47, *Constitution of Kenya* (2010).

<sup>89</sup> *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] eKLR.

<sup>90</sup> Article 22(1), *Constitution of Kenya* (2010).

<sup>91</sup> Article 165(3b), *Constitution of Kenya* (2010).

## 2.5 Conclusion

This chapter set out to determine the nature of pre-election disputes with regards to the constitutional rights in the Kenyan Constitution. It has discussed a brief history of election disputes in Kenya, the characteristics of pre-election disputes, and the rationale behind regarding pre-election disputes as rights implications. In doing so, it has shown that political rights that are implicated in the event of pre-election disputes are constitutional rights protected by the Bill of Rights. In the chapter that follows, the study will discuss whether courts determining matters within another independent body's domain blurs the doctrine of separation of powers, potentially raising concerns on judicial overreach.



## **3.0 IMPLICATIONS ON THE DOCTRINE OF SEPARATION OF POWERS WHEN COURTS DETERMINE MATTERS UNDER THE PURVIEW OF ANOTHER INDEPENDENT BODY**

### **3.1 Introduction**

In this chapter, my study will examine what the implication on the doctrine of separation of powers when courts determine pre-election disputes that are within the purview of another independent body is. To do so, it will begin by studying how the doctrine of separation of powers has been viewed and interpreted by different scholars. Thereafter, I shall discuss the doctrine of separation of powers in the context of Kenya. Lastly, I shall discuss in what scenario the exhaustion principle prevents checks and balances in the context of Kenya.

### **3.2 Separation of powers as viewed by different scholars**

Fearing the potential for governmental power to undermine the very values it upholds, Western institutional theorists have long grappled with the delicate balance between ensuring effective governance and preventing the abuse of power. These theorists argue that control mechanisms are crucial to ensure that the pursuit of societal values do not inadvertently lead to their own destruction.<sup>92</sup> Other scholars, e.g., Jeremy Waldron have argued that this doctrine of separation of powers is important as it puts in place a system of checks and balances. This involves a power diffusion system where authority is distributed across multiple actors, each with the capacity to limit and influence the actions of others, thus preventing the concentration and abuse of power.<sup>93</sup>

With regards to the separation of powers, there exists a prominent clash in interpretation – there are two schools of thought: formalists, and functionalists.<sup>94</sup> Formalists are strict constructionists who favour a rigid interpretation of the Constitution. They hold the opinion that each branch should be confined to its explicitly enumerated powers.<sup>95</sup> On the other hand, functionalists advocate for a more flexible approach. They are alive to the potential overlap between branches.<sup>96</sup>

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<sup>92</sup> Vile M. J. C., *Constitutionalism and the Separation of Powers*, 2<sup>nd</sup> Edition, Liberty Fund, Inc., United States of America, 1998, 3.

<sup>93</sup> Waldron J., 'Separation of Powers in Thought and Practice' 54(2) *Boston College Law Review*, 2013, 433.

<sup>94</sup> Vile M. J. C., *Constitutionalism and the Separation of Powers*, 403.

<sup>95</sup> Vile M. J. C., *Constitutionalism and the Separation of Powers*, 403.

<sup>96</sup> Vile M. J. C., *Constitutionalism and the Separation of Powers*, 403.

The very pure form of the doctrine of separation of powers, which is the formalist approach, is associated with Baron Montesquieu.<sup>97</sup> Interestingly, he has never clearly articulated a theory of functional separation and specialisation in its pure form despite this association.<sup>98</sup> According to the pure form of the doctrine of separation of powers according to Maurice Vile, he states that there should be a tripartite division of government, whereby the power vested in the state is distributed amongst three distinct branches: the legislative, the executive, and the judiciary. Each branch holds a specific and identifiable function, i.e., the creation of laws (legislature), the execution of laws (executive), and the interpretation of laws (judiciary).

To ensure a balanced and impartial government, it is imperative that each branch remains confined to its designated function and refrains from intruding upon the purview of the other bodies.<sup>99</sup> Furthermore, to uphold separation of powers and prevent undue concentration of power, this principle extends to the individuals present in these branches. This mandates strict separation of personnel, whereby no individual is permitted to simultaneously hold membership in more than one branch. In essence, this system creates a framework of checks and balances, wherein each branch acts as a watchdog, vigilantly monitoring and where required, mitigating the actions of the others. Ultimately, this ensures that no single faction or individual can exert complete control over the machinery of the state, safeguarding against potential despotism and promoting a just and equitable governance system.<sup>100</sup>

There are scholars like Aileen Kavanagh who have pushed for revisionism of this pure form of the doctrine of separation of powers. She has contended that while the ideal separation of powers model envisions distinct functions for each branch of government, reality presents a more nuanced picture. In practice, all the three branches (legislative, executive, and judiciary) engage in facets of all three functions (legislative, executive, and judicial) to some extent, making a strict "one branch-one function" approach untenable for purely descriptive purposes.<sup>101</sup>

Additionally, Suzanne Prieur Clair is another scholar who shares the same sentiments as Kavanagh. She posits that a transition from the formalist method of analysis to the functionalist

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<sup>97</sup> Vile M. J. C., *Constitutionalism and the Separation of Powers*, 83-84.

<sup>98</sup> Kavanagh A., 'The Constitutional Separation of Powers', 224.

<sup>99</sup> Clair S. P., 'Separation of Powers: A New Look at the Functionalist Approach' 40(1) *Case Western Reserve Law Review*, 1989, 335.

<sup>100</sup> Vile M. J. C., *Constitutionalism and the Separation of Powers*, 14-15.

<sup>101</sup> Kavanagh A., 'The Constitutional Separation of Powers', 226.

approach is a step in the correct direction.<sup>102</sup> She further mentions that the functionalist approach acknowledges that the distinct powers of the three branches are not designed to function in complete isolation. Instead, it emphasises the potential for overlap and cooperation based on the practicalities of governance.<sup>103</sup> Waldron too is another scholar who challenges the traditional understanding of separation of powers as a rigid division of functions between the different government branches. Instead, he proposes a more nuanced approach based on the distinctive "integrity" of each branch.<sup>104</sup>

With this major shift from a formalist approach to a functionalist one, we can observe how the revisionism of the doctrine of separation of powers is alive to the drastic change in the political sphere, and seeks to implement and use this doctrine in an ever-changing context.

### **3.3 Separation of powers in the context of Kenya**

Foundational to many democracies is the concept of dividing government authority. This principle, known as separation of powers, creates branches with distinct responsibilities. The United States of America's (USA) Constitution, often viewed as a prime example of this structure, allocates law-making power to a bicameral Congress, executive authority to the President, and the power of judicial review to the Supreme Court and lower courts..<sup>105</sup> Kenya has an autochthonous Constitution which has set out to, as much as possible, separate the functions, individuals and institutions of the State.<sup>106</sup>

The separation of powers principle is a characteristic of Kenya's constitutional design, serving as a fundamental commitment within its very architecture. However, this principle goes beyond mere prohibition of interference between the different government branches. It also empowers each branch with countervailing functions, establishing a system of checks and balances to restrain actions taken by others. This notwithstanding, these countervailing powers are not intended to take over functions which are vested elsewhere. Rather, they necessitate deference from the judiciary, legislature, and executive to the branch entrusted with a specific function.<sup>107</sup>

The above was mentioned in the 2013 Kenyan case of *Mumo Matemu v Trusted Society of Human Rights Alliance*, which followed the rationale behind South Africa's Constitutional

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<sup>102</sup> Clair S. P., 'Separation of Powers: A New Look at the Functionalist Approach', 331.

<sup>103</sup> Clair S. P., 'Separation of Powers: A New Look at the Functionalist Approach', 333.

<sup>104</sup> Waldron J., 'Separation of Powers in Thought and Practice', 460.

<sup>105</sup> Mbondenyi M. and Ambani J., *THE NEW CONSTITUTIONAL LAW OF KENYA: Principles, Government and Human Rights*, 61.

<sup>106</sup> Mbondenyi M. and Ambani J., *THE NEW CONSTITUTIONAL LAW OF KENYA: Principles, Government and Human Rights*, 61.

<sup>107</sup> *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

Court in the case of *Democratic Alliance v The President of the Republic of South Africa & 3 Others*.

The South African Constitutional Court in this case stated that the principle of judicial deference to executive decisions, whereby such decisions are only overruled in the event they are deemed irrational, serves as a keystone for upholding the separation of powers doctrine. If courts were to invalidate executive actions deemed merely unreasonable or procedurally flawed, the risk of judicial encroachment upon the executive branch's function would become problematic.<sup>108</sup>

In the case 2012 Kenyan case of, *Trusted Society of Human Rights v The Attorney-General and Others*, which the High Court decided, held that, “Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, the Constitution, regarding the necessity of separating the Governmental functions. The Constitution consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two.”<sup>109</sup> Additionally, in the case 2018 Kenyan case of *Wilfred Manthi Musyoka v Machakos County Assembly*, the court stated that the separation of powers doctrine is reflected in Kenya’s Constitution, particularly in Article 1(3) of the Kenyan Constitution, which vests sovereign powers in the three arms of government.<sup>110</sup>

The court’s sentiments are seen where the 2010 Kenyan Constitution clearly delineates the distribution of power across the three branches: the judiciary, executive and legislature. The legislative branch, solely vested in Parliament, holds exclusive power to create laws.<sup>111</sup> The executive branch, led by the President, the Deputy President, and their cabinet, are vested with executive authority.<sup>112</sup> Finally, the judicial branch, composed of courts and tribunals, interprets the law and ensures its fair application, independent from any other authority.<sup>113</sup> There is

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<sup>108</sup> *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

<sup>109</sup> *Wilfred Manthi Musyoka v Machakos County Assembly & 4 others* [2018] eKLR.

<sup>110</sup> *Wilfred Manthi Musyoka v Machakos County Assembly & 4 others* [2018] eKLR.

<sup>111</sup> Article 94(5), *Constitution of Kenya* (2010).

<sup>112</sup> Article 129(2), *Constitution of Kenya* (2010); The executive authority which is vested in the executive arm of the government is to implement laws and policies.

<sup>113</sup> Article 159(1), *Constitution of Kenya* (2010).

caution taken in ensuring that the judiciary exercises its power only in line with Kenya's Constitution, and it is not subjected to any person or authority.<sup>114</sup>

Drawing on past cases, we can observe several key principles regarding the separation of powers doctrine in Kenya. Firstly, there exists a mutual obligation of respect. Each branch of government must acknowledge and respect the independence of the others. Second, each arm should avoid dictating how another fulfils its designated responsibilities. Third, while courts possess the rightful authority to evaluate adherence to constitutional principles by all public entities, this power comes with a critical responsibility: exercising judgment with objectivity and precision. Fourth, to safeguard the smooth functioning of constitutional governance, courts should exhibit restraint. Interventions should be reserved for essential cases, with careful consideration given to the specific circumstances, objective needs, and relevant public interests at stake in each individual matter. Finally, it's important to remember that all branches of government, while carrying out their respective functions, remain subject to the law itself. These principles were reaffirmed in the 2017 Kenyan case of *Justus Kariuki Mate v Martin Nyaga Wambora*.

As much as Kenya's 2010 Constitution has separated the persons, functions and institutions of the State, there exists instances of checks and balances whereby one organ may exercise the functions of another, i.e., the judiciary during adjudication of disputes may sentence an individual to imprisonment, and the President may exercise the power of mercy.<sup>115</sup> Likewise, the judiciary too has a mandate to exercise their authority and interfere in the functions of other arms of government where there are actions carried out by individuals or state organs, that violate the Constitution of Kenya (2010).<sup>116</sup>

### **3.4 Scenarios where the exhaustion principle prevents checks and balances in Kenya**

Legal systems generally expect individuals to utilize all available solutions within the established legal framework before seeking intervention from the courts. This principle, a cornerstone of efficient judicial administration, dictates that individuals must first pursue remedies outlined by law before a court will hear their case. Simply put, someone cannot seek judicial relief for a perceived grievance until they have exhausted the prescribed administrative

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<sup>114</sup> Article 160(1), *Constitution of Kenya* (2010).

<sup>115</sup> Article 133, *Constitution of Kenya* (2010).

<sup>116</sup> Asher's E., 'Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law?' 35 *Journal of Law, Policy and Globalization*, 2015, 102 – <[21205 \(iiste.org\)](https://www.iiste.org)> on 10 February 2024.

options.<sup>117</sup> This is known as the exhaustion doctrine of administrative remedies, which requires individuals to exhaust all available administrative remedies within a relevant agency before seeking judicial review in court on a constitutional matter. Essentially, individuals must first utilize the established internal procedures within an agency to address their concerns before invoking the jurisdiction of the court.

Kenyan Courts have grappled with the exhaustion principle on several occasions, and to begin with, the court in the 2020 Kenyan case of *William Odhiambo Ramogi v Attorney General* stated that the question of the exhaustion principle comes into play when a party aggrieved by the actions of an administrative agency seeks judicial redress for such actions without first employing the available alternative remedies offered by the agency itself.

This doctrine serves to defer judicial consideration of these matters, ensuring that the party has diligently pursued their own interests through the established extrajudicial resolution mechanisms before resorting to the court system.<sup>118</sup> This was a reiteration from the 1992 Kenyan case of *Speaker of National Assembly v Karume*, where the Court opined that in instances where the An Act of Parliament or the Kenyan Constitution establishes a defined and formal process for addressing specific grievances, adherence to such procedures is imperative. This principle extends to any specialized procedures mandated by statute, as their implementation is grounded in sound justifications.<sup>119</sup>

Why the exhaustion principle? In the 2015 Kenyan case of *Geoffrey Muthinja Kabiru v Samuel Munga Henry*, the rationale the court gave behind the exhaustion principle is that where there is an established dispute resolution mechanisms external to the judiciary, it is essential that they be fully utilized prior to invoking the jurisdiction of the courts. The courts should be reserved as a final recourse, and not as the initial point of intervention in any dispute. This emphasis on internal remedies aligns with Kenya's commitment to fostering alternative dispute resolution (ADR) mechanisms. As enshrined in Article 159 of the Constitution, courts prioritize exploring solutions outside the courtroom whenever possible. This ensures parties attempt to resolve their differences through these established channels before resorting to judicial intervention.<sup>120</sup>

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<sup>117</sup> Davis K., 'Administrative Law Doctrines of Exhaustion of Remedies, Ripeness for Review, and Primary Jurisdiction: 1' 28(2) *Texas Law Review*, 1949, 168.

<sup>118</sup> *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR.

<sup>119</sup> *Speaker of National Assembly v Karume* [1992] eKLR.

<sup>120</sup> *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* [2015] eKLR.

In Kenya, the very same 2010 Constitution holds supreme authority. Any existing law is invalid when it contradicts the Constitution. Similarly, any action or inaction that is in contravention with the Constitution is deemed unlawful and void.<sup>121</sup> Additionally, the Constitution provides guidance for courts interpreting Kenya's Bill of Rights. Courts are tasked with "developing the law" to ensure it upholds these rights rather than undermine them. Furthermore, when faced with ambiguity, courts must choose the interpretation that best promotes and facilitates the exercise of the specific right or freedom in question.<sup>122</sup> This raises a trade-off between upholding the Bill of Rights, and preservation of the exhaustion doctrine.

When courts take the exhaustion requirement route, this may consequently inhibit parties' rights. To resolve this trade-off, I shall discuss exceptions to this rule based on the balancing test established in the case of *McCarthy v Madigan*. First, where there is undue prejudice, individual rights trump the exhaustion principle.<sup>123</sup> If pursuing exhaustion would significantly harm the individual's ability to later pursue their case in court, exhaustion may be excused.<sup>124</sup> Secondly, exceptions should be made where there is inadequate agency remedy. When the agency lacks the expertise to offer effective relief, exhaustion becomes pointless.<sup>125</sup> Lastly, where there is agency bias, and consequently mistrust, individual rights trump the exhaustion principle.<sup>126</sup>

In the Kenyan context, Kenyan Courts have been alive to this trade-off, and have provided for exceptions to the exhaustion requirement. This was in the 2017 Kenyan case of *Republic v IEBC* where the court stated that only under exceptional circumstances will it be deemed that the exhaustion requirement is inconsistent with the fundamental principles enshrined within the Constitution or legal framework, and thus permit the parties to directly invoke the court's jurisdiction. This exception is particularly relevant in instances where the raised issue necessitates the interpretation of the Constitution, especially in uncharted legal territory, or where a fundamental constitutional value is directly implicated.<sup>127</sup>

Additionally, in the 2018 Kenyan case of *Fleur Investments Limited v Commissioner of Domestic Taxes*, a similar instance where an exceptional circumstance was taken into

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<sup>121</sup> Article 2(4), *Constitution of Kenya* (2010).

<sup>122</sup> Article 20(3a) & (3b), *Constitution of Kenya* (2010).

<sup>123</sup> *McCarthy v Madigan* (1992) The United States Court of Appeal for the Tenth Circuit.

<sup>124</sup> *McCarthy v Madigan* (1992) The United States Court of Appeal for the Tenth Circuit.

<sup>125</sup> *McCarthy v Madigan* (1992) The United States Court of Appeal for the Tenth Circuit.

<sup>126</sup> *McCarthy v Madigan* (1992) The United States Court of Appeal for the Tenth Circuit.

<sup>127</sup> *Republic v Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR.

consideration was when the court, as the fundamental guardian of justice, cannot remain passive when institutions arbitrarily disregard the rights of Kenyans who seek protection under Kenya's Constitution and other laws. Where there exists a clear demonstration of abuse of discretion, malice, capriciousness, or a violation of natural justice principles by such institutions, it is the prerogative and duty of the courts to intervene. Those entrusted with statutory authority and responsibilities are bound to exercise their authority in a reasonable and equitable manner.<sup>128</sup>

In addition to the above cases, we see an exception to the exhaustion principle being applied in the 2022 Kenyan case of *Muka v Malala* too. In this case, the exhaustion doctrine was discussed in order to determine if the court had jurisdictional authority to confirm or deny the validity of Malala's nomination for the Kakamega governorship. In summary, the 3<sup>rd</sup> and 4<sup>th</sup> respondents sought to dismiss the petition and application with a preliminary objection, arguing that it infringed upon their mandate to adjudicate nominations and denied them jurisdiction, stating that the same was vested in IEBC's specialized tribunal. However, they determined that enforcing such limitations in this instance would effectively deny the petitioners their right to legal recourse, leaving them without remedy for their grievances. Recognizing the exceptional circumstances, the court opted to bypass the standard doctrine of exhaustion and proceed with the case.<sup>129</sup>

The doctrine of standing further addresses this stance whereby parties who have experienced constitutional rights implications have a right to invoke a court's jurisdiction. In doing so, parties are required to demonstrate: they have suffered concrete and particularised harm, the challenged action must directly cause the alleged harm, and a favourable court ruling should be able to remedy the harm.<sup>130</sup>

Therefore, in Kenya's context, having ascertained that pre-election disputes are constitutional rights implications, the principle of checks and balances, i.e., allowing the IEBC to exercise their exclusive jurisdiction for pre-election disputes without intervention, should not take precedence over individual rights.

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<sup>128</sup> *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] eKLR.

<sup>129</sup> *Muka & another v Malala & 12 others; Commission for University Education & 2 others* [2022] eKLR.

<sup>130</sup> Scalia A., 'The Doctrine of Standing as an Essential Element of the Separation of Powers' 17(4) *Suffolk University Law Review*, 1983, 885.

### 3.5 Conclusion

This chapter set out to analyse the implication on the doctrine of separation of powers when courts determine pre-election disputes that are within the purview of another independent body. It has discussed the doctrine of separation of powers as viewed by different scholars, the doctrine of separation of powers being viewed in the context of Kenya, and in what scenarios does the exhaustion principle prevent checks and balances in Kenya. In doing so, it has shown special scenarios where safeguarding individuals' fundamental rights and freedoms trumps the doctrine of separation of powers. In the chapter that follows, my study will discuss whether the Kenyan Constitution requires constitutional courts to hear pre-election disputes on first instance where constitutional rights are implicated.



**4.0 THE SCOPE OF CONSTITUTIONAL COURTS' JURISDICTION  
REGARDING PRE-ELECTION DISPUTES WITH CONSTITUTIONAL  
RIGHTS IMPLICATIONS UNDER THE KENYAN CONSTITUTION  
(2010)**

**4.1 Introduction**

In the previous chapters, I have established that pre-election disputes constitute constitutional rights infringement. Consequently, this warrants court intervention, trumping any form of procedural technicalities, in a bid to safeguard individuals' rights. In this chapter, my study will examine whether the Kenyan Constitution requires constitutional courts to hear pre-election disputes on first instance where constitutional rights are implicated. To do so, it will begin by studying how Kenyan Constitutional Courts treat post-election disputes on first instance. Thereafter, I shall discuss the reason why constitutional courts should hear pre-election disputes on first instance. Lastly, I shall discuss the possible outcomes when constitutional courts entertain pre-election disputes on first instance.

**4.2 Kenyan Constitutional Courts' treatment of post-election disputes**

I had earlier established how pre-election disputes can be regarded as constitutional rights implications. For post-election disputes, they too can be regarded as constitutional rights implications. This is because an election petition transcends a mere contest between candidates; it serves as a crucial tool for safeguarding the fundamental political rights of individuals.<sup>131</sup> For this sub-chapter, I shall show how the Kenyan constitutional courts have handled and treated cases on post-election disputes on first instance.

<b>Case</b>	<b>Facts of the case</b>	<b>Court finding on whether it will take the issue</b>
<i>Joseph Oyugi Magwanga &amp; another v Independent Electoral and Boundaries Commission &amp; 3 others [2018] eKLR</i>	The Petitioners in the Homa Bay gubernatorial race contested the validity of the entire election due to discrepancies between results announced at polling stations and those announced at final tallying centers. They argued that these inconsistencies occurred across all eight constituencies and suggested a potential collaboration among election officials to manipulate the outcome in favor of a particular candidate. These actions,	The Court found that they could still take up the matter.  Article 38 of the Constitution of Kenya – the right to a free and fair election, was one of the rights in contention in this case.  The Court found that indeed IEBC and its electoral

<sup>131</sup> Musila G., Sihanya B., Ongoya E., and Thiankolu M. 'Handbook on Election Disputes in Kenya Context, Legal Framework, Institutions and Jurisprudence' Social Science Research Network, 2013, 8.

	according to the challengers, constitute a violation of their fundamental right to participate in a free and fair election..	officials interfered with the Petitioners' right to a free and fair election, and thereafter the Court ordered the IEBC to conduct another gubernatorial election for Homa Bay County.
<i>Andrew Toboso Anyanga v Mwale Nicholas Scott Tindi &amp; 3 others [2017] eKLR</i>	The applicant challenged Nicholas Mwale's election as Member of Parliament for Butere Constituency in Kenya. The High Court dismissed the challenge because it was filed one day too late. The applicant appealed this decision to the Court of Appeal.	<p>The Court found that they could still take the matter up for appeal.</p> <p>The right in question in this case that was a key grievance was the right to a free, fair and regular elections as outlined in Article 38(2) of the Kenyan Constitution.</p> <p>The Court stated that although the Applicant filed an appeal using the wrong rules, they could still proceed and deliberate on the matter to grant the individual his right to free and fair elections, without undue regard to procedural technicalities. This was allowed when the Court granted an appeal in this matter.</p>
<i>Sarah Mwangudza Kai v Mustafa Idd Salim &amp; 2 others [2013] eKLR</i>	A voter in Kilifi South, who is the Petitioner herein, challenged the results of the 2013 National Assembly election. The winning candidate, who was the 1st Respondent, wants the matter dismissed because it was not filed on time and because it was filed by someone who wasn't qualified. He also claims the challenge doesn't properly disclose the election results, as required by the rules.	<p>The Court found that they could still take the matter for appeal.</p> <p>The right in question in this case that was a key grievance was the right to a free, fair and regular elections as outlined in Article 38(2) of the Kenyan Constitution.</p> <p>The court ultimately threw out this case, citing the Petitioner's lack of substantial evidence to substantiate claims of electoral irregularities. However, the court acknowledged its responsibility to address concerns about free and fair</p>

		<p>elections. They emphasized their duty to explore potential remedies for individuals who believe their right to such elections has been compromised. This sense of responsibility is what led the court to hear the case in the first place.</p>
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From the above cases, we can observe that there exist procedural rules which are put in place by law. Some parties' have made submissions to strike out appeals that have been filed despite not following the procedure. Courts are required to ensure the prescriptions of procedure and form to trump the primary object, which is that of dispensing substantive justice to the parties. We can see a pattern in which the rationale of the courts in determining post-election disputes is hinged on Article 159(2) of the Constitution of where courts are alive to the fact that justice should be delivered without undue regard to procedural technicalities. Additionally, the Courts recognize that there are constitutional issues to be answered as there are rights within the Bill of Rights that are likely to be violated, consequently causing parties to invoke the courts' jurisdiction.

This, ideally, is my stance on parties being allowed to invoke courts' jurisdiction in pre-election disputes, despite non-exhaustion of alternative remedies provided by law. Seeing as courts are taking post-election disputes, which are constitutional rights implications, it is important that the same rationale should be adopted in the case of pre-election disputes.

#### **4.3 Kenyan Constitutional Courts determining pre-election disputes**

The Kenyan Constitution dictates that all general elections must be conducted with fairness and freedom as outlined in Article 81(e). This entails an environment free from any form of violence, intimidation, undue influence, or corruption. Additionally, the process must be transparent and managed in a way that is unbiased, neutral, efficient, accurate, and accountable. As explored in Chapter 2 of my research, disputes arising before elections have constitutional ramifications.

In conduction of free and fair elections, individuals are required to accord and be accorded impartiality, transparency, and accountability. The Kenyan Constitution empowers courts to adjudicate pre-election disputes. As aforementioned, the types of disputes handled encompass issues like voter registration, candidate nominations, campaign financing, and electoral code

violations. If left unresolved, this jeopardises free and fair elections. In ensuring impartiality, pre-election disputes often raise concerns about the impartiality of electoral institutions or the conduct of specific individuals. Constitutional courts play a crucial role in ensuring fairness by deliberating on matters before them and issuing orders to rectify discriminatory practices or address allegations of bias.

Furthermore, transparency is paramount in conducting free and fair elections. Constitutional courts could contribute to this by ensuring open and accessible procedures for resolving pre-election disputes. In conclusion, holding electoral stakeholders accountable for their actions is crucial to preventing future misconduct and upholding the integrity of the process. Constitutional courts can achieve this by imposing sanctions on individuals or institutions who are said to have violated electoral laws and/or engaged in unfair practices, infringing on individuals' political rights. This accountability mechanism deters future transgressions and strengthens the electoral system.

#### **4.4 Outcomes when Kenyan Constitutional Courts entertain pre-election disputes on first instance**

Determination of pre-election disputes is within the purview of the Political Parties Dispute Resolution Tribunal (PPDRT), and the IEBC Dispute Resolution Committee (IEBC DRC). However, this does not deter courts from entertaining disputes as discussed in the previous chapters. I shall delve into the outcomes of such judicial intervention, exploring the functionality of independent bodies and the safeguarding of individual rights, which have been my discussions in the previous chapters

Despite court intervention, independent bodies like the PPDRT and IEBC DRC remain operational and continue to possess the ability and expertise to determine any pre-election disputes brought before them. In fact, judicial judgments often uphold the decisions of these tribunals, reinforcing their legitimacy and expertise. Courts generally intervene only when issues fall outside the tribunals' mandate and/or raise broader constitutional concerns. This dynamic ensures that independent bodies retain their primary role while courts act as safeguards against potential abuses or oversights.

Individual rights enshrined in the Kenyan Bill of Rights, particularly the political rights that I have discussed in this study, are paramount throughout the electoral process. Courts have an obligation to take an active role in protecting these rights through pre-election dispute resolution. Ultimately, the outcome during such deliberations is one – delivering justice.

#### **4.5 Conclusion**

This chapter set out to discuss the implication on the doctrine of separation of powers when courts determine pre-election disputes that are within the purview of another independent body. It has discussed whether the Kenyan Constitution requires constitutional courts to hear pre-election disputes on first instance where constitutional rights are implicated, the reason behind constitutional courts hearing pre-election disputes on first instance, and what the possible outcomes are when constitutional courts entertain pre-election disputes on first instance. In doing so, it has shown that indeed constitutional courts in Kenya can hear pre-election disputes on first instance before exhausting the avenues provided by the law.



## **5.0 CONCLUSION AND RECOMMENDATIONS**

### **5.1 Summary of the study**

My study set out to analyse and determine whether parties can invoke the jurisdiction of courts for determination of their matters despite non-exhaustion of alternative mechanisms provided by the law. There have been several instances as discussed, where parties would invoke a court's jurisdiction to have a particular pre-election dispute heard and determined, and would be turned away with orders to seek redress from the relevant mechanisms.

There are key questions which my study has focused on in the analysis. To begin with, my study has set out to investigate what the nature of pre-election disputes is with regards to the constitutional rights in the Constitution of Kenya (2010). I have outlined how pre-election disputes involve constitutional rights implications, and therefore, courts in Kenya have a duty to entertain such disputes. Moreover, pre-election disputes involve political rights, which should be accorded the same weight<sup>132</sup> as other rights enshrined in the Bill of Rights in the Constitution of Kenya (2010).

Secondly, this research explored the tension that arises when courts adjudicate pre-election disputes traditionally handled by another independent body. The Kenyan Constitution (2010) establishes the Independent Electoral and Boundaries Commission (IEBC) as an autonomous entity. However, the judiciary retains the responsibility to intervene when alleged violations touch upon fundamental rights enshrined in the Bill of Rights. This primacy of the Bill of Rights supersedes the separation of powers principle in instances where an individual claims a constitutional right has been compromised. In essence, while judicial intervention in such disputes may create friction with the separation of powers doctrine, upholding fundamental rights ultimately takes precedence.

Finally, my study discussed whether the Kenyan Constitution requires constitutional courts to hear pre-election disputes on first instance where constitutional rights are implicated. Constitutional Courts in Kenya have been entertaining post-election disputes, which involve constitutional rights implications, particularly the right to a free, fair and regular election. Seeing as both periods, before (pre-) and after (post-) the election, need to uphold the right to free and fair elections as discussed in Chapter 4, we can therefore conclude that indeed

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<sup>132</sup> By same weight, I mean that parties should freely invoke the jurisdiction of the court, similarly to how other rights implications disputes brought by parties would invoke the court's jurisdiction.

Constitutional Courts in Kenya have a duty to entertain, deliberate, and determine matters on pre-election disputes on first instance.

## **5.2 Recommendations**

From the foregoing, I would wish to offer recommendations on my study to judges, legislators, the electoral body in Kenya (IEBC), parties who may experience pre-election disputes and legal practitioners. I would wish to first recommend that courts should be encouraged to employ discretion on a case-to-case basis, rather than turn away parties asking them to seek redress from the alternative measures provided for by the law.

Deliberation and determination on a case-to-case basis is a familiar concept within the courts. This concept's scope should extend to courts deliberating on whether they will entertain pre-election disputes, despite there being specialized tribunals created to handle such disputes. Factors that courts could consider include the strength of the legal arguments presented by both parties, i.e., the submissions made by the party invoking the court's jurisdiction should make a strong case on the constitutional right implication that has warranted bringing the matter before a constitutional court. Moreover, courts could consider shifting the burden of proof from the party seeking to bypass exhaustion to the party advocating for its strict application. This could possibly encourage a more nuanced approach by the courts, preventing automatic dismissal of cases based solely on non-exhaustion.

Secondly, courts should assess the potential ripple effects of their decisions on forthcoming similar cases. The objective is to steer clear of establishing a problematic precedent where any pre-election disagreement becomes grounds for judicial intervention. Therefore, swift dismissal of petitions that fall short of the initial legal strength criterion is crucial. To buttress the first point, the strength of legal arguments presented by those seeking judicial involvement should demonstrably address the specific right infringed or potentially infringed, the explicit constitutional provision guaranteeing that right, and a clear instance of a state actor or entity violating that right through action or inaction. Any case that fails to convincingly address these elements should be promptly dismissed by the courts.

Lastly, I would wish to recommend that legislators define the precise scope of alternative dispute resolution mechanisms for pre-election disputes, and outline specific situations where non-exhaustion is acceptable. Currently, the Constitution states that the courts have a duty to protect the Bill of Rights, in this case, political rights included too. These specific situations should boil down to the specific type of dispute, postulating which disputes must and which

may require exhaustion of alternative mechanisms. Factors to be considered in this categorization could be the complexity of the dispute, and the potential harm involved. To boot, the legislators could include a futility clause, allowing parties to bypass the exhaustion requirement where necessary, for instance, history of bias or unreasonable delays.

These recommendations combine legislative reform and judicial discretion in an attempt to create a more nuanced and flexible framework in addressing pre-election disputes.



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–<[Human Rights Committee reviews Kenya on its implementation of the International Covenant on Civil and Political Rights \(knchr.org\)](https://www.knchr.org)> on 4 February 2024.

