

**THE TIME FACTOR: A COMMENTARY ON THE RIGHT OF A
JUST DETERMINATION OF A PETITION ARISING FROM A
PRESIDENTIAL ELECTION UNDER ARTICLE 140 (2) OF THE
CONSTITUTION OF KENYA**

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

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

Signed.....

Date.....

This dissertation has been submitted for examination with my approval as a university supervisor

Signed.....

Date.....

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DEDICATION

I dedicate this work to my family; you have always been supportive throughout my academic endeavours. To my parents who realized the potential in me and nurtured it. My brothers and my sisters; your little pieces of advice never went unheeded. I dedicate this piece of writing to all out there who, in the murky corridors of the courts seek the very elusive justice.

ACKNOWLEDGEMENT

The Almighty God for His unconditional love and guidance. You showered me with unmerited favour and now I say, "Thank you Father." My sincere gratitude also goes to my supervisor Mr. Marvin Oliech. His guidance and unfailing support have seen this work become this beautiful piece of intellect. His understanding and ever flowing wisdom encouraged me always. My gratitude also goes to my family. The support I always received from you financially, emotionally and spiritually in the course of my four-year journey was amazing. You are the best. Indeed, I am forever indebted to you.

ABSTRACT

At the heart of a democracy it is the right of citizens to choose leaders who govern them. Through conducting elections, the people constitute government to preside over public affairs. However, in Kenya and other African countries the quality of the elections has many at times been vitiated by fraud, incompetence, ~~unequal playing field rigging claims~~ and violence. ~~Partly the problem has historical roots where in the first decade of attaining independence in the 1950s and 1960s, many African regimes rapidly descended into autoocracy and many countries formally recognized one-party regimes.~~

~~In instances where elections are affected by anomalies and its~~ This leads to disputed results are disputed, and aggrieved parties have looked to the seek for redress from the Judiciary as a last resort, n institution of last hope to seek redress. The Judiciary is faced with the unenviable task of determining the ultimate outcome of ~~the such polls in an election in which the results have been contested in the courts an~~ incredibly expeditious timeline. ~~Consequently, in order to protect the peoples' right of choice in an election, and to promote and safeguard democracy, the Judiciary must be perceived as competent, honest, learned and independent.~~

~~In the view of the foregoing background, t~~ This paper research seeks ought to investigate the challenges ~~facing of the J~~ udiciary and litigants in whenever presidential election petitions arise in Kenya and briefly examine other African countries jurisdictions in the adjudication of presidential election disputes. ~~And In~~ in pursuit of promoting democratic principles and good governance, the ~~paper research seeks~~ ought to explore the viability of ~~establishing a continental supranational mechanism for resolving disputed presidential elections through adjudication according both the bench and litigants before it~~ adequate time and resources to collectively and competently deliver the dream of democracy – credible elections.

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ABBREVIATIONS

CoK	Constitution of Kenya
ECHR	European Convention on Human Rights and Fundamental Freedoms
eKLR	Electronic Kenya Law Reports
EMB	Electoral Management Body
IEBC	Independent Electoral and Boundaries Commission
JWCEP	Judicial Working Commission on Election and Preparation
UDHR	Universal Declaration of Human Rights

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CHAPTER ONE

1.1 Background of the study

“

The most critical aspect of managing elections begins the morning after victory. It is managing the cleavages wrought by bruising electoral contests and narrow margins of victory, undoing the dirty work of creating friend or foe categories across various ethnic groups – building bridges across ethno-political divides. It is the management of the potential seeds of discord within the victor’s camp, lest it flower in the next general election”¹

The spirit of ~~constitutionalism-democracy~~ requires elections to be free, fair and credible. All actors in a democracy including citizens and specific mandated institutions are expected to deliver on this constitutional requirement where elections integrate inclusivity and public participation. This guarantees the exercise of primary rights to vote and the rights to be voted for with regards to a public office.²

Disputes arising from presidential elections evoke sharp mixed feelings from the members of public which arises out of discontent with the overall credibility of conducting the elections and the manner in which courts handled the electoral presidential disputes. In the past, disputes relating to the outcome of presidential elections have resulted in chaos based on the emotive nature of politics and the blatant disregard for the court process as instanced in 2007.

According to statistics captured in the Waki report, ‘The 2007 post-election violence claimed approximately 1500 lives and left well over 300, 000 persons internally displaced. Bearing this in mind, the veracity of information relating to the voting process and dispute resolution of the results must undergo thorough scrutiny and be clearly protected by the Kenyan law.³ The Carter Centre

¹ Onyango, Oloka, J, *When courts do politics: public interest law and litigation in East Africa*, Cambridge Scholars Publishing, 2017, 218. Akoko Akech describes the importance of the Courts objective intervention in handling presidential disputes.

² Article 81, *Constitution of Kenya* (2010).

³ The Inquiry into post-election violence Commission, *Waki report*, 2008, 304, 271. Waki Commission was an international commission of inquiry established by the Kenyan government in February 2008 to investigate the clashes following the disputed 2007 presidential election.

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observed that the failure to create and implement an effective mechanism for the resolution of electoral disputes can gravely undermine the legitimacy of an entire electoral process.⁴

Electoral laws⁵ are cognizant that the electoral process may be interfered with and its credibility undermined. Therefore, electoral laws provide avenues of seeking redress through a petition in a court process.⁶ A fair and transparent redress mechanism commands the respect of the people thus lending legitimacy and credibility to the election and further serves as a peaceful alternative to violent post-election responses.⁷ Conversely, failure to put in place an effective electoral dispute mechanism can seriously undermine the legitimacy of an entire electoral process.

The obligation of resolving presidential disputes falls primarily under the Judiciary's mandate. Whereas only two presidential elections have been held since the promulgation of the 2010 constitution, there were several presidential disputes handled under the 1967 constitution of Kenya by the Judiciary all in which the electoral process and the presidential results were marred with election irregularities and contested in the High Court.

1.2 The role of the Judiciary in the electoral process in Kenya

The Judiciary is faced with the unenviable task of determining the ultimate outcome of the poll in elections which the results have been contested in the courts. Consequently, in order to protect the peoples' right of choice in an election, and to promote and safeguard democracy, the Judiciary must be perceived as competent, honest, learned and independent.⁸

The Judiciary puts in place a redress mechanism during presidential elections to satisfy and protect the credibility of the elections and ensure the process was carried out in a fair and just manner as jealously safeguarded in the constitution. Article 50 of the constitution endorses the

⁴ *The Carter Center Guide to Electoral Dispute Resolution at 2010.* http://www.cartercenter.org/resources/pdfs/news/peace_publications/conflict_resolution/Election_DisputesGuide.pdf It was assembled in 2010. on 09 January 2019

⁵ *Electoral laws Grey Book 2017. Electoral laws are all those laws that in one way or another affect the conduct of elections. In Kenya, the major electoral laws are the Constitution, Elections Act, IEBC Act, Election Offences Act and the Supreme Court Act.*

⁶ Article 87 of the constitution of Kenya. It describes a petition as a fundamental court process which provides a legal avenue to challenge both the election process and the election results.

⁷ Chad Vickery, *Understanding, Adjudicating, and Resolving Election Disputes*, 2011, 1-12.

⁸ Muna Ndulo "Rule of Law, Judicial Reform, Development and Post Conflict Societies" See also Muna Ndulo, "Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System." 1-26.

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right to a fair hearing, which is enshrined under natural justice, to every individual subjected to the court process including petitioners.

The Judicial Working Committee on Elections and Preparations was formed by the Chief Justice in 2012 to advise the Judiciary on administrative arrangements and measures for the efficient disposal of election related matters. The JWCEP committee analysed the current legislative procedures which guide the presidential petitions, the applicability of the established procedures in practice and identified the challenges faced in application of those procedures. The committee reached a finding that the period under which the Supreme Court decides on the presidential petitions was incredibly short.⁹

1.3 The role of the Courts in the presidential petition process in Kenya.

The law foresees the possibility of anticipates electelectoral ion disputes and malpractices and creates an avenue for solvingdisputing the electelectoral disputes ion results through a court pe through a court process in a petition. A petition is a court process established under Article 87 of the constitution which provides a legal avenue to challenge both the election process and the election results conducted by independent electoral bodies such as the IEBC.¹⁰ The Independent and Electoral Boundaries Commission is established under the constitution and is mandated with the responsibility to conduct free and fair elections.¹¹ IThe IEBC is expected to administer elections in an impartial, neutral, efficient, accurate and accountable manner.¹² Both the courts and the public play an oversight role to ensure the IEBC discharges its mandate strictly according to the provisions of the constitution.

1.3.1 The regime under the 1969 Constitution of Kenya, 1969 was in foree (pre 2010 constitution)

Article 10 of the repealed Constitution of 1969 conferred authority to the High court to hear and determine petitions arising from presidential elections within 6 months after the declaration of the results. However, the president elect could be sworn in before the petition had been decided by the High court which defeated the essence of a petition process as seen in the Matiba v Moi case. the

⁹ T, Mogeni, M, Kerrets – Makau, Judicial Working Committee on Elections and Preparations, 2014. The six months was adequate for hearing other petitions, whereas the timelines for the presidential petition was too tight.

¹⁰ Independent electoral and Boundaries Commission established under the constitution of Kenya.

¹¹ Article 88, *Constitution of Kenya* (2010).

¹² Article 81, *Constitution of Kenya* (2010).

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petition lasted for for over a year after the elections had been held which was well overdue the 6-month period prescribed.¹³

~~1.3.2~~ **A new dawn: The post- 2010 era**

In the current legal regime, only the Supreme Court has exclusive original jurisdiction to hear and determine disputes relating to the elections of the office of the President¹⁴ and the petition must be decided upon in 14 days. The constitution emphasizes on expeditious resolution of presidential disputes aiming for transition in power of the office of the President to be legitimate, peaceful and ensure no power vacuum. Indeed, this encompasses the principle of expedient justice in contemporary legal circles.

~~In spite of the incredible speed at which our courts have been mechanized to operate in the present legal regime in the dispensation of electoral justice, the constitution requires Article 160 (d) mandates~~ all courts and tribunals in exercising judicial authority ~~and~~ to administer justice without undue regard to procedural technicalities.¹⁵ ~~Article 51 of the constitution empowers the court to extend any deadlines for handling petitions prescribed under the Act or by the resolution of any court of law.~~¹⁶ It is debatable as to whether substantive principles of law under Article 47 (1) that require administrative action to be expeditious, efficient, lawful, reasonable and procedurally fair have been fully realized under the new constitution.

1.4 The general principles of the electoral system in Kenya

Article 81 of the constitution sets out the general principles which the electoral system is obligated to abide by to ensure the true exercise of the sovereign power of its citizens. ~~The principles include the~~ ~~The electoral system shall comply with the following principles~~ — (a) freedom of citizens to exercise their political rights under Article 38; ~~(b)~~ not more than two-thirds of the members of elective public bodies shall be of the same gender; ~~(c)~~ fair representation of persons with disabilities; ~~(d)~~ universal suffrage based on the aspiration for fair representation and equality of vote; and ~~(e)~~ free and fair elections, which are — ~~(i)~~ by secret ballot; ~~(ii)~~ free from violence, intimidation, improper influence or corruption; ~~(iii)~~ conducted by an independent body; ~~(iv)~~

¹³ *Kenneth Stanley Njindo Matiba v Daniel Toroitich Arap Moi* [1994] eKLR. The petition lasted for for over a year after the elections had been held which was well overdue the 6-month period prescribed. The president elect Moi was sworn in as president of the Republic of Kenya before the petition challenging his win in the 1992 elections was determined.

¹⁴ Article 163 (3) (a), *Constitution of Kenya* (2010).

¹⁵ Article 160 (d), *Constitution of Kenya* (2010).

¹⁶ ~~Section 51, Supreme Court Rules (2012).~~

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transparent ~~election; and (v)~~ administered in an impartial, neutral, efficient, accurate and accountable manner.¹⁷

1.5 The conflicting interests arising out of presidential petition timelines

The constitution mandates parliament to establish effective mechanisms for the timely settling of electoral disputes.¹⁸ Parliament provided for 28 days within which a petition to challenge a presidential electoral outcome is to be filed in response to the declaration of the presidential election results.¹⁹ To the contrary, Article 140 of the constitution seems to set a disjunctive procedure where the petitioner is required to file a petition with regards to a presidential election within only 7 days after the declaration date – and it prevails in this instance due to the concept of the hierarchy of laws.²⁰

~~The law sets constitutional safeguards which provides an avenue for a petition against the declaration of the outcome of a presidential election.~~ The essence of a petition rationale is to safeguard the sovereignty of the people in a democracy against subversions and illegalities.²¹

Subsequently, the principles of natural justice and a fair hearing should be manifest in both the procedural limb and substantial limb of a petition. In 2013, a petition heard in the Supreme Court in the case of Raila Odinga & 5 Others v Independent Electoral and Boundaries commission (IEBC) & 3 others, a subsisting issue was raised that the existing petition timelines were short and rigid²² which negatively flawed the petition process.²³

¹⁷ Article 81, *Constitution of Kenya* (2010).

¹⁸ Article 87 (1), *Constitution of Kenya* (2010). It establishes a safeguard by the courts to ensure fairness and accountability in the dispensation of the mandate of IEBC whose primary role is to conduct national elections and declare the results.

¹⁹ Article 87 (2), *Constitution of Kenya* (2010). It sets the 28-day time limit within which a presidential petition is to be filed in the Supreme Court after the declaration of the electoral results.

²⁰ The Hierarchy of laws is a concept that ‘ranks’ the priority of laws and other legislation. These are (in order of precedence): the constitution, legislation passed by initiative, legislation passed by the legislature, delegated legislation, the Common Law.

²¹ Article 140 of Constitution of Kenya.

²² *Raila Odinga & 5 others v Independent Electoral and Boundaries commission & 3 others* [2013] eKLR

Presidential petition filed in the Supreme Court by the petitioners with respect to the 2013 presidential elections held in Kenya.

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1.6 Hypothesis

Kenya has had two constitutions which primarily govern the presidential petitions arising from the electoral process in courts.²⁴

In the repealed 1969 constitution, the courts had discretionary and unregulated powers on the time under which they could determine presidential election petitions. This led to unnecessary lagging of petition cases at the High Court. The determination of presidential petitions routinely dragged for over 6 months which interfered with the right of people to protest electoral malpractices that affected the legitimacy of the electoral process and therefore, was not a reflection of the true will of the people.

Following the promulgation of the 2010 constitution, amendments were made to reduce the courts discretionary powers on handling and determining election petitions. The Supreme Court was mandated to determine presidential petitions in 14 days based on the need for expedition and timely resolution. However, this has introduced practicality challenges where there is a mechanization of the process and both the courts and parties have found the time frame to be rigid and short.

1.7 Research Objectives

This paper will analyze:

1. The significance of the establishing laws of the office of the president and its impact on the state of affairs of the country and its people.
2. The history of the laws of the electoral system implemented to elect the president in the country and its significance in a growing democracy.
3. The legal redress procedures put in place in an electoral system to validate the credibility of the presielectoral system of electing the presidential elections in the country.
4. The pros and cons of providing or not providing stringent timelines in the constitution for resolving presidential electoral disputes.
5. A brief comparative perspective of the Kenyan system of handling presidential electoral disputes with the Ghanaian and Indian system of administration.
6. The proposed recommendations which address the timelines challenge in seeking legal redress with relation to presidential elections in the courts.

²⁴ -Information sourced from <<http://www.parliament.go.ke/the-national-assembly/resources/statutory-documents>> accessed on 19th December 2019 at 15.07 P.M.p.m.

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1.8 Research Questions

1. What is the history of handling presidential elections, the dispute resolution system of those elections in Court in Kenya and the timelines guiding both parties?
2. What are the set procedures of the timelines guiding the courts and the parties in a presidential electoral dispute in Kenya and whether it achieves natural justice?
3. How do the other jurisdictions handle presidential dispute resolution in the Courts and the respective timelines?

1.9 Justification of the research study

This paper highlights the challenges associated to the 14-day timeline stipulated within Article 140 of the Kenyan constitution and proposes a workable timeframe in which the courts can fulfill its overriding objectives under both Article 159²⁵ and Article 47²⁶ of the Constitution. Article 159 requires the courts to exercise their judicial authority in a manner which ensures justice without undue regard to procedural technicalities whereas Article 47 obligates the courts to dispense administrative action, which is expeditious, efficient, lawful, reasonable and procedurally fair.

The Judiciary Working Committee on Election Preparations report 2014 found the 14 days as inadequate time for handling presidential petitions and was too tight.²⁷ However, no reasonable timeframe has been proposed. This being a public interest issue, the right to be heard and receive justice for the people faces the possible risk of manipulation and corruption. The courts should be accorded with both reasonable and prompt opportunity to deliver rational judgements based on substantive law. They should not be limited by procedural technicalities at the greater expense of disregard for the precepts of justice and fair administrative action.²⁸

This research seeks to analyze the different constituents of a fair hearing which include but are not limited to the right to adequate preparation before trial, right to be heard and afforded a reasonable opportunity to present evidence and the right to have adequate time for deliberation to be issued

²⁵ Article 159, *Constitution of Kenya* (2010). In the petition process, the courts shall exercise the judicial authority in a manner which ensures justice is done to all and administered without any undue regard to procedural technicalities.

²⁶ Article 47, *Constitution of Kenya* (2010). Parties arguing a presidential petition are protected by the constitution to receive administrative action, which is expeditious, efficient, lawful, reasonable and procedurally fair.

²⁷ *Judiciary Working Committee on Election Preparations report*, 9, 2014. The committee was assembled by the chief justice of the Judiciary and the report prepared in May 1, 2014.

²⁸ G, Goodwin-Gill, *Free and Fair Elections*, Inter-Parliamentary Union, 2006, ix.

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based on the merit as envisaged under Article 47 of the constitution.²⁹ This research will determine as to what extent the petition process under Article 140 is expeditious, efficient, lawful and reasonable and procedurally fair.³⁰

1.10 Assumptions, scope and limitations of the research

There is a subsisting difficulty as to quantify the number of days that will be sufficient for the just determination of a presidential petition in the Supreme Court. However, the assumption is that the court should be guided by the core principles of justice enshrined under Article 159 of the Constitution of Kenya conjunctively. Essentially, the court should deliver justice without delay but at the same time balance without undue regard to procedural technicalities. The Court should accord parties to a petition with a reasonable opportunity to present their case and be heard and reach determinations based on merit.

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1.11 Chapter breakdown

1.11.1 Chapter 1: Introduction to the study

It will introduce the meaning and importance of ~~the place of a~~ presidency in a nation, ~~and the~~ the electoral system ~~attached to the office of the presidency to the readers~~ and its importance in a democracy. It further discusses ways of validating the credibility of presidential elections through petitions in court since they are public interest litigations. The courts should ensure that they safeguard the peoples' sovereignty in the exercise of ~~its~~ ~~their~~ judicial authority. The ~~hinderance~~ of the dispensation of justice ~~by the court~~ in presidential election petitions ~~should not be hindered~~ by procedural technicalities ~~arising as a consequence of the law embedded in the law~~.

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1.11.2 Chapter 2: Theoretical Framework of Concepts and General Contexts

It entails an analysis of both the theoretical and legal framework under which Kenyan law prescribed to the 14 days for hearing and determining presidential petitions. It further examines the public interest stakes involved in a presidential petition and whether the 14 days provided in the existing constitution ~~is just and efficient~~ satisfies the ideological principles and purposes of ~~the law~~ bearing in mind courts must always do justice in ~~accordance to the law while the~~ dispensation ~~of~~ their constitutional mandate.

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²⁹ Article 47 Constitution of Kenya (2010).

³⁰ Article 47 Constitution of Kenya (2010).

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1.11.3 Chapter 3: Presidential Election Petitions in Kenya

It entails an analysis and scrutiny of the history of presidential election petitions, the development of dispute resolution election laws governing the determination of presidential electoral disputes in court, and a comparative perspective of the electoral dispute resolution provisions to those of other jurisdictions such as Ghana and India. It gives a conclusion based on the research findings collected from the comparative perspective of other common law jurisdictions.

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1.11.4 Chapter 4: Natural Justice and the Adjudication of Electoral Disputes

An in depth understanding of the meaning of natural justice and the essential elements which should constitute a legal system. A critique of the electoral system in Kenya and whether it conforms with the principles of natural justice. Whether the 14 days-time period allocated for the hearing of presidential petitions amounts to the dispensation of natural justice.

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1.11.5 Chapter 5: Findings, Conclusion and Recommendations

A presentation of the concise findings from the entire research into presidential petitions and its ~~comparison and~~ ~~comparison and~~ implication in the Kenyan system. Further, it provides an insight into the application of recommendations in the existing Kenyan system for handling presidential petitions and justifications to support the findings.

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CHAPTER TWO

THEORETICAL FRAMEWORK OF CONCEPTS AND GENERAL CONTEXTS

2.1 Introduction

Elections are always a matter of public interest importance given the fact that people are generally granted the right to choose their leaders through universal suffrage and express their personal beliefs/ opinions under various elective methods whether direct or representative under the constitution which is the primary governing legal document of the country. Drawing from this dint of public interest, legislators and legislative bodies responsible for the design and implementation of regulation have an obligation to pursue collective goals with the aim of promoting the general welfare of the community.³¹ ~~An evaluation of whether the evaluates whether the~~ regulatory framework fulfills collective goals and to what extent ~~does~~ it achieve~~s~~ the sought end ~~is necessary~~. ~~Pursuant to the In line with the~~ envisaged regulatory framework ~~design~~ effective in ~~achievingpursuing~~ societal democracy. ~~Ideally~~ the laws ought to be transparent, free and fair and should be administered in an impartial, neutral, efficient, accurate and accountable manner.³² The

³¹ Morgan B and Yeung K, *An Introduction to Law and Regulation: text and materials* Cambridge University Press, 2007.

³² Article 81, *Constitution of Kenya* (2010).

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opportunity to challenge an electoral outcome concretizes the sovereignty of the citizens conferred in the constitution.³³ Therefore, it is trite law to identify and address any impediments to a free and fair election.³⁴ The courts are mandated to interpret and apply laws fairly and efficiently on election disputes.

Prosser considers public law as a tool used by state bodies to achieve their ends through the design of state institutions. In a model of such nature, the degree of success ~~is was~~ attributable to the efficiency in achieving the goals at the least possible cost. The primary focus will be suitability of means rather than with specifying goals. Law is defined by its purpose of legitimation and has an essential moral element in their definition.³⁵ Democratic elections are a prerequisite to stable and democratic governance³⁶ and may arguably be one of the strongest points of contention in states.

The electoral process involves making both administrative and judicial decisions through managing elections and resolving electoral disputes by the EMB and finally by the courts.³⁷ Such decisions should be made accurately and efficiently to forestall power vacuums and uphold electorate confidence in the electoral outcome.³⁸

2.2 Theoretical discussion of the concept public interest: Utilitarianism and Contractarianism

According to Benabent, *Public Interest in Political Philosophy*, 'Public interest is a concept regarded as an essential requirement in any democratic organisation. It emerges as a contemporary justification to the collective interest of the members in society. Public interest is used to justify a decision made which affects a society. ~~Where alternative decisions are sought, public interest is the criterion applied.~~³⁹

The concept of public interest arises from two major lines of liberal philosophical and historical thought, which is utilitarianism and contractarianism. In addition, it is notable to refer to Habermas

³³ Article 1, *Constitution of Kenya* (2010).

³⁴ Ameresekere N, *Politics, Justice & the Rule of Law*, Author House, 2013, 197.

³⁵ Prosser T, *Nationalised industries and public control*, 1986.

³⁶ 'Panel II: Emerging Principles Pertaining to the Resolution of Election Disputes' 57 *Administrative Law Review*, 2005, 872.

³⁷ Electoral Management Bodies such as the Independent and Electoral Boundaries Commission.

³⁸ Levitt J, *Resolving Election Error: The Dynamic assessment of materiality*, 2012, 97.

³⁹ Benabent M, *Public Interest in Political Philosophy: A Necessary Ethical and Regulatory Concept for Territorial Planning*, 382.

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theory of communicative action, which introduced a new perspective in the concept of public interest. These philosophies have in common the fact that they consider public interest to be a means to the achievement of a fairer society.⁴⁰ [Elections in this regard depict the highest levels of public interest. It is the channel through which Kenyans get the rare chance to choose their leaders and as such this right being quite sacrosanct and heavy should be protected and promoted.](#)

—2.2.1 Utilitarianism

Utilitarianism proposes that public interest is the increase of social well-being. The interest of the community is the sum of the interests of the several members of the community.⁴¹ Elections are a democratic process; in which the electorate freely chooses individuals who will effectively represent and realize its' interests.⁴² Therefore, elections give effect to the right of every person to take part in government to better societal welfare.⁴³

Migai posits that elections secure the social contract whose peoples' consent to be governed by chosen representatives makes the communities stronger. However, elections that are not free or fair can divide the community.⁴⁴ Power sharing deals⁴⁵ emerged as a way of resolving disputed presidential elections for better societal welfare. In Kenya, power sharing agreements were consummated following fraudulent and disputed presidential elections in 2007. With the support of the international community, power sharing deals were initiated as a means of ending violence and resolving the post-election crisis.⁴⁶

—2.2.2 Contractarianism

According to Hamlin, *Contractarianism*, 'Contemporary contractarianism stems from the voluntary act of entering into a contract or an agreement in a specified joint commitment with others. According to Hobbesian contractarian thinking, the interests of an individual in an explicit agreement translates to the mutuality of interests of those in the agreement. The idea of contract

⁴⁰ Benabent M, *Public Interest in Political Philosophy: A Necessary Ethical and Regulatory Concept for Territorial Planning*, 381.

⁴¹ Bentham J, *An Introduction to The Principles of Morals and Legislations*, 1781, Batoche Books, 2000.

⁴² Hoffman AL, 'Political Parties, Electoral Systems and Democracy: A Cross-National Analysis' 44 *European Journal of Political, Research*, 2005, 231.

⁴³ Article 21 (1), *Universal Declaration of Human Rights*, 10 December 1948, G.A. res. 217A (III).

⁴⁴ Migai A, *Administrative Law*, Strathmore University Press, 2016, 314.

⁴⁵ O' Flynn, Russel. 'Power sharing in principle enables conflicting groups to remedy long standing patterns of antagonism and discrimination, and to build a more just and stable society for all. Institutionally, there is an indeterminate number of ways in which democratic power sharing can be realised.'

⁴⁶ Preamble, *National Accord and Reconciliation Act* (2008).

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investigates the prospect for mutual advantage for rational individuals. In the Kantian contractualist thinking, rational contemplation of the world from an impartial standpoint will reveal what political arrangements are just/ moral. Its' essential nature is to construct a hypothetical, impartial position from which to consider the justness of a decision based on what is rationally agreed upon.⁴⁷

Citizens enter a social contract with their government to enforce their person rights and facilitate the enjoyment of social freedoms. The government is formed through the exercise of the citizens right to self-determination. The eligible citizens elect leaders who voice the peoples' demands which manifests as exercise of the peoples' sovereignty. An estimate of 20 million citizens participate in the electoral process to elect a candidate to the office of the presidency in Kenya⁴⁸. This has a significance on ~~translates to~~ both the direct and indirect impacts on the social, economic and political affairs of the citizens in the country; more specifically development of infrastructure such as roads, hospitals and schools; rates of revenue earning and collection such as business operations, banks, employment and taxes; the political stability, governance, peace and security of a nation; and the judicial system of ensuring justice.

2.2.3 The relevance of public interest theory in the election petition process

The government should puts in place elaborate dispute resolution systems in the courts to ensure elections are carried out in an equitable, fair and just manner to protect the public interest which forms the basis of the electoral process. At the heart of the governments' mandate is to ensure that these systems are efficient, legitimate and that there is a meeting of the mind between national statutes legitimate expectations and their application with fundamental principles of natural justice and fairness. This ensures that the procedures of electoral dispute adjudication afford the right to be heard to parties and the right to a fair hearing.

2.3 The traditional approach (pre 2010 constitution) to adjudication of petitions

The traditional ideology of adjudication views courts as restating the law as was enacted by the legislature with no exercise of discretion. Hence, the courts' decisions are a mere discovery of the

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⁴⁷ Hamlin A, *Contractarianism*, University of Manchester, 4.

⁴⁸ The last time Kenya's EMB published the voters register, it contained a total of 19, 611, 423 million registered voters in all the counties with an overwhelming 40,883 polling stations.

intention of the legislature.⁴⁹ However, the adjudication process is inherently imbued with discretion and the traditional view seen as an oversimplification of the adjudication process.

There were no set timelines in statute in which election petitions were to be heard and determined prior to the 2010 constitution. The length of time for hearing petitions depended solely on the overall efficiency of the judicial system and consequently dragged the judicial process of seeking redress through petitions which discouraged petitioners from taking their matters to court since justice was delayed and inefficient.⁵⁰

2.4 The modern approach (post 2010 constitution) to adjudication of petitions

Hart considers the law to be open textured.⁵¹ ~~He~~ further describes three reasons for this assertion; firstly, it is due to the ambiguity of language or words; secondly, that rules usually use only general standards of reasonableness and just which need to be related to or distinguished from specific circumstances; and thirdly, the indeterminacy inherent in the doctrine of precedents where judges have to relate current decisions with prior decisions.⁵²

Borrowing from Harts school of thought, the purpose of election law is to manage the election process and guide electoral dispute resolution to promote the sovereignty of a people and at the same time prevent its' subversion. The procedure for disputing an election in the Kenyan system is by filing an election petition complaining of either an undue election or undue return ~~in~~ the electoral process. Election petitions are regarded as "*sui generis*" proceedings.⁵³ Doubt is cast on the election result based on an illegality which substantially affects the election process consequently leading to untrue results.

Article 140 requires anyone wishing to challenge the election of the president to file a petition in the Supreme Court within 7 days after which, the court hears and determines the issues in 14 days.⁵⁴ The parties to a presidential petition; the petitioner and the respondent operate within

⁴⁹ Freedman Lloyd's Introduction to Jurisprudence 1378 and 1389.

⁵⁰ Judicial Working Committee on Elections and Preparations, 2014.

⁵¹ Hart ~~to~~ *HLA, The Concept of Law*, 128.

⁵² Hart *HLA, The Concept of Law*, 128, 124-141.

⁵³ *Moses Masika Wetangula vs. Musikari Nazi Kombo & 2 Others* [2015] eKLR. The court explicated that election petitions in every respect is *sui generis* which are instituted for the purpose of contesting the validity of an election, or disputing the return of a candidate, or claiming that the return of a candidate is vitiated on the grounds of lack of qualification, corrupt practices, irregularity or other factor. Such petitions rest on private political or other motivations, coalescing with broad public and local interests; they teeter in their regulatory framework from the civil to the criminal mechanisms; and they cut across a plurality of dispute-settlement typologies.

⁵⁴ Article 140 (1) and (2), *Constitution of Kenya* (2010).

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stringent timelines despite the voluminous amount of preparation involved in the evidence collection, paperwork compilation and witness coordination. Furthermore, the Supreme Court is accorded only 3 days to decide the petition based on its merits. The court is required to scrutinize both the petitioners and respondents vast documents, hear the lengthy oral submissions of both parties, conduct a fresh recount of the votes cast in the country, reflect on all issues before it and give its decision based on merits of the petitions within the incredibly stringent timelines.

Bearing the foregoing, the electoral procedures do not afford an opportunity of due process in the hearing and determination of presidential petitions. According to compiled findings of a post evaluation draft report on both the August 8th and subsequent October 17th repeat presidential election, the need to extend the determination deadlines of presidential petitions is imminent to provide for reasonable and practical time for the results publication and public scrutiny, the adequate preparation for a petition and the implementation of due process in court, including possibility of recount.⁵⁵

The concept of justice is defined as what is right, fair, appropriate or deserved in social relations. It is the sovereigns' expectation that the law should promote justice by establishing the procedures that will ensure that competing claims are handled in a manner which is fair, appropriate and consistent.⁵⁶ According to D Galligan, *Due Process and Fair Procedures*, If justice is the first virtue of law and politics, then procedural justice is an essential element in its attainment.⁵⁷ The idea is that substantive justice will be the product of a consistently applied impeccable method.⁵⁸ Article 159 (2) of the constitution is clear on the tenets of justice which the court is under strict obligation to abide by in the dispensation of its duties. The courts should deliver justice without any undue regard to procedural technicalities. However, Article 140 which limits the time period under which the Supreme Court decides on a presidential petition to 14 days that has been found to be rigid, stringent for the parties preparing for the petition and might negatively impact the outcome of the determination of the issues presented before the court.

⁵⁵ The Post Evaluation Draft Report for the August 8, 2017 General Election and October 26, 2017 Fresh Presidential Elections, 5.

⁵⁶ Migai A, *Administrative Law*, Strathmore University Press, 2016, 57.

⁵⁷ Galligan DJ, *Due Process and Fair Procedures: A Study of Administrative Procedures*, Clarendon Press, Oxford, 1996, xvii.

⁵⁸ Nonet P and Selznick P, *Law and Society in Transition: Toward Responsive Law*, Harper & Row, New York, 1978, 67.

2.5 Research Methodology

This research is largely qualitative in nature and will reference majorly primary sources, national statutes, case law both domestic and international, and other documentation of the AU and other relevant bodies. In addition, secondary sources such as academic articles in journals, conference presentations, internet sources, occasional papers, and newspaper publications are referred to. This research engaged a general analysis of the context under which elections are held in Kenya and other similar jurisdictions, seeking to find the common standards on democracy and the resolution of electoral disputes in common law jurisdictions, and explores the possibility of establishing a supranational approach to resolving presidential disputes.

I ~~will~~ consider Article 140 of the constitution which is the establishing clause of the existing timelines of hearing presidential petitions, and examine whether it suffices to satisfy the threshold of due process in the dispensation of justice.⁵⁹ The courts are required to promote the right to a fair hearing and ensure that parties are afforded a reasonable opportunity to be heard and present their cases. We will consider whether the courts have exercised judicial authority in accordance to the guiding principles which require the courts to dispense justice without undue regard to procedural technicalities.⁶⁰

~~In addition, I will also~~ analyse the constituting elements of a presidential election petition to have an in depth understanding of the processes' practicality and realization. Hence, we shall consider the tenets of law which inform the petition process and ensures that the fundamental pillars of justice and fairness are achieved in both the active role of the parties and the courts participating in an election petition. We shall make an analysis of the existing timelines and determine whether it depicts a practical implementation of the guiding principles of the presidential petition.

It is noteworthy that I will be guided by constitutional provisions extending to the founding principles of constitutionalism which provides a harmony in application of the principles enshrined under the constitution and the degree of balancing both individual rights and public interest which should be exercised in the adjudication of presidential election petitions. Article 47, 48, 50, 140, 159, will be instrumental in the analysis.

⁵⁹ Galligan DJ, *Due Process and Fair Procedures: A Study of Administrative Procedures*, Clarendon Press, Oxford, 1996, xvii.

⁶⁰ Article 159, *Constitution of Kenya* (2010).

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We will consider electoral statutes which act as a guide to the courts in exercising their constitutional mandate in the adjudication of election petitions with more focus on the presidential petitions. The electoral statutes establish the requirements which the parties in a petition process must satisfy to competently participate in the process and procedures which both the court and the parties must follow in the petition process to ensure it is done within the strict provisions of the laws. We rely majorly on literary sources written about elections which provide ~~an~~ in-depth perspective of the significance of election petitions and its' purpose in a democracy. This will place the Kenyan presidential election petitions in context and will provide a thorough understanding which will then provide a transformative lens of addressing the challenges such as stringent timelines which affects the efficient determination of presidential petitions in Kenya.

Furthermore, ~~I will consider~~ stakeholders reports such as the Judiciary who have participated in the electoral dispute resolution ~~electoral~~ process and have conducted a thorough research on the current situation, thereby identifying emerging challenges and proposed better ways of handling the situation will be given heed. We shall consider their opinions regarding the existing timelines allocated for hearing presidential petitions since they primarily discharge the mandate of determination and are more in sync with the process and can evaluate its practicability and efficiency in achieving justice and fairness.

We shall compare the Kenyan system of handling presidential petitions to those of other jurisdictions such as India and Ghana. More specifically, in the aspect of timelines under which the presidential petitions are decided by the courts. This will provide an appreciation of the different factors which come into play in the consideration of the length of the proceedings and the aims which the law prioritizes on achieving. Hence, we will decipher the position of Kenyan laws and its implication on aspects of justice as compared to other jurisdictions.

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CHAPTER THREE

THE HISTORY OF PRESIDENTIAL ELECTION PETITIONS IN KENYA

3.1 Introduction

The presidency is a highly contested office in Kenya which is attributed to the central power and control which the president enjoys over the whole country. It is the highest form of authority exercised in the country. Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the people.⁶¹ General elections are conducted through secret ballot once in every 4 years.⁶² An aspiring candidate can only be elected president when they receive more than half of the votes cast in the election and at least 25% of the votes cast in more than half of each of the counties.⁶³

3.2 The role of electoral management bodies in Kenya.

~~Since the~~The presidency is the soul of government, ~~and~~ disputes which concern it carry a great significance.⁶⁴ ~~As a result, it follows that~~ presidential electoral disputes ~~should be~~ resolved timeously and in a manner that results in peace, stability, security and justice.⁶⁵

⁶¹ Article 38, *Constitution of Kenya* (2010).

⁶² Article 136, *Constitution of Kenya* (2010).

⁶³ Article 138, *Constitution of Kenya* (2010). Outlines the procedure in a presidential election.

⁶⁴ *Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others* (2013) eKLR 298-300.

⁶⁵ https://repository.up.ac.za/bitstream/handle/2263/43647/Azu_Role_2013.pdf;sequence=1. It recognized the importance attached to the office of the presidency and therefore prescribed an expeditious dispute resolution mechanism.

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In Kenya, EMB's⁶⁶ have played a significant role in advancing democracy. However, at the same time ~~the electoral commissions~~ have also been at the centre of disputed elections ~~in Kenya~~.⁶⁷ Several factors account for the electoral commission's failure to organise impeccable elections. These include inadequate resources and control over budgets, lack of experience of key staff, and lack of reliable voter roll. These are all serious challenges but when they occur inadvertently, they generally tend to affect the parties to an election in similar fashion.⁶⁸

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The Independent and Electoral Boundaries Commission is established under the constitution and is mandated with the responsibility to conduct free and fair elections.⁶⁹ The Independent Electoral and Boundaries Commission should administer elections in an impartial, neutral, efficient, accurate and accountable manner.⁷⁰ Both the courts and the public play an oversight role to ensure the Independent and Electoral Boundaries Commission discharges its mandate strictly according to the provisions of the constitution. The law anticipates the possibility of election malpractices and creates an avenue for disputing the election results in court through a petition process.⁷¹

3.3 The procedure for the presidential election petitions in Kenya

The procedure for challenging an election under the present constitution is by way of filing an election petition which complains of either an undue election or undue return.⁷² An election petition presupposes that an election has been held and the result announced, but challenged on a ground contrary to the legitimate expectation of the electoral process ~~the lack of fairness of the electoral process~~.

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—3.3.1 -The Constitution of Kenya

The constitution requires anyone wishing to challenge the election of the president elect to file a petition in the Supreme Court within 7 days after which, the court hears and determines the issues in strictly 14 days.⁷³

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⁶⁶ Electoral Management Bodies such as the Independent Electoral and Boundaries Commission,

⁶⁷ Refer to the 2007 bungled elections that led to loss of lives, property and general chaos in the country (Kriegler Commission and the Waki Report (2008). etc)

⁶⁸ Hazan, "Morocco: Betting on a Truth and Reconciliation Commission" USIP Special Report 165, July 2006.

⁶⁹ Article 88, *Constitution of Kenya* (2010).

⁷⁰ Article 81, *Constitution of Kenya* (2010).

⁷¹ Article 140 *Constitution of Kenya* (2010). A person may file a petition in the Supreme Court to dispute an election outcome within 7 days.

⁷² Article 140 (2) *Constitution of Kenya* (2010).

⁷³ *Ibid.*

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3.3.2 The Supreme Court Rules

Rule 6 of the Supreme Court Rules (hereafter rules), ~~it~~ requires the petitioner to file a petition in the Supreme Court within 7 days of declaration of the results. Rule 7 of the rules requires the petitioner to serve the documents to the Respondent within three days. Where the Respondent wishes to oppose, he is required to file a response within three days. There will be a pre-trial conference nine days after the filing of a petition. Within two days of the pre-trial conference the court shall commence the hearing of the petition. The court shall give its decision but may reserve its reasons for the decision to a later date.

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3.4 The Kenyan jurisprudence on presidential election petitions

According to Onyango and Oloka, J, *When courts do politics*, the presidential petitions have been on a steady rise with substantial presidential elections ending up in courts of law, thus it is clear that more attention is due to not only the way courts are becoming more involved in handling presidential elections but also the overall impact of such intervention by the courts.⁷⁴

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3.4.1 The era of the repealed constitution of 1969: Delayed justice rife with technicalities

The electoral process was governed under the National Assembly and Presidential Election Act⁷⁵ and the National Assembly and Presidential Election Rules.⁷⁶ There were no set timelines in these statutes in which election petitions were to be heard and determined prior to the 2010 constitution. The length of time for hearing petitions depended solely on the overall efficiency of the judicial system and consequently dragged the judicial process of seeking redress through petitions which discouraged petitioners from taking their matters to court.⁷⁷ Moreover, many petitions were dismissed on mere technicalities thus ~~denying according to~~ miscarriage of justice.⁷⁸

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⁷⁴ Onyango, Oloka, J, *When courts do politics: public interest law and litigation in East Africa*, Cambridge, 2017, 218.

⁷⁵ *National Assembly and Presidential Elections Act* (Chapter 7 of the Laws of Kenya)

⁷⁶ *National Assembly and Presidential Election Rules* (1993).

⁷⁷ Judicial Working Committee on Elections and Preparations, 2014.

⁷⁸ *Kenneth Njindo Stanley Matiba v Daniel Torotich Arap Moi (1994) eKLR*. There was a dismissal on grounds of 'personal service. The respondent used all in his capacity to avoid personal service and the court in its determination could not accommodate alternative service methods despite them being acknowledged and encouraged in legal practice.

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The High court had original jurisdiction over all electoral disputes prior to the enforcement of the 2010 constitution.⁷⁹ Article 10 read together with Article 44 of the repealed constitution, conferred the High court with an election court status to exercise limited jurisdiction in deciding matters arising from both presidential and parliamentary elections. The decisions of the High Court subject to election petitions were not subject to appeal before the Court of Appeal.⁸⁰ The double mandate of the High Court to hear all election disputes led to serious backlog of cases.⁸¹

In the *Matiba v Moi* case, the general presidential elections were held in 29th December 1992. The President elect Moi was sworn in before the petition against his win was determined. The final determination was given in 19th November 1993. The petition lagged in court for well over a year.⁸²

This was evidence of a distinct disconnect between the principle of natural justice of prevention from delayed justice in the court hearing.

In *Mwai Kibaki v Daniel Moi*, the respondents argued that the mode of service effected by the appellant through serving of the petition documents with the Registrar later than the prescribed period of 28 days was in contravention to Section 20 of the National Assembly and Presidential Act Cap 7. The matter was settled in court a year after the elections had been held and the incumbent had been sworn into office, which prejudiced the court process due to the immense ‘political influence and the national resources under his control as the serving president of the country.’⁸³

3.4.2 The new era of the 2010 constitution: Super expedient timelines

The 2010 constitution changed the framework within which the Judiciary handles the resolution of electoral disputes. Timelines for determination of electoral disputes were set according to presidential, parliamentary and county petitions. According to Article 140 (2) a presidential petition is to be determined within 14 days, whereas both the parliamentary and county petitions presented in court were to be determined within 6 months. The Judiciary was under strict obligation

⁷⁹ Mwangi S, A history of Constitution making in Kenya, 2012, *Media Development Association*, 83.

⁸⁰ *Mudavadi v Kibisu* [1970] EA 585. It was held the Court of appeal had jurisdiction to hear appeal from an order of the High Court which does not determine the validity of the election.

⁸¹ *Kenneth Njindo Stanley Matiba v Daniel Toroitich Arap Moi* (1994) eKLR. This case was an election petition filed by the petitioner against the elected president Moi. It lagged in the high court for a period of over 10 years.

⁸² *Kenneth Njindo Stanley Matiba v Daniel Toroitich Arap Moi* (1994) eKLR.

⁸³ *Mwai Kibaki vs Daniel Toroitich Arap Moi* [1999] eKLR. The appellant Kibaki filed an appeal against the decision of the High Court dated 22 January 1998 delivered on the petition filed by the petitioner/ appellant regarding the 5th January 1998 presidential election results. The petition was subsequently dismissed on the 10th December 1999

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to comply with the constitutional mandate with no room for exercise of discretionary authority. The courts were faced with serious constraints of meeting the deadline while at the same time ensuring the delivery of justice.⁸⁴ This marked a complete paradigm shift from indefinite timelines to the shortest timelines possible.

The JWCEP formed to advise the Judiciary on administrative arrangements and measures for the efficient disposal of election related matters analysed the procedures which guided the presidential petitions, the applicability of the established procedures in practice and identified the challenges faced in application of those procedures. The committee reached a finding that the period under which the Supreme Court decided on the presidential petitions was short.⁸⁵

The 2013 presidential election results was disputed in the Supreme Court in a consolidated petition 5, 3 & 4 of 2013 which was the first landmark case bearing on the early steps to consolidate and set in motion the gains of a progressive and unique Constitution.⁸⁶ It was the first test of the Supreme Court to administer law and justice in relation to a matter of the expression of the *popular will* which is the election of the President. Particularly, in light of Section 3 (c) of the Supreme Court Act, which vests in this Court the obligation to develop a rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth.⁸⁷ The Court acknowledged in its' judgement that the presidential time frame under Article 140 was rigid. In the Court's opinion the current two-week time frame serves to prevent a state of anticipation and uncertainty in the country during the period before the judicial determination of the petition.⁸⁸

A judge of the High Court quoted, "We got it right with the MPs and county officials, but woefully wrong with the presidential petition; It was too rushed! That is the reason we had the type of ruling we saw. There was no time to write the judgment. The delay to explain your legal reasons why you ruled in a particular way can open all manner of speculations. The Judiciary might never recover from what happened.

⁸⁴ T, Mogeni, M, Kerrets – Makau, Judicial Working Committee on Elections and Preparations, 2014.

⁸⁵ T, Mogeni, M, Kerrets – Makau, Judicial Working Committee on Elections and Preparations, 2014. The six months was adequate for hearing other petitions, whereas the timelines for the presidential petition was too tight.

⁸⁶ *Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others* [2013] eKLR.

⁸⁷ *Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others* [2013] eKLR. Its' judgement was viewed as a baseline for the Supreme Court's perception of political matters, as these interplay with the progressive terms of the new Constitution.

⁸⁸ *Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others* [2013], Para 217.

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That is why I strongly submit that this timeline be extended to 28 days.”⁸⁹ This aversion further strongly supports the underlying argument which is that the present 14 day timelines is insufficient for both the courts and the parties to comply with the dictates of natural justice which provides the right to due process and a fair hearing.

According to the Makulilo and Alexander B, the time limit met in the 2013 presidential petition in Kenya was considered too short by contesting parties to allow a comprehensive examination of the issues in question.⁹⁰ The extension for the timelines of presidential petitions is necessary to allow realistic time for the Supreme Court to administer law and justice in relation to a matter of the expression of the *popular will* which is the election of the president. There is need to review the timelines, with many stakeholders recommending the need to revisit the time set for disposal of presidential election disputes.”⁹¹

In Namibia, an election petition was presented by the opposition following the 2009 presidential and parliamentary elections. The petition sought to void the presidential election on stated grounds.⁹² Section 10 of the Electoral Act (1992) required that election petitions could only be presented within 30 days of the results being announced. The petitioners presented their petition on the 30th day at 1630hrs and, therefore, within the statutory requirement. The Registrar of the High Court accepted the petition. However, a rule of court did not allow filing of process any day after 1500hrs. Because the petition was filed after 1500hrs, the court held that the petition was invalid for being filed out of time, and therefore, there was no valid petition to adjudicate on in the eyes of the law.⁹³

In the presidential petition between Alhaji Atiku Abubakar and Muhammadu Buhari (the president elect), the Supreme Court of Nigeria faced criticism on the grounds that it delivered a marathon judgement within 14 days, promising to deliver the reasons of its judgement on a later date. The

⁸⁹ *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 others* [2013] eKLR. Inadequate time for presidential election petitions.

⁹⁰ Makulilo, Alexander B, Ntaganda Eugene, *Election Management Bodies in East Africa*, African Books Collective 2016, 11.

⁹¹ The Judiciary working committee on election preparation: *Evaluation of the performance of the Judiciary in managing the electoral dispute process*, 2014, 8, 9.

⁹² *Rally for Democracy and Progress and others v Electoral Commission of Namibia and others* [High Court] Case A01/2010 476.

⁹³ *Ibid*, para. 44 and 45. See also the concurring judgment of Damaseb J, at para. 18

Supreme Court is described to have handled the matter in a brisk, haste fashion.⁹⁴ It is difficult to hold the Supreme Court accountable on the merit of its judgement where there is no reasoned, written down and properly articulated judgment.⁹⁵ The law provides for opportunity for an extensive judicial review of the decisions made by the apex court. However, upon the court finally makes its written reasons for its decisions available, no legitimate action can be taken to change the course of things. This creates a problem of perception whether the ordinary Nigerian citizen believes that justice has been done. It is a trite principle that justice should not only be done, but it should manifestly and undoubtedly be seen to have been done.

According to Siri G and Roberto G, *Democratization and the Judiciary*, the length of time it takes to decide petitions in a presidential election compromises the procedure. Petitions can only be brought until two weeks after the new president is sworn into office and can drag for two years to decide. This complicates a ruling against the incumbent.⁹⁶ The 2010 constitution introduced reforms to this electoral technicality. Firstly, it conferred original jurisdiction to only the Supreme Court to determine presidential petitions under Article 163 (3).⁹⁷ It shortened the time period within which a presidential petition could be decided to strictly 14 days by the Supreme court.⁹⁸ Lastly, article 141 of the constitution states that a president elect shall only be sworn in after the Supreme Court validates his/ her win where a petition was filed in court thus putting pressure on the courts to expeditiously dispose presidential petitions to maintain status quo in the nation.⁹⁹

3.5 Comparative perspective on electoral dispute resolutions in other jurisdictions

— 3.5.1 India

In India, Article 52 of the Constitution establishes the office of the president which is the highest elective office in the country and is elected in accordance with the provisions of the constitution and the Presidential and the Vice-Presidential Elections Act 1952.¹⁰⁰ The results of the presidential election are contested under Article 145 of the constitution in the form, manner, and the procedures

⁹⁴ *Alhaji Atiku Abubakar v INEC & Muhammadu Buhari & 1 other SC 1211/2019*

⁹⁵ https://opinion.premiumtimesng.com/2019/11/05/supreme-court-and-the-atiku-election-petition-by-reuben-accessed-on-23rd-December-2019-at-3:34-p.mabati/disqus_thread.

⁹⁶ Siri Gloppen, Roberto Gargarella *Democratization and the Judiciary: The Accountability Function of Courts*

⁹⁷ Mwangi S, *A History of Constitution Making in Kenya, 2012, Media Development Association*, 83.

⁹⁸ Article 140 (2) *Constitution of Kenya* (2010).

⁹⁹ Article 141 *Constitution of Kenya* (2010).

¹⁰⁰ Article 52 *Constitution of India*.

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which the Supreme Court prescribed.¹⁰¹ Section 14A of the Presidential and Vice Presidential Elections Act provides a maximum of 30 days under which a petition should be presented in the courts after a declaration of the election results.¹⁰² Article 21 of the constitution of India requires that procedures established by law be fair, just or right procedures. A fair procedure grants the right to a fair hearing. In addition, Article 311 (2) of the constitution of India provides for a right to notice and reasonable opportunity as a safeguard against arbitrary action.

~~The Supreme Court of India stated that it is the essence of a judgement of that it must be obtained after due observance of the judicial process. The deciding court should observe the minimum requirements of natural justice: it should be composed of impartial persons, acting fairly, without bias and in good faith; it must give reasonable notice to the parties to the dispute and afford each party adequate opportunity of presenting the case.¹⁰³~~

~~Article 21 of the constitution of India requires that procedures established by law be fair, just or right procedures. A fair procedure grants the right to a fair hearing. In addition, Article 311 (2) of the constitution of India provides for a right to notice and reasonable opportunity as a safeguard against arbitrary dismissal. [Krishan Iyer J, an Indian supreme court judge observed that in an electoral process every step from start to finish of the total process constitutes an election, not just the conclusion of culmination. The multitude of operations covered by the compendious expression 'election' thus commences from the initial notification and culminates in the declaration of the return of a candidate. There cannot be two views or doubts about the fact that 'free and fair elections' are a basic postulate of a free democratic society.¹⁰⁴ The integrity and credibility of the electoral process in India is protected in its' legal instruments.~~

~~It is of the essence that elections of public officials including the president are subject to scrutiny by an independent impartial tribunal.~~

The constitution of India visualizes resolution of electoral disputes by a judicial process by ascertaining the facts of the election and applying it to the law. The Indian Supreme Court held that free, fair, fearless and impartial elections are the guarantee of a democratic polity. Effective mechanism is the basic requirement for having such election. For conducting, holding and

¹⁰¹ Article 145 Constitution of India.

¹⁰² Section 14A of the Presidential and the Vice-Presidential Act, 1952.

¹⁰³ Viswanathan v. Abdul, the Supreme Court of India (1963);

¹⁰⁴ Mohinder Singh Gill v Chief Election Commissioner, S.C. 1977. Krishan Iyer J who is an Indian Supreme Court Judge observed:-

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completing the democratic process, a potential law based upon requirements of the society is concededly of paramount importance. A balanced judicial approach in implementing the laws relating to franchise is the mandate of this court.¹⁰⁵

In Tulsiram Patel the Supreme Court determined how the principles of natural justice had been interpreted by the courts and whether they acted within the limits they were confined to. The issue before the court related to the interpretation of Articles 309, 310 and the 311 of the constitution of India. The Supreme Court stated that as a result of judicial interpretation two rules have emerged representing the principles of natural justice in the judicial process. Firstly, no man shall be a judge in his own case and secondly, hear the other side – Audi Alteram Partem. It is deducible that before deciding an issue in the court, it is just that both parties are given the chance to be heard.¹⁰⁶

The Supreme Court of India stated that it is the essence of a judgement that it must be obtained after due observance of the judicial process. The deciding court should observe the minimum requirements of natural justice: it should be composed of impartial persons, acting fairly, without bias and in good faith; it must give reasonable notice to the parties to the dispute and afford each party adequate opportunity of presenting the case.¹⁰⁷ The rules of natural justice are rooted in all legal systems. They are manifested in the twin principles of nemo index in sua causa and audi alteram partem. The aim of natural justice is to secure justice or conversely prevent miscarriage of justice.

The rationale for the 30 days allowed in India for presentation of election petitions in the Supreme Court is to satisfy the *audi alteram partem* principles of natural justice in the dispensation of judicial and quasi-judicial functions. The principle encompasses the Right to notice; Right to present case and evidence; Right to rebut adverse evidence; Right to cross examination; Right to legal representation; Disclosure of evidence to party; Report of enquiry to be shown to the other party and ultimately a reasoned decision.

~~In Tulsiram Patel the Supreme Court determined how the principles of natural justice had been interpreted by the courts and whether they acted within the limits they were confined to. The issue before the court related to the interpretation of Articles 309, 310 and the 311 of the constitution of India. The Supreme Court stated that as a result of judicial interpretation two rules have emerged~~

¹⁰⁵ V.S. Achuthanandan v. P.J. Francis, Supreme Court (2001).

¹⁰⁶ Union of India v Tulsiram Patel, Supreme Court, (1985).

¹⁰⁷ Viswanathan v. Abdul, the Supreme Court of India (1963).

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~~representing the principles of natural justice in the judicial process. Firstly, no man shall be a judge in his own case and secondly, hear the other side—Audi Alteram Partem. It is deducible that before deciding an issue in the court, it is just that both parties are given the chance to be heard.¹⁰⁸~~

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~~The Presidential and Vice Presidential Elections Act 1952, Article 14 provides a timeline of 30 days from the date of publication of results for petitioners who seek to challenge the election results of a presidential elect candidate to prepare and file a petition in the Supreme Court of India.~~

~~The Supreme Court of India stated that it is the essence of a judgement of that it must be obtained after due observance of the judicial process. The deciding court should observe the minimum requirements of natural justice; it should be composed of impartial persons, acting fairly, without bias and in good faith; it must give reasonable notice to the parties to the dispute and afford each party adequate opportunity of presenting the case.¹⁰⁹~~

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~~Article 21 of the constitution of India requires that procedures established by law be fair, just or right procedures. A fair procedure grants the right to a fair hearing. In addition, Article 311 (2) of the constitution of India provides for a right to notice and reasonable opportunity as a safeguard against arbitrary dismissal.~~

3.5.2 Ghanaian lessons

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The 1992 parliamentary elections held in Ghana were boycotted due to massive electoral irregularities that had characterised the presidential election which was held a month earlier. Consequently, the entire electoral process was deemed to be flawed. As a measure to avoid, a repetition of the same, constitutional measures was initiated and implemented to strengthen Ghana's electoral commission. This ultimately led to the improvement of the 1966 general elections held in Ghana, which were generally regarded as free, fair and credible.¹¹⁰

Part I of the public election regulations of Ghana, appoints the Electoral Commission of Ghana to oversee the electoral process of both the parliamentary and presidential elections. The mandate of the Electoral Commission of Ghana includes holding a public election and appointing a returning officer in each constituency which the election is to be held.¹¹¹ Presidential elections in Ghana are

¹⁰⁸ *Union of India v Tulsiram Patel*, Supreme Court, (1985).

¹⁰⁹ *Viswanathan v. Abdul*, the Supreme Court of India (1963).

¹¹⁰ A Aubynn, Behind the transparent ballot box: The significance of the 1990's election in Ghana' in M Cowen and L Laaska (eds) Multi party election in Africa (2002), 102.

¹¹¹ Part I, *Public Elections Regulations Act*, Ghana (1996).

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specifically adjudicated for under the Presidential Elections Law (1992) which outlines the conditions which a presidential candidate is eligible for election, the nomination procedures and the election process and consequently the presidential electoral dispute process.¹¹² The validity of the election of the president in Ghana can be challenged by any Ghana citizen within 21 days after the declaration of the results of the presidential election.¹¹³ Similarly in Ghana, Article 64 (1) of the 1992 constitution provides that any citizen is entitled to file a petition at the Supreme Court to challenge the validity of the election of a president.¹¹⁴

Contrary to the legitimate expectation, it took the Supreme Court of Ghana 18 months and one day to hear and dispose of the Nana Akufo- Addo case. The petition which was file on the 28th December 2012 suffered delay and was only determined and judgement rendered on the 29th August 2013. The delays are rather attributable to the absence of fixed petition timelines for the determination of presidential disputes in the Ghana constitution. Article 64 (1) of the Ghana constitution only provides the 21 days within which a petition should be filed in the Supreme Court. However, it is silent on the time by which the dispute should be determined. This is a paradigm shift in the interests of the fixed timelines in Kenya under which the Supreme Court determined the Raila Odinga petition case in 14 days because the constitution of Kenya 2010 provides stringent timelines for both the institution and the determination of presidential election disputes. It is noteworthy that constitutions play a crucial role in ensuring presidential election disputes are resolved expeditiously.

The committee in the Report of the Bench Marking visits to Ghana, reported that in Ghana, the number of petitions filed after the 2016 elections were significantly low. It was noted that out of the 275 parliamentary seats only 7 were filed. This is evidence of the maturity of Ghana's democracy.¹¹⁵ In terms of time allocation in handling presidential petitions Ghana places an emphasis on shifting focus from procedural technicalities to the substantive laws.¹¹⁶

¹¹² Section 1 - 4, *Presidential Elections Law*, Ghana (1992).

¹¹³ Section 5, *Presidential Election Law*, Ghana (1992).

¹¹⁴ Article 64 (1), *Constitution of Ghana*, (1992).

¹¹⁵ *Report of the Bench Marking visits to Ghana, South Africa and Mexico by the Judiciary Committee on Elections.*

¹¹⁶ *Akufo-Addo v. Electoral Commission, the Superior Court of Judicature (2012). A petition challenging the validity of the election of John Dramani Mahama as President of Ghana pursuant to the presidential election held on 7th and 8th December 2012. The party had 28 days to petition to the Supreme Court.*

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The Supreme Court of Ghana has an extensive jurisdiction as compared to the Kenyan Supreme Court, including the jurisdiction to extend election timelines where necessary.¹¹⁷ Ghana legislation is mindful of due process principle of affording reasonable opportunity to persons intending to petition the publication of the presidential results in the Gazette. It provides 21 days for presentation of the petition in the supreme court.¹¹⁸ This affords the parties sufficient time to meticulously gather the evidence that would found their respective claims and responses.¹¹⁹ Contrasted with the Kenyan legal regime, only 7 days are provided for the persons to petition the declaration of the presidential election results.¹²⁰

At the same time, Ghana prioritises the principle of expediency in resolving presidential electoral disputes, by providing that the time limit for presentation of the presidential petition shall not be extended.¹²¹ This guarantees that election petitions being a public interest issue, are resolved within the shortest realisable time frame without undue delay. Ghana legislation provides for application of Rules of Court Committee as a legislative instrument to guide the Supreme Court for the practice and procedure for presidential petitions presented to the Supreme Court.¹²² Furthermore, where a president-elect is sworn in even before election disputes are settled by the courts, the need for an efficient resolution of cases becomes even more sensitive. Indeed, the element of time is inherent in the concept of fair adjudication, making justice a time-bound concept.¹²³

~~The committee in the Report of the Bench Marking visits to Ghana, reported that in Ghana, the number of petitions filed after the 2016 elections were significantly low. It was noted that out of the 275 parliamentary seats only 7 were filed. This is evidence of the maturity of Ghana's democracy.¹²⁴ In terms of time allocation in handling presidential petitions Ghana places an emphasis on shifting focus from procedural technicalities to the substantive laws.¹²⁵~~

¹¹⁷ Report of the Bench Marking visits to Ghana, South Africa and Mexico by the Judiciary Committee on Elections, 2017, 14.

¹¹⁸ Section 18 (1) Representation of the People Law, Ghana (1992).

¹¹⁹ M. Azu, The Role of the Judiciary in strengthening democratic governance in Africa: An examination of the resolution of the recent presidential election disputes in Ghana and Kenya (2013).

¹²⁰ Rule 16, Supreme Court Rules, Kenya (2012)

¹²¹ Section 18 (1) Representation of the People Law, Ghana (1992).

¹²² Section 5, Presidential Election Law, Ghana (1992).

¹²³ Electoral Integrity Group 'Towards an international statement of the principles of electoral justice' (Accra Guiding Principles) 2011.

¹²⁴ Report of the Bench Marking visits to Ghana, South Africa and Mexico by the Judiciary Committee on Elections.

¹²⁵ *Akufo Addo v. Electoral Commission, the Superior Court of Judicature* (2012). A petition challenging the validity of the election of John Dramani Mahama as President of Ghana pursuant to the presidential election held on 7th and 8th December 2012. The party had 28 days to petition to the Supreme Court.

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CHAPTER FOUR

NATURAL JUSTICE AND THE ADJUDICATION OF ELECTORAL DISPUTES: PROCEDURAL AND SUBSTANTIAL RULES

4.1 Introduction

4.1.1 What is Adjudication

Adjudication is the formal and institutionalized system of reasoned (rational) conflict resolution.¹²⁶ Adjudication aims to settle disputes fairly on the basis of applicable laws. The courts require procedural rules to guide the determination of cases in a fair manner to achieve substantive justice. Ideally the courts should depend on both substantive justice and procedural justice. The substantive rules apply to the fairness or merits of the case whereas the procedural rules govern the manner of resolving a dispute.¹²⁷

Raila Odinga v IEBC (2013) was the second presidential election petition in the country's history to be heard on its merits. Before it, there was only *Mwau vs Moi*, the rest were dismissed on technicalities.¹²⁸ This was bad for the judiciary which was resort to by the people as the last hope in seeking redress through election petitions to safeguard democracy. must be perceived as competent, honest, learned and independent.¹²⁹

4.2 The legitimate Expectation

According to Wade, it is the reasonable expectation that can equally be well invoked in any of the many situations where fairness and good administration justify the right to be heard.¹³⁰

Byles J observed that both the law of God and man give a party an opportunity to make his defence at his own instance. He mentions that God did not pass sentence on Adam before he called him to make his defence. This provides a procedural safeguard against arbitrary administrative adjudication.¹³¹

¹²⁶ Fuller, *The Forms and Limits of Adjudication*, 353- 409.

¹²⁷ Morrison, Geary and Malleeson *Common Law Reasoning and Institutions*, 36.

¹²⁸ *Balancing the Scales of Electoral Justice - Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence*, 2013, 48.

¹²⁹ Muna Ndulo "Rule of Law, Judicial Reform, Development and Post Conflict Societies" See also Muna Ndulo, "Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System."1-26

¹³⁰ Wade, *Administrative law*, 522.

¹³¹ Byles, J, *Co-oper v Wanderwoth Board of Works*, 1881, 73.

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4.2.1 Distinguishing between procedural rules and substantial rule in adjudication

Procedural rules and technicalities are manifestly referred to as ‘handmaids rather than mistresses’ of substantive justice.¹³² These technical rules are instruments available to the judiciary to help render substantive justice and are therefore not ends in themselves. In 1878 Lord Penzance compellingly stated that procedures are the machinery of law whereby they provide the means/channel in which law is administered and justice is reached. However, procedures divert from its proper function where in place of facilitating, it is permitted to obstruct, and further extinguish, legal rights.¹³³

There is a subsisting difficulty in distinguishing this distinction in practice as opposed to theory, as Holdsworth, aptly observed that one of the most difficult and permanent problems which legal systems face is an amalgamation of due regard for the claims of substantial justice with a procedural system too rigid to be workable. It is easy to favor one quality at the expense of the other, with the result that either all system is lost, or there is so elaborate and technical a system that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves.¹³⁴

4.2.2 Governing legislations

Pursuant to an objective and legitimate expectation, citizens approach the courts to resolve conflicts in order that courts may look at their merits, without unduly being fettered by technicalities, and have the cases decided fairly. Judges, therefore, have a duty to do substantive justice. Article 159 (2) (d) requires justice to be administered without undue regard to procedural technicalities.¹³⁵

Article 140 of the constitution of Kenya mandates the Supreme Court to make its’ deliberation on presidential election petitions strictly within 14 days. The constitution does not provide room for any reasonable extension of time in relation to the 14 days’ timeframe allocated for presidential petitions. The Supreme Court is under strict obligation to dispense of its’ constitutional mandate under Article 140.

¹³² Clark, *The Handmaid of Justice*, 298.

¹³³ *Henry J.B. Kendall and Others v Peter Hamilton* [1878] 4 AC 504. Procedures which provide means in which the law is administered have now been put to govern where in fact it is required to subserve.

¹³⁴ Holdsworth *History of English Law* 251. A British legal historian.

¹³⁵ Article 159 (2) (d) *Constitution of Kenya* (2010).

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This specific provision raises the issue of whether highly esteemed principles of fairness and fair hearing are prioritized and given due weight in the petitioning of presidential results in the Supreme Court.

4.2.3 The ideal adjudication process: Huefner

The judicial determination of presidential election disputes, in order to be instrumental as a peaceful judicial remedy must offer aggrieved persons a genuine possibility of redress for their grievances. To accomplish this, Huefner identifies at least three factors that require to be embedded in the adjudication process. Firstly, the process must be fair and perceived as fair by both litigants and the public.¹³⁶ In order to achieve fairness the process ought to treat the parties to a dispute equally and offer both parties an equal opportunity to present their cases. The process is required to award the parties resolutions impartially and meritoriously. A process tailored to favor the incumbent or incumbent party, disregarding the strength of evidence presented against it cannot be considered to be fair.

Secondly, the process must be transparent, that is, when an election is disputed and a court adjudicates on the dispute, it must do so in a way that is understandable (based on prior existing rules) and fair analysis of evidence as relates to the competing claims.¹³⁷ According to Article 7 of the Supreme Court rules, the court shall give its decision. However, it may reserve the reason for its decision to a later date. In effect, the Supreme Court furnishes the reasoning of the judgement to the public after it has pronounced itself on a certain verdict in the petition. The people who are the major stakeholders in the election process do not have a means of recourse against the Supreme Courts' written reasoned judgement considering that the decision of the judges is final, and the consequences of its decision have been implemented. Finally, the process must be prompt and determine cases with finality.¹³⁸ As is often said, justice delayed is justice denied.¹³⁹

¹³⁶ Huefner SF "Remedying Election Wrongs"2007 (44) Harvard Journal on Legislation 265 – 325.

¹³⁷ Huefner SF "Remedying Election Wrongs"2007 (44) Harvard Journal on Legislation 265 – 325.

¹³⁸ Ibid 265 - 325

¹³⁹ O Kaaba 'The challenges of adjudicating presidential election disputes in domestic courts in Africa' (2015) 15 African Human Rights Law Journal 329-354.

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4.3 The principle and essential elements of natural justice: Its relevance in electoral law and the court systems

4.3.1 Historical perspective

There is no single definition of natural justice. However, the concept of natural justice emanates from core principles which are the essence of natural law. The rules of natural justice are the minimum standards of fair decision making imposed on entities acting in a judicial capacity. It arises where the entities are required to make decisions which will have a direct impact on the rights/ legitimate expectations of the individuals concerned.¹⁴⁰ Article 16 (1) of the ECHR states that in the determination of the civil rights/ criminal charges levelled against an accused, everyone is entitled to a fair and public hearing within a reasonable time by independent and impartial tribunal established by law.¹⁴¹ In a hallmark English decision, *Abbott v Sullivan*, it was stated that the principles of natural justice are easy to proclaim, but their precise extent is far less easy to define.¹⁴²

In *Maneka Gandhi v Union of India*, Lord Morris read that the very concept of natural justice should at all stages guide the courts whose judicial functions is essential. There is nothing rigid or mechanical of natural justice. The principles and procedures are applied in any situation which is right and just and fair.¹⁴³

The doctrine of justice translated into procedural fairness in judicial hearings has been considered as a fundamental component into the realm of administrative decision making. The Brighton police authority dismissed its chief member without providing him an opportunity to defend his actions. The actions of the police authority were held to be a violation of the doctrine of natural justice.¹⁴⁴

4.3.2 The *Audi Alteram Partem* doctrine

The maxim 'audi alteram partem' includes every question of a fair procedure or due process.¹⁴⁵ It denotes that no one should be condemned unheard. It is a principle under natural justice which in its application in law places an obligation in the judicial system to ensure that parties in a prima

¹⁴⁰ The principles and essential elements to natural justice, Chapter 1, 15.

¹⁴¹ Article 16 (1) of the European Convention on Human Rights and Fundamental Freedoms of 1950.

¹⁴² *Abbott v Sullivan*, 1 K.B.189, 1952, 195.

¹⁴³ *Maneka Gandhi v Union of India*, Supreme court, AIR, 1978, 597.

¹⁴⁴ *Ridge v Baldwin, A.C 1940*.

¹⁴⁵ HWR Wade, *Administrative Law*, 4th Edition 421.

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facie legal dispute are entitled to be heard in their presence, entitled to dispute their opponent's case including cross examine witnesses and call their witnesses to tender evidence before the court and entitled to know the reasons for the decision rendered by the court.¹⁴⁶

4.4 The fair hearing: Meaning, object and ambit

4.4.1 Ingredients of a fair hearing

—4.4.1.1 Notice: Right to present a claim and the Right to Defend a claim

In an ideal legal system, a hearing should commence with notice by the authority concerned to the affected person. The reasoning is that where a person does not know the case against him, he cannot defend himself. Where the proceedings commence without giving proper notice to the affected party, the proceedings are in violation of natural justice. Furthermore, the notice is required to be served properly to the person concerned.¹⁴⁷

According to the procedure laid down in Rule 6 of the Supreme Court rules, the petitioner is required to file a petition in the Supreme Court within 7 days of declaration of the results.¹⁴⁸ Rule 7 requires the petitioner to serve the documents to the Respondent within three days. Where the Respondent wishes to oppose, he is required to file a response within three days. The notice should give sufficient time to the persons concerned to his case to prepare.¹⁴⁹ In assessing the time required for each case, it depends on the facts of each case. In the case of a presidential petition, the parties to a petition are required to analyse the documents used to relay information in the voting process.

In the 2017 general elections, the total number 40, 886 polling stations widespread in the 47 counties were used in to relay results of the presidential election. Despite the law requiring full digitalization of the transmission of the presidential results,¹⁵⁰ the manual transmission of electoral results was employed in the 2017 presidential elections. Therefore, the parties in the petition filed

¹⁴⁶ *National Central Cooperative Bank v Ajay Kumar*, Supreme Court, 1994, 39.

¹⁴⁷ *Laxmi Narain Anand C.S.T* (1980)

¹⁴⁸ Rule 6, *Supreme Court Rules*, Kenya (2012)

¹⁴⁹ *Public prosecutor v K.P Chandrashekhara* (1957)

¹⁵⁰ Section 39, (1C), (a), *Election Act*, Kenya (2011)

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in the Supreme Court were required to review the form 34 A¹⁵¹, form 34 B¹⁵² and form 34 C¹⁵³ used in the electoral process which formed the basis of both presenting and responding to the legal issues which affected the presidential election. The practicality of preparing for the petition within 7 days of the declaration of the results in accordance with the Supreme Court rules is intolerable within the wide meaning of natural justice. The petitioners are not accorded sufficient time to scrutinize, prepare and discharge such a constitutional duty of an immense, tedious and voluminous scale. Despite, the essence of the presidential petition being to ensure justice in the electoral process. The notice must be adequate and reasonable.

The Respondents to a presidential petition are accorded only 3 days to respond to a presidential petition in the Supreme Court yet the petitioners are accorded 7 days to prepare for the same petition which is a glaring disparity in the time afforded to parties by the courts for preparation of the petition.¹⁵⁴ In *Lawrence v State of Bombay*, it was held that the notice period of a claim should be legal and give sufficient time to the concerned party to prepare for her case.¹⁵⁵ It is the authors view that equity must not be sacrificed at the expense of expedition in a manner that unreasonably hastens the time for both the petitioners and the respondents to comply with the court processes. Both parties are entitled to a right to a fair hearing which includes being afforded a reasonable and equitable time within which to present and defend their case.

— 4.1.1.2 The hearing: the scope of action of the court within natural justice

In the judicial process, the court should not direct itself without providing a reasonable opportunity of being heard to the person affected by it. This guarantees fairness and due process in the process. The reasonable opportunity of a hearing referred to as a fair hearing is a fundamental ingredient of the audi alteram partem rule. Furthermore, the Court plays a more pivotal role since it scrutinizes the pleadings of both parties, marry their assertions to the evidence tendered during the hearing, analyse the rationale and churn out a determination on whether the election was free and fair. The time factor is much more critical on the court due to this monstrous obligation to be surmounted

¹⁵¹ Section 39, (1A), Elections Act (2011). Form 34 A contains the provisional presidential results in each polling station. It is filled by the presiding officer. It contains details of the votes garnered by each candidate, the total number of registered voters in that station, the rejected votes, the objected ones, the disputed and the valid ones.

¹⁵² Section 39, (1B), Elections Act (2011). Form 34 B contains the provisional presidential results in each constituency. It is filled by the returning officers.

¹⁵³ Section 39, (1C) Elections Act (2011). Form 34 C contains the final presidential results at the national tallying centre.

¹⁵⁴ Rule 7, *Supreme Court Rules*, Kenya (2012).

¹⁵⁵ *Lawrence v State of Bombay*, S.C AIR 1856, 531.

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in barely two weeks. Studies have shown that it takes an average of 28 days to conclusively hear and determine a complex commercial matter before a superior court¹⁵⁶ leave alone having to entertain loads of documents from over 40,886 polling stations in a matter where the stakes are at the zenith.

The election courts are required to comply and provide parties with reasonable opportunity to present their electoral claim and defend the claim before arriving at a decision.¹⁵⁷ The principles of natural justice extend to the presentation of evidence in an electoral court. The parties are under legal obligation to disclose any evidence which they tend to rely on for the other parties comment and rebuttal. Where evidence is used and such opportunity is not provided to the other party, it will go against the rules of fair hearing.¹⁵⁸ The extent and content of the information required to be disclosed depends on the set of facts of each case.¹⁵⁹ The courts should be guided under the Bangalore principles to guarantee judicial independence, impartiality and a fair hearing. Thereby give both parties an equal chance to present and defend their claims pursuant to natural justice.¹⁶⁰

According to the Supreme Court rules there will be a pre-trial conference nine days after the filing of a petition. Within two days of the pre-trial conference the court shall commence the hearing of the petition. The court shall give its decision but may reserve its reasons for the decision to a later date.¹⁶¹ The fact that the courts are not able to issue a written judgement within the elapse of the 14 days period points to the rush in which the court decides the petition. Without the written judgement of the Supreme Court, the legal reasoning of the court is ambiguous. The determination of the Supreme Court is final and thus has an effect of nullity on any subsequent legal action with respect to the petition proceedings. Yet is essential to ensure justice is meted to the people and thereby uphold the validity of the presidential electoral process. In 2013, the Supreme Court decided to uphold the win of the presidential elect candidate Uhuru Kenyatta. However, the court promised to furnish the public with the reasons for its major decision in two weeks. - which is

¹⁵⁶ *The Judicial Working Commission on Elections and Preparations in Kenya, 2012.*

¹⁵⁷ Union of India v J.P. Mitter A.I.R 1950 S.C 27. The court stated that the rule of fair hearing requires the affected party be given an opportunity to meet the case against him effectively and provide room for the affected party to make written representations.

¹⁵⁸ State of Orissa v Binapani S.C, A.I.R, (1967), 1269.

¹⁵⁹ Prem Prakash v Punjab University, S.C, (1972) 1408.

¹⁶⁰ Bangalore Principles of Judicial Conduct 2002, 3,4.

¹⁶¹ Ibid.

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proof that it may be impractical to hear and determine the petition in the stipulated time!¹⁶² The determination of the court without any written judgement generated disquiet.¹⁶³

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CHAPTER FIVE

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GENERAL CONCLUSION AND RECOMMENDATION

Whether deliberate or not, failed elections deny the people their right to constitute government according to their will in a transparent way. A robbery of the right of the people to participate in their own government and thus the greatest offence that can be committed against the constitution and the people.¹⁶⁴ In effect failed elections take away the consent of the people as the basis of the right to govern.

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It is clear from the foregoing analysis of this paper that a fixed timeframe within which election petitions are to be determined in the Supreme Court is of great value in terms of dispensing justice expediently and effectively. However, a rigid time frame denies a fair hearing to the parties involved in the presidential litigation process. In effect, equity of a fair hearing is robbed off the petition process at the expense of expediency.¹⁶⁵ This violates the rules of natural justice which forms the basis of legal systems. In addition, indefinite time frames within which the presidential petitions are to be heard rob off the country certainty and political stability thus resulting into lack of faith in the judicial process of electoral dispute resolution and affects the economy negatively.

The constitution requires anyone wishing to challenge the election of the president elect to file a petition in the Supreme Court within 7 days after which, the court hears and determines the issues

¹⁶² Balancing the Scales of Electoral Justice - Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence, 2013, 51.

¹⁶³ G. Kegoro 'Why the Low-Key Conclusion of a Very High-Profile Election Dispute?' African Culture Direct, <http://africanculturedirect.blogspot.co.ke/2013/04/why-low-key-conclusion-of-very-high.html>, at 8 February 2016.

¹⁶⁴ Ben Nwabueze "Nature and Forms of Elections Rigging" Distinguished Nigerian law scholar.

http://www.nigerdeltacongress.com/articles/nature_and_forms_of_elections_ri_htm (Date of use: 20 May 2014)

¹⁶⁵ Raila Odinga and another v Independent Electoral Boundaries Commission (2017). The petitioners were stopped from filing presenting crucial findings in support of the petition due to the stringent timelines within which the constitution provides.

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in 14 days.¹⁶⁶ These strict temporal timelines have injected certainty into the time frame for the disposition of presidential election disputes in Kenya.¹⁶⁷ However, both the parties and the court require adequate time which is reasonable to provide a fair hearing to come up with reasoned arguments and supporting evidence of a national scale of the vast documents used to relay electoral figures and the conduct of electoral officers that substantially affected the fairness of the electoral process.. Justice is required to be determined without undue regard to procedural technicalities under Article 159 (2) of the constitution.¹⁶⁸

5.1 – Key Recommendations

5.1.1 Timelines

Whereas the subject of this research paper, timelines within which disputed presidential elections are determined in court, has been subjected to a fair amount of scholarly inquiry, there does not seem to be any existing scholarly literature that has inquired into how the Kenyan courts can resolve disputes of such nature in a timely yet adequate manner.

Where literature on election timelines exist, it is narrowly fixated on the advantages of the rigid timeframe amended by the 2010 constitution and not the emerging challenge associated with article 140 of the constitution. This study has, therefore, cut a new approach in that it has demonstrated that the right to due process and the right to a fair hearing is neglected in the existing approach to the petition process.

Presidential electoral disputes have serious implications for social cohesion and national integration. The right of parties in a petition to present their cases must be fairly balanced with the public interest to resolve presidential election disputes expeditiously.

There should be a positive initiative to extend the timeline period under article 140 of the constitution which prescribes to a 14 days period to 30 days which strikes a delicate balance between the right to expediency and the right to be equity. However, without efforts to try new ways to resolve the short and rigid timeframe challenges, rushing over electoral dispute resolution can lead to a miscarriage of justice.

¹⁶⁶ Ibid.

¹⁶⁷ M, Azu, The Role of the Judiciary in strengthening democratic governance in Africa: An examination of the resolution of the recent presidential election disputes in Ghana and Kenya (2013).

¹⁶⁸Article 159 (2) of the constitution 2010.

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5.1.2 Further Research

There is hope that this study will not only bring in a new touch into the Kenyan system in handling presidential electoral petitions and recommend ample time with which the courts incorporate fundamental pillars of natural justice in the hearing process but also aim that the research stimulates further debate and more research on how other judicial common wealth frameworks and mechanisms handle and determine presidential petitions and the timeframe within which the superior courts dispense of their constitutional mandate.

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