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Rethinking the Supreme Court's Appellate Jurisdiction on Questions Involving Interpretation or Application of the Constitution: A Reply to Walter Khobe

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Abstract

Walter Khobe in his article, '*The Jurisdictional Remit of the Supreme Court of Kenya Over Questions Involving the 'Interpretation and Application of the Constitution'* lauds the Supreme Court for adopting the unbound normative derivative doctrine to justify its enlarged jurisdiction under article 163(4)(a) of the Constitution, 2010 in matters arising from interpretation or application of the Constitution, including election petitions. Whereas I agree in principle that the doctrine is firmly embedded in the Constitution, I submit that invoking the doctrine as a means to exercise appellate jurisdiction specifically in election disputes is inconsistent with a holistic reading of the Constitution and election laws. Besides, the *sui generis* nature of election disputes and the capacity constraints of the Supreme Court, among other factors, militate against a blanket application of the doctrine in exercise of appellate jurisdiction in election petitions. In the end, I recommend that to foreground the broad transformative goals of the Constitution, the Supreme Court should decline any invitation to exercise appellate jurisdiction in election petitions, especially under article 163(4) (a).

Key words: Normative derivative, Article 163(4)(a), Constitution of Kenya, Election Petition, Jurisdiction, Supreme Court of Kenya

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1. Introduction

The 2007-2008 post-election violence was a watershed moment that left a mark in the countries transitional justice history. In the aftermath of the violence, the clamour for change was evident among all persons in the coalition government, the civil society, and the citizenry. One of the by-products of these initiatives was the transformative Constitution 2010[1] whose promulgation transformed the country from an authoritative regime into a constitutional democracy.[2] The Constitution decreed its supremacy and enjoined all persons and actions to comply with its provisions substantively. It assigned the judiciary the coveted but humongous custodian role to breathe life into its text and ensure all persons conform to it and established a value system to guide the polity.[3]

To effectively dispense this new and tasking mandate, the judiciary, like all other institutions, had to undergo radical and progressive transformation to enhance efficiency and inspire public confidence that was lacking in the pre-2010 regimes.[4] Judicial officers that had served in the pre-2010 era were vetted, and those considered not suitable purged. The Constitution elevated the judiciary into a co-arm of government equal to the legislature and the executive.[5] It foregrounded institutional and functional independence, purposefully limiting executive interference that had seen judges serve at the whim of the executive.[6] The Supreme Court was a progeny of these far-reaching reforms that engineered a rebirth of the judiciary. Conscious of the inherent power imbalance in the classical tripartite arms of the government, the Constitution introduced an arguably fourth arm of the government, the independent constitutional commissions.[7] One of the commissions is the Independent Electoral and Boundaries Commission (IEBC),

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[1] *In the Matter of the Speaker of the Senate & Another* [2013] eKLR para 51.

[2] *In the Matter of the Speaker of the Senate & Another* [2013] eKLR para 241.

[3] Article 10 of the Constitution.

[4] Ahmednasir Abdullahi, 'The Limits of Prescriptive Reforms: The Struggle and Challenges of Judicial Reforms in Kenya, 2002 to 2010' Nairobi Law Monthly (Nairobi, 16 September 2015) available at <https://nairobilawmonthly.com/index.php/2015/09/16/limits-of-prescriptive-change-challenges-to-judicial-reforms/> accessed on 10th May 2020. (Herein after Ahmednasir Abdullahi 2016).

[5] Article 1(3) and chapter 10 of the Constitution.

[6] Hon. Justice David Majanja, 'Judiciary's Quest for a Speedy and Just Electoral Dispute Resolution Mechanism: Lessons from Kenya's 2013 Elections' in Collins Odote and Linda Musumba (Eds), *Balancing the Scales of Electoral Justice (2016) 24.*

[7] Article 88 and 248 (2)(c) of the Constitution. On the fourth arm, See *In the Matter of the National Land Commission* [2015] eKLR (Advisory Opinion Reference No. 2 of 2014) para 175; B. M. Sihanya 'Constitutional Implementation in Kenya 2010-2015: Challenges and Prospects', FES Occasional Paper No.5 (2011) 38.

whose principal mandate is to conduct free, fair, and verifiable elections.[8] These, among other reforms, manifest the country's determination in unanimously saying *Nunca Más!*[9] (never again) to all vices of the authoritarian past.

In the context of this discussion, in the new dawn, Kenyans said never again to prolonged delays in the final determination of election disputes, to procedural technicalities that predominantly triumphed over substantive justice, to corrupt, partial, and incompetent judicial officers, and executive control of the judiciary. These reforms had a historical underpinning. Their absence had pushed the country to the brink of collapse. As a safeguard against these vices, the Constitution defined timelines for adjudication of election disputes. Where necessary, it allowed the legislature to make laws with the explicit instruction to ensure timely settling of disputes.[10] Most importantly, the framers of the Constitution and the legislature did not confer jurisdiction to the Supreme Court to exercise appellate jurisdiction in election appeals.

Surprisingly, in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*[11] (*Munya 1*), the Supreme Court arrogated to itself appellate jurisdiction in the disguise of interpreting or applying the Constitution by invoking the normative derivative doctrine. Despite the doctrine being progressive as Khobe aptly observes, the unrestrained jurisdiction in election petitions has been an Achilles heel of the court in many ways. First, the Supreme Court is unduly prolonging the time taken in settling election disputes contrary to the intention of the Constitution.[12] The limited number of judges in the Supreme Court and the lack of statutory timelines for exercising its appellate jurisdiction in election contests are some of the apparent reasons for the undue delays. Second, the Supreme Court has become extremely technical in applying article 163(4)(a) with little substantive appreciation of the

[8] See Article 88 of the Constitution.

[9] As used by the Recovery of Historical Memory Project (REHMI) of Guatemala in its transitional justice report.

[10] Article 87(1), 105(2) and (3) of the Constitution.

[11] [2014] eKLR para 77 and 78.

[12] For example, in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2015] eKLR, the appellant filed an application to the Supreme Court seeking extension of time to file an appeal outside the 30-day period prescribed by the Supreme Court Act, 2011 (Act No. 7 of 2011) On 24 April, 2014, the application was allowed via a ruling dated 4 July, 2014 and the judgment was issued on 19 October, 2015. The petition took about two and a half years in the judiciary, with one and a half year in the Supreme Court. In *Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 Others* [2019] eKLR (not heard on merits), a gubernatorial petition took about two years in courts and about seven months before the Supreme Court; *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 5 Others* [2019] eKLR, *a gubernatorial elections petition took about one and five months in courts and nine months before the Supreme Court.*

transformative values of the Constitution, especially in election disputes. About ten years of the court's existence, an analysis of its interpretation of article 163(4)(a) reveals a brazen cherry-picking exercise devoid of a firmly grounded and consistent judicial philosophy.[13]

It is against this background that this article responds to Khobe's article arguing that even though the Supreme Court has jurisdiction to interpret and apply the Constitution, there are overriding transformative goals that curtail its appellate jurisdiction in election disputes. To this end, the paper is divided into six parts. Part one is a general introduction to the analysis. Part two discusses the expedited justice, democratic representation, and devolution as imperatives that should inform a transformative adjudication of election disputes. Part three focuses on the *sui generis* aspects of elections that make them a necessary evil for the courts. Part four analyses the peculiarities of the Supreme Court that makes it an unsuitable forum for adjudication of election disputes. Part five briefly discusses the inconsistencies in the Supreme Court's decisions on the application of article 163 (2) (a), showing that perhaps the Supreme Court has realised its mistakes in adopting the unrestrained normative derivative approach. Finally, in part six, I share the conclusions and recommendations from the paper.

2. Expedited Justice, Democratic Representation, and Devolution as Overarching Constitutional Values

One characteristic of Constitutions promulgated in a transitional justice context is the tendency to be prescriptive in addressing some of the ills of past regimes while prescribing values that guide societies to posterity.[14] In the Kenyan context, a priority area in which the Constitution sought to bring change to was undue delays in courts, especially in settling election petitions. To this end, the Constitution enjoined courts to expedite justice.[15] The drafters went further to

[13] Muthomi Thiankolu 'Standards of Review and Resolution of Electoral Disputes in Kenya: A Review of the Jurisdiction of the High Court; The Court of Appeal; and the Supreme Court' in Collins Odote and Linda Musumba (Eds), *Balancing the Scales of Electoral Justice (2016) (hereinafter Muthomi Thiankolu (2016)); Muthomi Thiankolu, 'Role of the Courts in Ensuring Free and Fair Elections in Kenya: A Tale of Fifty-Six Years of Legal Sophistry and Intellectual Dishonesty' (2019) 4 Kabarak Journal of Law and Ethics 53-90 ; Ahmednasir Abdullahi (2015).*

[14] For a comprehensive discussion on transformative goals of the Constitution see Klare Karl, 'Legal Culture and Transformative Constitutionalism' [1998] 14 *SAJHR 146-188; See also the Supreme Court in the Matter of the Speaker of the Senate & Another* [2013] eKLR.

[15] Article 159(2)(b) of the Constitution.

prescribe a strict timeline for adjudication of petitions regarding the election of the president (14 days), members of parliament (6 months) and further gave the legislature tacit instructions to enact laws that will guarantee timeous resolution of electoral disputes.[16]

Another constitutional norm relevant to this discussion is the need for representation by democratically elected representatives at the national level and county level.[17] The election should be free, transparent, fair, and verifiable.[18] Whereas these preconditions of an election may seem to be giving courts more power to scrutinise evidence and verify the results, courts should bear in mind the strict timelines for adjudication of election petitions. Prolonged election petitions stifle democracy and impede the seamless transition of holders of electoral offices at the national and county level. Undue delays can also allow undemocratically elected persons to represent the citizenry.

Closely related to representation is devolution. Devolution was one of the efforts by the citizenry to ensure inclusivity and equitable distribution of resources.[19] At the centre of devolution is the office of the governor, whose mandate includes establishing an executive to spearhead development and effective service delivery within the county.[20] Surprisingly, with this mandate, the legislature and the judiciary have not given gubernatorial election disputes preferential treatment to reduce timelines that affect the smooth running of county governments. Governors and deputy governors are at the nerve centre of devolution and, therefore, election petitions dragging for a year and more threatens devolution. There will be far-reaching consequences that threaten devolution in the event the Supreme Court nullifies a gubernatorial election where the office holders have undemocratically served for almost two years.

When a court embarks on a holistic interpretation of the Constitution, central values of free and fair elections, timelines, the need for democratic representation and devolution should be considered alongside other imperatives such as the country's history,[21] substantive justice, and the mischief that constitutional

[16] Article 87 of the Constitution; Sections 75(2),(4) and 85A of the Election Act.
[17] See Articles 1(2) and 38(2) of the Constitution.
[18] Articles 81(e) and 86(a) of the Constitution.
[19] Chapter 11 of the Constitution.
[20] Articles 176 and 179 of the Constitution.
[21] Sections 3 (c) and (d) of the Supreme Court Act.

principles sought to cure.[22] From its inception, the Supreme Court appears to have favoured a holistic interpretation of the Constitution. In *Matter of the Kenya National Human Rights Commission*[23] the Supreme Court observed thus:

> But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean *in light of its history,* of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.

Further, in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* (*Munya 2*),[24] and with specific reference to an election petition, in paragraph 62, the Supreme Court observed:

> Article 87 (1) grants Parliament the latitude to enact legislation to provide for "timely resolution of electoral disputes." This provision must be viewed against the country's electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people's franchise, not to mention the entire democratic experiment. The Constitutional sensitivity about "timelines and timeliness", was intended to redress this aberration in the democratic process. The country's electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people's will, in name of which elections are decreed and conducted, should not be held captive to endless litigation.

From the preceding excerpts, the Supreme Court aptly acknowledges the essence of a holistic interpretation that is conscious of the country's history, constitutional timelines, and context. Further, in *Munya 2*, the Supreme Court reiterated the citizenry's desire to have finality, predictability, certainty, and legitimacy in an election process, values that were alien in the pre-2010 dispensation. One would expect the Supreme Court to be at the forefront in championing these values by striking a balance when interpreting or applying the Constitution.

On the contrary, the Supreme Court in *Munya 1* adopted the unbound normative derivative doctrine singularly narrowly focusing on interpreting

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[22] *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others* [2014] eKLR para 142.

[23] Supreme Court Advisory Opinion Reference No. 1 of 2012 para 24.

[24] [2014] eKLR para 62.

article 163(4)(a) without balancing the competing transformative imperatives such as constitutional timelines, the history of the country,[25] and the need for finality in the election among others. Besides, the court did not attempt to set out the contours of the doctrine. These omissions saw the court seeking to justify the doctrine in subsequent decisions.[26] Additionally, the Supreme Court has contributed significantly to the delayed resolution of election disputes. For example, in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others,*[27] the court took one and a half years to hear and determine the appeal. Similarly, in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 5 Others*[28] the court took nine months to resolve election petition pending before the court. These infractions point at a court determined to apply the law selectively at its convenience without venturing into a holistic interpretation. Such a creeping practice threatens to water down the gains of the Constitution and provides an incentive for undemocratically elected persons to exploit the judicial process to buy time in office.

3. Elections Petitions as a Necessary Evil in Courts

The 'third wave of democratisation' saw an influx of election petitions in courts which gave birth to a phenomenon christened the *judicialisation of politics* or *extending election campaigns to courts.*[29] Since *Bush v Gore,*[30] democracies have registered an influx in the number of election petitions. In Kenya and Africa, election petitions, more so in tightly contested presidential elections, are becoming the hallmarks of the election process.[31] Similarly, there is an influx in parliamentary and county election petitions in Kenya. In 2013, a total of 188 election petitions were filed before the Magistrates Courts and the High Court. In 2017, this number

[25] Klare, Karl E, 'Legal Culture and Transformative Constitutionalism' [1998] 14 *SAJHR 146-188.*

[26] *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others* [2014] eKLR, para 136.

[27] [2015] eKLR.

[28] [2019] eKLR.

[29] Joshua A. Douglas, 'Discouraging Election Contests', 47 *University of Richmond Law Review (2013) 1015.*

[30] 531 U.S. 98 (2000); Richard L. Hasen (2005); Kwasi Prempeh, 'Comparative Perspectives On Kenya's Post-2013 Election Dispute Resolution Process And Emerging Jurisprudence' in Collins Odote and Linda Musumba (eds), *Balancing the Scales of Electoral Justice (2016) 149-176 (hereinafter Kwasi Prempeh (2016).*

[31] Kenya 1992, 1997, 2013 and 2017, Ghana 2013, Uganda 2001, 2007 and 2016, and Malawi 2019.

more than doubled to 388 petitions.[32] The high number of petitions indicates that courts have increasingly become a significant player in determining who ascends to key elective positions in the executive, legislature, and county governments.[33] This comes with several challenges which are subsequently discussed.

Firstly, judicialisation of politics causes a counter-majoritarian difficulty for the judiciary.[34] In most democracies, unlike other elected representatives who enjoy popular mandate from the citizenry, judges are not elected by the citizenry. Therefore, when invited to adjudicate election disputes, more so in closely contested elections, there is a well-founded (perceived) apprehension among the citizenry that, like any other voter, judges have their preferred candidates in elections. Therefore, they are prone to ideological decision making as opposed to the judicious determination of electoral disputes.[35] As Richard Hasen observed with reference to the US context:[36]

> A court asked to decide a question of statutory or constitutional law that affects the outcome of an already held election is injected in the worst way into the political thicket. Journalists immediately question the partisan background of the judges, and partisan motives are immediately questioned and dissected no matter what the judges do.

In Kenya, the problem is bigger in presidential elections that are laden with partisan and ethnic interests. Judging from the past general elections, the court has come under attack from the parties that it has ruled against. In 2013, the opposition coalition, CORD criticised the Supreme Court for dismissing its petition.[37] In 2017, the unprecedented nullification of the presidential election results saw the Supreme Court judges, and the judiciary come under attack by the incumbent and

[32] Protecting Fundamental Rights In Electoral Disputes: African Electoral Jurisprudence Network Inaugural Discussions 16 – 17 APRIL 2019 available at <http://africajurists.org/wp-content/uploads/2019/11/AFRICAN-ELECTORAL-JURISPRUDENCE-NETWORK-INAUGURALDISCUSSIONS-REPORT-FINAL-6-6-19.pdf> accessed on 1st May 2020.

[33] Joshua Douglas (2013).

[34] Tom Ginsburg, Judicial Review in New Democracies Constitutional Courts in Asian Cases, Cambridge University Press (2003) 2.

[35] Joshua A. Douglas, 'Discouraging Election Contests', 47 *University of Richmond Law Review. 1015 (2013) 1016.*

[36] Richard L. Hasen, 'Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown', 62 *Wash. & Lee L. Rev. 937 (2005), 993.*

[37] 'Kenya Supreme Court upholds Uhuru Kenyatta election win' BBC News (London, 30 March 2013) available at < https://www.bbc.com/news/world-africa-21979298> accessed on 5th May 2020.

supporters of the Jubilee Party threatening to 'revisit the matter'.[38] Some of the judges experienced direct threats.[39] When deciding the second presidential election petition results in 2017, the Supreme Court judges were under real or perceived duress, which is unhealthy in manifesting justice. True to the president's threat, the judiciary's budget was slashed while parliamentary and county election petitions were pending in courts.[40] The manifestation of substantive justice in election petitions appears to be a mirage. The victors will consider the decision to be just, whereas the losing party considers the decision to be unjust.

Secondly, election petitions should be decided within limited timelines. This is informed by the need for the finality of the election process, seamless transition, and continued delivery of government services. Also, the constitutional terms of the elected representatives start running immediately after an election cycle despite the protracted election disputes. The strict timelines for filing and adjudication of electoral disputes are sometimes considered to be a procedural disincentive to the contestants aimed at reducing the number of election petitions.[41] In the Kenyan context, the timelines have a well-intended purpose aimed at addressing the undue delay that characterised election petitions in the pre-2010 dispensation. In part, the history of prolonged delays in determining election disputes was one of the reasons the Orange Democratic Movement Party could not trust courts to adjudicate over impugned 2007 elections. Assuming that each court takes six months to adjudicate an election petition, which is not the case, the average time for determining an election petition would be one and a half years. To this end, by entertaining second appeals, the Supreme Court is increasingly eroding the whole essence of timelines in Kenya,[42] a practice that many countries do not entertain.[43]

Besides, depending on the office in question, election petitions create high public tension and anxiety, which militates against prolonged litigation as facts on

[38] Patrick Lang'at 'Uhuru, Ruto hit out at Supreme Court' *Daily Nation (Nairobi, 2 September 2017) available* < https://www.nation.co.ke/news/Uhuru-meets-governors-MCAs/1056-4080158-mu9652/index.html> accessed on 5th May 2020.

[39] 'Deputy CJ Philomena Mwilu's driver shot' *Daily Nation (Nairobi, 24 October 2017) available* <https://www.nation.co.ke/news/Deputy-CJ-Mwilu-driver-shot/1056-4154198-4pkl3yz/index.html> accessed on 5th May 2010.

[40] Protecting Fundamental Rights In Electoral Disputes: African Electoral Jurisprudence Network Inaugural Discussions 16 – 17 APRIL 2019 available at <http://africajurists.org/wp-content/uploads/2019/11/AFRICAN-ELECTORAL-JURISPRUDENCE-NETWORK-INAUGURALDISCUSSIONS-REPORT-FINAL-6-6-19.pdf> accessed on 1st May 2020.

[41] Joshua A. Douglas (2013).

[42] Kwasi Prempeh (2016) 170.

[43] For example, Ghana, Nigeria, and Sierra Leone see Kwasi Prempeh (2016) 156.

the ground may significantly change.[44] For instance, where significant time has passed, courts consider other factors such as stability. As a consequence, prolonged adjudication of the petitions in the judiciary diminishes public confidence in the judiciary's ability to render a credible and impartial judgment.

Thirdly, election petitions pose polycentricity challenges. Judges are, at times, invited to consider extra-legal imperatives that are not within their expertise when adjudicating election petitions. Generally, there is a heavy budgetary implication for nullifying an election, more so in developing countries like Kenya. The economic impact varies depending on the elective position. This, among other considerations, militates against nullification of consecutive elections occurring in quick successions even where in some instances, it may be legally sound to do so.[45] Also, a judge is not likely to predict the impact of the decision on the stability of a country and other stakeholders in the political process**.** For example, in Kenya, after the nullification of the presidential election in 2017, the CORD coalition (one of the main contestants) pulled out of the subsequent polls, which outrightly affected the legitimacy of the resultant election. Also, there were wrangles within the IEBC,[46] to the extent that the Chairman intimated that he was not in a position to guarantee a free and fair election.[47] Such rapid developments clearly show that courts cannot decisively regulate the election processes. Therefore, even though election disputes are justiciable, courts should only intervene where the legislature the Constitution invite them expressly. Judicial craft and innovation should be reserved to more deserving cases like those aimed at promoting social good among other shared societal interests.

Fourthly, the evidentiary threshold for election petitions is above the balance of probabilities' but short of 'beyond reasonable doubt'.[48] This is mainly because, in election petitions, vitiating factors such as corruption, fraud, and malpractice

[44] Kwasi Prempeh (2016) 154.

[45] Systemic violation of election laws it not a problem that courts can prescribe a quick-fix legal solution. At times the problem is endemic and requires broad societal reforms. See generally on the limits of law in addressing widespread social vices. Indira Carr, 'Corruption, Legal Solutions and Limits of Law' (2007) 3 *International Journal of Law in Context, 227-255.*

[46] Patrick Lang'at, 'Why I fled Kenya and quit IEBC — Roselyne Akombe' *Daily Nation (Nairobi, 18 October 2017 available at* <https://www.nation.co.ke/news/Roselyne-Akombe-quits-IEBC-and-flees-Kenya/1056-4144598-lshy27z/index.html> accessed on 10th May 2020.

[47] Patrick Langat, 'Wafula Chebukati: I can't guarantee credible poll on October 26' *Daily Nation (Nairobi, 18 October 2017) available at* <https://www.nation.co.ke/news/Wafula-Chebukati-on-repeat-presidential-election/1056-4145232-oyj67sz/index.html> accessed on 10th May 2020.

[48] *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR, para 203.

are criminal activities. In Kenya, a petitioner's burden of proof is two-fold. First, he has to establish electoral malpractice and second, establish that the malpractice affected the outcome of the election.[49] It is onerous to expect the petitioner to rightly demonstrate the impact of malpractice on the elections, information that only the IEBC can give.[50] This informational asymmetry between a petitioner and the IEBC, therefore, requires courts to play a more inquisitorial role and not the customary passive role in adversarial litigation.[51] Where the court finds that there was irregularities which did not meet the required threshold of annulling elections, this affects the image of the ultimate winner, especially in closely contested elections. To the public, this creates an impression that the candidate rigged to a certain degree which is sanctioned by the courts.[52]

Therefore, the counter-majoritarian difficulty, the strict timelines, the polycentricity hurdle, and the high evidentiary threshold mean that election petitions are not a forte where the judiciary can stand out as a pro-citizenry institution. It is only the victors who appreciate the role of the judiciary. Thus, the judiciary should always limit its involvement in election petitions even though they are justiciable.

4. The Peculiar Mandate of the Supreme Court

The Constitution provides four instances in which the Supreme Court exercises its jurisdiction, namely, adjudicating presidential election petitions, rendering advisory opinions, hearing appeals of disputes concerning the interpretation or application of the Constitution and appeals of matters certified to be of public importance.[53] In dispensing its mandate, there are a number of challenges that constrict the Supreme Court's ability and make it unsuitable to exercise appellate jurisdiction electoral disputes.

First, the Supreme Court lacks the capacity to resolve numerous appeals expeditiously. With only seven judges and one bench to hear appeals, the Supreme Court can only admit a limited number of cases.[54] In doing this, it does not matter

[49] *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR, para 304.

[50] Kwasi Prempeh (2016) 152.

[51] Kwasi Prempeh (2016) 152; Muthomi Thiankolu (2019) 73.

[52] Joshua Douglas (2013) 1024.

[53] Article 163(3),(4),(5) and (6) of the Constitution.

[54] Article 163(1) of the Constitution.

whether the case involves the interpretation or application of the Constitution. In certain instances, the only consideration, although not overtly mentioned, would be capacity constraints. This is informed by the resulting inconsistencies in admitting appeals pertaining to the interpretation or application of the Constitution.[55] At present, it is almost impossible for constitutional law practitioners to competently predict whether the Supreme Court would admit an appeal on account of article 163(4)(a).

Second, the Supreme Court has an expressive problem, especially after deciding presidential election disputes. Once the Supreme Court determines a presidential election petition, it creates a real or perceived impression of favouring a political faction. This impression is well-founded where some judges are subjected to threats as witnessed in the aftermath of the 2017 presidential election petition. Though regrettable, it has happened and may happen in the future. As a result, subsequent election petitions determined by the Supreme Court are analysed by the public in light of the court's finding in the preceding presidential petition. Although threats to the Supreme Court affect the judiciary as a whole, the High Court and Court of Appeal have a comparative advantage since they have many distinct benches. Among litigants, the Supreme Court is at times considered to be seeking another forum to justify its precedent set in presidential election petitions.[56] In part, the Supreme Court's experience in presidential election petitions explains its insistence on strict adherence to constitutional timelines even in cases where delays have been occasioned by the courts.[57]

Third, the Supreme Court is a special court whose jurisdiction is not open to all matters. Its decisions bind all other courts.[58] As such, a mistake by the court will impede the development of law in the country's legal system. Since its judges are not infallible, one way to reduce mistakes is by having strict controls in the number of matters it adjudicates. The court's focus should not be on a mistake arising from a specific dispute before the Court of Appeal but those mistakes threatening

[55] Muthomi Thiankolu (2019).

[56] Ahmednasir Abdullahi, 'The Limits of Prescriptive Reforms: The Struggle and Challenges of Judicial Reforms in Kenya, 2002 to 2010' Nairobi Law Monthly (Nairobi, 16 September 2015) available at <https://nairobilawmonthly.com/index.php/2015/09/16/limits-of-prescriptive-change-challenges-to-judicial-reforms/> accessed on 10th May 2020; George Kegoro, Who's Smarter Now? Questions Linger as Supreme Court Halts Appeal Rulings Daily Nation (Nairobi, 19 July 2014) available at <https://mobile.nation.co.ke/news/Whos-smarter-now-Questions-as-Supreme-court-halts-Appeal/-/1950946/2390742/-/format/xhtml/-/gnxjh7z/-/index.html> accessed on 10th May 2020.

[57] *Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 Others* [2019] eKLR.

[58] Art 163 (7) of the Constitution.

the broad systemic integrity of the legal system.[59] Admittedly, since all courts are competent[60] and all judges are fallible,[61] not every mistake arising from a decision of the Court of Appeal should be corrected by the Supreme Court. Progressively, the Court of Appeal and the High Court can correct their mistakes without necessarily relying on the Supreme Court's precedents.

Further, the special jurisdiction of the court requires it to dispense justice expeditiously. Apart from presidential election petitions that have strict timelines, advisory opinions on intergovernmental relations have a sense of urgency since they aim to foster harmonious intergovernmental relationships. Similarly, some of the matters certified to be of public importance need speedy determination since, at times, they are aimed at redressing systemic injustice. The same sense of urgency applies to matters on the interpretation or application of the Constitution to guarantee consistency within the courts' system. Prolonged delays will defeat the *raison d'etre* of establishing the court. Already, there is evidence of delays in adjudicating disputes touching on bold and transformative constitutional provisions such as leadership and integrity,[62] and social-economic rights.[63]

The above-mentioned reasons mean that the Supreme Court must be selective when determining which election petition to admit. As will be demonstrated, the court is yet to establish a consistent criterion that informs its decision on jurisdiction. This heightens the risk of the court being viewed as playing politics while equally, election petition causes backlogs that undermine the court's overall efficiency. By avoiding partisan election disputes and prioritising cases furthering social justice, the Supreme Court will transform the image of the judiciary to that

[59] Aharon Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 *Harvard Law Review 19, 27 as cited in Muthomi (2016), 122.*

[60] The Supreme Court has admitted this. See for example *Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others* [2012] eKLR, para 30. See also *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* [2012] eKLR para 15

[61] Aharon Barak, *The Judge in a Democracy,* Princeton University Press (2006) 98-111.

[62] For example, in *Trusted Society of Human Rights Alliance v Mumo Matemu and Five Others, Petition No. 12 of 2013 filed on 2 September 2013,* the hearing was ongoing one and a half years from filing at a time when the respondent had resigned. See *Wahome Thuku,* 'Matemu's case resumes despite resignation' *Standard Digital* (Nairobi, 23 June 2015) available at <https://www.standardmedia.co.ke/article/2000166665/matemu-s-case-resumes-despite-resignation> accessed on 10 May 2020. The case was eventually withdrawn without hearing on merit, thus the dithering by the Supreme Court could be blamed for the wasted opportunity that would have enabled the court to pronounce itself on this important constitutional controversy.

[63] A case regarding the realisation of social economic rights, specifically right to housing, *Mitu-Bell Welfare Society v Kenya Airports Authority Petition No.3 of 2018,* has been pending in the supreme court for more than two years (at the time of writing).

of a public protector.[64] This will see the judiciary enjoy goodwill from the general public to the extent that when the executive unites with parliament to frustrate the judiciary, the citizenry will be steadfast to defend the judiciary. It is unlikely that the Supreme Court's penchant for partisan election petition will grant it popular support that a judiciary needs in a nascent constitutional democracy, more so where the government lacks a significant opposition.[65]

5. Inconsistencies in applying Article 163(4)(a) of the Constitution

Evidently, the Supreme Court continues to manifest inconsistencies in interpreting article 163(4)(a) of the Constitution. At the onset, the Supreme Court was determined to limit its jurisdiction. This would have resulted in a pyramidal jurisdictional structure, with the court at the apex. However, increasingly, the jurisdictional structure appears to be taking the shape of an hourglass.[66] In one of its formative decisions, the Supreme Court in *Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others*[67] observed that:

> In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.

This approach indicates a court determined to limit the number of cases. However, to litigants, it is confusing since there are no parameters set to determine what constitutes cardinal issues of law or of jurisprudential moment. The Supreme Court is the sole determiner of what amounts to cardinal issues of law or

[64] In a democracy, populist strategies championing social welfare such as realising social economic rights among other basic rights can be effectively employed by the courts to draw support from the polity. See Tom Ginsburg (2003)132; see also Kim Lane Scheppele, 'Democracy by Judiciary (Or Why Courts can sometimes be more Democratic than Parliaments)' Paper prepared for the conference on Constitutional Courts, Washington University, 1-3 November 2001 (Hereinafter cited as Kim Scheppele (2001)). This does not mean that where the jurisdiction is rightfully invoked the court should shy from exercising jurisdiction or rendering unpopular decisions. See Aharon Barak (188).

[65] Where the executive and the parliament appear to be on the same side, that threatens the judiciary in a constitutional democracy. Commitment to implementing social justice and other shared goals of the society will grant the judiciary popular support from the citizenry and the civil society which will enable it exercise oversight effectively. See Kim Scheppele (2001).

[66] James Otieno-Odek, 'Transmutation of Kenya Superior Court Jurisdiction: From Pyramidal to Hour-Glass Jurisdictional System' (Law Society of Kenya Annual Conference, Mombasa, August 2014);

[67] [2012] eKLR, para 30; see also *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* [2012] eKLR para 15.

jurisprudential moment that fall within the scope of article 163(4)(a). In a bid to limit the scope of article 163(4)(a), in *Lawrence Nduttu and 6000 Others v Kenya Breweries Ltd & Another*[68] the court observed in para 28 that:

> The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 4) (a).

The import of the above approach is that the Supreme Court has appellate jurisdiction in all constitutional petitions since, by their nature, the substratum from the High Court will centre on constitutional interpretation or application. Although this standard brings more clarity in the scope of the court's appellate jurisdiction, it exposes it to numerous appeals resulting from constitutional petitions, and therefore there is a need for additional safeguards to regulate appeals it adjudicates.

A stark contrast with the above exercise of jurisdiction was in the *Munya 1* where the court strayed from its initial attempts to narrow its appellate jurisdiction without any precaution. The Supreme Court expanded its jurisdiction as follows:

> While we agree with Mr. Muthomi, regarding his contention that Section 87 of the Elections Act cannot be equated to a constitutional provision, we must hasten to add that the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution.

From the above decree, the court goes beyond the formal appreciation of the issues canvassed before the court of appeal and looks at the net effect of the decision whether 'the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.'[69] The import of this approach is that the Supreme Court can exercise jurisdiction over any matter where it directly touches on a constitutional provision or any statute since a court cannot disengage the two. Though progressive, the inherent problem with this approach is mainly as a result of the court's failure to define the scope of this approach, and the context in which

[68] [2012] eKLR

[69] *Munya 1 para 69.*

it would be invoked. Further, the moment was not right for such an approach. Prempeh counsels against making sharp deviations from prevailing norms when confronted with election petitions, since they raise legitimacy questions.[70]

Among the three approaches, the Supreme Court appears to be seeking to rely more on the *Ngoge case* approach with slight modification while terming the normative derivative approach as one of the ways that it can invoke its jurisdiction. Subsequently, the court justified its approach in *Munya 1* by observing that the transformative character of the Constitution allows such an interpretation.[71]

The Supreme Court also appears to have generally opted not to entertain election appeals insisting that the issues should be precisely defined to identify precisely the particular constitutional principle and/or provision violated.[72] Furthermore, the Supreme Court appears to have shifted from its earlier insistence for litigants to specify the constitutional provision for invoking its appellate jurisdiction. In *Suleiman Mwamlole Warrakah & 2 Others v Mwamlole Tchappu Mbwana & 4 Others* the Supreme Court observed that:[73]

> In this appeal, what Counsel for the petitioners is asking us to do is to assume jurisdiction by way of elimination. This Court is being called upon to hold that, because certification, was not sought by the intending appellant, then it must follow that the said appellant, is invoking the Court's jurisdiction as of right, under Article 163 (4) (a) of the Constitution, even without demonstrating that, such right obtains in the first place. This we cannot do, as it would make a mockery of our past pronouncements on the matter. In *Daniel Kimani Njihia v. Francis Mwangi Kimani & Another [*2015] eKLR this Court was categorical that in preferring an appeal, "*a litigant should invoke the correct constitutional or statutory provision; and an omission in this regard is not a mere procedural technicality, to be cured under Article 159 of the Constitution."* This statement of principle, in our view, still holds sway, and we see no reason to engineer a shift from it.

Shifting from the above holding, in *Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 Others,*[74] the appellant did not mention the specific provision under which she moved the court. Instead, she relied on the

[70] Kwasi Prempeh (2016) 162.

[71] *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4Others* [2014] eKLR, para 136.

[72] See for example *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 Others* [2018] eKLR, para 52.

[73] [2018] eKLR para 53; see also *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 Others* [2018] eKLR.

[74] [2019] eKLR.

Supreme Court Rules, 2012, specifically rule 9, that provides the contents of a petition and rule 33 that provides the timeframe for filing an appeal as well as the documents that form the record of appeal. Shifting from its early insistence on the need to specify the provision under which one seeks to invoke the its jurisdiction, the court observed that the 'appeal before us, in its body, is crafted in a manner that demonstrates that the Petitioner invokes this Court's jurisdiction under Article 163(4)(a) of the Constitution and specific provisions of the Constitution are cited as having been violated'.[75] The approach in *Martha Karua case* where the Supreme Court looks at the substantive issues in the petition in the event one fails to specify the article on which the appellate jurisdiction of the court is invoked is progressive but a significant shift from the approach in *Warrakah case* where it failed to demonstrate an appreciation of the substantive grounds of the appeal.

Furthermore, outside election petitions, the Supreme Court continue to manifest inconsistencies in applying the normative derivative doctrine.In *Stanley Mombo Amuti v Kenya Anti-Corruption Commission*[76]the appellant challenged the constitutionality of non-conviction based asset forfeiture under section 26 and 55 of the Anti-Corruption and Economic Crimes Act, 2003. The Supreme Court declined to exercise jurisdiction indicating that article 40 of the Constitution was not at the centre of the dispute before the Court of Appeal. Yet, the net effect of the impugned Court of Appeal decision was to allow the Ethics and Anti-Corruption Commission to confiscate properties of a person for failure to render accounts on how the properties in question were acquired. The Supreme Court observed that such pertinent constitutional law issues[77] were at the periphery of the dispute yet the net effect of the decision was to limit the appellant's constitutional right to property.

The examples discussed above demonstrate the inconsistencies that have resulted from the Supreme Court's unrestrained expansion of its appellate jurisdiction under article 164(3)(a). Increasingly, a jurisdictional question that ought to be easily identified has been interpreted in a manner that leaves more questions than answers.[78] The drafters did not intend that the provision be the most litigated point before the Supreme Court. Going by the prevailing inconsistencies

[75] *Martha Karua case para 35.*

[76] [2020] eKLR.

[77] Non-conviction base asset forfeiture raises fundamental constitutional law issues such as right to property among others and has been appoint of constitutional litigation in many jurisdictions. For example see the European Court of Justice in *Gogitidze and Others v Georgia Application no. 36862/05).*

[78] For a further analysis on the inconsistencies in applying article 163(4) see Muthomi Thiankolu (2019) 84-88.

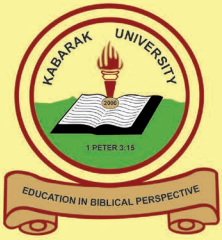
in applying article 164(3)(a), appeals do not lie as of right, but only those matters where the Supreme Court deem to concern interpretation or application of the Constitution. Owing to the partisan nature of elections, the prevailing inconsistencies when adjudicating election petitions create an impression that the court can do everything possible to arrogate itself jurisdiction to meet political ends. The court would gain significant public support if it invoked the normative derivative doctrine to facilitate substantive justice in disputes furthering social justice but not in partisan election petitions. To avoid real or perceived biased approach to election petitions, and balancing other imperatives such as the limited capacity of the court, the need for efficiency and finality, strict timelines and seamless transition, the Supreme Court should desist from exercising its appellate jurisdiction in election disputes, especially under article 163(4)(a).

6. Conclusions and Recommendation

This paper has demonstrated that although the normative doctrine is well-founded within article 163(4)(a) of the Constitution, its application in election petitions obliterates the very transformative principles that it is designed to advance. It invites the court into partisan election disputes where every decision is perceived from a partisan political angle, it increases inconsistencies in exercising appellate jurisdiction, and most importantly, it prolongs electoral disputes contrary to the overriding objectives of the Constitution. To circumvent these challenges, it is hereby recommended that the court should decline exercising appellate jurisdiction in election disputes, especially under article 163(4)(a).

Further, the Supreme Court should set out clear guidelines to guides its discretion in applying article 163(4)(a). Even though such guidelines may not be comprehensive, they will significantly address prevailing inconsistencies, thereby, increasing points of convergence and saving judicial time. Preferably, the normative derivative doctrine advocated by Khobe should be invoked sparingly in the most deserving cases that promote social justice aside from election petitions.[79] Without limiting its scope, the doctrine will open floodgates to the court since in a constitutional democracy like Kenya, all disputes have a constitutional underpinning. In the event that the Supreme Court does not relinquish its appellate jurisdiction in election disputes, the court should set timelines within which its jurisdiction is to be exercised in line with the spirit of the Constitution.

[79] See Kim Scheppele (2001); Tom Ginsburg (2003)132.



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