

| | | |
|--|----------------------------------|--|
| Institution: Cardiff University | | |
| Unit of Assessment: Law (18) | | |
| Title of case study: Influencing the 2017 Supreme Court judgment to overturn the Presidential election result in Kenya | | |
| Period when the underpinning research was undertaken: 2013-2015 | | |
| Details of staff conducting the underpinning research from the submitting unit: | | |
| Name(s): | Role(s) (e.g. job title): | Period(s) employed by submitting HEI: |
| John Harrington Ambreena Manji | Professor Professor | 01/10/2013-present 01/07/2013-present |
| Period when the claimed impact occurred: 01/09/2014-01/12/2017 | | |
| Is this case study continued from a case study submitted in 2014? No | | |
| 1. Summary of the impact (indicative maximum 100 words) | | |
| <p>A long history of civil unrest around elections in Kenya led to the introduction of a new Constitution in 2010, promoting legally enforceable rights and judicial review for electoral conduct. Cardiff research showed that the decision of the Supreme Court in 2013 to uphold the disputed Presidential election did not adopt a principled interpretation of the new Constitution. The research shaped the 2017 decision of the Supreme Court to overturn that years' election result. It influenced civil society debate, shaped the successful pleadings of petitioners to invalidate the result, and was adopted in the overall judgment. This set a precedent for better accountability, fairness and the peaceful resolution of high-level political disputes in Kenya, additionally influencing the overturning of the Presidential election in Malawi in 2017.</p> | | |
| 2. Underpinning research (indicative maximum 500 words) | | |
| <p>When the 2007 Kenyan presidential election was disputed, the opposition leader – lacking confidence in the judiciary – called for civil unrest, which led to widespread violence, the deaths of an estimated 1,500 people, and considerable state breakdown. To prevent this happening again, a Constitution with legally enforceable rights and judicial review was introduced in Kenya in 2010.</p> <p>When the Presidential election in 2013 was challenged on the grounds of obvious problems with registration, voting systems and counting, the leader of the opposition followed constitutional procedure and brought the case to the Kenyan Supreme Court (Odinga v IBEC). The petitions before the Court were a crucial test of new constitutional principles, but the Court ruled in favour of upholding the result [3.1].</p> | | |
| 2.1 Analysis of the Court's decision | | |
| <p>In analysing the Court's decision to uphold the result, Harrington and Manji found the judgment to be inconsistent with the transformative ambitions underpinning the new Constitution [3.1]. Their analysis involved a close reading of the key issues which the Court addressed when deciding that, although the election contained numerous irregularities, it was not so flawed as to be invalid. These included the standard of proof; the presumption that the election was fairly conducted; the exclusion of opposition representatives from vote-counting; and the collapse of the electronic vote transmission system and its replacement by unreliable paper records. Harrington and Manji also evaluated the Court's use and understanding of domestic and foreign precedents in determining these questions. They combined a technical legal review with historical contextualization, showing the wider political significance of the decision, with reference to the literature on political reform in Kenya since the early 1990s.</p> <p>The Cardiff researchers argued that the Constitution mandates a shift in legal culture away from narrow literalism to a more purposive and principled mode of argumentation [3.1]. Therefore, detailed electoral regulations, the codes for transmission of results, and the rules on proof in any court case must be interpreted with a view to the Constitution's ambition to</p> | | |

protect good governance, integrity, transparency and accountability, and to promote political rights including free and fair elections. The research [3.1] found that:

- Instead of employing principled arguments, the Court's reasoning had been overwhelmingly cautious, avoiding both principles and the broader historical context.
- Through emphasis on evidential and procedural rules, the judgment reinforced the powers of the executive and the model of a state beyond the reach of the law.
- The Supreme Court had opted to deliver a single judgment on behalf of the whole court, without plural concurring opinions, or dissents. In effect this closed down the scope for public deliberation and discussion among senior judiciary about the meaning of the new constitution.
- The Supreme Court had adopted too high a standard of proof for invalidating elections, which posed an obstacle to securing the transformative purpose of the Constitution. The Court required both quantitative (where the plaintiff would have needed to have proven that the election result would have been different) and qualitative (where the plaintiff would have needed to have proven that the process was unfair) tests to be met for invalidation of the election. The research argued that a qualitative standard alone would have been sufficient.

2.2 Kenya as a 'Leviathan' state

Harrington and Manji showed that the form and content of the Court's judgment mimicked the past legal and political practices of the 'Leviathan' state which should have been superseded in 2010. Their joint research documented the constitutional history of Kenya, in both its colonial and post-colonial phases, as a 'Leviathan' state - one which concentrates power in the executive and renders itself immune to scrutiny. Centralization and authoritarianism, coupled with widespread corruption, has led to economic inequality and serious civil conflict, often at election time [3.2, 3.3]. Principled adjudication of election petitions can contribute to stability and peaceful regime change. Courts are the guardians of this transformation [3.4] as their decisions can contribute to a culture of accountability and respect for the rule of law [3.3, 3.4].

The Cardiff research concluded that the Kenyan Supreme Court's failure to interpret the Constitution purposively in 2013 was a lost opportunity which bolstered the old model of state powers acting beyond the reach of the law [3.1]. Instead of reinforcing the gains made by the new constitution in 2010, it threatened to undermine them.

3. References to the research (indicative maximum of six references)

[3.1] J Harrington & A Manji, 'Restoring Leviathan: The Kenyan Supreme Court, Constitutional Transformation, and the Presidential Election of 2013' (2015) 9 *Journal of Eastern African Studies* 175-192 DOI: 10.1080/17531055.2015.1029296

[3.2] A Manji, *Counterpoint: Whose Land is it Anyway? The Failure of Land Law Reform in Kenya* (London, Africa Research Institute 2015). Available from HEI on request.

[3.3] A Manji, 'The Politics of Land Reform in Kenya' (2014) 57 *African Studies Review* 115-130 DOI: 10.1017/asr.2014.8

[3.4] J Harrington, 'Access to Essential Medicines in Kenya: Intellectual Property, Anti-Counterfeiting and the Right to Health' in M Freeman, B Bennett & S Hawkes (eds), *Law and Global Health. Current Legal Issues, vol. 16* (Oxford, Oxford University Press 2014) 94-118. Available from HEI on request.

4. Details of the impact (indicative maximum 750 words)

The Kenyan 2017 presidential election was again won by the incumbent President Uhuru Kenyatta. The opposition leader, Raila Odinga, and his running mate appealed the decision via petition to the Supreme Court, with the aim of overturning the election result on the grounds of widespread irregularities. The petition was coordinated by Paul Mwangi as Chief Litigation strategist, with support from Kenyan lawyers, civil society organisations (including the Africa Centre for Open Governance, AfriCOG) and lawyers from international civil society

foundations. For example, Waikwa Wanyoike from the Open Society Justice Foundation provided litigation counsel and was coordinator for the prosecution.

Cardiff research was critical in supporting this team to challenge the election outcome. Collins Odote, an expert in election law who writes and trains on election issues for stakeholders including the Kenyan Judiciary, states *“the research was instrumental to and influenced the decision of the Supreme Court of Kenya both in the run up to and during the 2017 election Petition...which overturned the election result”* [5.1]. Gladwell Otieno, Director of the African Centre for Open Governance, notes the importance of this judgment as *“the integrity of the election process is central to realising the promise of the new Kenyan constitution”* [5.2].

4.1 Influencing Kenyan civil society debate on the electoral process

a. Civil society and the judiciary

The research was *“fundamental reference material”*, and regularly cited in ongoing debates around the electoral process by leading civil society actors including Yash Ghai, Jill Cottrell Ghai and Collins Odote [5.1, 5.2]. For example, the former Director of Amnesty International Africa and UN Special Rapporteur on the Rights of Assembly noted in *Daily Nation* (the highest circulation Kenyan independent newspaper, with a readership of over 4M) *“[the research] should be required reading for the entire Judiciary...it reminds us why we fought so long for a new Constitution and what its promulgation was supposed to mean”* [5.3a]. The research influenced the debate as follows:

- AfriCOG, one of the leading civil society organisations monitoring governance, corruption and rule of law issues in Kenya, drew on the research in its 2015 Policy Forum [5.4]. Attendees included lawyers, politicians, and community stakeholders to learn lessons from the 2013 election [5.2]. The research was a *“touchstone for all of our participants”* as it *“pinpoint[ed] how the hearings, and the final judgment, had failed to meet the challenge of the new constitution”* [5.2].
- Both Waikwa Wanyoike (Open Society Justice Foundation) and Collins Odote used the research in training for the Kenyan judiciary, including justices and magistrates, before the 2017 petition. The research findings on the importance of a qualitative test formed *“a central subject of discussion during judges’ training sessions on electoral justice”* [5.1, 5.5].
- The research was cited by AfriCOG in their Amicus Observations to the International Criminal Court at the Hague in 2015, during the proceedings against sitting President Uhuru Kenyatta and Vice-President William Ruto for their alleged roles in the 2007-8 post-election violence [5.2, 5.6].

b. Chief Justice of the Supreme Court of Kenya

Chief Justice David Maraga directly cited the research in 2016 [5.7]. His essay on scrutiny, written and published before his appointment as Chief Justice of Kenya, highlights that *“it is important to view the courts as the 2010 Constitution does, not as an unwelcome usurper of the electorate’s power, but as a purposeful safeguard against fixing elections which has tainted a large part of Kenya’s history as a democracy”* [5.7, p.101]. Wanyoike, litigation counsel and coordinator for the prosecution, notes the importance of this in setting a framework for the prosecution case: *“The approach in the paper and the views by the Chief Justice were helpful in plotting for example the application on scrutiny...it had a bearing on how we approached the substantive questions in our prosecution”* [5.5].

4.2 Strengthening the Pleadings

Wanyoike notes that the research, in particular [3.1], underpinned the prosecution strategy and *“overall philosophy of the petition”* [5.5]. [Text redacted] confirmed the importance of citation by the Chief Justice in building the case: [text redacted] [5.8].

Wanyoike states *“the thesis and arguments advanced by the research became primary material of formulating the case theory and controlling arguments”* including:

- *“the transformative nature of the 2019 Constitution generally”;*
- *“qualitative aspects of measuring the validity of elections”;*

- *“a look at the entire election process as a seamless whole”* [5.5].

Other organisations also used the research in their affidavits (sworn evidence submitted as part of the main petition). AfriCOG’s contribution to the affidavit lodged by the Kenya Human Rights Commission relied on the research, which was *“essential to our argument that fairness should not be impeded by a narrow, technical approach on the part of the Supreme Court and the transformative effect of the new constitution should embolden the Court to invalidate the election if it found that it did not abide by principles of fairness and transparency”* [5.2].

Wanyoike notes that the research also had an influential role in persuading Mr. Odinga to challenge the election decision. Odinga initially announced he would not go to Court as the threshold for invalidating the election result established in 2013 seemed *“insurmountable”* [5.5]. The prosecution team, led by Mwangi and Wanyoike, used the research to make a strong case for persuading the Court to accept only a qualitative test instead, and *“part of the reason that Mr. Odinga changed his mind and challenged the decision was because his legal team convinced him that he stood a good chance to get the Court to change the test of invalidating elections”* [5.5].

4.3 Adoption of the Research in the Judgment of the Supreme Court

On 7 August 2017, the Supreme Court ruled in Odinga’s favour by declaring that the election had not been conducted in accordance with the Constitution. Reported as *“a historic ruling”*, this was *“the first example in Africa in which a court nullified the re-election of an incumbent”* [5.3b]. The judgment was important in Kenya where *“courts have long been subservient to the President”* [5.3c].

Otieno (AfriCOG) notes that the research *“was crucial to our success [in overturning the 2017 election]”* [5.2]. Wanyoike states that the extent to which the research was well-known in civil society *“made it easier for the Court to internalize the arguments, but critically influenced its departure from its electoral jurisprudence of 2013”* [5.5]. The research findings on the progressive interpretation of electoral law highlighted in [3.1] are reflected in the judgment wording;

- The Supreme Court committed to a “purposive and progressive interpretation” of electoral law relevant to the petition [5.9, para 175] and the standard of proof required [5.9, para 114].
- It held that state officials are bound by the constitution “to observe national values (inter alia good governance, integrity, transparency and accountability)” and to uphold “political rights including the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors” [5.9, para 196].
- It said the case had to be decided “in light of the need to keep in tune with Kenya’s transformative Constitution...one that ensures that elections are a true reflection of the will of the Kenyan people” [5.9, para 212].
- It concluded that “the constitutional principles that we have upheld in this judgment were embedded and became a critical part of our electoral law” [5.9, para 390].

The judgment used this interpretation of the Constitution to:

- Adopt a qualitative test for invalidating elections [5.9]. Wanyoike notes that this was *“the greatest contribution of the research”* as it *“restored the transformative intention of the 2010 constitution”* [5.5];
- Abandon the single judgment format of 2013. As well as the majority opinion delivered by Chief Justice Maraga, a further concurring opinion and a dissent were delivered [5.9].

Collins Odote states that the *“reasoning demonstrated the court’s appreciation of its role in taming the ‘Leviathan’”* [5.1]. Otieno adds *“the 2017 ruling has had an important influence on political, legal and constitutional life in Kenya through strengthening those who are working for proper accountability and fairness in the electoral process, and for a full transition from autocracy to democracy in our country”* [5.2].

Notably, the judgment of the Kenyan Supreme Court has given “*legal precedent and political courage*” to other African nations “*to demand full scrutiny*” and challenge executive power [5.2]. For example, in 2019 the High Court in Malawi overturned their presidential election result. They used similar reasoning to the 2017 Kenyan judgment by highlighting the importance of interpreting the Constitution “broadly and **purposively**” [5.10, para 1443] and following the Kenyan judgment on the adoption of a qualitative test for invalidating elections [5.10, para 1071] aligned to the formative research analysis and outcomes undertaken by Harrington and Manji [3.1].

5. Sources to corroborate the impact (indicative maximum of 10 references)

[5.1] Testimonial: Dr Collins Odote, expert on constitutional law, University of Nairobi

[5.2] Testimonial: Dr Gladwell Otieno, Director, Africa Centre for Open Governance

[5.3] Media sources **a)** Maina Kiai, *Daily Nation*, 10 September 2016 **b)** *New York Times*, 1 September 2017, **c)** *The Guardian*, 1 September 2017

[5.4] Africa Centre for Open Governance, *Rethinking Electoral Management: An Emerging Agenda for the 2017 Elections* (Nairobi: AfriCOG, 2015)

[5.5] Testimonial: Dr Waikwa Wanyoike, Director of Strategic Litigation at the Open Society Justice Foundation

[5.6] International Criminal Court, *Amicus Observation of the Africa Centre for Open Governance Pursuant to Rule 103 of the Rules of Procedure and Evidence*, 8 May 2015

[5.7] David Maraga, ‘Scrutiny in Electoral Disputes: A Kenyan Judicial Perspective’ in Collins Odote and Linda Musumba (eds), *Balancing the Scales of Electoral Justice* (Nairobi: International Development Law Organisation, 2016)

[5.8] [Text redacted]

[5.9] *Presidential Petition 1 of 2017: Odinga v IEBC* (Supreme Court of Kenya) [2017] eKLR

[5.10] Judgment of the Republic of Malawi in the High Court of Malawi in the case of *Saulos Klaus Chilima & Lazarus McCarthy Chakwera v Arthur Peter Mutharila & Electoral Commission*, 5 February 2020