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The Role of the Judiciary in Promotion of Free and Fair Elections

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I.Introduction

The right to vote is fundamental in any democratic state, but an entitlement does not guarantee that right simply by providing for elections. The crucial issue is the extent to which these elections meet national and international legal standards. Although most African states recognize voting rights in theory,[1] an examination of what states do in practice paints a different picture. It shows that the process faces several challenges as a result of human interference. This paper focuses on the recent presidential elections in Kenya in 2007 and Zimbabwe in 2008 as case studies. These events support the argument that reforms must be made for elections in Africa to comply with international standards.[2] Not only did these elections have an impact on voting rights, but also they had a substantial effect on democracy and international and national peace and security. The outcome of the presidential election in each state was highly contested. Several irregularities were reported in both countries, casting serious doubts on their electoral systems.

This paper focuses on the resolution of electoral disputes. This issue is at the core of securing the fair and honest conduct of an election. It is also essential to any country that is serious about respecting, promoting, and protecting the fundamental right to vote. As this paper demonstrates, an independent judiciary is required for a contested election to be resolved effectively. An independent judiciary is an essential ingredient in free and fair elections. Julius Nyerere, a former president of Tanzania, argued that unless judges perform their work "properly, none of the objectives of [a] democratic society" can be met.[3] Accordingly, any initiative that seeks to reform the electoral process in Africa must also focus on the judicial

[1] See, for instance, Tanzanian *Constitution*, 1998, section 5; Ugandan *Constitution*, 1996, section 59; Zambian *Constitution*, 1996, section 113(e); Zimbabwean *Constitution*, 2008, section 61(4).

[2] See, for instance, Tanzanian *Constitution*, 1998, section 5; Ugandan *Constitution*, 1996, section 59; Zambian *Constitution*, 1996, section 113(e); Zimbabwean *Constitution*, 2008, section 61(4).

[3] Julius Nyerere, *Freedom and Socialism* (Oxford University Press: Dar es Salaam, 1968) at 110.

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system, due to the central role[4] that courts play in the resolution of electoral disputes in particular and the promotion and protection of democracy in general.

Any person who is dissatisfied with the result of a presidential election can challenge it in domestic courts. Special courts are established in most African countries to handle such claims.[5] This paper first discusses the process of challenging the results of a presidential election. It then evaluates some of the factors that cast doubt on the ability of courts to handle electoral disputes in accordance with due process considerations.

II. Resolving Electoral Disputes: Process

Multiple procedures dictate the process of challenging the election of a president. Once the Electoral Monitoring Board ('EMB') declares the results of the vote, any unsatisfied person can challenge this outcome in court, within a specified period of time.[6] Essentially, election petitions involve determining the "validity"[7] of a poll. The burden of proof is on the person who lodges the application to demonstrate that there was an irregularity in the electoral process.[8] The burden a petitioner must meet is a balance of probability, not beyond a reasonable doubt.[9] Those election petitions that fail to meet this burden are dismissed with costs.[10]

Any aggrieved person can appeal the decision of the electoral court to an appellate court.[11] Only questions of law can be raised on appeal in Zimbabwe.[12] In Kenya, by contrast, because the law is silent on the scope of issues that an appellant can advance, administrative law

[4] See also *R v Returning Officer of Kamukunji* High Court of Kenya at Nairobi, Misc. Civ. Appl. No 13 of 2008, delivered 29 July 2008 (Nyamu, Wendoh JJ) (unreported) at 18 (Describing courts as a "pillar" of democracy").

[5] See Kenya's *Constitution*, 2001, sections 10, 44; South Africa's *Electoral Commission Act*, 1996, section 18; Zambia's *Constitution*, 2001, article 41(2)(b); Zimbabwe's *Electoral Act*, 2005, section 161.

[6] Kenya's *Constitution*, section 44(1) and *National Assembly and Presidential Elections Act*, 1969, section 20; Zambia's *Electoral Act*, 2006, section 21(3); Zimbabwe *Electoral Act*, 2005, section 111. But see section 41(7) of the Tanzanian *Constitution*, which prohibits courts from inquiring into the election of a president.

[7] *Matiba v Moi* (2001) *KLR* 525 at 531; *Thande v Montgomery* (1970) EA 341 at 344.

[8] Kenya's National Assembly Elections (Election Petition) Rules, rule 4(1)(b).

[9] *Mbuwe v Eliufoo* (1967) EA 240 at 241.

[10] See, for instance, Zambia's *Electoral Act*, 2006, section 105; Kenya's *National Assembly Election (Election Petition) Rules*, rule 34.

[11] Kenya's *National Assembly and Presidential Elections Act*, 1969, section 23(1)(4); Zimbabwe *Electoral Act*, 2005, section 172(2).

[12] *Electoral Act*, 2005, section 172(2). See also sub-section 1 of this section ("A decision of the Electoral Court on a question of fact shall be final").

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principles apply.[13] Therefore, an aggrieved party could appeal the decision of an electoral court on grounds that the decision maker erred either in law or in fact. Where an appellate court allows the appeal, the appellate court refers the petition back to the electoral court if it made an error of law. Under such circumstances the electoral court must re-adjudicate the challenge based on the guidance the appellate court provided. For those cases where an appellate court finds that the electoral court made an error of fact, it refers the matter to the EMB directly, with an order, for instance, to recount votes.[14]

The mandate of an electoral court is limited to determining whether or not the law was complied with. Therefore, if the court determines that a person was unduly elected, judges can only order the EMB to re-tally votes. Judges cannot declare that a particular presidential candidate won the election.[15] This authority rests solely with the EMB.

Although the process appears straightforward in theory, several problems have arisen in practice, including issues surrounding the independence and impartiality of courts and their ability to deliver justice promptly in election petitions. It is these issues that the paper now turns to.

III. Independence and Impartiality

As guardians of their countries' constitutions[16] and the rights of individuals, judges must uphold the law at all times. This rule stems from the principle of separation of powers. Under this doctrine, the three arms of government — legislative, executive, and judicial — are required to be autonomous in their work. This requires each arm to guard itself from undue influence by the others.[17]

[13] See also *Kipkalya Kones v R* Court of Appeal of Kenya at Nairobi, Civil Appeal No 94 of 2005, delivered 10 November 2006 (Omolo, O"Kubasu, Githinji JJA) (unreported) at 18 (Kenya's electoral commission is "amenable" to "judicial review").
[14] Kenya's *Constitution*, 2001, section 10(3); Zimbabwe *Electoral Act*, 2004, section 111(2)(b).
[15] Ibid.
[16] See also *Joseph Kimani and Others v. The Attorney General and Others* High Court of Kenya at Mombasa, Petition N0. 669 of 2009 at 11, delivered 5 January 2010 (Ibrahim J) (unreported) (Describing courts are the "ultimate custodian of the Constitution").
[17] See also Williams J in *Queen v. Kirby ex parte Boilermakers's Society of Australia* (1956) 94 CLR 254 at 301 (The doctrine of separation of powers requires the three arms of Government to be kept 'separate and distinct").

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The separation of powers is crucial in any constitutional state.[18] Judicial independence is particularly important, as without it, it would be difficult for an individual to ensure the protection of his or her human rights from infringement by the state.[19] Indeed, judicial independence is the "lifeblood of constitutionalism."[20]

Furthermore, the independence of the judiciary from the other arms of Government plays a central role in preserving and promoting the integrity of courts.[21] Independence also ensures that disputes are adjudicated based on their factual and legal merits, not on political considerations. In other words, judges should be free to act on their "own convictions, without any apprehension of personal consequences" to themselves.[22]

Charles Montesquieu claims that in comparison to the power of the other arms of government, the power of the judiciary is "next to nothing."[23] However, this claim underestimates the pivotal role that judges play in the protection and promotion of voting rights. In particular, they are charged with the responsibility of adjudicating the "validity"[24] of a presidential election. An objective decision maker must ensure not only that justice is done, but also that it is seen to be done. He or she must grant effective remedy to a person whose rights and freedoms have been violated.[25] Moreover, confidence in the legal process is critical if such a

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[18] In the United States, for instance, this point was emphasized during the debates over whether to ratify or reject the Federal Constitution. Alexander Hamilton, James Madison, and John Jay, *The Federalist with The Letters of "Brutus"* in Terence Ball (ed) (Cambridge: Cambridge University Press, 2006) at 234-240 (per Madison). Much later, Justice Brandies stated that separating the branches of government is crucial, not only to "avoid friction" between the three arms of government, but also to "save the people from autocracy." *Myers v. United States*, 272 U.S. 106, 293 (1926). See also Hamilton, Madison, and Jay, *supra*, note 18 at 234 ("The accumulation of all powers legislative, executive and judiciary in the same hands [could lead to] tyranny").

[19] In order to cement the independence of the judiciary, judges in Kenya and Zimbabwe have life tenure, subject to good behavior. Section 62 of the Kenyan *Constitution*; sections 86 and 87 of the Zimbabwean *Constitution*. See also Justice Brennan in *Northern Pipeline Construction Company v Marathon Pipeline Company* (1982) 458 U.S. 50 at 60 ("The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well").

[20] *Beauregard v Canada* 1986 CarswellNat 1004 at para 24.

[21] See also *R v Director of the Serious Fraud Office* [2008] EWHC 714 at paragraph 76.

[22] *Bradley v Fisher* (1871) 80 U.S. 335 at 347. See also soft law principles, as reflected in the United Nations ('UN') *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, paragraph 2.

[23] Charles Monstesquieu, *The Sprit of the Laws* (Prometheus Books: New York, 2002) at 156.

[24] Justice Mathew in *SMT Indira Ghandi v Shri Narain* (1976) SCR 347 at 506.

[25] *Convention for the Protection of Human Rights and Fundamental Freedoms* (also called European Convention for Human Rights), 213 U.N.T.S. 222 (entered into force 3 September 1953) ("*ECHR*") article 13; *Chahal v UK* (1997) 23 E.H.R.R. 413; *Conka v Belgium* (2002) 34 E.H.R.R. 54.

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person is to seek redress in the judicial system. People, especially those who are aggrieved, must have a sense that electoral courts will act independently and determine petitions based on well-established domestic and international legal principles. As the Australian High Court once stated, "the appearance of independence preserves public confidence in the judicial branch,"[26] as well as in the law. In other words, public perception of bias by the judiciary should be minimized, if not eliminated altogether. The parties to a petition and members of the public should be confident that justice prevailed.

The opposition parties in Kenya and Zimbabwe employed two distinct approaches in the wake of the flawed presidential election.[27] Whereas the opposition party in Kenya refused to seek relief in court, its counterpart in Zimbabwe chose to pursue a judicial remedy. An evaluation of these approaches ultimately reinforces the argument that an independent judiciary is an essential tool for democracy.

Writing Off the Judiciary: The "We Will Not Go to Court" Route

As one would have expected, the main opposition party in Kenya, the Orange Democratic Movement ("ODM"), challenged the outcome of the 2007 presidential election. Although one also would have expected the ODM to seek relief within the local legal framework, the party refused to ventilate its grievance in "Kibaki's courts," thus expressing a total lack of confidence in Kenya's judiciary to resolve any challenge to the election results independently and impartially. The ODM viewed the courts as an instrument of the state that could not objectively adjudicate any petition that involved the sitting president. Thus, the ODM believed that the solution to the flawed presidential poll lay in engaging the government through peaceful protests rather than through litigation. Their supporters took their dissatisfaction with the election results to the streets. In response, the government declared that it would deal decisively with any

[26] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1989) 189 *CLR* 1 at 14.
[27] Virtually all observers concluded that the 2007 Kenyan presidential election fell short of acceptable minimum standards for democratic elections. See, for instance, Commonwealth Observer Group, *Kenya General Election: 27 December 2007*, http://www.thecommonwealth.org/shared_asp_files/GFSR.asp?NodeID=174448 (last accessed 1 November 2009), at 28; European Union Election Observation Mission, *Kenya General Elections: 27 December 2002*, http://ec.europa.eu/external_relations/human_rights/eu_election_ass_observ/kenya/rep02.pdf (last accessed 1 November 2009), at 1.

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unauthorized or unlawful demonstration. It also argued that any aggrieved person should seek relief in court: "Elections are over and our Constitution does say that once the Electoral Commission has declared the results those are the results that we accept. If we have any disputes, the normal way of resolving them is … by petitioning the High Court."[28]

Interestingly, the Vice President of Kenya, Kalonzo Musyoka, who was a contender for the presidency in the 2007 election, echoed this viewpoint: "I am a lawyer. I can even take instructions. And I can argue for [the ODM]."[29] Some commentators expressed similar sentiments. Peter Kagwanja, President of the Africa Policy Institute, claimed that the domestic legal framework was the proper forum for resolving electoral disputes.[30] Kagwanja asserted that "giant strides" had been made since Kenya's independence in 1963 to set up "a functioning modern" judicial system.[31] Thus, people must respect court decisions, "however sleazy" they may be.[32] To support this assertion, Kagwanja cited the U.S. Supreme Court decision in *Bush v. Gore*,[33] where the central issue was the tallying of votes in the state of Florida.

Bush has been the subject of wide discussion,[34] and courts in Kenya could have drawn from the rich jurisprudence that decision has generated. However, the assertion by Kagwanja is narrow in the sense that he ignores the vital role that confidence in the judiciary and court system plays in the litigation process. Indeed, courts worldwide have underscored the value of public confidence on the judiciary. In their dissent in *Bush*, Justices Breyer and Stevens describe belief in the judiciary as the foundation of the rule of law.[35] Canadian[36] and Australian[37] courts have also acknowledged that public perception is a core component of the justice system. In the words of Justice Katju of the Indian Supreme Court:

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[28] "PNU and ODM-Kenya Speak," footage available at http://www.youtube.com/watch?v=S-tMBFV9-0Q (accessed 11 August 2008) (per George Nyamweya, Secretary General of the ruling party, Party of National Unity.
[29] "Kalonzo: ODM Should go to Court," footage available at http://www.youtube.com/watch?v=aW0vYtYOR_k (accessed 11 August 2008).
[30] Peter Kagwanja, "Breaking Kenya's Impasse: Chaos or Courts?," (2008) 1 *Africa Policy Brief* 1 at 3-4.
[31] *Supra*, note 30 at 4.
[32] Ibid at 3.
[33] 531 U.S. 98 (2000).
[34] Anthony Laden, "Democratic Legitimacy and the 2000 Election," (2002) 21 *Law and Philosophy* 197; Jesse Choper, "Why the Supreme Court Should Not Have Decided the Presidential Election of 2000," (2001) 18 *Constitutional Commentary* 335; Bruce Ackerman, (ed), *Bush v Gore: The Question of Legitimacy* (Yale University Press: New Haven, 2002).
[35] At 128 (Stevens J) and 158 (Breyer J).
[36] MacKeigan v Hickman (1989) CarswellNS 24 at paragraph 12.
[37] Kable v Director of Public Prosecutions (1969) 189 CLR 51 at 118.

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> It is of upmost importance for the public to have confidence in the judiciary. The role of the judiciary is to resolve disputes amicably. Without it, people may use violence to resolve differences. To avoid this, the judiciary must be independent. This is an inherent trait. If a judge is independent and knows the law, the losing party is likely to be pacified. He or she will be content, notwithstanding the fact that he or she has lost the action.[38]

Data from Africa[39] and elsewhere[40] demonstrate the importance of public trust in the judiciary. People engage the judiciary because they have faith in the court system, and they believe their disputes will be resolved based on legal principles. In addition, they trust that judges will be independent and not favor any party. Absent this trust, it is doubtful that presidential candidates would ever seek relief in domestic courts.

Kenya's judiciary has undergone a number of developments, including a transformation from an all-white bench at the time of independence to a bench comprised of local-born judges today. However, courts in Kenya and Zimbabwe do not have a reputation of fairness and independence. Survey data suggest that many citizens do not trust that courts and judges in Africa are autonomous in their work. In a survey conducted in 2006 and 2007 among thirty-two African countries, including Kenya and Zimbabwe, the Gallup Organization found that just over half of those polled (fifty-three percent) expressed confidence in the judiciary in their country.[41]

[38] Interview with Markandey Katju, Cape Town, South Africa, 27 January 2009.

[39] Richard Vengroff and Michael Magala, "Democratic Reform, Transition and Consolidation: Evidence from Senegal's 2000 Presidential Election," (2001) 39 *Journal of Modern African Studies* 129 at 147-156;
International Foundation for Election Systems, "A Nigerian Perspective on the 2007 Presidential and Parliamentary Elections: Results from Pre- and Post-Election Surveys," available at http://www.ifes.org/publication/34df07e58b75b1f077da49901b958445/Nigeria%20elections%202007%20way%20forward%20conf%20presentation%20FINAL.pdf (accessed 23 April 2009) at 1.

[40] A.K.J. Watt, "New Alignments in South Indian Politics," (2002) 42 *Asian Survey* 733 at 746-748, 751; James Gibson, Gregory Caldeira and Lester Spence, "The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?," (2003) 33 *British Journal of Political Science* 535 at 539-545; Commonwealth Observer Group, "Pakistan National and Provincial Assembly Elections, 10 October 2002," available at http://www.thecommonwealth.org/document/176283/177346/35146/pakistan_2002_cog_report.htm (accessed 23 April 2009) at 15; Antonio Lamer, "The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change," (1996) 45 *University of New Brunswick Law Journal* 3 at 7 ("maintenance of public confidence" in the judiciary could enhance the faith litigants—winners and losers—have on this institution).

[41] Gallup, "In South Africa, High Level of Confidence in Judiciary," available at http://www.gallup.com/poll/110968/South-Africa-High-Level-Confidence-Judiciary.aspx (accessed 24 November 2008).

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Moreover, a number of studies have established that courts in Kenya and Zimbabwe cannot discharge their mandates impartially and independently. For instance, in its 2008 report, the Fund for Peace, a nonprofit research and education organization, described the judiciary in Kenya and Zimbabwe as "weak"[42] and "poor,"[43] respectively. Legal practitioners argue that public confidence in the Kenyan judiciary has "virtually collapsed."[44] Simply put, the judiciary in Kenya and Zimbabwe is facing a crisis of confidence.

Judges, like all members of the public, are entitled to hold opinions and express their views on any issue. However, as the South African Supreme Court cautions, the conduct of judges should not in any way "compromise" the discharge of their duties.[45] In Kenya, the Chief Justice, Evan Gicheru, acted improperly in the wake of the disputed presidential election. Within an hour of the EMB announcement that Kibaki had won the 2007 presidential election, Gicheru hurriedly swore him in at the Nairobi State House. Gicheru's presence at the ceremony shattered the trust in the Kenyan judiciary of all reasonable and informed people. His conduct contradicted his 2007 call that judges should take their constitutional mandate seriously.[46] More shockingly, his conduct contradicted the judicial oath he had taken to uphold the Constitution and adhere to the law "without fear or favor, affection or ill will."[47] In light of the conditions surrounding the swearing in of Kibaki, it was doubtful that the judiciary would be impartial and independent in deciding any petition that challenged his election. This was one of the main factors that influenced the ODM's decision not to seek relief in court.

(a) **Invoking the Court Process**

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[42] The Fund for Peace, "Country Profile: Kenya," available at http://www.fundforpeace.org/web/index.php?option=com_content&task=view&id=36&Itemid=61 (accessed 24 November 2008).

[43] The Fund for Peace, "Country Profile: Zimbabwe," available at http://www.fundforpeace.org/web/index.php?option=com_content&task=view&id=296&Itemid=458 (accessed 24 November 2008).

[44] Peter Annasi, *Corruption in Africa: The Kenyan Experience* (Dialnet Communication Systems: Nairobi, 2004) at 84.

[45] Per Harms DP in *National Director of Public Prosecutions v Jacob Zuma* (573/08) [2009] ZASCA 1(12 Jan 2009) (Farlam, Ponnan, Maya and Cachlia JJA concurring) at paragraph 16. See also Sylvia Bertodano, "Judicial Independence in the International Criminal Court," (2002) 15 *Leiden Journal of International Law* 409 at 417 ("For a judge to describe as guilty a man whom his court has not yet tried suggests a lack of the impartiality required of that judge at trial").

[46] Evan Gicheru, "Independence of the Judiciary: Accountability and Contempt of Court," (2007) 1 *Kenya Law Review* 1 at 1.

[47] Kenya's Oath of Office for Judges (on file with author).

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Unlike the ODM in Kenya, the MDC in Zimbabwe did seek relief in court. There was an inordinate delay in releasing the results of the first round of the election. Thus, the MDC applied to High Court for an order to compel the EMB to release the presidential election results. In his judgment in *Movement for the Democratic Change v. The Chairperson of the Zimbabwe Electoral Commission*,[48] Justice Uchena found that there was indeed an inordinate delay in announcing the election results. He stated that the EMB was "wasting time doing everything else other than what they should have been doing,"[49] namely, processing results. Citing section 67A(7) of the Electoral Act, which provides that the decision of the EMB on whether or not to order a recount "shall not be subject to appeal," the High Court asserted that this subsection implied that the decision of the board was "final."[50] In other words, it could not be challenged, not even in a court of law. According to Justice Uchena:

> The provision barring an appeal simply means [the EMB] has been given a very wide discretion as to whether or not to order a recount. The provision that [the] decision [of the EMB] shall not be subjected to an appeal also means that this court can not inquire into that decision. This should therefore be the end of the inquiry, as the respondent's conduct can only be open to jurisdiction of this court when it strays from the law.[51]

Thus, the court dismissed the MDC application.

As the High Court pointed out, the statute purported to oust the jurisdiction of the court in cases where a party had appealed the decision of the EMB. However, the EMB in Zimbabwe is not immune from judicial review[52] under section 67A(7) of the Electoral Act. The High Court Act (1981) of Zimbabwe, which grants the court the general power to review "proceedings and

[48] Movement for the Democratic Change v The Chairperson of the Zimbabwe Electoral Commission High Court of Zimbabwe at Harare, delivered 14 April 2008 (Uchena J) (unreported).
[49] *Ibid* at 4.
[50] *Ibid* at 14.
[51] Ibid.
[52] For the difference between appeal and judicial review, see Bryan Garner, (ed), Black's Law Dictionary (West: Dallas, 2004) at 105 and 864, respectively.

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decisions" of "administrative authorities,"[53] reinforces this argument. In *Movement for the Democratic Change* the MDC was not appealing a decision of the EMB, as a decision had yet to be handed down. Rather, it was seeking an order of mandamus to compel the EMB to perform its constitutional duty — declare the result of the presidential vote. Instead of invoking an inapplicable provision of the law, a neutral judge would have construed the statute objectively.

The rule of law requires decisions to be somewhat "predicable" [54] and "stable."[55] To put it in another way, judges should not decide cases arbitrarily.[56] In keeping with the golden rule of statutory construction, they must not arrive at an absurd interpretation of the law.[57] Moreover, decision makers must conduct real analysis.[58] Towards this end, before arriving at a decision, Justice Uchena was required to apply relevant legal tests objectively to the facts of the case. However, it is doubtful that an objective decision-maker would have reached a conclusion similar to that of the *Movement for the Democratic Change* court.

The second criticism against the decision in *Movement for the Democratic Change* stems from the High Court's treatment of the ouster clause. As the court pointed out, ouster clauses such as 67A(7) of the Electoral Act do not entirely remove the decision of an administrative authority from the scrutiny of courts. To pass constitutional muster, decisions of administrative bodies must comply with due process considerations. These outcomes also should be fair and reasonable. This general canon is well-established within both common law countries such as the United Kingdom,[59] Australia,[60] and Kenya[61] and non-common law countries such as South Africa.[62] It is unsatisfactory for a Superior Court merely to recognize the existence of an ouster

[53] Sections 26 and 27.
[54] S.G. Jaisinghani v Union of India (1967) 2 SCR 703 at 718.
[55] JW Harris, *Legal Philosophies* (Butterworths: London, 1997) at 156.
[56] See also principle 5.2 of the Bangalore Principles prohibiting judges from considering "irrelevant grounds" when writing their decisions.
[57] Turner v Hellard (1885) L.R. 30 Ch.D 390 at 393-394; Coopers and Lybrand v Bryant (1995) 3 SALR 761 at 767; Mohammed v Bakari and 2 Others (2008) 3 KLR 54 at 68; Immigration and Naturalization Service v Luz Cardoza-Fonseca (1987) 480 U.S. 421 at 452.
[58] Anisminic Ltd v Foreign Compensation Commission (1969) AC 147 at 199; Darling Casino Ltd v New South Wales Casino Control Authority (1997) 191 CLR 602 at 635. See also William Marbury v James Madison (1803) 1 Cranch 137 at 177 (Judges "must of necessity expound and interpret" legal rules (per Justice Marshall)).
[59] *Anisminic Ltd v Foreign Compensation Commission*, *supra*, note 58 at 170.
[60] *R v Hickman* (1945) 70 CLR 598 at 615.
[61] *Constitution*, section 123(8). See also *Kipkalya Kones v R* Court of Appeal of Kenya at Nairobi, Civil Appeal No 94 of 2005, delivered 10 November 2006 (Omolo, O'Kubasu, Githinji JJA) (unreported) at 18.
[62] See *Constitution*, sections 33 (1), 34.

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clause, and the grounds upon which it can intervene. The supervisory function of the High Court required Justice Uchena to have carefully evaluated the evidence presented and used it to decide whether the conduct of the EMB was consistent with the law.

Justice Uchena acknowledged that there was an inordinate delay on the part of the EMB in declaring the outcome of the presidential poll.[63] Nonetheless, the judge failed to conduct further inquiry into this delay, contrary to the requirements of the constitution. The mere declaration by the judge of the legal position was insufficient. As the U.K. House of Lords has emphasized, a decision-maker must deliver "substantial" justice.[64] In other words, the adjudication process should be more than a mere formality. Few would deny that the narrow approach that Justice Uchena adopted can stifle democracy and human rights as well as the development of jurisprudence in those fields. Unfortunately, that approach is not unique to Zimbabwe. Similar trends have been noted elsewhere in Africa.[65]

Real independence implies that judges should make decisions or conduct review applications "based on the backdrop of the Constitution and precedent without fear of retribution by either the legislative or executive branches."[66] A judge adjudicating an electoral dispute should always be "conscious" that the decision he or she hands down "transcends private rights and defends the constituency and the democracy of the country."[67] There is no evidence to suggest that the Zimbabwean judiciary in this instance was under any outside influence. However, it is arguable that it was not entirely independent because Mugabe had announced in the past that his administration would not respect court decisions that were contrary to the ideals of his government.[68] Further, as noted above, evidence shows that the

[63] Movement for the Democratic Change at 4.
[64] Arthur Spackman v The Plumstead District Board of Works (1884-85) L.R. 10 App. Cas. 229 at 240.
[65] See, for instance, Peter Vondoepp, "Politics and Judicial Assertiveness in Emerging Democracies: High Court Behavior in Malawi and Zambia," (2006) 59 Political Research Quarterly 389 at 395.
[66] Justice Kelly quoted by "A discussion of Judicial Independence with Judges of the United States Court of Appeal for the Tenth Circuit," (1997) 74 *Denver University Law Review* 355 at 356. See also the Canadian Supreme Court in R v Valente (1985) CarswellOnt 129 at para 16.
[67] *Mohinder Gill v The Chief Election Commissioner* (1948) 1 Supreme Court Cases 405 at 421 (per Iyer J).
[68] US State Department: Zimbabwe: 2005 Investment Climate," available at http://www.state.gov/e/eeb/ifd/2005/42203.htm (accessed 24 November 2008). See also *Kaunda and Others v President of the Republic of South Africa and Others* (2005) 4 SA (CC) 235 at 269 (counsel arguing that the Mugabe administration had "ignored" previously court orders).

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judiciary in Zimbabwe is not independent. Thus, it is doubtful that the resolution of this electoral dispute gave the petitioners or the public the impression that the court was fair.

Decision makers should be independent to the extent that they can rule against the state. The decision of the High Court in *Movement for the Democratic Change* affirms the idea that decision makers "who are afraid cannot adequately fulfill the considerable responsibilities that the position demands."[69] It also affirms the idea that in countries where the judiciary is firmly "under the control" of the state, any action against the government or its officials is futile.[70] Some argue that in *Bush v. Gore*, the majority of the U.S. Supreme Court was determined to rule in favor of Bush.[71] Likewise, in *Movement for the Democratic Change*, the Zimbabwean High Court was determined to rule in favor of Mugabe.

IV. Timeliness

It is in the interest of justice for claims to be adjudicated promptly by courts and tribunals. As the legal maxim "justice delayed is justice denied" implies, the right to a fair hearing requires proceedings to be conducted expeditiously.[72] Thus, in the context of elections, the law in Kenya and Zimbabwe requires petitions to be heard and determined expeditiously.[73] However, despite this legal requirement, election challenges are rarely adjudicated promptly.

Table V (below) shows the length of time it has taken courts in Kenya to hear and rule on election petitions filed after the establishment of multi-party elections in 1992. The sample size – twenty-five petitions – is small, but the data provides valuable insight into national trends.

[69] Sandra O'Connor, *The Wall Street Journal* 27 September 2006 A18.
[70] Rok Ajulu, '"Kenya's Democracy Experiment: The 1997 Elections," (1998) 25 *Review of African Political Economy* 275 at 283.
[71] Elizabeth Garrett, "Institutional Lessons From the 2000 Presidential Election," (2001-2002) 29 *Florida State University Law Review* 975 at 991.
[72] *UDHR* article 10; *ICCPR* article 14.
[73] Kenyan *National Assembly and Presidential Elections Act*, sections 19(4) and 23(6); *Electoral Act* of Zimbabwe section 172 (3).

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Table I

Resolution of Election Petitions in Kenya

Time (Years)	Number of Petitions (First Instance)	Number of Petitions (Appeal)
<1	7[74]	7[75]
1-2	16[76]	1[77]
2-3	1[78]	1[79]
>3-4	1[80]	0

Although some petitions (twenty-eight percent) were decided speedily at first instance,[81] it took over one year to adjudicate most petitions (seventy-two percent), notwithstanding the

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[74] *Murathe v Macharia* Civil Appeal No. 171 of 1998, delivered 23 April 1999 (Kwach, Tunoi and Pall JJA) (unreported); *Muiya v Nyaga*, Election Petition No. 7 of 2003 (Mwera J) (unreported); *Chelaite v Njuki*, 2 *KLR* 209 (2008); *Joho v Nyange*, Election Petition No. 1 of 2005 (Maraga J) (unreported); *Libasia v Wekesa*, Election Petition No. 10 of 1993 (O'Kubasu, Mbito and Mwera JJ) (unreported); *Njeru v Muturi*, 2 *KLR* 583 (2008); *Shakombo v Mwalala*, Election Petition No. 5 of 1993 (O'Kubasu, Mbito and Mwera JJ) (unreported).

[75] *Matiba v Moi*, Civil Appeal No. 179 of 1993, delivered 27 October 2006 (Gachuhi, Omolo, Shah JJA) (unreported); *Maitha v Said*, Civil Appeal No. 292 of 1998, delivered 12 February 1999 (Gicheru, Tunoi and Pall JJA) (unreported); *Kibaki v Moi*, Civil Appeal Number 173 of 1999, delivered 10 December 1999 (Chunga, Omolo, Shah, Lakha, Owuor JJA) (unreported); *Chelaite v Njuki*, 2 KLR 209 (2008); *Omar v Mbuzi*, Civil Appeal Number 50 of 2006, delivered 27 October 2006 (O'Kubasu, Otieno, Deverell JJA) (unreported); *Mutani v Ntwiga*, Civil Appeal No. 99 of 1999, delivered 9 July 1999 (Omolo, Tunoi, Lakha JJA) (unreported); *Murathe v Macharia*, Civil Appeal No. 171 of 1998, delivered 23 April 1999 (Kwach, Tunoi and Pall JJA) (unreported).

[76] *Manduli v Machayo*, 2 *KLR* 195 (2008); *Nyamweya v Oluoch*, Election Petition No. 74 of 1993 (O'Kubasu, Mbito and Mwera JJ) (unreported); *Kajembe v Nyange*, Election Petition No. 38 of 1993 (O'Kubasu, Mbito and Mwera JJ) (unreported); *Shakombo v Mwalala*, Election Petition No. 5 of 1993 (O'Kubasu, Mbito and Mwera JJ) (unreported); *Asiko v Electoral Commission of Kenya*, Election Petition No. 1 of 1998 (O'Kubasu, Mbito and Mwera JJ) (unreported); *Wekesa v Onsera*, Election Petition No. 39 of 1993 (O'Kubasu, Mbito and Mwera JJ) (unreported); *Kyengo v Kithonga* Election Petition No. 36 of 1993 (O'Kubasu, Mbito and Mwera JJ) (unreported); *Obongita v Maiyole*; Election Petition No. 42 of 1993 (O'Kubasu, Mbito, Mwera J) (unreported), *Elima v Kombo* Election Petition No. 64 of 1993 delivered 17 November 1994 (O'Kubasu, Mbito, Mwera J) (unreported); *Kibaki v Moi*, Civil Appeal Number 173 of 1999, delivered 10 December 1999 (Chunga, Omolo, Shah, Lakha, Owuor JJA) (unreported); *Matoke v Akoi*, Election Petition No. 68 of 1993 (O'Kubasu, Mbito and Mwera JJ) (unreported); *Ntwiga v* Musyoka, 2 *KLR* 583 (2008); *Onalo v Wanjala*, Civil Appeal Number 215 of 2003, delivered 16 December 2005 (Omolo, O"Kubasu, Waki JJA) (unreported); *Mutani v Ntwiga*, Civil Appeal No. 99 of 1999, delivered 9 July 1999 (Omolo, Tunoi, Lakha JJA) (unreported); *Mwau v ECK*, 1 KLR 691 (2008); *Gakunga v Maina*, Election Petition No. 47 of 1993.

[77] *Onalo v Wanjala*, Civil Appeal Number 215 of 2003, delivered 16 December 2005 (Omolo, O"Kubasu, Waki JJA) (unreported).

[78] *Shimbwa v Mwangola*, Election Petition No. 11 of 1993 (O'Kubasu, Mbito and Mwera JJ) (unreported).

[79] *Moi v Mwau*, Civil Appeal Number 131 of 1994, delivered 16 December 2005 (Cockar CJ, Omolo, Akiwumi Waki JJA) (unreported).

[80] *Omar v Mbuzi*, Court of Appeal of Kenya at Nairobi, Civil Appeal Number 50 of 2006, delivered 27 October 2006 (O'Kubasu, Otieno, Deverell JJA) (unreported).

[81] Chalaite, Libasia, Murathe, Muiya, Joho, Njeru, Shakambo.

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fact that courts are required to give election petitions "priority."[82] In particular, the cases of *Mwangola*[83] and *Omar*,[84] which took about three and four years, respectively, for courts to hear and rule on, are quite troubling. The record of the appeal court is much better than that of the court of first instance. Although most appeals (seventy-eight percent) were decided within one year, it took the appeal court three years to hand down a decision in *Moi*,[85] despite the legal requirement for appeals to be heard and determined expeditiously.[86]

A holistic examination of the system suggests that it is also plagued by delays. For example, it took three years, including both stages of the process, for courts to reach a decision on the petitions in *Onalo*[87] and *Omar*.[88] Interestingly, the Chief Justice of Kenya has deplored this state of affairs.[89] Moreover, at hearings before the commission that was charged with the responsibility of investigating the human rights violations that occurred in the wake of the flawed election in Kenya —Commission of Inquiry into the Post-Election Violence—[90], members of the public accused the judiciary of delaying the "administration of justice."[91]

Courts that hear election petitions must work toward ensuring that justice is delivered swiftly. The situation in Kenya, as illustrated in Table I, cannot be maintained by a state that holds itself up as a democratic country.[92] Kenya must match its words with concrete action. Under the law, the candidate whom the EMB declares to be the winner continues to hold office until a court finds an error in the electoral process. If the court delays reaching a decision, the consequences are widespread. First, delays in adjudicating election petitions have an impact on the fundamental right of citizens to choose their representatives. Second, delayed justice denies a winning candidate the chance to represent his or her constituents in particular and the public in general. Third, delayed justice affects candidates on a personal level. A candidate whom a

[82] National Assembly and Presidential Elections Act, section 19(4).
[83] *Supra*, note 78.
[84] *Supra*, note 75.
[85] *Supra*, note 75.
[86] *Ibid*, section 23(6).
[87] *Supra*, note 77.
[88] *Supra*, note 75.
[89] See Beauttah Omanga, "Winning Election Petition No Easy Task," *The Standard* (21 December 2008) at 26.
[90] Vide Gazette Notice No. 4473 of 23 May 2008.
[91] Commission of Inquiry into the Post-Election Violence Report of the Commission of Inquiry into the Post-Election Violence Experienced in Kenya after the General Elections held on 27th December 2007, available at http://www.dialoguekenya.org/docs/PEV%20Report.pdf (accessed 16 October 2008) ("Waki Commission") at 461.
[92] *Constitution*, section 1A.

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court finds to have won an election is rarely awarded damages to compensate him or her for lost income. This issue is of particular concern if the life of the current parliament is about to come to an end, as was the situation in *Mbuzi*.[93] Even if such a candidate is awarded damages, they are typically insufficient. Conversely, a candidate whom a court finds was elected wrongly is usually not required to return the income he or she received while in office. In such cases, delayed justice leads to unjust enrichment.

Finally, if electoral disputes are not determined expeditiously, democracy itself "suffers."[94] If the public is represented by an individual whom the majority did not elect, that seriously undermines the individual right to vote and be represented by a person of his or her choice. Moreover, the "slow pace" of adjudicating election petitions could fuel "cynicism about the commitment of the government and the courts to resolve electoral disputes."[95] This cynicism is well-founded because a person who has been elected improperly can influence the court process using state resources.[96]

V. How can Judicial Independence be Restored and Supported?

The independence of the judiciary is not only advantageous to courts, but also is of great benefit to litigants, the general public, and the international human rights movement. Thus, courts must take a lead role in ensuring that the right to vote is respected, protected, and promoted at all times.[97] In keeping with their oaths of office, judges must defend the constitution of their countries. They must be bold spirited.[98] Their decisions must be grounded on sound legal reasoning. They should be prepared to make decisions that do not sit well with the administration in power. A judge should "feel compelled to select" those constitutional "values

[93] *Supra*, note 80.
[94] *ZDanoka v Latvia* (2007) 45 E.H.R.R. 478 at 525.
[95] The Carter Center, "Observing the 2001 Zambia Elections," available at http://www.cartercenter.org/documents/1135.pdf (accessed 23 April 2009) at 53.
[96] Research on Nigeria supports this position. See, for instance, Rotimi Suberu, "Nigeria's Muddled Elections," (2007) 18 *Journal of Democracy* 95 at 104.
[97] As experience in Malawi shows, an objective judiciary can play a central role in protecting democracy. Siri Gloppen and Edge Kanyongolo, "The Role of the Judiciary in the 2004 General Elections in Malawi," available at www.cmi.no//publications (accessed 5 August 2008).
[98] See also George Christie and Patrick Martin, *Jurisprudence: Text and Readings on the Philosophy of Law* (Minnesota: West Publishing Company, 1995) at 933 (arguing for an "active judiciary").

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and principles" that promote "equality and dignity."[99] However, for this objective to be realized, an enabling environment must exist. This subsection evaluates some of the judicial reforms that could be adopted as a means of achieving this goal. These initiatives could restore and promote public confidence in and guarantee the independence of the court system. Improvements could also ensure that decisions are based on the rule of law.

Transparency and promptness are essential components of an efficient system of justice.[100] Although the judiciary in most African states is independent, practice suggests that judges are still vulnerable to influence from the executive. This could be traced to the fact that members are appointed by the president.[101] However, all appointees must meet certain legal requirements, including having practiced law for at least seven years.[102] In both Kenya and Zimbabwe, the president is required to consult the Judicial Service Commission ("JSC"), but this legal requirement falls short of guaranteeing the judiciary complete independence, as the president also appoints members of the JSC.[103] Indeed, the ability of JSC officials to be independent in this kind of environment is doubtful. Moreover, it is doubtful whether any real consultations occur before a judge is appointed into office in either country. Even if the JSC were to act independently, its advice would not legally bind the president.[104] In other words, under the current legal framework the president can appoint a judge for purely political reasons as long as the appointee meets the minimum requirements for the position.

Although judicial reforms could be counterproductive in transitional states,[105] it is apparent that changes must be made to the courts if the rule of law is to prevail. For the judiciary

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[99] Jackie Dugard, "Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's Transformation," (2007) 20 *Leiden Journal of International Law* 965 at 981.

[100] Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, "Promotion and Protection of all Human Rights, Civil and Political, Economic, Social and Cultural Rights, Including the Right to Development," A/HRC/8/4 (13 May 2008) paragraph 43.

[101] See, for instance, Kenya's *Constitution*, 2001, section 61; Tanzania's *Constitution*, 1997, section 118; Zimbabwean *Constitution*, 2007, section 84.

[102] Kenya's *Constitution*, 2001, section 61(3)(b); Zimbabwean *Constitution*, 2007, section 82(1)(b).

[103] Kenya's *Constitution*, 2001, section 68; Zimbabwean *Constitution*, 2007, section 90.

[104] Makau Mutua, "Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya," (2001) 23 *Human Rights Quarterly* 96 at 104.

[105] Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy: "Civil and Political Rights, Including the Questions of Independence of Lawyers and Judges," A/HRC/4/25 (18 January 2007) paragraph 22; "Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration of Justice and Impunity," A/62/207 (6 August 2007) paragraph 27.

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to be fully independent, as envisioned by international human rights laws,[106] it is imperative to review the selection process.[107] Indeed, there is a need to divest the president of power over the system.[108] Kenya and Zimbabwe could adopt the Zambian model where, in addition to the president, the legislature is involved in the selection of judges.[109] Moreover, to guard against the majority party in the legislature wielding excessive power, Kenya and Zimbabwe could adopt the South African model, which requires the president to consult with all the leaders of the parties represented in parliament.[110] Finally, to promote competency and professionalism in the bench, an independent appointment committee that includes members of the bar and civil society could be constituted to screen appointees, as is the case in South Africa.[111]

The criteria that judges must meet are another issue for consideration. In the words of Joy (pseudonym), a Kenyan decision-maker, "Part of the problem lies in the appointment process. It is a political process and the judges are reluctant to lose their pay pack. They would rather play ball. It is who lobbies for whom. There is no vetting. If it was on merit, you really have nothing to fear."[112]

At present, the bar is too low. It needs to be raised to ensure that only the best candidates are appointed to the courts. Appointees should be selected on the basis of their records, which should demonstrate work of superior quality. It is not sufficient for judges to possess merely "appropriate training and qualifications of the law."[113] The proposal by the Kreigler Commission that those who judge a contested election have expertise in election law[114] should be implemented, as it would enable courts to deal expeditiously with any possible legal objection,

[106] See articles: 26 of the *Banjul Charter*; 37 of the *CRC*; and 14 of the *ICCPR*.
[107] See "The East African Community Observer Mission Report: Kenya General Elections December 2007," available at http://www.parliament.go.tz/bunge/docs/ealanews.pdf (visited 19 April 2009) at 9; Commonwealth Secretariat, "Report of the Commonwealth Expert Team: Antigua and Barbuda General Election, 23 March 2004, available at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BF3B45C53-F1A0-4557-873D-46EFCBBEE90E%7D_FinalReportOFTheCETAntiguaAndBarbuda.pdf (visited 19 April 2009) at 9.
[108] Evidence from Mexico suggests that this approach could enhance the independence of the judiciary. Pilar Domingo, "Judicial Independence: The Politics of the Supreme Court in Mexico," (2000) 32 *Journal of Latin American Studies* 705 at 712 to 715.
[109] *Constitution*, 1996, section 93(1).
[110] *Constitution*, 1996, section 174(3) and (4).
[111] Section 178(1) of the *Constitution*.
[112] Interview with Joy, Eldoret, Kenya, 7 February 2009.
[113] See, for instance, *Report of the Advisory Panel of Eminent Commonwealth Judicial Experts*, Nairobi, Kenya (17 May 2002), available at http://www.commonlii.org/ke/other/KECKRC/2002/8.html (accessed 13 May 2009) at 24.
[114] *Supra*, note 91 at 141-142.

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some of which could prolong the court process unnecessarily. Further, a judge should demonstrate that he or she embodies qualities such as transparency, integrity, independence, and high moral standing, as well as personal technical skills.[115] He or she should also be willing to collaborate with other judges. Lastly, the selection process should be transparent, and interviews should be open to the public. Anyone seeking public office should be subjected to "public scrutiny" about why he or she wants the position and the "qualities of competence" he or she would offer.[116]

These initiatives would strengthen the rule of law and democracy in Africa. Further, they would increase the speed with which courts decide election disputes. Zambian law requires electoral challenges to be heard and determined within six months of filing.[117] The Independent Review Commission, which was established to investigate the electoral process in Kenya—the ("Kriegler Commission")[118] made a similar recommendation.[119] Adopting these initiatives would enable Kenya and Zimbabwe to achieve that goal.

VI. Conclusion: Making Tough Choices

This paper has set out to evaluate changes that could be made to strengthen the fundamental right to vote in Africa. The analysis in this paper has demonstrated that the judiciary failed to discharge its obligation in manner that gained the acceptance of the nation and the international community. A wide range of suggestions for improvements have been made. These suggestions could be of great benefit to both individual states and the international community, as they could contribute to preventing a repeat of the human rights violations that characterized the presidential

[115] For a wider discussion of this theme, see Simon Evans and John Williams, "Appointing Australian Judges: A New Model," (2008) 30 *Sydney Law Review* 295 at 313-314; Edwin Abuya and George Mukundi, "Assessing Asylum Claims in Africa: Meeting or Missing Standards," (2006) 53 *Netherlands International Law Review* 171 at 192-196.
[116] K.D. Ewing, "A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary," (2000) 38 *Alberta Law Review* 708 at 720.
[117] *Constitution*, 1996, section 102(1).
[118] Vide Gazette Notice No. 1982 of 14 March 2008.
[119] Independent Review Commission *Report on the Independent Review Commission on the General Elections held in Kenya on 27 December 2007*, available at http://www.dialoguekenya.org/docs/FinalReport_consolidated.pdf (accessed 23 September 2008) ("Kriegler Commission") at 22.

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elections in Kenya and Zimbabwe. The challenge lies in implementing these suggestions. A bold administration is required to do so in a way that strengthens human rights. However, it must be emphasized that legal action alone will not automatically guarantee a free and fair presidential election. Rooting out the long "culture of electoral lawlessness" requires "concerted, non-partisan commitment to electoral integrity on the part of political leaders"[120] as well as the general public and other governmental and non-governmental agencies.

Doubtless, the task ahead is colossal. There are no simple, quick solutions, especially for countries where the president has considerable influence over key institutions such as the judiciary. If impunity is to be fought full-force, tough choices must be made. Courts must discharge their duties without fear or favor. Moreover, cronyism must give way to professionalism. Part of the solution lies in changing the means of appointing judges. As the preceding analysis underscores, an all-encompassing formula must be adopted if effective reforms are to be realized on the ground. Moreover, if real results are to be achieved, members of the public must be actively involved.[121]

In August 2010 a new constitution was promulgated in Kenya. The new legal order seeks to introduce a number of fundamental changes. In particular, article 166 of the new *Constitution*, unlike its former counterpart, involves parliament in the selection of judges. Restrictions are also placed on the term for holding office of the chief judge.[122] Additionally, the procedures for removing a judge from office have been simplified.[123] An open process will also be used to appoint members of the JSC.[124] Although these legal changes could go a long way towards meeting strengthening the

[120] *Ibid* at 9.

[121] Edwin Abuya and Dulo Nyaoro, "Between a Rock and a Hard Place: Victims of Persecution and Armed Conflict in South Africa," (2009) 32 *Hastings International and Comparative Law Review* 1 at 26-34.

[122] Article 167(2).

[123] Article 168 (This can be initiated by the Judicial Service Commission or 'any person').

[124] Article 171.

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rule of law and democracy in Kenya, the challenge lies in their implementation. Similar changes must be undertaken in Zimbabwe if the judiciary is to play its rightful role. Unfortunately, as of the moment, it is hard to tell when (or whether) similar changes will be adopted.

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