

Spring 2010

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Recommended Citation

Edwin Odhiambo Abuya, *Can African States Conduct Free and Fair Presidential Elections?*, 8 NW. J. INT'L HUM. RTS. 122 (2010).
<http://scholarlycommons.law.northwestern.edu/njihr/vol8/iss2/1>

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Can African States Conduct Free and Fair Presidential Elections?

Edwin Odhiambo Abuya*

*Asiyekubali kushindwa si msihindani.*¹

I. INTRODUCTION

¶1 Can African States hold free and fair elections? To put it another way, is it possible to conduct presidential elections in Africa that meet internationally recognized standards? These questions can be answered in the affirmative. However, in order to safeguard voting rights, specific reforms must be adopted and implemented on the ground. In keeping with international legal standards on democracy,² the constitutions of many African states recognize the right to vote.³ This right is reflected in the fact that these states hold regular elections. 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.

¶2 Although most African states recognize voting rights in theory, 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. Accordingly, this paper evaluates some of the institutional and legal reforms that African states could adopt to prevent voter fraud in presidential elections, and thereby promote democracy and the rule of law across the continent. This paper focuses on the recent presidential elections in Kenya in 2007 and

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¹ “He who does not admit defeat is not a sportsman” (Swahili) (*translation by author*).

² See African (Banjul) Charter on Human and Peoples’ Rights, art. 13, ¶ 1, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5; Convention on the Rights of Persons with Disabilities, art. 29, Dec. 6, 2006, 660 U.N.T.S 195; International Covenant on Civil and Political Rights arts. 23, 25, *adopted* Dec. 16, 1966, 999 U.N.T.S 171 [hereinafter ICCPR]; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(c), Dec. 21, 1965, 660 U.N.T.S 195. For international legal standards concerning democracy, see Universal Declaration of Human Rights, G.A. Res 217(A), arts. 8, 21, 22, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR].

³ See, e.g., TANZ. CONST. art. 5 (1977); UGANDA CONST. art. 59 (1995); ZAMBIA CONST. (Constitution Act 1991) art. 113(e); ZIMB. CONST. art. 61(4) (1979).

Zimbabwe in 2008 as case studies. In many ways, these events support the argument that reforms must be made for elections in Africa to comply with international standards. 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 state of affairs affirms the argument that elections in Africa are hardly democratic.⁴

Presidential elections in many African countries are very competitive. As in many parts of the world, presidents in Africa wield substantial power.⁵ The influence that comes with the office makes it very attractive. Herein lies the problem, especially if an incumbent president who is eligible for re-election attempts to utilize all means necessary to win an additional term. There are no concerns if electoral rules are followed. However, if the rules are broken, serious consequences result at both a national and a regional level, as the tragic events that followed the flawed 2007 presidential election in Kenya demonstrated.⁶ In the interest of international peace and security as well as in the interest of human rights, democracy and the rule of law, measures must be taken to guard against any interference with presidential elections.

The success or failure of an election can be gauged by the extent to which it contributes to or hinders “political stability.”⁷ In addition to the domestic impact, the consequences at the international level are important considerations. Unlike in Kenya, the results of the presidential election in Zimbabwe did not lead to widespread violence, death, or destruction of property. However, this does not mean that the country was tranquil in the wake of the flawed election. In fact, several instances of human rights violations were reported in the period surrounding the election.⁸ In order to protect fundamental human rights, the international community intervened in both countries. Eventually, this effort bore fruit, as the disputing political parties signed a power-sharing

⁴ Dan Ottemoeller, *Popular Perceptions of Democracy*, 31 COMP. POL. STUD. 98, 99 (1998), available at <http://cps.sagepub.com.turing.library.northwestern.edu/cgi/reprint/31/1/98>. But see Heinz Jockers & Dirk Kohnert, *The Successful Ghana Election of 2008: A Convenient Myth*, 48 J. MOD. AFR. STUD. 95 (2010).

⁵ See, e.g., ANGL. CONST. 56, 66 (1992); MALI CONST. art. 29 (1992).

⁶ Virtually all observers have concluded that the 2007 Kenyan Presidential Election fell short of acceptable minimum standards for democratic elections. See, e.g., Commonwealth Observer Group, Kenyan General Election (Dec. 27, 2007), http://www.thecommonwealth.org/shared_asp_files/GFSR.asp?NodeID=174448 (last visited June 19, 2010) [hereinafter Commonwealth Observer Group]; European Union Election Observation Mission (EU EOM), Doubts About the Credibility of the Presidential Results Hamper Kenya’s Democratic Process, 1 (2007), available at

http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/afet-21jan08kenyaecomprelconclusio/afet-21jan08kenyaecomprelconclusions.pdf; THE INTERNATIONAL REPUBLICAN INSTITUTE ELECTION OBSERVATION MISSION FINAL REPORT, ADVANCING DEMOCRACY WORLDWIDE: KENYA PRESIDENTIAL, PARLIAMENTARY AND LOCAL ELECTIONS 34 (2007), available at <http://www.iri.org/sites/default/files/Kenya's%202007%20Presidential,%20Parliamentary%20and%20Local%20Elections.pdf>; Kenya Elections Domestic Observation Forum, Preliminary Press Statement and Verdict of 2007 Kenya’s General Elections (2007), available at <http://www.iedafrica.org/documents/KEDOF-statement-31-12-07.pdf>; Pan African Parliament Election Observer Mission, Statement to Kenya’s General Election Held on 27 December 2007 (2007), available at http://www.pambazuka.org/actionalerts/images/uploads/STATEMENT_OF_THE_PAN_AFRICAN_PARLIAMENT_ELECTION_OBSERVER_MISSION_TO_KENYA.pdf.

⁷ J.P.W.B McAuslan & Yash P. Ghai, *Constitutional Innovation and Political Stability in Tanzania: A Preliminary Assessment*, 4 J. MOD. AFR. STUD. 479, 492 (1966).

⁸ See *infra* Part IV.

agreement in Kenya in February 2008 and in Zimbabwe in September 2008.⁹ In the case of Kenya, commissions of inquiry were established to investigate the electoral process — the Independent Review Commission (“Kriegler Commission”)¹⁰ — and the human rights violations that occurred in the wake of the flawed election — Commission of Inquiry into the Post-Election Violence (“Waki Commission”).¹¹ Both commissions have reported their findings.¹²

15 The entire electoral process in many countries is “vulnerable”¹³ to fraud. Although most countries “rarely change” their electoral systems,¹⁴ this should not lead to complacency. Instead, those who seek democracy must fight with full force against practices that seek to undermine it. Several areas require legal reform, but this article focuses on three central aspects: management of elections, voting procedures, and resolution of electoral disputes. These issues are at the core of securing the fair and honest conduct of an election. They are also essential to any country that is serious about respecting, promoting, and protecting the fundamental right to vote. Reforms in these areas could enable states in Africa to strike a “successful balance between democratic participation on the one hand and governability on the other.”¹⁵ However, these reforms must have a real impact on the ground.¹⁶

16 Section II evaluates the central mandate of an Election Management Board (“EMB”), namely, to run elections. In both Kenya and Zimbabwe, officials of the EMB are directly appointed by the president. This section evaluates the qualifications and skills that these officials should possess as well as the proper size of an EMB. Section III reviews the procedures used to elect presidents in Kenya and Zimbabwe. Whereas in theory the process is straightforward, in reality it is fraught with difficulties, including inordinate delays in declaring poll results. Section IV reviews the issues surrounding political violence as well as intimidation and harassment of voters. In most democratic states, losing candidates can challenge the outcome of a presidential poll in domestic courts or tribunals. However, as Section V demonstrates, an independent judiciary is

⁹ Agreements on file with the author.

¹⁰ Authority of the Republic of Kenya, *The Commissions of Inquiry Act (Appointment of Commissions of Inquiry)*, KENYA GAZETTE SUPPLEMENT No. 1982, Mar. 14, 2008, at 525, available at http://www.comms.go.ke/Kriegler_IREC/Annex_1.A.pdf.

¹¹ Authority of the Republic of Kenya, *Commissions of Inquiry Act Commission of Inquiry Into the Post-Election Violence Following the December 2007 General Election*, KENYA GAZETTE SUPPLEMENT No. 4473, May 23, 2008, at 1249, available at http://www.dialoguekenya.org/docs/Gazette_Notice_CIPEV_May23.pdf.

¹² Independent Review Commission, *Report on the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007* (Sep. 17, 2008) [hereinafter Independent Review], <http://aceproject.org/regions-en/countries-and-territories/KE/reports/independent-review-commission-on-the-general/view>; 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* (Oct. 20, 2008), available at <http://www.dialoguekenya.org/docs/PEV%20Report.pdf> [hereinafter Commission of Inquiry].

¹³ Daniel Calingaert, *Election Rigging and How to Fight It*, 17 J. DEMOCRACY 138, 147 (2006).

¹⁴ Patrick Dunleavy & Helen Margetts, *Understanding Dynamics of Electoral Reform*, 16 INT’L POL. SCI. REV. 9, 10 (1995).

¹⁵ Gerardo Munck, *Democratic Stability and its Limits: An Analysis of Chile’s 1993 Elections*, 36 J. INTERAMERICAN STUD. WORLD AFF. 1, 2 (1994).

¹⁶ For a discussion of deploring electoral reforms that are designed to benefit the elite, see L. Shiu -Hing & Yu Wing Wat-Yat, *The Politics of Electoral Reforms in Hong Kong*, 39 COMMW. & COMP. POL. 98 (2001), available at http://pdfserve.informaworld.com.turing.library.northwestern.edu/10406_731207542_713999549.pdf.

required for a contested election to be resolved effectively. To conclude, Section VI contends that mere passage or amendment of law is not sufficient. Meeting international standards of democracy requires constant policing of the proposals this article sets out.

II. ELECTION MANAGEMENT BOARDS: EFFECTIVE GATE KEEPERS?

¶7 This section first evaluates the challenges the EMBs in Kenya and Zimbabwe faced in discharging their mandate. It then explores some of the reforms that could be adopted to ensure that EMBs function in accordance with the law.

A. Mandate and Independence

¶8 EMBs are public bodies that play an important role in securing, protecting, and promoting democracy in any state. As the South African Constitutional Court has stated, they implement “national legislation” on the “conduct of elections.”¹⁷ Their main functions include voter registration, education of voters, conducting the vote, counting and tallying votes, and declaring the results.

¶9 In most countries, the EMB is a permanent, specialized agency. This is advantageous for at least two reasons. First, elections are not a one-off affair. A formal declaration of a winner does not mark the end of a presidential election. Dissatisfied parties can challenge the results.¹⁸ In addition to the winning candidate, an effective petition should join the EMB in court proceedings. Failure to do this could give rise to a legal challenge, as the EMB implements any order a court may issue. Thus, the EMB should be given an opportunity to be heard. Second, the task of managing an election is quite involved. Significant time and resources are usually dedicated to the success of an election. In both Kenya and Zimbabwe, the EMB handles key pre-election tasks such as managing the voter roll and conducting voter education.¹⁹ For these reasons, it is not ideal to have a temporary board.

¶10 The EMB is thus a fundamental institution in the electoral process. The fact that it is charged with implementing the right to vote, which people often exercise in highly competitive circumstances, makes it susceptible to interference by, among others, presidential candidates and political parties. To guard against external influence, the constitutions of Kenya and Zimbabwe placed considerable emphasis on the independence of the EMB.²⁰ In both of these countries this independence was strengthened by the fact that its commissioners had five-year tenures.²¹ Based on these constitutional guarantees, one would expect the EMBs and the individual commissioners to be guided exclusively by the law in the discharge of their mandate.

¶11 However, despite these constitutional protections, the EMBs in both Kenya and Zimbabwe were vulnerable because those countries’ presidents appointed the members.²² The process of appointing members of the EMB goes to the heart of guaranteeing a free

¹⁷ *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC) at 894 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2001/23.pdf>.

¹⁸ See *infra* Part III.

¹⁹ CONSTITUTION, Art. 41(A) (2008) (Kenya); ZIMB. CONST. art. 61(4)(f) (1979).

²⁰ See CONSTITUTION, Art. 41(10) (2008) (Kenya); ZIMB. CONST. art. 61(5) (1979).

²¹ CONSTITUTION, Art. 41(4) (2008) (Kenya); ZIMB. CONST. sched. 1 (1979).

²² CONSTITUTION, Art. 41(1) (2008) (Kenya); ZIMB. CONST. art. 61 (1979).

and fair presidential election. “A unilateral appointment process is more likely to reduce the appearance of independence.”²³ Accordingly, the process should inspire confidence in the public that the board will discharge its mandate in accordance with the law. A “non-partisan” EMB contributes significantly toward guaranteeing an “honest” presidential election.²⁴ An objective institution could also promote the “transparency, accountability and effectiveness of electoral administration.”²⁵ It therefore becomes a matter of concern if the sitting president is also a candidate in the election, as was the case in both the Kenya election of 2007 and the Zimbabwe election of 2008. In cases where the entire process is deemed to be objective, such as the 2002 elections in Kenya, losers will concede, as they will have lost a fair battle.²⁶ By contrast, stolen presidential elections often trigger “widespread outrage.”²⁷ As the fallout from the 2007 Kenya election demonstrates, the consequences of a flawed presidential election are indeed severe.²⁸

¶12 The appointment of EMB members by the leader of a country is not in itself problematic. In fact, this process is used in many countries.²⁹ The challenge lies in ensuring that the EMB delivers an election that meets internationally acceptable standards. Toward this end, some attempts have been made in Zimbabwe to minimize the president’s influence over the appointment of the chairperson of the EMB by requiring him or her to consult the Judicial Service Commission (“JSC”).³⁰ However, this procedure raises several questions. In particular, the number of candidates that will be proposed for consideration for this position, and by whom, is unclear.³¹ There is also no guidance on the issues that must be discussed at the consultation. A further limitation lies in the fact that the president is not obligated to adopt the recommendations of the JSC. The constitution of Zimbabwe provides that, if the appointment of the chairperson is inconsistent with the recommendation of the JSC, the president will inform the senate “as soon as practicable.”³² However, the constitution is silent on the measures that the senate

²³ MARK FREEMAN, TRUTH COMMISSION AND PROCEDURAL FAIRNESS 134 (2006).

²⁴ David Lockmiller, *The Advisory Law Commission of Cuba*, 17 HISP. AM. J. 2, 4 (1937).

²⁵ Commonwealth Secretariat, Commonwealth Expert Team, *Sri Lankan Presidential Election 17 November 2005: Report of the Commonwealth Expert Team*, 30 (Nov. 22, 2005), http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/AC871F4B-5A17-4A57-AA39-31045BD21C61_SRI LANKA PRESIDENTIAL ELECTION 17 NOVEMBER 2005-REPORT OF THE COMMONWEALTH EXPERT TEAM.pdf.

²⁶ Independent Review Commission, *supra* note 12, at 33 (“An EMB’s success lies in how greatly it inspires public confidence in its role as an impartial manager and referee of elections.”); *see also*, Shumbana Karume, *Towards an Understanding of Contemporary Conflict in Zanzibar*, 27 ELECTORAL INST. S. AFR. OCCAS. 1 (2004), available at <http://www.eisa.org.za/PDF/OP27.pdf>.

²⁷ Mark Thompson & Philipp Kuntz, *Stolen Elections: The Case of the Serbian October*, 15 J. DEMOCRACY 159, 168 (2005).

²⁸ *See* Edwin Abuya, *Consequences of a Flawed Presidential Election*, 29 LEGAL STUD. 127 (2009).

²⁹ For instance, in the U.K. and in Australia, members of the EMB are appointed by the Queen and Governor-General, respectively. *See* The Electoral Commission, *Political Parties, Elections and Referendums Act 2000 Recommendations for Change* (2003), available at http://www.electoralcommission.org.uk/_data/assets/pdf_file/0003/63993/PPERA-report---Recommendations-for-change.pdf; Commonwealth Electoral Act, 2005, pt. II, div. 2, § 6 (Austl.), available at http://aceproject.org/ero-en/regions/pacific/AU/cwlthelectoral1918_wd02.pdf/view.

³⁰ ZIMB. CONST. art. 61(1)(a) (1979).

³¹ By contrast, other members are selected from a list of nine nominees, which the Committee on Standing Rules and Orders [CSRO] submits to the president. *Id.* at art. 61(1)(b).

³² *Id.*

may take once the president informs them. Moreover, the fact that the president appoints members of the JSC³³ creates a conflict of interest.³⁴

¶13 For the outcome of a presidential election to be respected, each individual member of the EMB not only must be neutral, but also must be seen as impartial. Some African states demanded an impartial body to run elections at the time of their independence.³⁵ Courts in Africa have also demanded impartiality. For instance, the Malawian Constitutional Court has argued that an EMB must be “proactive and independent.”³⁶ Absent these traits, it would be difficult for the results of the presidential poll to be widely accepted as free and fair. Both the Kenyan and Zimbabwean EMB fell short of these key requirements. Several commentators expressed doubts as to the ability of the EMB in Zimbabwe to be impartial, due to the close relationship between its members and the president.³⁷ Similar doubts apply to the Kenya situation, where the vice-chairperson of the EMB in the 2007 elections, Kihara Muttu, previously had acted as incumbent President Kibaki’s counsel.³⁸

¶14 The independence of the EMB is measured not only in terms of the appointment, status, and removal of its members,³⁹ but also according to each member’s past record. In Kenya and Zimbabwe, it is arguable that the past relationship between EMB officials and the president undermined the board’s ability to be impartial. Some critics may counter this argument by asserting that, although Muttu had been the president’s attorney, he was elected to the position of vice-chair by fellow commissioners.⁴⁰ Additionally, one could claim that there were twenty other commissioners⁴¹ to safeguard the democratic process. However, these claims overlook the fact that the perceived fairness of elections is based not only on how the EMB as an institution is perceived, but also on the extent to which individual commissioners are perceived to be neutral.⁴² Further, these claims fail to

³³ *Id.* at art. 90.

³⁴ See ZINBANI MAUENDENI ET AL., CONSOLIDATING DEMOCRATIC GOVERNANCE IN SOUTHERN AFRICA: BOTSWANA 18 (2007), available at <http://www.eisa.org.za/PDF/rr31.pdf> (“consolidation of democracy is not promoted when the overwhelming majority of members of [an EMB] are appointed by the president alone.”).

³⁵ See K. W. J. POST, THE NIGERIAN FEDERAL ELECTION OF 1959: POLITICS AND ADMINISTRATION IN A DEVELOPING POLITICAL SYSTEM 165 (1963).

³⁶ Republican Party v. Malawi Electoral Commission and Others (Constitutional Case No. 5), MWHC (2004), available at <http://196.211.206.107/malawilii/mw/cases/MWHC/2004/30.html>.

³⁷ Angus Shaw, *Zimbabwe’s Mugabe Faces Challenge to His Power*, SEATTLE POST-INTELLIGENCER, Mar. 27, 2008, at A9, available at http://www.seattlepi.com/national/356798_zimbabwe28.html (Zimbabwe’s EMB is “stacked with former and current military personnel loyal to Mugabe.”); *All Over Again: Human Rights Abuses and Flawed Electoral Conditions in Zimbabwe’s Coming General Elections*, 20 HUMAN RIGHTS WATCH 2(A), 36-39 (2008), available at <http://www.hrw.org/en/reports/2008/03/18/all-over-again>; Gabriel Shumba, *International Standards and the 2002 Presidential Election in Zimbabwe*, 10 ILSA J. INT’L & COMP. L. 95, 104-105 (2003-2004).

³⁸ See, e.g., *Kibaki v. Middle East Bank Ltd.*, (1990) eKLR (H.C.K.) (Kenya); *Abdul Karim Hassanaly v. Westco Kenya Ltd.*, (2003) eKLR (H.C.K.) (Kenya).

³⁹ ANNE AAKEN, INDEPENDENT ELECTORAL MANAGEMENT BODIES AND INTERNATIONAL ELECTION OBSERVER MISSIONS—ANY IMPACT ON THE OBSERVED LEVEL OF DEMOCRACY?: A CONCEPTUAL FRAMEWORK 13 (Univ. Haifa Separation of Powers: New Doctrinal Perspectives and Empirical Findings Conference, Working Paper, 2007), http://law.haifa.ac.il/events/events_files/Aaken%20EMBs%20Haifa%202007.PDF.

⁴⁰ CONSTITUTION, Art. 41(2) (2008) (Kenya).

⁴¹ *Id.* at Art. 41(1).

⁴² Data from Lesotho and Zambia affirm this contention. Roger Southall & Roddy Fox, *Lesotho’s General Election of 1998: Rigged or Rigueur?*, 37 J. MOD. AFR. STUD. 669, 688 (1999); Robert Molteno & Ian Scott,

account for the fact that it is the president who appoints EMB officials, notwithstanding the fact that other commissioners have a hand in appointing the vice-chairperson. Justice must not only be done, but also must be seen to be done. Accordingly, if there is any possibility that the EMB or an individual official is seen to be partial, it will likely cast doubt on the entire electoral process.

B. Strengthening Election Management Boards

1. Appointment of Officials

¶15 The success of an EMB depends on its “free acceptance as legitimate”⁴³ by citizens and observers. Fieldwork conducted in the United Kingdom has also found that “boosting public confidence” in the electoral process could “increase” voter participation as well as “deter those intent on committing voter fraud.”⁴⁴ The challenge for Kenya and Zimbabwe lies in restoring public confidence in the wake of the flawed presidential elections. This is not an easy task. There are no easy, quick solutions. Even so, practical steps must be taken to improve the current state of affairs. The objective should be to create an institution that is “active” and “involved.”⁴⁵

¶16 Guarding against election fraud, real or perceived, requires a change in the mode of appointing electoral commissioners. Many election observers have noted this.⁴⁶ Several studies have also found a direct correlation between the mode of appointing officials and their ability to discharge their role independently.⁴⁷ In the context of elections, the mode of appointing EMB officials has a bearing on the board’s ability to discharge its function. As the Kriegler Commission affirmed, staff recruitment has a ‘significant impact on the quality’ of an election and the “credibility” of the EMB.⁴⁸ Minimizing concerns over credibility requires a radical shift in the process of appointing members of the EMB. The power to appoint officials needs to be redistributed if electoral fraud is to be checked.

¶17 Events in Kenya underscore the importance of incorporating challenges to the appointment process into a formal legal framework. In 1997, the government of Kenya agreed to involve the opposition parties in the selection of EMB officials.⁴⁹ Although this

The 1968 General Election and the Political System, in *POLITICS IN ZAMBIA* 155, 157-58 (William Turdoff ed., 1974).

⁴³ Richard Soudriette & Andrew Ellis, *Electoral Systems Today: A Global Snapshot*, in *ELECTORAL SYSTEMS AND DEMOCRACY* 16, 16 (Larry Jay Diamond & Marc F. Plattner eds., 2006).

⁴⁴ The Electoral Commission, *The Electoral Fraud (Northern Ireland) Act 2002: An Assessment of Its First Year in Operation* 15 (Dec. 2003), available at <http://cain.ulst.ac.uk/issues/politics/election/electoralcommission1203.pdf>.

⁴⁵ *New Nat’l Party of S. Afr. v Gov’t of RSA* 1999, (5) BCLR 489 (CC) at 5156 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/1999/5.pdf>.

⁴⁶ See, e.g., Commonwealth Observer Group, *supra* note 6, at 9; Commonwealth Secretariat, *Report of the Commonwealth Expert Team on Antigua and Barbuda General Election 23 March 2004* 26, (Mar. 28, 2004), available at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BF3B45C53-F1A0-4557-873D-46EFCBBEE90E%7D_FinalReportOfTheCETAntiguaAndBarbuda.pdf.

⁴⁷ Edwin Abuya, *Refugee Status Determination in Australia: Breaking All the Rules*, 25 LIVERPOOL L. REV. 221, 225-229 (2004); Edwin Abuya & George Mukundi, *Assessing Asylum Claims in Africa: Meeting or Missing Standards*, 53 NETH. INT’L L. REV. 171, 190-96 (2006).

⁴⁸ Independent Review Commission, *supra* note 12, at 84. Research on elections in post-apartheid South Africa has drawn a similar conclusion. See Jorgen Elkit & Andrew Reynolds, *The Impact of Election Administration on the Legitimacy of Emerging Democracies: A New Comparative Politics Research Agenda*, 40 COMMW. & COMP. POL. 86, 108 (2002).

⁴⁹ Inter-Party Parliamentary Group Recommends Constitutional Administrative Reforms (Kenya Television

decision did not lead to any amendment to the national law, the formula was used in 1997 and 2002.⁵⁰ One might have expected the government to follow this practice in subsequent elections, but when the Kibaki administration assumed power in 2002, it refused to do so, despite the fact that Kibaki had firmly supported this selection method as leader of the opposition in 1997.⁵¹

¶18 Although there may be no one correct method for appointing EMB officials, there are a number of alternatives. Overall, the process should divest power from a single individual. In his work that reviews elections in nineteenth century France, Frederick Artz contends that it was “bad practice” for the King to appoint EMB officials.⁵² Several works on democracy in Africa⁵³ and elsewhere⁵⁴ have also underscored the importance of having a broad-based, as opposed to unilateral, appointing authority. Indeed, the unilateral appointment of EMB officials is undesirable in any democratic state. Further, the selection process must be fair and free from any external influence. The underlying objective should be to create an EMB that is not only independent, but also is seen to be independent. Courts and commentators share this view. For instance, the High Court of Kenya has argued that the constitution requires the EMB to be “transparent” and “accountable.”⁵⁵ The Kriegler Commission also noted that one of the criteria for evaluating an EMB is its ability to “assert its independence.”⁵⁶

¶19 There are a number of routes that could be taken to restore confidence in and accord effective independence to an EMB. Generally speaking, one of two processes could be employed— a political process or a mixed process. Under the first alternative, EMB members could be appointed jointly by the president and the official leader of opposition, as is the requirement in Trinidad and Tobago.⁵⁷ In December 2008, the Constitution of Kenya was amended to pave the way for such an appointment process.⁵⁸ This process is ideal for countries with two political parties. However, in countries where

Network broadcast Sept. 11, 1997).

⁵⁰ See, e.g., Eric Shimoli, *10 New Faces in Cheson Poll Team*, DAILY NATION, Oct. 31, 1997 (on file with author); *Moi Extends Terms of Electoral Commission of Kenya Commissioners*, E. AFR. STANDARD, Oct. 25, 2002 (on file with author).

⁵¹ *IPPG Deal Returns to Haunt Kibaki*, STANDARD, Jan. 12, 2007; David Mugonyi & Bernard Namunane, *Opposition Leaders Threaten Mass Action over Poll Team*, DAILY NATION, Jan. 13, 2007; Independent Review Commission, *supra* note 12, at 31.

⁵² Frederick Artz, *The Electoral System in France During the Bourbon Restoration, 1815-30*, 1 J. MOD. HIST. 205, 209 (1929).

⁵³ David Harris, *From “Warlord” to “Democratic” President: How Charles Taylor Won the 1997 Liberian Elections*, 37 J. MOD. AFR. STUD. 431, 441 (1999); David Pottie, *Electoral Management and Democratic Governance in Southern Africa*, 28 POLITIKON 133 (2001); Emmanuel Gyimah-Boadi, *Managing Electoral Conflicts: Lessons from Ghana*, in ELECTIONS AND CONFLICT MANAGEMENT IN AFRICA 101, 114 (Timothy D. Sisk & Andrew Reynolds eds., 1998).

⁵⁴ Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 973-84 (2005); Frank Emmert et al., *Trouble Counting Votes?: Comparing Voting Mechanisms in the United States and Selected Other Countries*, 41 CREIGHTON L. REV. 3, 24-6 (2007); Commonwealth Observer Group, *St. Kitts and Nevis General Election 29* (Oct. 24, 2004), available at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B5972135A-B249-4CA4-B21E-A84996267327%7D_St%20KittsandNevisReport%20_without%20annexes.pdf.

⁵⁵ *Electoral Comm'n of Kenya v. Att'y Gen.*, (2008) 3 K.L.R. 596, 604 (H.C.K.) (Kenya).

⁵⁶ Independent Review Commission, *supra* note 12, at 33.

⁵⁷ CONST. OF THE REP. OF TRINIDAD & TOBAGO ACT § 71(3). Cf. John Nagle, *How Not to Count Votes*, 104 COLUM. L. REV. 1732, 1743-44 (2004) (contending that the evolution of the electoral process in the U.S. suggests that a similar method was once used there).

⁵⁸ The Constitution of Kenya Review Act, (2008) Cap. 3A § 2. (Kenya).

there are more than two parties, this method is inappropriate, as some constituencies could be excluded from the EMB. For this method to work effectively in multi-party states, all registered parties must be allowed to participate in the appointment process, as was the situation in Kenya in 1997 and 2002.

¶20 Some critics have cast doubt on this model. For example, in its review of the 2006 elections in Guyana, the Commonwealth Observer Group argued that it “does not work”⁵⁹ because it fails to inspire public confidence in the electoral body.⁶⁰ However, this position is difficult to maintain because it is not supported by any hard evidence. On the contrary, as the former chairperson of Kenya’s EMB, Samuel Kivuitu, argued, this process can give the electoral body “credibility” and “boost confidence” in the “eyes” of the public.⁶¹ Indeed, evidence from several countries, including Bhutan,⁶² Botswana,⁶³ Georgia⁶⁴ and Lesotho,⁶⁵ suggests that an all-inclusive appointment process could minimize doubts over the impartiality of the EMB as well as contribute to its success.

¶21 As a second alternative, parliament, as the people’s representative, could be involved in the selection process. In Namibia, Uganda, and Zambia, EMB members are appointed by the president, with the approval of Parliament.⁶⁶ It is reasonable to assume that, if there is any disagreement in parliament on the nomination of any individual, the matter will be put to a vote, and the decision of the majority will prevail.⁶⁷ This model appears equitable on its face. However, it is likely that the party with the majority of seats in parliament would invariably have its way.⁶⁸ In order to address this concern, the civil society could also be involved in the selection process, as is the situation in Mozambique.⁶⁹

¶22 The third alternative follows the model that is used in Kenya to nominate members of parliament⁷⁰ and was used in ancient Greece and Rome to appoint election officials.⁷¹

⁵⁹ Commonwealth Observer Group, *Guyana General and Regional Elections* 59 (Aug. 28, 2006), available at http://www.thecommonwealth.org/Shared_ASP_Files/UploadedFiles/0AD0B937-FD40-456B-8495-EDB265E8E806_GuyanaCogReport.pdf.

⁶⁰ *Id.* at 16.

⁶¹ Gakuu Mathenge, *Election Chiefs Warn of 2007 Election Crisis*, DAILY NATION, July 16, 2006, available at <http://www.nation.co.ke/News/-/1056/133972/-/rv68to/-/index.html>.

⁶² EU Election Observation Mission, *Bhutan: Final Report on the National Assembly Elections* 11 (Mar. 24, 2008), available at

http://ec.europa.eu/external_relations/human_rights/eu_election_observ/bhutan/final_report_en.pdf.

⁶³ DAVID SEBUDUBUDU & BERTHA Z. OSEI-HWEDIE, DEMOCRATIC CONSOLIDATION IN SADC: BOTSWANA’S 2004 ELECTIONS 11 (2005).

⁶⁴ See *Georgian Labour Party v. Georgia*, App. No. 9103/04, 45 Eur. H. R. Rep. 173 (S.E. 12), 175 (2007).

⁶⁵ TUMELO TSIKOANE ET AL., DEMOCRATIC CONSOLIDATION IN SOUTHERN AFRICA: LESOTHO 19 (2007).

⁶⁶ *Electoral Act of 1992*, 471 GOV’T GAZETTE REP. NAMIB. 5 (Aug. 31, 1992); UGANDA CONST. 5, art. 60(1) (1995); The Electoral Commission Act, § 4(3) (1996) (Zambia). A panel, with broad-based membership, should be engaged to recommend nominees for consideration by Parliament. In South Africa, for instance, the selection panel consists of the president of the constitutional court, the Public Protector and representatives of the Human Rights Commission and Commission of Gender Equality. See Electoral Commission Act 51 of 1996, sec. 6(3) (S. Afr.).

⁶⁷ See also Electoral Commission Act 51 of 1996, sec. 6(2)(c) (S. Afr.) (EMB officials will be appointed upon recommendation by “a majority of the members of the National Assembly”).

⁶⁸ The Ugandan government, for instance, passed contentious laws when it had a majority of seats in parliament. In 2005, it amended the constitution, through the Constitution (Amendment) Act, to eliminate presidential term limits. Similar trends have been noted elsewhere. See TSIKOANE ET AL., *supra* note 65, at 31.

⁶⁹ Electoral Law, No. 20/2002, art. 5(1)(a) (2002) (Mozam.).

⁷⁰ CONSTITUTION, art. 33 (2008) (Kenya).

Under this model, the EMB members would be appointed from a list of names that political parties have submitted. Parliament, not the president, would approve the appointees. Political parties would nominate members based on the number of seats they have in parliament. Although this method tilts the balance in favor of the party with the majority,⁷² it may be most practical, particularly in power-sharing arrangements, which often make it difficult to separate the government from the opposition. Further, this mode of appointing officials is a “powerful safeguard” of the right to vote.⁷³ As all political parties are involved in establishing the rules of the game, there is a high likelihood that the contestants will abide by them.

¶23 Members of the EMB could also be appointed through a mixed process. A competitive procedure to recruit staff could be used. Under this method, parliament would engage an independent recruitment agency, selected through a competitive bidding process, to source suitable candidates to serve on the board. Parliament could then affirm the list of nominees. This process has been utilized in Namibia since 2000.⁷⁴ Kenya, too, has embraced this approach since the end of 2008.⁷⁵ As several commentators contend, this mode of appointment could enhance public confidence in the EMB.⁷⁶ It could work in both power-sharing and non-power-sharing environments. Regardless, for the EMB to receive broad-based support, the entire appointment framework must be transparent.

2. Qualifications for Officials

¶24 Measures that seek to strengthen democracy in Africa must also consider the knowledge, experience and skills of EMB members.⁷⁷ Habel Nyamu, a former Electoral Commissioner in Kenya, contends that the ‘starting point’ for creating an objective EMB lies in selecting officials who possess “high qualifications and character” and are “beyond reproach in relation to their past public life.”⁷⁸ These criteria, as the Krieger Commission noted, could promote “integrity” on the part of EMB officials as well as “a sense of judgment and mettle to referee a political contest without being unduly influenced by political pressure.”⁷⁹

¶25 A number of steps have been taken both in Kenya and Zimbabwe to prescribe minimum criteria for officials. Under both regimes, EMB officials must be citizens.⁸⁰ In addition, the chairperson is required to be a judge or an eligible judge—a person who has

⁷¹ See E.S. STAVELY, GREEK AND ROMAN ELECTIONS AND VOTING 38-9 (1972); LILY TAYLOR, PARTY POLITICS IN THE AGE OF CAESAR 60 (1949).

⁷² ELECTORAL INSTITUTE OF SOUTHERN AFRICA, MALAWI: PARLIAMENTARY AND PRESIDENTIAL ELECTION 10 (2004), available at <http://www.eisa.org.za/PDF/m04eomr.pdf>.

⁷³ Brett Fairbairn, *Authority vs. Democracy: Prussian Officials in the German Elections of 1898 and 1903*, 33 HISTORICAL J. 811, 816 (1990).

⁷⁴ DEBIE LEBEAU & EDITH DIMA, MULTIPARTY DEMOCRACY AND ELECTIONS IN NAMIBIA 8-9 (2005).

⁷⁵ CONSTITUTION, art. 41, § (3) (2008) (Kenya).

⁷⁶ *Id.*

⁷⁷ Research on the evolution of elections in the United States supports this position. See John Reynolds, *A Symbiotic Relationship: Vote Fraud and Electoral Reform in the Gilded Age*, 17 SOC. SCI. HIST. 227, 243-247 (1993).

⁷⁸ Habel Nyamu, *Managing Elections in Kenya*, in THE POLITICS OF TRANSITION IN KENYA: FROM KANU TO NARC 265, 272 (Walter Oyugi et al. eds., 2003).

⁷⁹ Independent Review Commission, *supra* note 12, at 30.

⁸⁰ CONSTITUTION, art. 41 (1A) (2008) (Kenya); ZIMB. CONST. art. 82(1) (2000).

been in legal practice for at least seven years.⁸¹ This requirement applies in a number of African and non-African states.⁸² However, it could be eliminated without compromising standards. Although elections involve legal issues, that does not justify the requirement for the head of the EMB to hold a legal qualification. In the United Kingdom, for example, despite the absence of such a requirement, the EMB has conducted elections that meet international standards.

¶26

Additional requirements exist in Zimbabwe. Individuals with criminal records,⁸³ individuals who have been adjudged bankrupt,⁸⁴ and individuals who have a financial interest in the operations of the EMB⁸⁵ are excluded from assuming office. It is imperative for any electoral regime to include similar provisions. The 2008 amendment to the Kenyan constitution also sought to exclude certain categories of persons from holding office: persons who are not of high moral character and integrity,⁸⁶ members of the armed forces,⁸⁷ and individuals affiliated to political parties.⁸⁸ Academic qualifications were also introduced. EMB officials are now required to hold a degree from a “recognized” university.⁸⁹ Doubtless, these stipulations are designed to safeguard the independence⁹⁰ and honor of the EMB. In the absence of these requirements, as is the situation in a number of African states, there is a risk that the EMB will be staffed by persons “lacking any professional experience or expertise in election management or other skills that could contribute to the evenhanded management of an electoral process.”⁹¹ It is thus imperative for the electoral regime in Zimbabwe to embrace similar provisions. However, the list of preconditions in both countries is limited as it excludes a number of core skills, qualifications, competencies, and values, which members of any EMB must hold. An ideal candidate should possess:

- Solid knowledge of the national languages;
- Superior verbal and written communication skills;
- Strong analytical, problem solving, thinking and writing abilities;
- Advanced computer skills;
- Excellent knowledge of national and international election standards;
- Consistent high levels of attention to detail;

⁸¹ *Id.*

⁸² See Commonwealth Electoral Act, 1918, § 6(4) (Austl.); TANZ. CONST. art. 74(1) (1977).

⁸³ ZIMB. CONST. First Schedule, §§ 2(1)(c)-(d) (2000).

⁸⁴ *Id.* § 2(1)(c).

⁸⁵ *Id.* § 2(1)(b).

⁸⁶ CONSTITUTION, art. 41(4)(c) (2008) (Kenya). See also UGANDA CONST. art. 60(2) (1995) (requiring members of the EMB to be persons of “high moral character” and “proven integrity”); Electoral Law, (2002) No. 20/2002, art. 4(2) (Mozam.) (requiring EMB officials to be “professionally qualified and with acceptable moral values”).

⁸⁷ CONSTITUTION, art. 41(3) (2008) (Kenya).

⁸⁸ *Id.* art. 41(1)(6)(a)-(c). This is a requirement in many countries. See UGANDA CONST. art. 60(5)(c) (1995); Electoral Commission Act 51 of 1996, sec. 6(2)(b) (S. Afr.).

⁸⁹ CONSTITUTION, art. 41(4)(b) (2008) (Kenya).

⁹⁰ Several critics have made this point. See Wole Olaleye, *Administration of Elections—A Persistent Struggle of Institutionalisation and Consolidation*, in DILEMMAS OF POLITICAL TRANSITION 36, 41 (Shumbana Karume ed., 2004); Heather Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 ELECTION L. J. 184, 194 (2007).

⁹¹ Independent Review Commission, *supra* note 12, at 31.

- High standards of professional and personal integrity;
- Proven organizational and time management skills with a deadline focus;
- Confidence to work with a wide range of knowledgeable and demanding persons; and
- Ability to work independently and as a member of a team.

3. Size of the EMB

¶27 The size of the EMB is the third issue of concern. As the saying goes, two heads are better than one.⁹² As Table I (below) shows, there is a great variance in the size of EMBs among countries. The data in Table I, which is representative of global trends, shows that the average number of EMB members is approximately eight. The size of the EMB that ran the 2008 presidential election in Zimbabwe was consistent with this figure. By contrast, its Kenyan counterpart that managed the 2007 presidential election, which had twenty-two members, was one of the largest in the world.

Table I

Country	EMB Members
Australia ⁹³	3
Belize ⁹⁴	5
Bostwana ⁹⁵	7
Brazil ⁹⁶	7
Burundi ⁹⁷	5
Cambodia ⁹⁸	9
Chile ⁹⁹	5
Colombia ¹⁰⁰	9
Cote d'Ivoire ¹⁰¹	15
Egypt ¹⁰²	10
Ecuador ¹⁰³	7
Ghana ¹⁰⁴	7

⁹² For the advantages of having more than one member in the EMB, see *S.S. Dhanoa v. Union of India & Others*, (1991) 9 A.I.R. 1745, 1754-55.

⁹³ Commonwealth Electoral Act, 1918, § 6(2) (Austl.).

⁹⁴ BELIZE CONST. art. 88(1) (1981).

⁹⁵ BOTS. CONST. art. 65A(1) (1966).

⁹⁶ CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 119 (2010) (Braz.).

⁹⁷ POST-TRANS. INTERIM CONST. REP. BURUNDI art. 90 (1992).

⁹⁸ See Cambodian National Election Committee, <http://www.ncelect.org.kh/English/Home.htm> (last visited May 5, 2010).

⁹⁹ CHILE CONST. art. 95 (2005).

¹⁰⁰ COLOM. CONST. art. 264 (1991).

¹⁰¹ Loi Portant Creation de la Commission Electoral Independante, art. 5 (Cote d'Ivoire), <http://endj.ci/CEI.htm> (last visited June 21, 2010).

¹⁰² EGYPT CONST art. 76 (2007).

¹⁰³ ECUADOR CONST. art. 209 (2008).

Guyana ¹⁰⁵	7
Israel ¹⁰⁶	9
Kazakhstan ¹⁰⁷	7
Kenya ¹⁰⁸	22
South Korea ¹⁰⁹	9
Malta ¹¹⁰	9
Liberia ¹¹¹	5
Moldova ¹¹²	9
Nigeria ¹¹³	13
Netherlands ¹¹⁴	7
Pakistan ¹¹⁵	5
Peru ¹¹⁶	5
Philippines ¹¹⁷	7
Rwanda ¹¹⁸	7
Russia ¹¹⁹	15
Sri Lanka ¹²⁰	5
South Africa ¹²¹	5
Sudan ¹²²	9
Trinidad and Tobago ¹²³	5
Uganda ¹²⁴	7
United Kingdom ¹²⁵	9
United States ¹²⁶	6

¹⁰⁴ Ghana Const. (Promulgation) Law, art. 43(1) (1992).

¹⁰⁵ GUYANA CONST. art. 161 (1995).

¹⁰⁶ Knesset Elections Law (Consolidated Version), 5729-1969, 23 LSI 113-14 (1968-69) (Isr.).

¹⁰⁷ OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, REPUBLIC OF KAZAKHSTAN OSCE/ODIHR ELECTION OBSERVATION MISSION REPORT 6 (2004), *available at* http://www.osce.org/documents/odihr/2004/12/3990_en.pdf.

¹⁰⁸ CONSTITUTION, art. 41(1) (2008) (Kenya).

¹⁰⁹ S. KOREA CONST., art. 114(2).

¹¹⁰ General Elections Act, art. 7(2) (1991) (Malta).

¹¹¹ New Election Law, art. 2(1) (1986) (Liber.).

¹¹² Moldova Electoral Code, No. 1381-XIII, art. 16(2) (1997).

¹¹³ CONSTITUTION, Schedule 3, Art. 14(1) (1991) (Nig.).

¹¹⁴ Elections Act, ch. A, § A(2)(3) (1989) (Neth.).

¹¹⁵ PAK. CONST. art. 218(2)(a)-(b) (1962).

¹¹⁶ PERU CONST. art. 179 (1993).

¹¹⁷ CONST. (1986), Art. IX(A)(1)(1), (Phil.).

¹¹⁸ Law Relating to the Organization and Functioning of the Electoral Commission, No. 31/2005, art. 7 (2005) (Rwanda).

¹¹⁹ On Basic Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum 1997, No. 67-FZ, art. 22(2).

¹²⁰ SRI LANKA CONST. art. 103 (1) (1978).

¹²¹ Electoral Commission Act 51 of 1996, sec. 6(1) (S. Afr.).

¹²² SUDAN INTERIM NAT'L CONST. art. 141, § (1) (2005).

¹²³ TRIN. & TOBAGO CONST. § 71(2) (1976).

¹²⁴ UGANDA CONST. art. 60(1) (1995).

¹²⁵ Political Parties, Elections and Referendums Act, 2000, c. 41, § 1(3) (Eng.).

¹²⁶ 2 U.S.C. § 437c(a) (2000).

Uruguay ¹²⁷	9
Zambia ¹²⁸	5
Zimbabwe ¹²⁹	6

¶28 Some may claim that the Kenyan EMB required twenty-two members to manage some fourteen million registered voters effectively.¹³⁰ However, this assertion fails when one considers recent elections in Africa and elsewhere. For instance, in the 2007 elections in Australia and Nigeria, there were some fourteen¹³¹ and thirty-five¹³² million voters, respectively. The Australian example in particular shows that the solution does not lie in having a large EMB, but rather in ensuring that it is independent, efficient, fair, and accurate. In keeping with global trends, the Kenya constitution was amended at the end of 2008 to bring the number of EMB members in line with the international average.¹³³ Thus, the new interim EMB consists of nine members.¹³⁴ One would hope that the resources that will be saved through this initiative¹³⁵ will be re-directed toward measures that seek to promote democracy, such as voter education and training and investment in technology that will enhance the tallying and reporting of votes, as evaluated in Section III.

III. THE ELECTORAL PROCESS: GOOD FROM AFAR, FAR FROM GOOD

¶29 The second area of needed reform relates to voting procedures. Individuals wishing to vie for the presidency in any country must meet certain criteria. Under the laws of Kenya and Zimbabwe, a person must be a citizen.¹³⁶ In addition, he or she must meet prescribed age requirements.¹³⁷ Moreover, each candidate must be a registered voter.¹³⁸ Certain requirements also exist with regard to winning the presidency. As in many countries, the winner-take-all or first past the post rule applies. Under this electoral system, the winning candidate is the one who obtains the most votes.¹³⁹ There is an additional hurdle for an aspiring candidate in Kenya in particular: he or she must also obtain a set quota (twenty-five percent) of the votes in five of the eight provinces.¹⁴⁰ This rule is based on the argument that a person who is elected president must also receive

¹²⁷ URU. CONST. art. 324 (2004).

¹²⁸ The Electoral Commission Act, (1996) § 4(2) (Zambia).

¹²⁹ Electoral Act 2008 § 6(2) (Zimb.).

¹³⁰ Electoral Commission of Kenya, Registered Voters by Constituency (2007), *available at* http://static.scribd.com/docs/2g1csb018zj4l.swf?INITIAL_VIEW=width.

¹³¹ Australian Election Commission, General Information: Enrollment by State, <http://results.aec.gov.au/13745/Website/GeneralEnrolmentByState-13745.htm> (last visited May 5, 2010).

¹³² Independent National Election Commission, Elections 2007: Results for Presidency Presidential Elections, http://www.inecnigeria.org/election/show_index_result.php?ele_id=2804 (last visited May 5, 2010).

¹³³ Independent Review Commission, *supra* note 12, at 49.

¹³⁴ CONSTITUTION, Art. 41(1) (2008) (Kenya).

¹³⁵ *See* Independent Review Commission, *supra* note 12, at 43 (estimating that it costs the Kenyan tax payer KShs 500 million [circa UK £ 4.5 million] to pay salaries for EMB officials for five years).

¹³⁶ ZIMB. CONST. art.28(1)(a) (2008); CONSTITUTION, art. 5(2)(a) (2008) (Kenya).

¹³⁷ ZIMB. CONST. art. 28(1)(b) (2008); CONSTITUTION, art. 5(2)(b) (2008) (Kenya).

¹³⁸ CONSTITUTION art. 5(2)(c) (2008) (Kenya).

¹³⁹ Electoral Act § 110(3) (2008) (Zimb.); CONSTITUTION, Art. 5(3)(f) (2008) (Kenya).

¹⁴⁰ CONSTITUTION, Art. 5(3)(f) (2008) (Kenya).

broad-based support. Herein lies a fundamental difference between the processes in the two countries.

¶30 Although the procedure for electing a president appears straightforward and transparent in theory,¹⁴¹ actual practice paints a different picture. Several problems occurred in both Zimbabwe and Kenya, including inordinate delays in communicating the outcome.

A. Legal Framework

¶31 Multiple procedures dictate the voting process in Kenya and Zimbabwe. For the purpose of national elections, both countries are divided into constituencies.¹⁴² Within each constituency, there are several polling stations.¹⁴³ Ballot papers are issued blank, and voters are required to check a box for their preferred candidate. Eligible voters are required to cast ballots at the polling station on an appointed day. Illiterate and blind voters normally receive assistance.¹⁴⁴ To ensure that only qualified voters participate in the process, identity checks are conducted to verify a voter's eligibility.¹⁴⁵ There are no provisions in both countries for early voting¹⁴⁶ or voting by proxy. Unlike the situation in Kenya, eligible voters can cast their votes by post in Zimbabwe.¹⁴⁷ As the case in the pre-independent period,¹⁴⁸ voting is by secret ballot in both states. Voter turnout in the Kenyan presidential election was decent. It is estimated that, of the fourteen million registered voters, some ten million (seventy-one percent) participated in the 2007 presidential election.¹⁴⁹ In Zimbabwe, the turnout was much lower. Of the six million registered voters, 2.5 million (forty-three percent) voted in the first round of the presidential election.¹⁵⁰

¶32 At the close of each polling station, the sealed ballot boxes are opened and emptied, and the votes are counted.¹⁵¹ Once all the votes have been counted, the presiding official of the EMB announces the outcome to those at the polling station.¹⁵² In addition, the results must be affixed outside the polling station.¹⁵³ Results from all polling stations are then sent to one central place in the constituency for tallying.¹⁵⁴ Agents of political parties

¹⁴¹ See also W.J.M. MACKENZIE, *FREE ELECTIONS: AN ELEMENTARY TEXTBOOK* 141 (1958) (describing the tallying of votes as the "easiest part of the elections to keep honest").

¹⁴² CONSTITUTION, Art. 42 (2008) (Kenya); ZIMB. CONST. art. 61(4)(h1) (2008).

¹⁴³ Presidential and Parliamentary Elections Regulations of Kenya, (2007) Cap. 7 Sub. Leg. § 6; Electoral Act § 51 (2008) (Zimb.).

¹⁴⁴ See, e.g., Electoral Act §§ 59-60 (2008) (Zimb.).

¹⁴⁵ See Presidential and Parliamentary Elections Regulations of Kenya, (2007) Cap. 7 Sub. Leg. § 33.

¹⁴⁶ See G.F. Engholm, *African Elections in Kenya, March 1957*, in *FIVE ELECTIONS IN AFRICA; A GROUP OF ELECTORAL STUDIES*, 391, 447 (W. J. M. Mackenzie & Kenneth Robinson eds., 1960) (noting this mode of voting was available in pre-colonial Kenya).

¹⁴⁷ See Electoral Act §§ 71-81 (2008) (Zimb.).

¹⁴⁸ See GEORGE BENNETT & CARL ROSBERG, *THE KENYATTA ELECTION: KENYA 1960-1961* 72-79 (1961).

¹⁴⁹ Office of the Government Spokesperson, *Election Results 2007*, <http://www.communication.go.ke/elections/default.asp> (last visited May 5, 2010).

¹⁵⁰ See Electoral Institute of Southern Africa, *Zimbabwe: 2008 Presidential Election Results - First Round*, <http://www.eisa.org.za/WEP/zim2008results5.htm> (last visited May 5, 2010).

¹⁵¹ Electoral Act §§ 62-63 (2008) (Zimb.).

¹⁵² Presidential and Parliamentary Elections Regulations of Kenya, (2007) Cap. 7 Sub. Leg. § 40; Electoral Act § 64(1)(e) (2008) (Zimb.).

¹⁵³ Electoral Act § 64(1)(e) (2008) (Zimb.).

¹⁵⁴ *Id.* at § 64(2); Presidential and Parliamentary Elections Regulations of Kenya, (2007) Cap. 7 Sub. Leg.

are allowed to monitor the process at the counting places on behalf of their candidates.¹⁵⁵ The assumption is that if there are any anomalies in the counting process, those agents will point them out. Depending on the size of the constituency, vote tallying can take anywhere from a few hours to a full day. Once all the votes have been counted, the Returning (Kenya) or Presiding (Zimbabwe) Officer announces the results to those at the tallying hall.¹⁵⁶ However, unlike at the polling station, these results are not posted. The declaration of the results at the national level is also made in public. The formal announcement is made at the EMB office in Nairobi, Kenya¹⁵⁷ or in Harare, Zimbabwe.

¶33 The top two candidates in the 2007 Kenyan presidential election, Kibaki and Odinga (see Table II), met all the legal requirements for election as president. By contrast, none of the presidential candidates in Zimbabwe garnered over fifty percent of the votes, as required for victory. As Table III shows, Morgan Tsvangirai, the Movement for Democratic Change (“MDC”) candidate, obtained the highest number of votes cast, but this was insufficient for him to win the presidency. He received about forty-eight percent of the votes, narrowly missing the mark. His closest rival, Robert Mugabe, of the Zimbabwe African National Union-Patriotic Front (“ZANU-PF”), obtained just over forty percent of the total votes cast. Since no candidate met the fifty percent requirement, a run-off election was conducted between Mugabe and Tsvangirai.¹⁵⁸ As Table IV shows, Mugabe “won” the run-off by an overwhelming majority. This issue is discussed further in Section III.

Table II ¹⁵⁹

Results of the 2007 Presidential Election in Kenya		
Candidate	Party	Number of Votes
Mwai Kibaki	Party of National Unity	4,578,034
Raila Odinga	Orange Democratic Movement	4,352,860
Kalonzo Musyoka	Orange Democratic Movement-Kenya	879,899
Ngacha Karani	Kenya Patriotic Trust Party	21,168
Pius Muiru	Kenya People’s Party	9,665
Nazlin Omar	Workers Congress Party	8,624
Kenneth Matiba	Saba Saba Asili	8,049
David Waweru	Chama Cha Uma Party	5,976
Nixon Kukubo	Republican Party of Kenya	5,926

§ 35A(5)(d).

¹⁵⁵ Electoral Act §§ 55(2)(b), 62(2)(b) (2008) (Zimb.); Presidential and Parliamentary Elections Regulations of Kenya, (2007) Cap. 7 Sub. Leg. §§ 23(1)(a), 35(4)(c).

¹⁵⁶ Presidential and Parliamentary Elections Regulations of Kenya, (2007) Cap. 7 Sub. Leg. § 40; Electoral Act § 64(1)(e) (2008) (Zimb.).

¹⁵⁷ Presidential and Parliamentary Elections Regulations of Kenya, (2007) Cap. 7 Sub. Leg. § 41.

¹⁵⁸ Electoral Act § 110(4) (2008) (Zimb.); CONSTITUTION, Art. 5(4)(d) (2008) (Kenya).

¹⁵⁹ See Office of the Government Spokesperson, Election Results 2007, <http://www.communication.go.ke/elections/default.asp> (last visited May 5, 2010).

Total	9,870,201
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Table III¹⁶⁰

Results of the 2008 Presidential Election in Zimbabwe (First Round)			
Candidate	Party	Number of Votes	Percentage
Morgan Tsvangirai	Movement for Democratic Change	1,195,562	47.87
Robert Mugabe	Zimbabwe African National Union-Patriotic Front	1,079,730	43.24
Simba Makoni	Independent	207,470	8.31
Langton Towungana	Independent	14,503	0.6
Total		2,497,265	

Table IV¹⁶¹

Results of the 2008 Presidential Election in Zimbabwe (Run-Off)			
Candidate	Party	Number of Votes	Percentage
Robert Mugabe	Zimbabwe African National Union-Patriotic Front	2,150,269	90.2
Morgan Tsvangirai	Movement for Democratic Change	233,000	9.8
Total		2,383,269	

B. *Actual Practice: Inordinate Delays in Declaring Poll Results*

¶34

It is unrealistic to prescribe a specific timeline within which the constituency results must be transmitted because the number of voters is not distributed evenly. In practice, unforeseen challenges normally arise within constituencies or polling centers on the day of voting, which can make it difficult to meet a prescribed deadline. The laws in Kenya and Zimbabwe appear to recognize this state of affairs, as they are silent on issues surrounding the time within which results must be turned in. However, the absence of

¹⁶⁰ Zimbabwe Election Support Network, Statement on the Announcement of Presidential Results and a Presidential Run-Off, http://www.zesn.org.zw/pub_view.cfm?pid=184 (last visited May 5, 2010).

¹⁶¹ *Mugabe Wins by 9 to 1 Margin*, CNN, June 29, 2008, <http://cnnwire.blogs.cnn.com/2008/06/29/mugabe-wins-by-9-to-1-margin/> (last visited Feb. 21, 2010).

legal provisions should not be interpreted to mean that the EMB has a blank check or that the EMB can take several days to announce the election results. On the contrary, the outcome of a presidential poll should be communicated within a reasonable time.

Admittedly, what is reasonable in each case will be determined by particular circumstances on the ground. Even so, the underlying goal should be to ensure that results at all levels are transmitted promptly. In addition, an objective electoral system should ensure that every person who is entitled to vote is able to do so, and that every vote is fairly and accurately counted.

¶35 In reality, the electoral process in Kenya and Zimbabwe was fraught with delays, despite the requirement that results be announced expeditiously. This was unfortunate, as there are several undesirable implications for failing to release results promptly. Unexplained delays can lead to anxiety in a country, especially if the constituencies in question are deemed to be strongholds of a particular candidate. Inordinate delays also cast serious doubts on the authenticity of the result of a particular election and on the electoral process in general.¹⁶² In Kenya, many parties, including the EMB, were unable to understand why results from some constituencies had not been submitted when voting had closed several hours earlier. During a press conference held two days after the elections, Samuel Kivuitu, the chairperson of the EMB, expressed his concerns regarding the delay in results coming from some constituencies, which were considered to be the incumbent president's strongholds:

As I told you previously, I am not happy to see results coming the way they are coming because there's no reason why results should be delayed. There cannot be any excuse and I don't find any excuse at all. Because the sole purpose of introducing counting ... at the polling station was to hurry up the process. And, although I agree there was a challenge because this time there were more voters, the turnout was higher than ever before. That is no excuse for us to be here on a Saturday for elections we held on a Thursday.¹⁶³

¶36 People also expressed concerns over the delay in releasing results of the presidential poll in Zimbabwe. In a legal challenge that the opposition filed in the High Court of Zimbabwe,¹⁶⁴ Justice Uchena stated:

In the absence of an [appropriate] explanation the delay between 29th March and the 4th April 2008 seems to be unjustified and points to a lack of inefficiency. The period between the holding of the elections and the date of application is six days. Three other elections involving greater numbers of candidates were processed and finalized at their levels within

¹⁶² See, e.g., INTERNATIONAL REPUBLICAN INSTITUTE, SOMALILAND: SEPTEMBER 29, 2005 PARLIAMENTARY ELECTION ASSESSMENT REPORT 30 (delays in declaring poll results led to claims of "fraud" and manipulation of votes in favor of the ruling party), *available at* [http://www.iri.org/sites/default/files/Somaliland's 2005 Parliamentary Elections Assessment.pdf](http://www.iri.org/sites/default/files/Somaliland's%2005%20Parliamentary%20Elections%20Assessment.pdf).

¹⁶³ Kivuitu: I Do Not Know Where the Retuning Officers Are, YOUTUBE, <http://www.youtube.com/watch?v=JRiEiyjZYfs> (last visited May 6, 2010).

¹⁶⁴ Movement for the Democratic Change v. Chairperson of the Zimb. Electoral Comm'n, (2008) E/P 24/08, 4 (High Court) (Zimb.)

two days of the date of the elections. The work to be done by the Chief Elections Officer is made simpler by the counting and collation done at polling stations and constituency levels. All he has to do is to verify and display the constituency returns and add the figures thereon to identify the winning candidate whom he should forthwith declare the President of Zimbabwe. This task should all things being equal not have taken the [EMB] up to the 4th April 2008 to announce the presidential results.¹⁶⁵

The holdup in releasing results in both countries was interpreted as an intentional act by some members of the EMB and the government to rig the elections in favor of the sitting president.

¶37 While it took the Kenyan EMB three days to report the presidential results, the process lasted much longer in Zimbabwe — almost five weeks to tally results of the first round of the presidential election. One could argue that the apparent delay in announcing the results in Zimbabwe was due to a request by the ZANU-PF for a recount of ballot boxes¹⁶⁶ in twenty-three of the 210 constituencies¹⁶⁷ (eleven percent).¹⁶⁸ However, this claim is not easy to sustain, considering the date of the request for the recount, April 12, 2008, and the date the final result was declared, May 2, 2008. For a recount to be carried out in any election there must be a result that a party wishes to challenge. That party must convince the EMB that an improper initial count likely affected the outcome of the election.¹⁶⁹ It is reasonable to assume that the EMB can make this judgment only if the most votes have been counted. Thus, the EMB in Zimbabwe must have counted the votes from almost all constituencies by April 12, 2008. It is difficult to understand how it could have taken the EMB over three weeks to compute the results from twenty-three constituencies, when it had taken them only two weeks to compute the results from nearly 230.

¶38 One could imagine that part of the reason for not releasing the results promptly in Zimbabwe was to avoid a repeat of the bloodbath that had occurred in Kenya in the wake of the flawed presidential election. The EMB's concern was to ensure a proper process from start to finish. To avoid the appearance of fraud, the board had to be especially meticulous when tallying the votes. Thus, additional time was required. Although this assertion sounds credible at face value, it is undermined by the fact that it took the EMB just two days to declare the outcome of the run-off, in which roughly an equal number of votes was cast.¹⁷⁰

¶39 Simply put, there were no valid reasons for the delay in declaring presidential results in these countries, especially considering that these were not the first presidential election held there.¹⁷¹ In particular, the delay in Zimbabwe was unacceptable. The

¹⁶⁵ *Id.* at 11.

¹⁶⁶ Electoral Act § 67A (2008) (Zimb.) (allowing parties to challenge the results from any constituency).

¹⁶⁷ ZIMB. CONST. art. 61A(3) (2000).

¹⁶⁸ *Zimbabwe Election Recount Delayed*, BBC, Apr. 21, 2008,

<http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/africa/7358420.stm> (last visited Feb. 21, 2010).

¹⁶⁹ Electoral Act § 67A(3) (2008) (Zimb.).

¹⁷⁰ *See supra* Tables II & III.

¹⁷¹ Both of these countries have had a long experience with elections. *See* Goran Hyden & Colin Leys, *Elections and Single-Party Systems: The Case of Kenya and Tanzania*, 2 BRIT. J.POL.SCI. 389, 392-405 (1972) (discussing the 1969 elections in Kenya); Lionel Cliffe et al., *Nationalist Politics in Zimbabwe: The*

inordinate delays made it difficult for the outcome of the elections to be accepted locally and internationally. As the Kenyan experience demonstrates, the consequences of this can be tragic. States in Africa cannot take comfort in the fact that delays in releasing the results of a presidential vote have been noted on other continents.¹⁷² The next subsection explores some of the measures that could be taken to ensure that election results are reported expeditiously.

C. Checking Unwarranted Holdups

¶40 There are several steps that could be taken to ensure that the results of a presidential election are declared promptly and accurately, thereby protecting the integrity of the electoral process. Countries that seek to comply with the rule of law can employ two legislative measures to rein in delays. The first measure relates to a point made earlier: EMB officials must be selected on the basis of merit. Well-qualified EMB officials would use their skills and expertise in a manner that would protect and promote as well as strengthen the fundamental right to vote in accordance with international norms.

¶41 The second measure relates to the manner in which results are communicated from each polling station to the central tallying center. Once votes have been counted at the polling stations or tallied at the constituency level, the EMB official in charge fills out a form that describe the outcome of the presidential poll.¹⁷³ He or she then takes this form to the constituency or main EMB office for final tallying or formal announcement.¹⁷⁴ The time it takes an official to commute depends largely on where the person comes from. It is reasonable to assume that those officials who are in remote parts of the country would take hours or days to arrive at the central tallying center in the constituency or the main office of the EMB. This is highly undesirable in view of the negative consequences of failing to communicate results promptly.

¶42 The fact that the results of a presidential election need to be conveyed efficiently and expeditiously cannot be overemphasized.¹⁷⁵ As the Kriegler Commission stated, effective communication between the EMB and the public could alleviate “misconception, suspicion, rumour, and anger.”¹⁷⁶ Indeed, the mode of communicating results must be examined if any meaningful change is to be made to the voting process in particular and the electoral framework in general. Electoral systems in Africa cannot afford to continue using slow, unreliable modes of communication. Improved communication, as evidence from several countries show,¹⁷⁷ could enhance the reporting

1980 Elections and Beyond, 18 REV. AFR. POL. ECON. 44, 44 (1980); Anthony Lemon, *Electoral Machinery and Voting Patterns in Rhodesia, 1962-1977*, 77 AFR. AFF. 511, 511(1978).

¹⁷² See, e.g., Steven Rogers, *Philippine Politics and the Rule of Law*, 15 J. DEMOCRACY 111, 112-13 (2004) (describing delay as the “weakest link” in the democratic process in the Philippines).

¹⁷³ Electoral Act §§ 64(1), 65(6) (2008) (Zimb.); Presidential and Parliamentary Elections Regulations of Kenya, (2007) Cap. 7 Sub. Leg. §§ 35A(4), 40(1)(f).

¹⁷⁴ Electoral Act §§ 64(2), 67(1) (2008) (Zimb.); Presidential and Parliamentary Elections Regulations of Kenya, (2007) Cap. 7 Sub. Leg. §§ 39(4), 40(1)(g)(ii).

¹⁷⁵ See, e.g., THE INTERNATIONAL REPUBLICAN INSTITUTE, KENYA PRESIDENTIAL, PARLIAMENTARY AND LOCAL ELECTIONS, DECEMBER 2007 40, available at [http://www.iri.org/sites/default/files/Kenya's 2007 Presidential, Parliamentary and Local Elections.pdf](http://www.iri.org/sites/default/files/Kenya's%20Presidential,%20Parliamentary%20and%20Local%20Elections.pdf).

¹⁷⁶ Independent Review Commission, *supra* note 12, at 10.

¹⁷⁷ Klaas Walraven, *The End of an Era: The Ghanaian Elections of December 2000*, 20 J. CONTEMP. AFR. STUD. 183, 186 (2002); Maya Roy, *The State of Democracy After Disaster: How to Maintain the Right to*

of poll results. Countries such as Kenya must phase out “outdated methods”¹⁷⁸ of tallying, recording, transcribing, and transmitting results. Accordingly, there is a need to amend the current electoral laws so as to introduce prompt and reliable methods of communicating results such as e-mail, within the domestic electoral framework of Kenya in particular. Indeed, in 2005, Kenya’s EMB made a similar recommendation.¹⁷⁹ In Zimbabwe, the issue is not lack of legislation, but rather the implementation of the law. The Electoral Act permits counting and tallying officials to transmit results via quick methods such as “electronic mail,”¹⁸⁰ but there is scant evidence that they used this mode of communication in 2008.¹⁸¹

¶43

Additionally, provisions should be made for the direct transmission of results from polling stations to the main tallying center. In its report, the Kriegler Commission recommended that a tallying system that could facilitate “secure simultaneous transmission” of results from polling stations “to the national tallying centre”¹⁸² should be developed immediately. As experience demonstrates, those procedures, which require results from polling stations to be taken to constituencies for tallying, are not only time-consuming,¹⁸³ but are also prone to manipulation. In fact, the direct transmission of results from polling centers has been used previously in Africa and elsewhere.¹⁸⁴ In Kenya this method was utilized successfully in 2005 for a referendum vote. Curiously, the EMB failed to utilize it during the 2007 election. The International Foundation for Electoral Systems (“IFES”), which observed the general election in Kenya, reported that the EMB rejected its offer to “install a computer program that would have enabled election officials in the constituencies to submit results electronically to Nairobi and then on to a giant screen available to the public.”¹⁸⁵

¶44

Although the reason for rejecting the IFES offer is still unclear,¹⁸⁶ there are a number of possibilities that could explain why this proposal was not accepted. Perhaps officials of the EMB were ill-trained to use the technology. This relates to a point made earlier: officials should be required by law to possess advanced computer skills. Indeed,

Vote for Displaced Citizens, 17 S. CAL. INTERDISC. L. J. 203, 216-17, 229 (2007) (discussing elections in Mexico and Iraq).

¹⁷⁸ Independent Review Commission, *supra* note 12, at 9.

¹⁷⁹ *Id.* at 30 (“[T]he law should be amended to allow preliminary results by, [among others], email” [quoting Electoral Commission of Kenya, Evaluation of the 2005 Referendum]).

¹⁸⁰ Electoral Act § 67(1) (2008) (Zimb.).

¹⁸¹ The author noted this during two field studies in Zimbabwe in 2009.

¹⁸² Independent Review Commission, *supra* note 12, at 10.

¹⁸³ *Id.* at 135 (noting that, if there was delay in one polling station, this would have an impact on relaying that constituency’s presidential result).

¹⁸⁴ Interview with Peita Mamo, Australian Election Commission, in Sydney, Austl. (Oct. 2008) (stating modern technology has been used to run elections successfully in countries like Australia).

¹⁸⁵ INTERNATIONAL FOUNDATION FOR ELECTORAL SYSTEMS, THE ELECTORAL PROCESS IN KENYA: A REVIEW OF PAST EXPERIENCE AND RECOMMENDATIONS FOR REFORM 135 (2008), available at http://www.ifes.org/publication/077c11dc773ce6e94745f7ab711cf11e/IFES%20KENYA%20OSIEA_Aug22_FINAL.pdf. See also Independent Review Commission, *supra* note 12, at 135 (“[L]aptops were not used for tallying at the constituency level, no WAN [Wide Area Network] was set up and the ECK opted for the method that been used [previously]—and proved slow”).

¹⁸⁶ See also Independent Review Commission, *supra* note 12, at 48 (“[W]hen the returning officers gathered in Nairobi on 22 December 2007, some complained about the problems they would have using computers, and the decision of 14 June 2007 [to use computers to transmit results] was revoked in circumstances that are unclear”).

the EMB itself had made this recommendation.¹⁸⁷ Alternatively, perhaps the EMB rejected this offer intentionally in order to make it possible to fix the presidential vote. As the IFES noted, the use of modern technology could have made it “virtually impossible to change results.”¹⁸⁸ Arguably, the failure to embrace modern technology, and thereby prevent voter fraud, is one of the factors that led to the violence in Kenya.

¶45 To ensure that results of the presidential election are communicated accurately, expeditiously, and efficiently, steps must also be taken to insulate the voter database from any external interference. Experience in South Africa¹⁸⁹ and the Netherlands¹⁹⁰ reminds us that hackers can gain access to and interfere with computerized voter databases. Additionally, because “software is notoriously subject to defects causing programs to malfunction,”¹⁹¹ the continuous monitoring and review of the entire system is of utmost importance. These measures would contribute to ensuring that electoral systems meet international and domestic legal requirements on free and fair elections. However, as of now, the Kriegler Commission report describes the EMBs accurately in both Kenya and Zimbabwe: “a traditional organization, with inadequate flows of information, averse to even minimal risks and to the use of technology, functioning in a compartmentalized fashion.”¹⁹²

¶46 To move beyond this situation, EMB officials must implement the measures suggested in this section on the ground. For these measures to succeed, states must invest in computer software that supports the instant tabulation and reporting of results. Measures such as these would contribute significantly to ensuring that the outcome of the presidential vote is communicated promptly and accurately from the polling station to the main office of the EMB and, ultimately, to the people.

IV. THE EXPERIENCE OF VOTERS: POLITICAL VIOLENCE, INTIMIDATION, AND HARASSMENT

¶47 Free and fair elections require a level playing field for all presidential candidates. This is important in view of the fact that incumbent presidents normally wield considerable power and influence, which they can use to manipulate the electoral process. In order to guard against this, international and domestic electoral laws require elections to be fair¹⁹³ in the sense that each candidate or political party has equal access to public resources such as media,¹⁹⁴ security, and funding.¹⁹⁵ Elections must also be free.¹⁹⁶ In

¹⁸⁷ *Id.* at 136 (quoting Electoral Commission of Kenya, Report on the National Referendum Evaluation Workshop).

¹⁸⁸ INTERNATIONAL FOUNDATION FOR ELECTORAL SYSTEMS, *supra* note 185.

¹⁸⁹ LAURENCE PIPER, SOUTH AFRICA’S 2004 ELECTION: THE QUEST FOR DEMOCRATIC CONSOLIDATION 13 (Electoral Institute of Southern Africa 2005).

¹⁹⁰ See Rop Gonggrijp et al., Nedap/Groenendaal ES3B Voting Computer—A Security Analysis (2006), available at <http://www.wijvertrouwenstemcomputersniet.nl/images/9/91/Es3b-en.pdf>.

¹⁹¹ Michael Carrier, *Vote Counting, Technology, and Unintended Consequences*, 79 ST. JOHN’S L. REV. 645, 652 (2005).

¹⁹² Independent Review Commission, *supra* note 12, at 49.

¹⁹³ CONSTITUTION, Art. 42(A) (2008) (Kenya); UGANDA CONST. art. 61(a) (1996); ZIMB. CONST. art. 61(4) (2008). See also ICCPR, *supra* note 2, art. 24; UDHR, *supra* note 2, art. 21.

¹⁹⁴ See, e.g., Electoral Act § 3 (2008) (Zimb.); UGANDA CONST. art. 67(2), 67(3) (1996); Broadcasting Act of 1999, § 2 (S. Afr.).

¹⁹⁵ See, e.g., Electoral Law, No. 20/2002, art. 7(1)(v) (2002) (Mozam.).

¹⁹⁶ CONSTITUTION, Art. 42A (2008) (Kenya); NAMB. CONST. art. 28(4) (1990); ZIMB. CONST. art. 61(4)

particular, candidates and their supporters must be able to solicit for votes from any part of the country, without any fear of harassment or intimidation by state and non-state actors.¹⁹⁷ Meeting these objectives would ensure that the right to vote is not only protected, but also promoted.

¶48 In many African states, acts of violence and intimidation and harassment of voters are a common part of elections.¹⁹⁸ Experience shows that perpetrators include both state and non-state actors.¹⁹⁹ Their deplorable actions have caused considerable damage to property and have led to the loss of many innocent lives. Additionally, they undermine the credibility of the process and “political development,”²⁰⁰ as well as erode the legitimacy²⁰¹ of the administration that is subsequently formed. Moreover, acts of violence, intimidation, and harassment prevent some voters from participating effectively in an election.

¶49 Although sitting presidents can use state resources to protect themselves,²⁰² the same cannot be said for opposition candidates, who often must hire private security forces. Thus, it becomes extremely difficult and expensive for any opposition candidate

(2008); ICCPR, *supra* note 2, art. 25; UDHR, *supra* note 2, art. 21.

¹⁹⁷ S. AFR. CONST. 1996, art. 19(1); Electoral Act § 134 (Zimb.) (2008); Offences Act, (1958) Cap. 66 § 9 (Kenya).

¹⁹⁸ See generally Kjetil Tronvoll, *Voting, Violence and Violations: Peasant Voices on the Flawed Elections in Hadiya, Southern Ethiopia*, 39 J. MOD. AFR. STUD. 697 (2001); Joe Hanlon & Sean Fox, *Identifying Fraud in Democratic Elections: A Case Study of the 2004 Presidential Elections in Mozambique* 6 (2006), available at <http://www.crisisstates.com/download/wp/wpSeries2/wp8.2.pdf>; Allen Keller & Samantha Stewart, *We Have Degrees in Violence: A Report on Torture and Human Rights Abuses in Zimbabwe* (Dec. 2007), available at

http://www.soros.org/resources/articles_publications/publications/zimbabwe_20071201/zimbabwe_20071130.pdf; Ghana Centre for Democratic Development, *Election Violence, Monitoring of the Presidential and Parliamentary Elections, Ghana, 2004* (Feb. 15, 2005), available at <http://www.ifes.org/publication/8e5ad1688b62c0f9c8e6599d3fc406c1/GhanaEVER.pdf>; The Carter Center, *Observing the 2004 Mozambique Elections* 37 (Oct. 2005), available at <http://www.cartercenter.org/documents/2218.pdf>; European Union Election Observation Mission, *Nigeria: Final Report, Gubernatorial and State Houses of Assembly Elections, 14 April 2007, and Presidential and National Assembly Elections, 21 April 2007* 20-22 (2007), available at http://ec.europa.eu/external_relations/human_rights/election_observation/nigeria/final_report_en.pdf; Electoral Institute of Southern Africa Election Observer Mission Report, *Madagascar Presidential Elections* 17-18 (Dec. 3, 2006), available at <http://www.eisa.org.za/PDF/madeom2006.pdf>.

¹⁹⁹ See Jacqueline Klopp, “Ethnic Clashes” and Winning Elections: The Case of Kenya’s Electoral Despotism, 35 CAN. J. AFR. STUD. 473 (2001); Human Rights Watch, “They Beat me Like a Dog”: Political Persecution of Opposition Activists and Supporters in Zimbabwe 13-18 (Aug. 2008), available at <http://www.hrw.org/sites/default/files/reports/zimbabwe0808webwcover.pdf>.

²⁰⁰ See Sue Downie, *Cambodia’s 1998 Election: Understanding Why it is Not a Miracle in the Mekong*, 54 AUSTL. J. INT’L AFF. 43, 53 (2000); see also Ulrich Mücke, *Elections and Political Participation in Nineteenth-Century Peru: The 1871-72 Presidential Campaign*, 33 J. LATIN AM. STUD. 311, 312 (2001) (acts of violence are inconsistent with “democratic decision making”).

²⁰¹ See David Throup, *Elections and Political Legitimacy in Kenya*, 63 J. INT’L AFR. INST. 371, 387 (1993); Fred Hayward & Ahmed Dumbuya, *Changing Electoral Patterns in Sierra Leone: The 1982 Single-Party Elections*, 28 AFR. STUD. REV. 62, 82 (1985).

²⁰² See also Michael O’Donovan, *The Administration of Elections in Zambia*, in ELECTIONS AND DEMOCRACY IN ZAMBIA 25, 27-28 (Claude Kabemba ed., 2004); Commonwealth Observer Group, *Mozambique National and Provincial Elections* 25 (Oct. 28, 2009), available at <http://www.thecommonwealth.org/files/217881/FileName/2009MozambiqueCOGReport.pdf> (the ruling party used “state resources” “in the conduct of its campaign”); Commonwealth Observer Group, *Malawi Parliamentary and Presidential Elections* 29 (May 19, 2009), available at <http://www.thecommonwealth.org/files/211206/FileName/FINALREPORT.pdf> (“[S]tate resources were used to the undue advantage of the incumbent . . . [S]tate-owned media failed to provide balanced coverage or reasonable access to all parties.”).

and his or her supporters to campaign openly and without fear of attack.²⁰³ This state of affairs limits opposition presidential candidates from enjoying the internationally recognized right to participate in an election.

¶150 Claims of voter intimidation and harassment were made in both Kenya and Zimbabwe. The Kriegler Commission noted that there was widespread political “violence” and “voter intimidation” in the lead-up to the 2007 Kenya election.²⁰⁴ Opposition political parties in particular had a very hard time campaigning in areas that were considered to be government strongholds.²⁰⁵ Some candidates and their supporters suffered serious injuries at the hands of law enforcement officials and non-state agents that the government was unwilling to control.²⁰⁶ Some people even alleged that government officials had a direct hand in perpetrating acts of violence against opposition members. For instance, it was claimed that the Minister of Roads and Public Works, Simeon Nyachae, had incited youth to assault members of the opposition at a rally in his hometown of Kisii on September 19, 2007.²⁰⁷ Those attacks left three members of the opposition presidential campaign team with serious injuries.²⁰⁸ Although the Minister for Internal Security at the time, John Michuki, claimed that investigations into the matter were underway,²⁰⁹ not one arrest has been made, casting doubts on the authenticity of these investigations and the sincerity of the Minister’s comments. In general, the events surrounding the 2007 Kenya election raise questions over the commitment of politicians to observe, respect, and promote provisions of the 2002 Electoral Code of Conduct, which requires them to “avoid” and “prevent” acts of violence and intimidation.²¹⁰

¶151 As was the case in Kenya, the periods preceding both rounds of the 2008 presidential election in Zimbabwe were marked by voter intimidation and violence against the MDC and its supporters.²¹¹ Many were the victims of acts that amounted to

²⁰³ Interestingly, in Kenya, security concerns also forced the sitting president to suspend his campaign in some opposition strongholds during the 2007 election. See *PNU Puts Off Kisumu Rallies*, DAILY NATION, Oct. 8, 2007, available at <http://multimedia.marsgroupkenya.org/?StoryID=197576&p=Rarieda&page=1>.

²⁰⁴ Independent Review Commission, *supra* note 12, at 58.

²⁰⁵ See ODM Injuries, YOUTUBE, <http://www.youtube.com/watch?v=RTtWS8PDWQk> (last visited May 5, 2010); *We Are Sorry for Violence, Meru Leaders Tell ODM*, STANDARD, Nov. 1, 2007, <http://allafrica.com/stories/200710311006.html> (last visited May 10, 2010).

²⁰⁶ See ODM in Meru, YOUTUBE, http://www.youtube.com/watch?v=WDh_5S19jFw (last visited May 5, 2010); Raila Seeks Votes in Kibaki’s Turf, YOUTUBE, <http://www.youtube.com/watch?v=gFj34sXnkOU> (last visited May 5, 2010).

²⁰⁷ See Kisii Violence Follow Up, YOUTUBE, http://www.youtube.com/watch?v=dyBWi8Y-E_A (last visited May 5, 2010); see also Nyachae Defends Attack/ Wamwere to Support Kibaki, YOUTUBE, <http://www.youtube.com/watch?v=yAGAgQC1TU> (last visited May 5, 2010).

²⁰⁸ Many condemned these attacks. See ODM Injuries, YOUTUBE, <http://www.youtube.com/watch?v=RTtWS8PDWQk> (last visited May 5, 2010). See also *Envoy Decry Rise in Election Violence*, STANDARD, Nov. 9, 2007, <http://allafrica.com/stories/printable/200711081114.html> (last visited May 5, 2010); *KNCHR Church Call for Action on Inciters*, STANDARD, Sept. 26, 2007, <http://allafrica.com/stories/printable/200709260010.html> (last visited May 5, 2010).

²⁰⁹ *Attack on ODM Sparks Riots in Parts of the Country*, DAILY NATION, Sept. 23, 2007, <http://www.marsgroupkenya.org/multimedia/?StoryID=195308&storydate=2007-09-23> (last visited May 5, 2010).

²¹⁰ Electoral Code of Conduct, (1997) ¶ 5(a) (Kenya).

²¹¹ Some contend that the “regime power in Zimbabwe has always been buttressed by coercion, chillingly symbolized in ZANU-PF’s trademark emblem, the fist.” Michael Bratton & Eldred Masunungure, *Zimbabwe’s Long Agony*, 19 J. DEM. 4, 50 (2008).

torture,²¹² as well as mistreatment and beatings at the hands of the state-backed youth militia.²¹³ In particular, there was a dramatic increase in the level of threats and violence just before the second round of voting, as the following narratives affirm:

The ZANU-PF youth used to go round residential estates in Harare threatening people in their homes. They would also stop Mini-bus taxis, flash out anyone who they thought was an MDC supporter and cane him or her in public. The message was clear: vote for MDC and you will be in big trouble. This created a lot of fear among the people. One night they came to my house and forced me to pledge my loyalty to ZANU-PF. As I was terrified, I did exactly what they demanded.²¹⁴

I am a well-known opposition figure in my town. A few days to the election ZANU-PF youth and Government soldiers came to my house at 4 a.m. They took me to the nearby river and directed me to swim. The water was so cold, but I had to comply. Then they bound my hands with barbed wire and instructed me to roll on the sand. It was quite painful, but what could I do? After this ordeal I was taken to an army camp. They only gave me water. My father, a ZANU-PF supporter, intervened, and I was released. In total I spent four days in a cell. Immediately upon my release I fled the country.²¹⁵

At one of the rallies, which I attended, ZANU-PF youth came with guns. They fired in the air and warned us that, if we did not vote for them, *hondo rikudzoka* [war will come back]. This message scared many people. . . . I also saw several patients, with injuries apparently inflicted by the youth, at the local hospital where I was on attachment. One case in particular was chilling. It involved a man who had burns all over his body, which were inflicted by fire.²¹⁶

¶52

Thousands of people, including women and children, were displaced because of state-sanctioned violence.²¹⁷ Some MDC officials were imprisoned on flimsy grounds.²¹⁸

²¹² For the definition of “torture,” see Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

²¹³ See Human Rights Watch, *Bullets for Each of You: State-Sponsored Violence Since Zimbabwe’s March 29 Elections* (Jun. 2008), available at <http://www.hrw.org/sites/default/files/reports/zimbabwe0608.pdf>; Amnesty International, *A Trail of Violence After the Ballot* (2008), available at <http://www.unhcr.org/refworld/country,,,ZWE,,4847aa3a2,0.html>; Int’l Federation of Human Rights, *Zimbabwe: Run up to the March 29 Presidential and Parliamentary Elections - A Highly Repressive Environment for Human Rights Defenders* (Mar. 19, 2008), available at <http://www.unhcr.org/refworld/docid/47e0ea160.html>.

²¹⁴ Interview with Qubhekani, in Nata, Bots. (Aug. 12, 2009).

²¹⁵ Interview with Chipiwa, in Francistown, Bots. (Jan. 3, 2010).

²¹⁶ Interview with Kwanele, in Chinhoyi, Zimb. (Dec. 22, 2009).

²¹⁷ See, International Displacement Monitoring Centre, *The Many Faces of Displacement: IDPs in Zimbabwe* 13-16 (Aug. 2008), available at <http://www.unhcr.org/refworld/country,,,ZWE,,48ad3b70c,0.html>.

²¹⁸ UK Home Office, *Country of Origin Information Report: Zimbabwe*, at 27 (Sept. 29, 2008), <http://www.unhcr.org/cgi->

Due to fears over his safety, Tsvangirai, the leader of the opposition, fled to the Dutch Embassy in Harare.²¹⁹ It is disturbing to note that although some of the perpetrators were identified by the victims, the police have not taken any steps to investigate these crimes or arrest the suspects due to their association with the ruling party, ZANU-PF.²²⁰

¶53 Against this backdrop, it was highly unlikely for the run-off to be free and fair, as required by election standards. The right to vote is “inconceivable without the [effective] participation of a plurality of political parties representing the different shades of opinion to be found within a country’s population.”²²¹ However, the EMB, under Mugabe’s influence, ignored calls by the international community and the MDC to postpone the second round of the presidential election until the security situation improved.²²² In the end, the MDC withdrew from the run-off leaving Mugabe to compete in a one-horse race.²²³ Although Table IV (above) shows that Mugabe won the second round by a landslide, this outcome is not a reflection of the will of the electorate.

¶54 In many countries, acts of violence toward, and harassment and intimidation of, candidates and their supporters are proscribed not only by electoral laws,²²⁴ but also by criminal laws.²²⁵ In its general comment on voting rights, the UN Human Rights Committee urged states to ensure that the laws and regulations that prohibit electoral violence are “strictly enforced.”²²⁶ Unfortunately, this is a challenge for many African states, as law enforcement officials are still too weak to prosecute politicians and their criminal gangs. The Waki Commission found that law enforcement officials in Kenya in particular are unable to discharge their mandate due to political interference.²²⁷ A senior police officer who appeared before the commission testified to that effect:

Q: And you talked about some criminal gangs called Chikororo. Did you monitor this gang?

A: [Yes]. [They] are used specifically when the elections are near, to scare away potential voters who are against a particular candidate.

Q: And you do anything about that?

bin/texis/vtx/refworld/rwmain?page=country&docid=48e23adc2&skip=0&coi=ZWE&querysi=Tendai%20Biti&searchin=fulltext&display=10&sort=date.

²¹⁹ See *Zimbabwe Opposition Leader in Hiding*, YOUTUBE, <http://www.youtube.com/watch?v=KJtN1SWaGiw> (last visited May 5, 2010).

²²⁰ See, Human Rights Watch, “*Our Hands are Tied*”: *Erosion of the Rule of Law in Zimbabwe* 26-31 (Nov. 2008), available at <http://www.hrw.org/reports/2008/zimbabwe1108/zimbabwe1108web.pdf>.

²²¹ *United Communist Party of Turkey v Turkey*, 26 Eur. H.R. Rep. 146, 164 (1998).

²²² See *UN Says Fair Vote in Zimbabwe Impossible*, YOUTUBE, <http://www.youtube.com/watch?v=JhNeVw0YfQY> (last visited May 5, 2010).

²²³ See *Opposition Leader Pulls out of Zimbabwe Elections*, YOUTUBE, <http://www.youtube.com/watch?v=gJp2B9ptGSw> (last visited May 5, 2010).

²²⁴ See Electoral Act (2006) § 82(1) (Zambia); Election Offences Act, (1958) Cap. 66 § 9 (Kenya), available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php; Electoral Act § 105 (2008) (Zimb.).

²²⁵ Penal Code, (1985) Cap. 63 §251 (Kenya); Public Order and Security Act § 17-19, 22 (2002) (Zimb.); Criminal Procedure Act 51 of 1977 §§ 266, 267 (S. Afr.).

²²⁶ U.N. Human Rts. Comm., *General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.7(July 12, 1996).

²²⁷ Commission of Inquiry, *supra* note 12, at 457.

A: We sort of arrested most of them, ... and we had a lot of problems.

Q: You had what?

A: A lot of problems, because there was a lot of tension. We arrest, pressure is put, I release them.

Q: When you talk about pressure, what kind of pressure was it?

A: You find that I get calls from Nairobi, my boss says, did you arrest these people? I say, yes for this and that. Then he says, well, warn them, let them go home. I comply.

Q: And you said your boss is the Police Commissioner.

A: [Yes]...

Q: Did you find any politicians who were either organizing or inciting these particular youths?

A: My Lords, for this particular Chinkororo Hon. Nyachae was behind.

Q: And when you say behind, what exactly do you mean?

A: He is the one who organize[d], financed. They were known as his people.

Q: And did you find any tangible evidence of this organization of financing?

A: That is where the problem is, My Lords, because to get tangible evidence was very difficult. But as we go along investigating, you come across some evidence that so and so we have arrested that person, that person is aligned to so and so. So you see a pattern. Of this group you arrest, you see which group now turns up, making a lot of noise or even calling my boss or whatever.

Q: Do you know that whoever was organizing them has direct connections to your superiors, at least? ...

A: What they were doing according to me is that, once we arrest, they couldn't call me direct, here in Kisumu. But there is a way of circumventing [my office]. So it would come from my boss when I report.... I will inform him I have all these people arrested, I have detained them in this Police station, may be after a day he will call me and

say, you remember those people you arrested, give them unconditional release and I will comply and people will go.

Q: The issue I am putting to you obviously these people you were arresting have direct connections to persons who are higher up, who are able to talk or find their way to the Commissioner obviously, even if they were not financing. At least you can say they had some influential connections somewhere.

A: Yes. ²²⁸

¶55

Acts of violence and harassment against candidates and their supporters must be deplored. Such an influence is both “unpleasant” and “undesirable.”²²⁹ These activities are the “bluntest forms of state power to intimidate or defeat political opponents.”²³⁰ For any presidential election to be free and fair, the playing field must be level. Research on elections in many parts of the world has drawn this conclusion.²³¹ Ban Ki-Moon, the current UN Secretary General, stated that an election held in a violent environment “lack[s] all legitimacy.”²³² Flawed presidential elections have an impact on national and international peace and security, as the post-election violence in Kenya and the humanitarian crisis in Zimbabwe show. Thus, it is in the interest of African states to ensure that presidential elections are free from violence, intimidation, and harassment. Toward this end, it is of utmost importance for political parties, as well as their supporters and candidates, to respect the electoral rules. Additionally, all law enforcement officials must be neutral. They should not attempt to influence or intimidate any voter to cast his or her vote for a particular candidate.²³³ In keeping with their constitutional mandate, they must provide security to voters and non-voters alike, irrespective of their political affiliation. It is of grave concern that in both Kenya and Zimbabwe law enforcement officials did not protect the people and, in the case of Zimbabwe, actually perpetrated acts of violence against them.

²²⁸ *Id.* at 458-59.

²²⁹ See Geoffrey Brennan & Philip Pettit, *Unveiling the Vote*, 20 BRIT. J. POL. SCI. 311, 332 (1990). See also *Manson Nyamweya v. Joseph Magara*, (2008) Election Petition 3 of 2008 35 (Kenya) (unreported) (Musinga, J.) (terming political violence as “unacceptable”).

²³⁰ See Tom Young, *Elections and Electoral Politics in Africa*, 63 J. INT’L AFR. INST. 299, 303 (1993).

²³¹ See Electoral Institute of Southern Africa, *Election Observation Mission Report South Africa: National and Provincial Elections, 12-14 April 2004* 16-17 (2004), available at <http://www.eisa.org.za/PDF/sa04eomr.pdf>; Ronald King, *Counting the Votes: South Carolina’s Stolen Election of 1876*, 32 J. INTERDISC. HIST. 169, 170 (2001); Neil Devotta, *Sri Lanka’s Political Decay: Analysing the October 2000 and December 2001 Parliamentary Elections*, 41 COMMW. COMP. POL. 115 (2003).

²³² Ban Ki-moon, U.N. Sec’y-General, Press Encounter After Security Council Luncheon (June 23, 2008), available at <http://www.un.org/apps/sg/offthecuff.asp?nid=1178>.

²³³ Several observers have deplored the political involvement of law enforcement officials. See, Commonwealth Observer Group, *Fiji Islands General Election, 6-13 May 2006* 24, 25, 47 (2006), available at http://www.thecommonwealth.org/Shared_ASP_Files/UploadedFiles/CA16B913-2D20-4058-874A-52BBDE02BCD2_FijiGeneralElection2006-ReportoftheCommonwealthObserverGroup.pdf; The Carter Centre, *Observing the 2004 Mozambique Elections* 65 (Oct. 2005), available at <http://cartercenter.com/documents/2218.pdf>.

V. RESOLVING ELECTORAL DISPUTES: PROCESS AND CHALLENGES

¶156 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.²³⁴ Accordingly, any initiative that seeks to reform the electoral process in Africa must also focus on the judicial system, due to the central role²³⁵ 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.²³⁶ This section 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.

A. Process

¶157 Multiple procedures dictate the process of challenging the election of a president. Once the EMB declares the results of the vote, any unsatisfied person can challenge this outcome in court within a specified period of time.²³⁷ Essentially, election petitions involve determining the “validity”²³⁸ 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.²³⁹ The burden a petitioner must meet is a balance of probability, not beyond a reasonable doubt.²⁴⁰ Those election petitions that fail to meet this burden are dismissed with costs.²⁴¹

¶158 Any aggrieved person can appeal the decision of the electoral court to an appellate court.²⁴² Only questions of law can be raised on appeal in Zimbabwe.²⁴³ In Kenya, by contrast, because the law is silent on the scope of issues that an appellant can advance, administrative law principles apply.²⁴⁴ Therefore, an aggrieved party could appeal the

²³⁴ JULIUS NYERERE, FREEDOM AND SOCIALISM 110 (1968).

²³⁵ See also *Republic v. Returning Officer of Kamukunji*, (2008) eKLR 18 (H.C.K.) (Kenya) (describing courts as a “pillar” of democracy”).

²³⁶ See CONSTITUTION, §§ 10, 44 (2008) (Kenya); Electoral Commission Act, (1996) sec. 18 (Zambia); ZAMBIA CONST. (Constitution Act 2001) art. 41(2)(b); Electoral Act § 161 (2008) (Zimb.).

²³⁷ See CONSTITUTION, § 44(1) (2008) (Kenya); National Assembly and Presidential Elections Act, (2009) Cap. 66 § 20(1)(a) (Kenya); Electoral Act, (2006) sec. 21(3) (Zambia); Electoral Act § 111 (2008) (Zimb.); but see TANZ. CONST. art. 41(7) (1977) (prohibiting courts from inquiring into the election of a president).

²³⁸ See *Matiba v. Moi*, (1993) 1 K.L.R. 525, 531 (Kenya); *Thande v. Montgomery*, (1969) 1 K.L.R. 341, 344 (Kenya).

²³⁹ National Assembly Elections (Election Petition) Rule, (1993) Cap. 7 Sub. Leg. 4(1)(b) (Kenya). See also *William Gitau v. George Thuo*, (2008) Election Petition 10 of 2008 14 (Kenya) (unreported) (Kimaru, J.) (“To discharge [the] burden, [a] petitioner must adduce evidence that establish the alleged election offences.”)

²⁴⁰ See *Mbowe v. Eliufoo*, (1967) E.A.L.R. 240, 241 (Tanz.); *Ayub Mwakesi v. Mwakweru Ali*, (2008) Election Petition 1 of 2008 70 (Kenya) (unreported).

²⁴¹ See Electoral Act, (2006) sec. 105 (Zambia); National Assembly Election (Election Petition) Rule, (1993) Cap. 7 Sub. Leg. 34 (Kenya).

²⁴² National Assembly and Presidential Elections Act, (2009) Cap. 66 § 23(1)(4) (Kenya); Electoral Act § 172(2) (2008) (Zimb.).

²⁴³ Electoral Act § 172(1) (2008) (Zimb.) (“[A] decision of the Electoral Court on a question of fact shall be final.”).

²⁴⁴ See also *Kipkalya Kones v. R*, (2006) 3 K.L.R. 291, 293 (Kenya) (Kenya’s electoral commission is

decision of an electoral court on grounds that the decision maker erred either in law or in fact. Where it 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.²⁴⁵

¶159 The mandate of an electoral court is limited to determining whether 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.²⁴⁶ This authority rests solely with the EMB.

B. Challenges

¶160 Although the process appears straightforward in theory, several problems have arisen in practice. This subsection evaluates issues surrounding the independence and impartiality of courts and their ability to deliver justice promptly in election petitions.

1. Independence and Impartiality

¶161 As guardians of their countries' constitutions²⁴⁷ 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.²⁴⁸

¶162 The separation of powers is crucial in any constitutional state.²⁴⁹ 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.²⁵⁰ Indeed, judicial independence is the “lifeblood of constitutionalism.”²⁵¹

“amenable” to “judicial review”).

²⁴⁵ See CONSTITUTION, Art. 10(3) (2008) (Kenya); Electoral Act § 111(2)(b) (2008) (Zimb.).

²⁴⁶ *Id.*

²⁴⁷ See also *Joseph Kimani v. Attorney General*, (2009) K.L.R. 1, 11 (Kenya) (describing courts as the “ultimate custodian of the Constitution.”).

²⁴⁸ See also *Queen v. Kirby ex parte Boilermaker’s Society of Australia* (1956) 94 C.L.R. 254, 301 (Austl.) (The doctrine of separation of powers requires the three arms of Government to be kept “separate and distinct”).

²⁴⁹ 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 & JOHN JAY, *THE FEDERALIST WITH LETTERS OF “BRUTUS”* 234-40 (Terence Ball ed., 2006). Much later, Justice Brandeis 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. U.S.*, 272 U.S. 106, 293 (1926); see also HAMILTON, MADISON, & JAY, *supra* at 234-40 (“[T]he accumulation of all powers legislative, executive and judiciary in the same hands [could lead to] . . . tyranny.”).

²⁵⁰ In order to cement the independence of the judiciary, judges in Kenya and Zimbabwe have life tenure, subject to good behavior. See CONSTITUTION, Art. 62 (2008) (Kenya); ZIMB. CONST. art. 86-87 (2000); see *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 60 (1982) (Brennan, J.) (“[T]he guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well.”).

²⁵¹ *Beauregard v. Canada*, [1986] 2 S.C.R. 56, 70 (Can.).

¶63 Furthermore, the independence of the judiciary from the other arms of government plays a central role in preserving and promoting the integrity of courts.²⁵² 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.²⁵³

¶64 Charles Montesquieu claims that in comparison to the power of the other arms of government, the power of the judiciary is “next to nothing.”²⁵⁴ 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”²⁵⁵ 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.²⁵⁶ Moreover, confidence in the legal process is critical if such a 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”²⁵⁷ 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.

¶65 The opposition parties in Kenya and Zimbabwe employed two distinct approaches in the wake of the flawed presidential election. 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.

a) Writing Off the Judiciary: The “We Will Not Go to Court” Route

¶66 As one would have expected, the main opposition party in Kenya, the Orange Democratic Movement (“ODM”), challenged the outcome of the 2007 presidential election.²⁵⁸ Although one also would have expected the ODM to seek relief within the local legal framework,²⁵⁹ 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

²⁵² See also *R v. Director of the Serious Fraud Office*, (2008) 4 All Eng. Rep. 927, ¶ 76 (Eng.).

²⁵³ See *Bradley v. Fisher*, 80 U.S. 335, 347 (1871); see also U.N. Cong. on the Prevention of Crime & the Treatment of Offenders, *Basic Principles on the Independence of the Judiciary* ¶ 2 (1985), available at <http://www2.ohchr.org/english/law/indjudiciary.htm>.

²⁵⁴ CHARLES MONTESSQUIEU, *SPIRIT OF THE LAWS* 156 (2002).

²⁵⁵ *SMT Indira Gandhi v. Shri Narain* (1976) S.C.R. 347, 506 (Mathew, J.).

²⁵⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13, 213 U.N.T.S. 222 (Sept. 3, 1953); *Chahal v. U.K.*, 23 Eur. H.R. Rep. 413 (1997); *Conka v. Belgium*, 34 Eur. H.R. Rep. 54 (2002).

²⁵⁷ *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs*, (1989) 189 C.L.R. 1, 14.

²⁵⁸ See also Christopher Anderson & Silvia Mendes, *Learning to Lose: Election Outcomes, Democratic Experience and Political Protest Potential*, 36 BRIT. J. POL. SCI. 91, 107 (2005) (“[L]osers would be more likely to protest against the political regime.”).

²⁵⁹ See generally Yaov Dotan & Menachem Hofnung, *Legal Defeats—Political Wins: Why do Elected Representatives Go to Court?*, 38 COMP. POL. STUD. 75 (2005); James Blumstein, *The Supreme Court and Voter Eligibility*, in *ISSUES OF ELECTORAL REFORM* 33-48 (Richard Carlson ed., 1974).

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.²⁶⁰ 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 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.”²⁶¹

¶67 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].”²⁶² 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.²⁶³ Kagwanja asserted that “giant strides” had been made since Kenya’s independence in 1963 to set up “a functioning modern” judicial system.²⁶⁴ Thus, people must respect court decisions, “however sleazy” they may be.²⁶⁵ To support this assertion, Kagwanja cited the U.S. Supreme Court decision in *Bush v. Gore*,²⁶⁶ where the central issue was the tallying of votes in the state of Florida.

¶68 *Bush* has been the subject of wide discussion,²⁶⁷ 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.²⁶⁸ Canadian²⁶⁹ and Australian²⁷⁰ 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:

²⁶⁰ See also Independent Review Commission, *supra*, note 12, at 59 (The ODM “declared that it was not possible to receive justice from a partisan judiciary that was known to subvert justice in electoral matters.”).

²⁶¹ See PNU and ODM-Kenya Speak, YOUTUBE, <http://www.youtube.com/watch?v=S-tMBFV9-0Q> (last visited May 5, 2010).

²⁶² See Kalonzo: ODM Should Go to Court, YOUTUBE, http://www.youtube.com/watch?v=aW0vYtYOR_k (last visited May 5, 2010).

²⁶³ Peter Kagwanja, *Breaking Kenya’s Impasse: Chaos or Courts?*, 1 AFR. POL’Y BRIEF 1, 3-4 (2008).

²⁶⁴ *Id.* at 3.

²⁶⁵ *Id.*

²⁶⁶ *Bush v. Gore*, 531 U.S. 98 (2000).

²⁶⁷ See generally Anthony Laden, *Democratic Legitimacy and the 2000 Election*, 21 L. & PHIL. 197 (2002); Jesse Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT. 335 (2001); BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman, ed., 2002).

²⁶⁸ *Bush v. Gore*, 531 U.S. at 128 (Stevens, J., dissenting), 158 (Breyer, J., dissenting).

²⁶⁹ See *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 (Can.).

²⁷⁰ See *Kable v. Director of Public Prosecutions* (1969) 189 C.L.R. 51, 118 (Austl.).

It is of utmost 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.²⁷¹

¶69 Data from Africa²⁷² and elsewhere²⁷³ demonstrate the importance of public trust in the judiciary. People engage the judiciary because they have faith in the court system,²⁷⁴ 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.²⁷⁵ Absent this trust, it is doubtful that presidential candidates would ever seek relief in domestic courts.

¶70 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 native-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.²⁷⁶ 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"²⁷⁷ and "poor,"²⁷⁸ respectively. The 2008 report of the Waki

²⁷¹ Interview with Markandey Katju, in Cape Town, S. Afr. (Jan. 27, 2009).

²⁷² Richard Vengroff & Michael Magala, *Democratic Reform, Transition and Consolidation: Evidence from Senegal's 2000 Presidential Election*, 39 J. MOD. AFR. STUD. 129, 147-56 (2001); International Foundation for Election Systems, *A Nigerian Perspective on the 2007 Presidential and Parliamentary Elections: Results from Pre- and Post-Election Surveys 1* (2008), available at <http://www.ifes.org/publication/34df07e58b75b1f077da49901b958445/Nigeria%20elections%202007%20way%20forward%20conf%20presentation%20FINAL.pdf> (last visited May 5, 2010).

²⁷³ A.K.J. Watt, *New Alignments in South Indian Politics*, 42 ASIAN SURVEY 733, 746-748, 751 (2002); James Gibson et al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 539-545 (2003); Commonwealth Observer Group, *Pakistan National and Provincial Assembly Elections, Oct. 10, 2002* 15 (2002), available at http://www.thecommonwealth.org/document/176283/177346/35146/pakistan_2002_cog_report.htm (last visited May 5, 2010).

²⁷⁴ See also Report of the Special Rapporteur on the Independence of Judges and Lawyers, *Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration of Justice, Impunity*, U.N. Doc. E/CN.4/2004/60 (Dec. 31, 2003) (prepared by Leandro Despouy) ("What is at stake is the trust that the courts must inspire in those who are brought before them in a democratic society.").

²⁷⁵ See Bruce Baker, *Cape Verde: The Most Democratic Nation in Africa?*, 44 J. MOD. AFR. STUD. 493, 496, 502-503 (2006); Keith Panter-Brick, *Prospects for Democracy in Zambia*, 29 GOV'T & OPPOSITION 231, 242 (1994); Nandini Patel et al., *Consolidating Democratic Governance in Southern Africa: Malawi* 43-45 (Electoral Institute of Southern Africa 2007).

²⁷⁶ *In South Africa, High Level of Confidence in Judiciary*, GALLUP, Oct. 6, 2008, <http://www.gallup.com/poll/110968/South-Africa-High-Level-Confidence-Judiciary.aspx> (last visited May 10, 2010).

²⁷⁷ The Fund for Peace, *Country Profile: Kenya*, http://www.fundforpeace.org/web/index.php?option=com_content&task=view&id=36&Itemid=61 (last

Commission observed that Kenya's judiciary had "acquired the notoriety of losing the confidence and trust of [its clientele] because of the perception that it is not independent."²⁷⁹ Legal practitioners argue that public confidence in the Kenyan judiciary has "virtually collapsed."²⁸⁰ Simply put, the judiciary in Kenya and Zimbabwe is facing a crisis of confidence.

¶71 Judges, like all members of the public, are entitled to hold opinions and express their views on any issue.²⁸¹ However, as the South African Supreme Court cautions, the conduct of judges should not in any way "compromise" the discharge of their duties.²⁸² 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.²⁸³ 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.²⁸⁴ 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."²⁸⁵ 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.

b) Invoking the Court Process

¶72 Unlike the ODM in Kenya, the MDC in Zimbabwe did seek relief in court. As discussed above, there was an inordinate delay in releasing the results of the first round of the election. Thus, the MDC applied to the 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*, Justice Uchena found that there was indeed an inordinate delay in announcing the election results. He

visited May 5, 2008).

²⁷⁸ The Fund for Peace, *Country Profile: Zimbabwe*, http://www.fundforpeace.org/web/index.php?option=com_content&task=view&id=296&Itemid=458 (last visited May 5, 2008).

²⁷⁹ Commission of Inquiry into the Post-Election Violence, *supra* note 12, at 460.

²⁸⁰ PETER ANNASI, CORRUPTION IN AFRICA: THE KENYAN EXPERIENCE 84 (2004). These views are consistent with earlier research on the credibility of Kenya's judiciary. *See also*, REPORT OF THE INTEGRITY AND ANTI-CORRUPTION COMMITTEE OF THE JUDICIARY OF KENYA 36-37 (Sept. 2003), *available at* http://www.marsgroupkenya.org/Reports/Government/Ringera_Report.pdf.

²⁸¹ *See also* Sean Macdonald, *Balance and Independence: The Judicial Process in the Charter Era*, 16 DALHOUSIE J. LEG. STUD. 161, 163 (2007) (describing the situation in Nova Scotia where the court runs a website, which contains papers written by judges on "controversial matters").

²⁸² *National Director of Public Prosecutions v Jacob Zuma* 2009 (573/08) SA 1 (SAC) at 8 (S. Afr.). *See also* Sylvia Bertodano, *Judicial Independence in the International Criminal Court*, 15 LEIDEN J. INT'L L. 409, 417 (2002) ("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.").

²⁸³ *See also* Nic Cheeseman, *The Kenyan Elections of 2007: An Introduction*, 2 J. E. AFR. STUD. 166, 166 (2008) ("On 30 December 2007, Kibaki's second term began in a very different way. [Unlike in 2002 when he was sworn in public,] this time the President was inaugurated in a hastily arranged ceremony at his official residence.").

²⁸⁴ Evan Gicheru, *Independence of the Judiciary: Accountability and Contempt of Court*, 1 KENYA L. REV. 1, 1 (2007).

²⁸⁵ *See* Oath of Allegiance for Judges (Kenya) (on file with author).

stated that the EMB was “wasting time doing everything else other than what they should have been doing,”²⁸⁶ 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.”²⁸⁷ In other words, it could not be challenged, 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.²⁸⁸

Thus, the court dismissed the MDC application.

¶73 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 review²⁸⁹ 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 decisions” of “administrative authorities,”²⁹⁰ 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.

¶74 The rule of law requires decisions to be somewhat “predicable.”²⁹¹ To put it in another way, judges should not decide cases arbitrarily.²⁹² In keeping with the golden rule of statutory construction, they must not arrive at an absurd interpretation of the law.²⁹³ Moreover, decision makers must conduct real analysis.²⁹⁴ Towards this end, before arriving at a decision, Justice Uchena was required to apply relevant legal tests objectively to the facts of the case.²⁹⁵ However, it is doubtful that an objective decision-

²⁸⁶ *Movement for the Democratic Change v. Chairperson of the Zimbabwe Electoral Commission*, (2008) E/P 24/08, 4 (High Court) (Zimb.).

²⁸⁷ *Id.* at 14.

²⁸⁸ *Id.*

²⁸⁹ See *Black’s Law Dictionary* 105, 864 (8th ed. 2004) (explaining the difference between appeal and judicial review).

²⁹⁰ High Court Act §§ 26, 27 (1981) (Zimb.).

²⁹¹ *Jaisinghani v. Union of India*, (1967) 2 S.C.R. 703, 718 (India).

²⁹² See also *Bangalore Principles of Judicial Conduct*, 5.2, U.N. Doc. E/CN.4/2003/65 (Nov. 25, 2002) (prohibiting judges from considering “irrelevant grounds” when writing their decisions.)

²⁹³ *Turner v. Hellard*, [1885] 30 Ch.D. 390, 393-94 (U.K.); *Coopers and Lybrand v Bryant* 1995 (3) SA 761, 767 (S. Afr.); *Mohammed v. Bakari and 2 Others*, (2008) 3 K.L.R. 54, 68 (C.A.K.) (Kenya); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987).

²⁹⁴ See *Anisminic Ltd. v. Foreign Compensation Commission*, (1969) 2 A.C. 147, 199 (U.K.); *Darling Casino Ltd v. New South Wales Casino Control Authority* (1997) 191 C.L.R. 602, 635 (Austl.). See also *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (Judges “must of necessity expound and interpret” legal rules.).

²⁹⁵ See also *Plaintiff S157 v. Commonwealth* (2003) 211 C.L.R. 476, 494 (Austl.) (people “are ordinarily

maker would have reached a conclusion similar to that of the *Movement for the Democratic Change* court.

¶75 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 should also be fair and reasonable. This general canon is well-established within both common law countries such as the United Kingdom,²⁹⁶ Australia,²⁹⁷ and Kenya²⁹⁸ and non-common law countries such as South Africa.²⁹⁹ It is unsatisfactory for a Superior Court merely to recognize the existence of an ouster 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.

¶76 Justice Uchena acknowledged that there was an inordinate delay on the part of the EMB in declaring the outcome of the presidential poll.³⁰⁰ 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.³⁰¹ 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.³⁰² Unfortunately, that approach is not unique to Zimbabwe. Similar trends have been noted elsewhere in Africa.³⁰³

¶77 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."³⁰⁴ 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

entitled to expect more than good faith" from courts.).

²⁹⁶ *Anisminic Ltd.*, 2 A.C. at 170.

²⁹⁷ *R. v. Hickman* (1945) 70 C.L.R. 598, 615 (Austl.); *Plaintiff S157/2002 v R* (2003), 211 C.L.R. 476,483 (Austl.).

²⁹⁸ CONSTITUTION, Art. 123(8) (2008) (Kenya); *see also* *Kipkalya Kones v. R.*, (2006) 18 (C.A.K.) (unreported) (Kenya).

²⁹⁹ *See* S. AFR. CONST., §§ 33 (1), 34 2008.

³⁰⁰ *Movement for the Democratic Change v. The Chairperson of the Zimbabwe Electoral Commission*, (2008) E/P 24/08 at 4 (High Court) (Zimb.).

³⁰¹ *Arthur Spackman v. The Plumstead District Board of Works*, [1885] 10 A.C. 229, 240 (U.K.).

³⁰² *U.S. v. Wunderlich*, 342 U.S. 98, 102 (1951) (The conduct of the decision maker also affirms Justice Minton's argument that a judge who is not independent can act irrationally.).

³⁰³ *See, e.g.*, Peter Vondoepp, *Politics and Judicial Assertiveness in Emerging Democracies: High Court Behavior in Malawi and Zambia*, 59 POL. RES. Q. 389, 395 (2006) ("Judges . . . appear to be acting strategically in Zambia, deferring to government when the executive's interests seem apparent, but turning their backs on government in those rare instances when it appears that the incumbent is about to lose power.").

³⁰⁴ Judge Paul J. Kelly, *A Discussion of Judicial Independence with Judges of the United States Court of Appeal for the Tenth Circuit*, 74 DEN. U. L. REV. 355, 356 (1997). *See also* *R v. Valente*, [1985] 2 S.C.R. 673 (Can.).

country.”³⁰⁵ 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.³⁰⁶ Further, as noted above, evidence shows that the 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.

¶178 Decision makers should be independent to the extent that they can rule “against” the state.³⁰⁷ 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.”³⁰⁸ The decision 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.³⁰⁹ Some argue that in *Bush v. Gore*, the majority of the U.S. Supreme Court was determined to rule in favor of Bush.³¹⁰ Likewise, in *Movement for the Democratic Change*, the Zimbabwean High Court was determined to rule in favor of Mugabe.

2. Timeliness

¶179 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,³¹¹ the right to a fair hearing requires proceedings to be conducted expeditiously.³¹² Thus, in the context of elections, the law in Kenya and Zimbabwe requires petitions to be heard and determined expeditiously.³¹³ However, despite this legal requirement, election challenges are rarely adjudicated promptly.

¶180 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.

Table V

³⁰⁵ Mohinder Gill v. The Chief Election Commissioner, (1948) 1 S.C.C. 405, 421 (Iyer, J.) (India).

³⁰⁶ U.S. State Department, *Zimbabwe: 2005 Investment Climate*, <http://www.state.gov/e/eeb/ifd/2005/42203.htm> (no longer available). See also *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at 269 (S. Afr.) (arguing that the Mugabe administration had previously “ignored” court orders).

³⁰⁷ Republican Party v. Malawi Electoral Commission and Others (Constitutional Case No. 5), 33 (Malawi High Ct. 2004).

³⁰⁸ Sandra Day O'Connor, Op-Ed, *The Threat to Judicial Independence*, WALL STREET J., Sept. 27, 2006, at A18.

³⁰⁹ Rok Ajulu, *Kenya's Democracy Experiment: The 1997 Elections*, 25 REV. AFR. POL. ECON. 275, 283 (1998).

³¹⁰ Elizabeth Garrett, *Institutional Lessons From the 2000 Presidential Election*, 29 FL. ST. U. L. REV. 975, 991 (2002).

³¹¹ Edwin Abuya, *United Nations High Commissioner for Refugees and Status Determination Imtaxaan in Kenya: An Empirical Survey*, 48 J. AFR. L. 187, 196 (2004).

³¹² UDHR, *supra* note 2, art. 10; ICCPR, *supra* note 2, art. 14.

³¹³ National Assembly and Presidential Elections Act, (2009) Cap. 66 §§ 19(4), 23(6) (Kenya); Electoral Act § 172 (3) (2008) (Zimb.).

Resolution of Election Petitions in Kenya		
Time (Years)	Number of Petitions (First Instance)	Number of Petitions (Appeal)
<1	7 ³¹⁴	7 ³¹⁵
1-2	16 ³¹⁶	1 ³¹⁷
2-3	1 ³¹⁸	1 ³¹⁹
>3-4	1 ³²⁰	0

¶81 Although some petitions (twenty-eight percent) were decided speedily at first instance,³²¹ it took over one year to adjudicate most petitions (sixty-four percent), notwithstanding the fact that courts are required to give election petitions “priority.”³²² In particular, the cases of *Mwangola*³²³ and *Omar*,³²⁴ 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. Most appeals (seventy-eight percent) were decided within one year. However, it took the appeal court three years to hand down a decision in *Moi*,³²⁵ despite the legal requirement for appeals to be heard and determined expeditiously.³²⁶

¶82 A holistic examination of the system suggests that it is plagued by serious delays. For example, it took three years, including both stages of the process, for courts to reach

³¹⁴ *Murathe v. Macharia*, (2008) 2 K.L.R. 244 (C.A.K.) (Kenya); *Muiya v. Nyaga*, (2008) 2 K.L.R. 493 (C.A.K.) (Kenya); *Chelaite v. Njuki*, (2008) 2 K.L.R. 103 (C.A.K.) (Kenya); *Joho v. Nyange*, (2008) 3 K.L.R. 188 (C.A.K.) (Kenya); *Libasia v. Wekesa*, (2008) 2 K.L.R. 196 (C.A.K.) (Kenya); *Njeru v. Muturi*, (2008) 2 K.L.R. 504 (C.A.K.) (Kenya); *Shakombo v. Mwawlwala*, (2008) 2 K.L.R. 558 (C.A.K.) (Kenya).

³¹⁵ *Matiba v. Moi*, (2008) 1 K.L.R. 670 (C.A.K.) (Kenya); *Maitha v. Said*, (2008) 2 K.L.R. 337 (C.A.K.) (Kenya); *Kibaki v. Moi*, (2008) 2 K.L.R. 301 (C.A.K.) (Kenya); *Chelaite v. Njuki*, (2008) 2 K.L.R. 103 (C.A.K.) (Kenya); *Omar v. Mbuzi*, (2008) 3 K.L.R. 269 (C.A.K.) (Kenya); *Mutani v. Ntwiga*, (1999) Civil Appeal No. 99 (Kenya) (unreported); *Murathe v. Macharia*, (2008) 2 K.L.R. 244 (Kenya).

³¹⁶ *Manduli v. Machayo*, (2008) 1 K.L.R. 510 (Kenya); *Nyamweya v. Oluoch*, (2008) 1 K.L.R. 580 (Kenya); *Kajembe v. Nyange*, (2008) 1 K.L.R. 1 (Kenya); *Shakombo v. Mwawlwala*, (2008) 2 K.L.R. 558 (Kenya); *Asiko v. Electoral Commission of Kenya*, (1998) Election Petition No. 1 (Kenya) (unreported); *Wekesa v. Onsera*, (1993) Election Petition No. 39 (Kenya) (unreported); *Kyengo v. Kithonga*, (1993) Election Petition No. 36 (Kenya) (unreported); *Obongita v. Maiyole*, (1993) Election Petition No. 42 (Kenya) (unreported); *Elima v. Kombo*, (1994) Election Petition No. 64 of 1993 (Kenya) (unreported); *Kibaki v. Moi*, (2008) 2 K.L.R. 301 (Kenya); *Matoke v. Akoi*, (2008) 1 K.L.R. 616 (Kenya); *Ntwiga v. Musyoka*, (2008) K.L.R. 276 (Kenya); *Onalo v. Wanjala*, (2005) Civil Appeal Number 215 of 2003 (Kenya) (unreported); *Mutani v. Ntwiga*, (1999) Civil Appeal No. 99 (Kenya) (unreported); *Mwau v. ECK*, 1 K.L.R. 691 (2008); *Gakunga v. Maina*, (2008) 1 K.L.R. 520 (Kenya).

³¹⁷ *Onalo v. Wanjala*, (2005) Civil Appeal Number 215 of 2003 (Kenya) (unreported).

³¹⁸ *Shimbwa v. Mwangola*, (1993) Election Petition No. 11 (Kenya) (unreported).

³¹⁹ *Moi v. Mwau*, (2005) Civil Appeal Number 131 of 1994 (Kenya) (unreported).

³²⁰ *Omar v. Mbuzi*, (2008) 3 K.L.R. 269 (C.A.K.) (Kenya).

³²¹ *Chelaite v. Njuki*, (2008) 2 K.L.R. 103 (C.A.K.) (Kenya); *Libasia v. Wekesa*, (2008) 2 K.L.R. 196 (C.A.K.) (Kenya); *Murathe v. Macharia*, (2008) 2 K.L.R. 244 (C.A.K.) (Kenya); *Muiya v. Nyaga*, (2008) 2 K.L.R. 493 (C.A.K.) (Kenya); *Joho v. Nyange*, (2008) 3 K.L.R. 188 (C.A.K.) (Kenya); *Njeru v. Muturi*, (2008) 2 K.L.R. 504 (C.A.K.) (Kenya); *Shakombo v. Mwawlwala*, (2008) 2 K.L.R. 558 (C.A.K.) (Kenya).

³²² National Assembly and Presidential Elections Act, (2009) Cap. 7 §19 (4) (Kenya).

³²³ *Shimbwa*, *supra* note 318.

³²⁴ *Omar*, *supra* note 320.

³²⁵ *Moi*, *supra* note 319.

³²⁶ National Assembly and Presidential Elections Act, (2009) Cap. 7 § 23(6) (Kenya).

a decision on the petitions in *Onalo*³²⁷ and *Omar*.³²⁸ Interestingly, the Chief Justice of Kenya has deplored this state of affairs.³²⁹ Moreover, at hearings before the Waki Commission, members of the public accused the judiciary of delaying the “administration of justice.”³³⁰

¶83 Courts that hear election petitions must work toward ensuring that justice is delivered swiftly. The situation in Kenya, as illustrated in Table V, cannot be maintained by a state that holds itself up as a democratic country.³³¹ 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. The UN Special Rapporteur on the Independence of Judges and Lawyers (“UN Special Rapporteur”) stressed that slow progress and delays in the execution of judicial tasks could “result in a denial of justice.”³³² 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 court finds to have won an election is rarely awarded damages to compensate him or her for lost income. 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.

¶84 Finally, as the European Court of Human Rights has stated, if electoral disputes are not determined expeditiously, democracy itself “suffers.”³³³ 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.”³³⁴ This cynicism is well-founded because a person who has been elected improperly can influence the court process using state resources.³³⁵

³²⁷ *Onalo*, *supra* note 317.

³²⁸ *Omar*, *supra* note 320.

³²⁹ See Beauttah Omanga, *Winning Election Petition No Easy Task*, STANDARD, Dec. 21, 2008, at 26, <http://www.standardmedia.co.ke/InsidePage.php?id=1144002287&cid=289&>.

³³⁰ Commission of Inquiry into the Post-Election Violence, *supra* note 12, at 461. Unfortunately, similar trends have been reported in other African states. Richard Joseph, *Challenges of a “Frontier” Region*, 19 J. DEM. 94, 102 (2008) (“After the 1999 and 2003 balloting [in Nigeria], election tribunals adjudicated challenges so slowly that dishonest results became *faits accomplis*”); MINNEH KANA ET AL., SIERRA LEONE: LEGAL AND JUDICIAL SECTOR ASSESSMENT 13-14 (2004).

³³¹ CONSTITUTION, Art. 1A (2008) (Kenya).

³³² Despouy, *supra*, note 274 at ¶ 35.

³³³ *ZDanoka v. Latvia*, 45 E. H.R. Rep. 478, 525 (2007).

³³⁴ The Carter Center, *Observing the 2001 Zambia Elections* 53 (2002), available at, <http://www.cartercenter.org/documents/1135.pdf> (last visited May 19, 2010).

³³⁵ Research on Nigeria supports this position. See Rotimi Suberu, *Nigeria’s Muddled Elections*, 18 J. DEM. 95, 104 (2007).

C. Restoring and Supporting Judicial Independence

¶85 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.³³⁶ In keeping with their oaths of office, judges must defend the constitution of their countries. They must be bold spirited. 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 and principles” that promote “equality and dignity.”³³⁷ 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.

¶86 Transparency and promptness are essential components of an efficient system of justice.³³⁸ 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.³³⁹ However, all appointees must meet certain legal requirements, including having practiced law for at least seven years.³⁴⁰ 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.³⁴¹ Indeed, the ability of JSC officials to be independent in this kind of environment is doubtful.³⁴² 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.³⁴³ In other words, under the current legal framework the

³³⁶ As experience in Malawi shows, an objective judiciary can play a central role in protecting democracy. Siri Gloppen & Edge Kanyongolo, *The Role of the Judiciary in the 2004 General Elections in Malawi*, (Chr. Michelsen Institute Development Studies and Human Rights, Working Paper No. 16, 2004), available at <http://www.cmi.no/publications>.

³³⁷ Jackie Dugard, *Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's Transformation*, 20 LEIDEN J. INT'L L. 965, 981 (2007).

³³⁸ U.N. Human Rts. Council, *Promotion and Protection of All Human Rights, Civil and Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 43, U.N. Doc. A/HRC/8/4 (May 13, 2008).

³³⁹ See CONSTITUTION, Art. 61 (2008) (Kenya); TANZ. CONST. art. 118 (1977); ZAMBIA CONST. (Constitution Act 1991) § 84.

³⁴⁰ CONSTITUTION, Art. 61(3)(b) (2001) (Kenya); ZAMBIA CONST. (Constitution Act 1991) art. 82(1)(b).

³⁴¹ CONSTITUTION, Art. 68 (2008) (Kenya); ZAMBIA CONST. (Constitution Act 1991) art. 90.

³⁴² See also International Crisis Group, *Post-Election Zimbabwe: What Next?* 8 (2009), available at http://www.crisisgroup.org/library/documents/africa/southern_africa/093_post_election_zimbabwe_what_next.pdf (contending that the JSC is “largely dominated by ZANU-PF sympathizers”); Commonwealth Observer Group, *Swaziland National Election* 6 (2008), available at <http://www.thecommonwealth.org/files/184644/FileName/SwazilandNationalElections2008-CETReportFinalPrint.pdf> (“This appointment system has the potential to ultimately undermine the independence of the judiciary”).

³⁴³ Makau Mutua, *Justice Under Siege: The Rule of Law and Judicial Subsistence in Kenya*, 23 HUM. RTS. Q. 96, 104 (2001).

president can appoint a judge for purely political reasons as long as the appointee meets the minimum requirements for the position.

¶87 Although judicial reforms could be counterproductive in transitional states,³⁴⁴ it is apparent that changes must be made to the courts if the rule of law is to prevail in Africa. For the judiciary to be fully independent, as envisioned by international human rights laws,³⁴⁵ it is imperative to review the selection process.³⁴⁶ Indeed, there is a need to divest the president of power over the system.³⁴⁷ Kenya and Zimbabwe could adopt the Zambian model where, in addition to the president, the legislature is involved in the selection of judges.³⁴⁸ 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.³⁴⁹ 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.³⁵⁰

¶88 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.”³⁵¹

¶89 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,” as some suggest.³⁵² The proposal by the Kreigler Commission that those who judge a contested election have expertise in election law³⁵³ should be implemented, as it would enable courts to deal expeditiously with any possible legal objection, 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.³⁵⁴ He or she should also be willing to collaborate with other

³⁴⁴ U.N. Human Rts. Council, Report of the Special Rapporteur on the Independence of Judges and Lawyers, ¶ 22 U.N. Doc. A/HRC/4/25 (Jan. 18, 2007) (*prepared by Leandro Despouy*); Special Rapporteur on the Independence of Judges and Lawyers, *Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration of Justice and Impunity*, ¶ 27, U.N. Doc. A/62/207 (Aug. 8, 2007).

³⁴⁵ See African (Banjul) Charter on Human and Peoples’ Rights, *supra* note 2, art. 26; Convention on the Rights of the Child, art. 37, G.A. Res. 44/25, 44 U.N. GAOR. Supp. No. 49, U.N. Doc. A/44/736 (1989); ICCPR, *supra* note 2, art. 14.

³⁴⁶ Commonwealth Observer Group, *supra* note 6, at 9.

³⁴⁷ 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*, 32 J. LATIN AM. STUD. 705, 712-15 (2000).

³⁴⁸ ZAMBIA CONST. (Constitution Act 1991) art. 93(1). Research conducted in Zambia suggests that this procedure could have a positive impact on the judiciary. Vondoepp, *supra* note 303, at 397.

³⁴⁹ S. AFR. CONST. 1996, § 174(3)-(4).

³⁵⁰ *Id.* at § 178 (1).

³⁵¹ Author interview with Joy, in Eldoret, Kenya, (Feb. 7, 2009).

³⁵² See generally INTERNATIONAL COMMISSION OF JURISTS, KENYA: JUDICIAL INDEPENDENCE, CORRUPTION AND REFORM 24 (2005), available at <http://icj.org/IMG/pdf/kenyareport.pdf>.

³⁵³ Independent Review Commission, *supra* note 12, at 141-142.

³⁵⁴ For a wider discussion of this theme, see Simon Evans & John Williams, *Appointing Australian Judges*:

judges.³⁵⁵ 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.³⁵⁶

¶90

These initiatives would strengthen the rule of law and democracy in Africa. Additionally, 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.³⁵⁷ The Kriegler Commission made a similar recommendation.³⁵⁸ Adopting these initiatives would enable Kenya and Zimbabwe to achieve that goal.

VI. CONCLUSION: MAKING TOUGH CHOICES

¶91

This article 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 institutions that decided the recent elections in Kenya and Zimbabwe failed to do so 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 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.³⁵⁹ Rooting out the long “culture of electoral lawlessness” requires “concerted, non-partisan commitment to electoral integrity on the part of political leaders”³⁶⁰ as well as the general public and other governmental and non-governmental agencies.

¶92

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 police force, the EMB, and the judiciary.³⁶¹ If impunity is to be fought full-force, tough choices must be made. Government agencies and courts must discharge their duties without fear or favor. They must be accountable for their acts and omissions. Moreover, cronyism must give way to professionalism. Part of the solution lies in changing the means of appointing officials. As the preceding analysis underscores, an all-encompassing formula must be adopted if effective reforms are to be realized on

A New Model, 30 SYDNEY L. REV. 295, 313-314 (2008); Abuya & Mukundi, *supra* note 47, at 192-96.

³⁵⁵ Justice Macdonald, the Chief Justice of Nova Scotia, describes team work as an essential trait for judges to possess. See Macdonald, *supra* note 281, at 172-173.

³⁵⁶ See generally K.D. Ewing, *A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary*, 38 ALBERTA L. REV. 708, 721 (2000).

³⁵⁷ ZAMBIA CONST. (Constitution Act 1991) art. 76.

³⁵⁸ Independent Review Commission, *supra* note 12, at 22.

³⁵⁹ See also Gregory Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 207 (2000) (“Laws are never perfect in either their creation”).

³⁶⁰ Independent Review Commission, *supra* note 12, at 9.

³⁶¹ See also CHENJERAI HOVE, SHEBEEN TALES: MESSAGES FROM HARARE 116 (1994) (“Democracy can never thrive in a political monologue in which the leaders, like rain gods, pour messages on the heads of disempowered individuals and communities”).

the ground. Additionally, if real results are to be achieved, members of the public must be actively involved.³⁶²

¶93 Government institutions must take a more active role in the discharge of their mandate. Collectively, they must work toward ensuring that any person suspected of having engaged in any electoral malpractice is arrested, charged, and tried in accordance with due process principals. Proper investigations must be taken to ensure that all perpetrators are brought before the court. All those found guilty must be punished for the offence they committed. These measures will send a strong signal that these institutions are taking their roles seriously and will go a long way toward restoring the confidence in the government that many citizens have lost.

¶94 Kenya and Zimbabwe are repackaging themselves as democratic states. This is a step in the right direction. Through this process, both countries could bring about the change they need and deserve. It is in the interest of both to grasp this opportunity with both hands. If the current leaders fail to follow through, history will no doubt judge them harshly.

VII. POSTSCRIPT

¶95 As of June 2010, there were constitutional developments in Kenya. Parliament had passed a draft of a new constitution, which was awaiting a referendum in August 2010. The new legal order seeks to introduce a number of fundamental changes. Firstly, it makes provision for a new EMB. Clause 88 of the draft law, which establishes this institution, excludes any person who has held office or stood for election as a member of parliament or of a political party. Also excluded are state officials. The draft legislation also expands the mandate of the EMB. Further, clause 166 of the draft Constitution, unlike its current counterpart, involves parliament in the selection of judges. Restrictions are also placed on the term for holding office of the chief judge. Additionally, the procedures for removing a judge from office have been simplified. These legal changes could go a long way toward reducing strengthening the rule of law and democracy in Kenya.

³⁶² Edwin Abuya & Dulo Nyaoro, *Between a Rock and a Hard Place: Victims of Persecution and Armed Conflict in South Africa*, 32 HASTINGS INT'L & COMP. L. REV. 1, 26-34 (2009).