

Political and Judicial Contestations Affecting Election Management in South Africa, Kenya, and Zimbabwe

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Abstract

The latest elections in South Africa, Kenya, and Zimbabwe suggest that Africa must brace for serious legal and political contestations of election management. The separation of powers principle presupposes a healthy balance between the executive, judiciary, and legislative arms of the state. This seemingly worked well to support the election management bodies (EMBs) from undue interference and meddling by these arms of state before, during, and after elections. However, recent developments in South Africa, Kenya, and Zimbabwe suggest that a slight shift in this arrangement has occurred, and that serious contestations between politicians, the judiciary, and election management have resulted in adulteration of the 'free, fair, and credible' principles of conducting elections on the continent. Using a comparative perspective and rational choice approach of institutional theory, this article interrogates the relationships between the judiciary, politicians, and EMBs in the three countries, and evaluates them based on the African Union's (AU) Declaration on the Principles Governing Democratic Elections in Africa and the AU's Charter on Democracy, Elections, and Governance.

Introduction

In their work as the administrators and authorities that conduct elections, election management bodies (EMBs) in Africa do immense work in the regularisation and consolidation of democracy through elections. The EMBs are known by various names, such as Independent Electoral Commission', Elections Board, and Elections and Boundaries Commission. The work they have done on incubating and inculcating democracy on the continent is immense. In terms of practice, these bodies must design and implement mechanisms to determine eligible voters, and see to it that all those who are eligible eventually do cast their votes. They must

also ensure that these votes ultimately result in seats in a country's chamber of public representatives, whether at the national, regional, or local level. In some countries (such as South Africa), these bodies also assist universities and colleges of higher education, as well as other public bodies to run their elections to ensure the elections are free and fair. The work of these EMBs also contributes to research and scholarship, as elections in countries are usually a subject of immense interest for researchers, students, and other categories of learners. In terms of public policy, the practical and research components of conducting elections usually assist EMBs in designing, defining, refining and implementing policies related to elections, including on voter registration, civic and voter education, overseas or diaspora voting, voting by incarcerated individuals, and numerous categories of special votes, such as for people with a disability, people who are pregnant, the infirm and the elderly.

The main research question for this article was: To what extent will the judicialisation (or increase in resorting to the courts) of the election outcomes and disputes undermine or promote electoral democracy in Africa? To answer this research question, an institutional theory, particularly the rational choice approach, was employed. The analysis focused on how 'people functioning within institutions behave as they do because of normative standards rather than because of their desire to maximise individual utilities'.¹ In the context of this article, the political elites and political parties function within systems that operate along democratic values. The principle of separation of powers expresses the normative standards of how institutions keep each other in check to advance a democratic political culture.

In a more focused and narrow perspective, the role of the courts in Africa in ameliorating election-related disputes and conflicts in Africa was analysed. Relying on the recent case examples of elections in Kenya (2017), Zimbabwe (2008; 2018) and South Africa (2019), this paper assesses the pros and cons of judicialising election outcomes and disputes in Africa. These three countries were selected for study because they display Africa's latest examples of intervention by the courts in election-related disputes.

This research also expands on earlier research done on Zambia and Zimbabwe, which posed the following two questions:

'The main question is whether judiciaries in Africa should continue to be final arbiters on electoral disputes; particularly the disputes that concern the electoral results. Another question is whether judiciaries in Africa have been adjudicating on electoral disputes in a manner that enhances the higher objective of democratisation.'²

Research Methodology and Approach

Using a qualitative research approach, specifically a review of the relevant literature, a conceptual and theoretical overview, and based on inputs of participants at the Human Sciences Research Council's 'Democracy and Elections Writing Retreat' held in Dakar, Senegal from 30 November to 3 December 2023, the authors interrogated the issues detailed above to

answer the main research question of the paper. The qualitative research methodology of document review relies on material from EMBs, including reports by election observer missions in the selected countries.

This qualitative research methodology was chosen for three reasons. Firstly, it is suitable for this kind of study as it enables the authors to consider the available research options for this study. Secondly, it helps the authors to identify and apply the pertinent epistemological and ontological pathways for this topic, especially election systems and theoretical reflections on Africa's elections, including the practical manifestations of these elections in the three countries. Thirdly, only qualitative research methodologies offer the relevant instruments (e.g. unstructured interviews with relevant stakeholders to understand their opinions, policies, legal preferences and perspectives on how elections should be conducted in their jurisdictions).

Contextualising and Conceptualising Contested Election Outcomes in Africa

An election is, by its nature, a contest, but it should not be bloody, vindictive, or steeped in vengeance. If this happens, elections become an obstacle that undermines the voters' choice, democratic and human rights, and the entrenchment of democratic rule using the ballot. However, there is a need to rethink the conceptualisation of elections. There is a thinking that perceives of elections as being a mechanism to allocate state power among political parties, and thus as a competitive process. Integral to this process is the possibility of contesting the election outcome and the declaration of the winners. However, other forms of conceptualisation are used in this article to examine how elections can serve as part of a country's public relations exercise, its domestic and foreign policies, and attempts to assure foreign investors, donors, and partner nations that a country is a reliable ally. In this new type of thinking, elections should be perceived as a process of entrenching democratic values among the political parties and the society in general, not as a zero-sum game.

Many elections all over the world have been closely fought.³ However, this does not mean that all closely fought elections inevitably end up as contestations at the law courts. While an election, like other contests, 'is defined by its rules and criteria for ranking and determining the outcome',⁴ this does not mean that it must necessarily be a bloody contest. Thus, some countries experience legal contestations more than others. In some countries, special courts exist that are dedicated to dealing with election disputes. It is acknowledged that litigation 'is generally a two-party contest in which each side attempts to influence the decision of [a] judge or jury as to guilt or innocence'.⁵ However, with elections, the dispute is usually about which political party or candidate won, or whether the election was marred by electoral fraud, which brings into question the victory of the other party or candidate.

Legal contestation of elections in Kenya

In 2017, Kenya's Supreme Court unprecedentedly nullified the elections and became 'the first in Africa to nullify the election of an incumbent'.⁶ This bold move by the court was the first

of its kind on the continent and set in motion a train of thought and debate on the role of the courts in an election. According to Gerzo,⁷ the court ruling was not only unprecedented, but challenged the notion that the courts in systems categorised as hybrid regimes should support the incumbent political elites, regardless of evidence of electoral fraud. It is in the context of the argument advanced by Gerzo that this article provides an analysis of how to rethink the conceptualisation of elections and the role of the courts in advancing a democratic culture in hybrid regimes. The Kenyan case is also helpful in analysing how to bolster the independence of EMBs.⁸

On the one hand, the Kenyan case study suggests that when the separation of powers is strong, the courts may be empowered to play a proactive role that boosts democracy. On the other hand, such intervention by the courts may bring about what some call the ‘judicialisation of politics’,⁹ or the ‘judicialisation of election disputes’.¹⁰ This might have negative implications for the manifestation of the voters’ choice and their right to decide who governs them through the ballot and not the courts. Yet, the move by Kenya’s judicial authorities motivated similar moves elsewhere in Africa, notably in Malawi in 2019, when the country’s judiciary became ‘the second in Africa to annul the election of a presidential incumbent’.¹¹ Subsequently, the role of the court in adjudicating election disputes was also felt in Zimbabwe, as discussed below.

Legal contestation of elections in Zimbabwe

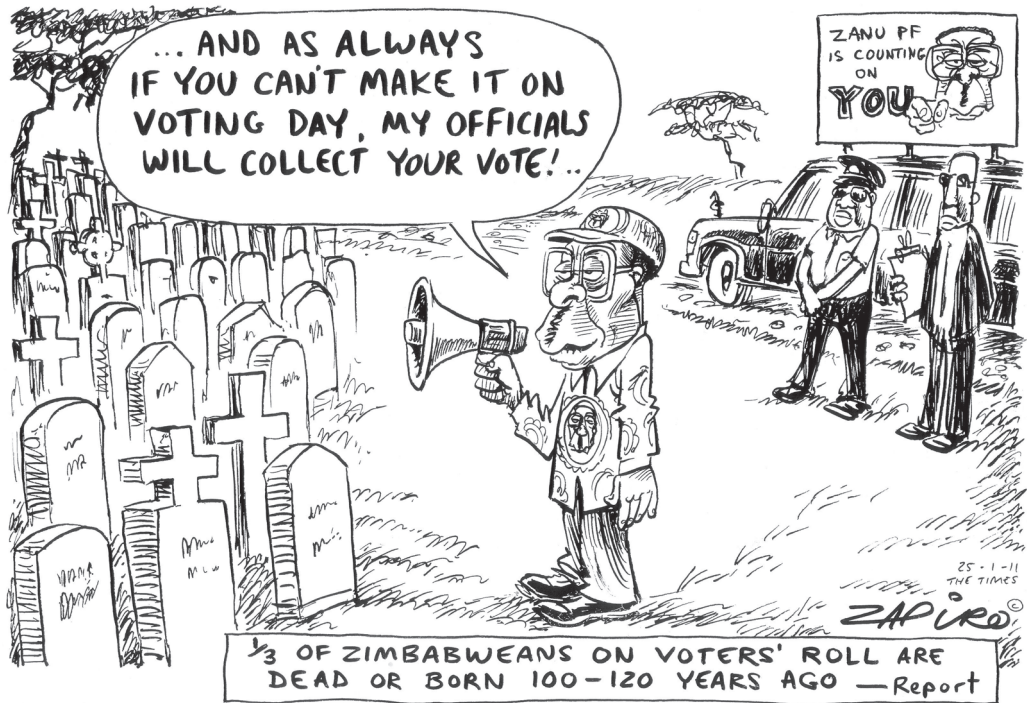
Zimbabwe’s elections in August 2023 have also been marred by contestations amid allegations of electoral fraud.¹² Such contestations have now become the hallmark of Zimbabwe’s elections since the heydays of former leader, Robert Mugabe. Arguably, these perennial contestations have compromised the legitimacy of Zimbabwe’s election outcomes and adversely undermined the integrity of its EMB, the Zimbabwe Election Commission (ZEC). (See Figure 1 and 2 below.)

Similarly, in terms of its judiciary, one scholar posits that ‘the Zimbabwean judiciary is fully and faithfully captured’.¹³ The term ‘captured’ as used here suggests a judiciary that is not independent but that operates according to the whims of the executive, namely, President Emmerson Mnangagwa’s government. If this assertion is correct, then it would explain why the country’s authorities appear to trust the verdict of the courts whenever election-related disputes arise; and why civil society bodies (e.g. the Zimbabwe Election Support Network (ZESN) and the ordinary members of the public do not trust the courts when it comes to adjudicating on election-related disputes between the government and the opposition. Accordingly, following claims of election rigging by the opposition in the country’s 2023 harmonised elections, the Zimbabwean government spokesperson, Nick Mangwana, said that ‘only the courts of law can order fresh elections in Zimbabwe’.¹⁴

A key contention of this article is how far the Zimbabwean judiciary applies the rule of law independently of the whims of serving politicians. Similarly, as Figure 2 suggests, EMB and state officials in the country are known to be loyal to the governing Zimbabwe African National Union-Patriotic Front (ZANU-PF), to the extent that their unethical practices have

resulted in the integrity of Zimbabwe's electoral processes and government legitimacy being undermined.

Figure 1: Cartoonist's impression of vote rigging: Deceased 'voters' in Zimbabwe's elections



Source: *The Times*, 2011

Legal contestation of elections in South Africa

Since 1994, South Africa's elections have been admired internationally for being fair, free, and compliant with international election management standards. Moreover, South Africa's political system and judiciary enjoy global respect for their steadfast adherence to the rule of law. Yet, in recent elections, notably the 2019 national and provincial elections and the subsequent electoral disputes, South Africa has seen the advent of disputed electoral outcomes. While such disputes were expeditiously and systematically addressed by the country's Electoral Court and the Constitutional Court, this still shows that the country is not immune to such disputes emerging. In the case of South Africa, however, the Electoral Court and Constitutional Court have to date played an impartial role in adjudicating election disputes. The High Court, Supreme Court of Appeal (SCA), and other courts have also played a role in ensuring that election disputes in the country are resolved in terms of the rule of law.

In the case of South Africa, recent research has highlighted the question of independence and impartiality in terms of the country's judicial appointments. It is argued that '[g]

overnment (that is the ruling party in the legislature and the executive) would evidently prefer a politically sympathetic judiciary which defers to governmental decisions'.¹⁵ However, Malan¹⁶ acknowledges that 'the draftsmen of the constitution took great pains to secure the integrity of the judiciary'. Such integrity remains largely intact, as even some members of the governing party (the African National Congress (ANC)) and its alliance partners, Congress of South African Trade Unions (COSATU) and the SA Communist Party (SACP), regularly complain about the role of the judiciary in exposing corruption, handling cases of government impropriety, and sentencing the culprits involved in 'state capture',¹⁷ especially during the country's 'nine wasted years'¹⁸ under the former President, Jacob Zuma.

Limitations and Delimitations of the Article

To ensure that the data collected was manageable, the study focussed on the three country examples that were chosen for it. For purposes of delimitation, the study focussed on policy, practice, and scholarship in terms of the role of the courts in adjudicating election outcomes in Africa, with a special focus on the three countries identified. The main limitation of the study was that it did not use interviews or a survey questionnaire, which would have allowed the researcher to tap into the knowledge of relevant researchers.

Assumption

The authors assume that when the courts become central to the electoral outcome and so determine who governs and who loses, this has dire implications for the democratic process. Furthermore, such judicialisation or judicial intervention may threaten the establishment of electoral democracy and discourage voting if the citizens know that the courts may overturn an election outcome or order a re-vote even where the populace finds this unwarranted. The role of election candidates may also be undermined in terms of representation. Therefore, the electorate may find that their participation role is denied.

Legitimacy and Legality

In terms of participatory and representative democracy, the principle of electing individuals to represent others in a legislature or parliament is said to be a fair process of appointing leaders (representatives) whose government will be legitimate, as it rests on the will of the people or the governed. However, procedural legality requires that the process of electing and appointing public representatives be followed to ensure that the legitimacy of these appointments can be guaranteed.

Sovereignty and Election Commissions in Africa

For many EMBs, the question of national sovereignty is a fundamental point to consider, as it determines how far they can go in seeking help regarding election outcomes and electoral disputes, and their resolution in Africa. Among the issues that relate to sovereignty is the ability of a political, constitutional and legal jurisdiction to resolve its issues, problems and dilemmas without any unsolicited external (regional or global) intervention. In practice, this presents serious obstacles in the functioning of EMBs and their stakeholders, as it eliminates or reduces the number of options and participants that can help with resolving election outcome dilemmas.

Compromised EMBs: the Achilles Heel of Electoral Democracy in Africa

A discussion on the conduct of EMBs on the continent should be situated in the dominant discourse of what has been argued to be a ‘democratic recession’.^{19,20,21,22} This discourse is primarily informed and corroborated by the indexes of Freedom House and the Economist Intelligence Unit, which indicate that half the world’s population lives under authoritarian regimes. According to the Freedom House report of 2023,²³ democracy is in recession, while the Economist Intelligence Unit’s 2022²⁴ Democracy Index report indicates that of the 167 countries included in their classification, 24 are full democracies, 48 are flawed democracies, 36 are hybrid regimes, and 59 are authoritarian regimes. On the African continent, there is one full democracy, six flawed democracies, 14 hybrid regimes, and 23 authoritarian regimes.

In addition to the two reports indicated above, the Mo Ibrahim Foundation report of 2022²⁵ indicates that the governance score in Africa flatlined at an overall score of 48.9 between 2012 and 2021 (ten years). The Afrobarometer report titled ‘Do Africans want democracy, and do they think they’re getting it?’²⁶ indicates that 69 per cent of Africans prefer democracy to any other kind of governance system. Governance and democratisation are interwoven.

The discussion in this article does not confirm or dispute the discourse of democratic recession, but tries to understand the conduct of EMBs and measures the performance of the chosen case studies within this context. Interestingly, in the 2023 report produced by Freedom House, the case studies for this article offer contrasting positions: South Africa is categorised as ‘free’, while Kenya is categorised as ‘partly free’, and Zimbabwe as ‘not free’.²⁷ The report specifically refers to Kenya’s improvement in terms of the management of the 2022 elections and its democracy in general:

‘Other power transfers have been far more democratic. Kenya’s [2022] election featured increased transparency, fresh evidence of judicial independence, and a peaceful handover of the presidency from one political bloc to another. The process represented a stark improvement over previous balloting, which has repeatedly been marred by ethnic violence, electoral misconduct, and politicians’ refusal to accept defeat.’²⁸

Although violence has been minimised in Kenya since the 2007 elections, disputes regarding election outcomes have become a common feature. The disputes arise out of doubt about the credibility of the election results. Interestingly, the results are put into question by officials at the EMB. Both the 2017 election results, which were annulled by the court, and the 2022 election results were questioned by EMB officials.²⁹ Following the post-electoral violence of 2007, the courts have become the best alternative to resolve disputes in Kenya. This confirms two important considerations; firstly the independence of the judiciary and, secondly the trust that Kenyans have in the courts to adjudicate contentious political issues. In democratic systems, the strength of one arm of the state may contribute to strengthening another. In Kenya, the independence of the judiciary has helped strengthen the EMB since 2010. It is an exercise of the principle of checks and balances.

Once an EMB is compromised or weakened, serious problems can arise in a country. In Africa, the various signs that characterise a compromised EMB include an EMB that is not impartial because it is inclined to party political agendas and the incumbent government's political interests. Another is the inability of the body to control the determination of its policies and strategies for future elections, or to declare a winner or nullifying elections if warranted in terms of a country's electoral laws and constitution.

A compromised or weakened body usually lacks independence and autonomy, and this tends to undermine the trust of the public and election stakeholders in the relevant body. (During his election observation activities on the continent, this author (Maphunye, K.J.) has seen how this can occur in a country). In order for EMBs to act independently, they should be able to make decisions and implement measures that are in the best interests of the electorate, without fear or favour. Furthermore, (administrative) autonomy is critical, as it allows an EMB to rely on its resources, structures and systems to ensure that it does not become beholden to any sectarian or biased political interests.

One of the major difficulties faced by EMBs in Africa in terms of safeguarding their independence and autonomy is that elections are usually funded from the public purse. Therefore, EMBs usually have to account to incumbent political representatives, and maintain their independence when regularly meeting with the political leaders in the legislatures.

Judicialisation of Elections in Kenya, an Example of the Deepening of Democracy

The resort to the courts in Kenya has helped to deepen the process of democratisation, rather than undermine it. Election outcomes in Kenya have been a source of political contestation and followed by extreme violence, specifically in December 2007. In the subsequent elections of 2013, there were petitions filed against running presidential candidates before voting day, and appeals to annul the elections after voting. The courts dismissed these petitions and appeals. In 2018, the court annulled the elections following complaints about irregularities. This was historic and unprecedented in the history of elections on the African continent. Kenya is the first and the only country on the continent to have elections annulled by the

court. The recent elections held in August 2022, were plagued with the usual contestations. Unprecedentedly, some officials of the EMB distanced themselves from the results. This was the second precedent set by Kenya regarding the outcomes of elections on the continent. Despite this show of doubt in the election outcomes, the Supreme Court confirmed the results. By and large, the role of the judiciary in Kenya's elections has been in the advancement of democracy and is key to resolving political contestations. It has occupied a supreme position in mitigating the violence experienced following the 2007 elections.

There are several key political dividends because of the role of the judiciary in Kenya's electoral process: enactment of the Independent Electoral and Boundaries Commission Act, the Elections Act of 2011, and the Elections (Technology) Regulations of 2017.³⁰ Although there were institutional reforms and legislation to mitigate the challenges of 2007, the elections in Kenya remained highly contested.

Figure 2: Cartoonist's impression of electoral malpractice in Zimbabwe's elections



Source: Sunday Times 2008

Zimbabwe and Elections, a Belligerent Authoritarian State

The 2007 elections of Kenya may be comparable to the 2008 elections of Zimbabwe, in consideration of the violence that marred the outcomes. As Figure 2 above suggests, Zimbabwe is one of the African countries that have experienced significant levels of electoral malpractice, which eventually compromised the integrity of its elections and EMB. While the country is

not the only one experiencing such issues in Africa, (other examples include the Democratic Republic of Congo, Ethiopia, Nigeria, and Madagascar), Zimbabwe's case has certainly been a thorn in the flesh of the Southern African Development Community (SADC) and African Union (AU), whose election principles it has flouted in many of its recent elections.

Although the Kenyan case was extreme, Kenya, however, rose from this tragic experience to a path of maturing democracy, while Zimbabwe continues to experience the same issues relating to poor management of elections that the country has been experiencing since Mugabe's terms of office. Thus, the country has deteriorated into a belligerent state whose elections have continually been punctuated by disputes and violence. Zimbabwe held harmonised (or combined) elections in August 2023; as usual, the elections were followed by disputes and condemnation from observer missions. In response, the governing ZANU-PF took a belligerent stand towards all critics of this election. Interestingly, the SADC Observer Mission for the country's 2023 harmonised elections put forward a critical report and clearly pointed out the recurring challenges regarding the ZEC, some legislation, and in the constitution. Although the SADC report did not contain any harsh censure or condemnation of the errant Zimbabwean electoral process,³¹ ZEC's handling of the elections, and ZANU-PF's usual Machiavellian-like pre-election tactics, SADC's message to the Zimbabwean authorities seemed intended to convey two messages to the country. First, the report appeared to signal the sub-regional body's renewed attempts to distance itself from biased elections, marred by violence, fraud, vote rigging, and other unethical practices that flout the SADC Principles and Guidelines Governing Democracy and Elections. Second, the sub-regional body seemed to signal its refusal to accept the role of Zimbabwe's ongoing saga of problematic elections and compromised legitimacy.

Inclusive Development as a Precondition for Democratisation

Although the focus of this article is on EMBs and democratisation on the African continent, there is a recurring theme in the discourse of 'democratic recession', acknowledging the interlink between this decline and lack of economic development and to a certain extent lack of inclusive economic development. Thus, it would be amiss to discuss and solely focus on the EMBs and ignore this important aspect of democratic recession. Secondly, Fukuyama³² compares the emergence of the waves of democratisation to the spread of ideas, and civilisations (Western civilisation and the idea of human equality), which is also argued to emerge from Athens. Of course, we need to also appreciate the emergence of the Industrial Revolution and its evolutions from the First Industrial Revolution to the current Fourth Industrial Revolution and how this is intertwined with aspirations for liberal democracy.

Fukuyama³³ observed: 'There is a correlation between economic development and stable democracy; most of the world's rich industrialised countries today are democracies, whereas most remaining authoritarian states are much less developed.' This observation of Fukuyama is plausible, but a glance at the Nordic countries gives the impression that it is a democracy of a certain type, not the dominant liberal democracy.

Table 1: Various typologies on democratic states

Democracy Index 2022	Fragile States Index (2022)	Global Peace Index (2023)	Human Development Index (2023)
1. Norway	1. Finland	1. Iceland	1. Switzerland
2. New Zealand	2. Norway	2. Denmark	2. Norway
3. Finland	3. Iceland	3. Ireland	3. Iceland
4. Sweden	4. Denmark	4. New Zealand	4. Hong Kong, China
5. Iceland	5. New Zealand	5. Austria	5. Australia

Source: Maphunye and Lekaba³⁴

Table 6.1 shows how well social democratic states are doing in terms of various indexes. In all the indexes, the Nordic countries are leading. Surprisingly, the advocates of liberal democracy, the United States of America in particular, is ranked 30th in the EIU Democracy Index report of 2022, 40th in the Fragile Peace Report of 2022, 131st in the Global Peace Index, 21st in Human Development Index.^{35,36,37,38} The Nordic countries have sustained their leadership in these global rankings. It could then be argued that the current debate on democratic recession ignores the fact that lack of inclusive development is a main contributor to the phenomenon. To turn the tide of this recession, there are two options; firstly, to follow the example of the Nordic countries, or the Chinese model of development. The danger with the latter example is that China is an authoritarian, one-party system. The UNDP,³⁹ observed that ‘pervasive economic insecurity generates popular discontent and imperils political stability’. By extension, a democracy that is unable to address human conditions of development, security, and peace is prone to instability and recession.

Interestingly, the 2021 Democracy Index of the Economist Intelligence Unit was titled ‘The China Challenge’,⁴⁰ and elaborated as follows:

‘How much of a challenge does China pose to democracy, the model of governance to which most people in the world aspired for the past century? The potency of this political challenge is inextricably linked to China’s incredible economic success over the past three decades. The Chinese economy has grown at almost triple the pace of the US economy in nominal GDP terms since 1990, turning China from a poor developing country into an economic superpower with the second largest GDP in the world. China’s rulers have become more confident about promulgating the alleged superiority of their system over that of the West, and the Covid-19 pandemic has accentuated this trend.’

Acknowledging the rise of China and how it positioned itself as an alternative and stepped into authoritarianism and state capitalism (socialism with Chinese characteristics), Fukuyama’s notion of development and stable democracy is not far-fetched. It can be further argued that most countries ranking high in typologies of democracy – like the Democracy Index of the Economist, Freedom House, and the International IDEA – have advanced social democracy instead of liberal democracy. However, not all economic growth translates into a progressive

social system that empowers citizens and further development. On the African continent, the African Development Bank⁴¹ estimates growth rates averaging 5.5 per cent for the following countries in 2023:

- Rwanda (7.9 per cent)
- Cote d'Ivoire (7.1 per cent)
- Benin (6.4 per cent)
- Ethiopia (6 per cent)
- Tanzania (5.6 per cent)

In the same report, the ADB estimates the socio-economic effects of the Russia-Ukraine war thus:

- Increase of about eight million people living under \$1.90 per day
- 15 million people, i.e. 1.1 per cent of Africa's population, fall under extreme poverty
- Increase in under-nourished people, from an average of 195.5 million in 2000-2002 to 256.1 million in 2019-2021.

The report of ADB draws parallels between economic growth and human development in some African countries. It brings the appreciation that although economic growth is important, there should be policies targeted at improving human conditions, to avoid any element of insecurity and thus a threat to democracy. This also advances the argument that the growth and deepening of democracy depends on various interrelated factors of political systems.

Having carefully examined the roles of the judiciary in the adjudication of election-related disputes, it is only fair to recognise the interrelationships between the three arms of the state, namely the executive, legislature, and judiciary. Of these three, only the judiciary can be trusted with the adjudication of election disputes as judges and other judicial officers are not normally directly involved in the hustle and bustle of political issues. However, some writers caution:

Although the role of the judiciaries in electoral disputes is firmly established in contemporary times, it is not without controversy. The fears of judicialisation of politics are still extant and genuine today as they were initially when it was deemed that the courts have no role in electoral disputes.^{42,43}

In the case of countries such as Kenya, Zimbabwe, and South Africa, this matter needs careful reflection and the meticulous implementation of the rule of law to avoid meddling of the judiciary in daily political contestations. In the case of South Africa, particularly, such a cautionary note is advisable given continual allegations by the opposition and some citizens that South African judges or the judiciary are 'captured' by the state or the governing ANC.^{44,45}

Conclusion

The role of the judiciary in Africa's elections, like elsewhere in the world, remains critical for the promotion and consolidation of electoral democracy. The courts have a vital role to play in adjudicating electoral disputes and conflicts as we have seen in the cases of Kenya, Zimbabwe, and South Africa. Yet, increasingly, Africa's elections recently saw the advent of an extensive role by the courts, even resulting in the annulment of closely contested national or general elections. On the contrary, though, an extensive or pronounced role by the courts in major election disputes might emasculate the necessary role of the EMBs. This scenario may also create the 'judicialisation of elections' or the 'judicialisation of politics', which means that the courts, unlike the electorate, will ultimately decide the fate of a process that in principle should be decided at the ballot box. Moreover, Africa's EMBs and elections management fraternity must heed the following warning:

'When elections are judicialised in Africa, national courts overwhelmingly legitimise incumbent electoral victories. When opposition candidates lose in high-stakes presidential and gubernatorial elections, they seldom concede defeat without legal challenges. Claims of electoral irregularities, fraud, incompetence of electoral bodies, violence, and an unequal playing field, among other factors, transform these cases into highly contested mega-political disputes when they are judicialised.'⁴⁶

Elections are an important indicator of democratisation or its recession. Thus, the management of elections contributes to the health of democracy. However, the discourse of democratic recession is mainly on the rankings, and how over time authoritarianism has grown. Although the typologies of democratisation give us an outlook of democracy globally, their utility cannot be generalised. Each political system has its unique challenges and varies in terms of how power is distributed. It is noteworthy that the discourse on democratic recession does not appreciate the key issues contributing to the democratic decline, issues such as high levels of inequality, poverty, and lack of human development. In some societies like Kenya, identity issues are at the core of politics and influence the distribution of resources. This may fuel sentiments against the ruling elites, and the resort could be violent protests or highly disputed election results. Thus, some issues that are regarded as contributors of democratic decline may lead to the process of democratisation. In this article, the discourse helped frame the discussion of how EMBs conduct elections and how the legal parameters help to safeguard democracy.

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