

# Zambia Electoral Analysis Project (ZEAP) Briefing paper series

## Briefing Paper 2: The Role of the Courts in the Electoral Process in Zambia

### Findings

- The judiciary potentially plays a cardinal role in levelling the electoral playing field through its fair determination of pre- and post-election disputes.
- In Zambia most of the electoral disputes are heard and determined by the High Court and the nascent Constitutional Court.
- The courts lack operational independence and have not determined recent political and electoral cases on the basis of merit.

### Policy Implications

- The Zambian courts in their current form cannot be expected to play the role of a neutral, trusted and fair mediator in the electoral process.
- The manner in which the courts have determined recent political and electoral cases and the way the Constitutional Court failed to determine the 2016 presidential election petition on merit makes it unlikely that the opposition will seek judicial redress should the 2021 election be disputed.

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## 1. Introduction

The judiciary plays a cardinal role in the electoral process. The courts typically deal with the fundamental issues of: (a) the validity of the result, and therefore the right to challenge the outcome of elections; (b) the right to provide redress for the violation of suffrage rights; and (c) criminal prosecution against those who have corrupted or attempted to corrupt the electoral process. This is often through the determination of both pre- and post-election disputes. In determining pre-election disputes relating to the electoral process, the judiciary can either level or tilt the electoral playing field, thereby enforcing or obliterating democratic norms. In determining post-election disputes, courts have the power to determine who eventually assumes electoral office. Ultimately, this reality underscores the need for a functionally effective and independent judiciary in Zambia. The right to vote would be merely abstract if the right to sue to enforce it was not guaranteed in law. Likewise, the right to seek redress before the courts is a corollary of the right of candidates who obtain the necessary number of votes required by law to be duly installed in office.<sup>1</sup>

This briefing paper sets out the structure and mandate of the courts in Zambia in relation to the electoral process as well as locating the courts in the political context of the country in terms of their operational independence. This is followed by an overview of how the courts have responded to cases that have been brought before them for adjudication, focusing specifically on matters relating to the registration of voters, the qualification of candidates, the campaign and media landscape as well as the resolution of disputed election results. It is contended that the judiciary, especially the Constitutional Court, lacks operational independence to determine cases on merit and fairly. As the case examples below demonstrate, the courts have usually ruled to either keep the status quo or in a manner favourable to the ruling party. This entails that the judiciary is not expected to play the role of a trusted mediator in the electoral process.

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## 2. Structure, mandate and independence of the courts in relation to election disputes

The Constitution of Zambia provides for a hierarchy of four superior courts; namely the High Court,<sup>2</sup> the Court of Appeal,<sup>3</sup> the Supreme Court<sup>4</sup> and the Constitutional Court.<sup>5</sup> The High Court has original and unlimited jurisdiction in civil and criminal matters and serves as an appellate court for matters from the Subordinate Court.<sup>6</sup> In relation to the electoral process, the High Court sits as a court of first instance in parliamentary election petitions.<sup>7</sup> It is required to hear and determine a parliamentary election petition within 90 days of the petition being filed. Appeals from the High Court in such cases lie to the Constitutional Court.<sup>8</sup> There are no special procedures or special courts in Zambia for electoral disputes.

The Supreme Court plays an insignificant role in the electoral process. Prior to the 2016 amendment to the Constitution, the Supreme Court heard presidential election petitions as the court of first and final instance. The Supreme Court was divested of this jurisdiction by the 2016 amendment, which vested this responsibility in the Constitutional Court. Since parliamentary election petitions are heard by the High Court and appeals lie to the Constitutional Court, the Court of Appeal is bereft of jurisdiction to hear election related matters.

A presidential election petition is required to be filed in the Constitutional Court within seven days of the announcement or declaration of presidential election results. The Constitutional Court is then required to “hear” (and presumably determine) the petition within fourteen days of the petition being filed. Where the Constitutional Court fails to reach a unanimous decision, the rules allow judges to decide the case by the majority of judges. This was the case in 2016 when three judges voted to dismiss the case while two dissented. The decision of the Constitutional Court is final and not subject

to an appeal. This is particularly problematic because the Constitutional Court is reposed with both original and final jurisdiction, against legal principles which generally give litigants an opportunity to appeal.

The Constitutional Court has a general and wide mandate over the interpretation of the Constitution. With the exception of the Bill of Rights, all constitutional matters fall within the jurisdiction of the Constitutional Court.<sup>9</sup> More specifically, the Constitutional Court hears disputes about the validity of candidate nominations and election petitions relating to the president.<sup>10</sup> This entails that the Constitutional Court now hears the bulk of electoral cases, giving it enormous power to determine the fate of constitutionalism and the rule of law in the country with absolute finality.

Although Zambia established a Constitutional Court in 2016, its capacity to play a meaningful role in the electoral process has been hampered by lack of independence, with the packing of the Court with pliant judges. This is because the President has a free hand when appointing judges, untrammelled by any requirements of integrity, impartiality, commitment to constitutional values and competence in constituting the judicial bench.<sup>11</sup> The appointment process itself lacks transparency. Vacancies are never advertised and the whole recruitment and appointment process is shrouded in secrecy. As a result, it is impossible to know what qualified one candidate above another for the office of judge.<sup>12</sup>

The declining trend in judicial independence in Zambia is illustrated using the following two figures. The first graph comes from the World Bank’s data and illustrates changes in judicial independence between 2007 and 2017.<sup>13</sup>

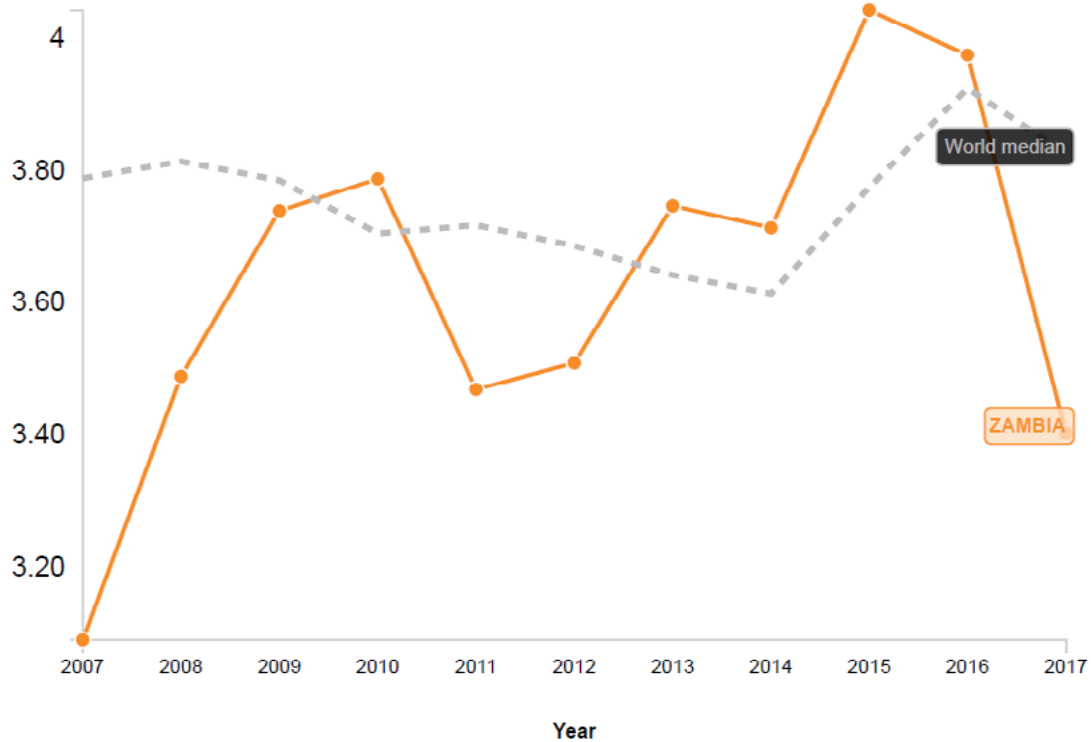


Figure 1: Judicial Independence Index, from the World Economic Forum Global Competitiveness Index.

The graph below, which comes from the University of Gothenburg's Varieties of Democracy Project demonstrates the declining extent to which the judiciary has been able to constrain the actions of the executive since 2014, as well as the declining compliance with judicial decisions.<sup>14</sup>

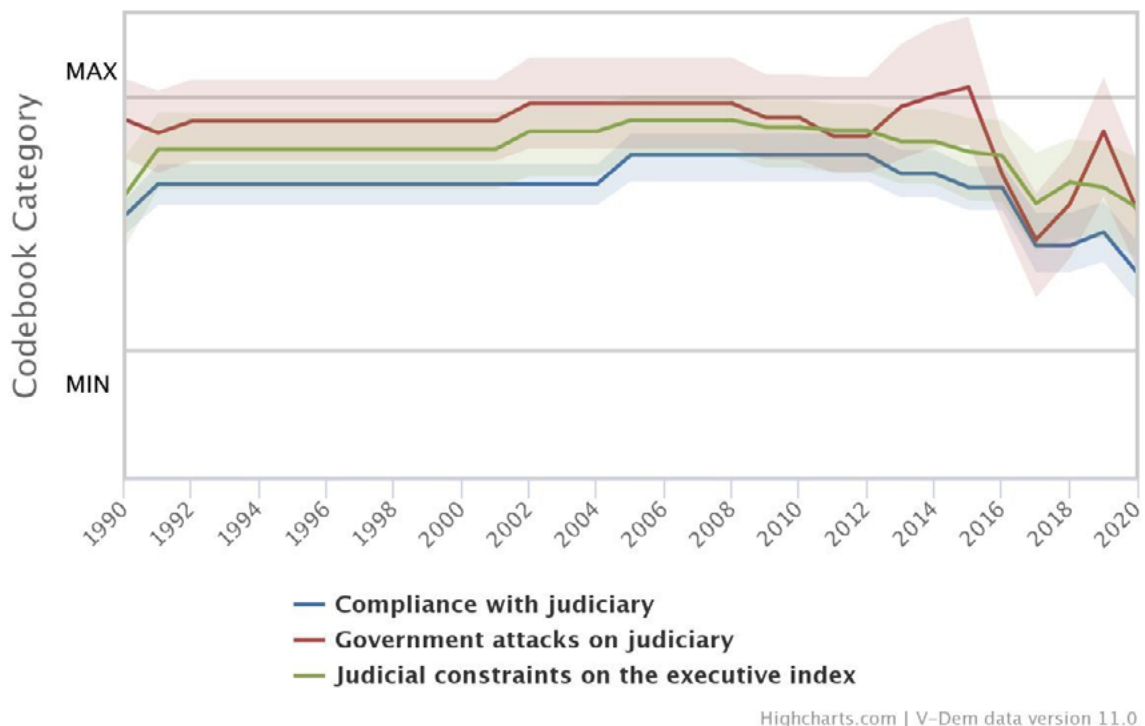


Figure 2: Graph on 1) compliance with judicial decisions, 2) government attacks on the judiciary and 3) the judicial constraints on the executive composite index. Generated using Varieties of Democracy Project data, found at <https://www.v-dem.net/en/>

The response of one judge to a parliamentary committee question about his suitability for office is telling. *Africa Confidential* reported that when Judge Martin Musaluke was asked about his suitability for office he answered as follows: "I did not apply for the position I am being considered for ... The fact that I have been recognized by the Appointing Authority [President Edgar Lungu] is evidence of my competence and suitability."<sup>15</sup>

It is important to emphasise that no just and credible dispute resolution system may be contemplated unless the prerequisites of an independent judiciary and due process of law requirements are granted in law and practice.

### **3. Role of courts in the electoral process**

Parties and individuals continue to take electoral and political cases to court regardless of the outcome, even when they may not have confidence in the judiciary, and despite the fact that in relation to electoral disputes, there is a deep sense of distrust of courts in Zambia. There are several factors that could explain this practice. These include the fact that the parties may use the courts as a safety valve in order to diffuse tension, choosing to fight by proxy through lawyers; as a face-saving option for lost political disputes; as a political tool to fix opponents, to gain legitimacy or to gain political leverage by threatening to discredit the process or an opponent; and as a bargaining chip to force concerned institutions to compromise and be more consultative.<sup>16</sup> In Zambia, the courts have generally faced four types of electoral cases, from the aftermath of the 2016 elections to the run up to the 2021 general elections. These relate to the voter registration process, the qualification of candidates, the regulation of campaign space and access to the public media, and the challenging of election results. We highlight below how the courts have dealt with disputes under each of these themes.

#### ***Voter registration***

The registration of voters is largely governed by the Electoral Process Act 2016, which mandates the Electoral Commission of Zambia (ECZ) to register voters on a continuous basis.<sup>17</sup> A number of legal problems affected the voter registration process conducted by ECZ in 2020 in preparation for the 2021 general elections and remain largely unresolved at present. At the start of the registration process, the ECZ indicated that the old voter register would be abolished and that the new registration process would only last one month. Neither position is supported by any provision of the law.

A number of stakeholders expressed discontent with the ECZ's decision and, acting through Chapter One Foundation, challenged the legality of these decisions in August 2020.<sup>18</sup> Despite the urgency of this issue, the case is still pending before the Constitutional Court, creating uncertainty about the legality of the new voter register. Considering that the election is less than a month away, by sitting on the case without hearing it, the Constitutional Court has effectively prevented scrutiny of the register and the creation of a sound legal footing for the register, both of which are critical to its legitimacy.

#### ***Challenging the qualifications of candidates and their running mates***

All prospective candidates are required to formally file nomination papers in support of their candidacy to the returning officer.<sup>19</sup> Of note is that the Constitution provides for the right to challenge the candidature of someone whose nomination papers have already been accepted by the returning officer.<sup>20</sup> This was invoked for the first time in two separate cases in the run up to the 2021 election.

The first case, *Sishuwa and Another v Nkandu Luo and Others*,<sup>21</sup> challenged the constitutionality of the nomination of all the sixteen running mates who filed for election. It was argued that they did not meet the requirements of the Constitution, such as paying the nomination fee. The case was dismissed on the technicality that running mates were deemed to have fulfilled the requirement once the presidential candidate pays.

The second case, *Legal Resources Foundation Limited and Others v Edgar Lungu and Another*,<sup>22</sup> challenged the nomination of the ruling Patriotic Front's presidential candidate on the grounds that he was ineligible as he had already twice been elected to the office of president; his candidacy, therefore, being in violation of the constitutional two-term limit. The Constitutional Court, inter alia, held that Lungu's first term did not count as a full term as it was inherited when his predecessor, Michael Sata, died in office in 2014, contrary to the actual wording of the Constitution. The cases arose in the context of the 2016 amendment to the Zambian constitution which deems a term of less than three years, assumed by a vice president who takes over the unexpired term of a deceased or incapacitated president, not a full term for purposes of the two-term limit clause. Lungu, however, was first elected under the pre-2016 clause where the unexpired term constituted a full term in office and the 2016 clause would not apply to him as he was not a running mate as contemplated by the law. Instead of addressing the issue asked of the Court by the petitioners, the judges reformulated the questions and essentially dealt with what constitutes a "term", going on to justify why Lungu's first term was merely inherited and not a full term.

## **Campaign regulation and access to the public media**

Zambia's democratic credentials have been declining for some years now. This trend has gathered pace in recent years and one of its major casualties is the closing of free media and political space for critical voices, including the opposition. Varieties of Democracy in 2020, for example, named Zambia among the top ten most autocratising counties in the world.<sup>23</sup> The state-owned media houses such as *Zambia National Broadcasting Authority (ZNBC)*, *Times of Zambia* and the *Daily Mail* newspapers predominantly serve the interests of the ruling party and do not cover the opposition except negatively. The private media almost always operate under threat of closure. This can be seen through the shutdown of *The Post* newspaper (the country's main private newspaper) *Prime TV* (the country's main private TV station critical of government), and private radio stations, and the recent threats to close the *Muvi TV* station.<sup>24</sup>

Without easy access to the media, the opposition has largely been relying on social media and physical meetings and rallies to interact with the electorate. The outbreak of COVID-19 and the consequential measures by government restricting meetings, and the ECZ's express decision to ban political meetings and roadshows, indicate further shrinking space for critical civil society and the opposition. The challenge that this has generated is even greater when one considers that ruling party officials, including President Lungu, have been having physical meetings with the public without consequence. It is this disparity that has led some commentators, such as Sishuwa Sishuwa, to claim that the onset of the coronavirus pandemic was not seen as a tragedy by authorities but as an opportunity to further close political space for the opposition and civil society. Sishuwa commented: "the major casualty of the coronavirus disease in Zambia is not human life but the country's democratic tradition."<sup>25</sup>

In June 2021, the opposition United Party for National Development (UPND) applied for judicial review in the High Court to challenge the decision of the ECZ to ban election campaigns and roadshows, and to challenge the failure of ECZ to designate campaign time slots for all political parties in the public media as required by law.<sup>26</sup> On the first issue, without interrogating the legal issues raised and the constitutionality or legality of ECZ banning elections, the High Court declined to grant leave on the ground that allowing meetings would risk the lives of Zambian citizens.<sup>27</sup>

The High Court, however, allowed the second limb of the application which sought to compel ECZ to prescribe the amount of time to be allocated to political parties on public media during the campaign period. The ECZ in consequence prescribed a paltry minimum of 30 seconds for each political party on ZNBC.<sup>28</sup> The insignificant amount of time prescribed by ECZ, the lack of detail about prioritising prime time slots, and absence of the enforcement mechanism suggest that claims for equal state media coverage are an exercise in futility, yielding no meaningful gain for the opposition and general citizenry yearning for critical voices.

### ***Challenging presidential election results***

Although there has been no presidential election that has been annulled by the Courts in Zambia, prior to the establishment of the Constitutional Court all presidential petitions which were successfully filed (and not withdrawn) were heard on their merits by the Supreme Court. Regardless of the Court outcome, this gave a measure of closure to the electoral process as aggrieved parties were afforded an opportunity to ventilate their case in the Court.

The performance of the Constitutional Court on this score, however, is very poor, and is coloured by its inconclusive handling of the 2016 election

petition. This case followed the Zambian General Elections of 2016. The country held its General Elections on 11 August 2016. On 15 August 2016, the Electoral Commission of Zambia (ECZ) declared the incumbent, Edgar Lungu of the ruling Patriotic Front (PF) party, to be the winner, beating his closest rival, Hakainde Hichilema, of the main opposition United Party for National Development (UPND). Official figures indicate that Lungu garnered 1,847,855 (50.35%) of the votes while Hichilema got 1,760,347 votes (47.6%).<sup>29</sup> By getting more than 50%, Lungu secured an outright victory, narrowly avoiding a second-round runoff by just 13,022 votes.<sup>30</sup>

Given legitimate concerns about both the electoral process and the validity of the results in some constituencies,<sup>31</sup> the opposition UPND disputed the results, alleging, inter alia, that the ECZ colluded with the ruling PF to manipulate the results in favour of the incumbent. After giving several conflicting rulings about when the trial should commence, the Constitutional Court discontinued the petition without hearing it on the ground that the time allocated for hearing the case had elapsed.<sup>32</sup> The decision of the Court was bitterly criticised by the main opposition UPND, academic commentators and civil society organisations.<sup>33</sup> It is believed that the judgement contributed to further tension and political polarisation in the country, leading to the arrest and charging with treason of opposition leader Hakainde Hichilema in 2017. The manner in which the 2016 case unfolded makes it unlikely that the opposition, should they lose in 2021, would consider seeking redress in court. The opposition is likely to react in the manner of Raila Odinga when he responded to the aftermath of the 2007 Kenyan general election by refusing to take a case to the courts which he considered to be staffed by "Kibaki's judges".<sup>34</sup>



## 4. Conclusion

Zambia has a hierarchy of courts vested with jurisdiction over electoral matters. The most important courts in this regard are the High Court and the Constitutional Court. The courts in Zambia generally lack independence. It has been shown that the establishment of the new Constitutional Court entailed that all the judges were appointed by the president and are favourably predisposed to the ruling party. A review of election-related cases in this brief suggests that the current Zambian judiciary lacks capacity to deliver substantive justice and direct the electoral process in a manner that would inspire the confidence of the people. This, however, does not mean parties and candidates will not take cases to court. Courts still play several political functions in the electoral process beyond dispensing ideal or acceptable substantive justice including providing a historical record of events.

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## References

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- <sup>2</sup> Article 133 Constitution of Zambia (Amendment) Act No. 2 of 2016
- <sup>3</sup> Ibid, Article 30
- <sup>4</sup> Ibid, Article 124
- <sup>5</sup> Ibid, Article 127
- <sup>6</sup> Ibid, Article 134
- <sup>7</sup> Ibid, Article 73
- <sup>8</sup> Ibid
- <sup>9</sup> See Articles 28 and 128 Constitution of Zambia
- <sup>10</sup> See Articles 52, 101 and 103
- <sup>11</sup> See for example, Article 40 of the Constitution
- <sup>12</sup> Muna Ndulo, "Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System", (2011) 2 *Zambia Journal of Social Sciences*, 1-27. See also Mumba Malila, "Righting the Wrongs: Justice Clever Musumali's Legacy of Judicial Activism Revisited", <https://africanlii.org/content/ant-681>
- <sup>13</sup> This graph can be found at: [https://todata360.worldbank.org/indicators/h5ebaeb47?country=ZMB&indicator=669&viz=line\\_chart&years=2007,2017](https://todata360.worldbank.org/indicators/h5ebaeb47?country=ZMB&indicator=669&viz=line_chart&years=2007,2017)
- <sup>14</sup> Details on the methods used can be found at: <https://www.v-dem.net/en/our-work/methods/>
- <sup>15</sup> "Opposition MPs accuse the President of putting an unqualified Judge on the Constitutional Court" (2018) 59 *Africa Confidential* 3
- <sup>16</sup> Siri Gloppen and Edge Kanyongolo, "The Role of the Judiciary in the 2004 General Elections in Malawi", CMI Working Paper 2004/16
- <sup>17</sup> Section 7 Electoral Process Act 2016
- <sup>18</sup> See <https://diggers.news/courts/2020/08/07/chapter-one-drags-ecz-to-concourt-over-30-days-voter-registration-exercise/> and <https://www.themastonline.com/2020/10/08/chapter-one-foundation-amends-voter-registration-petition/>
- <sup>19</sup> Ibid, Article 52 Constitution of Zambia 2016
- <sup>20</sup> Ibid, Article 52(4)
- <sup>21</sup> *Sishuwa and Another v Nkandu Luo and Others* 2021/CCZ/0028/0032
- <sup>22</sup> *Legal Resources Foundation Limited and Others v Edgar Lungu and Another* 2021/CCZ/0025/0027
- <sup>23</sup> Varieties of Democracy Institute, *Autocracy Surges- Resistance Grows: Democracy Report 2020* (2020), 6. See also [Zambia: Freedom in the World 2021 Country Report | Freedom House](#)
- <sup>24</sup> Ibid
- <sup>25</sup> Ibid

<sup>26</sup> *Batuke Imenda (Suing in His Capacity as Secretary General of the United Party for National Development) v Electoral Commission of Zambia and Attorney General 2021/HN/158*

<sup>27</sup> *Ibid*

<sup>28</sup> ECZ, Notice to All Political Parties and Candidates Participating in the Forthcoming General Elections (2 July 2021)

<sup>29</sup> Available at [https://www.elections.org.zm/general\\_elections\\_2016.php](https://www.elections.org.zm/general_elections_2016.php)

<sup>30</sup> Available at <http://ecz-news.com/news/%22%80%8bguide-to-calculation-of-501-for-august-11th-2016-elections/>

<sup>31</sup> Some of these were outlined in the EU observer report ([https://eeas.europa.eu/election-observation-missions/eom-zambia-2016/15300/euom-final-report-2016-zambia-general-elections\\_en](https://eeas.europa.eu/election-observation-missions/eom-zambia-2016/15300/euom-final-report-2016-zambia-general-elections_en)), and the Carter Centre's report (<https://www.cartercenter.org/news/pr/zambia-091516.html>)

<sup>32</sup> *Hakainde Hichilema and Another V Edgar Lungu and others 2016/CC/0031 Ruling No.33 of 2016*, para 9. See also "Presidential election petition to start on Friday and conclude on Thursday next week" available at <https://www.lusakatimes.com/2016/08/30/presidential-election-trial-to-start-on-friday-and-conclude-on-thursday-next-week/>

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<sup>34</sup> O'Brien Kaaba, "The Challenges of Adjudicating Presidential Election Disputes in Domestic Courts in Africa," (2015) 15 *African Human Rights Law Journal*, 329-354

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