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Editor's Note

We are very pleased to present *Volume 2: Issue 1* of the SCR 2019. We have selected four cases for review. In this issue we feature two important regional cases, one decided by the nascent Zimbabwean Constitutional Court and the other, by the Kenyan Supreme Court. The other two cases are drawn from within Zambia and determined by the Constitutional Court and the Supreme Court respectively.

The first case comment analyses the Zimbabwean Constitutional Court's decision in the case of *Nelson Chamisa v Emmerson Dambudzo Mnangagwa* dealing with the disputed presidential election of August 2018 in Zimbabwe. The significance of the decision is self-evident as this was the first post-Mugabe election which in a sense tested the democratic credentials of post-Mugabe institutions, including the judiciary. The second case commentary turns our attention to Kenya, to the cases of *Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others (2013 and 2017).* The commentary has a narrow but significant focus on the proper import of invalid votes in the democratic process.

Coming back to Zambia, we look at two cases, one decided by the Constitutional Court and having stirred a major national debate, and the other, which went largely unnoticed, yet is very significant in the evolution of Zambian jurisprudence on customary law. The case of *Daniel Pule and Others v Attorney General* dealt with the eligibility of President Lungu to stand for another term in office, having already served two terms in office. The final case is that of *Kilolo Ng'ambi v Opa Kapijimpanga*, which required the Supreme Court to determine how succession to traditional chieftaincy office should be determined where there were competing candidates and existing customary law was limited and unable to help resolve the competing claims.

The selection of our four case notes, featuring two important African regional decisions and two cases from Zambia's twin apex courts, promise to provide insights, intrigue and perhaps despondency about the development of contextually relevant jurisprudence by our courts.

Tinenenji Banda

Nelson Chamisa v Emmerson Dambudzo Mnangagwa and Others CCZ 42/18 (August 2018)

O'Brien Kaaba

Facts

Zimbabwe held its first post-Mugabe general elections on 30th July 2018. On 3rd August 2018, the Zimbabwe Electoral Commission (ZEC) declared Emmerson Dambudzo Mnangagwa as the candidate who received the requisite 'more than half the number of votes cast' and declared duly elected President of Zimbabwe. Aggrieved by this development, Nelson Chamisa, the main opposition contender, challenged the validity of the election of Mnangagwa in the Constitutional Court.

Holding

After hearing the case, the Constitutional Court unanimously:

1) Dismissed the application with costs; and
2) Declared Emmerson Dambudzo Mnangagwa as duly elected President of Zimbabwe.

Significance

This case note is based on the abridged judgment of the Constitutional Court. Ideally the note should have been based on the full reasoned judgment of the Court. However, at the time of writing, more than a year since the handing down of the abridged judgment, the full reasoned judgment had not yet been given.

The case is important as it is the first post-Mugabe presidential election petition. In a sense, the case was a test of the Zimbabwean judiciary's commitment to the possibility of contributing to the democratic rebuilding and affirmation of constitutionalism in the immediate aftermath of the dictatorial Mugabe era that destroyed key governance institutions, leaving them beholden to the ruling elite. From the African continental perspective, it could also be said that the case was an opportunity for the African judiciary to build on the precedent set by the Kenyan Supreme Court in 2017 that nullified the presidential election and elaborated a jurisprudence that is contextually relevant in redressing electoral fraud.

The decision by the Zimbabwean Constitutional Court, however, suggests that the Court failed to grab the opportunity to contribute to more democratic jurisprudence that reflects constitutional norms and values. In fact, the Court seemed to frown on the petitioner having exercised his constitutional right to challenge the election. This can be gleaned from the first order the court made. The Court tersely stated: 'The application is dismissed with costs.' Though short, this expression is weighty as it means the applicant had to bear the costs of all the parties in the case (featuring 25 respondents). It is unheard of in Anglophone Africa for a court to order costs in a constitutional matter of grave national interest. A perusal of presidential election judgments from similar jurisdictions such as Zambia (1996,[1] 2001,[2] 2016[3]), Uganda

[1] Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba (1998) ZR 49
[2] Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) ZR 138
[3] Hakainde Hichilema and Another V Edgar Lungu and others 2016/CC/0031 Ruling No.33 of 2016

(2001,[4] 2006,[5] 2016[6]), Kenya (2013[7] and 2017[8]), Ghana (2013[9]) and Nigeria (2003[10] and 2007[11]) demonstrates that costs are not usually ordered in such matters.
Challenging a presidential election is an exercise of a fundamental constitutional entitlement that should not carry any risk of costs. The importance of this was forcefully stated by the Supreme Court in Zambia:

> As we have always said on costs in matters of this nature, it is in the interest of the proper function of our democracy that challenges to the election of the president, which are permitted by the Constitution and which are not frivolous should not be inhibited by unwarranted condemnation in costs.[12]

In this Zambian case, the Supreme Court dismissed the presidential election petition, but considered that that alone did not mean there were no grievances upon which the applicant could seek redress, despite the complaints not rising to the requisite level that would warrant nullifying an election.

The South African Constitutional Court has elaborated a three-fold rationale for ordinarily not ordering costs in constitutional matters.[13] First, it diminishes the chilling effect that an adverse costs order can have on parties asserting constitutional rights and might have the effect of citizens foregoing meritorious claims. Second, constitutional litigation, regardless of the outcome, might bear not only on the interests of litigants directly involved in a matter, but may have consequences on the rights of others similarly situated. Third, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the constitution.[14]

The fact that the Court did not find in favour of a litigant is not sufficient warrant to order costs. The Court must take a broad look at matters raised and consider how a costs order may hinder or promote the advancement of justice.[15] Writing for the unanimous Lesotho Court of Appeal, Justice Musonda held that in constitutional matters, even if a litigant laboured under the misconception that they had a good case, that alone is not sufficient ground for the court to order costs when the case is lost.[16]

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[4] Kizza Besigye vs. Yoweri Museveni Electoral Petition No. 1 of 2001
[5] Kizza Besigye vs. Yoweri Kaguta Museveni Presidential Election Petition No.1 of 2006
[6] Amama Mbabazi v Yoweri Kaguta Museveni and Others Presidential Election Petition No. 01 of 2016
[7] Raila Odinga vs. The Independent Electoral and Boundaries Commission and others Supreme Court Petition No. 5,3 and 4 of 2013
[8] Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others Presidential Election Petition No. 1 of 2017
[9] Nana Addo vs. John Dramani No J2/6/2013 Judgment of 29 August 2015
[10] Muhammadu Buhari and others vs. Olusegun Obasanjo and others SC.133/2003 17 NWLR (2003)
[11] Atiku Abubakar and others vs. Musa Umaru Yar'adua and others SC.72/2008 Supreme Court of Nigeria Judgement of 12 December 2008
[12] Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) ZR 138
[13] Trustees for the Time Being of the Biowatch Trust v Registrar Genetic Resources and Others [2009] ZACC 14, para 23
[14] Ibid
[15] Ibid, para 16
[16] Kananelo Mosito and Others v Qhalehang Letsika and Others Court of Appeal (Civil) 9/2018, para 50. See also The President of the Court of Appeal v The Prime Minister and Others Court of Appeal (Civil) 62/2013, para 27

Allowing aggrieved parties to seek relief in the courts without risking being condemned to costs potentially opens the courts widely to the people, or as Prempeh put it, it allows judges to 'take the courts to the people.'[17] This would ensure that courts become the commonly used avenues for resolution of contested democratic claims as opposed to resort to street violence or other self-help means.

In the case of Zimbabwe, the award of costs in constitutional matters is governed by the Constitutional Court Rules 2016.[18] Rule 55(1) provides: 'Generally no costs are awarded in a constitutional matter: Provided that, in an appropriate case, the Court or judge, as the case may be, may make such order of costs as it or he or she deems fit.' The Court in this case never even referred to this authority, nor did it give any explanation justifying the award of costs. In the absence of a cogent justification for an award of costs, the Court could be said to have acted arbitrarily and out of spite in order to 'punish' the petitioner for exercising his constitutional right. Such a decision does not clothe the Zimbabwean Constitutional Court in good light and suggests it failed to extricate itself from the feelings of the ruling party and its candidate whose election was being challenged.
Another notable issue in the judgment relates to the nature of evidence the court suggested was needed for the applicant to prove his claim. According to the Court, the petitioner should have produced source evidence demonstrating the irregularities in the electoral results. This evidence could, inter alia, have come from the candidate's party poll agents and election observers, by furnishing the Court with signed copies of election results forms (Form VII) from polling stations. In the words of the Court:

> The applicant was at large to have his polling station agents at each and every polling station around the country. Observers were also free to participate in the process. The applicant's agents would have observed the voters arriving, being given the ballot papers as applicants for these papers before the presiding officers, going to vote in secret in the booths, and having the vote counted in their presence if they were there. At the end of the counting all agents would have signed the VII form if they so wished and given copies.

In the view of the Court, if the evidence from the agents and observers from polling stations was produced, it would have answered all questions to do with allegations of manipulating the results. The Court further thought that an election should not be easily nullified as the declaration of results gave rise to a presumption of validity.

Although this approach looks innocuous on the surface, on close examination it gives the impression of a Court that is scared to confront the electoral disputes presented before it head-on, without excuses. As John Hatchard has argued, such an approach 'can be seen as a way of ensuring that the most sensitive of political questions is avoided.'[19] Two short-comings of this approach can be noted. First, in this computer technology era, results of an election can be manipulated regardless of, or even more aptly, in spite of having party agents and observers at the polling stations. This possibility is well illustrated by the 2017 Kenyan Supreme Court decision.[20] In nullifying the election, the Supreme Court was convinced that the results were

[17] H Kwasi Prempeh, 'Marbury in Africa's Judicial Review and the Challenge of Constitutionalism in Contemporary Africa' (2006) 80 Tulane Law Review 65
[18] Statutory Instrument 61 of 2016
[19] John Hatchard, 'Election Petitions and the Standard of Proof' (2015) 27 Denning Law Journal 300
[20] Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others Presidential Petition No. 1 of 2017

tampered with in the Independent Electoral and Boundaries Commission's (IEBC) servers. The IEBC itself was complicit in the fraud. In this case, reports from observers were of no use at all, as the Supreme Court pointed out: 'The interim reports [of observers] cannot therefore be used to authenticate the transmission and eventual declaration of results.'[21] Considering that Chamisa made similar allegations of election results tampering as was the case with the 2017 Kenyan elections, the Court should have been more open to the possibility of elections being manipulated not just at the polling station but in the national tabulation process, and to the possibility that the ZEC may have been complicit.

Second, the presumption of validity of an election lacks any demonstrable basis in the Zimbabwean Constitution, or any modern liberal constitutional law theory. The Court's role as a guardian of constitutionalism is to enforce constitutional values, in this case, the values of allowing people to choose their own leaders in an environment that allows the collective and genuine will of the people to prevail. As such, state institutions cannot be presumed, without critically clearing every reasonable allegation, to administer a credible election. The constitutional norms that entitle citizens to political participation and genuine elections also bind public institutions and, therefore, state institutions should not enjoy any privileges and presumptions in their favour. As the Kenyan Court in 2017 showed, such state institutions may not always utilize their power for the common good but use it to manipulate systems for narrow interests. It is, therefore, the duty of the electoral court to ensure that every little allegation is properly assessed and to this effect, state institutions responsible for conducting elections should not have any benefit of the assumption that they conducted their affairs prudently. This approach was recently used by the Austrian Constitutional Court when it nullified that country's 2016 presidential election. It stated:

> Therefore, not only individual possible incidents of manipulation, which are potentially more likely, such as the invalidation of votes, but rather all theoretically possible forms of manipulation and abuse have to be taken into account; because as explained above the legal provisions intended to safeguard the electoral principles are also to serve as protection against manipulation and abuse by the state itself as the organizer of the elections.[22] (emphasis the author's)

The role of the electoral court in a constitutional democracy should be to enforce constitutional norms and not take pre-determined positions. It should be open to assess all possible allegations and consider state agencies administering elections as equally bound to constitutional standards as everyone else. The Zimbabwean Constitutional Court had an opportunity to do this. It had a further opportunity to devise contextually relevant mechanisms of responding to local democratic needs of the country and help rebuild the democratic aspirations of the Zimbabwean people, taking the example of the Kenyan Supreme Court in 2017. This however, is not to argue that the Court should have invalidated the election, but that it should have presided over the dispute as a neutral enforcer of constitutional values. The abridged judgment, however, suggests the opportunity may have been missed.

[21] Ibid

[22] Heinz-Christian Strache and Others v Federal Electoral Commission and Others Constitutional Court W 6/2016-125 (1 July 2016), page 159.

Raila Odinga and Others v Independent Electoral and Boundaries Commission and Others [2013] KLR-SCK Petition No.5 of 2013 & No. 1 of 2017

Teddy J O Musiga

Facts

Since the establishment of the Supreme Court of Kenya in 2011, it has so far determined two disputes arising from presidential election petitions. From the outset, it is important to clarify that this commentary does not purport to review the decisions of the 2013 and 2017 presidential election petitions.[1] It only seeks to review and critique one salient aspect that emerges from the Supreme Court of Kenya's approach in the treatment of rejected votes in those presidential election disputes.

The case note criticises the Supreme Court of Kenya's approach which seems to favour the exclusion of rejected votes in the final computation of presidential election winners. It presents an argument that rejected votes are important in the computation of presidential election winners. It does that by raising three major arguments. The first argument flows from a rights perspective; the right to vote. The second argument flows from the constitutional requirement that presidential election winners ought to garner a fifty plus one percentage of the votes to win an electoral contest. The third argument flows from the legal distinction between votes cast, valid votes cast, spoilt ballots, stray votes and rejected votes. Ultimately, the paper concludes by presenting a case for why rejected votes matter in a presidential election petition and why they should be included in the computation of winners of presidential election contests.

Holding: The Supreme Court's Treatment of Rejected Votes in Presidential Election Petitions

In the wake of the 2013 Kenyan presidential elections, three private citizens filed a petition at the Supreme Court of Kenya challenging the inclusion of rejected votes in the final tally of the results of the presidential elections.[2] Prior to filing the Petition, it was alleged and reported in the media that the Electoral Commission had made a decision to include the rejected votes in the computation of the final presidential election results.[3]

At the time of filing the Petition, it was alleged that there was an estimated total number of 330,000 rejected votes and the number kept rising. The petition was filed due to the fear that

[1] For a full review of the 2013 and 2017 presidential election petitions see; Maina Wachira. 'Verdict on Kenya's Presidential Election Petition: Five Reasons the Judgment Fails the Legal Test' The East African, <http://www.theeastafrican.co.ke/OpEd/comment/Five-reasons-Kenya-SupremeCourt-failed-poll-petition-test/-/434750/1753646/-/297c6q/-/index.html> accessed 10 July 2019; George Kegoro 'Why the Low-Key Conclusion of a Very High Profile Election Dispute?' <https://www.nation.co.ke/oped/opinion/440808-1753130-bfjrptz/index.html> accessed 10 July 2019; Francis Angila Away (2016), "A critique of the Raila Odinga v IEBC decision in light of the legal standards for Presidential elections in Kenya' in Dr Collins Odote & Dr Linda Musumba (eds) 'Balancing the Scales of Electoral Justice Resolving Disputes from the 2013 General Elections in Kenya and the Emerging Jurisprudence' IDLO and JTI 2016; O'Brien Kaaba, 'Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others Presidential Petition No. 1 of 2017,' (2018) 1SAIPAR Case Review

[2] Petition No. 3 of 2013 eKLR; The Petitioners were Mr. Moses Kuria, Mr. Dennis Itumbi & Ms. Florence Sergon. All of them were referred to as the second Petitioner in the consolidated petition.

[3] Katrina Manson (2013, 6th March) 'Rejected' votes will be taken into account in Kenyan election. Accessed at <https://www.irishtimes.com/news/world/rejected-votes-will-be-taken-into-account-in-kenyan-election-1.1318136>

their inclusion in the final tally could jeopardise an outright victory for either of the two leading presidential candidates.[4]

The Petitioners thus contended that the decision of the Electoral Commission to include the rejected votes was in contravention of article 138(4) of the Constitution of Kenya, 2010 as well as Rule 77(1) of the Elections (General) Regulations 2012.[5] The Supreme Court agreed with their submissions and held that rejected votes should not count in the final tally of presidential election votes. They also held that the correct interpretation of article 138(4) of the Constitution refers only to valid votes cast and does not include ballot papers or votes that are cast but later rejected for non-compliance with the terms of the governing law and regulations.[6]

Following the 2017 Presidential elections, the question of the inclusion or exclusion of the rejected votes in the final computation of the winner presidential election similarly became a major issue in court.[7] However, this time around, that application was made within the context of the main petition filed by the Petitioners as opposed to the 2013 case where the question arose even before the declaration of the Presidential election winner by the Electoral Commission.

Notably, the actual total number of rejected votes could not be clearly ascertained. On the one hand, the Petitioners alleged that the total number of rejected votes accounted to about 2.6 percent of all the total votes cast.[8] On the other hand, the Respondents (Particularly the Electoral Commission) alleged that the total number of rejected votes were 81,685 as declared in Form 34C, a percentage of 0.54 percent of the total votes cast. Curiously, the Electoral Commission in their submissions in court averred that the variance between the actual number of rejected votes on Form 34C and the public portal (which the Petitioners used) were as a result of human error and did not significantly affect the outcome of the election.[9] And therefore following the precedent from the Supreme Court in 2013, they made a decision not to include them in the final computation of the Presidential election winner.

Whichever the case, the Petitioners insisted and persistently argued that such numbers were still too high to be ignored and that they had an effect on the final results and outcome of the Presidential election. In that regard, the Petitioners urged the court to reconsider its 2013 findings on rejected votes and hold that rejected votes should be taken into account to determine the threshold under article 138(4) of the Constitution.[10]

In rendering their decision, the Supreme Court held that rejected votes should not be included in the final computation of presidential election winners. Particularly, they held that:

> a rejected vote is a vote which is void, a vote that accords no advantage to any candidate; it cannot be used in the computation of determining the threshold of 50% + 1. A purposive interpretation of article 138(4) of the Constitution, in terms of article 259 of

[4] Consolidated petition (Petition No. 5 of 2013)[28]
[5] Consolidated petition (Petition No. 5 of 2013)[28]
[6] Consolidated petition (Petition No. 5 of 2013)[28]
[7] Odinga & another v Independent Electoral and Boundaries Commission & 6 others [2017] KLR-SCK Presidential Election Petition No. 1 of 2017
[8] Petition No. 1 of 2017[40-43]; Dissenting judgment by Njoki Ndung'u, SCJ[176]
[9] Petition No. 1 of 2017[78-80]
[10] Ibid[154-170]

> the Constitution, leads to only one logical conclusion: that the phrase votes cast in article 138(4) means valid votes.[11]

Consequently, the Supreme Court upheld the view they had earlier adopted in the 2013 case. Effectively, both the 2013 and 2017 decision of the Supreme Court held that 'rejected votes' do not matter and should not be included when determining computations for presidential election winners.

To better comprehend how the Supreme Court treated the question of either inclusion or exclusion of rejected votes in the two cases, it is important to give a brief background to what those two cases were about.

(a) 2013 *Raila Amolo Odinga* Presidential Election Petition (Consolidated Petition No. 5 of 2013)

Following the disputed elections of March 4th, 2013, three separate Presidential election petitions were filed at the Supreme Court of Kenya to challenge that election outcome. The first petition contested the inclusion of rejected votes in the final tally which, they argued had a distorting effect on the percentage votes won by each candidate.[12] The second petition contested the manner in which the electoral process was conducted by the electoral management body.[13] The third petition challenged the legality of the electoral management body's declaration of Uhuru Kenyatta as president elect.[14]

They were all later consolidated into one petition; *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others.*[15] The main issue to be decided by the Court in the consolidated Petition was the allegation that the entire election was not conducted in accordance with the Constitution and the electoral laws. Consequently, it was argued that the presidential electoral process was so fundamentally flawed that it was impossible to ascertain whether the presidential results as declared were lawful.

However, after the hearings, the Court unanimously upheld the election of the 3rd and 4th Respondents as President and Deputy President – elect respectively.

Table 1: 2013 Summary of Presidential Election Results

	Actual figures	**Percentages**
Total votes cast	12,330,028	100.00%
Valid votes cast	12,221,053	99.12%
Rejected votes	108,975	0.88%

(b) 2017 *Raila Amolo Odinga* Presidential Election Petition

In 2017, another presidential election petition was filed at the Supreme Court of Kenya following the disputed presidential elections held on August 8, 2017.[16] Incidentally, the main

[11] Petition No. 1 of 2017 [170]
[12] Petition No. 3 of 2013 eKLR; It was filed by 3 petitioners. All of them were referred to as the second Petitioner in the consolidated petition.
[13] Petition No. 4 of 2013 Eklr; Both Petitioners were identified as the third Petitioner in the consolidated Petition.
[14] Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others [2013] KLR-SCK Petitions No 5 of 2013
[15] Ibid
[16] Odinga & another v Independent Electoral and Boundaries Commission & 6 others [2017] KLR-SCK Presidential Election Petition No. 1 of 2017

petitioner was the same person who was the main petitioner in the 2013 presidential election petition.[17] The petitioners raised many issues *inter alia* that the conduct of the 2017 presidential election violated the principles of a free and fair election as well as the electoral process as set out in the Constitution, electoral laws and regulations and that the respondents committed errors in voting, counting and tabulation of results. The petitioners alleged further that the respondents had committed irregularities and improprieties that significantly affected the election results. One of the major issues with regards to the counting and tabulation of the presidential election results revolved around the question of either inclusion or exclusion of the rejected votes (which is the main subject of discussion in this paper).

Table 2: 2017 Summary of August 2017 Presidential Election Results

	Actual figures	**Percentages**
Total votes cast	15,593,050	100.00%
Valid votes cast	15,180,381	97.35%
Rejected votes	411,510	2.63%

After the hearing of the petition, the court rendered a decision annulling the results of the 8th August, 2017 Presidential elections. In summary, when annulling the results of that presidential election by a majority of four to two, the Supreme Court judges held that there were systemic and systematic irregularities and illegalities that prevented the election from standing. As a result of the foregoing, the Independent Electoral and Boundaries Commission (IEBC) conducted a fresh election on October 26, 2017 whereupon the ruling party's candidate Uhuru Kenyatta was declared the President.

Significance

The position of the Supreme Court of Kenya with regards to treatment of rejected votes is one that excludes the rejected votes in computing the overall election outcome. In their view, 'a rejected vote is a vote which is void, a vote that accords no advantage to any candidate; it cannot be used in the computation of determining the threshold of 50% + 1'.[18]

As a result of both decisions, it has become increasingly doubtful how to treat rejected votes in Kenya. This paper argues that both decisions took a narrow approach by holding that rejected votes only refer to the 'valid votes cast'. In the Supreme Court's view, for a vote to be considered during the computations for determining winners, then it needs to offer a numerical advantage to at least one of the candidates in the electoral contest. Therefore, in their view, the only votes to be counted are the valid votes cast; rejected votes or even stray votes should not be counted at all.

The problem with holding that 'votes cast' only refers to 'valid votes cast' springs from the fact that article 138(4) of the Constitution of Kenya expressly provides for 'votes cast' and not 'valid votes cast'. This presupposes that all the votes found inside the ballot box should be counted and tabulated as 'total votes cast'. In that way, the returns of the election are able to clearly indicate the total percentages of each contestant after the inclusion of all the rejected votes. Unfortunately, the Supreme Court seems to prefer an approach where 'total votes cast' are equated to 'valid votes cast'. This is problematic because throughout Kenya's electoral

[17] The only major difference was that whereas in the 2013 Presidential election, Mr. Odinga ran for the elections under a coalition called, 'Coalition for Reforms and Democracy (CORD)'; in the 2017 presidential elections he ran under a coalition called, 'National Super Alliance'. Both coalitions were composed of multiple political parties registered in Kenya.

[18] Petition No. 1 of 2017[170; see also Consolidated Petition No. 5 of 2013[258-285]

laws, the only mention of the term 'valid votes cast' is found in regulations 69(2) and 70 of the Elections (General) Regulations, 2012 which is subsidiary legislation. And interpretation 'votes cast' to be 'valid votes cast' creates the absurdity that a constitutional principle is being interpreted using a subsidiary legislation.

It therefore remains unclear why the Supreme Court has twice chosen to interpret the meaning of 'votes cast' by making reference to the meaning given to it in subsidiary legislation as opposed to giving it the meaning provided for in the Constitution of Kenya. Notably, article 138(4) of the Constitution of Kenya provides for 'votes cast'; which is a departure is from section 5 (3) (f) of the repealed Constitution of Kenya which provided that in computation of presidential election winners, only 'valid votes' matter.

A plain reading of regulations 69(2) and 70 leads to the conclusion that they only refer to valid votes. The Supreme Court in both petitions held that a voter is said to have cast his or her vote when the procedure under regulations 69(2) and 70 of the Elections (General) Regulations, 2012 has been followed.[19] That means that, that upon receipt of the ballot paper, the voter proceeds to mark correctly, indicating his exact choice of the candidate he wishes to vote for, and then inserts that marked ballot paper into the respective ballot box for the election concerned.

Both the 2013 and 2017 decisions further raise several assumptions; first, that the right to vote only refers to valid votes cast to the exclusion of rejected votes, stray votes and disputed votes and second, that the rejected votes have no numerical value to the ultimate computation of all the votes cast in any given election.

Yet, world over it is increasingly becoming accepted that rejected votes play a key role in electoral outcomes and should never be ignored. For instance, Canadian jurisprudence indicates that for an election to be annulled; the total number of rejected votes should be equal to or out-number the winner's plurality (*Opitz v. Wrzesnewskyj*)[20]. That shows that the numerical value of rejected votes cannot be ignored.

While countries like the United States of America treat rejected votes as, 'residual votes,'[21] usually, residual votes are either 'over-votes or under-votes'. Under-votes refer to a ballot in which a counting machine found no voter choice for a particular office.[22] In such a case, the voter refrains from voting for any candidate. On the other hand, an over-vote is a ballot that is rejected by the counting machine because it indicates more than one choice for an office.[23] In the 2004 presidential petition of *Bush v Gore*[24], the American Supreme Court held that sufficient 'legal votes' existed among the under-votes cast thus making the outcome of the election doubtful. The court therefore ordered a recount of all the remaining under-votes in Florida State.

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[19] Petition 1 of 2017[166-167]

[20] Opitz v. Wrzesnewskyj, 2012 SCC 55, [2012] 3 S.C.R. 76

[21] Michael J. Hammer, Won-Ho Park, Michael W. Traugott, Richard G. Niemi, Paul S. Herrnson, Benjamin B. Bederson and Frederick C. Conrad, 'Losing Fewer Votes: The Impact of Changing Voting Systems on Residual Votes'(2010)63 Political Research Quarterly,129-142; Stephen Ansolabehere and Charles Stewart III, 'Residual Votes Attributable to Technology' (2005) 67 The Journal of Politics , 365-389

[22] Analysis and Report of Overvotes and Undervotes for the 2016 General Election, <https://dos.myflorida.com/media/697477/overundervotereport-2016.pdf> accessed 10 July 2019

[23] Ibid

[24] Bush v Gore, 531 US (2000)

Consequently, comparative jurisprudence on the question of rejected votes indicates that its proper comprehension should come from a solid understanding of electoral behaviour of voters which has a bearing on the overall election outcomes. To further support the importance of rejected votes, Maina Wachira argues in his paper, 'Verdict on Kenya's presidential election petition: Five reasons the judgment fails the legal test'[25], that rejected votes should count for two reasons. First, from a rights perspective, the right to vote entails three elements: the right to make a choice from among the candidates on the ballot; the right to refuse to participate in the election by abstaining and the right to cast a protest vote by rejecting all the candidates on the ballot. He argues that the right to cast a protest vote can be expressed by deliberately spoiling a ballot. Second, he argues that rejected votes should count because the article 138(4) of the Kenyan Constitutions sets high electoral thresholds for the presidential elections. That provision requires that for a person to be declared the winner of a presidential election, they should garner more than half of all the votes cast in the elections as well as at least twenty five percent of the votes cast in more than half of each county. Notably, such a prerequisite does not exist for all other electoral positions.

Therefore, from an electoral theory perspective, the right to vote also contemplates protest votes and thus such votes should not be treated as an error as the Supreme Court has twice done. However, and admittedly, some rejected ballots could arise out of illiteracy levels of voters thereby meriting the argument that they be treated as an error rather than a protest. In such a case, the illiterate voters do not understand how to make their decision from among the candidates presented in the ballot paper. The electoral laws provide that a valid ballot is that which has been marked correctly. The decision of how to mark the ballot paper is often left to the discretion of the individual voter. In giving meaning to the 'mark' made by a voter in the ballot paper, the electoral officers often look at the intention of the voter.

However, a sample of ballot papers that were eventually treated as rejected votes revealed that due to high levels of illiteracy, certain voters fail to mark their ballot papers correctly. They (voters) do so by either not making any mark on the ballot, viz, leaving the ballot paper blank or writing on the ballot paper in a way that cannot be treated as a 'mark' in *strictu sensu*. Additionally, some voters put marks against the names of all the candidates in the ballot paper while others put their signatures alongside 'the mark'. Others also draw on the ballot paper. In all these scenarios (and many others not mentioned), the electoral officers often treat such ballots as rejected votes.

Moving away from the argument that rejected votes come about as a result of illiteracy, disregarding rejected votes leads to two further conceptual challenges. First, it puts the voter who goes to a polling station, queues and makes a decision to cast a protest vote against all the candidates on the ballot in the same position as that citizen who in spite of having the right to vote chooses to stay at home and not vote.[26]
The second challenge is also best captured by Maina Wachira's analogy in which he describes an electoral contest with 100 voters and two hugely unpopular candidates.[27] . The winner of the election outcome is expected to garner 50 plus one of all the votes cast. 60 percent of the

[25] Maina Wachira. 'Verdict on Kenya's Presidential Election Petition: Five Reasons the Judgment Fails the Legal Test' The East African, <http://www.theeastafrican.co.ke/OpEd/comment/Five-reasons-Kenya-SupremeCourt-failed-poll-petition-test/-/434750/1753646/-/297c6q/-/index.html> accessed 10 July 2019
[26] Ibid
[27] Maina Wachira, 'Verdict on Kenya's Presidential Election Petition: Five Reasons the Judgment Fails the Legal Test' The East African, <http://www.theeastafrican.co.ke/OpEd/comment/Five-reasons-Kenya-SupremeCourt-failed-poll-petition-test/-/434750/1753646/-/297c6q/-/index.html> accessed 10 July 2019

voters protest against both by 'spoiling' their ballots. Candidate A, gets 35 votes and candidate B, gets five votes. If rejected votes are included, candidate A has only 35 percent of the votes cast and cannot win in the first round because he/she falls short of the 50 plus one requirement. But if you exclude rejected votes, candidate A wins with 87.5 percent of valid votes cast, and, therefore, meets the required threshold of 50 plus one.

Another reason why rejected votes should be counted stems from the legal distinction between spoilt ballots and rejected ballots. Under Rule 71 of the Elections (General) Regulations 2012, a spoilt ballot paper is generally one that a voter has inadvertently spoiled and handed back to the election officers in exchange for a new blank ballot. The voter is then issued a fresh ballot paper in place of the former. Such a ballot paper does not enter the voting box (it is not cast) and therefore cannot be counted among the votes cast.

On the other hand under Rule 77(1), a rejected ballot refers to that ballot which either (i) lacks certain security features, (ii) the voter has voted for more than one candidate, (iii) the voter has left on it a writing or mark by which he/she may be identified or (iv) the ballot remains unmarked or void for uncertainty. Regardless of the reason, a rejected ballot, therefore, is a cast vote; the result of a voter attending a polling station and placing a ballot in the ballot box. Such a ballot should be counted towards turnout, even if it doesn't count towards a particular candidate. It is merely counted for purposes of determining who among the electoral contestants meets the 50 plus one threshold. The rationale is that, the law and electoral practise contemplate a tabulation of each and every vote cast at the point of filing returns when the voting exercise ends. This is why, particularly Forms 34A, B & C (used by the electoral management body for filing returns for presidential election winners) each have a slot for tabulating the total numbers of valid votes cast, rejected votes, votes, disputed votes, stray votes and spoilt ballots. Further, rule 81 of the Elections (General) Regulations 2012 also provides that, 'upon completion of a count, including a recount, the presiding officer shall seal in each respective ballot box – (a) valid votes; (b) rejected ballots sealed in a tamperproof envelop; (c) used ballot papers sealed in a tamper proof envelop; (d) counterfoils of used ballot papers sealed in a tamperproof envelop; (e) copy of election results declaration forms; and (f) stray ballot papers in tamperproof envelops.'

In conclusion, the main argument in this paper has been that a proper interpretation and understanding of the term 'votes cast' should refer to all the votes cast, viz, all the ballot papers that have been marked and thereafter inserted in the ballot box. Unfortunately, the Supreme Court of Kenya has twice held that the term 'votes cast' only refers to valid votes cast. The question then becomes; why tabulate all votes if at the end of the exercise they count for nothing?

Finally, this paper has shown that rejected votes matter and also that they should be included in the final computation when determining presidential election winners. The paper also demonstrated why there is a need to rethink the twin decisions (of 2013 and 2017) of the Supreme Court on the question of the treatment of rejected votes.

Daniel Pule and Others v Attorney General and Others 2017/CCZ/004 Selected Judgment No. 60 of 2018

Elias C. Chipimo

Facts

In a case brought to determine the eligibility of President Edgar Lungu to stand as a presidential candidate in 2021, having served less than three years in his first term, the Constitutional Court determined that: '…the presidential tenure of office that ran from January 25, 2015 to September 13, 2016 and straddled two constitutional regimes, cannot be considered as a full term.'

In doing so, the Constitutional Court effectively backdated the application of the 'New Clauses' to a time when there was already a law governing: (a) the eligibility of a person to stand again as a presidential candidate who has twice been elected as president (he or she would be disqualified); and (b) how long a presidential term needed to be in order to count as a full term under the law (there was previously no minimum period, meaning prior to the 2016 amendment to the Constitution, a person could technically be president for less than a year and still be deemed to have served a full term).

To give you an example of the awkwardness of this position, imagine the Constitution being amended to raise the qualification age for presidency to 40 years from 35. Using the logic above, a president who was elected at 35 years would now be deemed to be ineligible to have stood in the earlier election based on a law that had not existed at the time.

The pre-amended Constitution clearly stated that 'a person who has twice been elected as President' could not run again for that office, while the amended Constitution states that a person who has 'twice held office' cannot run again for that office. There is no contradiction in these two positions – the later version simply tidies up the earlier one by making clear that there also has to be a swearing in.

Under Zambia's Republican Constitution, the rule about a presidential term not qualifying as a full term if it spanned a period of less than 3 years, first came into existence in the 2016 amended Constitution. It arises in only two situations: (a) where the office of president falls vacant and the vice-president automatically takes over (e.g. if the incumbent dies); and (b) when an election is held because the vice-president who should take over to serve the remaining term is either unwilling or unable to do so. We can call these the 'New Clauses'.
Obviously neither of these situations was at play during the 2015 presidential election because these provisions were not in existence and were therefore not recognised in the law at that time.

Holding

The Court's justification for their decision is that they felt Parliament would have intended to make transitional provisions to address the question of the term of the president under the pre-amendment Constitution but simply overlooked it. As stated by the Court:

> …the question is what could have been the intention of the legislature on this aspect of the transitional arrangements for the presidential term straddling two constitutional regimes? Our firm view is that it could not have been the intention of the legislature not to provide for the period that was served and that straddled two Constitutional regimes, as to how it should be treated.

In short, the Court decided that they should backdate the application of the three-year rule, even though it did not exist at the time of President Lungu's first election, because of the need to clarify how this would affect a person that happened to be president in between these two constitutional regimes.

Significance

I believe the Constitutional Court misdirected itself and I set out seven grounds to justify this conclusion:

1. The idea that the first period served by the incumbent president straddled two Constitutional regimes and therefore needed some form of transitional wording is really a fabrication of a concept. The Court somehow managed to identify a problem that did not exist – the amended constitution was assented to seven months before the 2016 election. Parliament was dissolved in May, 2016 and the remaining time to the election was merely a caretaker phase as the official campaign period had already commenced and was nearing its conclusion. The president's tenure was therefore coming to an end under the 2015 mandate which was adequately covered by the pre-amended Constitution. As we shall see later, serving even for one year constituted a full term under the pre-amended Constitution.

2. In inserting and backdating the application of a provision that was only due to come into effect after the Constitutional Amendment Bill was passed, the Constitutional Court has, in effect, usurped the power of Parliament, abrogating the fundamental rule of separation of powers. They concluded that '…it could not have been the intention of the legislature not to provide for the period that was served and that straddled two Constitutional regimes, as to how it should be treated,' and then went on to decide on behalf of Parliament, which option they believe Parliament would have chosen. Raising the concern about intention is one thing; deciding which option Parliament would have taken is quite another. The Court has therefore planted into an earlier time, a provision in the law that Parliament did not on the face of it intend to come into effect until 2016 and they have done it using a set of facts that does not fit with the situation contemplated by the very provision they are relying on. For there to be justification that Parliament's intention should be assumed by the Courts, there would have to be compelling reasons that doing nothing would result in injustice or unreasonableness. This was not the case – there would be no crisis if President Lungu was subjected to the same rule as his predecessors, namely that anything less than three years still constitutes a full term.

3. In 2015, the president was elected under the pre-amendment Constitution and was therefore subject to its provisions as they existed at the time. When the amendments were made – not too long before the campaign period had been officially opened – the logical assumption is that they would apply to future elections since they referred to a system that was planned to be introduced by the very amendments (i.e. the system of the running mate).

4. Interpreting the intention of Parliament in this way goes against the principle in law that unless expressly stated, law has no retrospective effect. As a general rule, law is not to be applied to the retrospectively unless it clearly stipulates as such. Even then, it cannot be applied to undermine rights that were available to someone before the new law existed.

5. No transitional provision was necessary in this case if the intention (as is clearly stated in the amended Constitution) was to tie the three-year rule to vice-presidents taking over from an incumbent (or any other person doing the same because the vice-president could not or chose not to stand). By deciding that some form of transitional provision was necessary, the Court

was effectively making a decision to protect one man, President Lungu, because only he was affected by the decision of Parliament not to include any transitional provisions. This was not a new Constitution that was being presented; it was merely the same document being amended and unless the intention was clearly stated by the Legislature, there was no basis for the Court to impose an intention on Parliament.

6. Under the pre-amended Constitution, there was no such thing as a partial term. If the incumbent died two years before the next election then a fresh election would have to be held and this remaining two years would be counted as a full term. The clear intention of the legislature under the pre-amended Constitution was not to have partial terms. By introducing this new issue of a partial terms of less than three years not counting as a full term, it ought to have been clear that this was only to apply under the new dispensation – i.e. after the amended Constitution came into force and not before. Parliament would not have needed to put transitional arrangements in place to deal with such a straightforward matter. All future elections would be subject to the new provisions and all prior elections would be subject to the old provisions.

7. The facts that would need to be present to support the retrospective application of the minimum three-year term rule are absent: in 2015, there was no automatic process for any vice-president to take over and the election was held, not because there was a vacancy or because of any incapacity of the vice-president. The election in September 2015 was held because the Constitution at the time required an election to be held within 90 days whenever there was a vacancy in the office of the president.

The indisputable fact is that the person whose term of office started on 25 January 2015 did not ascend to the office of President because he was vice-president or as a result of an election held because the then vice-president could not, for any reason, assume the office of President. There was no need for the Constitutional Court to assume that Parliament overlooked the need for transitional provisions regarding the issue of term of office. In doing so, the Court has probably overstepped its jurisdiction and granted rights to an incumbent president that were not given to him by Parliament. Although in their judgment they try to distance themselves from making this an issue about President Lungu, their decision makes it precisely that because he is the only one that will acquire a new right as a result of their assumption of what they believe Parliament would have done if they had applied their minds to it. This is a matter that can be taken up in the High Court as it is not premised on the interpretation of the Constitution but is a jurisprudential issue concerning the separation of powers and the powers the Constitutional Court has given itself to address a problem that never existed in the first place.

Kilolo Ng'ambi v Opa Kapijimpanga Appeal No. 210/2015 (Judgment of 9th October 2018)

O'Brien Kaaba

Facts

This was an appeal against the High Court decision relating to succession disputes for the Kapijimpanga chieftaincy in North Western Zambia. The incumbent chief died on the throne in 2008. Duly following the traditional succession process, the traditional electoral college (composed of certain members of the royal family) gathered in September 2010 to choose the next chief. Six contenders emerged and were all considered eligible. The electoral college could not agree on which one of them should be chief and the process ended in a deadlock. In consequence, the electoral college executed a written agreement among themselves to enlist a third party, Chief Mujimanzovu, to break the deadlock by choosing one of the six to be the chief. Mujimanzovu, as requested, chose the Appellant, Kilolo Ng'ambi, as the new chief. No reasons are given for the selection, or at least the judgment does not mention any.

Dissatisfied with the decision of Chief Mujimanzovu, the respondent and others asked the High Court to nullify the selection of the appellant, arguing in part that the method of his selection was not in line with the established succession customary law of the Kaonde people. The High Court nullified the selection of the appellant. Considering that this was a novel situation which had not arisen before and for which there were no traditional mechanisms for resolving it, the High Court creatively made the following orders:

1. Stakeholders in the chieftaincy such as indunas and other group leaders, as interested parties and subjects of the chiefdom without whom there would be no chief, be fairly represented in coming up with a formula, criteria or solution which will assist in resolving any stalemate in the selection process for the Kapijimpanga throne;
2. All eligible candidates be accorded an opportunity to offer themselves as possible successors;
3. The candidates be assessed on presentation of their family trees supported by the official registers of the matrilineal lineage and any other recognized books of historical literature;
4. The whole process be conducted within 90 days of the date of this judgment; and
5. In default of taking all the required necessary steps, any of the parties is hereby granted liberty to apply.

Holding

The Supreme Court set aside the decision of the High Court. It took the capricious and narrow view that since the electoral college, which was entitled under Kaonde customary law to select a chief, asked Chief Mujimanzovu to break the deadlock, the electoral college had 'delegated' its powers to him. The decision of Chief Mujimanzovu appointing the appellant, therefore, stood as he was a delegate of the electoral college. The Supreme Court held that the appellant was, therefore, correctly chosen as the rightful heir to the throne of the Kapijimpanga chieftaincy.

Significance

The case raises important questions about how customary law disputes should be resolved by the courts where existing customary law does not have appropriate mechanisms in place to redress the problem. What should be done if a novel problem arises in the context of customary law and the existing customary law is inadequate to address it? The judgment of the Supreme

Court fails to thoroughly answer that question. Reading the judgment leaves one with a sense that the Supreme Court missed an opportunity to develop clear, well-reasoned and principled jurisprudence that would be a useful guide to similar challenges in future. The decision is unconvincing, amorphous and lacking in rigorous legal analysis.
In disposing of the case, the Supreme Court overwhelmingly relied on the view that the electoral college 'delegated' that responsibility to a third party to help break the deadlock. In holding so, the Supreme Court cited no authority at all, apart from referring to a dictionary to define delegation as follows:

> In common parlance, delegated authority is the entrusting some of one's work/function to others. According to the Law Dictionary, delegated authority means the transfer of authority from one person to another. It implies acting on behalf of another for another's benefit. It is apparent, in this case, that the royal families of the Kapijimpanga chiefdom delegated their function to choose a chief to Senior Chief Mujimanjovu after they had reached a deadlock.

There is nowhere else the Supreme Court deals further with this concept in any nuanced manner. It is common knowledge in law that the concept of delegation is not as simplistic as stated by the Supreme Court. At common law the general principle is that power should be exercised by those upon whom it is conferred.[1] A function can only be delegated if the source of power allows for such delegation. Otherwise a delegate cannot delegate: *delegatus non potest delegare*.[2]

There is nowhere in the judgment that the Supreme Court indicates that the electoral college had power to delegate its function to a third party. Considering that the situation was novel and no similar precedent existed in the customary law of the concerned community, there was, therefore, no basis for assuming that electoral college functions were delegable. The electoral college were mere representatives of the members of the concerned customary law tradition. They exercised power to select the chief on behalf of their people, as delegates of the larger community. When the exercise of that delegated power ended in a deadlock, the delegates did not have the power to do as they wished. It was, therefore, necessary for the court to trace the source of that power and be satisfied that it could be delegated lawfully. This never happened. There was, therefore, no basis in the judgment for assuming that the electoral college lawfully delegated its power. Surely in law delegation is not a blank cheque.
That has been the consistent thread running through the jurisprudence relating to the concept of delegation. For example, in the case of *Reverend Lameck Joshua Kausa v The Registrar of Societies (1977) ZR 195* it was held that power conferred specifically on the Registrar of Societies could not be delegated to his subordinate. By parity of reason, power conferred by the community on the electoral college could, therefore, not be delegated to a third party, as there was no existing customary law that allowed for such delegation.

It is suggested that to resolve the dispute, the Supreme Court could have adopted a more creative approach that recognizes customary law as 'living,' evolving and adaptive and see themselves (the Court) as having a role in developing customary law that is democratized and consistent with constitutional values. This is the approach, for example, the South African

[1] HWR Wade and CF Forsyth, Administrative Law (11th edn, Oxford University Press 2014) 259
[2] Ibid, 260

Constitutional Court seems to have taken.[3] Although the Supreme Court tersely recognized the adaptive capabilities of customary law, it disavowed any role for the Court in the development of that customary law, stating that 'whether or such solution [appointing a third party to break the deadlock where the electoral college was unable to decide] would be "one off" solution or evolve into a new custom or tradition to address similar situations is for the electoral college to decide.' By so holding, the Supreme Court envisioned no role for itself in the development of customary law and left its development entirely in the fate of social accidents and vicissitudes of history.

This approach taken by the Supreme Court is problematic as it does not allow for customary law to develop in a consistent and principled manner that would be in line with constitutional norms. As former South African Chief Justice, Pius Langa, stated, such an ad hoc approach to the development of customary law is unsatisfactory as 'changes will be very slow; uncertainties regarding the real rules of customary law will be prolonged and there may be different solutions to similar problems.'[4] Article 7(d) of the Zambian Constitution recognizes customary law as a source of legal norms, subject only to the Constitution. The judiciary, as guardian of the Constitution, has a clear mandate to ensure customary law develops in a manner consistent with constitutional norms and values. The Supreme Court should not have abdicated this mandate.

While it is the responsibility of the court to determine what customary law is or ought to be in line with the constitutional norms, this does not entail the Court imposing its views about particular customary norms. It is the role of the concerned customary community to collectively develop and shape their own customs in responding to new social and economic developments in society. A new practice cannot be considered a binding customary norm by members of the concerned community without internalizing it and considering themselves bound by it. This is akin to Professor HLA Hart's concept of a 'reflective critical attitude.'[5] That is, the members of the concerned community regard a custom as a common standard of behaviour upon which criticism and demands for conformity would be considered justified.[6]
To have this critical reflective attitude, it is essential 'to respect the right of communities that observe systems of customary law to develop their law.'[7] This way, the concerned community is, therefore, 'empowered to bring its customs into line with the norms and values of the constitution.'[8] The importance of this was succinctly stated by the South African Constitutional Court:

> …it is important to ensure that customary law's congruence with our constitutional ethos is developed in a participatory manner, reflected by the voices of those who live the custom. This is essential to dispel the notion that constitutional values are foreign to customary law and are being imposed on people living under customary law against their will.[9]

[3] See for example, Nonkululeko Letta Bhe and Others v Magistrate Khayelitsha and Others Case CCT49/03; Modjadji Florah Mayelane v Mphephu Ngwenyama and Others [2013] ZACC 14; and Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana and Others v Sidwell Nwamitwa and Others [2008] ZACC 9.
[4] Nonkululeko Letta Bhe and Others v Magistrate Khayelitsha and Others Case CCT49/03 [para 112]
[5] HLA Hart, The Concept of Law (2nd edn, Oxford University Press 1961) 57
[6] Ibid
[7] Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana and Others v Sidwell Nwamitwa and Others [2008] ZACC 9 [para 45]
[8] Ibid, [para 73]
[9] Modjadji Florah Mayelane v Mphephu Ngwenyama and Others [2013] ZACC 14 [para 50]

This suggests that the development of a new customary norm is the concern of the wide community who live that custom and should not be left in the hands of a small group, as the Supreme Court effectively decided. The decision of the High Court, which required wider community participation and consensus building in resolving the problem seems consistent with this approach than the position taken by the Supreme Court. The approach taken by the High Court could have ensured democratization of customary law by ensuring that as far as possible, new customary norms would be developed in a more consultative and participatory manner. Such an approach would serve the purpose of fostering constitutional values such as democracy, constitutionalism and good governance as elaborated under Article 8(c) and (e) of the Constitution. That said, it goes without saying that the Supreme Court missed a tremendous opportunity to set clear standards in the evolution of customary law so that its development would be participatory, principled and consistent