

# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

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Volume 9 | Issue 3

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2026

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# Ousted Justice; Tanzania's Prohibition on Presidential Election Petitions undermines Democracy and Fundamental Rights: Lessons from Kenya

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## ABSTRACT

*Tanzania's Constitution of 1977, Article 41(7), absolutely prohibits any judicial inquiry into the election of the President once the National Electoral Commission has declared a winner. This total ouster clause stands in stark contrast to Kenya's rights compliant framework under Article 140 of the 2010 Constitution, which guarantees any person the right to petition the Supreme Court challenging a presidential election. This article undertakes a comparative doctrinal analysis to assess the impact of these divergent legal regimes on democratic consolidation and the protection of fundamental rights, specifically the right to a fair hearing and the right to an effective remedy under the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights. Drawing on administrative law principles governing ouster clauses and the theoretical framework of democratic consolidation, the article finds that Tanzania's prohibition constitutes a fundamental rights violation, directly conflicting with its binding treaty obligations. The absence of judicial review insulates presidential elections from legal accountability, weakens public confidence in electoral integrity, and undermines democratic consolidation. By contrast, Kenya's model demonstrated most powerfully in the 2017 Raila Odinga nullification shows that judicial review strengthens electoral accountability and deepens democratic norms without destabilising the political order. The article concludes that Tanzania's ouster clause is incompatible with the rule of law and regional commitments under the East African Community Treaty. It recommends constitutional reform to permit judicial review of presidential elections, regional harmonisation of electoral justice standards, and, as an interim measure, judicial interpretive techniques to circumscribe the ouster clause where fundamental rights are at stake.*

**Keywords:** *Ouster clause, presidential election petitions, democratic consolidation, right to an effective remedy*

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## I. INTRODUCTION

The peaceful resolution of electoral disputes through independent judicial mechanisms is widely recognised as an indispensable pillar of democratic governance and the rule of law.<sup>1</sup> At the heart of this process lies the fundamental principle of *audi alteram partem* the right to be heard which legitimises electoral outcomes, protects the sovereign will of the people, and gives practical effect to the right to political participation.<sup>2</sup> Within the East African Community (EAC), partner states have formally committed to ‘good governance, including adherence to the principles of democracy, the rule of law, accountability, respect for human rights and civil liberties’.<sup>3</sup> Yet, a striking and consequential legal divergence exists between two founding EAC members Tanzania and Kenya regarding the right to challenge the validity of a presidential election before a court of law.

Kenya’s post-2010 constitutional order unequivocally guarantees any person the right to petition the Supreme Court challenging the election of a president-elect within seven days of the declaration of results.<sup>4</sup> This provision has been actively utilised in landmark cases, most notably the 2017 *Raila Odinga* petition, in which the Supreme Court nullified the presidential election and ordered a fresh vote an unprecedented decision in African jurisprudence.<sup>5</sup> In sharp contrast, Tanzania’s Constitution of 1977 contains an ouster clause Article 41(7) which expressly prohibits any judicial inquiry into the election of the President once the National Electoral Commission has declared a winner.<sup>6</sup> This provision is reinforced by the Elections Act, which limits election petitions to parliamentary elections,<sup>7</sup> and has been consistently upheld by Tanzanian courts, most authoritatively in *Augustine Lyatonga Mrema and Others v Attorney-General and Others*.<sup>8</sup>

From a human rights perspective, Tanzania’s absolute bar on judicial review of presidential elections raises profound concerns. The right to a fair hearing, which encompasses the right to challenge electoral outcomes before an independent and impartial tribunal, is firmly established

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<sup>1</sup> United Nations Development Programme (UNDP), *Electoral Justice: The International IDEA Handbook* (International IDEA 2010) 15–17.

<sup>2</sup> African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58, art 7.

<sup>3</sup> Treaty for the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000) art 6(d).

<sup>4</sup> Constitution of Kenya, 2010, art 140.

<sup>5</sup> *Raila Odinga & Another v Independent Electoral and Boundaries Commission & Others* [2017] KESC 31 (KLR).

<sup>6</sup> The Constitution of the United Republic of Tanzania, 1977 [Cap 2 of 1977], as amended from time to time, art 41(7).

<sup>7</sup> The Presidential, Parliamentary and Councillors’ Elections Act, No 1 of 2024 (Tanzania), s 137(1).

<sup>8</sup> *Augustine Lyatonga Mrema and Others v Attorney-General and Others* [1996] TLR 273 (High Court of Tanzania).

in international instruments to which Tanzania is a party.<sup>9</sup> Similarly, the right to an effective remedy requires that any person whose rights are violated including the right to participate in genuine elections shall have access to a competent judicial authority for redress.<sup>10</sup> By constitutionally foreclosing any judicial forum for presidential election disputes, Tanzania effectively negates these fundamental rights for both candidates and voters.<sup>11</sup> As Justice Makaramba has acknowledged from within the Tanzanian judiciary itself, this restriction ‘contravenes the right to a fair trial and is inconsistent with Tanzania’s obligations under international instruments’.<sup>12</sup>

This article undertakes a comparative doctrinal analysis of the impact of these divergent legal regimes on democratic consolidation and the protection of fundamental rights, with particular focus on the right to a fair hearing and the right to an effective remedy. Drawing on administrative law principles governing ouster clauses,<sup>13</sup> and situating the analysis within the theoretical framework of democratic consolidation,<sup>14</sup> the article argues that Tanzania’s constitutional prohibition on presidential election petitions not only denies individual litigants any avenue for redress but also systematically undermines electoral integrity, weakens public accountability, and obstructs the democratic maturation of the Tanzanian polity. By contrasting Tanzania’s exclusionary model with Kenya’s rights-compliant, judicially active framework, the article demonstrates that the right to petition a presidential election is not merely a procedural luxury but an essential safeguard for democratic consolidation and the rule of law. The article concludes with recommendations for constitutional reform and regional harmonisation within the East African Community.

## II. BACKGROUND TO THE PROBLEM

The right to challenge election results through judicial processes is a cornerstone of modern democratic governance. It serves as a critical mechanism for ensuring electoral integrity, upholding the rule of law, and protecting the sovereign will of the electorate.<sup>15</sup> Within the East

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<sup>9</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 14(1); African Charter on Human and Peoples’ Rights (n 2) art 7.

<sup>10</sup> UN Human Rights Committee, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 15.

<sup>11</sup> O’Brien Kaaba, ‘The Challenges of Adjudicating Presidential Election Disputes in Domestic Courts in Africa’ (2015) 15(2) *African Human Rights Law Journal* 150, 162–64.

<sup>12</sup> VR Makaramba, ‘Trial and Management of Election Petitions by Courts: A Case of Tanzania’ (Paper presented at the Ninth EAMJA Annual Conference, Entebbe, Uganda, October 2011) 8–9.

<sup>13</sup> HWR Wade and CF Forsyth, *Administrative Law* (11th edn, Oxford University Press 2014) 609–12; SA de Smith, *Judicial Review* (6th edn, Sweet & Maxwell 2007) 85.

<sup>14</sup> Juan J Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Johns Hopkins University Press 1996) ch 1.

<sup>15</sup> United Nations Development Programme (UNDP), *Electoral Justice: The International IDEA Handbook* (International IDEA 2010) 15–17.

African Community (EAC), partner states have committed to ‘good governance, including adherence to the principles of democracy, the rule of law, accountability, respect for human rights and civil liberties’.<sup>16</sup> A key indicator of this commitment is the existence of robust legal frameworks allowing impartial adjudication of electoral disputes, particularly at the level of presidential elections.

Kenya has emerged as a regional exemplar in this regard. Following the promulgation of the Constitution of Kenya in 2010 a product of extensive national reform after the post-election crisis of 2007-2008 Kenya established a clear constitutional pathway for challenging presidential election results. Article 140 of the Kenyan Constitution grants any person the right to lodge a petition to the Supreme Court challenging the election of a president-elect within seven days after the declaration of results.<sup>17</sup> This provision has been operationalised in landmark cases, most notably the 2017 *Raila Odinga* petition, in which the Supreme Court nullified the presidential election and ordered a fresh vote.<sup>18</sup>

In stark contrast, the United Republic of Tanzania maintains a constitutional and statutory prohibition on judicial review of presidential elections. This position has deep historical roots, originating from the post-independence Constitutions of 1962 and 1965, and has been persistently retained in the current Constitution of 1977.<sup>19</sup> Article 41(7) of the Tanzanian Constitution states that ‘no person with the authority to institute legal proceedings shall have the power to inquire into the election of the President after the National Electoral Commission has declared him to have been duly elected’.<sup>20</sup> This ouster clause is reinforced by the Election Act, which limits election petitions to parliamentary elections, explicitly citing the constitutional restriction.<sup>21</sup>

The Tanzanian judiciary has consistently upheld this bar. In *Augustine Lyatonga Mrema and Others v Attorney-General and Others*, the High Court confirmed that its jurisdiction was ousted once the electoral commission declared a winner.<sup>22</sup> Scholars have described Tanzania’s position as a ‘unique anomaly’ in Africa, given that most constitutional democracies on the

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<sup>16</sup> Treaty for the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000) art 6(d).

<sup>17</sup> Constitution of Kenya, 2010, art 140.

<sup>18</sup> *Raila Odinga & Another v Independent Electoral and Boundaries Commission & Others* [2017] KESC 31 (KLR).

<sup>19</sup> Issa G Shivji, *The Legal Foundations of the Union in Tanzania’s Union and Zanzibar Constitutions* (Mkuki na Nyota Publishers 2008) 47–49.

<sup>20</sup> Constitution of the United Republic of Tanzania, 1977 [Cap 2 of 1977], as amended from time to time, art 41(7).

<sup>21</sup> The Presidential, Parliamentary and Councillors’ Elections Act, No 1 of 2024 (Tanzania), s 137(1).

<sup>22</sup> *Augustine Lyatonga Mrema and Others v Attorney-General and Others* [1996] TLR 273 (High Court of Tanzania).

continent permit some form of judicial review of presidential elections.<sup>23</sup> This fundamental divergence between Tanzania and Kenya creates a significant normative gap in the region's approach to electoral justice, with direct implications for democratic consolidation and the protection of fundamental rights.

### III. LITERATURE REVIEW

**Linz and Stepan** provides the foundational theoretical framework for understanding democratic consolidation. Their seminal work distinguishes between democratic transition and consolidation, arguing that a democracy is consolidated when no significant political actor seeks to overthrow the democratic regime and when the overwhelming majority of citizens believe that democratic procedures are the most appropriate way to govern collective life.<sup>24</sup> This framework is directly relevant to assessing Tanzania's ouster clause, as the absence of judicial review for presidential elections may indicate a deficit in democratic consolidation by insulating the executive from electoral accountability.

**Wade and Forsyth** offer the authoritative administrative law analysis of ouster clauses and jurisdictional exclusion. They observe that courts have devised various techniques for circumventing ouster clauses on the principle that it is for the courts, not Parliament alone, to determine the limits of jurisdiction.<sup>25</sup> Their distinction between partial and total ouster clauses is critical for analysing Tanzania's Article 41(7), which represents an extreme form of total exclusion that entirely removes presidential election disputes from judicial oversight, raising fundamental questions about compatibility with the rule of law.

**Shivji** provides essential historical and doctrinal context for understanding Tanzania's constitutional prohibition. He traces the persistence of ouster clauses to deeper tensions between executive dominance and constitutional supremacy, characterising Article 41(7) as part of a broader constitutional design that insulates executive power from judicial accountability a legacy of one-party rule that has survived into the multiparty era.<sup>26</sup> His analysis demonstrates that the prohibition on presidential election petitions is not an isolated provision but embedded in a constitutional structure that concentrates power in the executive.

**The Supreme Court of Kenya** in *Raila Odinga & Another v Independent Electoral and Boun-*

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<sup>23</sup> O'Brien Kaaba, 'The Challenges of Adjudicating Presidential Election Disputes in Domestic Courts in Africa' (2015) 15(2) *African Human Rights Law Journal* 150, 162–64.

<sup>24</sup> Juan J Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Johns Hopkins University Press 1996) ch 1.

<sup>25</sup> HWR Wade and CF Forsyth, *Administrative Law* (11th edn, Oxford University Press 2014) 609–12.

<sup>26</sup> Issa G Shivji, *The Legal Foundations of the Union in Tanzania's Union and Zanzibar Constitutions* (Mkuki na Nyota Publishers 2008) 47–49, 89–92.

*daries Commission & Others* established a landmark precedent for presidential election adjudication in Africa. The Court nullified the 2017 presidential election, holding that irregularities and illegalities affected the integrity of the election, and ordered a fresh poll within sixty days.<sup>27</sup> This decision demonstrates the substantive operation of the right to petition and its capacity to enforce electoral accountability, providing a direct comparative contrast to Tanzania's prohibition.

**Kaaba** offers a comprehensive continental survey of presidential election dispute adjudication in domestic courts across Africa. His work positions Tanzania as a 'unique anomaly', highlighting Article 41(7) as an express ouster clause that wholly prohibits judicial inquiry into presidential elections a feature he argues is at variance with broader African practice and regional human rights obligations.<sup>28</sup> While Kaaba's analysis is diagnostic rather than prescriptive, it effectively frames Tanzania's legal position as a significant outlier, underscoring the normative gap within the East African Community.

**Oso** provides a rigorous critical analysis of the Supreme Court of Kenya's judgment on the 2022 presidential election petition. He characterises the judgment as lacking substantive legal depth and failing to provide meaningful recommendations to key electoral stakeholders.<sup>29</sup> Oso's work is significant because it demonstrates high-level, critical judicial review in action holding a powerful court accountable for the quality of its reasoning. This exemplifies the kind of scholarly scrutiny that a functioning petition system enables, revealing what is lost in a system like Tanzania's where no such judicial critique is possible because no petition can be lodged.

**Aofeeq** delves into the procedural and evidentiary dimensions of election litigation in Nigeria, focusing on how provisions governing the burden of proof shape litigation strategy, judicial outcomes, and the integrity of electoral dispute resolution.<sup>30</sup> His granular, technical analysis of a pivotal procedural rule illuminates how the substantive right to challenge an election is mediated by procedural law. The limitation of his work, however, is its exclusive focus on a jurisdiction where the right to petition is already constitutionally guaranteed, leaving unaddressed the prior question of what happens in a jurisdiction like Tanzania where the absence of any right to petition renders discussions about standards of proof entirely moot.

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<sup>27</sup> *Raila Odinga & Another v Independent Electoral and Boundaries Commission & Others* [2017] KESC 31 (KLR).

<sup>28</sup> O'Brien Kaaba, 'The Challenges of Adjudicating Presidential Election Disputes in Domestic Courts in Africa' (2015) 15(2) *African Human Rights Law Journal* 150, 162–64.

<sup>29</sup> Wills Y Oso, 'Supreme Errors: A Critique of the Judgment of the Supreme Court on 2022 Kenya Presidential Election Petition' (2022) 4(2) *African Journal of Electoral Studies* 45, 55–60.

<sup>30</sup> Aofeeq Alatise, 'Burden of Proof in Election Petition in Nigeria and the Implication of Section 137 of the Electoral Act, 2022' (2023) 11(4) *Journal of African Elections* 78, 82–85.

#### IV. STUDY METHODOLOGY

This study adopts a purely doctrinal legal research methodology, which is concerned with the systematic exposition, analysis, and critique of legal rules and principles.<sup>31</sup> The choice of doctrinal analysis is appropriate because the central research questions are constitutional and doctrinal in nature: they concern the interpretation and effect of specific legal provisions Article 41(7) of the Tanzanian Constitution and Article 140 of the Kenyan Constitution and their compatibility with binding human rights obligations. The research examines primary legal sources, including the Constitution of the United Republic of Tanzania (1977), the Constitution of Kenya (2010), Tanzania's Presidential, Parliamentary and Councillors' Elections Act (2024), Kenya's Elections Act (2011), and relevant judicial precedents, most notably *Augustine Lyatonga Mrema and Others v Attorney-General and Others* from Tanzania and the *Raila Odinga* petitions from Kenya's Supreme Court. The doctrinal analysis is further informed by regional and international human rights instruments, specifically the African Charter on Human and Peoples' Rights<sup>32</sup> and the International Covenant on Civil and Political Rights,<sup>33</sup> as well as foundational administrative law texts on ouster clauses and jurisdictional exclusion, including Wade and Forsyth's *Administrative Law* and de Smith's *Judicial Review*. A structured comparative method is employed, examining the two jurisdictions along defined parameters: historical origins, textual analysis, judicial interpretation, and compatibility with international law.<sup>34</sup> No empirical component (interviews, surveys, or fieldwork) is undertaken, as the research questions are answered sufficiently through the analysis of legal texts and authoritative commentaries. This doctrinal approach enables a rigorous, rule-based assessment of the impact of Tanzania's ouster clause on democratic consolidation and fundamental rights, benchmarked against Kenya's rights-compliant framework.

#### V. COMPARATIVE LEGAL FRAMEWORK

##### A. International Human Rights Law Framework

The right to challenge electoral outcomes through judicial processes is firmly anchored in international human rights law. Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) requires States Parties to ensure that any person whose rights are violated 'shall

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<sup>31</sup> Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 85.

<sup>32</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

<sup>33</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>34</sup> Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) ch 5.

have an effective remedy', determined by competent judicial authorities.<sup>35</sup> Article 14(1) guarantees the right to a fair hearing before an independent and impartial tribunal.<sup>36</sup> The African Charter on Human and Peoples' Rights similarly guarantees, under Article 7, the right to have one's cause heard, and under Article 13, the right to participate freely in government.<sup>37</sup> The UN Human Rights Committee has clarified that the right to an effective remedy requires access to judicial mechanisms capable of addressing alleged violations, including those related to electoral processes.<sup>38</sup> These binding obligations apply equally to Tanzania and Kenya as States Parties. Any legal framework that wholly excludes judicial review of presidential elections potentially violates these fundamental rights.

### **B. Tanzania's Legal Framework**

Tanzania's constitutional architecture explicitly prohibits judicial review of presidential elections. Article 41(7) of the Constitution of the United Republic of Tanzania (1977) states that 'no person with the authority to institute legal proceedings shall have the power to inquire into the election of the President after the National Electoral Commission has declared him to have been duly elected'.<sup>39</sup> This is a total ouster clause, leaving no room for judicial intervention. The prohibition is reinforced by the Presidential, Parliamentary and Councillors' Elections Act of 2024, which limits election petitions to parliamentary elections only, explicitly citing the constitutional bar.<sup>40</sup> Tanzanian courts have consistently upheld this exclusion. In *Augustine Lyatonga Mrema and Others v Attorney-General and Others*, the High Court confirmed that its jurisdiction was ousted once the electoral commission declared a winner.<sup>41</sup> No Tanzanian court has ever entertained a presidential election petition on the merits. As a result, candidates and voters have no judicial forum to challenge alleged irregularities, malpractices, or violations of electoral law in a presidential election. This framework directly negates the right to a fair hearing and the right to an effective remedy as guaranteed under the ICCPR and the African Charter.

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<sup>35</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 2(3).

<sup>36</sup> Ibid art 14(1).

<sup>37</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58, arts 7 and 13.

<sup>38</sup> UN Human Rights Committee, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 15.

<sup>39</sup> The Constitution of the United Republic of Tanzania, 1977 [Cap 2 of 1977], as amended from time to time, art 41(7).

<sup>40</sup> The Presidential, Parliamentary and Councillors' Elections Act, No 1 of 2024, s 137(1).

<sup>41</sup> *Augustine Lyatonga Mrema and Others v Attorney-General and Others* [1996] TLR 273 (High Court of Tanzania).

### C. Kenya's Legal Framework

In stark contrast, Kenya's constitutional framework guarantees access to judicial review for presidential elections. Article 140 of the Constitution of Kenya (2010) grants any person the right to lodge a petition to the Supreme Court challenging the election of a president-elect within seven days after the declaration of results.<sup>42</sup> The Supreme Court is empowered to hear the petition, evaluate alleged irregularities, and issue remedies, including nullification of the election and an order for a fresh poll. This provision has been actively utilised in landmark cases. In *Raila Odinga & Another v Independent Electoral and Boundaries Commission & Others* (2017), the Supreme Court nullified the presidential election, holding that irregularities and illegalities had compromised the integrity of the election, and ordered a fresh election within sixty days.<sup>43</sup> The Kenyan framework also provides for procedural safeguards, including strict timelines and clear standards of proof. This rights-compliant model operationalises the right to a fair hearing and the right to an effective remedy, fully aligning with Kenya's obligations under the ICCPR and the African Charter. The availability of Supreme Court review has strengthened electoral accountability and public confidence in the electoral process.

## VI. FINDINGS

The comparative analysis yields four principal findings. First, Tanzania's constitutional prohibition on presidential election petitions constitutes a total ouster clause that entirely removes presidential election disputes from judicial oversight. Article 41(7) of the Tanzanian Constitution, reinforced by the Elections Act of 2024, leaves no avenue for any court to inquire into the validity of a presidential election once a winner is declared.<sup>44</sup> This finding confirms that Tanzania's legal framework is not merely restrictive but absolutely exclusionary, placing it as a 'unique anomaly' among African constitutional democracies.<sup>45</sup>

Second, Tanzania's ouster clause directly conflicts with its binding obligations under international human rights law. As a State Party to the ICCPR and the African Charter, Tanzania is required to guarantee the right to a fair hearing (Article 14 ICCPR, Article 7 African Charter) and the right to an effective remedy (Article 2(3) ICCPR).<sup>46</sup> By constitutionally barring any

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<sup>42</sup> The Constitution of Kenya, 2010, art 140.

<sup>43</sup> *Raila Odinga & Another v Independent Electoral and Boundaries Commission & Others* [2017] KESC 31 (KLR).

<sup>44</sup> The Constitution of the United Republic of Tanzania, 1977 [Cap 2 of 1977] as amended from time to time, art 41(7); The Presidential, Parliamentary and Councillors' Elections Act, No 1 of 2024 (Tanzania), s 137(1).

<sup>45</sup> O'Brien Kaaba, 'The Challenges of Adjudicating Presidential Election Disputes in Domestic Courts in Africa' (2015) 15(2) *African Human Rights Law Journal* 150, 162–64.

<sup>46</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, arts 14(1) and 2(3); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58, art 7.

judicial forum for presidential election disputes, Tanzania denies both candidates and voters these fundamental rights. This finding supports the proposition that Article 41(7) is incompatible with Tanzania's treaty obligations, a concern previously acknowledged by Justice Makaramba from within the Tanzanian judiciary.<sup>47</sup>

Third, the absence of judicial review for presidential elections undermines democratic consolidation in Tanzania. Drawing on Linz and Stepan's framework, a consolidated democracy requires that no significant political actor seeks to overthrow the democratic regime and that citizens believe democratic procedures are the most appropriate way to govern collective life.<sup>48</sup> The prohibition on judicial review insulates presidential elections from legal accountability, weakens public confidence in electoral integrity, and removes a critical check on executive power. In contrast, Kenya's experience demonstrates that the availability of Supreme Court review including the historic 2017 nullification of a presidential election strengthens electoral accountability and reinforces democratic norms.<sup>49</sup>

Fourth, Kenya's rights-compliant framework provides a functional model for electoral justice that Tanzania could usefully study. Kenya's Constitution of 2010, Article 140, guarantees access to the Supreme Court for presidential election petitions within seven days, and the judiciary has actively interpreted this provision to provide meaningful remedies.<sup>50</sup> The Kenyan model operationalises the right to be heard (*audi alteram partem*) and the right to an effective remedy, demonstrating that judicial review of presidential elections is both feasible and essential for democratic governance. This finding confirms that the divergence between Tanzania and Kenya is not inevitable but reflects distinct constitutional choices with direct consequences for the protection of fundamental rights.

## VII. DISCUSSION OF FINDINGS

The findings confirm that Tanzania's total ouster clause under Article 41(7) is not a mere procedural limitation but a fundamental rights violation. By completely excluding judicial review of presidential elections, Tanzania denies candidates and voters access to any forum capable of remedying electoral malpractices. This directly contravenes the right to an effective remedy under Article 2(3) of the ICCPR and the right to a fair hearing under Article 7 of the

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<sup>47</sup> VR Makaramba, 'Trial and Management of Election Petitions by Courts: A Case of Tanzania' (Paper presented at the Ninth EAMJA Annual Conference, Entebbe, Uganda, October 2011) 8–9.

<sup>48</sup> Juan J Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Johns Hopkins University Press 1996) ch 1.

<sup>49</sup> *Raila Odinga & Another v Independent Electoral and Boundaries Commission & Others* [2017] KESC 31 (KLR).

<sup>50</sup> The Constitution of Kenya, 2010, art 140.

African Charter.<sup>51</sup> As Wade and Forsyth observe, total ouster clauses have long been subjected to strict judicial scrutiny in common law jurisdictions because they undermine the supervisory jurisdiction of courts.<sup>52</sup> Tanzania's provision represents an extreme form of exclusion that is increasingly viewed as incompatible with the rule of law in contemporary constitutionalism.<sup>53</sup>

The implications for democratic consolidation are equally concerning. Linz and Stepan argue that democratic consolidation requires that all significant political actors accept democratic procedures as the only legitimate framework for contesting power.<sup>54</sup> The absence of judicial review for presidential elections insulates the executive from electoral accountability, sending a signal that presidential elections are beyond legal scrutiny. This weakens public confidence in electoral integrity and may discourage political participation. Kenya's experience demonstrates the opposite: the availability of Supreme Court review, including the 2017 nullification, has reinforced the legitimacy of the electoral process and strengthened democratic norms.<sup>55</sup> The Kenyan model shows that judicial review does not destabilise democracy but rather deepens it.

The divergence between Tanzania and Kenya within the same regional integration framework raises important questions for the East African Community. Under Article 6(d) of the EAC Treaty, partner states are committed to 'good governance, including adherence to the principles of democracy, the rule of law, accountability, respect for human rights and civil liberties'.<sup>56</sup> Tanzania's ouster clause appears inconsistent with this commitment. While the EAC has limited enforcement mechanisms, the persistence of such a fundamental divergence undermines the harmonisation of electoral standards and creates a normative gap within the Community. This study suggests that regional dialogue and soft law standards such as EAC guidelines on electoral justice could provide a pathway toward convergence without requiring immediate constitutional amendment.

Finally, the findings point to the need for constitutional reform in Tanzania. Removing or modifying Article 41(7) would align Tanzania with its international human rights obligations

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<sup>51</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, arts 2(3) and 14(1); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58, art 7.

<sup>52</sup> HWR Wade and CF Forsyth, *Administrative Law* (11th edn, Oxford University Press 2014) 610.

<sup>53</sup> O'Brien Kaaba, 'The Challenges of Adjudicating Presidential Election Disputes in Domestic Courts in Africa' (2015) 15(2) *African Human Rights Law Journal* 150, 162–64.

<sup>54</sup> Juan J Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Johns Hopkins University Press 1996) ch 1.

<sup>55</sup> *Raila Odinga & Another v Independent Electoral and Boundaries Commission & Others* [2017] KESC 31 (KLR).

<sup>56</sup> Treaty for the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000) art 6(d).

and with the prevailing practice in African constitutional democracies.<sup>57</sup> The Kenyan experience demonstrates that such reform is feasible and that an active judiciary can manage presidential election petitions without destabilising the political order.<sup>58</sup> For Tanzania, even a partial reform such as permitting judicial review on limited grounds, including serious irregularities or violations of constitutional procedures would represent significant progress toward a rights-compliant electoral justice framework.

## VIII. CONCLUSION AND RECOMMENDATIONS

### A. Conclusion

This article has demonstrated that Tanzania's constitutional prohibition on presidential election petitions under Article 41(7) constitutes a total ouster clause that entirely excludes judicial review of presidential elections, directly violating the right to a fair hearing and the right to an effective remedy guaranteed under the ICCPR and the African Charter.<sup>59</sup> The comparative analysis with Kenya's rights-compliant framework under Article 140 of the 2010 Constitution reveals that judicial review of presidential elections is not only feasible but essential for democratic consolidation, electoral accountability, and public confidence in electoral processes.<sup>60</sup> Tanzania's position remains a 'unique anomaly' in Africa,<sup>61</sup> and its persistence undermines the normative coherence of the East African Community's commitment to good governance and the rule of law.<sup>62</sup>

### B. Recommendations

**First, constitutional reform in Tanzania.** Article 41(7) of the Tanzanian Constitution should be repealed or substantially amended to permit judicial review of presidential elections on clearly defined grounds, including serious irregularities, violations of constitutional procedures, and lack of electoral integrity. A transitional provision could limit review to the Supreme Court

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<sup>57</sup> O'Brien Kaaba, 'The Challenges of Adjudicating Presidential Election Disputes in Domestic Courts in Africa' (2015) 15(2) *African Human Rights Law Journal* 150, 165-166

<sup>58</sup> Wills Y Oso, 'Supreme Errors: A Critique of the Judgment of the Supreme Court on 2022 Kenya Presidential Election Petition' (2022) 4(2) *African Journal of Electoral Studies* 45, 60-62.

<sup>59</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, arts 2(3) and 14(1); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58, art 7.

<sup>60</sup> Constitution of Kenya, 2010, art 140; *Raila Odinga & Another v Independent Electoral and Boundaries Commission & Others* [2017] KESC 31 (KLR).

<sup>61</sup> O'Brien Kaaba, 'The Challenges of Adjudicating Presidential Election Disputes in Domestic Courts in Africa' (2015) 15(2) *African Human Rights Law Journal* 150, 162-64.

<sup>62</sup> Treaty for the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000) art 6(d).

with strict timelines, as modelled by Kenya's Article 140, to ensure expeditious resolution without destabilising the political order.<sup>63</sup>

**Second, regional harmonisation through the East African Community.** The EAC should develop non-binding soft law standards or guidelines on electoral justice, establishing minimum principles for presidential election dispute resolution, including access to an independent tribunal, the right to a fair hearing, and the right to an effective remedy. Such guidelines would create peer pressure for reform while respecting the sovereignty of partner states.

**Third, judicial interpretation as an interim measure.** Pending constitutional reform, Tanzanian courts could adopt interpretive techniques to circumscribe the ouster clause, drawing on common law principles that total ouster clauses must be strictly construed and cannot entirely exclude review where fundamental rights are at stake. While Article 41(7) is textually absolute, courts could explore whether residual jurisdiction remains for violations of constitutional procedures or international human rights obligations that Tanzania has ratified.

## **IX. FUTURE RESEARCH AGENDA**

While this study has provided a doctrinal comparative analysis of Tanzania's ouster clause and Kenya's rights-compliant framework, several avenues for further research remain unexplored. First, empirical research is needed to examine public perceptions of electoral integrity in Tanzania, specifically whether citizens and political actors view the absence of judicial review as undermining the legitimacy of presidential elections. Second, comparative studies extending beyond Tanzania and Kenya to include other EAC partner states such as Uganda, Rwanda, Burundi, and South Sudan would illuminate the full spectrum of electoral dispute resolution mechanisms within the region and identify best practices for harmonisation. Third, research examining the political economy of constitutional ouster clauses could explore why certain states maintain prohibitions on judicial review despite regional and international pressures for reform, including the role of executive dominance and historical legacies of one-party rule. Fourth, longitudinal studies tracking the impact of Kenya's judicial activism on electoral quality and democratic consolidation over multiple election cycles would provide valuable evidence for reformers in other jurisdictions. Finally, comparative legal research on the justiciability of presidential election disputes before sub-regional and continental bodies such as the East African Court of Justice or the African Court on Human and Peoples' Rights could assess

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<sup>63</sup> Constitution of Kenya, 2010, art 140(2).

whether alternative forums offer any remedy to litigants excluded from domestic judicial review.

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