Electoral Studies 85 (2023) 102653

Contents lists available at ScienceDirect

Electoral Studies

journal homepage: www.elsevier.com/locate/electstud

Judicial resistance during electoral disputes: Evidence from Kenya

Thalia Gerzso

Department of Government, London School of Economics, United Kingdom

ARTICLE INFO

Keywords:
African politics
Electoral Contention
Democracy
Court and law

ABSTRACT

Over the last decade, African courts have played an important role in the conduct of free and fair elections. In Kenya, the Supreme Court nullified the presidential election of the incumbent. These rulings challenge the conventional wisdom that courts in hybrid regimes always support power holders despite blatant evidence of electoral fraud. Furthermore, these sparks of judicial resistance deserve our scholarly attention as they have the power to start the democratization process or limit further autocratization. Hence, this paper seeks to understand the conditions under which courts are able to resist incumbents' pressure to legitimize electoral malpractice and side with the opposition. I argue that institutional reforms incentivize courts to resist the incumbent's pressure and to rule in favor of the opposition during electoral disputes under two conditions. First, institutional reforms must reinforce de jure independence by enacting effective legal and constitutional mechanisms that prevent the executive branch from undermining the separation of power. Second, institutional reforms must mobilize judicial support networks by granting them the tools to engage in strategic and repeated litigation. I test this novel theory by leveraging original qualitative and quantitative data from Kenya. Using process tracing, I show how the 2010 constitution created an environment where the courts had no other choice than to annul the election of the incumbent – President Kenyatta – in 2017.

1. Introduction

Over the last decades, courts have been increasingly adjudicating political issues. This judicialization of politics has led courts to behave as policymakers and resolve political controversies (Shapiro and Stone, 1994; Hirschl, 2006). This phenomenon has now extended to the realm of electoral politics. Political parties have used courts to challenge electoral results (Aydın-Çakır, 2014) and shape how voters perceive the legitimacy of the election (Kerr and Wahman, 2021). For instance, both in the 2008 and 2020 American presidential elections, defeated candidates challenged the results before courts of law.

This judicialization of elections can also be observed in hybrid regimes (i.e., electoral autocracies and non-consolidated democracies). For instance, the Kenyan highest courts have adjudicated 224 electoral disputes in the past thirty years. Because incumbents have often weaponized formal institutions to remain in power, it has long been assumed that courts in hybrid regimes were too weak to resist the executive branch's interference (Tate, 1993; Hirschl, 2009). Scholarship has rebutted this assumption by identifying conditions under which judicial resilience can occur (Helmke, 2002; VonDoepp, 2006; Trochev and Ellett, 2014; Kureshi, 2021). Despite its important contribution, the findings from this literature are often mixed and do not take into account the increased constraints that courts face during an election period.

In hybrid regimes, elections are a political moment that can destabilize the existing political equilibrium (Bleck and Van de Walle, 2018). To ensure their survival, incumbents have strong incentives to manipulate the electoral process but also pressure courts which have been increasingly asked to assess the validity of elections. Because these electoral cases can put the future of the ruling regime in jeopardy, incumbents do not hesitate to rely on formal and informal strategies to coerce courts into favoring the ruling regime. As a result, denouncing electoral fraud and annulling electoral results are costly for courts. In this particular context, I define and describe cases where courts refuse to close their eyes on electoral malpractices and side with the opposition as an act of resistance against the ruling regime.

These episodes of judicial resistance are more frequent than one would assume. Despite the tight grip of Uganda's president on the judiciary, courts have been able to nullify the results of some parliamentarian elections (Murison, 2013). In Malawi, the Supreme Court declared the 2020 presidential election fraudulent and ordered a rerun, which led to an alternation in power. In Kenya, the Supreme Court overturned 66 electoral results since 1992 and nullified the election of President Uhuru Kenyatta in 2017. These cases deserve our scholarly attention as they have the potential to prevent electoral backsliding from occurring and, in some cases, trigger the democratization process. Hence, this paper seeks to identify the conditions under which cases

E-mail address: tg355@cornell.edu.

https://doi.org/10.1016/j.electstud.2023.102653
Received 5 January 2023; Received in revised form 12 July 2023; Accepted 16 July 2023
Available online 10 August 2023

of judicial resistance can emerge. In other words, when – and why – do courts in hybrid regimes take the risk of siding with the opposition during electoral disputes?

To answer this research question, I identify a mechanism through which institutional reforms affect courts' behavior during electoral disputes in hybrid regimes. I argue that institutional reforms can create incentives for courts to engage in judicial resistance under two conditions. First, institutional reforms must create legal mechanisms that shield the judiciary from the executive branch's attempts to undermine its independence. Second, effective institutional reforms must mobilize judicial support networks. When institutional reforms introduce legal guarantees that bolster *de jure* independence, judicial support networks are more likely to go to courts to challenge electoral results (Harvey, 2022). By adjudicating an increasing number of cases, courts gain experience and confidence in electoral dispute resolutions. Institutional reforms also enable judicial support networks to create a cottage industry around judicial professionalization and training in electoral disputes (Epstein and Posner, 2018). Finally, the mobilization of judicial support networks puts the judiciary under intense scrutiny, thus shifting the costs and benefits of siding with the ruling party.

I focus on the case of Kenya to determine whether the conditions identified in my theoretical framework drove the rise of judicial resistance observed in the country from 2013 to 2020. This case provides a useful setting to understand how and why courts decide to side with the opposition in electoral disputes. Like many African states, Kenya liberalized its regime during the third wave of democratization in the early 1990s. Despite the introduction of multiparty elections in 1992 and the first alternation in power in 2002, Kenya never managed to democratize fully, and the judiciary remained under the executive branch's control. In 2010, a new constitution was enacted following the violent election of 2007 that almost plunged the country into a civil war. Designed by a commission of constitutional experts, the 2010 constitution reformed the judiciary, which was seen as a cornerstone for peace-building and democracy. This particular context allows me to leverage a source of institutional variation and determine whether the 2010 reform affected court behavior.

I rely on both original quantitative and qualitative data to estimate the effect of institutional reform on judicial resistance and outline the causal mechanism at play. Using process tracing, I combine qualitative data from 24 semi-structured interviews with Kenyan judges, clerks, lawyers, and activists and descriptive statistics from 224 electoral disputes that I hand-coded. I show that courts are more likely to rule against the ruling party when institutional reforms enact legal and constitutional measures that improve *de jure* independence and mobilize judicial support networks.

This paper makes important contributions. First, this paper contributes to the field of electoral studies by showing how courts can prevent – or foster – electoral backsliding. With the judicialization of elections observed across regions, political actors have used courts to shape how voters perceive elections' legitimacy and reduce electoral fraud (see, for instance, Aydın-Çakır, 2014; Kerr and Wahman, 2021; Harvey, 2022). Building on these findings, this article goes one step further by identifying the conditions under which courts are receptive to the actions taken by pro-opposition actors and willing to annul fraudulent elections. Second, this paper contributes to the literature on authoritarian institutions by showing that although formal institutions can be a powerful tool for autocrats, they also can be an effective instrument for pro-democratic actors (Shen-Bayh, 2018; Ochieng'Opalo, 2019; Meng, 2020). My findings further deepen our understanding of court behavior in hybrid settings. By showing that courts will side with the opposition under certain conditions, this paper rebuts the presumption that courts are mere black boxes used by autocrats for their own political survival. Third, this article advances our knowledge about African judiciaries — an understudied topic in both the literature on authoritarian courts and African politics — by providing the first micro-level dataset about Kenyan electoral disputes. This new dataset provides extensive information about the parties to the case, their political affiliation, the type of disputes brought before the court, the issue at stake, the court composition, and the outcome of the dispute, thus facilitating further research on African courts. Finally, this paper's findings can inform policymakers about when and how judicial institutions can advance the rule of law and facilitate peaceful transfers of power. By understanding how institutional reform can prevent courts from being weaponized by incumbents or, in reverse, deployed by the opposition, this paper determines how courts can serve as a tool (or roadblock) to the practice of fair and peaceful elections. In other words, these findings can inform institutional-building efforts by identifying how institutional reform can foster democratization.

2. Understanding variation in judicial assertiveness

Defined as the ability of courts to defy and resist powerful actors through their rulings (Kapiszewski, 2011), scholars have taken different approaches to understand better why some courts are more assertive than others with regard to their relationship with the executive branch. A high level of judicial assertiveness is often associated with the level of democracy. Judges are more likely to be independent in democratic regimes. Increases in political competition create incentives for the executive branch to develop checks and balances mechanisms, thus giving more autonomy to the judiciary (Chavez, 2004; McCubbins and Schwartz, 1984; Ramseyer, 1994). As political competition increases, courts will be more inclined to make decisions that threaten the ruling party's interests.

A second approach is to examine how interactions with other political actors determine the courts' level of assertiveness. Evidence from consolidated democracies suggests that elite cohesion and class competition lead to the emergence of a stronger judiciary (Hirschl, 2000). Looking at the American context, scholars have also emphasized how the relationship between branches of power can affect courts' behavior. For instance, the presence of the solicitor general (Salokar, 1994) or a reversal threat from Congress (Spiller and Gely, 1992) influences the outcome of the Supreme Court's ruling. The literature has also highlighted the role of micro-level factors in courts' decision-making process. According to this attitudinal approach, individual characteristics, such as ideational factors, explain variations in judicial assertiveness. Through court rulings, judges seek to maximize their policy preferences since checks and balances mechanisms protect them against other branches of power (Segal, 1997).

Despite these insights, the literature mainly focuses on consolidated democracies and thus fails to capture the constraints that courts face in hybrid regimes. Theories of judicial assertiveness tested in hybrid regimes suggest that court behavior is shaped differently than in consolidated democracies (VonDoepp, 2006; Popova, 2010). Because of the executive branch's disproportionate power in hybrid regimes (Bratton and Van de Walle, 1997), courts' relationship with political actors and other branches of government differs from the one courts in consolidated democracies have. Judges cannot simply follow their ideational or policy preferences without considering other factors. That is why students of judicial politics must acknowledge the political environment in which courts evolve to explain variations in judicial behavior.

3. Judicial behavior in hybrid regimes

Although courts are not inherently democratic or authoritarian (Shen-Bayh, 2022), different types of political regimes impose different sets of constraints on the judiciary. In hybrid regimes, incumbents have increasingly weaponized formal institutions to strengthen their regimes (Gandhi and Przeworski, 2007; Boix and Svolik, 2013). For power-holders eager to remain in power, courts offer a plethora of political advantages. Courts can facilitate elite cohesion (Barros, 2002), monitor and discipline bureaucrats (Peerenboom, 2002; Rose-Ackerman, 2004), weaken the opposition (Ginsburg, 2003; Nardi, 2010; Shen-Bayh, 2018,

2022), attract foreign investments (Moustafa, 2007), and legitimate undemocratic and/or unpopular decisions (Lubman, 1999; Moustafa, 2007).

To control the judicial process and ensure that courts will support the ruling regimes, incumbents have used various strategies (Gloppen et al., 2022). For instance, incumbents have leveraged institutional configurations to undermine courts' ability to make independent decisions by restricting the type of legal challenges brought before courts (Magaloni, 2003), reducing the scope of judicial review (Brown, 2012), or altering the courts' original jurisdiction (Bánkuti et al., 2012). Incumbents also have fragmented judiciaries by creating exceptional courts (e.g., military tribunals) alongside ordinary courts to target sensitive cases and political actors (Toharia, 1974; Moustafa, 2007). In addition to using institutional constraints, autocrats have sought to weaken judicial activism and support networks to prevent judges from gaining assertiveness through repeated litigation (Moustafa, 2014). Finally, scholarship suggests that judges often adopt self-restraint due to their weakness vis-a-vis the executive branch (Verner, 1984; Urribarri, 2011). Hence, judges in hybrid regimes face a hostile environment that does not allow them to behave like their peers exercising in democratic settings (Trochev and Ellett, 2014).

Despite all these formal and informal constraints, courts in hybrid regimes have still shown that they can resist powerholders' interferences under certain conditions. For instance, interest-oriented theories suggest that judicial resilience is more likely to occur when the ruling regime is weak (Helmke, 2002) or when powerholders are involved in the litigation process (VonDoepp, 2006). Variation in judicial assertiveness is, therefore, the result of strategic considerations (Ríos-Figueroa, 2007). The literature has shown, however, that other factors can foster judicial resilience (VonDoepp and Ellett, 2011). For example, scholarship has shown that high levels of judicial assertiveness are associated with socially constructed attitudes: socialization with peers and legal networks can affect judges' ability to oppose the ruling regime (Hilbink, 2012; Ingram, 2015). For institutionalist scholarship, these factors are endogenous to institutional configurations as variations in institutional interlinkages between the ruling regime and the judiciary can predict courts' assertiveness (Kureshi, 2021).

Courts' ability to resist incumbents' pressures in hybrid regimes appears to be the product of a multi-factorial process that warrants more complex and context-based explanations that acknowledges the political and social environment in which courts evolved in (Gloppen Ellet & Trochev, 2014; Gloppen and Kanyongolo, 2012; Dressel et al., 2017). This paper builds on existing scholarship by showing how institutional and agency factors interact and shape judicial behavior in the particular context of elections.

4. Theory: The effect of institutional reform on judicial resistance

In this section, I develop a theory of judicial resistance by identifying the conditions under which courts in hybrid regimes take the risk of siding with the opposition during electoral disputes. I argue that institutional reforms incentivize courts to resist the incumbent's pressure during electoral disputes under two conditions. First, institutional reforms must reinforce *de jure* independence by enacting effective legal and constitutional mechanisms that prevent the executive branch from undermining the separation of power. Second, institutional reforms must mobilize judicial support networks by granting them tools to engage in strategic and repeated litigation, professional training, and monitoring activities. These repeated interactions between the judiciary and judicial support networks enable courts to gain experience and develop electoral jurisprudence. Furthermore, by putting courts under scrutiny, judicial support networks make collusion between courts and the executive branch more apparent and, therefore, costlier. In other words, by mobilizing judicial support networks, institutional reforms give courts the tools and incentives to resist incumbents' pressure to dismiss evidence of electoral fraud. I proceed by detailing the different steps of the causal mechanism outlined in Fig. 1. First, I identify which types of institutional reforms improve *de jure* independence and mobilize judicial support networks. I then explain how this mobilization triggered by institutional reforms leads to an increase in judicial resistance.

4.1. Institutional reforms and de jure independence

In this subsection, I identify which institutional reforms can trigger the causal mechanism outlined in Fig. 1. Not all institutional reforms improve de jure independence[1] or mobilize judicial support networks. In fact, African incumbents have repeatedly instrumentalized institutional reforms to protect their regimes and weaken other branches of government (e.g., Cheeseman, 2018; Ochieng'Opalo, 2019; Meng, 2020; Gerzso and van de Walle, 2022; Gloppen et al., 2022).

Building on Mahoney and Thelen's theory of institutional change (2010), I argue that pro-opposition actors must (1) participate in the reform process and (2) enact new rules that substantively protect the judiciary from the executive branch in order to trigger the sequence of events that lead to judicial resistance. These institutional reforms can take various forms (e.g., constitutional amendments, enactment of a new constitution, organic laws, or ordinary laws) but must meet these two following criteria in order to affect court behavior. First, institutional reforms must seek to either remove existing rules by introducing new ones or introduce new rules on top of existing ones to improve *de jure* independence. Such changes mostly occur through the enactment of a new constitution or legal provisions or by amending the existing constitutional and legal framework. The goal of these new rules is to either create new mechanisms protecting the judiciary from the executive branch or address issues created by legal loopholes. Second, pro-opposition actors must be involved in the reform process in order to enact rules that alter the status quo and mobilize judicial support networks. Because incumbents have repeatedly used institutional reforms to consolidate their power, institutional reforms that are at the sole initiative of the ruling party are unlikely to strengthen *de jure* independence or mobilize judicial support networks. *A contrario*, the involvement of pro-opposition actors in the reform process can send a signal to judicial support networks and incentivize them to rely on courts again to adjudicate electoral disputes (Epp, 1998; Schaaf, 2021). Hence, I expect to observe the causal mechanism outlined in Fig. 1 when institutional reforms meet these two criteria.

The first effect of institutional reforms – when enacted by pro-opposition members seeking to alter the current political equilibrium and improve horizontal accountability – is the enactment of constitutional and/or legal mechanisms that aim to shield the judiciary from the executive branch. The literature has identified several mechanisms that improve *de jure* independence. A well-documented protection is a reform of the appointment process. In many democratic and non-democratic states, the executive branch directly appoints judges in higher courts. Such a provision can undermine the judiciary's independence in hybrid regimes as it encourages clientelistic relationships (Kureshi, 2021). To address this issue, legislators have reformed appointment and removal procedures by either delegating this prerogative to Judicial Councils (Garoupa and Ginsburg, 2009), the parliament, or both (Hatchard et al., 2004). Scholarship has also drawn attention to the importance of financial autonomy when attempting to protect judicial independence. Incumbents have often starved the judiciary

[1] As opposed to de facto independence, which mostly refers to judges' behavior vis-a-vis power holders, *de jure* independence encompasses "all formal rules designed to insulate judges from pressure" (Rios-Figueroa and Staton, 2014, p. 106). The literature has repeatedly shown that *de jure* independence does not necessarily lead to *de facto* independence. I concur with this interpretation by arguing that *de jure* independence is a necessary but not a sufficient condition for judicial resistance to occur.

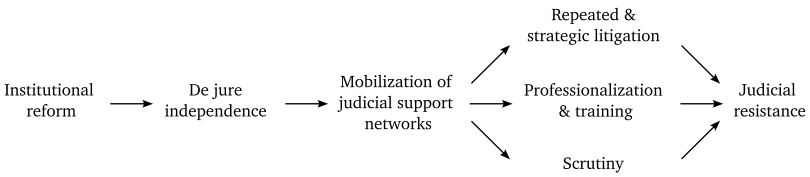

Fig. 1. Causal mechanism of judicial resistance.

to better control it and weaken it (Domingo, 2000; Gloppen et al., 2022). To prevent such a situation, institutional reforms can delegate the allocation of the budget to another entity, such as the legislature (Hatchard et al., 2004). Finally, the literature has recently highlighted how the judiciary's structure can undermine judicial independence. For instance, autocrats have fragmented the court system to sideline political threats (Moustafa, 2017).

This list of mechanisms aiming to improve *de jure* independence is not exhaustive. To be effective, institutional reforms must enact legal and constitutional mechanisms that are tailored to the state's legal and political context (e.g., legal tradition, manipulation used by the ruling party, etc.). Furthermore, reforming only one feature of the judicial system is not enough. To prevent the executive branch from capturing the judiciary, constitutional and lawmakers must take a holistic approach where several aspects of the judiciary's compositions and organization are redesigned to prevent powerholders from weaponizing any institutional weakness (Garoupa and Ginsburg, 2009; Melton and Ginsburg, 2014). For instance, reforming the appointment process would not prevent the executive branch from manipulating the judiciary's budget or structure to control it better. Hence, if theoretical expectations are correct, I expect to observe the following:

Hypothesis 1. When pro-opposition actors are included in the reform process, institutional reform will include numerous legal or constitutional provisions aiming at limiting the influence of the executive over the judiciary.

4.2. The mobilization of judicial support networks and its effect on judicial resistance

De jure independence is necessary but not a sufficient condition, however. For courts to engage in judicial resistance, the mobilization of judicial support networks is essential. Composed of lawyers, judicial organizations (e.g., Bar and Magistrate Associations), and civil society activists, judicial support networks have played an important role in shaping courts' behavior in both democracies (Epp, 1998) and non-democracies (Ginsburg and Moustafa, 2008). Judicial support networks have two specific characteristics that distinguish them from traditional litigants. First, judicial support networks are repeated and coordinated players with extensive litigating experience in a specific area of the law. Familiar with jurisprudence developments, these networks are able to build more effective litigation campaigns as they know which arguments resonate in courts. Second, these networks have the capacity to engage in large advocacy campaigns thanks to their connection and material resources. For example, in the United States, a network of lawyers and civil society actors working on civil rights issues brought cases before several state and federal courts in order to incentivize the Supreme Court to bring one of their cases on its docket (Epp, 1998)

To mobilize, however, these networks need to have the ability to take actions but also have guarantees that their actions might have an effect on courts' behavior. In hybrid regimes, powerholders often rely on judicial and legal lawfare to curb these networks' activities (Moustafa, 2014; Gloppen et al., 2022). Group of activists and advocates, thus, find fewer benefits to engaging in strategic litigation and advocacy campaigns in this political context as courts are under the influence of the executive branch. By enacting legal and/or constitutional mechanisms that improve *de jure* independence, institutional reforms signal to judicial support networks that courts might be more inclined to adjudicate their petitions in a free and fair manner. As a result, judicial support networks are more likely to mobilize and interact with courts after enacting such institutional reform. I, thus, formulate the following observable implication:

Hypothesis 2. The creation of legal and/or constitutional provisions aiming at improving *de jure* independence will lead to an increase in judicial support networks' mobilization.

I identify three pathways through which the mobilization of judicial support networks affects court behaviors and leads to judicial resistance (see Fig. 1). First, the mobilization of these networks enables courts to gain experience and confidence in adjudicating electoral disputes. Institutional change offers an opportunity for the opposition and members of civil society to engage with courts to reframe the electoral framework and jurisprudence. Strategic litigation allows opposition members to highlight specific issues related to the election process and assess – or question – the legitimacy of an election (Kerr and Wahman, 2021). Through strategic litigation, courts can develop a coherent jurisprudence that facilitates the adjudication of electoral disputes. For instance, courts can establish the criteria needed to assess the freedom and fairness of an election. Finally, repeated litigation enables courts to sharpen these legal tools, thus improving their confidence in their ability to justify their ruling. Thus, I hypothesize that:

Hypothesis 3. An increase in electoral litigation will lead to more pro-opposition rulings.

Second, judicial support networks' mobilization facilitates the creation of a cottage industry around judicial professionalization and training (Epstein and Posner, 2018). Professionalization and training are essential as they give judges legal "weapons" to justify their decision and assert their independence. Training helps courts learn about the substantive legal issues of electoral contention. Training also teaches judges how to address procedural issues proper to electoral disputes. Activists can also weaponize training to introduce foreign jurisprudence from democratic states. Courts can then decide to use these foreign legal concepts to justify their rationale when national electoral law is silent on a specific issue. Hence, I expect to observe that:

Hypothesis 4. Increased electoral training and professionalization workshops will lead to more pro-opposition rulings.

Finally, in addition to gaining expertise and confidence, repeated litigation and training sessions enable judicial support networks to monitor the judiciary's behavior closely, thus shifting the cost and benefits of issuing a pro-ruling party judgment. With the mobilization of judicial support networks, supporting the ruling party becomes increasingly tricky. When electoral fraud is apparent, these networks could construe pro-incumbent rulings as an admission of guilt from the judiciary. Public confidence in the courts' independence is critical as activists and opposition members might call for a purge/reform of the judiciary that might put in jeopardy the survival of the institution (Helmke, 2010). In this specific environment, rulings that favor an incumbent can become even costlier for the bench than a decision that undermines the regime's authority. In other words, courts must be assertive and resist the executive branch if the judiciary wants to survive. Hence, I hypothesize that:

Hypothesis 5. An increase in monitoring activities will lead to more pro-opposition rulings.

4.3. Scope conditions

4.3.1. Judicial resistance: A phenomenon inherent to the nature of hybrid regimes

Episodes of judicial resistance, as I define it, can only be observed in hybrid regimes.[2] In consolidated democracies, courts do not face the same level of pressure and constraints that judiciaries face in hybrid regimes. Hence, electoral dispute resolutions in consolidated democracies are governed by another set of parameters that are inherent to this type of political regime. The sequence of events outlined in this section cannot occur in non-electoral autocracies where elections do not occur regularly, and judicial support networks are inexistent.

The theoretical expectations I outlined in this section can only occur because of the hybrid nature of electoral autocracies and non-consolidated democracies, where repressive tools, electoral fraud, and democratic institutions co-exist. In these regimes, incumbents have allowed courts to adjudicate political and electoral disputes (e.g., legitimacy, elite cohesion, repression, etc.) (Moustafa, 2014; Shen-Bayh, 2022). However, by doing so, incumbents have allowed courts to become a forum where pro-opposition actors can challenge the established order (Ginsburg and Moustafa, 2008). Courts in hybrid regimes are, therefore, in a particular position where they are expected to function as a democratic institution and adjudicate cases brought by regimes' dissidents while facing a high level of formal and informal threats from powerholders. It is in this specific context of a tug-of-war between repressive and pro-democratic actors that judicial resistance can occur.

4.3.2. Judicial resistance: a phenomenon triggered by certain institutional reform

To trigger the sequence of events outlined in Fig. 1, I argued that pro-opposition actors must (1) participate in the reform process and (2) enact new rules that substantively protect the judiciary from the executive branch. Under which conditions does such reform occur? Incumbents in hybrid regimes have little incentive to authorize pro-opposition actors to participate in the reform process, as it could undermine their authority and their ability to manipulate the rules of the games. Nevertheless, scholarship has identified several factors that can lead incumbents to implement executive constraints and involve dissenting voices in the reform process. First, institutional reforms can result from an agent-based process where incumbents must institutionalize to coordinate elites' commitment problems (Boix and Svolik, 2013; Albertus and Menaldo, 2012). For instance, Meng (2020) shows that African autocrats delegated their authority to elites through institutional reforms in order to better survive. Second, institutional reforms can be the product of structural factors that force incumbents to include pro-opposition actors and adopt constraining measures. These structural forces create political opportunities that pro-opposition actors can exploit to secure new political rights (Rucht et al., 1996; Tarrow, 2022). In several African states, the 1980s financial crisis, coupled with the end of the Cold War, forced autocrats to delegate power to the opposition and liberalize their regime to stay in power (Bratton and Van de Walle, 1997).

This paper does not adjudicate between these two approaches. Rather, it highlights the different paths that can lead incumbents in hybrid regimes to let pro-opposition actors intervene in the reform process. The case study shows that in the Kenyan case, the 2007 electoral violence was a critical juncture for the country as it could not move forward without extensive institutional reforms. However, I do not expect critical junctures to be the necessary antecedent condition that triggers the sequence of events I outline. Depending on the political context of one specific state, such reform could occur under different conditions.

5. Empirical strategy

I conduct a case study of the Kenyan judiciary to validate the causal mechanism outlined in Fig. 1 (Lijphart, 1971; Levy, 2008). Researchers have repeatedly used within-case research methods to find "traces of the hypothesized causal mechanism within the context of a historical case" and to identify alternative pathways and explanations in order to show they fail to explain the sequence of events (Bennett and Elman, 2006).[3] To do so, I leverage original qualitative and quantitative data. Using process tracing, I aim to show (1) how variation in judicial resistance can be linked to the 2010 constitutional reform and (2) how this institutional change triggered the mechanism outlined in Fig. 1. Additionally, I use this original data to show how alternative theories (e.g., level of democracy, ideational factors, etc.) fail to explain the rise of judicial resistance in Kenya.

5.1. Case selection

I use the case of Kenya for several reasons. First, the Kenyan case allows me to address further concerns about judicial resistance being a product of democratization. Throughout the thirty-year period studied, Kenya has remained a hybrid regime where despite alternation in powers, democratic consolidation failed to occur. Despite the introduction of multiparty elections and successive constitutional amendments, the executive branch has repeatedly attempted to constrain other branches of government, undermined the opposition's influence, and engaged in electoral fraud. Even after the enactment of the 2010 constitution, horizontal and vertical accountability have remained under threat, thus allowing me to show that judicial resistance is not endogenous to democratization. Second, the Kenyan case allows me to exploit sources of institutional variation. Despite the first alternation of power in 2002 and promises of democratic reforms, the status quo remained unchanged until 2007. After the 2007 electoral violence that almost plunged the country into a civil war, the ruling party and the opposition had to work hand in hand to reform the state apparatus. This coalition enacted a new constitution drafted by constitutional experts in 2010. This new constitution profoundly reformed Kenyan institutions — including the judiciary. Finally, because of the high number of electoral disputes adjudicated since 1992, this case allows me to leverage variations in electoral dispute rulings.

[2] The literature on political regimes has moved away from a dichotomous conceptualization of authoritarian and democratic regimes (see, for instance, (Levitsky and Way, 2010). Hybrid regimes combine both democratic and authoritarian elements and encompass a wide spectrum of regimes (Diamond, 2002). Some hybrid regimes are electoral autocracies (or competitive authoritarian regimes). These regimes are "civilian regimes in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents' abuse of the state places them at a significant advantage vis- a vis- their opponent" (Levitsky and Way, 2010, p. 5). Other hybrid regimes could be described as non-consolidated democracies. Non-consolidated democracies went further in the democratization process (e.g., alternation in power, higher vertical or horizontal accountability) but never reached the consolidation stage. In both types of regimes, the ruling party holds elections and adopts democratic institutions and the rule-of-law framework while relying on formal and informal channels to undermine vertical and horizontal accountability (Linz and Stepan, 1996).

[3] For examples of recent within-case studies, see Jo (2022) and Gilbert (2022).

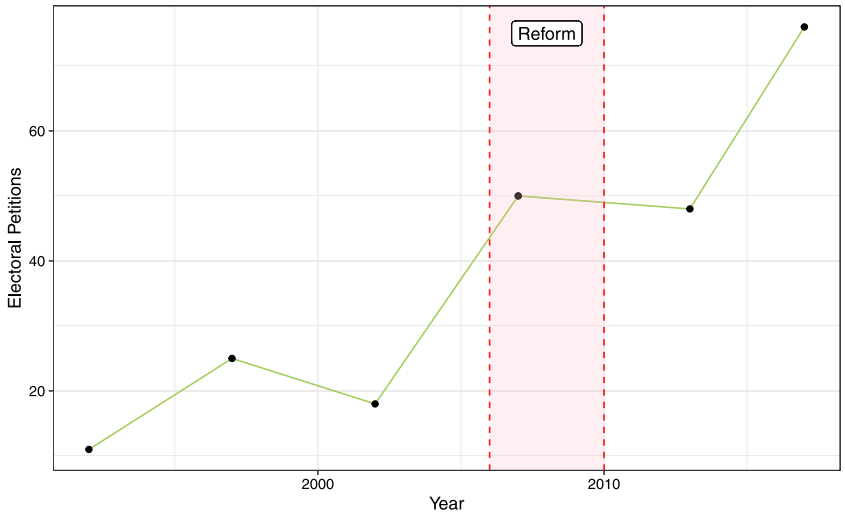

Fig. 2. Number of electoral disputes per election across time (1990–2020).

5.2. Data

To process trace the logic behind the emergence of judicial resistance in Kenya, I rely on original qualitative and quantitative data. I started this data collection process with electoral disputes. I first identified and listed all electoral disputes adjudicated by the highest Kenyan court from 1992 to 2020 using the legal database Kenyan law.[4] To ensure that my universe of cases was complete, I undertook the same tasks using compendiums of electoral disputes edited by the Kenyan section of the International Commission of Jurists. Once this task was completed, I analyzed and coded the 224 electoral cases I identified. For example, the dataset identifies the parties to the dispute and their political affiliation,[5] the type of dispute adjudicated (pre or post-election), the type of elections challenged, the judges on the bench, the outcome of the dispute, and the type of legal rationale used by the court (e.g., procedural or substantive or mixed). This process led to the creation of the first dataset on Kenyan electoral disputes.

Once I completed the dataset, I analyzed the data to identify patterns and sources of variation in electoral disputes across time. These descriptive statistics helped me adjust interview protocols. For example, I added questions to understand variation in my outcome of interest but also to understand the context behind specific patterns the quantitative data highlighted. I conducted fieldwork in Nairobi. Using a snowball strategy, I interviewed judges and clerks from the Supreme Court, Court of Appeal, and High Court (Rivera et al., 2002). To understand the role of judicial support networks, I interviewed high-profile lawyers, activists, and scholars. For security reasons, I did not record these interviews. Instead, I took extensive notes that I then transcribed when I got back from my interview location. After completing 24 interviews and reaching saturation, I analyzed the transcripts by identifying recurring themes and assigned relevant quotes to each category.

5.3. Operationalizing judicial resistance

Because elections in hybrid regimes create a window of opportunity where regime survival can be put in jeopardy, powerholders have a strong incentive to manipulate the electoral process. Hence, the pressure put on the judiciary is also at the apex when courts are asked to determine whether the election was free and fair. Because of this level of constraints, courts who refuse to dismiss evidence of electoral malpractice, collude with the incumbent, or allow the opposition to participate in elections engage in judicial resistance. To determine when courts engage in judicial resistance, I created a binary variable that takes the value of one when courts side with the opposition during an electoral dispute that opposes a ruling party candidate and a pro-opposition member (see Fig. 3).[6] In addition to quantifying the number of pro-opposition rulings, judicial resistance can also be measured by assessing the content and effect of each ruling. As the case study shows, some pro-opposition rulings had more important implications than others. Decisions that annul an election have more important political ramifications than rulings that allow parties to lodge an appeal, for instance. Hence, it is important to factor in this component when measuring judicial resistance. To do so, I reviewed the content of each case and provide descriptive statistics about the rulings' characteristics. I supplement this quantitative data with qualitative data obtained through semi-structured interviews with judges from the High Court, Court of Appeal, and Supreme Court and their clerks. These interviews allow me to understand better the factors judges consider when siding with the opposition, assess the relationship between the executive branch and the judiciary, and identify the motives behind some key rulings.

5.4. Operationalizing institutional change

Since the introduction of multiparty politics in 1992, Kenya underwent several constitutional and legal reforms that affected the functioning of the judiciary (i.e., 1992, 1997, 2002, 2010). I triangulate different data sources to determine whether these reforms reshaped the political equilibrium and established mechanisms that foster de jure independence. I first compare the successive constitutional amendments to identify any differences in the organization of the judiciary and its relationship with the executive branch. To identify the actors

[4] Prior to the 2010 constitutional reform, the High Court had jurisdiction over electoral disputes, but appeals were heard by the Court of Appeal. For this reason, I focused on the High Court and Court of Appeal cases. After the 2010 constitution, I only coded cases from the Supreme Court as the court became the court of last resort for electoral disputes.

[5] To determine the political affiliation of each party, I used the lists of electoral results. For non-political actors (e.g., voters, activists), I relied on newspaper articles, social networks, and LinkedIn.

[6] Error bars represent standard errors (i.e., temporal variation between years. Not all electoral disputes opposed a member of the ruling party and pro-opposition actors. For instance, opposition parties challenged each other before courts to gain control over a constituency. In other cases, voters went before courts to dispute the election of an opposition candidate. Of the 225 cases I collected, 125 opposed a ruling party candidate and pro-opposition actors.

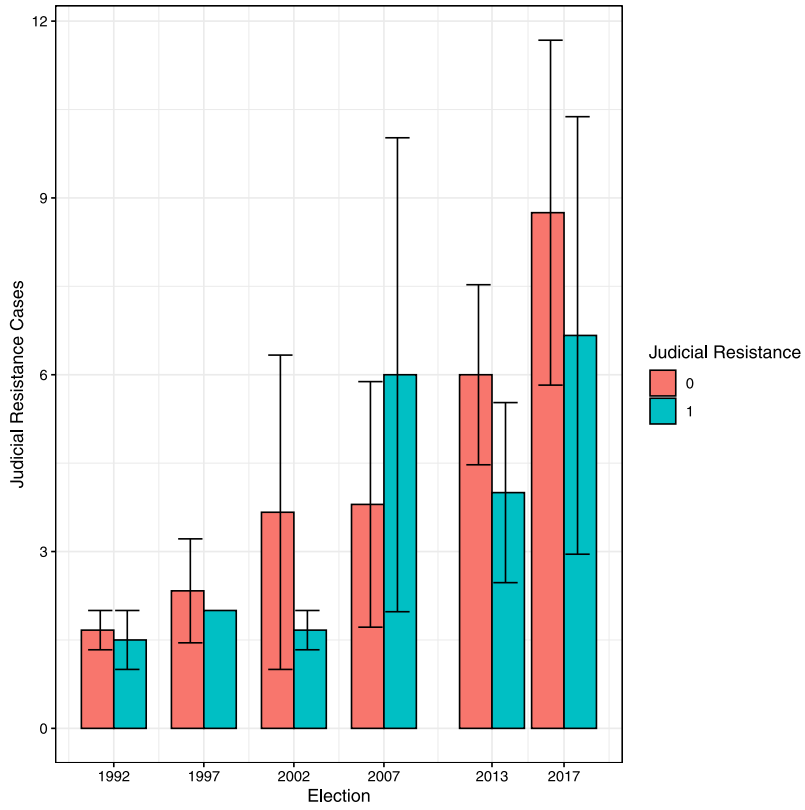

Fig. 3. Average number of judicial resistance cases per year for each electoral cycle.

involved in the reform process and understand their intent, I rely on reports published by the Kenyan International Commission of Jurists (ICJ), parliamentary minutes, and other secondary sources. Finally, I also interviewed key actors (i.e., jurists, scholars, activists, and judges) involved in the reform process.

5.5. Assessing the effect of institutional change

I use data triangulation to demonstrate how the causal mechanism operates and show how institutional reforms can trigger judicial support networks' mobilization. I use the number of electoral cases brought before Kenyan courts to estimate how mobilized judicial support networks are. I argue that a large number of electoral petitions indicate that judicial support networks believe that litigation is a viable channel to obtain their preferred outcome. The mobilization of judicial support networks is a multidimensional variable, however. Using the number of electoral petitions lodged per year does not allow me (1) to evaluate other forms of mobilization (professionalization workshops, training, public scrutiny on the judiciary) and (2) to link mobilization to the 2010 constitutional reform. Because no quantitative data is measuring the level of judicial mobilization, I estimate the degree of mobilization by using secondary sources (reports from the International Commission of Jurists and the Judiciary Committee on Elections, newspapers article) and data from semi-structured interviews with judges, lawyers who represented government and opposition candidates (including high profile cases), Justices' clerks, scholars, and activists. By asking interviewees about the number of training, cases, and workshops they attended, I am better equipped to measure the level of mobilization pre and post-reform. These interviews also enable me to map out the sequence of events to determine the causal link between institutional reform and mobilization and identify potential confounders.

6. Case study: The emergence of judicial resistance in Kenya

I start the case study in 1992 after the introduction of multiparty elections. I divide the thirty-time period into three parts to better understand the sequence of events and exploit within-case variation. In the first subsection, I focus on the 1992–2007 time period to understand why judicial resistance failed to occur despite the liberalization of the regime and the introduction of reforms aiming at improving the judiciary's independence. In a second sub-section, I use the 2007–2010 time period to outline what led to the enactment of the 2010 constitution and better understand how the judiciary navigated this transitional period. Finally, the 2010–2020 time period allows me to show how the new constitution mobilized the judicial support networks and how this mobilization led to an incremental rise of judicial resistance in electoral disputes.

6.1. 1992–2007: A judiciary under control

As the third wave of democratization swept over the African continent in the 1990s, a new political era started in Kenya. The 1992 constitution ended the single-party system by introducing multi-party elections for the first time. This constitutional reform gave hope to domestic and international observers as some constitutional provisions aimed at constraining the executive branch's power. These efforts, however, were insufficient. Like many African states, these reforms did not improve the state of democracy. In fact, this wave of institutionalization enabled incumbents like Daniel Arap Moi to remain in power and better control the elites (Meng, 2020).

In this section, I aim to show that none of the reforms enacted prior to 2008 shielded the judiciary from the executive branch, thus preventing courts from fairly adjudicating electoral petitions. First, despite introducing multiparty elections and seeking to facilitate the democratic transition, the 1992 constitution did not alter the Kenyan political equilibrium. President since 1978, Daniel Arap Moi, remained

in power during the transition to multi-party politics. Second, the new constitution and its subsequent amendments did not establish a clear separation of power. In fact, pursuant to the 1992 constitution, the judiciary is not a branch of power *per se*. Instead, the judiciary is categorized as a governmental department working under the authority of the Attorney General. This absence of constitutional mechanisms aiming at establishing *de jure* independence prevented courts from working independently.

As a result, judicial support networks' members did not consider the Kenyan judiciary as an independent branch of power. In fact, many lawyers and activists working at the time described the relationship between the judiciary and the executive branch as a "cozy" one during this time period.[7] The executive branch often treated judges as mere bureaucrats whose role was to enforce the government's agenda. The President was constitutionally responsible for judges' appointments, thus making the appointment and promotion process completely arbitrary. Moi systematically appointed loyalists and did not hesitate to remove judges who did not favor the ruling party. In 1998, *The Report of the Committee on the Administration of Justice* documented the widespread corruption practices within the judiciary. The report found evidence that the executive branch often bribed judges to dismiss or delay cases by displacing files or adding a procedural burden on the petitioner.

The election of the opposition leader, Mwai Kibaki, in 2002 gave hope to judicial support networks. During his electoral campaign, Kibaki promised to reform the constitution and to start a "radical surgery" to remove corrupt judges from the judiciary. Although Kibaki followed through by dismissing the Chief Justice and many judges in a mediatic witch-hunt, the reforms enacted under his presidency did not shield the judiciary from the executive branch's interference. In fact, the radical surgery aiming at restoring courts' integrity led judges to be even more at the mercy of the executive. To address the systemic issues that poisoned the judiciary during the Moi era, Kibaki prosecuted judges without following constitutional procedures and exposed them to mop justice.

As a result, judges working during that time felt particularly vulnerable as the executive never followed the prescribed constitutional removal procedures. This low sense of security incentivized judges not to contradict the executive branch and thus affected courts' behavior (International Commission of Jurists, 2005). In fact, Fig. 3 suggests that the average number of pro-opposition rulings declined during the 2002 electoral period, thus showing the detrimental effects of the 2002 radical surgery. Furthermore, Kibaki refused to enact the reforms aiming at improving the independence of the judiciary that he championed when he was the opposition leader (Cottrell and Ghai, 2007). This suggests that the Kibaki administration had no interest in establishing a true separation of power between the two branches. Therefore, this radical surgery did not challenge the status quo nor incentivized Kenyans to use courts. 59% of a survey's respondents said the "reforms transformed the judiciary to a small extent" (International Commission of Jurists, 2005). 9% argued that the change implemented made no difference (Ibid). This specific example invalidates the alternative explanation that posits that the collapse of the ruling regime facilitates judicial assertiveness. Despite the end of the Moi regime, the Kenyan judiciary did not have the capacity to engage in judicial resistance.

The executive branch's influence over the judiciary directly affected the adjudication of electoral disputes. According to a lawyer practicing at the time, the situation was the following:

> *"For the longest time, and I would say until 2007, you were very lucky if, irrespective of the merit of the case, you won. The court did not seem interested. They were deliberately subverted. They invented a lot of procedural technicalities, and we had no reasonable prospects. Over time, people lost confidence. It was pointless to go to courts because of all the technicalities created by the courts".*[8]

Quantitative data support this claim. From 1992 to 2007, the High Court and the Court of Appeal only adjudicated 43 cases. Out of these 43 cases, 39 cases challenged the election of members of the parliament, while 4 cases disputed the election of a presidential candidate. This low number of cases can be linked to the distrust of judicial support networks in the Kenyan judicial system. According to Kenyan lawyers, most electoral petitions were dismissed on technical and procedural grounds. This unreasonable reliance on arbitrary technicalities led lawyers to warn their clients about their petition's low prospects. Quantitative data corroborates their observation as I find that in 78 percent of the cases, the court focused on procedural aspects. This overreliance on procedural issues was politically motivated. In cases that opposed two opposition parties or candidates from the same party, the court relied on procedural issues only 50 percent of the time (see Appendix B). Looking at the rulings' content, one of the most common "technicalities" used by courts was the issue of service. Although service is fundamental for due process as it ensures that the opposing litigant is aware of the suit against them, pro-government actors often used it to escape litigation. Freshly elected, pro-government candidates would hide to avoid being served. Courts then dismissed the electoral petition challenging their election on the grounds that the petitioner did not serve the respondent. In other cases, courts adopted restrictive jurisprudence on what constituted service. In *Kenneth Stanley Njindo Matiba v Daniel Toroitich Arap Moi* (1993), the court refused to hear Matiba's argument because his wife – who had power of attorney – signed the petition instead of him. The court refused to consider the fact that Matiba was too ill to sign because of the years he spent in prison on President Moi's orders.

As a result, judicial resistance was low during this time period. Fig. 3 shows that courts issued less than three pro-opposition rulings per election period. Indeed, out of 43 cases, courts sided with the opposition only ten times despite clear evidence of electoral fraud in most cases. Out of 10 judicial resistance rulings, 9 annulled the election of a member of parliament. For lawyers, these cases of judicial resistance only occurred in low-profile electoral disputes. The High Court only sided with the opposition once when adjudicating a presidential petition.[9] The ruling, however, cannot be compared to the one issued in 2017, as the Court of Appeal only granted the right to the opposition to lodge an appeal. When adjudicating the merit of the petition during a subsequent hearing, the Court sided with the incumbent, Daniel Arap Moi.

> *"I think it's important to say that even before 2008, some courts handled electoral petitions correctly and nullified the election of Members of Parliaments. Because the stakes were lower, some judges were courageous and objective".*[10]

6.2. 2007–2010: Electoral violence and institutional change

The court's inability to adjudicate electoral petitions fairly had dire consequences during the 2007 presidential election. After the polls closed, preliminary results suggested that the opposition leader, Raila Odinga, defeated President Kibaki. A day later, Odinga's victory became less certain as the gap between the two candidates shrunk. Strong suspicions of electoral fraud arose as Kibaki won 105 000 votes in a constituency with only 75 000 registered voters.[11] Because of allegations of corruption within the judiciary, the opposition refused

[7] Interview DIK15.

[8] Interview DIK9.

[9] Civil Application no. 241 of 1993.

[10] Interview DIK22.

[11] Jeffrey Gettleman, Riots Batter Kenya as Rivals Declare Victory, The New York Times, Dec. 30, 2007.

to challenge these results before the courts. Indeed, a week before the general election, Kibaki appointed new judges to the dismay of many domestic observers (Kriegler and Waki, 2009). These suspicions were reinforced when the Chief Justice agreed to swear in President Kibaki for a second term despite the pending dispute over the electoral results' validity. Unable to resolve electoral contention through peaceful channels, this dispute escalated into an unprecedented wave of violence between the opposition and government supporters. Over 1,200 Kenyans died, and 700,000 people were displaced during this cycle of electoral violence (Lynch, 2009). This wave of violence was a shock for most Kenyans. For most interviewees, this wave of violence can be linked to the courts' inability to adjudicate electoral disputes fairly:

> *"The public lost so much confidence in the judiciary that people preferred to resort to violence rather than go to court. This background is extremely important. At some point, the judiciary completely lost its credibility. First, the quality of judgments was so poor that it was obvious that courts were corrupted. Second, the process was also problematic. The election petition took so long that the electoral cycle would have been completed when a judgment was issued".*[12]

To prevent the conflict from escalating into a civil war, the African Union stepped in and arranged a mediation between Odinga and Kibaki. After negotiations, parties recognized that meaningful institutional reforms were necessary to move forward. In this section, I demonstrate how the institutional reform process initiated in 2008 challenged the status quo by meeting the two criteria I identify in my theoretical framework: (1) the constitution-making process involved members from different political families, and (2) the reform introduced new mechanisms shielding the judiciary from the executive branch.

First, the constitutional reform was a collaborative process that included members of the ruling party, the opposition, the civil society, and constitutional experts (The Office of the African Union Panel of Eminent African Personalities, 2014). Early on, a Committee of Experts on Constitutional Review (CoE) composed of domestic and international (e.g., Zambia, Uganda, and South Africa) experts was mandated to identify constitutional issues that Kenya had faced and formulate recommendations. Before drafting the new constitution, the CoE worked in collaboration with a parliamentary working group, constitutional scholars, members of civil society, religious bodies, and professional associations to ensure that their point of view was included. Including pro-opposition actors was essential to prevent the executive branch from designing a constitution to consolidate its authority. In addition to representing different interests, these working groups and committees sent a strong signal to Kenyans: this reform process differed from the ones they had witnessed since 1992.

Second, this institutional reform reshaped the political equilibrium by constraining the executive branch and modifying the judiciary functioning and composition. All these measures addressed the issues that pro-opposition actors faced when challenging an election's result before a court of law. For the first time since independence, the Kenyan judiciary became a real branch of power. Article 160 provides that courts are independent and should not "be subject to the control or direction of any person or authority". In other words, the attorney general lost its constitutional power to dictate courts' behavior. To protect judges' autonomy, the constitution guarantees their financial independence by creating a consolidated fund. The constitution also alters the organization of the judiciary by introducing a new court — The Supreme Court. Composed of seven judges, the Supreme Court replaces the Court of Appeal as the court of last resort and has exclusive jurisdiction over disputes related to the president's election. The new constitution shields the judiciary from the executive branch by reforming the appointment process. Since 2010, the Judicial Service Commission has been responsible for the nomination and appointment of judges. The selection process has also become much more transparent. In order to become a Supreme Court justice, candidates need to go through a televised hearing where their professional credentials, character, and integrity are put to the test by the Judicial Service Commission. All judges and magistrates had to undergo this vetting process to stay on the bench. Finally, the CoE introduced reforms that targeted issues that were specific to the Kenyan judiciary. For example, the new constitution enacted a strict timeline to ensure the prompt adjudication of electoral disputes. For electoral disputes, courts are mandated to issue a ruling within six months. Litigation aiming at challenging a presidential election must be settled within 14 days. While the litigation is pending, candidates cannot be sworn in. In other words, the enactment of a constraining constitutional reform led to the creation of *de jure* independence, thus supporting Hypothesis 1.

This period of institutional change almost immediately affected the adjudication of electoral disputes. As shown in Fig. 2, the number of electoral petitions in 2008 reached unprecedented levels since the introduction of multiparty elections in 1992. Between 2008 and 2010, courts adjudicated 47 electoral disputes — 34 in 2008, 2 in 2009, and 11 in 2010. Forty cases opposed a ruling party candidate and a pro-opposition member. Although this increase in electoral petitions occurred before the enactment of the new constitution, I argue that this spike in cases occurred because of the institutional changes that were made at the time. Indeed, for many judges and lawyers practicing in 2008, members of the judicial community were well aware that the new reforms would end old practices and challenge the status quo.

> "*Between 2008 and 2010, people became more mobilized. Judges realized that the new constitution was coming. It created momentum.*"[13]

Judges were also conscious that their future within the judiciary was not secured. As many pro-opposition actors saw courts as the culprit for the 2007 electoral violence, many advocated for the dismissal of all judges. Courts, therefore, had the incentive to show that they could adjudicate electoral petitions in a fair manner. Interrogated about this specific time period, a judge answered:

> *"2007 was a wake-up call for the institution. Unless we changed the way we used to things, we would have lost the confidence of the public. We did not want to repeat this mistake".*[14]

Furthermore, because of the intense scrutiny on both presidential candidates and their parties, judges felt freer to resolve electoral disputes without fear of retaliation. These two factors explain why the first sparks of judicial resistance started in 2008. As Fig. 3 shows, Kenya experienced a first rise in judicial resistance episodes during the 2008–2010 period. In total, courts engaged issued 22 pro-opposition rulings.

Although Fig. 3 shows that the average number of pro-opposition rulings is greater for the 2007 election than the 2013 election, I argue that the effect of these rulings is somewhat limited when compared to the ones issued in 2013 and 2017. For instance, courts rarely focused on the merit of the cases. In 70 percent of the cases opposing a ruling party candidate to an opposition member, courts relied on procedural technicalities to justify their decision. Even when siding with the opposition, courts used a procedural justification rather than assessing the quality of the election in 55 percent of the case. In fact, courts only assessed the fairness of the election in 6 cases. Moreover, courts only adjudicated cases related to legislative elections during this

[12] Interview DIK16.

[13] Interview DIK11.

[14] Interview DIK19.

time period. Evidence from Uganda suggests that courts might be more inclined to show assertiveness when adjudicating legislative electoral disputes because the elections do not necessarily put the regime's survival in jeopardy (Murisson, 2016). Hence, the particular context surrounding the 2007 election created an opportunity for a judiciary eager to redeem itself without taking too many risks. On the one hand, courts satisfied pro-opposition actors by showing they were able and eager to nullify fraudulent elections. On the other hand, courts annulled only "safe" cases not to cross the future president and their party.

One could have an alternative interpretation of this sequence of events. The 2007 episode could have triggered a democratization process that led to the enactment of reforms between 2008 and 2010. With a democratization process ongoing, the constraints imposed on the judiciary by the ruling regime disappeared, thus allowing courts to side with the opposition more often. Fig. 5 challenges this alternative explanation. Using the Freedom House Score to measure the level of democracy,[15] Fig. 5 (see Appendix A) shows that the end of Moi's regime in 2002 improved the state of democracy. However, the 2007 election ended this progression as Kenya became more authoritarian. Following the adoption of the reforms discussed during the 2008–2010 time period, the state of democracy did not improve, and Kenya has remained a hybrid regime to this day. Moreover, Fig. 5 shows that there is no apparent correlation between judicial resistance cases and the level of democracy. Whereas judicial resistance cases have regularly increased from 2008 to 2020, the level of democracy declined in 2007 and remained in the "party-free" category since then.

6.3. 2010–2020: The rise of judicial resistance

After two years of mediation and consultation, Kenyans adopted the new constitution by referendum on August 4, 2010. This institutional change has had significant consequences on the adjudication of electoral disputes. With new constitutional provisions establishing a *de jure*independence between the judiciary and the executive branch, Kenyans regained trust in courts. Whereas 42 percent of the Kenyans surveyed by Afrobarometer in 2008 declared trusting the judiciary, 61% of respondents trusted the judicial system in 2011. When asked about the 2010 constitution, judges, lawyers, and activists described the new constitution as a "shift of paradigm" or "a benchmark moment". Furthermore, the short experience with courts during the 2008–2010 transition period gave Kenyans assurance of the courts' determination to get to the correct path. As a result, judicial support networks mobilized and decided to use courts to adjudicate electoral disputes.

This mobilization had several effects on the courts' behavior. First, the increase in cases helped courts gain confidence and expertise in adjudicating electoral disputes. Since 2010, each election has triggered a new wave of electoral cases, which provides further evidence supporting Hypothesis 2 (see Fig. 2). For the first general election since the enactment of the constitution, the Supreme Court adjudicated 48 cases. For the 2017 general election, the Supreme Court saw another increase, with 76 cases on its docket. The Supreme Court also adjudicated a greater variety of electoral disputes. Before 2010, most disputes challenged the election of members of parliaments and very few presidential elections.[16] Since 2010, petitioners have started to dispute the president's election, governors, and county assembly members (see Fig. 4). For judicial support networks, this increase in repeated and strategic litigation was a calculated strategy to change the electoral jurisprudence and increase monitoring activities:

> *"It's important to keep bringing more cases to the court because first, it creates precedents, and second, it sends a message to the executive branch: We are watching".*[17]

This increase in cases has enabled the Supreme Court to develop new jurisprudence and legal criteria to assess the validity of an election. In *Moses Masika Wetangula v Musikari Nazi Kombo*, the Supreme Court departed from an old British precedent (i.e., Morganv and Simpson, 1975) and established its own test to determine whether the election was void. In *Zacharia Okoth Obado v. Edward Akong'o Oyug*, the court established a new jurisprudence to nullify an election and conduct scrutiny. A couple of years later, the court changed its approach when asked to assess the validity of Governor Owiti's election. Although lawyers have deplored a lack of consistency in jurisprudence, these changes attest to the court's willingness to develop its own understanding of electoral law. This trial and error process culminated in 2017 with the adoption of a new test to assess the fairness of an election, thus leading to the first annulment of a presidential election. This body of evidence supports Hypothesis 3.

Second, the mobilization of judicial support networks led to an increase in judicial professionalization and training, which validates Hypothesis 2. Before 2010, judges did not receive any training on electoral disputes. They often had to learn once in office, which caused delays and inconsistencies between cases. Since the new constitution, judges have been regularly trained to handle electoral petitions. The new Chief Justice, Willy Mutunga, created the Judiciary Committee on Election to ensure proper training and professionalization of judges and magistrates on electoral questions. Every year, judges have to attend training sessions on electoral law. During an election year, the judiciary solely focuses on electoral training and suspends all other workshops. The Judiciary Committee on Election also visits other jurisdictions to learn good practices. Several delegations of judges have visited Ghana, Uganda, and Mexico to learn about their electoral dispute resolution mechanisms.[18] For all judges interviewed, these sessions have been highly beneficial. Training allows courts to be aware of any recent development in electoral law.[19] As electoral rules have changed constantly since 2010, these sessions enable judges to familiarize themselves with new provisions. Training also allows judges to share their experiences and good practices and identify potential issues. In 2013, judges struggled to finalize their judgment according to the new constitutional timeline; others faced difficulty with the scrutiny of ballots. The training sessions organized prior to the 2017 election have enabled the court to resolve these issues.[20] These sessions also facilitate conversations between judicial support networks and the judiciary. Academics, lawyers, and civil society members often train judges, thus allowing them to tackle the issues they wish to bring forward.[21] As a clerk working for a Supreme Court's Justice declared:

> *"These training sessions really helped judges to be better prepared, and they do apply what they learn. By the time election petitions are filed, we already have done research on issues that could potentially arise".*[22]

These training sessions and professionalization workshops have a direct effect on how courts adjudicate electoral disputes, thus validating Hypothesis 4. For instance, these repeated interactions with judicial support networks changed how courts approach elections after repeated training sessions. In 2017, the court defined elections as a process rather than an event. If elections are a process, courts have to consider what happened before and after the election rather than focusing on election day to determine if electoral fraud occurred, thus widening the scope of admissible evidence.

[15] A score of 1 indicates that the state is fully democratic. A score of 14 indicates that the state is a fully authoritarian regime.

[16] It is important to note that the 2010 constitution made local elections far more competitive than before, thus creating an increase in potential electoral dispute cases. Qualitative data, however, shows that the actual increase in electoral litigation is linked to judicial support network mobilization.

[17] Interview DIK5.

[18] Interview DIK15 & DIK16.

[19] Interviews DIK13 & DIK24.

[20] Interview DIK15.

[21] Interview DIK21.

[22] Interview DIK11.

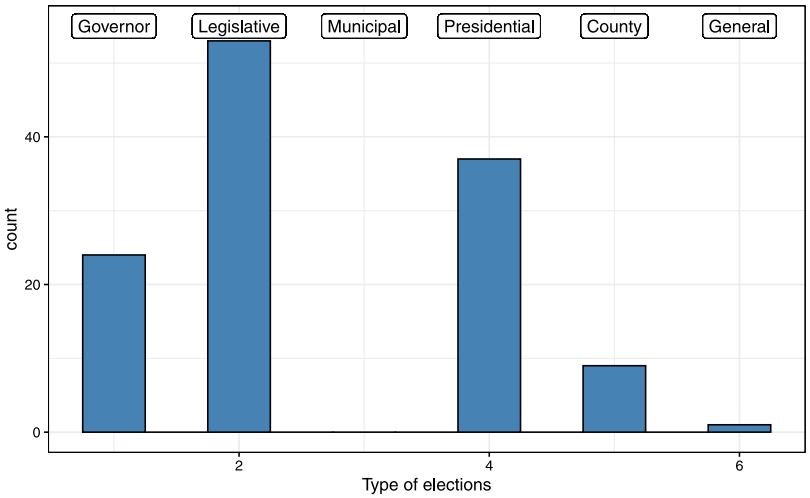

Fig. 4. Type of elections challenged before the Supreme Court (post-2010).

Table 1
Number of pro-opposition ruling by time period.

Period	Pro-opposition rulings
1992–2006	10
2007–2010	22
2011–2020	32

Fig. 3 and Table 1 show that the rise of judicial resistance has been incremental. Following the increase in pro-opposition rulings following the 2007 election, the number of judicial resistance cases slightly decreased during the 2013 electoral period to reach unprecedented levels in 2017. In 2013, the Supreme Court sided with the opposition in 12 cases. In 2017, the Court issued 20 pro-opposition rulings — including the first judgment annulling a presidential election. The Court also moved away from old practices. First, courts engaged in judicial resistance in broader cases that did not involve solely legislative elections. In 2013, the court annulled the election of two governors and county assembly members in addition to legislators. The court also sanctioned the electoral commission for its management of the diaspora electorate. This trend intensified during the 2017 election. Sixty-five percent of judicial resistance rulings affected the presidential election, 15 percent affected the outcome of a legislative election, and 10 percent dealt with gubernatorial elections. Second, even though courts still heavily relied on procedural justifications, the discrepancy observed before 2010 between cases that opposed the ruling party and the opposition versus intra-party disputes disappeared (see Appendix B). This suggests that courts stopped weaponizing procedural issues to favor the ruling party.

In other words, Kenyans had to wait until the 2017 election to see a meaningful increase in judicial resistance from the Supreme Court. For many domestic and international observers, the boldness of the Supreme Court in 2017 came as a surprise. In 2013, judicial support networks had really high expectations for the new Supreme Court. In addition to the promises of the new constitution, pro-opposition actors believed that the leadership of the new Chief Justice, Willy Muntunga, would incentivize the court to nullify the 2013 presidential election. Former human rights activist, Mutunga spent most of his life fighting for democracy and judicial independence. Judicial support networks were disappointed when he and the rest of the Supreme Court justices unanimously refused to nullify Kenyatta's election:

> *"Unfortunately, the Supreme Court did not nullify the election. It was disappointing because the Court relied on the Judiciary's old practices. The momentum of 2008 was halted. Technicalities still played a huge role, and petitions were thrown out. It was a huge disappointment because it seemed that the Supreme Court was operating under the old constitution".*[23]

Their expectations were even lower with the 2017 Supreme Court bench and the new Chief Justice, David Maraga. Seen as conservative and traditionalist, judicial support networks thought Maraga's influence would be detrimental to the adjudication of electoral disputes. They were proved wrong when the court sided with opposition candidates and nullified the presidential election of the incumbent, Uhuru Kenyatta. This discrepancy between the 2013 and 2017 benches undermines the alternative explanation that links judges' ideologies and characteristics to judicial assertiveness. Indeed, if this alternative explanation was correct, the 2013 bench should have nullified a greater number of elections. Fewer cases of judicial resistance should have been observed under the 2017 Supreme Court as its bench was more conservative. Fig. 3 shows that the exact opposite occurred: despite being more conservative, the 2017 Supreme Court was bolder than in 2013. In other words, the political preferences and belief system of the 2017 bench did not prevent the court from engaging in judicial resistance.

Several reasons explain why the 2017 bench of the Supreme Court was more assertive than in 2013. First, judicial resistance is a progressive phenomenon. Each electoral cycle is a political moment where actors learn to apprehend the rules of the game (Bleck and Van de Walle, 2018). The same goes for courts and electoral disputes. To gain expertise in electoral dispute resolution and develop jurisprudence, judges need to adjudicate an important number of electoral cases. This time issue was even more salient in the Kenyan case as judges had to familiarize themselves with new electoral rules, procedures, and legal frameworks. The Supreme Court was also a new entity within the judiciary. Unlike the 2013 bench, the Supreme Court in 2017 was much more equipped to act as an electoral dispute forum. When asked about it, judges stated:

> *"You need to remember that the 2013 electoral disputes only occurred a year after the creation of the Supreme Court. It was a big and trying moment for them".*[24]

> *"2013 was the first time electoral disputes were adjudicated under the new constitution. Nobody knew how to proceed. Actually, most judges were completely new".*[25]

[23] Interview DIK9.
[24] Interview DIK14.
[25] Interview DIK11.

Second, judicial support network mobilization was more important in 2017 than in 2013. In 2013, the Supreme Court had a short time to prepare for the general election. As the court did not know which issue would arise in the first election since the enactment of the constitution, training could not be tailored to the needs of the court. Furthermore, according to clerks and lawyers, the 2013 bench was not very receptive to training and professionalization workshops.[26] Most judges prepared independently without coordinating with their peers or consulting activists and scholars. Because of its reputation as a progressive court, activists felt less of the need to interact with the Supreme Court. The 2017 bench, on the other hand, had much more time to train and learn from what happened in 2013. The conservative reputation of Justice Maraga also incentivized judicial support networks to be more hands-on and prepared in advance petitions. When asked about the difference between the 2013 and 2017 electoral petitions, a judge stated:

> *"A huge factor is the quality of advocacy. In 2013, parties expected judges to make a certain decision because it was a new court and the Chief Justice came from a human rights background. The quality of these petitions was poor. So much of the evidence filed by Raila was late, and it was complete nonsense. The preparation was lacking because they only had 14 days. It took a week to write petitions. Lawyers waited for the announcement of the results to challenge the petition, but they needed to start way before that. The burden is on lawyers: they need to start documenting in advance. It's too late if they wait for the announcement of the results".*[27]

Finally, judicial support networks intensified monitoring activities after the 2013 election, thus putting courts under more intense scrutiny and incentivizing them to engage in judicial resistance (Hypothesis 5). The 2013 electoral rulings came as a disappointment for opposition and civil society actors. Some even thought that the Supreme Court had resumed its "cozy" relationship with the executive branch. Like in 2008, the Supreme Court knew that to survive, it had to weigh the pros and cons of ruling against Kenyatta carefully. During an interview, a high-ranked electoral commissioner said:

> *"After the 2013 ruling, courts were heavily criticized by civil society and academics. I think judges decided to preserve their own survival by overturning the 2017 election results".*[28]

Moreover, the electoral fraud committed by the ruling party was even more apparent than in 2013. For instance, the electoral management body refused to show the server to the judges during the hearing. Hence, if the court had decided to side with Kenyatta, the opposition would have construed the ruling as an admission of guilt and might not have trusted the court to handle future electoral disputes. During an interview, the leader of a high-profile Kenyan organization declared:

> *"The week before the hearing, my organization had a forum where we discussed the loose ends, the electoral legal framework, and the mistake that occurred during the election. The Supreme Court judges were watching our conversations. If it had not nullified this election, their legitimacy would have been lost. There comes a time when judges think about the legacy of their tenure. Here, there was nothing for judges to uphold. If it had refused to nullify the election, the court would have lost its credibility. Judges also think about their careers. Without this decision, we would have gone back to 2007. Now, we know we have a chance in court, so we will go on".*[29]

This body of evidence shows how courts have remained strategic actors throughout this sequence of events. Judicial support networks' mobilization made it costlier for the Supreme Court to side with Kenyatta. Because of the preparedness of the legal teams, coupled with the judiciary's training and the intense scrutiny, Court could hardly ignore evidence of electoral fraud. In other words, judicial support networks' mobilization, triggered by the 2010 constitution reform, rendered collusion with the executive branch almost impossible. That is why we observe a greater number of judicial resistance cases and the first nullification of a presidential election in 2017.

7. Conclusion

The judicialization of politics observed in several states over the last decades has now extended to new political realms. In both democracies and hybrid regimes, political actors have increasingly relied on courts to settle electoral contention. In hybrid regimes, these disputes are particularly important since they have the potential to trigger an alternation in power. Theories of judicial assertiveness in democracies are ill-equipped to understand why and when courts decide to side with the opposition despite the crippling pressure from the executive branch.

Kenya offers the appropriate setting to explore this question, as the Supreme Court was the first in Africa to nullify the election of an incumbent. Using original data collected during fieldwork, I show that institutional change is crucial to fostering judicial resistance. Institutional reforms have the ability to create mechanisms that protect the judiciary from the executive branch's influence. These reforms also have the power to mobilize judicial support networks by incentivizing them to use strategic litigation to monitor court behavior. As a result, courts develop confidence and legal tools to tackle electoral disputes. The enactment of provisions seeking to foster *de jure* independence coupled with the intense scrutiny of the opposition creates an environment where courts can have more to lose when siding with the incumbent.

If the Kenyan case allows me to verify the internal validity of my theory, I expect my findings to be generalizable to other contexts. Malawi appears to be an appropriate case to verify my theoretical framework's external validity. Like Kenya, Malawi is a hybrid regime where despite alternations in power, the democratization process failed to reach the consolidation stage. Like in Kenya, the Malawian courts have played a central role in electoral dispute resolution. In 2019, the Malawian judiciary was the second in Africa to annul the election of a presidential incumbent. This judgment's effect was even more important in Malawi as the rerun of the presidential election led to the victory of the opposition leader.

Although the 2019 ruling is important in Malawi's history, it is not the first episode of judicial resistance in the country. Unlike the Kenyan case, Malawian courts have engaged in judicial resistance much earlier. In the first multiparty elections, courts acted like a guardian of the new 1994 constitution by enforcing rules related to the nomination, registration, and voting process (VonDoepp, 2009). Courts nullified several laws seeking to disenfranchise certain parts of the population from the electoral process (Gloppen and Kanyongolo, 2012). In 2004, the High Court issued a ruling to prevent the incumbent, President Muluzi, from running for a third term. In 2009, the Court reiterated its jurisprudence by upholding the Electoral Commission's decision to bar Muluzi from running in the presidential race. Hence, the 2019 ruling was symptomatic of a broader propensity of the Malawian judiciary to engage in judicial resistance during electoral disputes.

What drives this proclivity toward judicial resistance in Malawi? Existing scholarship and preliminary evidence link the resilience of Malawian courts to the institutional reforms enacted in the early 1990s (Gloppen and Kanyongolo, 2012; Ellett, 2008; Asuelime, 2022). For instance, the executive branch does not have absolute power in the appointment process of the Chief Justice, as the President must secure a two-thirds majority in the National Assembly. The appointment process of high judicial offices is also based on seniority criteria rather than

[26] Interview DIK16.
[27] Interview DIK16.
[28] Interview DIK17.
[29] Interview DIK24.

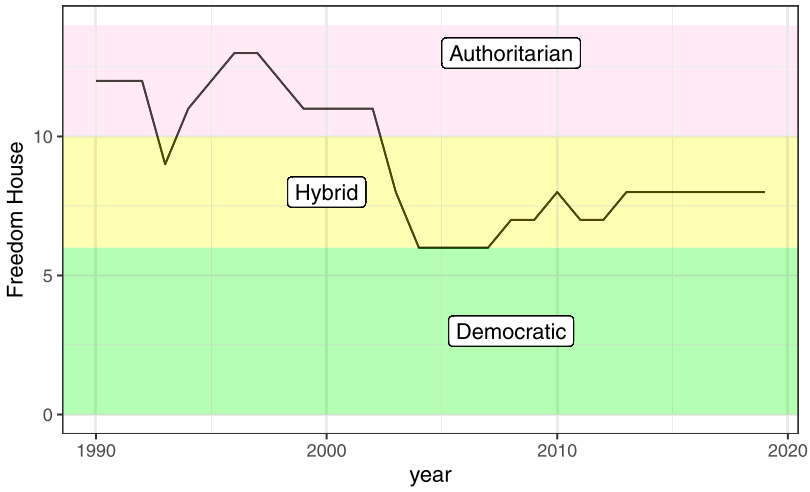

Fig. 5. Freedom House Score over the years (1990–2020).

political or clientelistic affiliation (VonDoepp, 2009). The constitution also provides an effective mechanism to protect judicial tenure (Gloppen and Kanyongolo, 2012). Finally, the system of parallel courts has allowed judges to develop expertise in constitutional and electoral matters. By shielding the judiciary from the executive branch, these institutional safeguards have granted an aura of legitimacy and incentivized judicial support networks to go to courts to resolve electoral contention. If more data is required to show how this mobilization has affected courts' behavior, these preliminary findings appear to confirm my theoretical expectations. Like in Kenya, the rise of judicial resistance during electoral disputes in Malawi has been an incremental process. Each election cycle has given an opportunity for the Malawian judiciary to become more assertive, develop electoral jurisprudence, and develop legal tools that have led to the 2019 ruling.

This paper makes several contributions. First, this paper sheds light on how courts can prevent – or foster – electoral backsliding. The Kenyan case study shows the court's important role in multiparty elections. Even if in Kenya, the annulment of the 2017 presidential election did not lead to an alternation in power after the election rerun, the Malawian's ruling did, thus putting Malawi back on the path of democratization. Second, it contributes to the literature on African political institutions by providing original micro-level data about Kenyan courts. Although recent scholarship has improved our understanding of the functioning of African institutions and their relationship with the executive branch (Ochieng'Opalo, 2019; Meng, 2020; Shen-Bayh, 2022), African courts remain deeply understudied. This paper addresses this gap by shedding light on the functioning of the Kenyan judiciary and its evolving relationship with the executive branch.

Third, these findings deepen our understanding of courts' behavior in hybrid regimes. This paper rebuts the presumption that courts operating in autocratic settings are mere instruments used by incumbents to consolidate their power. Courts can have their own agency despite the constraints imposed by the ruling power. The findings suggest that individual characteristics and structural factors do not always predict sparks of judicial resistance. More specifically, I show that institutional factors play an essential role as they can mobilize judicial support networks and minimize the executive's influence on the judiciary.

Finally, the paper makes important policy implications. By identifying the conditions under which institutional reforms mobilize prodemocratic actors, this paper informs policymakers about how institutional reform can foster – or undermine – democratization. Despite the repeated attempt to reform the judiciary from 1992 to 2007, Kenyans had to wait for the 2010 constitution to see meaningful changes. This paper suggests that institutional reforms can have such an effect when (1) constitutional making is a collaborative process that includes different stakeholders and (2) that the rules enacted seek to challenge the political equilibrium.

Declaration of competing interest

I certify that I have no financial and personal relationships with other people or organizations that could inappropriately influence (bias) my work.

Declaration of interest: None.

Data availability

Data will be made available on request.

Acknowledgments

I would like to thank Katharine Baldwin, Nic Cheeseman, Ali Cirone, Alex Dyzenhaus, Eun A Jo, Eric Kramon, Mike Kriner, Gabrielle Lynch, Tamir Moustafa, George Ofosu, Kwasi Prempeh, Lindsey Pruett, Lise Rakner, Rachel Beatty Riedl, Bryn Rosenfeld, David Samuels, Fiona Shen-Bayh, Øyvind Stiansen, Angie Torres-Beltran, Nicolas van de Walle; two anonymous reviewers, and participants in the APSA Autocracy and Democracy Workshop, the African Politics Conference Group Workshop, the BIEA Judiciary and Democratization in Africa Workshop, and Authoritarian Political Systems Group Workshop for their excellent and constructive comments. This research was generously funded by the United States Institute of Peace, the CCSS Qualitative and Interpretive Research Institute, the Cornell Graduate School, and the American Political Science Association.

Appendix A

See Fig. 5.

Appendix B

See Table 2.

Table 2
Percentage of rulings relying on procedural technicalities.

Period	Intra-party cases	Government v. Opposition cases
Overall	65%	72%
1992–2006	50%	78%
2007–2010	70%	70%
2011–2020	68%	70%

References

Albertus, Michael, Menaldo, Victor, 2012. Coercive capacity and the prospects for democratization. Comp. Politics 44 (2), 151–169.

Asuelime, Legend L.E., 2022. Judicial reform, electoral security as a tool of nation building: Towards understanding conflict transformation in Kenya and malawi. J. Nation-Building Policy Stud. 2022 (si1), 143.

Aydın-Çakır, Aylin, 2014. Judicialization of politics by elected politicians: The theory of strategic litigation. Political Res. Q. 67 (3), 489–503.

Bánkuti, Miklós, Halmai, Gábor, Scheppele, Kim Lane, 2012. Hungary's illiberal turn: disabling the constitution. J. Democracy 23 (3), 138–146.

Barros, Robert, 2002. Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution. vol. 4, Cambridge University Press.

Bennett, Andrew, Elman, Colin, 2006. Qualitative research: Recent developments in case study methods. Annu. Rev. Polit. Sci. 9, 455–476.

Bleck, Jaimie, Van de Walle, Nicolas, 2018. Electoral Politics in Africa Since 1990: Continuity in Change. Cambridge University Press.

Boix, Carles, Svolik, Milan W., 2013. The foundations of limited authoritarian government: Institutions, commitment, and power-sharing in dictatorships. J. Politics 75 (2), 300–316.

Bratton, Michael, Van de Walle, Nicolas, 1997. Democratic Experiments in Africa: Regime Transitions in Comparative Perspective. Cambridge University Press.

Brown, Nathan J., 2012. Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government. Suny Press.

Chavez, Rebecca Bill, 2004. The evolution of judicial autonomy in Argentina: Establishing the rule of law in an ultrapresidential system. J. Latin Am. Stud. 451–478.

Cheeseman, Nic (Ed.), 2018. Institutions and Democracy in Africa. Cambridge University Press.

Cottrell, Jill, Ghai, Yash, 2007. Constitution making and democratization in Kenya (2000–2005). Democratisation 14 (1), 1–25.

Diamond, Larry, 2002. Elections without democracy: Thinking about hybrid regimes. J. Democracy 13 (2), 21–35.

Domingo, Pilar, 2000. Judicial independence: the politics of the Supreme Court in Mexico. J. Latin Am. Stud. 32 (3), 705–735.

Dressel, Björn, Sanchez-Urribarri, Raul, Stroh, Alexander, 2017. The informal dimension of judicial politics: a relational perspective. Annu. Rev. Law Soc. Sci. 13, 413–430.

Ellett, R.L., 2008. Emerging Judicial Power in Transitional Democracies: Malawi, Tanzania and Uganda (Ph.D. Dissertation). North-Eastern University, Boston, MA.

Epp, Charles R., 1998. The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective. University of Chicago Press.

Epstein, Lee, Posner, Eric A., 2018. The Decline of Supreme Court Deference to the President. University of Pennsylvania Law Review, pp. 829–860.

Gandhi, Jennifer, Przeworski, Adam, 2007. Authoritarian institutions and the survival of autocrats. Comp. Political Stud. 40 (11), 1279–1301.

Garoupa, Nuno, Ginsburg, Tom, 2009. Guarding the guardians: Judicial councils and judicial independence. Am. J. Comp. Law 57 (1), 103–134.

Gerzso, Thalia, van de Walle, Nicolas, 2022. The politics of legislative expansion in Africa. Comp. Political Stud. 00104140221074277.

Gilbert, Danielle, 2022. The logic of kidnapping in civil war: Evidence from Colombia. Am. Political Sci. Rev. 116 (4), 1226–1241.

Ginsburg, Tom, 2003. Judicial Review in New Democracies: Constitutional Courts in Asian Cases. Cambridge University Press.

Ginsburg, Tom, Moustafa, Tamir, 2008. Rule by Law: The Politics of Courts in Authoritarian Regimes. Cambridge University Press.

Gloppen, Siri, Gerzso, Thalia, van de Walle, Nicolas, 2022. Constitutional, administrative, judicial, and discursive lawfare. In: Democratic Backsliding in Africa?: Autocratization, Resilience, and Contention. p. 58.

Gloppen, Siri, Kanyongolo, Fidelis Edge, 2012. Judicial independence and the judicialisation of electoral politics in Malawi and Uganda. In: Accountable Government in Africa: Perspectives from Public Law and Political Studies. pp. 43–69.

Harvey, Cole J., 2022. Can courts in nondemocracies deter election fraud? De jure judicial independence, political competition, and election integrity. Am. Politi. Sci. Rev. 116.4, 1325–1339.

Hatchard, John, Muna, Ndulo, Peter, Slinn., 2004. Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective. Cambridge University Press.

Helmke, Gretchen, 2002. The logic of strategic defection: Court–executive relations in Argentina under dictatorship and democracy. Am. Political Sci. Rev. 96 (2), 291–303.

Helmke, G., 2010. Public support and judicial crises in Latin America. U. Pa. J. Const. L. 13 (397).

Hilbink, Lisa, 2012. The origins of positive judicial independence. World Pol. 64, 587.

Hirschl, Ran, 2000. The political origins of judicial empowerment through constitutionalization: Lessons from four constitutional revolutions. Law Soc. Inquiry 25 (1), 91–149.

Hirschl, Ran, 2006. The new constitution and the judicialization of pure politics worldwide. In: Fordham Law Review. vol. 75, p. 721.

Hirschl, Ran, 2009. Towards Juristocracy: The Origins and Consequences of the New Constitutionalism. Harvard University Press.

Ingram, Matthew C., 2015. Crafting Courts in New Democracies: the Politics of Subnational Judicial Reform in Brazil and Mexico. Cambridge University Press.

Jo, Eun A., 2022. Memory, institutions, and the domestic politics of South Korean–Japanese relations. Int. Org. 76 (4), 767–798.

International Commission of Jurists, 2005. Kenya: Judicial Independence, Corruption and Reform.

Kapiszewski, Diana, 2011. Tactical balancing: High court decision making on politically crucial cases. Law Soc. Rev. 45 (2), 471–506.

Kerr, Nicholas, Wahman, Michael, 2021. Electoral rulings and public trust in African courts and elections. Comp. Politics 53 (2), 257–290.

Kureshi, Yasser, 2021. When judges defy dictators: An audience-based framework to explain the emergence of judicial assertiveness against authoritarian regimes. Comp. Politics 53 (2), 233–257.

Levitsky, Steven, Way, Lucan A., 2010. Competitive Authoritarianism: Hybrid Regimes after the Cold War. Cambridge University Press.

Levy, Jack S., 2008. Case studies: Types, designs, and logics of inference. In: Conflict Management and Peace Science. vol. 25, (1), pp. 1–18.

Lijphart, A., 1971. Comparative politics and the comparative method. Am. Political Sci. Rev. 65 (3), 682–693.

Linz, Juan J., Stepan, Alfred, 1996. Toward consolidated democracies. J. Democr. 7.

Lubman, Stanley B., 1999. Bird in a cage: Legal reform in China after Mao. Stanford University Press.

Lynch, Gabrielle, 2009. Durable solution, help or hindrance? the failings and unintended implications of relief and recovery efforts for Kenya's post-election IDPs. Rev. Afr. Political Econ. 36 (122), 604–610.

Magaloni, Beatriz, 2003. Authoritarianism, democracy and the supreme court: Horizontal exchange. Democr. Account. Lat. Am. 266.

Mahoney, James, Thelen, Kathleen, 2010. A theory of gradual institutional change. In: Explaining Institutional Change: Ambiguity, Agency, and Power. vol. 1, pp. 1–37.

McCubbins, Mathew D., Schwartz, Thomas, 1984. Congressional oversight overlooked: Police patrols versus fire alarms. Am. J. Political Sci. 165–179.

Melton, James, Ginsburg, Tom, 2014. Does de jure judicial independence really matter? A reevaluation of explanations for judicial independence. J. Law ourts 2 (2), 187–217.

Meng, Anne, 2020. Constraining Dictatorship: From Personalized Rule To Institutionalized Regimes. Cambridge University Press.

Moustafa, Tamir, 2007. The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt. Cambridge University Press.

Moustafa, Tamir, 2014. Law and courts in authoritarian regimes. Ann. Rev. Law Soc. Sci. 10, 281–299.

Moustafa, Tamir, 2017. Law and courts in authoritarian regimes 1. In: Routledge Handbook of Judicial Behavior. Routledge, pp. 427–444.

Murison, Jude, 2013. Judicial politics: election petitions and electoral fraud in Uganda. J. Eastern Afr. Stud. 7 (3), 492–508.

Nardi, Dominic, 2010. Discipline-flourishing constitutional review: a legal and political analysis of Myanmar's new constitutional tribunal. Aust. J. Asian Law 12 (1), 1–34.

Ochieng'Opalo, Ken, 2019. Legislative Development in Africa: Politics and Postcolonial Legacies. Cambridge University Press.

Peerenboom, Randall, 2002. China's Long March Toward Rule of Law. Cambridge University Press.

Popova, Maria, 2010. Political competition as an obstacle to judicial independence: evidence from Russia and Ukraine. Comp. Political Stud. 43 (10), 1202–1229.

Ramseyer, J. Mark, 1994. The puzzling (in) dependence of courts: A comparative approach. J. Legal Stud. 23 (2), 721–747.

Ríos-Figueroa, Julio, 2007. Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002. Lat. Am. Politics Soc. 49 (1), 31–57.

Rivera, Sharon Werning, Kozyreva, Polina M., Sarovskii, Eduard G., 2002. Interviewing political elites: lessons from Russia. PS: Political Sci. Politics 35 (4), 683–688.

Rose-Ackerman, Susan, 2004. Public participation in consolidating democracies: Hungary and Poland. In: Building a Trustworthy State in Post-Socialist Transition. Palgrave Macmillan, New York, pp. 9–28.

Rucht, Dieter, et al., 1996. The impact of national contexts on social movement. In: Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings. pp. 185–204.

Salokar, Rebecca Mae, 1994. The Solicitor General: The Politics of Law. Temple University Press.

Schaaf, Steven D., 2021. Contentious politics in the courthouse: Law as a tool for resisting authoritarian states in the middle east. Law Soc. Rev. 55 (1), 139–176.

Segal, Jeffrey A., 1997. Separation-of-powers games in the positive theory of congress and courts. Am. Political Sci. Rev. 91 (1), 28–44.

Shapiro, Martin, Stone, Alec, 1994. The new constitutional politics of Europe. Comp. Political Stud. 26 (4), 397–420.

Shen-Bayh, Fiona, 2018. Strategies of repression: Judicial and extrajudicial methods of autocratic survival. World Politics 70 (3), 321–357.

Shen-Bayh, Fiona Feiang, 2022. Undue Process. Cambridge University Press.

Spiller, Pablo T., Gely, Rafael, 1992. Congressional control or judicial independence: The determinants of US supreme court labor-relations decisions, 1949–1988. Rand J. Econ. 463–492.

Tarrow, Sidney, 2022. Power in Movement. Cambridge University Press.

Tate, C. Neal, 1993. Courts and crisis regimes: A theory sketch with Asian case studies. Political Res. Q. 46 (2), 311–338.
Toharia, Jose J., 1974. Judicial independence in an authoritarian regime: the case of contemporary Spain. Law Soc. Rev. 9, 475.
Trochev, Alexei, Ellett, Rachel, 2014. Judges and their allies: rethinking judicial autonomy through the prism of off-bench resistance. J. Law Courts 2 (1), 67–91.
Urribarri, Raul A. Sanchez, 2011. Courts between democracy and hybrid authoritarianism: evidence from the Venezuelan Supreme Court. Law Soc. Inquiry 36 (4), 854–884.
Verner, Joel G., 1984. The independence of supreme courts in Latin America: a review of the literature. J. Lat. Am. Stud. 16 (2), 463–506.
VonDoepp, Peter, 2006. Politics and judicial assertiveness in emerging democracies: High Court behavior in Malawi and Zambia. Political Res. Q. 59 (3), 389–399.
VonDoepp, Peter, 2009. Judicial Politics in New Democracies: Cases from Southern Africa. Lynne Rienner Publishers, Boulder, CO.
VonDoepp, Peter, Ellett, Rachel, 2011. Reworking strategic models of executive-judicial relations: Insights from new african democracies. Comp. Politics 43 (2), 147–165.