

**INFUSING INTEGRITY IN ELECTIONS: A CASE FOR REGULATING CORPORATE
CAMPAIGN CONTRIBUTIONS IN KENYA**

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DECLARATION

I **KENVINE ODHIAMBO OUMA** do declare that this Dissertation is my original work and has not been submitted elsewhere for examination, award of a degree or publication. Where other people's work, or my own work has been used, this has properly been acknowledged and referenced in accordance with the University of Nairobi's requirements.

KENVINE ODHIAMBO OUMA

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This research project has been submitted for examination with my approval as a University supervisor.

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Date: _____

DR. NKATHA KABIRA

DEDICATION

To all champions of democracy in Kenya particularly the late Christopher Msando who lost his life pursuing integrity in elections in Kenya.

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To my best friend Fildas Smith Otieno, you lived a fulfilling life and had an immeasurable impact in our lives. Rest in power! JKF(S) will surely miss you!

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African Union Declaration on the Principles Governing Democratic Elections in Africa, 2002.

African Union Convention on Preventing and Combating Corruption, 2003.

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Constitution of the Republic of South Africa, 1996.

Federal Accountability Act, 2006 (Canada).

Federal Election Campaign Act (FECA), USA.

Political Party Funding Act No. 6 of 2018 (South Africa).

The Electoral Act of Nigeria, 2010.

The Public Funding of Represented Political Parties Act No. 103 of 1997 (South Africa).

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights.
ACDEG	African Charter on Democracy, Elections and Governance.
AUCPCC	African Union Convention on Preventing and Combating Corruption.
AU	African Union.
BCRA	Bipartisan Campaign Reform Act.
CAMA	Companies and Allied Matters Act.
CAPF	Coalition for Accountable Political Financing.
CBK	Central Bank of Kenya.
CGD	Coalition for Governance and Development.
CID	Criminal Investigations Department.
FECA	Federal Election Campaign Act.
FEC	Federal Elections Commission.
HRC	Human Rights Committee.
IBEACO	Imperial British East Africa Company.
IEBC	Independent Electoral and Boundaries Commission.
ICCPR	International Covenant on Civil and Political Rights.
INEC	Independent National Electoral Commission.

KADU Kenya African Democratic Union.

KANU Kenya African National Union.

KASU Kenya African Study Union.

KAU Kenya African Union.

KCA Kikuyu Central Association.

KFL Kenya Federation of Labour.

LEGCO Legislative Council.

NARC National Rainbow Coalition.

NORDEM Norwegian Resource Bank for Democracy and Human Rights.

OAU Organization of African Unity.

ODM Orange Democratic Movement.

ODM-K Orange Democratic Movement Kenya.

PAC Political Action Committees.

PNU Party of National Unity.

PPFA Political Party Funding Act.

PSC Parliamentary Service Commission.

USA United States of America.

USD United States Dollars.

ABSTRACT

Money is the oil that greases Kenyan politics. Corruption is equally viewed as a key feature of Kenyan politics since 1990. This study examines how constitutional and statutory developments in Kenya since 2010 have regulated corporate contributions to candidates and political parties. The research undertakes the examination to establish whether these developments regulating corporate campaign contributions have so far ensured integrity, transparency and fairness in the electoral process. The efficacy of these constitutional and statutory strategies is assessed against the question as to whether they have reduced corruption and undue influence in the electoral process. The efficacy is further evaluated against the question whether it is possible to permit corporations to contribute financially in the political process without compromising the integrity of the electoral process.

The study makes four arguments. The first argument is that Kenya's political and historical account depicts a struggle by Kenyan politicians to resist the regulation of campaign financing. The second argument is that the legal framework regulating corporate campaign contributions in Kenya has significant gaps, weaknesses, and contradictions that hinder the effective regulation of such contributions. The third argument is that the implementation of the campaign financing laws in Kenya is a highly politicized process which requires the good will of politicians to effectively implement it. The fourth argument is that corporate campaign contributions in Kenya can be effectively regulated by concerted efforts from all the players in the electoral process including the IEBC, the financial regulators, candidates, political parties, corporations, non-governmental organizations, and election observers.

The study recommends implementation of the Election Campaign Financing Act, 2013 and amendments to entrench transparency and integrity in financing of politics noting that implementation is a deeply politicized process involving politicians who cherish opacity in the financing of politics in Kenya.

CHAPTER ONE

GENERAL INTRODUCTION

Political financing remains the number one corruption risk around the world...¹

1.1 Introduction

Money is the oil that greases Kenyan politics.² In all elections held in Kenya between 1992 and 2013, money was an important factor in defining politics and the nature of democracy.³ Corruption is equally found to be a key feature of Kenyan politics and has been persistently present in Kenya's political processes since the re-introduction of multi-party politics.⁴ Many election related scandals have been reported in Kenya, that led to the loss of billions of shillings.⁵

Candidates and political parties require money to organize and effectively conduct electoral campaigns. They require money to pay for advertisements and publicity, for administrative and operational costs, organise transport and conduct rallies, among others.⁶ Thus, money plays a crucial role in elections. On the other hand, money may be employed to undermine the electoral process through the bribery of voters, buying of votes, payment of youth to cause violence and scare opponents and even mislead voters, among others.⁷ Unregulated money in elections creates a disparity in election campaigns, increases inequality, and further marginalizes poor candidates.⁸

¹ Nathaniel Heller, 'Global Integrity Report: U.S. Joins Countries that Fail to Effectively Implement Money-in-Politics Rules' (2012) < <https://www.globalintegrity.org/2012/03/30/gir11/>> accessed 10 October 2019.

² African Union Commission, 'Report of African Union Election Observation Mission to the 4 March 2013' (2013) General Elections in Kenya' .

³ Ibid.

⁴ Oscar Gakuo Mwangi, 'Political Corruption, Party Financing and Democracy in Kenya' (2008) Vol. 46 Issue 2 *The Journal of Modern African Studies* pp. 267-285.

⁵ Ibid.

⁶ Karuti Kanyinga and Duncan Okello, *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections* (2010) Society for International Development (SID) & Institute for Development Studies, University of Nairobi.

⁷ Lukong Shulika, Wilson Muna et al, 'Monetary Clout and Electoral Politics in Kenya: The 1992 to 2013 Presidential Elections in Focus' (2014) Vol. 13 No. 2 *Journal of African Elections* 196-215.

⁸ Okechukwu Innocent E. and Nkechi Anyadike, 'Political Financing in Africa: A Comparative Study of Kenya and Nigeria: Proposal for Reform' (2014) Vol. 5 No. 27 *Mediterranean Journal of Social Sciences* pp. 22-34.

Candidates in elective politics and their political parties raise money in many ways. Some of the ways include loans or disposal of property to fund campaigns. Other sources of campaign funds include contributions from third parties in cash or in kind; membership subscriptions, dues, and levies on party office holders as well as public funding in the case of political parties.⁹ In a bid to raise funds for their campaigns, candidates and political parties receive contributions from various parties including foreign donors, individuals, and the corporate or private sector.¹⁰ Shari Bryan and Denise Baer argue that corporate contributions make up the largest tranche of party funding after party dues, fees and subscriptions.¹¹ Corporations may choose to give their contributions to unduly influence public policy.¹²

In all elections held in Kenya between 1992 and 2013, money played an important role in defining Kenya's politics. Key corruption scandals that affected Kenya's economy include the Goldenberg (1990-1991) and Anglo Leasing (2004) scandals that resulted in the loss of billions of shillings. These scandals were conceived to raise money for campaigns. Companies contributed huge sums of money during Kenya's electoral process necessitating a need for the regulation of corporate campaign financing.¹³

This study uses the Goldenberg scandal to examine the link between corporate money and corruption in Kenya's electoral process. Through a mixed method approach, this study assesses whether the Election Campaign Financing Act¹⁴ alongside other laws and regulations effectively regulate corporate campaign contributions in Kenya.

⁹ Shari Bryan and Denise Baer, *Money in Politics: A Study of Party Financing Practices in 22 Countries* (National Democratic Institute for international Affairs 2005) 10-12.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Election Campaign Financing Act 2013.

This study is looking to find whether corporations have played a key role in funding elections in Kenya. Secondly, whether companies that contribute heavily to fund campaigns influence public policy decisions and use government machinery to shield themselves from prosecution. Thirdly, do they also expect to recoup money spent in funding campaigns through lucrative government tenders. Fourth, although the Election Campaign Financing Act¹⁵ has tried to regulate corporate campaign financing, the study explores the significant gaps which may impair its implementation and enforcement. Moreover, does the law shield contributions and expenditure reports from scrutiny by the media, civil society organisations and members of the public thus compromising transparency and oversight.

1.2 Background

A brief historical background is best discernible if assessed in two phases namely, pre-2010 and post-2010. Before 2010, most significant connections between campaign contributions and electoral integrity became visible in 1992. Most notable was the 1992 general elections, where Kamlesh Pattni, through Goldenberg International Limited obtained more than USD 116 million from Central Bank of Kenya (CBK). Mr. Pattni then used more than USD 70 million received from **CBK** to purchase food for distribution as relief food to famine-stricken areas and cars for prominent Kenya African National Union (KANU) candidates in the elections respectively.¹⁶

After 2010, Kenya attempted to regulate campaign financing including corporate contributions. The Constitution of Kenya¹⁷ is a transformative document premised on certain principles and values including respect for human rights, equality, freedom, democracy, participation of the people, inclusiveness, integrity, transparency and accountability.¹⁸

¹⁵ Election Campaign Financing Act 2013.

¹⁶ African Union Commission, *Supra* fn 2 pp. 273-274.

¹⁷ Constitution of Kenya, 2010.

¹⁸ See the Preamble to the Constitution and Article 10 (2) of the Constitution.

This history will be interrogated in greater detail in chapter two which discusses the historical background on campaign financing in Kenya in a more detailed manner.

1.3 Statement of the Problem

Although Kenya promulgated the Constitution and enacted the Election Campaign Financing Act¹⁹ to regulate campaign contributions, there are significant gaps in the law and in its enforcement that make it difficult to effectively regulate corporate campaign contributions. Consequently, political parties, candidates and corporations may exploit the gaps and continue engaging in illegal campaign contributions. Therefore, the study identifies the gaps in Kenya's corporate campaign financing law and makes recommendations for review of the laws and implementation.

1.4 Objectives

This study aims to give a brief history of corporate involvement in financing Kenya's politics. It analyzes the international, regional and local legislative and institutional frameworks that regulate corporate campaign contributions in Kenya and examine how the Goldenberg Scandal influenced Kenya's politics. This study will also draw lessons from South Africa and Canada on the way they regulate corporate campaign contributions.

1.5 Research Questions

The study interrogates how corporations have been involved in Kenya's politics with a focus on the Goldenberg Scandal. The study further explores the laws that govern corporate campaign contributions in Kenya and what lessons Kenya can learn from South Africa and Canada's approach to regulating corporate campaign contributions.

¹⁹ 2013

1.6 Hypotheses

The study hypothesizes that corporations have played a key role in Kenya's electoral politics and have contributed millions of shillings to political parties and candidates. Corporations unlawfully obtained billions from the Government of Kenya to fund political parties and candidates in general elections. These corporations then use government machinery to shield themselves from prosecution over corruption scandal. Although the Constitution of Kenya and the Election Campaign Financing Act and other related laws have tried to regulate corporate campaign financing, there are significant gaps in the law which may impair implementation and enforcement of the laws to effectively regulate corporate campaign contributions in Kenya. Politicians are also fighting the regulation of corporate campaign contributions in Kenya to continue illegally receiving campaign funds from corporations without public scrutiny or disclosure of the contributions received and their campaign expenditure.

1.7 Justification

Prior to 2010, no law regulated campaign financing in Kenya. Studies conducted during this time called for the enactment of a law to regulate campaign contributions in Kenya. Studies conducted after the promulgation of the Constitution of Kenya 2010²⁰ have largely ignored corporate campaign contributions. More particularly, the studies have not focused on the impact of such contributions on electoral integrity. This situation leaves a knowledge gap that this study seeks to plug.

This study will also identify the gaps in the law that would assist various Government agencies, including the IEBC and the Registrar of Political Parties to understand what they need to do in order to ensure they effectively regulate and implement the laws on corporate campaign financing

²⁰ 2010.

in Kenya. Through lessons drawn from the regulation of corporate campaign financing in Canada and South Africa, this study will illustrate what Kenya needs to learn from South Africa and Canada to effectively monitor and regulate corporate campaign financing. Further, this study will suggest legal, institutional and policy changes to ensure that election campaign financing is effectively regulated in Kenya and that there is a fair playing field for all candidates and political parties.

1.8 Literature Review

Several scholars and researchers have written on campaign financing generally. Others have written on politics in Kenya during different phases of Kenya's democratic growth. Yet others have given an account of how much has been spent by political parties during the various elections conducted in Kenya. None of the accessible literature, however, is specifically dedicated to investigating the regulation of corporate campaign financing in Kenya, hence a significant general literature gap is evident, and this study intends to fill it.

This study draws its inspiration from the noted deficiency in literature. The deficiency has triggered a broad review of literature which is clustered around four key areas. The first set of literature identifies, generally, the underlying issues in regulating corporate campaign financing, the competing interests in regulating campaign financing generally and elicits premises for justification of regulation of campaign financing. The second assesses elections in Kenya, its history, evolution, the players and the development of democracy. The third examines the role of money in Kenya's politics. It examines how money has influenced politics and affected the integrity of elections in Kenya. The fourth looks at whether there has been an attempt to regulate campaign contributions in Kenya. If so, the law and practice in such an environment, particularly corporate campaign contribution. These four clusters are discussed under two heads, namely, those

concerning the linkage between corporations and political processes, and those concerning elections, private sector, money and politics in Kenya.

1.8.1 The Link between Corporations and Political Processes

Business holders participate in the political process for various reasons.²¹ To start with, businesses are aware that the decisions made in the political arena significantly affect business enterprises and the economy.²² Legal and policy changes affect the cost of doing business.²³ There are other players that include labour unions, consumer groups and environmentalists who seek to influence public policy.²⁴ Aware of how politics affects policy and the business environment, businesses have a legitimate right to participate in the political processes to express their opinions on issues affecting them.²⁵

Private enterprises are driven by economic interest and ideology to participate in politics.²⁶ Gao and Cone posit that private enterprises' continued participation in politics raises major ethical issues.²⁷ Firstly, businesspersons who contest and win political seats or are appointed to senior government offices where policy is made may influence government policymaking to favour their businesses.²⁸ Secondly, some of these business persons commit serious crimes in concert with cartels and syndicates in the political sphere,²⁹ and they may even engage in wanton corruption. Thirdly, because of their deep pockets, they may amass so much power and control during the electoral process to the exclusion of citizens and other marginalized groups.³⁰ In conclusion,

²¹ Zhilong Tian, Haitao Gao et al, 'A Study of Ethical Issues of Private Entrepreneurs Participating in Politics in China' (2008) Vol. 80 Journal of Business Ethics pp. 627-642.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

though participation of private enterprise in politics is important, their participation should be regulated to check their intentions, ways of participation and the effect of their participation.³¹ In respect of money, election law should be enacted to prevent corporate money from distorting elections and maintain openness, justice and fairness of the elections.³²

In analyzing the authority used by corporations to make campaign contributions to parties, K.D. Ewing³³ argues that corporations are the sacred cows of the United Kingdom's democracy. He states that corporations make huge financial donations to the conservative party.³⁴ However, the sum contributed by corporations is not disclosed; neither the party nor the contributing companies keep proper records..³⁵ The fundamental issue is that these companies make campaign contributions in absolute disregard for shareholder, employee or customer's interest.³⁶

Another contested question is whether companies should in the first place be allowed entry into the political arena and make campaign contributions.³⁷ Various arguments have been made for companies involvement in the political process.³⁸ Ewing argues that Companies must provide a specific clause in the Company's objects that permits them to make campaign contributions. Without specific clauses permitting such contributions, the Company cannot rely on a general or incidental clause to make such a contribution.³⁹

Other emerging questions include whether such campaign contributions are in the best interest of all shareholders including those who hold different political views from those of the majority or management. Do their views and voices count? Should the law provide for a voluntary

³¹ Ibid.

³² *ibid* at 74-75.

³³ KD Ewing, 'Company Political Donations and the Ultra Vires Rule' (1984) Vol. 47 Issue 1 *The Modern Law review* pp. 57.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

contribution scheme in which only shareholders supporting a political cause may deposit their monies for supporting such political causes?⁴⁰ Corporate money may also compromise the duty of the legislator, who instead of focusing on the electorate may be held at ransom by donors.⁴¹ The foregoing questions coupled with the effect of corporate money on the electoral process ought to be addressed by legislation on campaign finance.⁴²

In her analysis of corporate donations in Colombia, Nubia Evertsson⁴³ argues that through donations, corporations obtain illegal benefits without breaching the law, a paradox of sorts. In her view, electoral donations foster criminal offending and generates social harm.⁴⁴ She found that in Colombia palm oil growers donated about US\$ 800 million and US\$ 1.6 million to Uribe's election and re-election campaigns in 2002 and 2006.⁴⁵

To return the favour, the Uribe administration in 2003 hijacked a Finance Bill before the Congress, influenced the Congress to fast-track it and created tax exemptions for all bio-fuel products including sugar cane and palm oil.⁴⁶ In 2007, Uribe's Government introduced a subsidies program for palm oil growers, the Agro Ingreso Seguro (AIS) and distributed approximately US\$ 22.6 million to mostly palm oil growers who had donated towards his campaign and re-election bids.⁴⁷ Further reforms included the signing of decrees compelling all fuel products to have minimum biofuel which guaranteed a market for palm oil growers.⁴⁸ President Uribe also appointed government officials from individuals related to the palm oil producers.⁴⁹

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ Nubia Evertsson, 'Corporate Donations to Electoral Campaigns: A Case Study of White-Collar Crime' (2013) *State Crime Journal* pp. 52-71.

⁴⁴ *Ibid.*

⁴⁵ Nubia Evertsson, 'Corporate Donations to Electoral Campaigns: A Case Study of White-Collar Crime' (2013) *2 State Crime Journal* 52.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

The donations were a form of a bribe as there was an expectation of reciprocity from the donors who had already established an existing relationship with the (then) President. Uribe's government also used law and policy as a creative tool to favour the palm oil producers who donated to his campaign.⁵⁰ Consequently, there was loss of confidence in Colombia's electoral system and institutions as well as the destruction of democratic values.⁵¹

Flowing from the foregoing, corporations have a legitimate interest in politics, and may participate in the electoral process. Their participation impacts the social, political and economic facets of a society in various ways. In what way are they supposed to participate? Do they have authority to make campaign contributions? Should they be allowed to make these contributions? If so under which framework and in what manner? These are all important issues that this study seeks to discover within the Kenyan context. The foregoing literature is relevant as they identify the foregoing issues as they apply to different settings in the United Kingdom and Columbia.

1.8.2 Elections, Private Sector, Money and Politics in Kenya

Gikonyo Kiano⁵² observed that Kenyan Africans participated in the very first elections in March 1957 where Africans could register and participate as voters. The campaigns preceding the election were peaceful, without mudslinging or any employment of below the belt tactics.⁵³ However, there were three challenges that affected the 1957 general elections. First, not all Africans could register as voters due to rigid colonial rules that hindered the registration of members of the Kikuyu, Embu, and Meru Ethnic groups who had to obtain Loyalty Certificates prior to registration.⁵⁴ Secondly, emergency regulations restricted party registration and campaigns beyond district levels. Lastly, a

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Gikonyo Kiano, 'Elections in Kenya' (1957) Vol. 4 *Indiana University Press* 3-4.

⁵³ Ibid.

⁵⁴ Ibid.

complex voting system made it difficult for many Africans to participate in those elections.⁵⁵ In this election, the Africans elected eight representatives in the Colony's Legislative Council (LEGCO). It was thus seen as a victory for Africans as it was their first opportunity to directly take part in electing their Representatives to the LEGCO. The 1957 elections set a pace for Kenyans' participation in the electoral process⁵⁶.

G.M. Njuguna⁵⁷ has argued that money, like beer, flowed through the 1979 general election campaigns to the last day.⁵⁸ Because of poverty, bribery was rampant and in the entire fabric of the Kenyan society.⁵⁹ Bribery denied the impoverished electorate their freedom to exercise their franchise freely and minimized the chances of a poor candidate to win the elections.⁶⁰ To ensure fairness, Parliament enacted the Election Laws (Amendment) Act.⁶¹ This Act did not target corporate contributions, but was the first attempt to limit the permissible campaign expenses and raised the penalties for committing election offences.⁶² It capped campaign expenditure at Kshs. 40,000 after the nominations.⁶³ A breach of the spending limits attracted a maximum jail sentence of seven years.⁶⁴

The decision to legislate was an attempt by the KANU government to cover the fact that elections in Kenya were a preserve of the rich.⁶⁵ The operationalization of the provisions after nomination rendered the provisions otiose, as a lot of money was spent long before the actual elections took place.⁶⁶ Flowing from the foregoing, the law was enacted to protect the dominant and moneyed

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ G Njuguna, 'A Critical Appraisal of the Electoral Laws in Kenya with Special Reference to the 1979 General Elections' (LLB Dissertation, University of Nairobi 1982).

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid at 26.

⁶¹ Election Laws (Amendment) Act 1979.

⁶² Supra, fn 75.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ C. Odhiambo, *The Politics of Transition in Kenya: From KANU to NARC* (Heinrich Boll Foundation 2003).

⁶⁶ Ibid.

class in Kenya and lock out the poor candidates from participating in the elections.⁶⁷ The law was ineffective as the Government expressly admitted its inability to enforce its provisions. This concession was not only a drawback on the democratic gains made, but also encouraged people to disobey the law and act with impunity.⁶⁸ Njuguna recommended tighter electoral laws to curb electoral malpractices.⁶⁹

Peter Wanyande⁷⁰ argues that electoral behavior is influenced by a variety of factors which differ from country to country; one constituency to another, or in a multiparty or single party states. In his view, elections in Kenya are highly politicised and many Kenyans have a keen interest in the politics.⁷¹ According to him, ethnicity, clannism, religion, party affiliation, gender, the management of elections, corruption including the use of money, level of political awareness, and the constitutional and legal environment affect electoral behavior.⁷²

Similarly, the Centre for Governance and Development (CGD)⁷³ argues that money plays a critical role in elections in Kenya. In its view, candidates and political parties require considerable sums of money to conduct successful campaigns. The CGD has further argued that the search for and utilization of contributions has distorted competition between candidates and created a fertile breeding ground for corruption. This is found in the manner that private donors (which include corporate bodies) often attach conditions to the donations they make out to parties and candidates including a demand for favourable policies. This situation, in the CGD's view, is exacerbated by the absence of a statute regulating campaign contributions and expenditure. In its view, the lack of

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Peter Wanyande, 'Electoral Politics and Election Outcomes in Kenya' (2006) Vol. XXXI No. 3 *Africa Development* pp. 62-80.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

such a statute promotes bribery by enabling politicians to source for funds from whichever donor and spend it without restrictions.⁷⁴

Money may distort the electoral process;⁷⁵ impair equality in elections by influencing policy outcomes, award of government contracts, determined political party processes and drowned out the voices of the poor in Africa.⁷⁶ Moreover, Kenya lacks a statute to regulate political party and candidate finance.⁷⁷ Though the Societies Act required societies (including parties) to file annual returns, there was neither compliance nor enforcement.⁷⁸ Among the issues affecting Kenya's election are poor policies, non-regulation of political party fiscal operations and financing; marginalisation and electoral malpractices such as bribery and treating of voters.⁷⁹

Shari Bryan and Denise Baer⁸⁰ argue that political party financing patterns are not transparent and that a few individuals actively make decision on sources and expenditure of money during campaigns.⁸¹ They also found that wealthy individuals and businesses participated in politics to gain access to or control government contracts and reap personal benefits. This stifled democratic participation, undermines development of economies, and influences governments.⁸²

A focus on Kenya shows that the regulatory framework governing political party funding, the Societies Act, was not complied with and there was no restriction on donations.⁸³ Therefore, candidates with wealth and connections had their way as opposed to poor candidates who might

⁷⁴ Coalition for Governance and Development, 'Money and Politics: The Case of Party Nominations in Kenya, 2005' (2005).

⁷⁵ Ibid.

⁷⁶ Sefakor Ashiagbor, 'Party Finance Reform in Africa: Lessons Learned from Four Countries: Ghana, Kenya, Senegal & South Africa' (2005) National Democratic Institute for international Affairs.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ *ibid* at 12-13.

⁸⁰ Shari Bryan and Denise Baer, '*Money in politics: A study of party financing practices in 22 Countries*' (National Democratic Institute for International Affairs 2005).

⁸¹ Ibid.

⁸² Ibid.

⁸³ *Supra*, fn 92.

have had better policies.⁸⁴ They call for the levelling of the playing field and for parties and candidates to account for their expenditure in a transparent way.⁸⁵

Andreassen, Barasa and Tostensen, in their study on Kenya's 2007 elections found that the three major political parties that participated in the 2007 general election: ODM, PNU and Orange Democratic Movement Kenya (ODM-K) had election budgets of Kshs. 1.2 billion, 950 million and Kshs. 750 million respectively.⁸⁶ They also found that 72 organisations and prominent individuals donated between Kshs. 100,000/- and 154 million to the ODM campaign alone totaling a whopping Kshs 1.8 billion.⁸⁷ Apart from contributions from third parties, the authors also found that the three political parties raised funds through fundraising luncheons/dinners costing between Kshs 3,000/= and 1 million, well-wishers as well as state bribery or use of state resources to reward people in the respective constituencies.⁸⁸

These scholars further found that business persons and benefactors contributed generously to parties and candidates both in the government and the opposition to hedge against a possible loss of influence and expect future benefits in terms of contracts from whichever side forms the next government.⁸⁹ They opined that having no law regulating party and candidate financing, the candidates and parties also received money from multiple donors including from questionable sources.⁹⁰ The parties, candidates and organisations spent unprecedented amounts of money to influence voters' choices through voter bribery and vote buying. This affected the integrity of the electoral outcome.⁹¹

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Bard Andreassen, Tibeirus Barasa et al, '*I Acted under a Lot of Pressure: The Disputed 2007 Kenyan General Election in Context*' (Norwegian Resource Bank for Democracy and Human Rights (NORDEM Report) 2008).

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid at 41-42.

⁹⁰ Ibid.

⁹¹ Ibid pp. 50.

The Coalition for Accountable Political Financing (CAPF)⁹² explains that candidates, well-wishers, wealthy party leaders, foreign based donors, and business enterprises funded the 2007 election campaigns in Kenya. ODM, PNU and ODM-K received Kshs. 1.2 billion, Kshs. 611 Million, and Kshs. 50 million respectively as contributions.⁹³ In addition, they also established that campaign finance in Kenya was not regulated, without a limit on contributions and expenditure by candidates and political parties.⁹⁴

Candidates were free to raise and spend whatever money they received.⁹⁵ The foregoing scenario increased the risk for corruption in politics as there was no requirement for disclosure of income and expenditure; donations and the donors; in-kind income and no income was subject to public scrutiny.⁹⁶ The legal lacuna created a permissive environment that opened opportunities for electoral malpractices including bribery of voters and vote-buying.⁹⁷

Kennedy Masime and Charles Otieno⁹⁸ posit that the private sector availed resources to candidates and political parties for the 2007 general elections. The private sector provided loans to candidates, gave substantial donations to the campaign kitties of political parties and provided services to the candidates.⁹⁹ They argue that in the 2007 general elections, most corporate donors were companies in the construction and energy industries. Six energy and construction companies donated substantial sums to both PNU and ODM. They further posit that the contributions by these

⁹² (CAPF) Coalition for Accountable Political Financing, 'The Money Factor in Poll Race: A Monitoring Report of the 2007 General Election' (2008).

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid at 31-32.

⁹⁷ Ibid at 61.

⁹⁸ Ibid.

⁹⁹ Ibid.

companies show that the sector(s) were a site of bridging money and politics, thus an important site of corruption.¹⁰⁰

According to them, how money is sourced and expended has affected Kenya's governance and social wellbeing.¹⁰¹ As noted earlier, the money has been used to bribe voters, buy their votes and to fund the youth to disrupt election processes through violence.¹⁰² In their view, parties and candidates must strike a balance between the need for adequate resources, the risks of distorting political competition, and corruptly influencing elected leaders.¹⁰³ They advocate for a campaign finance law capping contributions, but containing appropriate and enforceable disclosure requirements, banning of illegal contributions and capping expenditures, among other measures.¹⁰⁴

Oscar Mwangi explains that corruption is a key feature in Kenya's politics.¹⁰⁵ In his view, during the single party period in Kenya, corrupt political financing was present, but not rampant because of the authoritarian nature of Kenyatta and Moi's Governments coupled with the fact that there was no meaningful competition in KANU.¹⁰⁶ Presidents Kenyatta and Moi directed and restricted corruption making its prevalence or publicity low.¹⁰⁷ They further relied on their civil servants to maintain political power. This was done through the creation of ethnic-political associations like Gikuyu, Embu and Meru Association (GEMA) and Kalenjin, Maasai, Turkana and Samburu Association (KAMATUSA) which provided political support to them.¹⁰⁸

¹⁰⁰ Kanyinga K. and Okello D., *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections* (Society for International Development (SID) & Institute for Development Studies, University of Nairobi 2010), pp 474-475.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid* at 484-485.

¹⁰⁵ Gakuo Oscar Mwangi., 'Political Corruption, Party Financing and Democracy in Kenya' (2008) Vol. 46 Issue 2 *The Journal of Modern African Studies* pp. 267-285.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

With the re-introduction of multi-party politics in Kenya in 1991, corruption became more prevalent.¹⁰⁹ The increased democratic space intensified intra- and inter-political party competition, created a demand for more campaign funds and increased the opportunity for corrupt political financing, selling of patronage to the biggest donors, and voter bribery was introduced.¹¹⁰ To raise money, President Moi's Administration created political banks which went under soon after the elections, appointed incompetent persons who plundered public resources, diverted them to campaign for him and bribe his opponents. The private sector with economic interests to protect also contributed money to KANU's campaign fund.¹¹¹

The government also initiated large scale projects of questionable viability where monies were diverted to fund politics. The Kibaki Administration also amassed money for the 2007 campaign through the abuse of leasing and financing of security and security related projects. Through the Goldenberg and Anglo-Leasing Companies, the public lost billions of shillings.¹¹² This resulted in a lack of meaningful participation and competition in Kenya's politics, locking out competent, but poor candidates, increased marginalisation of the youth, women, and persons with disabilities, and a complete disregard for the rule of law, amongst others.¹¹³

In reviewing the 2013 general elections, both the Commonwealth Secretariat¹¹⁴ and the African Union¹¹⁵ found that the 2013 elections were carried out without a legal framework regulating campaign financing. They further found that parties and candidates spent bigger sums of money compared to previous elections which led to an uneven playing field.¹¹⁶ In their view, the noted

¹⁰⁹ Ibid.

¹¹⁰ ibid at 272.

¹¹¹ Ibid.

¹¹² ibid at 274-276.

¹¹³ ibid at 277-280.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ African Union Commission, 'Report of African Union Election Observation Mission to the 4 March 2013 General Elections in Kenya' (African Union Commission 2013).

lacuna in legislation resulted in weak controls over a crucial element of the political system packed with intense competition.¹¹⁷ They therefore recommended that a comprehensive law be enacted to regulate campaign financing and increase transparency and probity in elections.¹¹⁸

Karuti Kanyinga¹¹⁹ opines there is no campaign financing law in Kenya. He adds that both sources of and limits on donations to individuals and candidates are unregulated.¹²⁰ Nor is there a requirement for disclosure of information on campaign income and expenditure by candidates and political parties.¹²¹ Parties and candidates are left to use any means to generate campaign finances thus creating fertile ground for corruption in Kenya.¹²²

In analysing the 1992 to 2013 Presidential elections in Kenya, Lukong S., Wilson K. and Stephen M.¹²³ urge that Kenya's politics has for a long time been all about money. They singled out the 2013 election as the most expensive election in Kenya's history. They argue that unregulated campaign money disfigured Kenya's democratic morality, derogated from the principles of free and fair elections and enlarged the space for the abuse of power, plunder of public resources, inequality, poverty and high unemployment rates among the youth.¹²⁴

According to Eme Innocent and Anyadike Nkechi,¹²⁵ Kenya, like Nigeria, does not regulate campaign financing in its electoral laws. It is a private affair shrouded in secrecy which is one of the bottlenecks to the quest for consolidation of democracy.¹²⁶ In their view, obscure and uncontrolled parties and candidates undermines the democratisation process, good governance,

¹¹⁷ Ibid.

¹¹⁸ Commonwealth Secretariat, 'Kenya General Elections' (Commonwealth Secretariat 2013).

¹¹⁹ Karuti Kanyinga, 'Kenya: Democracy and Political Participation: A review by AfriMAP, Open Society Initiative for Eastern Africa and the Institute for Development Studies, University of Nairobi' (Open Society Foundations 2014).

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Lukong Shulika, Muna W. et al, 'Monetary Clout and Electoral Politics in Kenya: The 1992 to 2013 Presidential Elections in Focus' (2014) Vol. 13 No. 2 *Journal of African Elections* pp. 196-215.

¹²⁴ Ibid.

¹²⁵ Okechukwu I. E. and Nkechi A., 'Political Financing in Africa: A Comparative Study of Kenya and Nigeria: Proposal for Reform' (2014) Vol. 5 No. 27 *Mediterranean Journal of Social Sciences* pp. 22-34.

¹²⁶ Ibid.

political accountability, citizens' faith and trust in the elected leaders.¹²⁷ They advocate for the regulation of money in politics to enhance transparency and accountability during the entire electoral cycle.¹²⁸ In reviewing the then Campaign Finance Bill,¹²⁹ they argue that the Bill lacked a clear conceptualisation of campaign finance, was not clear on enhancing transparency by ensuring full and maximum disclosure of information to the public and had inadequate safeguards to ensure accountability of the Campaign Committee established therein.¹³⁰

Nic Cheeseman and Brian Klass¹³¹ opine that bribery and treating are an embedded ritual of democracy in most countries to the extent that a candidate who does not do so risks losing the elections. Due to the need to bribe and treat voters, most candidates save money and build campaign war chests in between elections.¹³² These acts increase the cost of elections in multi-party democracies. In Kenya, the 2017 general elections cost approximately 1 billion US dollars. Candidates vying for Governor spent in excess of 6 million US dollars.¹³³ They opine that the high cost of elections affects the capacity of parties and candidates to raise finances thereby pushing them to personally foot their bills, fundraise from the wealthy, perhaps some shady individuals, and companies. Once the candidates win the elections they then enjoy the privilege of access to power and may even engage in corruption and the diversion of public resources to foot elections costs.¹³⁴ Consequently, as noted various times through this study, poor candidates are likely to be locked out from the elections, but more importantly compromising democracy and development.¹³⁵

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ 2011

¹³⁰ Supra, fn 146 at 25-26; 33.

¹³¹ Nic Cheeseman and Brian Klass, *How to Rig an Election* (Yale University Press 2018) 64-66.

¹³² Ibid.

¹³³ Ibid at 66.

¹³⁴ Ibid at 68.

¹³⁵ Ibid.

Felix Odhiambo¹³⁶ lauds the enactment of the Election Campaign Financing Act, 2013 to regulate campaign financing in Kenya. He however argues that the expanded mandate of the IEBC under the Act to manage election campaign finances inevitably increases responsibility on them which completely stretches their capacity thereby making it incapable of implementing the Act. The Act increases the IEBC's authority over and above the management of six elections and dealing with party nomination disputes in Kenya. He recommends further research on Political Parties and Campaign Financing in Kenya owing to the enactment of campaign financing laws in Kenya.¹³⁷

Max Gromping and Ferran Martinezi Coma¹³⁸ in their study of electoral integrity in Africa posit that the electoral cycle is a process involving various elements like the design and drafting of electoral legislation and procedures; recruitment and training of electoral staff and the demarcation of boundaries. Also included are voter, party and candidate registration; regulation of media and campaigns; campaign financing; voting, counting and declaration of results and post-election dispute resolution.¹³⁹ In their view, problems in elections may arise way before the election day.¹⁴⁰ The integrity of elections may be compromised at different stages of the electoral process.¹⁴¹ This may include a defect in the drafting of election laws; gerrymandering; unfair media campaign regulations; or where the rules of campaign financing are inadequate to level the playing field.¹⁴²

They concluded that there were lower levels of integrity in Africa as compared to other continents primarily because of Africa's history, the central role of ethnicity in politics, and the transitional and fragile nature of African democracies. They emphasize that Africa faces similar electoral

¹³⁶ Felix Odhiambo, 'Reforming Elections Management and Administration in Kenya: The Case for Independent Electoral and Boundaries Commission (IEBC)' (LLM Thesis, University of Nairobi 2016).

¹³⁷ The relevant acts are the Political Parties Act, 2011 and the Election Campaign Financing Act, 2013.

¹³⁸ Max Gromping and Ferran Martinezi Coma, 'Electoral Integrity in Africa: Why Elections Fail and What We Can Do about It' (Hans Seidel Foundation 2015) <<http://electoralintegrity.blogspot.co.ke/2015/06/electoral-integrity-in-africa.html>> accessed 31 January 2017. See also Pippa Noms, Ferran Martinez Coma et al, 'The year in elections: The expert survey on perceptions of electoral integrity' (2016).

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

challenges as other continents.¹⁴³ The degree of threats to electoral integrity is more severe on the African continent and thus creates issues with regulating campaign.¹⁴⁴ They urge African States to give greater attention to the regulation of money in politics and pass laws regulating campaign financing to restore public confidence in elections and to ensure a level playing field for all parties and candidates.¹⁴⁵

From the foregoing literature, the following lessons are discernible. First, money plays a crucial role in politics. Second, the cost of conducting elections in Kenya has steadily increased and now goes beyond 1 billion USD for Presidential Elections. Third, large sums of money have been used in election campaigns in Kenya. Fourth, the increased use of money in Kenya's politics has negatively affected the integrity and probity of elections. Fifth, due to the increased cost of conducting election campaigns, candidates competing for power are willing to use any means to win, including engaging in corruption to amass wealth and building war chests for campaigns too. Sixth, anecdotal evidence suggests that corporations and their executives have contributed funds towards election campaigns to curry favour with the government. Seventh, there is a consensus that all the elections in Kenya since 1979 have been conducted without any form of regulation on donations or contributions. In any event, there was no compliance with any of the existing laws on Campaign expenditure and filing of reports under the Societies Act. Eighth, there is a risk of having obscure and uncontrolled parties and candidates undermine the democratisation process, good governance, political accountability, citizen faith, and trust on the elected leaders. It is therefore imperative that a comprehensive regulation of campaign financing is put together in Kenya.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ *ibid.*

In as much as the literature reviewed above has identified and discussed corporate involvement during the electoral process in Kenya through campaign contributions, none of them has analyzed the regulation of corporate campaign financing laws after the passage of the Constitution and the campaign financing laws. The literature reviewed also lacks a comprehensive analysis of the campaign financing laws and their impact on the integrity and probity of elections in Kenya. The literature has helped to analyse the law and practice of campaign financing in Kenya with a specific focus on corporate campaign contributions in Kenya. The above publications are useful in laying a basis and placing this study in its proper place and context.

1.9 Theoretical and Conceptual Framework

This part addresses two important, but interconnected aspects of this study. The first part deals with concepts, which are not uniform in their definitions and understanding thus, require contextualization. These include corporations; campaign financing; and electoral integrity. A clear understanding of these concepts as used in this study is therefore necessary. The second part addresses the theoretical premise of campaign finance regulation of which this study is part.

1.9.1 Conceptual Framework

The concept of corporate personhood helps in determining the extent of a corporation's constitutional or statutory rights.¹⁴⁶ Courts have struggled to conceptualise corporations and their respective rights and obligations.¹⁴⁷ There are three conceptual perspectives to the understanding of the corporation: the corporate person, the corporate contract, and the unconstitutional condition perspective.¹⁴⁸

¹⁴⁶ Anne Tucker, 'Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United' (2011) Vol. 61 Issue 2 *Case Western Reserve Law Review* pp. 495-548.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

The corporate person perspective opines that the corporation as an artificial legal person with distinct rights and obligations from the shareholders or directors.¹⁴⁹ This theory assumes that the separation of ownership and control in the corporate firm creates opportunities for the abuse of power by corporate managers that must be checked by stringent controls.¹⁵⁰ The government steps in to establish the corporation, clothes it with the separation of ownership and control and is therefore justified to regulate corporations and limit their rights dissimilar to those enjoyed by natural persons.¹⁵¹

In the case of *Trustees of Dartmouth College v Woodward*,¹⁵² US Chief Justice Marshall described the corporation as an artificial being created by law, its rights and obligations spelt in the law and its lifespan provided by law as well. The law can justifiably limit a corporation's objects and purposes.¹⁵³

On the other hand, the corporate contract perspective propounded by Ronald Coase strips away the corporation's separate identity and personification from those of shareholders and directors.¹⁵⁴ It accordingly advocates for equal and uniform treatment and constitutional protection to corporate bodies and natural persons.¹⁵⁵ Any limitation on the right of a corporation must be justified in the same manner as would with individual rights and freedoms.¹⁵⁶

Yet Richard Epstein's unconstitutional conditions perspective frees corporations from inefficient mandatory rules but subjects them to invasive supervision by the courts.¹⁵⁷ This perspective clothes

¹⁴⁹ Larry E Ribstein, 'The Constitutional Conception of the Corporation' (1995) Vol. 4 *Supreme Court Economic Review* 95-140.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² 17 US 518.

¹⁵³ Ibid at 636.

¹⁵⁴ R.H. Coase, 'The nature of the Firm' (1937); See also, Cento Veljanovski 'Forever contemporary: The economics of Ronald Coase' (Institute of Economic Affairs 2015).

¹⁵⁵ Ibid.

¹⁵⁶ Richard A. Epstein, 'Executive Power in Political and Corporate Contexts' (2010) Vol. 12 No. 2 *Journal of Constitutional Law* pp. 277-312.

¹⁵⁷ Ibid.

the courts with the discretion to decide which rules should apply to corporations. It does not leave corporations with much room to choose for themselves.¹⁵⁸

This study took the corporations to include juridical persons established by law existing separately and independently of its members. This is recognised by law and authority in Kenyan Courts. In *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another*,¹⁵⁹ the Court of Appeal held that a shareholder has no ownership of or right to the property or assets owned by the company, a legal entity, separate and distinct from its shareholders. In this regard, this study agrees with the corporate person perspective. However, this study appreciates that the Constitution protects the rights of all persons *qua* persons which includes corporations and citizens as such.¹⁶⁰

Any limitation on any of the rights of corporations must be justifiable, reasonable, and proportionate in the same manner as would for natural persons.¹⁶¹ Kenyan Courts have a wide mandate to enforce and/or protect all fundamental rights and freedoms including those of corporations.¹⁶² The foregoing constitutional premise accords with Epstein's unconstitutional doctrine.¹⁶³ The concept of the corporation adopted herein is useful in arriving at a reasonable conceptualisation of campaign financing especially by corporations.

According to Michael Pinto-Duschinsky,¹⁶⁴ from a narrow perspective, political financing is “money for electioneering”. Given a wider definition, political financing includes raising of funds for party activities like setting up and maintaining permanent offices, paying salaries, carrying out research, public education, advertising, campaigns, conducting nominations and mobilising voters during elections. Okechukwu Innocent E. and Nkechi Anyadike posit that the term political

¹⁵⁸ *ibid.*

¹⁵⁹ [2014] eKLR.

¹⁶⁰ The Constitution of Kenya, 2010.

¹⁶¹ Article 24 of the Constitution of Kenya, 2010.

¹⁶² *Supra*, fn 174.

¹⁶³ *Supra*, fn. 174.

¹⁶⁴ Michael Pinto-Duschinsky, ‘Financing Politics: A Global View’ (2002) Vol. 13 No. 4 *Journal of Democracy*, 69-86.

financing should include not only campaign funds, but also political party expenses as both are crucial for every political party.¹⁶⁵

Similarly, Andile Sokomani¹⁶⁶ sees campaign financing as a generic term covering both party funds and campaign funds. In his view, the system of government determines the naming of political financing system. In his view, campaign financing is preferred in presidential systems of government where the emphasis is on candidates while political financing is used in Parliamentary systems where parties take primacy.¹⁶⁷ In his view, political foundations¹⁶⁸ while distinct from both parties and candidates are allied to them and spend money to advance their interest.¹⁶⁹

The foregoing authors seem to broaden campaign financing to include both campaign funds (funds to candidates) and party funds (funds to political parties). However, Patrick Ukase warns that the merger or fusion of these two distinct sources of funds could bring confusion because some countries like Nigeria have separate laws governing both campaign and party financing. In such instances, merging them would create ambiguities in analysis.¹⁷⁰

This study takes note of the foregoing contention but adopts the broader perspective of campaign financing to include both candidate and party financing. It takes the view therefore that campaign contribution includes contribution to both candidates and political parties. The Election Campaign Financing Act¹⁷¹ provides for both and it would be defeatist to separate the two in this study. The Act defines contribution to include both monetary and non-monetary contributions comprising

¹⁶⁵Innocent Okechukwu and Nkechi A., 'Political Financing in Africa: A Comparative Study of Kenya and Nigeria: Proposal for Reform' (2014) Vol. 5 No. 27 *Mediterranean Journal of Social Sciences* pp. 22-34.

¹⁶⁶Sokomani A., 'Money in Southern African Politics: The Party Funding Challenge in Southern Africa' (2005) Vol. 14 No. 4 *African Security Review* 81-90.

¹⁶⁷ Ibid.

¹⁶⁸ Political foundations include lobby groups, independent media campaigns as well as strategic public interest litigation in politically relevant cases.

¹⁶⁹ Ibid.

¹⁷⁰ Patrick I Ukase, 'Political Parties and Election/Campaign Financing in Nigeria: Interrogating the 2015 General Elections' (2016) Vol. 16 Issue 4 *Global Journal of Human Social Science: F Political Science*.

¹⁷¹ Election Campaign Financing Act 2013.

loans, donations, grants, gifts, property, services provided to a candidate or political party, and or expenditure or paying for any expenditure on behalf of a candidate or a political party. This definition captures the broad perspective that this study takes on campaign contribution in Kenya, which definition has implications for electoral integrity.

Electoral integrity is achieved by conducting regular, professional, impartial and transparent elections premised on the principles of universal suffrage and political equality based on international norms and standards.¹⁷² Max Gromping and Dr Ferran Martinez F. Coma¹⁷³ point out that the international standards and global norms include fairness, universal suffrage, political equality and the expectation of professional, competent electoral administration.¹⁷⁴ These principles are replicated in the Kenyan Constitution¹⁷⁵ and form the foundation of electoral administration in Kenya. This study perceives electoral integrity in the widest possible terms to include compliance with the principles enunciated in the international covenants, regional conventions and our Constitution in conducting elections in Kenya.

1.9.2 Theoretical framework

There are three competing schools of thought on campaign financing generally: the libertarian, egalitarian and critical legal theories. The justification for relying on these theories is because the libertarian theorists emphasize on the freedom of corporations and persons when it comes to campaign contributions and lack of regulation for campaign contributions. This theory is relevant to this study in that prior to 2013 corporate campaign financing was unregulated and this theory

¹⁷² Kofi Annan et al, 'Deepening Democracy: A Strategy for Improving the Integrity of Elections Worldwide' (Global Commission on Elections Democracy, and Security 2012). These Declarations and Conventions include the Universal Declaration on Human and Peoples Rights, 1948 the International Covenant on Civil and Political Rights, 1966 and other international regional treaties conventions.

¹⁷³ Supra, fn 151.

¹⁷⁴ Gromping M. and Coma F. M., 'Electoral Integrity in Africa: Why Elections Fail and What We Can Do about It' (Hans Seidel Foundation 2015) <<http://electoralintegrity.blogspot.co.ke/2015/06/electoral-integrity-in-africa.html>> accessed 31 January 2017.

¹⁷⁵ Constitution of Kenya, 2010 Article 81.

helps in confirming whether it worked for Kenya. Egalitarian theorists on the other hand, advocate for regulation of corporate campaign financing and aid this study in understanding whether regulation of the same will assist the political sphere of this country. Critical legal theorists come in to create a link between law and politics and justifies the need for the law to come in and regulate politics.

1.9.2.1 Libertarian Theory

The libertarian theory argues that individuals and corporations should be free from state control; democracy hinges on a free market of ideas and individuals should be allowed to freely campaign and push their policies in public without any restrictions on campaign contributions and expenditure.¹⁷⁶ To them, limiting campaign contributions and expenditure is a breach of the right to free speech expressed through contributions and expenditure on candidates who share their particular viewpoints.¹⁷⁷ A regulation of free speech would threaten both democracy and liberty.¹⁷⁸ Nozick propounds that individuals and corporations have inviolable rights to property, free speech, and the right to express themselves and use such property as they wish.¹⁷⁹ He criticizes the social re-distribution of economic and social goods from those naturally endowed to those less endowed as propounded by the egalitarian school of thought. Therefore, campaign regulation attempts to re-distribute economic and social goods from the rich to aid the poor in breach of their rights.¹⁸⁰

¹⁷⁶ Yasmin Dawood, 'Campaign Finance and American Democracy (2015) Annual Review of Political Science. For a detailed review of the egalitarian-libertarian debate see Generally, Cass Sunstein, *Democracy and the Problem of Free Speech* (1995), Free Press.

¹⁷⁷ *Ibid* at 2.

¹⁷⁸ *Ibid*. See also Daniel Smilov, 'Dilemmas for a Democratic Society: Comparative Regulation of Money and Politics' (2008), DICS Working Paper Series 4/2008, 2.

¹⁷⁹ Robert Nozick, *Anarchy, State and Utopia*, (Blackwell 1974), 149-174.

¹⁸⁰ *Ibid*. See also Theo Papaioannou, 'Technological Innovation and Liberal Theories of Justice' (2009) Innogen Working Paper No. 80, 8-11; Joachim Wundisch, 'Towards a Right-Libertarian Welfare State: an Analysis of Right Libertarian Principles and their Implications' (2014), *Mentis*, 7-10; Daniel Ho. Lowenstein, *Campaign Finance, Race and Equality* (2001) 79(1) *N.C.L. Rev.*; 1535-1540;

1.9.2.2 The Egalitarian Theory

The egalitarian theory has shaped the assessment of the interaction between corporations, campaign contribution and electoral integrity.¹⁸¹ The egalitarian theorists hold the view that inequality of resources should play no role in politics.¹⁸² They focus not on the rights of individuals in a vacuum but on these rights relative to the rights of others.¹⁸³ They advocate for equalization of opportunities for participation in the electoral process and a reduction if not elimination of inequality in electoral process through regulation of contributions, expenditure, media and a public funding to level the playing field.¹⁸⁴ They advocate for the limitation of contributions and expenditure to help legitimize the electoral results.¹⁸⁵

In his book, Rawls¹⁸⁶ sees justice as a social contract executed by people who come together setting aside all their differences and identities.¹⁸⁷ According to Rawls, each person should enjoy *equal rights* as other members of the society to the greatest extent permissible. However, any social and economic inequalities are to be adjusted to guarantee the greatest benefit to the least advantage. All offices and positions must be open to everyone under the conditions of fairness and equality of opportunity.¹⁸⁸ This protection should be provided in the Constitution which must not only enhance the value of the equal rights of participation for all members of society but also guarantee a fair opportunity to take part in and to influence the political process.¹⁸⁹

Permitting the wealthy to use their wealth to control the course of public debate may negate liberties, as the wealthy may exert a larger influence over the development of legislation.¹⁹⁰

¹⁸¹ Adeshina Lanre Afolayan, 'Egalitarianism' (2015) *Encyclopedia of Global Bioethics*.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ *ibid.*

¹⁸⁶ John Rawls, *A Theory of Justice* (Rev. Edn, The Belknap Press of Harvard University Press 1971) at 53.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ *ibid* at 197.

¹⁹⁰ Ibid.

Therefore, steps including public funding and ridding political parties of private economic interests must be taken to preserve the fair value for all the equal political liberties and to prevent electoral apathy and resentment.¹⁹¹

While criticizing the decision of the US Supreme Court in *Citizens United v FEC*,¹⁹² Dworkin¹⁹³ argues that if corporations exercise the immense power that the Supreme Court conferred on them and buy an extremely large share of the television time available for political ads, their campaigns will undermine rather than improve the public's political education. In his view, limiting independent campaign expenditure enhances fairness not only to all candidates but to create the best conditions for the public to make an informed decision when they vote.¹⁹⁴

On free speech, Dworkin argues that the regulation of free speech sustains the active role of the individual citizen in the electoral process, prevents diminution of the citizen's confidence in government and protects the rights of shareholders whose views differ from those expressed by management on behalf of the corporation.¹⁹⁵ Dworkin advocates for a regulated electoral process that seeks to balance both individual and public interests to create an electoral process devoid of undue influence, inequality and unfairness.¹⁹⁶

In pursuit of equality, egalitarians focus on equality of arms, equality of political influence and equality of access to the marketplace of ideas.¹⁹⁷ Equality of arms is aimed at ensuring a candidate or party has an equal ability to spend money and persuade voters and be elected through the limitation of expenditure and public funding of the poor candidates.¹⁹⁸ Equality of influence

¹⁹¹ Ibid.

¹⁹² 8 U.S. 205 (2010).

¹⁹³ Ronald Dworkin, 'The "Devastating" Decision' (2010) *The New York Review of Books*.

¹⁹⁴ Ibid.

¹⁹⁵ Ronald Dworkin, 'The decision that threatens democracy' (2010) *The New York review of Books*.

¹⁹⁶ Ibid.

¹⁹⁷ Lori A. Ringhand, 'Concepts of Equality in British Election Financing Reform Proposals' (2002) 22(2), *Oxford Journal of Legal Studies*, 253-273.

¹⁹⁸ Ibid.

ensures each citizen is able to exert the same level of political influence on their leaders. It is affected through the limitation of contributions.¹⁹⁹

Equality of access to the marketplace protects a citizen's right to equally and openly participate in political discourse as a speaker or a listener. It is achieved through an equal airing of all ideas in the marketplace by a limitation of third-party expenditure in campaign advertising.²⁰⁰

The main objective of the three facets of equality is to ensure that wealth does not translate into more control over the political process and poverty does not severely diminish a candidate's political power.²⁰¹

Fiss however, perceives the debate between libertarians and egalitarians not as an issue of liberty and equality, but one on different perceptions of liberty- as opposed to equality. On the one hand, the right to free speech is impeded by regulation of campaign finance, while on the other hand regulation of campaign finance protects free speech.²⁰² Unregulated free speech would therefore give prominence to the voice of the wealthy and drown out or silence the voice of the less affluent. The State therefore plays an intermediary role of protecting free speech from private aggregations of power.²⁰³

The libertarian and egalitarian theories respond to the utilitarianism theory. Utilitarians posit that people's conduct should result in greatest happiness for the greatest number of members of the society.²⁰⁴ Utilitarians focus on the goal or purpose of a policy or law, as opposed to the rights

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Keena Lipsitz, 'Democratic Theory and Political Campaigns' (2004) 12(2) *The Journal of Political Philosophy* 163-189.

²⁰² Yasmin Dawood, *supra* n197 at 3. For a detailed analysis, see Fiss O., *The Irony of Free Speech* (Harvard University Press 1996); and Fiss O., *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Westview Press 1996).

²⁰³ Ibid.

²⁰⁴ Theo Papaioannou, 'Technological Innovation and Liberal Theories of Justice' (2009) Innogen Working Paper No. 80, 8-11;

which are just legal obligations contributing to maximization of the aggregate utility.²⁰⁵ Utilitarians perceive the law as an instrument to achieve the aggregate good of the greatest number of members in a society.²⁰⁶ Utilitarianism is therefore perceived to focus on achieving the public good through enactment of public policy, which is not only sensitive to people's interests and desires, but takes into account the relevant risk, costs, and benefits.²⁰⁷

Bentham posits that utility is the yardstick for approval of every action in terms of whether it diminishes or improves the happiness of an individual or a society at large.²⁰⁸ Utilitarianism is a useful instrument of analysis for regulating campaign financing particularly on the questions of equality of participation, access, and influence to the political market place and managing the total cost of elections in Kenya.²⁰⁹

Flowing from the foregoing discussions, the egalitarian theory, particularly the Rawls' Theory of justice aptly describes the scenario on corporate contributions applicable to this study. First, it seeks to protect the liberties of each person equally. However, it goes beyond liberty and equality to look at other important considerations including public participation, inclusivity, equality and fairness which inform the electoral process and tries to level the playing field as is demanded by international conventions, regional conventions and the Constitution of Kenya.²¹⁰

Even though the egalitarian theory may not provide an absolute framework of analysis that guarantees the integrity of the electoral system, it minimizes opportunities and motivations to compromise elections.²¹¹ As a strategy, it informs a careful crafting of legislation that strikes the

²⁰⁵ Ibid at 12.

²⁰⁶ Ibid.

²⁰⁷ Shane Leong, et al, 'Managing the Risks of Corporate Political Donations: A Utilitarian Perspective' (2013) 118(2) *Journal of Business Ethics*, 429-455.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ (2010).

²¹¹ Christopher Lowry, 'Global Justice and Two Kinds of Liberalism' (CPSA Queen's University June 2008) <https://www.cpsa-acsp.ca/papers-2008/Lowry.pdf> accessed 25 September 2019.

appropriate balance and safeguards all the competing interests and concerns which demonstrates the utilitarian theory's usefulness to this study.²¹²

1.9.2.3 Critical Legal Theory

This theory engages in politics of reasoning.²¹³ Critical legal scholars look beyond the reasoning of every school of thought and analyze their findings based on politics and the law.²¹⁴ According to Critical legal scholars, law is politics and a form of human activity where political conflicts are worked out in ways that can contribute to the stability of social order.²¹⁵ Law is politics dressed in a different garb, operating within a historical context and in contested ideological struggles in a society.²¹⁶ To Critical legal scholars, legal reasoning cannot exist independently of the political discourse.²¹⁷ They permeate the social reality to expose the actual workings of the society, disclose particular interests identifiable with universal claims and discover how contradictions in the law are denied and instead the status quo presented as the natural state of affairs.²¹⁸

Duncan Kennedy argues that when persons resort to doing certain activities, they would realize in the end that common political orientation is more important than their political disagreements.²¹⁹ He asserts that politics is at the centre of legal thought.²²⁰ That attention should be given to the context of an issue rather than the text.²²¹ Moreover, law should be viewed critically and analyzed

²¹² *ibid.*

²¹³ James Boyle, 'The politics of reason: Critical Legal Theory and Local Social Thought' (1985) 133 (4) *University of Pennsylvania Law Review* 685-780.

²¹⁴ *Ibid.*

²¹⁵ Mark Tushnet, 'Critical Legal Studies: A Political History' (1991) 100(5) *Yale Law Journal*.

²¹⁶ Alan C. Hutchinson et al, 'Law Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36(1) Critical Legal Studies Symposium, *Stanford Law Review*, 199-245, 206. For a detailed analysis of this debate, see also Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685; Roberto Unger, 'The Critical Legal Studies Movement' (1983) 96 *Harvard Law Review*, 561.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ Julen Extabe, 'Law as Politics: Four Relations' (2016).

²²¹ Michael Fischl, 'Some realism about Critical Legal Studies' (1987) 41 *University of Miami Law Review* 505.

in the context of how it interacts with the society, culture, religion and politics.²²² While criticizing the Blackstone Commentaries on Common Law, Kennedy posits that Blackstone's artificial system of absolute and relative rights intended to protect individual autonomy while securing the general welfare was not only illusory but designed to recognize the existing patterns of hierarchy and domination of the Monarchy and the Anglican Church.²²³

The law is therefore seen as an instrument for implementing and enforcing powerful and oppressive political hierarchies. The law being subservient to the ruling interests of the liberal capitalist society to enhance the economic and political power of the ruling groups while neglecting the minorities, poor or weak in the society.²²⁴ On the protection of individual rights as espoused by the libertarians, the Critical Legal Theory perceives the claim for individual rights as exalting the autonomy of the individual over the needs of the community while neglecting the individual's personal need to be part of the community.²²⁵ Consequently, the rights discourse not only deflects the fundamental change in the structure of the society but also diverts focus from more urgent kinds of change in the society.²²⁶

Roberto Unger argues that law cannot decide a case upfront because the law is internally conflicted and inconsistent.²²⁷ The range of ideological conflict in the political arena is replicated in legal doctrine, hence why the law becomes too incoherent to have a sound theory explaining it. There is no linkage between a theoretical grounding and a successful political action.²²⁸ There is therefore

²²² Karin In Van Marle and Joel Modiri, 'What does changing the world entail? Law, Critique and Legal Education in the time of Post-Apartheid' (2012) 129 *The South African Law Journal* 209-219.

²²³ Alan C. Hutchinson et al, 'Law Politics and the Critical Legal Scholars, supra n214 at 218-219.

²²⁴ Judith Wagner DeCew, 'Critical Legal Studies and Liberalism: Understanding the Similarities and Differences' (1990) 18(1) *University of Arkansas Press*, 41-51, 47.

²²⁵ Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685. See also David Andrew Price, 'Taking Rights Cynically: A Review of Critical Legal Studies' (1989) 48(2), *The Cambridge Law Journal* 271-301,273.

²²⁶ David Andrew Price, 'Taking Rights Cynically: A Review of Critical Legal Studies' (1989) 48(2), *The Cambridge Law Journal* 271-301,273.

²²⁷ Readings from Andrew Altman, Roberto Unger and Martha Minow, *Critical Legal Theory* Ch. 5.

²²⁸ William Ewald, 'Unger's philosophy: A critical Legal Study' (1988) 97(5) *The Yale Law Journal* 664.

need to fuse ethical principles and ideas in the law to rescue legal determinacy.²²⁹ The Constitution comes in to avoid a disruption of established institutions that may have contributed to the a kind of crystallized plan of social hierarchy and division.²³⁰ Commenting on the regulation of corporate speech through regulation of independent corporate expenditure, Mark Tushnet argues that corporate speech is a commodity entrenched in capitalist society that can be bought or sold. To him, by striking out regulations limiting corporate speech, the US Supreme Court was merely applying the deep structure of capitalism to this area of constitutional law.²³¹ He assails the capitalist structure which entrenches corporate power and speech.²³²

According to Critical legal theory, doctrine is the basis for analysing a legal system's behavior hence doctrinal analysis is important since neither the political origins nor the way in which decisions may ultimately redistribute benefits or burdens has its relevance in a legal decision.²³³ Law is therefore not an animated abstraction.²³⁴ This theory is relevant in demonstrating the nexus between politics and the law on the one hand and regulation of corporate speech and corporate power on the other hand. It has elicited the deep factors that influence the law including societal structure, culture, religion and politics and how these manifests themselves in the law. Its utility is exemplified in the choice of the research methodology adopted and discussed below.

1.10 Research Methodology

This study utilizes a mixed doctrinal methodological approach by using both document analysis and case study. It employs a qualitative approach in collecting data. As a method, document

²²⁹ Ibid.

²³⁰ Mark Tushnet, 'Some current controversies in Critical Legal Studies' (2011) 12(1) German Law Journal 290-299.

²³¹ Ibid.

²³² Ibid.

²³³ Frank W. Munger and Carrol Seron, 'Critical Legal Studies versus Critical Legal Theory: A comment on Method' (1984) 6(3) Law & policy 256-297.

²³⁴ Peter Gabel, 'Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory' (1977) 61 Minnesota Law Review 601-643.

analysis involves reviewing and evaluating both printed and electronic materials.²³⁵ It requires the researcher to examine data and interpret it in order to elicit meaning, gain understanding, and develop empirical knowledge.²³⁶

In Chapter Two, a historical research methodology is employed. This kind of research explores past happenings with a view of providing a systematic account of the same.²³⁷ Apart from giving specific dates and periods of occurrences, it gives an elaborate explanation and proceeds to interpret the events with an intention of drawing a conclusion on how the same affects or influences the present.²³⁸ This information is gathered from both primary and secondary sources. Historical research allows the researcher to arrive at an accurate account of the past²³⁹ and to contribute to political studies.²⁴⁰

In Chapter Three, a doctrinal research methodology is used. It is a common style of analysis and reasoning among legal professionals.²⁴¹ It analyses all applicable laws that have been passed by government institutions, case law and other authorities.²⁴² It is majorly library based and answers the question of what the law is and says on a particular matter.²⁴³ It analyses legal issues with a view to identifying what needs to be done for further research.²⁴⁴ Further, it is a useful tool for

²³⁵Bowen Glenn A., 2009, 'Document Analysis as a Qualitative Research Method' vol. 9, no. 2 *Qualitative Research Journal* pp. 27-40.

²³⁶ Ibid.

²³⁷ Jovita J. Tan, 'Historical Research: A Qualitative Research Method' (2015).

²³⁸ Ibid.

²³⁹ Methodology: Historical Method, Steps in Historical Research, Sources, Criticism of data pp. 24-42 Ch. 5.

²⁴⁰ Fritz Sager and Christian Rosser, 'Historical Methods' (2015) *The Routledge Handbook of Interpretive Political Science*.

²⁴¹ Amrit Kharel, 'Doctrinal Legal Research' (2018).

²⁴² Ibid.

²⁴³ Salim Ibrahim Ali et al, 'Legal Research of Doctrinal and Non-Doctrinal (2017) 4(1) *International Journal of Trend in Research and Development*.

²⁴⁴Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 pp. 130-138.

clarifying any ambiguities in the law and proposing various reforms in laws and the legal system at large.²⁴⁵

In Kenya, many reports have been penned on Kenya's elections since independence. The various reports contain most accounts of various parties and candidates on the issue of campaign contributions in Kenya and the need for regulation. The said reports form the primary basis of analysis.

The research relies on published and unpublished documents for secondary data. It consults relevant books, book chapters, law reports, statutes, journal articles, published and unpublished government reports. Anecdotal sources, particularly credible newspapers, have been consulted for current affairs. The foregoing materials have been obtained from various libraries including the University of Nairobi's Parklands Law Library, Jomo Kenyatta Memorial Library, and the author's personal library. Online resources complemented the foregoing online resources where necessary.

In addition, a case study of the Goldenberg scandal provides an important insight into Kenya's experience in election campaign finance and the justification for regulating corporate campaign contributions. Case study enables a researcher to select a very limited phenomenon; examine data within a very specific context or investigate the said phenomenon in its real-life context.²⁴⁶ As a method, it allows this study to focus on the Goldenberg scandal as the subject of the study and relate the same to corporate campaign financing in Kenya and justify the need to regulate corporate campaign financing in Kenya.²⁴⁷ Goldenberg scandal was settled on because in post-independence

²⁴⁵Vijay M. Gawas, 'Doctrinal Legal Research Method a guiding principle in reforming the law and legal system towards the research development' (2017) 3(5) International Journal of Law 128-130. See also Paul Chynoweth, *Legal Research* (Ch. 3) available at http://www.csas.ed.ac.uk/data/assets/pdf_file/0005/66542/Legal_Research_Chynoweth_-_Salford_Uni..pdf (accessed 30 September 2019).

²⁴⁶ Zaidah Zainal 'Case Study as a research method' [2007], *Jurnal Kemanusiaan*, Bil. 9, 1-2.

²⁴⁷ Donna M. Zucker 'How to do Case Study Research' (2009), *Teaching Research Methods for in the Humanities and Social Sciences*, University of Massachusetts, 1. For a more detailed review of case study as a research method, see generally Yin, R.K., *Case Study Research: Design and Methods* (2nd Ed., Sage Publishing, 1994).

Kenya, it is one of the most reported and publicised corruption scandal in Kenya involving the government, corporate bodies, politicians and individuals, with an intention for raising campaign funds from public coffers through government contracts. The Goldenberg scandal enables this study to draw a discernible link between lack of regulation of corporate campaign financing and corruption in Kenya and the role corporations have played in Kenya's elections since independence to justify their regulation.

1.11 Chapter Breakdown

Chapter One has introduced this study and gives its context. It also identifies the problem statement, sets the research aims, the relevant questions of inquiry and gives the hypothetical answers to the relevant questions of inquiry. A detailed literature review, the conceptual and theoretical framework as well as the research methodology are adopted in the research project.

Chapter Two gives a historical, social and economic context and role of money in Kenya's politics. It traces the history and the role corporations have played in Kenya's politics during the colonial period, post-independence Kenya with a focus on the Kenyatta, Moi and Kibaki eras, and after the promulgation of the 2010 Constitution.²⁴⁸ It also looks at the impact of money on elections and the various attempts to regulate the use of money in politics with a view to contextualize this study. This chapter informs the next chapter on the regulation of corporate campaign contributions in Kenya.

Chapter Three analyzes the laws and institutions that seek to regulate corporate campaign contributions in Kenya. Starting with the international legal framework, it places the regulation of corporate campaign contributions in the global, regional, and local platform in terms of the laws,

policies, principles and values that undergird regulation and reform thereof. Relevant cases are also reviewed within the chapter.

Chapter Four is a case study of Kenya with a specific emphasis is on the interplay between the practice and the law in pre-Constitution of Kenya²⁴⁹ and the emerging issues arising therefrom. The chapter critically analyses the Goldenberg scandal its role in the 1992 General Elections and the impact of the scandal on Kenya's electoral process. This chapter also discusses lessons learnt from the same which informs the subsequent enactment of the Campaign Financing laws.

Chapter Five reviews the regulation and practice of corporate campaign contributions in Canada and South Africa. It analyses the trends, similarities, differences and challenges faced by those states in regulating corporate campaign contributions with a view to suggest good practices that Kenya can adopt in its attempt to effectively regulate corporate campaign contributions in Kenya.

Chapter Six concludes on the issues raised in this research project and makes recommendations on how the campaign financing laws can be harmonised to effectively regulate corporate campaign contributions in Kenya, and enhance integrity, transparency and accountability in the electoral process.

1.12 Conclusion

In this chapter, the research has detailed the background of the study and the problem the research is analysing in the hope of solving the outlined objectives, questions, justification, as well as some key assumptions in the study. The relevant literature has also been reviewed for the study. Most importantly, it has given a theoretical premise for the evaluation of campaign finance law in Kenya especially corporate campaign contributions.

Chapter Two looks at the historical background on campaign financing in Kenya. It looks at the eras post colonialism and how political parties used to fund their campaigns. It creates a picture on how government involvement in financing of campaigns for political parties creates a hurdle in the quest for a well-regulated electoral campaign financing.

CHAPTER TWO

HISTORICAL CONTEXT OF CAMPAIGN FINANCING IN KENYA

2.0 Introduction

This chapter addresses the historical, social and economic aspects of money in Kenya's politics. It briefly looks at Kenya's political history during the colonial and post-colonial periods in Kenya. The post-colonial period is also briefly discussed in pre and post 2010 phases. It discusses the role and impact of corporate money in Kenyan politics and the various legal, political and institutional developments in Kenya during the two periods. It further highlights the steps taken by Kenya to regulate the use of money in politics during the said periods.

2.1 Kenya during the Pre-Colonial, Colonial and Post-Colonial periods

2.1.1 Pre-Colonial Period

During the pre-colonial period, Kenya did not exist as a state.²⁵⁰ There was no large-scale state formation.²⁵¹ The largest political unit was a clan comprising families related by blood.²⁵² There was little political activity outside the clan and therefore no need to contribute resources for financing political activities.²⁵³ Money was also not used during this period as a medium of exchange.²⁵⁴

²⁵⁰Charles Hornsby, *Kenya: A History Since Independence*(Reprint Edn I.B. Taurius) 1.

²⁵¹ Ibid.

²⁵² ibid.

²⁵³ Ibid.

²⁵⁴ Moses Onyango edited by Kenneth Omeje, *The crisis of post coloniality in Africa* (Council for the Development of Social Science Research in Africa 2015).

2.1.2 Colonial Period

Colonialism is characterised by political, economic, and cultural domination of Africans by Europeans.²⁵⁵ The rules for colonial occupation were set during the 1884-85 Berlin Conference.²⁵⁶ The Conference created artificial territorial boundaries around Kenya and wrestled diplomatic initiative from the people of Kenya.²⁵⁷ In 1894, the British declared Protectorate status over Kenya. Boundaries were demarcated without the people's consent or consultation.²⁵⁸

After declaring Kenya as a protectorate, the British needed to have effective presence and control of Kenya to exploit the natural, human and economic resources to sustain their activities in Kenya.²⁵⁹ To this end, the British incorporated the Imperial British East African Company (IBEACO) and appointed its employees as the first colonial administrators in Kenya. IBEACO employees were responsible for recruiting and procuring local labour for the construction of the railway, maintaining and providing security for the railway line and the settlers and performing other administrative tasks to support British settlers in Kenya.²⁶⁰

Kenya's administration was divided into provinces, districts, divisions and locations.²⁶¹ All the provinces, districts and divisions were put under the jurisdiction of British officers, while locations became the responsibility of African Chiefs.²⁶² The Chief, though revered as an African leader became an agent of the colonial administration.²⁶³ Africans were restricted in the reserves under the leadership of the Chief.²⁶⁴ Above the Chiefs was an Assembly comprising five officials; three

²⁵⁵ Akinmade Donald Oluwafisayo, 'Colonial Legacy and the Refracted State: Africa in Motionless Motion' (2014) Vol. 3 No. 9 *Journal of Arts and Humanities* pp.62-72.

²⁵⁶ Ibid.

²⁵⁷ Ibid. See also the Anglo-German Agreement of 1886.

²⁵⁸ Ibid.

²⁵⁹ Moses Onyango, edited by Omeje K., *The crisis of post coloniality in Africa* (Council for the Development of Social Science Research in Africa 2015).

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Ibid at 186.

²⁶³ Ibid.

²⁶⁴ Ibid.

of whom were nominated settler members.²⁶⁵ With the majority of British members in the Assembly, the African voices were not heard.²⁶⁶ Through legislative pronouncements of 1902 and 1912, the Chiefs were tasked with maintaining public order, keeping the roads clear, providing labour for public activities and white settlers, collecting taxes and hearing petty native cases.²⁶⁷

The British colonial administration acted on orders and instructions from Britain. They did not engage African community leaders.²⁶⁸ The Executive authority of the colony was exercised by the Governor-General who ruled initially in the absence of a strong legislature.²⁶⁹ In October 1906, the Legislative Council was established to make laws and represent white settler opinion.²⁷⁰ The first election to the LEGCO was held in 1919 and British elected 11 representatives. The Indians and Arabs could elect representatives in 1924, but Africans were excluded.²⁷¹ The British dominated the Executive and Legislative Council and formulated government policies considering primarily their interests.²⁷² The exclusion completely kept Africans out of the political process.

In 1925, the Colonial Government established the Local Native Councils (LNCs) chaired by colonial District Officers (DOs) where Africans voices could be heard.²⁷³ However, most members to the LNCs were government appointees and could not champion African interests. The LNCs only provided a forum for the communication of African grievances to the DCs who chaired them. However, the DOs suppressed the native participation in the Boards and ensured that African interests remained subservient to those of the British settlers.²⁷⁴

²⁶⁵ *ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ *ibid* at 187.

²⁶⁸ Ndege P.O., 'Colonialism and its Legacies in Kenya' (2009) 32.

²⁶⁹ Daniel Branch and Nicholas Cheeseman, 'The Politics of Control in Kenya: Understanding the Bureaucratic-Executive State' [2006] Vol. 37 No. 107 *Review of African Political Economy* at 18.

²⁷⁰ Hornsby C., *Kenya: A History Since Independence* (Reprint Edn I.B. Taurius), 30.

²⁷¹ *Ibid.*

²⁷² Oginga Odinga, *Not yet Uhuru* (17th Edn East African Educational Publishers Ltd 2011).

²⁷³ *ibid.*

²⁷⁴ *Supra*, fn 243.

The colonial provincial administration prevented political meetings to raise funds, denied Africans permission to hold public meetings and often used force to suppress protests or disperse meetings organized by Africans.²⁷⁵

The oppressive and exclusive colonial administrative structures, coupled with the deprivation of land, the imposition of hut and poll taxes (to compel Africans to provide cheap labour), and the exclusion of Africans in the management of the affairs of Kenya necessitated the struggle for independence in Kenya that immediately came after the First World War.²⁷⁶

Several African political Associations were established across the colony including the Kikuyu Association formed in 1920,²⁷⁷ Young Kikuyu Association established in 1921, the Young Kavirondo Association, and the East African Association, with Harry Thuku as the Secretary General.²⁷⁸

The African Associations clamoured for the return of alienated land,²⁷⁹ challenged the Kipande System, which required Natives above 16 years of age to carry a Registration Card, the *Kipande* and protested the increase in Hut and Poll Tax from 5 Rupees to 10 Rupees.²⁸⁰

Many people gave both monetary and non-monetary contributions to finance the activities of the African Political Associations.²⁸¹ For instance, Mr M. A. Desai, the Editor of the East African Chronicle published the African Grievances in his Newspaper and provided an Office for the activities of the East African Association.³⁰ Another Indian businessman donated a car to provide

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Margaret Wangui Gachihi, 'The role of Kikuyu women in the Mau' (MA Thesis, University of Nairobi 1986).

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Ibid.

transport for the Officials of the East African Association. Other supporters contributed a shilling per month to support the East African Association's activities.³¹

In 1924, the Kikuyu Central Association (K.C.A) was formed with Johnstone (Jomo) Kenyatta as its General Secretary. The Association's objectives were both economic and political. It petitioned the Governor to permit Africans to grow cash crops including Coffee and to repeal the Hut Tax. It also clamoured for the appointment of a Kikuyu Paramount Chief, for the publication of the laws in the local Kikuyu language and for the release of Harry Thuku.³⁴ The K.C.A published a Newspaper, the *Muigwithania* which it used to popularise itself and its views.³⁵

In 1929, Jomo Kenyatta was financed by local contributions from Kiambu. He travelled to England to petition the Secretary of State and demand for direct election of Africans to the Legislative Council and have the African grievances addressed. By 1931, the K.C.A had registered more than 10,000 members with about 8,000 members paying a monthly contribution of 6 dollars a month.³⁶ These contributions assisted the Association in its activities.

In 1935, Harry Thuku established the Kikuyu Provincial Association (K.P.A).²⁸² In order to persuade the members of K.C.A to join the K.P.A, the K.P.A reduced their membership subscription to Kshs. 10 compared to the Kshs. 18.50 that was charged by the K.C.A. Its members were also asked to make annual contributions of between Two and Three shillings each.²⁸³

Other Associations formed in Kenya included the Progressive Kikuyu Party, the Kikuyu Loyal Patriots, the North Kavirondo Central Association, Ukamba Members Association, Taita Hills Association.²⁸⁴

²⁸² Timothy Parsons, 'Being Kikuyu in Meru: Challenging the Tribal Geography of Colonial Kenya' (2012) Vol. 53 *Journal of African History* pp. 65-86.

²⁸³ Ibid.

²⁸⁴ Ibid.

These associations presented their grievances to the colonial administration and Commissions on land and the administration of justice among Africans.²⁸⁵ These Associations also clamoured for the recognition and protection of their freedoms of speech and association. They also wanted to be freely allowed to collect funds for their political activities which had been restricted by the powerful chiefs. The Associations also wanted the colonial administration to lift the prohibition of political meetings²⁸⁶ However, in 1939, with the 2nd World War, the Government banned the K.C.A and imposed further firm measures to curb political activity amongst Africans.²⁸⁷

After the end of the 2nd World War, Africans became more politically conscious.²⁸⁸ Many of those who had gone to serve as soldiers in the World War and had returned home were now more exposed, had developed new skills, and were confronted by the high cost of living and the lack of adequate housing in the urban centres. These factors played a key role in raising the African political consciousness.²⁸⁹ Several local associations were formed at the Coast, among the Kipsigis Nandi (Kipsigis-Nandi Union), and the Maasai Union and in Nyanza through the Luo Union.²⁹⁰

In 1944, the Kenya African Study Union (K.A.S.U) was formed by moderate Africans to bring together Africans of the whole Colony.²⁹¹ The Union appealed for contribution of funds from the whole population of Kenya but only received support from the Asians and Africans.²⁹² The increased pressure and political activity resulted in the nomination of Eliud Wambu Mathu as the first African representative in the LEGCO in 1944.²⁹³ K.A.U leadership was drawn from across

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Arthur Munene Njari, 'The Colonial legacy in Kenya-British Military Relations: 1963-2005' (MA Thesis, Kenyatta University 2013).

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Kathryn R. Meyer, 'Kenya: Decolonization, Democracy and the Struggle for *Uhuru*' (Thesis, Mount Holyoke College 2015).

²⁹² Ibid.

²⁹³ Ibid.

the board with Jomo Kenyatta, Eliud Mathu and W.W.W Awori, among others.²⁹⁴ It published a newspaper, *Sauti ya Mwafrika*. Contributions to K.A.U were made primarily by its more than 100,000 registered members each paying an annual subscription of Kshs 5.²⁹⁵ This enabled the union to organise mass meetings and rallies across Nairobi and Central provinces.²⁹⁶

In October 1952, the colonial Government proclaimed a State of Emergency to deal with the Mau-Mau insurgency.²⁹⁷ Kenyatta and other K.A.U leaders were arrested and detained in Kapenguria. In 1953, the colonial Government banned K.A.U and did not allow formation of subsequent colony-wide political organisations. In 1955, the colonial government permitted Africans to form only district-wide political associations.²⁹⁸

The Trade-Unions, particularly the Kenya Federation of Labour (K.F.L), under the leadership of Tom Mboya filled the vacuum left by the ban on colony wide political parties in 1953.²⁹⁹ Tom Mboya managed to galvanise workers from different ethnic groups across Nairobi and Mombasa.³⁰⁰ He contacted his friends in the west and sourced funding from the United States of America (USA) to support the activities of K.F.L.³⁰¹ He also sourced for education scholarships to help educate Africans in the USA.³⁰²

At the same time, Oginga Odinga led the Luo Union which grew to become the largest union in East Africa.³⁰³ He also established the Luo Thrift and Trading Corporation to help Africans establish businesses.³⁰⁴ He solicited funding from the Communist countries and secured

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Ibid.

²⁹⁹ Pio Gama Pinto, *Glimpses of Kenya's Nationalist Struggle* (Asian African Heritage Trust 2014).

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ Ibid.

scholarships for Africans to acquire university education and invested profits received from the business in Kenya's politics.³⁰⁵ This made the British colonial government wary of his activities in Kenya.³⁰⁶

Flowing from the foregoing, the colonial history confirms that political was reserved for the wealthy white settlers and the Asian businessmen. Africans were excluded from colonial politics until after the 1st World War where Africans formed various political associations. These Associations were later merged into unions and subsequently political parties. Most African political associations including the K.C.A, K.P.A, K.A.U and K.A.S.U received monetary contributions in the form of membership subscriptions and annual contributions. Secondly, these associations fundraised from individuals and entrepreneurs. Third, these associations also received material support which included cars, office space and publicity of their grievances in Newspapers from Asian businessmen and African entrepreneurs. Fourth, profits from African business enterprises such as the Luo Thrift and Trading Company was ploughed back to politics. Fifth, African Associations and unions which included the Kenya Federation of Labour received foreign donations from the United States and the Communist countries.³⁰⁷ The Associations received support from various sources to enable them to finance their activities.

2.1.3 Post-Colonial Period

The post-colonial period is discussed in two phases, the pre and post 2010 spheres.

Negotiations for independence took place between 1960-1962 where Kenyan leaders agreed on a draft federal Constitution providing for both national and regional governments.³⁰⁸ Kenya attained

³⁰⁵ Ibid.

³⁰⁶ Ibid.

³⁰⁷ Stephen Kajirwa Keverenge, 'Political Party formation and Alliances: A case of Kenya' (Thesis, Atlantic International University).

³⁰⁸ H.W.O Okoth-Ogendo, 'The Politics of Constitutional Change in Kenya since Independence, 1963-69' (1972) Vol. 71 No. 282 *African Affairs* 9-34.

self-governance on 1 June 1963 with Jomo Kenyatta as Prime Minister, and became a republic with Kenyatta as the President on 12 December 1964.³⁰⁹ The independence government adopted the colonial administrative structures, economic, and political structures.³¹⁰ Compared to the colonial government, the post-colonial government became more autocratic and was not accountable to the people of Kenya.³¹¹ Through various constitutional amendments, the post-colonial governments of Kenyatta and Moi transformed Kenya into a patrimonial and autocratic state.³¹²

2.1.3.1 Pre-2010

In Kenya, political parties were mainly registered as societies. These political parties were controlled and managed by a few individuals who did not disclose their party funds. In as much as the Societies Act required societies (including political parties) to file annual returns on their income and expenditure, political parties failed to regularly comply or even at all. The Government also failed to enforce the law thereby negating the need to regulate political party operations, introduce fiscal discipline and curb electoral malpractices. However, the said Act does not restrict or limit any donations. This opacity, lack of transparency and accountability allowed candidates with wealth and connections to have their way and lock out poor candidates who might otherwise have had better policies.

³⁰⁹ *ibid.*

³¹⁰ *ibid.*

³¹¹ *ibid.*

³¹² Key amendments included the reduction of the threshold for constitutional amendments from 90% to 65% in Senate and 75% to 65% in the House of Representatives; the deletion of the executive power vested in the regional governments; the introduction of automatic vacation of the seat in the National Assembly by absconding eight sittings of the National Assembly or joining the Kenya Peoples Union (KPU) without seeking a fresh mandate from the voters; the introduction of emergency detention provisions in the Constitution and further derogation of fundamental human rights; abolishing the Senate and appointment of the Speaker of the National Assembly as the Chairperson of the Electoral Commission of Kenya, amongst others.

The first attempt to regulate campaign financing in Kenya was in 1979 ahead of the general elections. There were reports of widespread bribery of voters prompting KANU and the Parliament to pass the Election Laws (Amendment) Act. The Act capped the permissible campaign expenses to 40,000/- and raised the penalties for committing election offences. The cap on expenditure applied only once the candidate had been nominated. A breach of the spending limits attracted a maximum jail sentence of seven years. However, the Government and KANU expressly admitted they were unable to enforce its provisions. This negated the objective of levelling the political playing field and encouraged bribery and acts of impunity by politicians.

Candidates and parties continued to receive contributions from questionable sources which they were not enjoined to disclose or account for. The lack of an accountability framework provided an avenue for the parties and candidates to spend huge sums of money to influence voters' choices through voter bribery and vote buying. This affected the integrity of the electoral outcome.

In 1982, the Moi Government introduced section 2A that transformed Kenya a one party state by law.³¹³ In December 1991, Parliament repealed section 2A of the Constitution thereby bringing to an end the *de jure* one-party rule in Kenya and re-introduced multiparty politics in Kenya.³¹⁴ The re-introduction of multi-party system in Kenya opened up Kenya's political space for democratic competition.

The foregoing scenario increased the risk for corruption in politics in that there was no requirement for disclosure of income and expenditure; donations and the donors; in-kind income and no income was subject to public scrutiny. The legal lacuna created a permissive environment that opened opportunities for electoral malpractices which included bribery of voters and vote-buying. The same environment also provided an avenue for the prevalence of corruption especially after the re-

³¹³ Constitution of Kenya (Amendment) Act No 7 of 1982.

³¹⁴ Constitution of Kenya (Amendment) Act No 12 of 1991.

introduction of multipartism in Kenya in 1991 which increased the democratic space as well as inter-political party competition thence creating a demand for more campaign funds and consequently increasing opportunity for corrupt political financing through the selling of patronage to the biggest donors and voter bribery.

To raise money for the 1992 general elections, Moi government created political banks which went under soon after the elections, appointed incompetent persons who plundered public resources through the Goldenberg International Limited and Exchange Banks and diverted the proceeds to campaign for K.A.N.U candidates and bribe his opponents. Huge amounts of taxpayers' money about Kshs 2 Billion (US\$208-million) were utilized in Moi's election campaigns for a variety of purposes including hiring transport for voters and bodyguards, employment of thugs and bodyguards, distributing party T-shirts and cash tokens to voters.³¹⁵ The private sector with economic interest to protect also contributed money to K.A.N.U's campaign fund. The government also initiated large scale projects of questionable viability where monies were diverted to fund politics and funds diverted to fund the 1992 general elections. The sums spent by K.A.N.U were never acknowledged or disclosed. The sums exceeded what Moi and his partners could afford and seriously threatened Kenya's economic stability, created serious inflation in the aftermath of the election and nearly crippled Kenya's economy.³¹⁶

The Democratic Party (DP) whose Presidential Candidate was Mwai Kibaki had the financial backing of big Kikuyu businessmen while the inner circle of Forum for Restoration of Democracy-Asili (Ford-Asili) whose Presidential Candidate Kenneth Matiba included the Chairman of (BAT) Kenya, who had close ties to the Kenyatta family. FORD-Kenya whose Presidential Candidate

³¹⁵ Throup, D W & C Hornsby, *Multi-party Politics in Kenya: The Kenyatta and Moi States & the Triumph of the System in the 1992 Election* (1998) Athens, Ohio: Ohio University Press p 351-352, 358.

³¹⁶ Ibid.

was Oginga Odinga also raised 80% of its campaign contributions from a few large donations including from Kamlesh Pattni and from other anonymous well-wishers.³¹⁷

In the 1992 general elections, eight parties participated including KANU, FORD Kenya, FORD (Asili) and the Democratic Party. KANU's presidential candidate won the elections with 36% of the total votes cast.³¹⁸ In addition, KANU took 93 seats in the National Assembly, while both FORD (Kenya) and FORD (Asili) each won 31 seats with DP winning 23 seats.³¹⁹ However, The total votes garnered by the opposition was more than those garnered by the KANU Candidate President Daniel Toroitich Arap Moi while in the National Assembly. KANU had a narrow majority of Members of Parliament.³²⁰

In 1997 general elections was conducted within an environment of minimal changes through the Inter Parties Parliamentary Group (1997). However, the practices of undemocratic consolidation, domination, corruption and manipulation of political processes and institutions continued in the 1997 general elections. The 1997 general elections, like those in 1992, saw the misappropriation of state resources to instigate ethnic clashes, with the intention of terrorizing opposition supporters.³²¹

The 2002 general elections marked a significant shift in Kenya's voting history as Moi was not a Presidential candidate.³²² The election was marked with allegations of vote-buying where large sums of money were distributed at campaign rallies by party leaders and officials. It is reported that KANU bribed, rigged elections and intimidated supporters and voters of opposition candidates

³¹⁷ Sarah Elderkin, *Raila Odinga: The Flame of Freedom* (2015) Mountain Top Publishers, 230-236. See also Lukong Shulika, Wilson Muna et al, 'Monetary Clout and Electoral Politics in Kenya: The 1992 to 2013 Presidential Elections in Focus' (2014) Vol. 13 No. 2 *Journal of African Elections* 196-215.

³¹⁸ Ibid.

³¹⁹ Ibid.

³²⁰ Ibid.

³²¹ Lukong Shulika, Wilson Muna et al, 'Monetary Clout and Electoral Politics in Kenya: The 1992 to 2013 Presidential Elections in Focus' (2014) Vol. 13 No. 2 *Journal of African Elections* 196-215.

³²² Ibid.

but its candidate lost the presidential elections.³²³ Despite these reported contraventions, the 2002 election resulted in Kenya taking a crucial step in electoral development.³²⁴

In 2007, Parliament enacted the Political Parties Act to regulate the formation, management and public funding of political parties.³²⁵ The Act established the Political Parties Fund³²⁶ and tasked Registrar of Political Parties to administer the fund and enforce the law. Sources of the fund to the Political Parties Funds include allocations by the Minister of Finance in the annual estimates; and contributions and donations to the Fund from any other source. There was no fixed percentage of allocations to the Fund.³²⁷ The Act set out a formula for sharing of the funds among all political parties and identified the user of disbursements from the Fund.³²⁸

In addition, the Act permitted political parties to raise additional funds from membership fees, voluntary contributions and donations by individuals not exceeding five million shillings in any year, bequests and grants from any other source. Political parties could also utilize proceeds of any investment, project or undertaking in which the political party. However, the Act prohibited donations from aliens, foreign governments, inter-governmental or nongovernmental organization. The Act enjoined political parties to disclose to the Registrar full particulars of all funds or other resources obtained by it from any source,³²⁹ file expenditure reports within ninety days after an election and publish the sources of its funds including all sums received from the Fund and other sources including contributions from members and supporters and the donations to the party.³³⁰

³²³ Bachelard, J Y., 'The Anglo-Leasing corruption scandal in Kenya: The politics of international and domestic pressures and counter-pressures' (2010) *Review of African Political Economy*, 37(124), p 187–188.

³²⁴ Throup, D W. 'The Kenya general election: December 27, 2002' (2003) *Africa Notes* 14.

³²⁵ The Political Parties Act, 2007 (now repealed).

³²⁶ The Political Parties Act, 2007, Section 28.

³²⁷ Section 29 of the Political Parties Act, 2007.

³²⁸ Section 30(1), (2) & (3) the Political Parties Act, 2007.

³²⁹ Section 31.

³³⁰ Section 32(2).

The Auditor General was tasked with auditing the Accounts of all Political Parties and tabling audit reports to Parliament.³³¹

In the 2007 general elections and in disregard of the Political Parties Act, corporations and businesspersons continued playing a key role in availing resources to candidates and politicians.³³²

They provided loans to candidates and gave substantial donations to the campaign kitties of political parties and provided services to the candidates. Most corporate donors were companies in the construction and energy industries. Six energy and construction companies donated substantial sums to both Party of National Unity (PNU) and Orange Democratic Movement (ODM).³³³ The 2007 elections allegations of sparked concerns about the misuse of state funds and resources to fund election campaigns. In addition, there were increased cases of state patronage and bribery of votes.³³⁴ Ahead of the 2007 general elections, the Anglo-leasing scandal emerged linking corruption and money laundering as tools to manipulate the electoral outcome. The scandal involved a series of security contracts with official payoffs that were meant to fund and support the government's support of the 2005 Constitutional Referendum and NARC's 2007 election campaign.³³⁵ The Kriegler Commission found that the 2007 presidential election was void of transparency and was stifled with extensive bribery, coercion, vote-buying and voting fraud, which made the whole electoral process flawed. President Mwai Kibaki and Prime Minister Raila Odinga spent at least \$75 million on their presidential bids in 2007 while parliamentary candidates spent

³³¹ Section 34(1).

³³² Karuti Kanyinga and Duncan Okello, *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections* (Society for International Development (SID) & Institute for Development Studies, University of Nairobi 2010).

³³³ Ibid.

³³⁴ CAPF, *The Money Factor in Poll Race: A Monitoring Report of the 2007 General Election* (2008) p 11. See also Bay, S. 'Intelligence and State-Building – Understanding the Role of Intelligence Services in State-Building: The case of Kenya' (2010) MA Thesis, Department of Political Science, Lund University.

³³⁵ Chege, M. 'Kenya: Back from the Brink?' (2008) *Journal of Democracy* 19(4), p 129.

an average of \$100 000. The sources of these funds were however not disclosed or accounted for.³³⁶

To comply with the Political Parties Act, the Minister of Finance allocated a paltry Kshs. 200 million to political parties in the 2009/2010 budget. This token allocation was insufficient, and parties were left to continue relying on private donors, patrons, elected officials, to finance party activities with the negative consequences on democracy and party autonomy. The Finance Minister did not feel obliged to allocate further funds to political parties in Kenya thus defeating the purposes of the legislation to limit private influence on political parties.³³⁷

Money has thus been a major factor in the Kenyan political arena, and this has created a major

The Kibaki Administration also amassed money for the 2007 campaign through abuse of leasing and financing of security and security related projects through the Anglo-Leasing and Finance Limited.

The corrupt financing of election campaigns in Kenya resulted in a lack of meaningful participation and competition in Kenya, peddling of influence, locking out of competent but poor candidates, marginalization of the youth, women and persons with disability and negatively affected human rights, rule of law, the legislative process and Kenya's economy. Consequently, democratic governance in Kenya was compromised and the principle of free and fair elections defiled.

During this phase, two major corruption scandals involving top Government officials ensued and were linked to political financing. The Goldenberg and Anglo-leasing scandals. The two scandals involved contracts worth huge sums of money in Kenya which were procured and paid from the public coffers and reportedly used to finance the 1992 and the 2002 and the 2007 general elections.

³³⁶ (International Crisis Group 2013, p 31; The East African News 2012).

³³⁷ Friedrich Ebert Stiftung (FES), 'Institutionalizing Political Parties in Kenya' (2010) available at <https://library.fes.de/pdf-files/bueros/kenia/07885.pdf> accessed 15 November 2019.

The two scandals involved a cocktail of corruption, embezzlement of public funds, donations of proceeds of corruption to candidates and political parties and the use of state machinery to protect or cover up the key players in the scandals.

2.1.3.2 Post-2010 Phase

The 2010 the Constitution³³⁸ provides for core principles governing the electoral process of which campaign is part. These principles include the right to vote or contest in a general election, fair representation, equality of vote and free, fair and transparent elections devoid of violence, intimidation, improper influence or corruption.³³⁹

The Constitution³⁴⁰ also establishes the Independent Electoral and Boundaries Commission (IEBC) and tasks it with conducting general elections. The Commission is tasked with the monitoring and regulation of party nomination process, registration of candidates, facilitation of the observation, monitoring and evaluation of elections as well as regulating money used in election campaigns.³⁴¹ Moreover, the Commission prepares the Code of Conduct to be executed by candidates and monitors compliance with all electoral laws in Kenya.³⁴² The Constitution further provides for funding of political parties.³⁴³

The foregoing constitutional framework underscores the necessity of integrity, transparency, accountability, equality, prevention of undue influence or corruption in elections, and the participation of the people in Kenya's electoral process.

³³⁸ Constitution of Kenya, 2010.

³³⁹ Ibid.

³⁴⁰ Ibid, Article 88.

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ Ibid, Article 92(f).

Following the promulgation of the Constitution of Kenya,³⁴⁴ the National Assembly introduced the Campaign Finance Bill.³⁴⁵ This Bill sought to enhance transparency, disclosure of sources of financing for both candidates and political parties, and to provide safeguards to ensure accountability of the Campaign Committee established therein.³⁴⁶ The National Assembly also enacted the Political Parties Act,³⁴⁷ which regulates the funding of political parties by the State and other persons and provides safeguards for use of and management of funds received by political parties to enhance transparency and accountability in political parties in Kenya.³⁴⁸

In the 2013 general elections, the main political coalitions, CORD and the Jubilee Alliance spent huge funds in the election campaigns. Spending during the campaign period was largely unregulated even though the existing Political Parties Act prohibited political parties from obtaining foreign funding or funding from aliens or exceeding the expenditure cap of Kshs Five Million per contributor. Parties spent huge sums on items like political advertising and messaging, logistical arrangements such as motor vehicles, fixed wing aircrafts, helicopters and other campaign materials.³⁴⁹ In addition, reporting requirements for private campaign contributions and expenditure were inadequate. There was no transparency in the electoral process and the law was not enforced.³⁵⁰ The Commonwealth and the African Union observation teams recommended a comprehensive legal framework for party and campaign finance regulation should to ensure probity, transparency and fairness in electoral financing.³⁵¹

³⁴⁴ (2010).

³⁴⁵ (2011).

³⁴⁶ Ibid.

³⁴⁷ (2011).

³⁴⁸ Ibid.

³⁴⁹ African Union Commission, 'Report of African Union Elections Observation Mission to the 4 March 2013 General Elections in Kenya' (2013), *African Union Elections Observation Mission Report: Kenya*.

³⁵⁰ Commonwealth Secretariat, 'Report of the Commonwealth Observer Group: Kenya General Elections 2013'.

³⁵¹ Ibid.

Flowing from the foregoing examples, it is apparent that corporations have contributed to Kenya's electoral process. They have funded candidates and political parties for various reasons. Through contributions, corporations may peddle influence, bridge money and politics and engage in wanton corruption as reported in both the Goldenberg and Anglo-Leasing cases in Kenya.³⁵²

Corruption in campaign financing includes illegal financial contributions, illegal expenditure, use of state resources for political campaigns or quid pro quo donations to parties and candidates.³⁵³

Unlike natural persons, corporations are juridical persons deprived of the right to vote yet enjoy inherent fundamental rights.³⁵⁴ These rights may include the right to free speech and freedom of expression.³⁵⁵ Corporations may, in exercise of the right to free speech or expression spend money in politics.³⁵⁶ Their juridical nature coupled with the attendant benefits, perpetual existence, and favourable treatment in accumulation and distribution of wealth enables corporations to amass money in the economic market place and leverage these resources in politics.³⁵⁷ This may result in the erosion of public confidence in the political system, disempowerment of voters, marginalisation of other qualified and competent but poor candidates and the erosion of fundamental principles of democracy and accountability.³⁵⁸ The need for regulation cannot therefore be underscored.

However, the Election Campaign Finance Bill³⁵⁹ was deliberately delayed by the National Assembly and passed after the 2013 general elections.³⁶⁰ The Election Campaign Financing Act

³⁵² Ibid.

³⁵³ Edwin Nwatarali and Nathan Uche Dim, 'Investigating the Financial Income Streams of Political Parties in Nigeria' (2015) Vol. 6 No. 5 *International Journal of Innovation, Management and Technology* pp. 358-362.

³⁵⁴ Constitution of Kenya, 2010.

³⁵⁵ Ibid, Article 33.

³⁵⁶ Stephan Stohler, 'One Person, One Vote, One Dollar? Campaign Finance, Elections, and Elite Democratic Theory' (2010) Vol. 12 No. 4 *Journal of Constitutional Law* pp.1257-1278.

³⁵⁷ Ibid.

³⁵⁸ Andile Sokomani, 'Money in Southern African Politics: The Party Funding Challenge in Southern Africa' (2005) Vol. 14 No. 4 *African Security Review* 81-90.

³⁵⁹ (2011).

³⁶⁰ Ibid.

provides a framework for the regulation of both campaign contributions and expenditure in Kenya.³⁶¹ It mandates the IEBC to enforce its provisions, and provides for disclosure and resolution of disputes.³⁶² The said Act was intended to provide a new dimension of electoral reform in the run up to the 2017 General Elections.³⁶³ However, its commencement date was postponed in 2016 to apply after the 2017 general elections.³⁶⁴

To ensure compliance with the above principles, the Parliament of Kenya enacted the Election Campaign Financing Act.³⁶⁵ This Act regulates campaign contributions and election expenditure and provides an accountability framework for election funds during elections.³⁶⁶ The Act tasks IEBC with limiting and verifying sources of campaign contributions and oversees expenditure.³⁶⁷

In 2016, Parliament passed the Election Laws (Amendment) Bill³⁶⁸ also postponing the commencement of the Election Campaign Financing Act to after the 2017 general elections.³⁶⁹

During the same period, Parliament enacted the Elections Offences Act.³⁷⁰ The Act proscribes bribery, treating, undue influence of voters or the use of public resources in election campaigns, campaign by public officers or unlawful expenditure in an election.³⁷¹

The legislative steps taken by Parliament to enact laws regulating campaign financing is welcomed. However, the conduct of Members of Parliament to postpone the commencement of the Election Campaign Financing Act³⁷² signifies a political class either not interested in the

³⁶¹ Ibid.

³⁶² Ibid.

³⁶³ Felix Odhiambo, 'Reforming Elections Management and Administration in Kenya: The Case for Independent Electoral and Boundaries Commission (IEBC)' (LLM Thesis, University of Nairobi 2016).

³⁶⁴ Section 32 of the Election Law (Amendment) Act No. 1 of 2017 which introduced Section 1A of the Election Campaign Financing Act.

³⁶⁵ Election Campaign Financing Act, 2013.

³⁶⁶ Ibid.

³⁶⁷ Section 3(d) of the Election Campaign Financing Act, 2013.

³⁶⁸ Election Laws (Amendment) Bill 2016.

³⁶⁹ Independent Electoral and Boundaries Commission, 'The Post-Election Evaluation Draft Report for the August 8, 2017 General Election and October 26, 2017 Fresh Presidential Election' (2018).

³⁷⁰ Election Offences Act, 2016.

³⁷¹ Ibid.

³⁷² Election Campaign Financing Act 2013.

regulation of campaign finance or a law that does not appreciate the political realities of Kenya's politics. Either of the scenarios compound the regulation of corporate campaign contributions in Kenya. Based on the foregoing background, the study examines the infusion of integrity in Kenya's elections through regulating corporate campaign financing.

2.2 Conclusion

Flowing from the foregoing discourse, all the elections in Kenya since 1979 have been conducted without compliance with the existing laws on campaign financing. It is also clear that there was no law regulating donations or contributions. The extant legal framework of Societies Act was inadequate to effectively regulate political parties campaign contributions and expenditure. There was also no good will or adequate resources to enforce or implement the provisions of the Societies Act or the Election Laws to regulate election campaign contributions and expenditure in Kenya.

This had the effect of entrenching obscure and uncontrolled parties and candidates who undermined the democratic process, good governance, political accountability and citizen faith and trust on the elected leaders. There was therefore a need to regulate both political parties and candidates campaign contributions and expenditure. The Political Parties Act³⁷³ and the Election Campaign Financing Act, 2013 are attempts by Parliament to try and regulate this unruly horse.

The question then is whether the existing campaign financing laws are effective in their attempt to safeguard the integrity of elections and political rights of Kenyans protected in the Constitution.³⁷⁴

³⁷³ (2011).

³⁷⁴ Article 38 of the Constitution of Kenya, 2010.

CHAPTER THREE

REGULATION OF CORPORATE CAMPAIGN CONTRIBUTIONS IN KENYA

3.0 Introduction

This chapter analyses the legal framework governing corporate campaign contributions in Kenya. It considers the international conventions and institutions dealing with campaign contributions ratified by Kenya. Further, it investigates the regional instruments together with the local legislations passed by Kenya on the same.

International law forms part of Kenya's legal system under the Constitution.³⁷⁵ The general rules of international law³⁷⁶ and Treaties and Conventions ratified by Kenya are part of Kenya's law.³⁷⁷ In *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*,³⁷⁸ the Court of Appeal affirmed that only general principles³⁷⁹ of international laws, not all rules of international law, treaties and conventions ratified by Kenya form parts of Kenya's laws.³⁸⁰ However, the treaties and conventions are subservient to the Constitution and would not be considered if they contradict the Constitution.³⁸¹ The Court emphasized that the Government of Kenya would not be allowed to invoke the provisions of its internal law as justification for its failure to perform obligations under a Treaty,³⁸² a principle affirmed by the East African Court of Justice in the case of *Peter Anyang*

³⁷⁵ Article 2(5) & (6) of the Constitution of Kenya, 2010.

³⁷⁶ Article 2(5) of the Constitution of Kenya, 2010.

³⁷⁷ Article 2(6) of the Constitution of Kenya, 2010.

³⁷⁸ [2016] eKLR.

³⁷⁹ Describing the general rules of international law, the Court opined at paragraph 116 of its Judgment that "the general rules of international law are those rules that are peremptory principles and are norms of international law; they are the customary rules of international law or *jus cogens* in international law, they are those rules from which no derogation is permitted; they are globally accepted standards of behavior; they are rules and principles that are applicable to a large number of states on the basis of either customary international law or multilateral treaties; the general rules of international law are not based on the consent of the State but are obligatory upon state and non-state actors on the basis of customary international law and peremptory norms (*jus cogens*)."

³⁸⁰ Ibid.

³⁸¹ Ibid.

³⁸² See Article 27 of the Vienna Convention on the Law of Treaties (1969).

Nyong'o v The Attorney General of the Republic of Kenya.³⁸³ In Nyong'o, the Court held that a State which has voluntarily ratified a Treaty acquiring certain rights and obligations cannot run away from its obligations because its laws do not permit it to do so.³⁸⁴

It is therefore imperative to discuss the international and regional framework governing campaign financing to put this study into its proper context and place to understand Kenya's legal obligations under international, regional and local laws in so far as this study is concerned.

3.1 International Legal Framework

Campaign financing is an intrinsic aspect of the right of citizens to participate in the electoral process of their country. The right to vote is recognised under international law.³⁸⁵ It is embodied in significant international declarations, conventions and treaties such as the Universal Declaration on Human and People's Rights (UDHR),³⁸⁶ the International Covenant on Civil and Political Rights (ICCPR)³⁸⁷ and various regional agreements in Africa, Europe, and America. Intrinsic to the right to vote are fundamental principles including equality, freedom, periodic, genuine and universal equal. The Conventions also direct State parties to take legislative, policy and other measures to protect the right to vote.

For instance, in *Communication No. 2270/2013 and No. 2851/2016, Mohamed Nasheed v Republic of Maldives*, where the Applicant alleged breach of the provisions of Article 25 of the ICCPR protecting the right to contest in elections, the United Nations Human Rights Committee observed that Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the

³⁸³ EACJ Reference No. 1 of 2006.

³⁸⁴ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR at paragraph 116 available at <http://kenyalaw.org/caselaw/cases/view/123600/> (accessed 18 September 2019).

³⁸⁵ Alexander Kirshner, 'The International Status of the Right to Vote'.

³⁸⁶ Universal Declaration on Human and Peoples Rights 1948, Article 21.

³⁸⁷ International Covenant on Civil and Political Rights, 1966, Article 25. See also Gordon Brown, 'The Universal Declaration of Human Rights in the 21st Century: A living Document in a Changing World' (2016).

conduct of public affairs, the right to vote and to stand for be elected, and the right to public service. The Committee added that whatever form of constitution or government is in force in any Member State, the exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law that are objective and reasonable.³⁸⁸

The United Nations Human Rights Committee has opined that the State parties may enact laws permitting reasonable limitations on campaign expenditure. However, such laws are to be enacted when necessary to ensure that the free choice of voters is not undermined, or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party.³⁸⁹

State parties are further enjoined to take measures to eliminate all forms of corruption including political corruption in the electoral process. The United Nations Convention Against Corruption (UNCAC)³⁹⁰ enjoins State parties to enhance transparency in the funding of election campaigns and funding of political parties and to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.³⁹¹

Besides embodying the principles on the right to vote and tasking State parties to take measures to protect the right to vote and regulate campaign financing, the Conventions lack detailed provisions on campaign financing. They defer to the State parties to make laws on campaign financing. The UN Human Rights Committee has also not handled any complaints regarding regulation of campaign financing.

³⁸⁸ *Communication No. 2270/2013 and No. 2851/2016, Mohamed Nasheed v Republic of Maldives* available at <http://ccprcentre.org/database-decisions/> accessed 15 November 2019.

³⁸⁹ Office of the High Commissioner for Human Rights, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): 12/07/96. CCPR/C/21/Rev.1/Add.7, General Comment No. 25. (General Comments). Also see <http://hrlibrary.umn.edu/edumat/studyguides/votingrights.html> (accessed 18th September 2019).

³⁹⁰ United Nations, United Nations Convention Against Corruption, New York (2004), Article 7(3) & (4).

³⁹¹ United Nations Office on Drugs and Crime, 'United Nations Convention against Corruption: Priorities for the Provision of technical assistance' <https://www.unodc.org/pdf/crime/corruption/corruption_gpac_strategy_jul04.pdf> accessed 26 September 2019.

3.2 Regional Legal framework

The right to participate in the governance of one's country and the right to vote is protected under the African Charter on Human and Peoples' Rights (ACHRP),³⁹² the African Charter on Democracy, Elections and Governance (ACDEG),³⁹³ and other relevant African Union declarations and principles including the African Union Declaration on the Principles Governing Democratic Elections in Africa. The African Convention on the Prevention of Corruption³⁹⁴ tasks State parties to adopt legislative and other measures to curb the use of illegally acquired funds and corrupt practices to finance political parties and candidates.³⁹⁵

While these instruments protect the right to vote and enjoins State parties to take steps to protect this right, they do not expressly regulate campaign financing. The African Charter on Democracy and Governance only protects equality of access to state owned media during campaign period, while the Declaration provides for funding of political parties and not candidate in elections. The foregoing instruments do not contain any proposals on the regulation of campaign financing of political parties or candidates.³⁹⁶

Unlike the African Union, the European Union Council of Ministers has gone ahead and developed a detailed Recommendation on Common Rules against Corruption in the Funding of Political

³⁹² African Charter on Human and Peoples' Rights, 1981. For a detailed analysis of this instrument, see Richard Gittleman, 'The African Charter on Human and Peoples' Rights: A legal Analysis' (1982) Vol. 22 No. 4 *Virginia Journal of International Law* 667-714.

³⁹³ 2007 available at < http://archive.ipu.org/idd-E/afr_charter.pdf> (accessed 30 July 2019). For a detailed analysis, see Ben Kioko, 'The African Charter on Democracy, Elections and Governance as a Justiciable Instrument' (2019) Vol. 63 Supplement S1 *Journal of African Law* pp. 39-61. See also Micha Wiebusch, Lutz Oette et al, 'Introduction: The African Charter on Democracy, Elections and Governance at 10' (2019) Vol. 63 *Journal of African Law* pp. 3-7.

³⁹⁴ Kenya Law, African Union Convention On Preventing And Combating Corruption, 2003 available at <http://kenyalaw.org/treaties/treaties/38/African-Union-Convention-on-Preventing-and-Combating> (accessed 18 September 2019). See also Thomas R. Snider, 'Combating Corruption through International Law in Africa: A comparative Analysis' (2007) Vol. 40 Issue 3 *Cornell International Law Journal* 711-712.

³⁹⁵ Ibid Article 10.

³⁹⁶ Supra, fn 503.

Parties and Electoral Campaigns.³⁹⁷ The Recommendations provide for donations by the State, citizens and legal entities to parties and candidates. The Recommendations also embody general principles on donations, rules on expenditure and provides for reporting and independent monitoring of funding of political parties. State parties are enjoined to take measures to eliminate conflict of interest in donations, to ensure transparency and avoid secret donations, to ensure disclosure of donations exceeding a ceiling to the members of the public, capping of donations and adopt measures to evasion of the set rules.³⁹⁸

Moreover, the Recommendations provides that any donations by corporations or other legal entitles be registered in the books and accounts of the legal entitles, the shareholders of such legal entitles be informed of such donations and that public or state corporations be banned from making political donations.³⁹⁹ To encourage the making of donations, the Recommendations encourage tax reliefs to authorised donors.⁴⁰⁰

In order to prevent excessive funding of political parties and candidates, the Recommendations encourage State parties to cap expenditure.⁴⁰¹ State parties are also encouraged to provide for parties and candidates to keep records of all direct and indirect donations and expenditure⁴⁰² and maintain proper accounts to be audited and reported to the independent electoral agencies.⁴⁰³ The electoral agencies reserve the power to monitor compliance⁴⁰⁴ and impose effective, proportionate and dissuasive sanctions on political parties and candidates that contravene the law.⁴⁰⁵ The

³⁹⁷ Recommendation *Rec(2003)4* of the Committee of Ministers to Member States on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns.

³⁹⁸ See Article 3.

³⁹⁹ See Article 5.

⁴⁰⁰ See Article 4.

⁴⁰¹ See Article 9.

⁴⁰² See Articles 10 & 12.

⁴⁰³ See Article 11.

⁴⁰⁴ See Article 14.

⁴⁰⁵ Recommendation *Rec(2003)4* of the Committee of Ministers to Member States on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns. Article 3, Article 16.

Recommendations also encourage state parties to train specialists in the judiciary, national police or other personnel to help fight against illegal funding of political parties and electoral campaigns.⁴⁰⁶ Compared to Europe, the regional African Treaties, Conventions and Instruments are inadequate to effectively regulate campaign financing. Like Europe, the African Union should prepare a document that has explicit provisions on campaign financing including on corporate campaign contributions. Given that the African Union comprises Governments which may not advocate for democracy in their nations, it would be difficult to set these standards and enforce the same (even if set).

Consequently, setting specific guidelines in the conventions, charters and declarations would be a positive step by the African Union to enable the State parties to design their national legal frameworks to level the playing field by regulating funding of candidates and political parties and eliminate illegal funding of elections which compromises integrity, transparency and fairness in the electoral process.

3.3 Kenya's Regulatory Framework on Corporate Campaign Contributions

3.3.1 The Constitution of Kenya⁴⁰⁷

The Constitution of Kenya⁴⁰⁸ embodies the national soul and spirit of the people of Kenya. Kenyans aspired for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.⁴⁰⁹ Kenyans gave themselves a Constitution which overthrew the existing social order and defined a new social, economic, cultural, and political order for themselves.⁴¹⁰

⁴⁰⁶ Article 15.

⁴⁰⁷ 2010.

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ Willy Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' University of Fort Hare, Inaugural Distinguished Lecture Series, October 16, 2014 at p2.

The people of Kenya reconfigured the Kenyan state from the former vertical, imperial, authoritative, non-accountable content under the 1963 Constitution mutilated by the Kenyatta and Moi's governments to a horizontal, decentralized, democratized, and responsive state.⁴¹¹ The Kenyan people chose the route of transformation and not the one of revolution.⁴¹² In *Speaker of the Senate & another v Attorney-General & 4 others*⁴¹³ the Supreme Court of Kenya had a chance to comment on the nature of Kenya's Constitution. It found that it is a transformative charter designed to institute social change and inculcate social justice, equality, rule of law, freedom and democracy, amongst others.⁴¹⁴

During the Bomas Constitutional Review Conference, the people of Kenya said that wealthy individuals dominated political parties, most parties lacked adequate finances to conduct their affairs and that parties having more money had higher chances of winning elections in Kenya. The people were wary of political parties sourcing for funds from external donors and losing their independence to these donors. Consequently, they wanted the Government to fund political parties and parties to additionally sources for funds from membership fees, donors and other well-wishers.⁴¹⁵

Considering the observations from the people of Kenya, the Constitution of Kenya Review Commission recommended that state funding of political parties should only cover election

⁴¹¹ *Ibid.*

⁴¹² Karl E Klare 'Legal culture and transformative constitutionalism' (1998) Vol. 14 Issue 1 *South African Journal on Human Rights* 146-188 at 150 defines a transformative constitutionalism as an enterprise of inducing large-scale social change through non-violent political processes grounded in law. In *Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR, the Supreme Court stated at paragraph 52, "The transformative concept, in operational terms, reconfigures the interplays between the States majoritarian and non-majoritarian institutions, to the intent that the desirable goals of governance, consistent with dominant perceptions of legitimacy, be achieved."

⁴¹³ [2013] e-KLR, Supreme Court Advisory Opinion No. 2 of 2013 available at <http://kenyalaw.org/caselaw/cases/view/91815/> (accessed 18th September 2019).

⁴¹⁴ See paragraph 51.

⁴¹⁵ Government of Kenya, The Final Report of the Constitution of Kenya Review Commission (2005) available at <http://kenyalaw.org/kl/fileadmin/CommissionReports/The-Final-Report-of-the-Constitution-of-Kenya-Review-Commission-2005.pdf> accessed 15 November 2019.

expenses, civic education and organizational expenditure. Secondly, the commission recommended a complete ban on foreign or local corporate donations whether financial, material and other to political parties except in circumstances approved by the Electoral Commission while there should be a cap on individual contributions to political parties. Third, the Commission recommended that the Electoral Commission should cap election expenditure to ensure that elections do not become too expensive as to favour the wealthy and restrict participation by parties and independent candidates in the electoral process. Fourth, parties must submit annual report on their activities and accounts to the Electoral Commission which should be availed to the members of the public to ensure transparency in the electoral process.⁴¹⁶

As recommended by the Commission, the Bomas Draft Constitution of 2004 provided for both public and private funding of political parties. Private funding could come from subscriptions, donations, contributions from members and supporters of a political party. Parliament had the task of specifying the sources from which political parties could not receive funds and capping the maximum donation an individual, institution or body would give to a political party.⁴¹⁷ It also vested the promotion of free and fair elections, the supervision of political parties, the management of the Political Parties' Fund⁴¹⁸ and capping of expenditure by candidates on the Electoral Commission.⁴¹⁹ Political parties were also tasked to submit reports at the end of each financial year for auditing and publish the sources of its funds within three months after the end of every year, clearly stating amounts received from each source. This was to enhance transparency and accountability of political parties in Kenya.⁴²⁰ The Draft Constitution also banned use of public resources for election campaigns.⁴²¹ These provisions would have enhanced transparency

⁴¹⁶ *Ibid* at 146-147.

⁴¹⁷ Established under the Draft Constitution of Kenya, 2004, Article 115(2).

⁴¹⁸ Established under the Draft Constitution of Kenya, 2004, Article 113(1).

⁴¹⁹ Draft Constitution of Kenya, 2004, Article 108(2).

⁴²⁰ Draft Constitution of Kenya, 2004, Article 117(2).

⁴²¹ Draft Constitution of Kenya, 2004, Article 119.

accountability and integrity in the electoral process and in the management of political parties in Kenya.

The Independent Review Commission (IREC) chaired by Justice (Rtd) Johann Kriegler after analysing Kenya's electoral laws after the 2007 disputed General Elections observed that the repealed Constitution did not provide for the right to vote, there were too many pieces of legislation governing elections, and that the process of enforcement of election laws was cumbersome.⁴²²

The Commission further established that there was widespread vote buying and selling, abuse of public resources to campaign and public servants campaigned for some candidates during the campaign period. The Commission also established that some political parties lacked adequate financial, infrastructural and manpower resources to sustain their activities and manage the electoral process and had to resort donations by individuals who influenced the outcome of the nomination process.⁴²³

The Commission identified campaign finance as an arena that affected the quality of Kenya's democracy which required a keen attention to address concerns about unclean money being used in elections, misuse of public funds for political purposes or political campaign by public officers.⁴²⁴

The Committee faulted the Electoral Commission for lacking adequate enforcement powers, willful failure to implement the electoral laws and entertaining impunity and disregard of the law and the Commission's orders by politicians. The Committee recommended a detailed review of the law and rigorous enforcement of the same to ensure that both political funds mobilization and

⁴²² Government of Kenya, Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 available at https://www.kas.de/c/document_library/get_file?uuid=d8aa1729-8a9e-7226-acee-8193fd67a21a&groupId=252038 accessed 15 November 2019.

⁴²³ Ibid.

⁴²⁴ Ibid.

expenditure are closely monitored to preserve the quality of elections and to eliminate unfair, corrupt and illegal financing of elections in Kenya.⁴²⁵

The Committee of Experts had in their Revised Harmonised Draft Constitution given the IEBC the mandate to regulate the amount that may be spent by or on behalf of a candidate in election campaigns. The Committee noted that in a democratic society, regulation of campaign financing was very important as it would improve good governance, enhance transparency and reduce the incentive for grand corruption and looting of public coffers. However, the MPs in reviewing the Revised Harmonised Draft Constitution deleted the provision. In its wisdom, the Committee of Experts reinstated the clause vesting the IEBC with the mandate to regulate the amount of money that may be spent by or on behalf of a candidate or party in respect of any election in Kenya besides developing the code of conduct for candidates and parties contesting elections as well as implementing and enforcing the election laws in Kenya by political parties and candidates.⁴²⁶ This was a departure from the Bomas Draft Constitution which had spelt out not only the sources of funds but provided for authorised sources of funds, limits on campaign contributions as well as empowering the IEBC to cap expenditure by political parties and candidates. Parliament has the mandate to enact legislation to make further provisions for regulating campaign financing in Kenya.

In further transformation of Kenya's governance structure, the people of Kenya introduced the national values and principles of governance which bind State organs or officers and all persons who apply or interpret the law or makes or implement public policy decisions.⁴²⁷ The values and principles include democracy and participation of the people, human dignity, equity, social justice,

⁴²⁵ Ibid.

⁴²⁶ Article 88(4) of the Constitution of Kenya, 2010.

⁴²⁷ Constitution of Kenya, 2010 Article 10(1).

inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, good governance, integrity transparency and accountability.⁴²⁸

The Constitution also introduces a revamped Chapter on the Bill of Rights and Fundamental Freedoms which bind all law, persons and state organs.⁴²⁹ Among the rights protected under the Constitution are political rights which are inherent in its citizens alone.⁴³⁰ Political rights encompass the right to make political choices including the right to form, participate in forming or in the activities of a political party or campaigning for a political party or cause,⁴³¹ the right to free, fair and regular elections based on universal suffrage and the free expression of the will of electors for any elective office or any office of a political party,⁴³² and the right, without unreasonable restrictions, to be registered as a voter, to vote by secret ballot and to be a candidate for public office or office within a political party and if elected to hold office for the term prescribed by law.⁴³³

The Constitution of Kenya⁴³⁴ further introduces a Chapter Six on leadership and integrity focusing on responsibilities of leadership, the guiding principles of leadership and integrity, conduct of State officers including financial probity and restrictions on activities of State Officers.⁴³⁵ Amongst the guiding principles of leadership and integrity are selection on the basis of personal integrity, competence and suitability or election in free and fair elections.⁴³⁶ Others include lack of favouritism, improper motives or corrupt practices, selfless service based solely in the public

⁴²⁸ Constitution of Kenya, 2010 Art. 10(2).

⁴²⁹ Ibid, Article 20(1).

⁴³⁰ Ibid, Article 38.

⁴³¹ Muthui Hillary Mbavu, 'Kenya's Bill of Rights and Its implications on Kenya's Ability to apply the International Bill of Rights' (MA Thesis, University of Nairobi 2013).

⁴³² Ibid.

⁴³³ Ibid.

⁴³⁴ Constitution of Kenya, 2010.

⁴³⁵ Ibid.

⁴³⁶ Ibid.

interest, accountability to the public and discipline and commitment in service to the people.⁴³⁷

The implementing agency of Chapter Six is the Ethics and Anti-Corruption Commission⁴³⁸

The Constitution of Kenya further outlines the general principles for the electoral systems.⁴³⁹

These principles include freedom of citizens to exercise their political rights, universal suffrage based on the aspiration for fair representation and equality of vote and free and fair elections.⁴⁴⁰

Citizens are also entitled to protection from violence, intimidation, improper influence or corruption. Elections must be conducted by an independent body in a transparent, impartial, neutral, efficient accurate and accountable manner.⁴⁴¹ The inclusion of these provisions in the Constitution of Kenya 2010 is designed to deepen democracy in Kenya and safeguard the citizens' democratic rights and ensure integrity, transparency and accountability in the electoral process.

While the Bomas Draft had detailed provisions on campaign financing, the Constitution of Kenya only mandated the IEBC to regulate campaign financing but directed Parliament to enact legislation to make further provisions on the same. Pursuant to this constitutional directive, Parliament enacted the Political Parties Act and the Election Campaign Financing Act to regulate campaign financing in Kenya. The said Acts are analysed in the Section below to ascertain whether they comply with the intentions of the people of Kenya, deepen democracy, safeguard the citizens' democratic rights and ensure integrity, transparency and accountability in the electoral process.

⁴³⁷ Article 73(2) of the Constitution of Kenya, 2010.

⁴³⁸ Ethics and Anti-Corruption Commission Act, 2011 Chapter 65A Laws of Kenya.

⁴³⁹ Adams Oloo, 'Elections, Representations and the New Constitution' (Society for International Development) Working Paper No. 7.

⁴⁴⁰ Constitution of Kenya 2010, Article 81.

⁴⁴¹ Ibid.

3.3.2 The Political Parties Act⁴⁴²

This law regulates political parties in Kenya.⁴⁴³ The law operationalises the constitutional decree and the intention of Kenyans as expressed in the Bomas Report that the State should fund political parties to eliminate undue influence on parties from private donors and to level the playing field and to enable political parties to meaningfully participate in the electoral process. In *Political Parties Forum Coalition & 3 others v Registrar of Political Parties & 8 others*, the Court of Appeal held that the enactment of the Political Parties Act was to enhance multi-party pluralism with a view to foster competitive politics in Kenya.⁴⁴⁴

The Act regulates public funding of political parties through the Political Parties Fund⁴⁴⁵ and makes provision for private funding of political parties. On public funding, the Act directs Parliament to allocate to the fund at least 0.3 % of the revenue collected by the national government⁴⁴⁶ to be distributed to political parties that garner at least three percent (3%) of the total votes cast at the preceding general election.⁴⁴⁷ The criteria for allocation of funds was contested in the High Court and the Court of Appeal in *Political Parties Forum Coalition & 3 others v Registrar of Political Parties & 8 others*. The Court of Appeal appreciated the crucial role played by political parties in Kenya's democracy and emphasized that public financing was a mechanism to stimulate broader levels of diversity and bring different actors and groups into the political playing field, to strengthen democratic competition and to prevent corruption and any undue influence from private interests. The Court of Appeal recognised the fact that in Africa,

⁴⁴² Political Parties Act No. 11 of 2011.

⁴⁴³ Ibid.

⁴⁴⁴ *Political Parties Forum Coalition & 3 others v Registrar of Political Parties & 8 others* [2016] eKLR.

⁴⁴⁵ Section 26.

⁴⁴⁶ Political Parties Act No. 11 of 2011, Section 24(1)(a).

⁴⁴⁷ Political Parties Act No. 11 of 2011, Section 25(2)(a) as amended by The Political Parties (Amendment Act) No. 14 of 2016.

political parties operate in a context of limited income, where membership dues, is extremely limited. Public funding is useful in plugging that financial gap.⁴⁴⁸

Another area of contestation regarding public funding of political parties has been who is under the obligation to set it aside and disburse the same to the Fund. In *Orange Democratic Movement (ODM) v National Treasury & 5 others*⁴⁴⁹ the Orange Democratic Party sought Orders of mandamus to compel the Cabinet Secretary for the National Treasury, the Registrar of Political parties and the National Assembly to forthwith allocate, appropriate and disburse to the Party the sum of Kshs 4,135,903,545/= and other additional funds due to the party between the years 2012 and 2016. The High Court found that the National Treasury has a duty to include in its estimates allocation to the fund and disburse funds once allocated and appropriated by Parliament. The Registrar of Political parties only administers the fund.⁴⁵⁰

From a summary of disbursements published on its website for the financial years 2014- 2017, the Registrar has disbursed funds to The National Alliance and the United Republic Party (which merged to form the Jubilee Party), the Orange Democratic Party and the Wiper Democratic Movement – Kenya. In 2016-2017 financial year, the Jubilee Alliance received Kshs 195, 043,634 while ODM and Wiper Democratic Movement received Kshs 131,233,622 and Kshs 25,702,301 respectively.⁴⁵¹

The Act limits the purpose for which the public funding of political parties is granted to promote representation of special interests in Parliament, promote active citizen participation in political life, cover election expenses of the political including broadcasting, civic education and

⁴⁴⁸ See paragraph 45 of the Judgment.

⁴⁴⁹ *Orange Democratic Movement (ODM) v National Treasury & 5 others* [2017] eKLR.

⁴⁵⁰ Ibid.

⁴⁵¹ Office of the Registrar of Political Parties, 'Disbursement of the Political Parties Fund' available at https://www.orpp.or.ke/images/UPLOADSpdf/Disbursement_of_the_Political_Parties_Fund.pdf accessed 17 November 2019.

administrative and staff expenses of a political party. However, moneys received cannot be used to pay any members or supporters of the party, finance any activity in breach of the Electoral Code of Conduct or set up, invest in or purchase any immovable fixture or for any purpose incompatible with the promotion of multiparty democracy and the electoral process.⁴⁵²

As expressed in the Bomas Draft Constitution, the Act identifies permissible private sources of funds for political parties. These include membership fees, voluntary contributions, donations or grants from lawful sources, other than non-citizens or foreign governments, and proceeds from investments, projects or undertakings by the political party.⁴⁵³ Foreign agencies or political parties sharing similar ideologies with a political party in Kenya can however offer technical assistance excluding the provision of an asset to that political party.⁴⁵⁴

The Act prohibits contributions from third parties including contributions by non-citizens.⁴⁵⁵ It limits contributions by authorised persons to not more than 5% of the total expenditure of that party in a year based on the last audited accounts for the party.⁴⁵⁶ Any breach attracts sanctions on both the donor and the political party/recipient of such funds.⁴⁵⁷ In as much as the Act permits contributions from lawful sources or authorised persons, these terms are not defined by the Act. It leaves these key terms to interpretation by the Registrar of Political parties, political parties or the potential donor. The Registrar of Political Parties states that only Kenyan citizens as defined in the Constitution and the Immigration Act can make contributions to a registered party.⁴⁵⁸ The Registrar does not appreciate the fact that contributions from corporations are not prohibited or

⁴⁵² Section 26 of the Political Parties Act, 2011.

⁴⁵³ Ibid. Section 27.

⁴⁵⁴ UNDP, 'Political Parties Leadership Training Source Book' (2016).

⁴⁵⁵ Ibid.

⁴⁵⁶ Supra, fn 580.

⁴⁵⁷ Ibid, Section 28.

⁴⁵⁸ Office of the Registrar of Political Parties, 'The Political Parties Act in a Nutshell' available at <https://www.orpp.or.ke/images/RESOURCECENTER/political%20parties%20manual/The%20Political%20Parties.pdf> accessed 17 November 2019.

declared unlawful source. The Act prohibits contributions from non-citizens or foreign governments, intergovernmental organisations or a non-governmental organisation. Unless all corporations are categorized as non-citizens otherwise, they would be entitled to make contributions. This is a third area of contestation which makes it difficult to enforce the law. In fact, it would conflict with the Election Campaign Finance Act which permits contributions from corporations to candidates and political parties.

Further, to ensure transparency and accountability, political parties are required to disclose to the Registrar of Political Parties all contributions received from any of the listed sources.⁴⁵⁹ Any party that fails to disclose the source of funds commits an offence under the Act.⁴⁶⁰ The parties are also required to publicize information, in at least two newspapers, with nationwide circulation, on their sources of funds within a span of ninety days after the end of its financial year.⁴⁶¹ This information must include the sources of the funds, the amount received from its supporters and third party donations and the assets together with liabilities of the political party. Any political party that fails to publicize the information commits an offence.⁴⁶² There has been little compliance with this requirement over the years yet there is a requirement that that parties that fail to comply should not receive funds from the Political Parties Fund.

The Office of the Registrar of Political Parties is tasked with the mandate of enforcing the provisions of the Act.⁴⁶³ To monitor compliance, the Registrar of Political parties retain the power to call for the records of any political party for inspection. The Record is to include particulars of all sources of funds to the political party including contributions, donations or pledges of a contribution or donation, by the founding members of the political party or by third parties,

⁴⁵⁹ Ibid. S. 27(4).

⁴⁶⁰ Section 28(7).

⁴⁶¹ Ibid.

⁴⁶² Ibid.

⁴⁶³ Ibid, Section 33 and 34.

expenditure of the political party and indirect contributions and all financial transactions and records of assets and liabilities of the political party.⁴⁶⁴ The Registrar also has the power to withhold allocations to political parties contravening the Act, suspend a political party for a period of twelve months or even deregister any non-complying political parties.⁴⁶⁵

To ensure further transparency, political parties are required to submit their audited financial statements to the Auditor- General for auditing and tabling before the National Assembly. The last audited accounts tabled before the National Assembly was for the 2016-2017 financial year.⁴⁶⁶

This Committee Report identified the challenge that the Registrar has not implemented the Act fully and that the National Treasury has not complied with the High Court Order to make provision for the 0.3 % in the annual budget for allocation to the Political Parties Fund by Parliament.⁴⁶⁷ In the run up to the 2017 general elections, it is reported that the Jubilee Party candidate, Uhuru Kenyatta had a huge financial muscle of Kshs 1.4 billion in its account with further sums of Kshs 1.11 billion from members contributions, Kshs 621.8 million as nomination fees, Kshs 387 million as monthly party contributions and membership fees. On the other hand, the ODM party candidate Raila Odinga had about Kshs 1 billion shillings less than the Jubilee Party. In the 2018- 2019 financial year, the Jubilee Party raised Kshs 339,041,370 and spent all but Kshs 381,000 while ODM spent much lesser. The reports do not include all the sources of financing to those parties.⁴⁶⁸

During the 2017-2018 financial year covering the August 8, 2017 General Election and the October 26 repeat presidential election called by the Supreme Court, the Jubilee Party reported that it had

⁴⁶⁴ Sections 17 and 18 of the Act.

⁴⁶⁵ Sections 21 and 41(5)(c) of the Act.

⁴⁶⁶ National Assembly of Kenya, 'First Report of the Special Fund Account Committee on Audited Financial Statements for Political Parties Fund for the Year ended June 2017' available at <http://www.parliament.go.ke/sites/default/files/2019-03/POLITICAL%20PARTIES%20FUND%20TABLED%20REPORT.pdf> (accessed 15 November 2019).

⁴⁶⁷ Evelyne Judith Kwamboka, 'ODM petitions government over Sh 4.1 billion', Standard Digital 2 November 2019 available at <https://www.standardmedia.co.ke/article/2001347829/odm-petitions-government-over-sh4-1-billion>.

⁴⁶⁸ Ibid.

slightly over Kshs. 618 million in its accounts of which Ksh240 million was received from the Political Parties Fund while Sh378 million was raised from public donations.⁴⁶⁹

While providing for public funding of political parties is a good step towards the institutionalization of political parties in Kenya and enhance their participation in the democratic process, there are a lot of challenges that portend for the implementation of the law. To start with, there is a difficulty in allocation and disbursement of funds by the National Treasury and Parliament. In fact, even where parties like ODM secure Court Orders and a Parliamentary Committee has recommended that they comply, the National Treasury has failed to comply with the law and Court Orders. This militates against the very noble intentions of public funding in the first place. Secondly, several small parties are deprived of public funding.⁴⁷⁰ They must then resort to other sources to fund their activities which increases the opportunity and incentive for patronage and illegal funding of these political parties.

Third, the uncertainty in the law on lawful private sources or authorised contributions may inhibit regulation of corporate campaign contributions to political parties. Relatedly, if contributions are only limited to citizens as the Registrar of Political Parties has noted, there is a contradiction the Election Campaign Finance Act which permits corporations to both contribute to candidates and political parties and independently spend money in election campaigns.

Fifth, it is a historical fact that political parties' formation and functioning revolved around the personalities, ethnic and regional affiliations and charisma of the political leaders associated with those parties.⁴⁷¹ The said political parties have always relied on the leaders to source for funds for

⁴⁶⁹ Ibid.

⁴⁷⁰ Friedrich Ebert Stiftung (FES), 'Institutionalizing Political Parties in Kenya' (2010) available at <https://library.fes.de/pdf-files/bueros/kenia/07885.pdf> accessed 15 November 2019.

⁴⁷¹ Musa I.A. Segita, 'Review of Political Party Democracy in Kenya' (2017) 5(1), *Kabarak Journal of Research & Innovation*.

campaigns. Despite the institutionalization of political parties through registration, public funding of political parties, insistence on these parties having a national character; subscription to a code of conduct for political parties, and auditing of accounts, among other institutional attributes the Kenyan political culture remains unchanged. The constitutional and statutory architecture cannot change Kenyan politicians' frame of mind. It therefore requires a deliberate effort by the Registrar of Political Parties to educate the political parties and citizens on the benefit of regulation to ensure that they can change and comply with the law.

Though the Registrar of Political parties has immense powers to enforce the Act, there has been a great lethargy to enforce the law. No action has been taken against political parties who do not comply with the law especially on publishing and disclosing all contributions received and expenditure. Perhaps the Office of the Registrar is beholden to some powerful partisan political parties and officials who are used to the Kenyan political culture and would want status quo to remain.

Other challenges facing the implementation of the Act include executive power excesses especially in controlling the purse and allocations to the Office of the Registrar of Political Parties and candidates, negative ethnicity, and political corruption which continues to exist in Kenya. Therefore, there is need for all the organs of government and persons charged with the implementation of the Constitution and the Act to do so faithfully and fully. The members of the public, the civil society and other bodies must ever remain watchful of the process towards Kenya's democratization to avoid a relapse to the past especially in light of the requirement for publication of reports in the media to enable citizens ascertain who is contributing funds to which political party to enable them make informed choices during elections.

3.3.3 The Election Campaign Financing Act⁴⁷²

This law is aimed at regulating election campaign contributions and expenditure in Kenya, providing for accountability of all income received and expenditures during election campaigns.⁴⁷³

The Act allows corporations to contribute to candidates and political parties, empowers the IEBC to impose limits on amounts that individuals and corporations can contribute to candidates and political parties,⁴⁷⁴ provides for disclosure of by corporations, candidates and political parties to the IEBC in the candidate's or political party reports and mandates the IEBC to enforce its provisions.⁴⁷⁵ The foregoing aspects are separately examined below.

3.3.3.1 Regulation and Mandate of IEBC

The Election Campaign Financing Act ⁴⁷⁶ mandates the IEBC to regulate and administer election campaign financing laws in Kenya. It grants the Commission the powers to investigate and ask for records on expenses incurred by a particular candidate, political party or a referendum committee.⁴⁷⁷ Part 3 of the Act lays down the framework on how the IEBC is to regulate the contributions and expenditure as demonstrated below.⁴⁷⁸ The IEBC requires every political party intending to participate in an upcoming electoral process to submit to the Commission its Campaign Expenditure Rules before proceeding with the nomination of its candidates.⁴⁷⁹

⁴⁷² 2013.

⁴⁷³ Ibid.

⁴⁷⁴ Section 12(1)(b).

⁴⁷⁵ Section 16(3) of the Act.

⁴⁷⁶ Ibid, section 3.

⁴⁷⁷ Ibid, section 4.

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid.

3.3.3.2 Contributions and Donations Limits

Limitation on contribution is a mechanism to minimize the possibility of corruption or purchasing political influence on candidates and the electoral process.⁴⁸⁰ Its main objective is to achieve equality of influence in the electoral process. Limitations on contributions may either be quantitative or qualitative. Quantitative restrictions target the total sum that corporations and individuals may contribute to political parties while qualitative restrictions target the source of such contributions.

The Election Campaign Financing Act employs both quantitative and qualitative restrictions on contributions to candidates and political parties. It allows for financing of party nominations, election or referendum contributions received from other persons, political parties, organizations, any other lawful sources including from fundraisers or harambees.⁴⁸¹

The Act permits individuals and corporations to contribute to candidates and political parties. Corporations or organizations can contribute to a candidate or a political party in two ways.⁴⁸² If it is a monetary contribution, the corporation can only give amounts not exceeding the limits imposed by the IEBC. The corporation must channel its contribution through the candidate or political party expenditure account.⁴⁸³ However, if a corporation wishes to independently campaign for a candidate, that corporation is required to seek consent in writing from the intended recipient of their support, register with the IEBC and open a campaign financing account into which contributions given or received by it shall be deposited three months before the day of the

⁴⁸⁰ OSCE Office for Democratic Institutions and Human Rights, 'Handbook for the Observation of Campaign Finance' (2015) available at <https://www.osce.org/odihr/elections/135516?download=true> accessed 15 November 2019.

⁴⁸¹ Ibid, Section 11.

⁴⁸² Ibid.

⁴⁸³ Ibid.

polls.⁴⁸⁴ The independent expenditure amount must be within the spending limits issued by the Commission.⁴⁸⁵

The Act tasks the IEBC to impose contributions limits at least twelve months to a general election. The limits are to be set on the total contributions to a candidate or a political party, the contributions from a single source, paid up media coverage or a loan forming part of a contribution which a candidate, political party or a referendum committee may receive during the expenditure period.⁴⁸⁶ The IEBC must public a Gazette Notice to that effect. All contributions from third parties must not exceed twenty percent of the total contributions received from any one individual or corporation.⁴⁸⁷

Unlike the Political Parties Act, the Election Campaign Finance Act is clear in its definition of contributions, donations, and illegal sources in relation to contributions. The Act further makes adequate provisions for both monetary and non-monetary contributions including loans, other assets and prohibits public resources from being used in campaigns. This is a welcome move to facilitate a clear understanding of the law and ensure compliance with the Act.

In compliance with this provision of the law, the IEBC gazetted⁴⁸⁸ the limits of contributions for political parties together with candidates intending to vie as independent candidates in the general elections scheduled for 8th August 2017.⁴⁸⁹ In the gazette notice, the Commission fixed the total contributions to political parties at Kshs. 15,030,950,000.00 which a further limit of contribution from a single source being Kshs. 3,006,190,000.00.⁴⁹⁰ Contributions to presidential candidates were capped at Kshs. 5,247,588,207.74. Further caps were set for contributions to candidates vying

⁴⁸⁴ Ibid.

⁴⁸⁵ Ibid.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid.

⁴⁸⁸The Kenya Gazette Vol. CXVIII-No. 90 (8th August,2016) <
<https://www.iebc.or.ke/uploads/resources/XFHwhfQuU2.pdf>> accessed 25 July 2019

⁴⁸⁹ Ibid.

⁴⁹⁰ Ibid.

for County Governor, Senator, Women Representatives, Members of the National Assembly and Ward Representatives. The caps varied depending on the location, population and the total number of registered voters in that electoral area.⁴⁹¹

However, it was good only on paper since no records or indication whatsoever exists to prove that the political parties and candidates complied with the gazette notice. Further, Hon Raila Odinga moved to the High Court to challenge the gazette notice of the said rules as unconstitutional.⁴⁹² Most importantly, in line with Kenya's political culture of impunity and opacity in financing politics and the electoral process, politicians were up in arms and protested the Gazette Notice. The Chairperson of the National Assembly Committee on Delegated legislation, Hon. William Cheptumo is reported to have said that the regulations were not grounded in law and that they could not comply with them. Hon Dan Maanzo is reported to have said that the IEBC were mischievous in setting up the limits and publishing Rules and caps. In his view, the publication of the limits was construed to give IEBC a good image and condemn the Members of Parliament. He insisted that the IEBC should apologise to Kenyans.⁴⁹³

On 20th December 2016, the Chair of the Committee William Cheptumo moved a Motion that the House adopts the Report of the Committee on Delegated Legislation on its consideration of the Election Campaign Financing Regulations, 2016 resolving not to approve for publication the Election Campaign Financing Regulations, 2016 alleging that they contravened Section 5 of Election Campaign Financing Act, 2013 and Section 13 (a) of the Statutory Instruments Act. The Chairperson also proposed an amendment to relevant sections of the Election Campaign Financing Act to allegedly give proper timelines for compliance to enable the IEBC to submit fresh

⁴⁹¹ Ibid.

⁴⁹² Richard Munguti, 'Raila challenges the Elections Financing rules' Daily Nation (Nairobi, 15 December 2016).

⁴⁹³ Wilfred Ayaga, 'House team declares Kenya's campaign financing regulations null and void' Standard Digital online for 20 December 2016 available at <https://www.standardmedia.co.ke/article/2000227396/house-team-declares-kenya-s-campaign-financing-regulations-null-and-void> accessed 15 November 2019.

regulations for approval. The Members of Parliament passed the Election Laws (Amendment) Act⁴⁹⁴ postponing the commencement date of the Election Campaign Financing Act⁴⁹⁵ after the 2017 general elections.

Qualitative restrictions adopted by the Act include prohibition of anonymous donations, contributions from illegal sources,⁴⁹⁶ use of State resources or institutions, or public officers to campaign,⁴⁹⁷ and contributions from foreign governments. All the prohibited contributions received by candidates or political parties must be reported to the IEBC and such funds forwarded to the IEBC within 14 days.⁴⁹⁸ Failure to notify the IEBC amounts to an offence and one may be disqualified or barred from participating in the elections or referendum, whichever is applicable.⁴⁹⁹ It is also important to note that the Act provides a mechanism for handling illegal sources of funds received by candidates and political parties which is not contained in the Political Parties Act.

In Kenya, complaints have majorly been made against campaign by State and public Officers and the use of public or State resources in election campaigns. The outgoing Communication Authority of Kenya Director General Francis Wangusi confirmed in an interview with a journalist that a few months to the 2017 general elections, a Principal Secretary called him and demanded that the Communications Authority of Kenya contributes funds to the State campaign machinery for 2017 general elections. He declined this request. Additionally, another request was made for the Authority to fund the swearing-in ceremony of President Uhuru Kenyatta and his deputy William Ruto. Again, the Authority refused to do so. Government operatives then engineered his

⁴⁹⁴ Act No. 1 of 2017.

⁴⁹⁵ (2013).

⁴⁹⁶ Ibid.

⁴⁹⁷ Ibid, section 14.

⁴⁹⁸ Ibid.

⁴⁹⁹ Ibid.

suspension alleging that his conduct was being investigated prompting him to file a suit against the Board of Directors. The case was finally settled out of Court.⁵⁰⁰

In *Raila Amolo Odinga & Another v IEBC & 2 Others*⁵⁰¹ the Petitioner raised the issue of use of state or public resources attached the Presidency by publishing achievements and government projects in a public portal during the election period and undue influence by paying IDPs during the campaign period which compromised the integrity of the electoral process in breach of the law.⁵⁰² The Supreme Court took an uncanny path, abdicated its jurisdiction as an election Court in Presidential Election Petitions and deferred to the jurisdiction of the High Court where Petitions raising the same issue were filed on the interpretation of the Constitution.⁵⁰³ In a further attempt to run away from its constitutional and statutory obligation to give authoritative interpretation of the law and to guide all other Courts in Kenya, the Supreme Court made a rather curious observation that the Presidency was not required to give an account of state resources attached to that office nor was there a prohibition against the President to refrain from misusing public resources during election campaigns. The Supreme Court equally dismissed the allegation of undue influence through making payments of IDPs on account that the Petitioners had not adduced enough evidence to establish undue influence. Several other Election Petitions raised the similar issues which were dismissed for want of proof.⁵⁰⁴

⁵⁰⁰ Frankline Sunday, 'Wangusi: The day I defied an 'order from above' to fund 2017 polls' Standard Digital Publication for 8 September 2019 available at <https://www.standardmedia.co.ke/business/article/2001341116/wangusi-the-day-i-defied-an-order-from-above-to-fund-2017-polls> accessed 15 November 2019.

⁵⁰¹ Presidential Election Petition No. 1 of 2017.

⁵⁰² Section 14 of the Election Offences Act, 2016.

⁵⁰³ *Apollo Mboya v A-G & Others Pet 162 of 2017* and *Jack Munialo v A-G & Others Petition 182 of 2017*.

⁵⁰⁴ Examples include *Joseph Oyugi Magwanga & Another v IEBC & 3 Others*, Homa Bay High Court Election Petition 1 of 2017 and *Peter Odima Khasamule v Independent Electoral and Boundaries Commission (IEBC) & 2 Others*, Busia High Court Election No. Petition 4 of 2017. For a detailed review of these cases see Lucianna Thuo, 'Compendium of 2017 Election Petitions: Select Decisions, Issues and Themes Arising from the 2017 General Elections in Kenya (2019) The Kenyan Section of the International Commission of Jurists (ICJ Kenya).

In the United States of America, laws limiting contributions have been subject of intense litigation. In *Buckley v Valeo*⁵⁰⁵ the Congress amended the Federal Election Campaign Act of 1971 (FECA) in 1974 limiting individual and group political contributions to \$1,000 per candidate per election with an annual cap of \$25,000 and by a Political Action Committee (PACs) to \$5,000 per candidate per election.⁵⁰⁶ The amendment further limited a candidate's personal or family contribution to his campaign for each federal elective post. PACs were required to keep detailed records of all contributions and expenditure and to file quarterly reports with the Federal Electoral Commission (FEC). To implement the Act, the amendment created an eight Member Commission to which the President, Speaker of the Senate and Speaker of the House of Representatives each appointed two members with Clerks of each House being ex officio members.

The US Supreme Court considered the amendments and found that the provisions limiting political donations did not infringe on First Amendment Rights as such limitation was proportionate and justified by a legitimate governmental interest in limiting corruption or the appearance of corruption in politics.⁵⁰⁷ The Court distinguished independent candidate expenditure from direct contributions to candidates and political parties and upheld the limitation on direct contributions.⁵⁰⁸ The Court further faulted the limit on a candidate's self-expenditure for unreasonably restraining the candidate's capacity to engage in a discussion of public issues and vigorously campaign for election.⁵⁰⁹

In *McConnell -v- Federal Election Commission*,⁵¹⁰ the US Supreme Court upheld the restriction on contributions including the 2002 amendments through the Bipartisan Campaign Reform Act, 2002

⁵⁰⁵ 424 U.S 1 (1976). See Yasmin Dawood, supra n 197, 274.

⁵⁰⁶ Ibid. See also <https://www.law.cornell.edu/supremecourt/text/424/1> accessed 14 October 2019.

⁵⁰⁷ Ibid.

⁵⁰⁸ Monteiro A., 'Private Funding of Political Campaigns: Comparative analysis of the law in the United States and in Brazil' (2015) 1(1), *Revista Ballot*, 83-104.

⁵⁰⁹ See also the summary <https://legaldictionary.net/buckley-v-valeo/>

⁵¹⁰ 540 US 2003 available at <https://transition.fec.gov/pages/bcra/02-1674.pdf> (accessed 14 October 2019).

(BCRA) which sought to ban unrestricted donations (soft money) creeping into national or State political parties by corporations, trade unions or wealthy individuals and unregulated under the FECA. The Supreme Court reaffirmed the holding in *Buckley* that the prevention of corruption and the appearance of corruption was the only permissible justification for campaign finance regulation. In *McConnel*, the Supreme Court was emphatic that the limits on contributions was to address not only actual corruption threatened by large financial contributions but also address the appearance of corruption or undue influence on an officeholder's judgment which would erode public confidence in the electoral process. As such, the Court upheld the impugned provisions of the BCRA.⁵¹¹

The United States jurisprudence reviewed above justify the regulation or limitation of campaign contributions. The cases have demonstrated that the objective of regulation of campaign contribution is to limit both *quid pro quo* corruption, as well as any appearance of corruption. The cases have demonstrated the delicate balancing act where both free speech and equality are protected as proposed by the Rawlsian egalitarian school of thought.⁵¹² In line with the forgoing jurisprudence, Kenya has adopted the same model of permitting contributions but imposing both quantitative and qualitative restrictions on contributions.

3.3.3.3 Expenditure Accounts, Authorized Expenditure and Spending Limits

To start with, limitation or capping of expenditure is designed to achieve equality of arms and ensuring that a candidate or party has an equal ability to spend money and persuade voters and be elected through the limitation of expenditure and public funding of the poor candidates.⁵¹³

⁵¹¹ Ibid.

⁵¹² Ibid.

⁵¹³ OSCE Office for Democratic Institutions and Human Rights, 'Handbook for the Observation of Campaign Finance' supra n 671.

It is also designed to achieve equality of access to the marketplace and to protect a citizen's right to equally and openly participate in a political discourse as a speaker or a listener. It is achieved through an equal airing of all ideas in the marketplace by a limitation of third-party expenditure in campaign advertising.⁵¹⁴ Such limitations may also be quantitative or qualitative. The Election Campaign Financing Act adopts both quantitative and qualitative limitations on expenditure. Quantitative limitations are in the form of caps on spending while qualitative limitation relate to the authorized items or activities for which campaign expenses may be incurred by a candidate, political party or a corporation in incurring an independent expenditure.

The Act does not set the expenditure caps. It mandates the Commission to, through a gazette notice, impose spending limits as to the total amount a candidate or political party should spend for an election campaign.⁵¹⁵ The spending limits are to be based on the various factors including the geographical locations, the type of election being held, the population of persons in a particular electoral area, the number of parties in that electoral area and the communication infrastructure.⁵¹⁶

Ahead of the 2017 general elections, the IEBC gazetted expenditure limits. The notice indicated the maximum amount an individual or political party could spend ahead of party primaries and during election campaigning.⁵¹⁷ It also listed the specific amounts under every item including communication, election agents, campaign personnel, venues and the period within which the amount was to be spent within six months to the general election.⁵¹⁸ The total expenditure limits by political parties was fixed at Kshs. 15,030,950,000.00 same amount as the cap on total contributions to political parties. Presidential candidate expenditure cap was fixed at Kshs. 5,247,588,207.74.

⁵¹⁴ Ibid.

⁵¹⁵ Ibid.

⁵¹⁶ Ibid, Section 18.

⁵¹⁷ Ibid.

⁵¹⁸ Ibid.

Where a party, individual or committee exceeds the limits stated, the party must file a report to the Commission explaining the reasons for exceeding the said limits to the satisfaction of the Commission.⁵¹⁹The Commission reserves the mandate to prescribe the nature of authorized items or activities for which campaign expenses may be incurred including the cost of campaign venue, publicity, advertising, personnel, transportation costs and other justifiable expenses.⁵²⁰

To ensure that all contributions and expenditures are properly managed and accounted for, the Act requires political parties, their candidates and independent candidates to set up party or party candidate's or independent candidate's expenditure committees.⁵²¹ These committees are to be registered with the Commission not less than three months before a general election, 14 days after an announcement of a referendum or seven days upon the declaration of a vacancy prompting a by election.⁵²² These committees are expected to open an expenditure account whose details they must be share with the Commission during the registration process.⁵²³ The candidates are expected to deposit all contributions from the candidate, his political party or other contributions received from any other person, organization or any other lawful sources into the expenditure Account.⁵²⁴

The committee members are required to generally offer financial advice to the party, party candidate or independent candidate in relation to the election campaigns; manage the expenditure committee account; and account for all the funds received and used to the IEBC.⁵²⁵ The failure of a party candidate expenditure committee to submit a preliminary nomination expenditure report automatically disqualifies that candidate from contesting in the electoral process.⁵²⁶

⁵¹⁹ Ibid, Section 18(7).

⁵²⁰ Ibid, Section 19.

⁵²¹ Ibid, Sections 7 and 8.

⁵²² Ibid.

⁵²³ Ibid.

⁵²⁴ Ibid, Section 6

⁵²⁵ Ibid, Sections 7(4) and 8(3).

⁵²⁶ Ibid, Section 7.

The Act also permits independent expenditure by corporations on behalf of candidates. Prior to spending money on behalf of a candidate, corporations must obtain consent in writing from the candidate, register with the IEBC and open a campaign financing account into which contributions given or received by it shall be deposited three months before the day of the polls.⁵²⁷ The corporation can only spend such moneys on the items authorised by the IEBC subject to expenditure limits imposed by the IEBC. In the Gazette Notices Nos 6307-6310 limiting both contributions and expenditure, the IEBC did not make specific limits on independent corporate expenditure. It therefore follows that they are to comply with the expenditure limits on the Items set out for political parties and candidates.

Independent expenditure limits were attempted in 1979 where a cap of Kshs 40,000/- was imposed on candidates under the National Assembly and Presidential Elections Act. However, the limit was not complied with at all with the Government and the Ruling Party, KANU expressly admitting that they could not effectively implement the law. No case has been filed in respect to the expenditure limits.

The issue of independent campaign expenditure has been litigated in the United States of America. In *Buckley v Valeo*, the US Supreme Court declared the 1971 Amendments to FECA capping independent expenditure by candidates, groups and PACs' as unconstitutional for limiting the exercise of quality, quantity and diversity of free speech.⁵²⁸ The Court further faulted the limit on a candidate's self-expenditure for unreasonably restraining the candidate's capacity to engage in a discussion of public issues and vigorously campaign for election.⁵²⁹

⁵²⁷ Ibid.

⁵²⁸ Monteiro A., 'Private Funding of Political Campaigns: Comparative analysis of the law in the United States and in Brazil' (2015) 1(1), *Revista Ballot*, 83-104.

⁵²⁹ See also the summary <https://legaldictionary.net/buckley-v-valeo/>

In *McConnel v Federal Electoral Commission*, where the Congress amended the amendments to the Federal Election Campaign Act through the Bipartisan Campaign Reform Act, 2002 (BCRA) in 2002 banning independent third-party adverts by corporations, unions and Non-Profit Organisations 30 days before party primaries or 60 days before the election date. Various parties challenged the BCRA provisions on the ground that they contravened the First Amendment Right to free speech.⁵³⁰ The Supreme Court further upheld the restriction on the use of corporate funds to finance electioneering communications holding instead that the restriction was not overbroad and corporations could still use funds collected from separate segregated avenues. It was therefore not a complete ban on expression which would violate the First Amendment Right to free speech.⁵³¹

However, in *Citizens United v Federal Electoral Commission*⁵³² Citizens United wanted to air a film critical of Hillary Clinton, *Hillary: The Movie* ahead of the 2008 Democratic Party Primaries within 30 days of the primaries which would be a violation of BCRA which prohibited corporations from making independent expenditure on advertisements.⁵³³ The US Supreme Court (by a majority of 5-4) upheld the corporate right to free speech holding that the Federal Government could not suppress free speech because of juristic or corporate identity of the speaker.⁵³⁴ The Supreme Court struck down all BCRA provisions limiting independent expenditure by corporations and unions thus freeing corporations to spend money in electioneering communications and as well directly campaign for the election or defeat of candidates. However, the Supreme Court retained the prohibition on direct corporate and unions contributions to political

⁵³⁰ Ibid.

⁵³¹ Federal Electoral Commission *McConnel v. FEC* available at <https://transition.fec.gov/law/litigation/McConnell.shtml#sc> (accessed 14 October 2019).

⁵³² 558, U.S. 310 (2010).

⁵³³ Section 203 of BCRA.

⁵³⁴ Storrs Sam, 'Ethical Issues in Campaign Finance Reform: Equality v Free Speech (2013) 2(2), Seven Pillars Institute, 35-45.

parties and candidates. The Supreme Court emphasized that while the Government would not hinder free speech, it would properly regulate the same and enhance transparency by requiring for prompt disclosure of the sources of campaign funds by corporations.⁵³⁵

In the European Union, the European Court on Human Rights (ECtHR) has recognised the purpose of the limitation on expenditure and the state's need to protect the democratic debate when balancing regulatory objectives as against protection of freedom of speech.⁵³⁶ In *Bowman v United Kingdom*⁵³⁷ the Applicant challenged the United Kingdom's limit on independent campaign expenditure to £5⁵³⁸ as a violation of the freedom of speech and expression protected under Article 10 of the European Charter on Human and Peoples Rights. The Court considered United Kingdom's legitimate interest and objective in regulating independent campaign expenditure though found that the amount was too low and concluded that there was no violation of the Convention. The Court held that the restriction was proportionate to, and no more extensive than necessary in a democratic society to prevent the evasion of the maximum limits of expenditure. In the Court's opinion, such restrictions offer equality of arms as between candidates, protects candidates from manipulation by pressure groups and safeguard candidates' independence and does not prohibit the spending of money for the promotion of a cause other than promoting the interests, or harming the prospects, of a particular candidate. The restriction counterbalances the expenditure limits imposed on candidates and was limited in time to only during the electoral cycle. As such, they are justifiable, relevant and enough.

⁵³⁵ Section 201 and 311 of BCRA.

⁵³⁶ OSCE Office for Democratic Institutions and Human Rights, 'Handbook for the Observation of Campaign Finance' supra n 671.

⁵³⁷ 141/1996/760/961.

⁵³⁸ *Representation of the People Act 1983, Section 75)*

Relatedly, in *Animal Defenders International v United Kingdom*,⁵³⁹ the Court concluded that a ban on independent political advertising during the campaign period was justifiable and permissible to protect the democratic process from distortion by powerful financial groups with advantageous access to influential media. The prohibition was not a disproportionate interference with the Applicant's right to freedom of expression thus no violation of Article 10 of the Convention. The European Union jurisprudence gives a useful insight on the justification for imposing restrictions on independent expenditure caps by corporations. The USA has taken a liberal approach on independent campaign expenditure while the EU has taken a cautious and measured approach to regulating expenditure by candidates, corporates and political parties, which Kenya has adopted.

3.3.3.4 Disclosure Requirement

In *Citizens United*, the US Supreme Court while liberalizing independent expenditure said that the Government would enhance transparency by requiring for prompt disclosure of the sources of campaign funds by corporations.⁵⁴⁰ It is therefore a mechanism to promote accountability, transparency and public confidence in the integrity of an electoral process. In respect to corporations, disclosure is a mechanism by which corporations account to shareholders on their investment. Disclosure is also a useful tool for informing voters to enable them assess candidates and political parties before voting for them.

The Election Campaign Financing Act expects candidates, political parties together with referendum committees to disclose the amount and source of contributions received for campaign for nomination, election or referendum.⁵⁴¹ This disclosure entails indicating the amount of funds in one's expenditure account, the sources and nature of the said contributions and details of the

⁵³⁹ *Application no. 48876/08*.

⁵⁴⁰ OSCE Office for Democratic Institutions and Human Rights, 'Handbook for the Observation of Campaign Finance' supra n 671.

⁵⁴¹ *Ibid*, Section 16(3).

contributions and whether they were received in cash or in kind and whether or not they were donations.⁵⁴²

To ensure accountability, the Act imposes an obligation on a recipient of contributions to issue receipts for every amount received exceeding twenty thousand shillings.⁵⁴³ For contributions received from organizing harambees, the recipient must keep the record of the specific details of the harambee including the venue, date, organizers together with details of contributions received towards the harambee.⁵⁴⁴ Nevertheless, these contributions are to be given based on the limits set by the Commission through gazette notices.⁵⁴⁵

Through disclosure, a candidate or a political party will enable the IEBC to confirm whether that candidate, party or committee has complied with the requirement of the disclosure process under the Act.⁵⁴⁶

While under the Political Parties Act, the reports are public documents and are to be publicised in at least two newspapers with national circulation, disclosure reports under the Election Campaign Financing Act are confidential. They can only be disclosed when the information is required by a court of law, where there are investigations or where a complaint has been lodged against a party or candidate. A candidate who fails to disclose contributions and expenditure commits an offence. This may impair the right to access to information or militate against oversight of compliance by parties and candidates with this law.

⁵⁴² Ibid.

⁵⁴³ Ibid.

⁵⁴⁴ Ibid.

⁵⁴⁵ Ibid.

⁵⁴⁶ Ibid

3.3.3.5 Expenditure Reports

The filing of Reports is a useful tool to enable the IEBC monitor compliance with the Election Campaign Financing Act. Reporting should include preliminary reports (before election campaigns and during campaign periods) and final reports after the elections.⁵⁴⁷ An initial report commences the monitoring of compliance with preliminary election requirements like setting up of Committees, opening accounts and identifying the relevant accounting officers.⁵⁴⁸ Interim reports provide an opportunity for the IEBC to monitor compliance during the campaign process while the final report provides a complete and comprehensive account of all income and expenditure covering the entire electoral cycle.⁵⁴⁹

Kenya has adopted the three-tier reporting system of reporting. Candidates, political parties and corporations are required to register with the IEBC before elections and provide all the preliminary information. Party candidates are required to submit a preliminary nomination expenditure report to the political party and the IEBC.⁵⁵⁰ For an independent candidate or a referendum committee, they are each expected to submit only a final expenditure report to the Commission within three months following and elections.⁵⁵¹

All candidates and political parties are required to submit final expenditure reports to the IEBC within three months after elections.⁵⁵² Corporations independently spending money on behalf of candidates are also required to file reports on all their income and expenditure with the party or

⁵⁴⁷ OSCE Office for Democratic Institutions and Human Rights, 'Handbook for the Observation of Campaign Finance' *supra* n 671, 40.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Ibid.*

⁵⁵⁰ *Ibid.*, Section 10.

⁵⁵¹ *Ibid.*, Section 10.

⁵⁵² *Ibid.*

the candidate within thirty (30) days after an election to enable the candidate or political party incorporate the income and expenditure in the reports to the IEBC.

The expenditure report submitted by candidates, corporations and political parties must include records indicating all transactions, income and expenditure statements.⁵⁵³ While the reports are to help the IEBC monitor compliance with the law, the exemption of Independent candidates from submitting a preliminary nomination expenditure reports ignores the fact that Election campaigns in Kenya begin much earlier and most candidates actually spend more money during campaigns. It would there be foolhardy to assume that independent candidates only spend money after nominations. In fact, they may use this leverage to exceed the expenditure limits and account only for the sums spent during the official election period in their final reports to the IEBC.

3.3.3.6 Offences and penalties

The Act has designed that the failure to adhere to any of its provisions amounts to an offence by any party who breaches its provisions for which upon conviction one can be fined two million shillings or a term of imprisonment not exceeding five years or to both.⁵⁵⁴ The second penalty is an automatic disqualification of the candidate, political party or an independent candidate as the case may be.⁵⁵⁵

The Act has vested monitoring and oversight of compliance with the Act on the IEBC. The IEBC has the power to audit and review the reports to confirm compliance. Upon noticing any breaches, the IEBC may, if the breach has taken place before elections, disqualify the candidate, political party or the referendum committee from participating in the said election.⁵⁵⁶ The disqualified

⁵⁵³ Ibid, Section 10(5).

⁵⁵⁴ Ibid, Sections 22, 23 and 24.

⁵⁵⁵ Ibid.

⁵⁵⁶ Ibid.

candidates cannot be replaced by another candidate from the same party.⁵⁵⁷ If the breach is found after an election, the candidate or party is to be barred from participating in the next by-election or general election.⁵⁵⁸ Further, though the carry over clause of a ban is useful to ensure that candidates comply at all times, with Kenya's political culture, it will be difficult for the IEBC to implement this and ban candidates.

3.3.4 Political Parties' Rules and Regulations

To supplement the regulation of campaign financing by the Political Parties Act⁵⁵⁹ and the Election Campaign Financing Act,⁵⁶⁰ political party are required to have internal rules and regulations to regulate campaign contributions of its members.⁵⁶¹ A sample of two political parties, Orange Democratic Movement (ODM), and Jubilee rules give an interesting account. It is important to note that no political party even after the coming into force of the Election Campaign Financing Act after the 2017 general elections has developed rules and regulations as required by the law.

In 2014, the National Elections Governing Council for ODM adopted its election and Nomination Rules.⁵⁶² Any person intending to vie as an ODM candidate must show proof of having satisfied the requirements under the Elections Act and the Regulations thereof implemented by the Commission.⁵⁶³ Candidates are additionally required to sign a pledge of commitment to commit towards financing the party functions.⁵⁶⁴ The Rules do not have any further provisions on contributions or donations to the party or candidates during election campaigns. As for the Jubilee

⁵⁵⁷ Ibid, Sections 14(4), 21(5) & (6), 23(3).

⁵⁵⁸ Ibid.

⁵⁵⁹ (2011).

⁵⁶⁰ (2013).

⁵⁶¹ Kipruto Rono Arap Kirwa, 'The role of Political Parties in enhancing Democratic Governance in Africa: A case of Kenya' (MA Thesis, University of Nairobi 2018).

⁵⁶² ODM Election and Nomination Rules (adopted in 2014) < <https://www.odm.co.ke/images/downloads/ODM-Rules-Final.pdf>> accessed 25 July 2019

⁵⁶³ See Rule 19 of the ODM Nomination Rules, 2014.

⁵⁶⁴ Rule 21

party, it only has Nomination Rules which prescribe the procedure for conducting nominations with no clause on campaign financing of the party or party candidates during elections.⁵⁶⁵

3.4 Challenges faced in the Implementation of the Campaign Finance Laws

A review of the foregoing laws has disclosed that Kenyans wanted a break from the past and to reign in illegal campaign financing of political parties and candidates. In this regard, Parliament enacted several laws on campaign contributions and financing. However, Kenya is yet to fully regulate its campaign contributions and have politicians, parties or other supporters including corporate bodies adhere to the standards or rules laid down in the specific laws. In addition to those challenges observed in each of the foregoing sections, there are other challenges.

To start with, the Election Campaign Financing Act was enacted after the 2013 general elections and its commencement date postponed to the 2022 general elections in 2017. Its lofty provisions are yet to commence. This is largely due to Kenya's political culture that cherishes opacity and abhors transparency, accountability and integrity in the electoral process.

Secondly, the cost of elections continues to increase with each electoral cycle while the sources seem to be relatively less especially for small parties, women and not so endowed candidates.⁵⁶⁶

A lot of money is required during the party nominations exercise especially for the popular political parties as well as during the election campaign proper. The political parties also often rely on their party candidates to campaign for them in their strongholds without attendant additional funding.⁵⁶⁷

⁵⁶⁵ Jubilee Party Nomination Rules, 2016 < https://roggkenya.org/wp-content/uploads/jubilee-party-kenya-nomination-candidates-rules-primaries_sm.pdf> accessed 25 July 2019.

⁵⁶⁶ Magnus Ohman, 'The state of political finance regulations in Africa' (2016) International IDEA Discussion Paper 16/2016 < <https://www.idea.int/sites/default/files/publications/the-state-of-political-finance-regulations-in-africa.pdf>. accessed 31 July 2019.

⁵⁶⁷ Ibid.

This would increase the pressure on candidates and political parties to raise more funds including from illegal sources.

Third, the practice of bribery and treating of voters, though proscribed under the Election Offences Act is still rampant in Kenya and affects the entire relationship between political parties, candidates and the voters and compromises the electorates democratic right to choose leaders based on their abilities and policies.⁵⁶⁸ This increases the cost of elections and needs to be stopped by the IEBC, the National Police Service and all other Government agencies.

Fourth, as acknowledged by G.M. Njuguna in 1979,⁵⁶⁹ all attempts to cap campaign costs have failed because of the lack of goodwill and the failure to implement and enforce its provisions.⁵⁷⁰ This will affect the implementation of the law. Given that the enforcement of the Campaign Financing Act strikes at the hearts of politicians and political parties, it needs their total goodwill to allow the act to commence and the IEBC to implement it which has so far not been forthcoming as exemplified in the Members of Parliament accusation of IEBC as wanting to portray them in a bad light prior to postponing the commencement date of the Act in 2016.

Fifth is the capacity of the IEBC, the Registrar of Political Parties, the candidates and parties to comply with the disclosure and reporting requirements under the laws. The IEBC will be required to monitor all candidates and political parties and third-party entities who either contribute or spend money. While the IEBC and the Registrar of Political Parties have wide powers and discretion under the laws, there are various challenges with their capacity to investigate or conduct meaningful audits and reviews. For instance, the IEBC has itself been subject to corruption claims

⁵⁶⁸ Ibid at 21.

⁵⁶⁹ G.M. Njuguna supra n76.

⁵⁷⁰ Ibid at 23

on procurement of critical services or its impartiality in monitoring and ensuring compliance with the law. More questions may be raised on this critical issue.

Sixth, the IEBC and the Registrar of Political parties will be required to audit the reports and compliance status of candidates, political parties and third-party contributors or expenses. It will be an arduous task for them to do so noting that in Africa, the Election Management Bodies like IEBC do not have adequate finances to effectively discharge their core mandate. Relatedly, smaller parties in Kenya lack the proper institutional framework to receipt contributions, monitor their candidate's expense accounts, compile reports and submit to the IEBC. Some political parties lack office staff, others lack financial resources to adequately run an office, surely how can they then be expected to comply with the law.⁵⁷¹

Seventh, strict regulation as is Kenya's present regulatory framework may provide an incentive for political parties and candidates to keep parallel accounts under-report both their income and expenditure. In Kenya, political parties and candidates run parallel accounts that are not disclosed to the Registrar of Political Parties. It is estimated that during the 2013 general elections, Cord, Amani, Eagle and Jubilee Coalitions spent almost 10 Million shillings every day for hiring of helicopters for purposes of their campaigns.⁵⁷² The Jubilee Alliance and Coalition for Reforms and Democracy (CORD) used more than Kshs 10 billion which were not included in both parties reports to the Registrar of Political Parties.⁵⁷³ Kenya's political parties attitudes and culture have an important bearing on compliance.

⁵⁷¹ International Institute for Democracy and Electoral Assistance, Money, Influence, Corruption and Capture: Can Democracy be Protected' in *The Global State of Democracy 2017: Exploring Democracy's Resilience* (2017).

⁵⁷² Okechukwu Eme, 'Political Financing in Africa: A comparative study of Kenya and Nigeria: Proposal for reform' (2014) Vol.5 No. 27 *Mediterranean Journal of Social Sciences*.

⁵⁷³ International Institute for Democracy and Electoral Assistance, 'Money, Influence, Corruption and Capture: Can Democracy be Protected' in *The Global State of Democracy 2017: Exploring Democracy's Resilience* (2017)

Most importantly, the other oversight actors, voters, non-governmental organisations and human rights bodies cannot effectively play their watchdog role as both disclosure and expenditure reports are confidential and are not accessible to all on an online platform for each of access.⁵⁷⁴ Even the political party reports filed with the Registrar of Political Parties is not published and publicised as required by the law. It is therefore impossible for these watchdog entities to follow up on compliance with the law. The law needs to be amended to open all reports to public scrutiny.

The lack of clarity and contradiction on definition of lawful sources, illegal contributions and on corporate contributions to political parties under the Political Parties Act make it difficult for the IEBC and the Registrar of Political parties to implementation. The Political Parties Act needs to be harmonised with the provisions of the Election Campaign Financing Act to bring clarity and remove the contradictions in the Political Parties Act.

3.5 Conclusion

This Chapter set out to discuss the legislative and regulatory framework governing Elections campaign financing in Kenya. Various statutes, regulations, regional and international instruments have been considered and analyzed. It is noteworthy that the underlying principle emerging from the international, regional and local laws is the pursuit of fairness, equality of opportunity, transparency and integrity in elections. To achieve the foregoing, the international, regional and local legal framework analysed above proscribe corruption and illegal influence of corporate money in politics. Other than general principles, the international and regional legal framework lack specifics on regulating campaign financing. A case review conducted also gave an interesting insight into the political powerplay and the delicate balancing act in regulating campaign financing or fighting corruption in the electoral process.

⁵⁷⁴ Section 16(5) of the Election Campaign Financing Act, 2013.

Kenya has adopted a mixed policy strategy of both public and private campaign financing.⁵⁷⁵

The Election Campaign Financing Act and the Political Parties Act have in built mechanisms to level the playing field in the marketplace of politics through defining and permitting legal campaign contributions but capping the amount of private contributions to candidates and political parties, providing for public funding or support of political parties while proscribing illegal diversion or use of state resources to fund campaigns, particularization of legal expenditure and imposing expenditure caps for each position, requiring mandatory disclosure of contributions and expenses by political parties and candidates, the filing of expenditure reports and auditing of expenditure accounts by the IEBC and the Registrar of Political Parties, the imposition of sanctions to candidates and parties who fail to comply with the laws. All these statutory mechanisms seek to ensure that wealth does not translate into more control over the political process and poverty does not severely diminish a candidate's political power.⁵⁷⁶

Having analyzed the laws governing campaign financing in Kenya and the strategies adopted, it is proper to critically analyse the Goldenberg scandal and its role in fashioning the extant constitutional and legal strategies for regulating corporate campaign contributions in Kenya. This is discussed in the next chapter.

⁵⁷⁵ Pippa Norris, et al, 'Checkbook Elections: Political Finance in Comparative Perspective' (2006) *Money, Politics and Transparency* Series available at < https://carnegieendowment.org/files/Checkbook_Elections_brief.pdf > accessed 15 November 2019.

⁵⁷⁶ Keena Lipsitz, 'Democratic Theory and Political Campaigns' (2004) 12(2) *The Journal of Political Philosophy* 163-189.

CHAPTER FOUR

A CASE STUDY OF THE GOLDENBERG SCANDAL IN KENYA'S ELECTORAL PROCESS

4.0 Introduction

In Kenya, corruption is rife and rent seeking is sustained by an entrenched system of political impunity and patronage.⁵⁷⁷ Corruption in Kenya is systemic. It transcends both individuals and institutions. Corruption arises where capital and state intersect particularly in government contracts and tenders involving huge sums of money.⁵⁷⁸ Corruption undermines the inclusive nature of democracy and compromises equality by granting greater access to those that either give bribes, kickbacks, or make illegal payments to candidates, political parties, and government officials.⁵⁷⁹ Corruption further compromises accountability and transparency in governance.⁵⁸⁰

This chapter focuses on the Goldenberg scandal as it is one of the most reported and publicized corruption scandals involving corporations, and their proceeds ending up as contributions to election campaigns in Kenya. The scandal involved contracts worth huge sums of money which were procured and paid for from the public coffers and were reportedly used to finance the 1992 general election. The scandal involved a cocktail of corruption, embezzlement of public funds, donations of proceeds of corruption to candidates and political parties and the use of state machinery to protect or cover up the key players in the scandal.⁵⁸¹ The lessons learnt from this scandal are analyzed against the extant legal framework on campaign financing to confirm whether

⁵⁷⁷ Emmanuel Letete et al, 'Illicit Financial Flows and Political Institutions in Kenya' (2017) 275, African Development Bank, 3. See also Morris Szeftel, 'Misunderstanding African Politics: Corruption & the Governance Agenda' (1998) 25 (76), *Review of African Political Economy* 221-240.

⁵⁷⁸ Ibid.

⁵⁷⁹ Ronald Kempe Hope, 'Kenya's Corruption problem: Causes and Consequences' (2014) 52(4) *Commonwealth and Comparative Politics*, 493-512.

⁵⁸⁰ Mwangi wa Githinji et al, 'Reform and Political Impunity in Kenya: Transparency without Accountability' (2012) 55(1), *African Studies Review* 53-74.

⁵⁸¹ Ibid.

the constitutional and statutory framework post-2010 effectively regulate corporate campaign contributions in Kenya or sealed the gaps exploited in the two scandals to ensure integrity, transparency and equality in elections.

4.1 The Goldenberg Scandal and the 1992 General Elections

4.1.1 Political Context

Prior to the eruption of the Goldenberg scandal, in 1990, Parliament repealed Section 2A of the Constitution to bring KANU's one-party rule in Kenya to an end.⁵⁸² With the repeal of Section 2A in December 1991, Kenya conducted the first multi-party general elections on 29 December 1992 after the 1966 'little' general elections.⁵⁸³

In the said election, KANU's presidential candidate won the elections getting 36% of the total votes cast.⁵⁸⁴ In addition, KANU took 93 seats in the National Assembly, while both FORD (Kenya) and FORD (Asili) each won 31 seats and DP 23 seats.⁵⁸⁵ The total votes garnered by the opposition was more than those garnered by the KANU Candidate, President Daniel Toroitich Arap Moi while in the National Assembly, KANU had a narrow majority of Members of Parliament.⁵⁸⁶

4.1.2 The Goldenberg Scandal in Context (1991-1993)

The scandal involved senior officials of President Moi's administration. Together with local and international wheeler-dealers they capitalized on the government's desperation for foreign

⁵⁸² Ibid.

⁵⁸³Rok Ajulu, 'The 1992 Kenya General Elections: A Preliminary Assessment' in Review of African Political Economy' (1993) No. 56 pp. 98-102.

⁵⁸⁴ Ibid.

⁵⁸⁵ Ibid.

⁵⁸⁶ Ibid.

exchange and the greed of Moi's cronies to plunder Kenya's economy.⁵⁸⁷ It illustrated the level of grand corruption and looting of public resources in the highest political and executive offices of Kenya's Government.⁵⁸⁸

In August 1990, Goldenberg International Limited (hereinafter referred to as "Goldenberg") was incorporated at the Companies Registry by the Registrar of Companies with two initial subscribers and/or shareholders, Kamlesh Pattni and James Kanyotu.⁵⁸⁹ During this period, the government was experiencing a serious foreign exchange crisis due to declined earnings from the export sector, increased threats of aid cuts by development partners that were imposing strictures and conditions to Moi's regime for political and economic reform.⁵⁹⁰ Kenya was a largely controlled economy, with government controls on prices, interest rates and foreign exchange transactions through various Acts of Parliament which included the Exchange Control Act and the Export Compensation Act.⁵⁹¹

Consequently, no individual, corporation or firm could deal in foreign currency or retain any part of the proceeds of exports, even if they needed the funds to finance their imports or foreign commercial obligations.⁵⁹² Nevertheless, in October 1990, Goldenberg offered the government an alternative source of foreign exchange from what was described on paper as a "pilot scheme" involving gold and diamond jewelry exports.⁵⁹³ Goldenberg applied for an exclusive right and/or export license for gold, diamonds and jewelry from Kenya for an initial period of 5 years (with a

⁵⁸⁷ Peter Warutere, 'The Goldenberg Conspiracy: The game of paper gold, money and power' (2005) No. 117 *Institute for Security Studies*.

⁵⁸⁸ James T. Gathii, 'Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya' (1999) 14, *Connecticut Journal of International Law* 407-453, 427.

⁵⁸⁹ Peter Warutere, *supra* n 855.

⁵⁹⁰ *Ibid.*

⁵⁹¹ *Ibid.*

⁵⁹² *Ibid.*

⁵⁹³ Government of Kenya, 'The Report of the Judicial Commission of Inquiry into the Goldenberg Affair' (October 2005) at page 36, paragraph 78.

proposal to extend it for a further period of 5 years).⁵⁹⁴ Its proposal was to eliminate smugglers of these precious minerals and increase forex earnings for Kenya. They also sought monopoly status and export compensation at the rate of 35% (15% above the 20% prescribed by the Export Compensation Act).⁵⁹⁵

Simultaneously, Goldenberg also applied for a license to operate a finance company under the name of Goldenberg Finance Ltd.⁵⁹⁶ The government granted it an exclusive right to export gold and diamond jewelry but denied the company a forex dealership license hence prompting the company to open an Account with First American Bank.⁵⁹⁷ In April 1991, Goldenberg presented to First American Bank nine declaration (CD3) Forms to confirm that foreign exchange was received by it and to submit the returns together with the funds remitted by Goldenberg's customers overseas to the CBK.⁵⁹⁸ Through the forms, it was realized that Goldenberg was in breach of the exchange regulations, however, Goldenberg was allowed to continue trading claiming and receiving compensations.

By early 1992, Goldenberg had obtained a license to open a commercial bank in the name of Exchange Bank. Through this, all transactions were controlled under the same umbrella hence the difficulty in scrutiny.⁵⁹⁹ Most recorded transactions associated with Goldenberg occurred mainly between 1990 and 1993.⁶⁰⁰ At its peak in 1993, transactions associated with Goldenberg networks

⁵⁹⁴ Ibid.

⁵⁹⁵ Ibid.

⁵⁹⁶ Ibid.

⁵⁹⁷ Ibid.

⁵⁹⁸ Ibid.

⁵⁹⁹ Ibid at 7.

⁶⁰⁰ Ibid.

together accounted for over 10% of Kenya's Gross Domestic Product (GDP).⁶⁰¹ This scandal is estimated to have cost Kenya a conservative sum of US \$600 million in those three years.⁶⁰²

4.1.3 The Judicial Commission of Inquiry into the Goldenberg Scandal

Flowing from the foregoing background, the Goldenberg scandal tore through Kenya's political, economic and social fabric not just during the years when the actual transactions took place but also long afterwards.⁶⁰³ On 24 February 2003, President Mwai Kibaki appointed a Judicial Commission of Inquiry to investigate the Goldenberg scandal.⁶⁰⁴

The Commission was established to investigate the award of the proposal on the exportation of gold and diamonds to Goldenberg,⁶⁰⁵ counter check the irregularities on payments made to Goldenberg and investigate whether there were illegalities in the contracts.⁶⁰⁶ Finally, the Commission was to consider all persons and institutions involved in the scandal and advise whether they should be subjected to prosecution.⁶⁰⁷ The Commission was mandated to also inquire into the alleged payment of USD 210 million (Kshs. 13.5 billion) by the CBK to Goldenberg; how the money was used and whether any third parties benefitted from the said affair, their identity and sums paid to them.⁶⁰⁸ In addition, the Commission was to ascertain whether the Goldenberg's ill-gotten monies funded the campaigns of the political parties, the identity of those parties and to what extent those parties benefitted from the Goldenberg Scandal.⁶⁰⁹

⁶⁰¹ Pambazuka News, 'Kenya: Remember Goldenberg! Cost Kenya 10% Of GD' published on Pambazuka News available at <https://www.pambazuka.org> (accessed 13th September 2019).

⁶⁰² Ibid.

⁶⁰³ Government of Kenya, The Report of the Judicial Commission of Inquiry into the Goldenberg Affair, Government Printer, October 2005 at paragraph 1, page 1.

⁶⁰⁴ The Commission of Inquiry Act and by Gazette Notices Nos. 1237 and 1238 dated 24 February 2003.

⁶⁰⁵ This was to be investigated based on the provisions under the Local Manufacturers (Export Compensation) Act, Cap 482 Laws of Kenya.

⁶⁰⁶ Ibid.

⁶⁰⁷ Ibid.

⁶⁰⁸ Ibid.

⁶⁰⁹ Ibid.

4.1.3.1 The Findings and Recommendations of the Commission

The Commission undertook its work. It heard 102 witnesses over a period of 20 months.⁶¹⁰ The Commission found that Mr. Pattni had failed to produce evidence to support his claims that he had paid for KANU's t-shirts, posters, and other electoral items for the 1992 general elections.⁶¹¹ Furthermore, all vehicles allegedly purchased by Mr. Pattni and given to politicians and KANU campaign functionaries were not registered either in the names of Mr. Pattni, his companies, or in the names of the alleged beneficiaries.⁶¹² The Commission further found that the evidence availed by Mr. Pattni containing the payment schedule was skewed to fix certain individuals with whom Mr. Pattni had unresolved issues and was therefore tainted with bad faith.⁶¹³

However, the Commission found that that Mr. Pattni used the Goldenberg money to finance KANU in the 1992 general election.⁶¹⁴ The Commission found that because Mr. Pattni was close to some KANU politicians which included President Moi, Vice President Prof. George Saitoti and many other KANU politicians, he supported KANU financially. In fact, the Commission found as a fact that other KANU politicians like Mr. Evans Ondieki even signed payment chits acknowledging receipt of money on behalf of KANU from Mr. Pattni.⁶¹⁵ However, the Commission faced some difficulty in ascertaining the amount, nature and extent of such financial support without further tangible evidence or ascribe such support to particular individuals because of the unreliability of Mr. Pattni's List.⁶¹⁶

Regarding the third parties or individuals who benefitted from the payment of USD210 million (Kshs. 13.5 billion) by the **CBK** to the Exchange Bank Limited or Goldenberg and Goldenberg

⁶¹⁰ See paragraphs 12 and 15 of the Report at pages 10-11.

⁶¹¹ Ibid.

⁶¹² Ibid.

⁶¹³ Ibid.

⁶¹⁴ Ibid.

⁶¹⁵ Page 184 paragraph 487.

⁶¹⁶ Ibid at paragraph 488.

funds, the Commission found that there were both primary and secondary recipients of the funds totaling over 3.15 Billion Shillings.⁶¹⁷ Among the primary recipients were politicians, lawyers, law firms, children of politicians and companies associated with politicians and other entities that received the Goldenberg money.⁶¹⁸

Regarding the total alleged sum of Kshs 4.8 billion that Mr. Pattni had allegedly spent in the 1992 general elections, the Commission concluded that there was no sufficient proof from Mr. Pattni himself confirming the same.⁶¹⁹ He was not an election candidate and had no relations whatsoever to the beneficiaries of the amounts, hence, a further investigation ought to have been done.⁶²⁰ Further, in the event this was confirmed, KANU was supposed to refund the monies received by it. Secondly, it was confirmed that Mr. Pattni had made various financial donations to political leaders and in as much as it did not amount to a bribe, it portrayed a dangerous facet in parliamentary proceedings where such gifts and donations could be used to influence the propriety of contributions by members of Parliament in parliamentary proceedings and affect policy decisions.⁶²¹

Finally, the Commission established that various Government Ministries and organisations had been compromised during the scandal from the Auditor's office, CBK, General Service Police Unit, Office of the Attorney General, and even some Judicial Officers, hence a recommendation for further investigations to ascertain the exact role and intention of the officers concerned.⁶²² It was also established that the Government used the Parliamentary oversight mechanism under the Parliamentary Accounts Committee to manage public expectation, information and give the entire

⁶¹⁷ See pages 360-373 of the Report.

⁶¹⁸ Ibid at paragraph 515.

⁶¹⁹ Ibid.

⁶²⁰ Ibid.

⁶²¹ Ibid at paragraph 745 pp. 269.

⁶²² Ibid at paragraphs 773 to 784.

scandal a clean bill of health. In fact, the Committee found that the policy was adopted by the Executive and approved by Parliament. That the Executive had followed all the appropriate procedures required and that Parliament had approved appropriations and allocations to pay Goldenberg.⁶²³ By its resolution the Committee protected public officers and the key players in the scandal without recovering the funds paid to Goldenberg.⁶²⁴

However, the High Court on application by Prof George Saitoti and Eric Kotut in *Republic v Judicial Commission of Inquiry into The Goldenberg Scandal & 2 Others Ex-Parte George Saitoti and Eric Cheruiyot Kotut v S.E.O. Bosire & 2 Others* struck out various paragraphs in the Report which related to Prof George Saitoti and Eric Kotut and quashed the comments, findings and recommendations on their further investigations and prosecution. The Court issued Orders prohibiting the prosecution of both Prof George Saitoti and Eric Kotut.

In 2012 the main architect of the Goldenberg scandal, Kamlesh Pattni relying on the High Court decisions of Saitoti and Kotut sought to stop his prosecution for Goldenberg related offences arising from the Goldenberg Report. Mr. Pattni filed *Republic v. Attorney General & 3 others Ex parte Kamlesh Mansukhlal Damji Pattni*.⁶²⁵ The High Court terminated the prosecution of Pattni on grounds of breach of Mr. Pattni's right to a fair trial including the right to be presumed innocent and the right to be tried within a reasonable time and his vilification in the media without due process of law. Consequently, the Court granted the Orders of prohibition sought to stop the Director of Public Prosecutions from continuing with the criminal cases. The termination of the cases effectively terminated all efforts to prosecute perpetrators of the Goldenberg scandal.

⁶²³ James T. Gathii, supra n. 700 at 430-432.

⁶²⁴ Tonita Murray, 'Corruption in Developing Countries: What Keeping it in the Family Means for Everyone Else' (2015) 53, *Osgoode Hall Law Journal* 268-300.

⁶²⁵ High Court Misc. Application No 305 of 2012.

4.2 Lessons from Goldenberg Scandal in Kenya

A case study of Goldenberg Scandal has revealed that government officials engaged in corrupt deals in order to fund election campaigns. In addition, bribery was rampant in public procurement thereby giving the public officials an opportunity to abuse the procurement laws and processes to award hefty government contracts to divert public funds to individual or party campaign kitty. The scandal confirms that candidates and political parties need money for campaigns and will employ all rules and tricks to raise funds for their campaigns. Importantly, candidates and political parties like KANU during the Goldenberg scandal, abhor transparency and accountability for contributions and expenditure and do not wish to disclose or account for their political expenses.

Moreover, donors, like Kamlesh Pattni also did not want to keep records of the donations or expenditure to political parties and candidates. It was therefore very difficult for Mr. Pattni to table evidence of receipts, acknowledgements or signed chits for payments or expenditure on behalf of KANU or its candidates in the 1992 general elections. If any were kept, they were largely an afterthought, unreliable and did not represent an accurate list of total expenditure in campaigns.⁶²⁶

It is equally apparent that Kenya's political elite and politicians who have benefitted from campaign donations from corporations and individuals use state power and resources to shield the donors of those funds from scrutiny or prosecution. A case in point was the use of the GSU contingent of Kenya Police to protect Mr. Pattni from any arrest; the office of the Attorney General delaying the prosecution of the Goldenberg cases, entering *nolle prosequi* and drafting duplex charges which were thrown out by the Courts.⁶²⁷ All these steps were aimed at ensuring that the perpetrators were not brought to book. The judicial process was used to hinder and or shield

⁶²⁶ Ibid.

⁶²⁷ Government of Kenya, *supra* n 705.

prosecution of the persons involved in the Goldenberg Scandal.⁶²⁸ It also shows the failure of the Attorney General to properly exercise his prosecutorial powers in the public interest and recover funds pilfered through the Goldenberg scandal.⁶²⁹ The Parliamentary Accounts Committee also made a concerted effort to clear the Senior Government Officials and Kamlesh Pattni from the said scandal while crucifying the lower cadre staff.⁶³⁰

The effect of the unregulated campaign financing contributions included loss of confidence in the Kenya's electoral process, perpetuation of corruption in the political and electoral sphere, and increased instances of bribery and treating of voters during elections. It also resulted in increased cost of elections as well as diversion of public funds and state resources to campaign for incumbents thereby compromising the integrity, equality, transparency and accountability of elections.⁶³¹

4.3 Conclusion

This Chapter sought to discuss one of the mega corruption scandals that has faced the Kenyan political sphere since independence. The Goldenberg Scandal provided a critical insight into the role of corporations in Kenya's politics, the relationship between politicians, government officers and the corporations and the risk of corruption and the plunder of public resources. The lessons learnt from the Goldenberg scandal provides context and justification for regulation of corporate campaign contributions in Kenya. It also justifies Kenyans resolve to adopt the Constitution, the

⁶²⁸ See the *Eric Cheruiyot Kotut v S.E.O. Bosire & 2 Others* [2008] eKLR (High Court). See also *Joseph Mbui Magari v Attorney General & Another* [2011] eKLR (High Court) and *Republic v Judicial Commission of Inquiry into The Goldenberg Scandal & 2 Others Ex-Parte George Saitoti* [2006] eKLR (High Court). See also *Republic v Attorney General & 3 Others Ex Parte Kamlesh Mansukhlal Damji Pattni* [2013] eKLR (High Court).

⁶²⁹ In fact, the United States of America has banned Former Attorney General Hon Amos Wako for his Role in the previous corruption scandals including the Goldenberg. See Mireri Junior, 'Former AG Wako, wife and son barred from entering US over corruption' Standard Digital Newspaper, 18 November 2019 available at <https://www.standardmedia.co.ke/article/2001349893/ex-ag-amos-wako-barred-from-entering-us-over-graft> accessed 18 November 2019.

⁶³⁰ Tonita Murray, *supra* n737 293.

⁶³¹ *Ibid.* See also Maina Kiai et al, 'The Human Rights dimension of Corruption: Linking the Human Rights Paradigm to Combat Corruption' (2008) 4(3), *Journal of Global Ethics*, 247-253.

enactment of the Political Parties Act, Election Campaign Financing Act, the enactment of Anti-Corruption laws in Kenya as well as the transformation of public procurement laws in Kenya.

However, as has been discussed in Chapter three, laws alone may not be effective to curb illegal and corrupt financing of elections in Kenya. The laws need to be enforced by competent Government agencies with adequate financial resources and capacity to enforce the laws. In addition, the implementing agencies including the IEBC, the Registrar of Political Parties and the Ethics and Anti-corruption Commission need to work together to achieve their objective of regulating election campaigns. Moreover, political parties, candidates and all stakeholders need to work together to ensure that political parties and candidates are accountable and transparent in the conduct of election campaigns.⁶³² The next chapter draws lessons from other jurisdictions on how they have regulated their campaign financing with a view to analyzing how they regulate their corporate campaign contributions and hopefully learn some vital lessons.

⁶³² International Institute for Democracy and Electoral Assistance, *supra* n 815.

CHAPTER FIVE

LESSONS FROM SELECT JURISDICTIONS ON THE REGULATION OF CORPORATE CAMPAIGN CONTRIBUTIONS

5.0 Introduction

This chapter intends to draw lessons from South Africa and Canada on how they regulate campaign contributions. The chapter assess whether the two countries have enacted campaign financing laws, the extent to which such laws regulate corporate campaign contributions and expenditure, the strategies adopted by the two countries to implement the campaign finance laws and the challenges faced in implementation with a view to assisting Kenya achieve its purpose of ensuring integrity, transparency and equality in the electoral process in Kenya.

5.1 Rationale

South Africa was settled on as a developing democracy.⁶³³ It recently passed its Campaign Finance Law,⁶³⁴ and has had smooth running elections over time compared to other African countries.⁶³⁵ In addition, the Constitution of Kenya⁶³⁶ largely mirrors the provisions in the South African Constitution.⁶³⁷ It is therefore a good comparator for Kenya.

Canada is one of the few large countries across the globe which has upheld democratic principles over time and abides by its campaign financing laws. Through its successive governments since 1960 Canada has developed various legislations and guidelines on campaign financing. It is noteworthy that there have been successive laws and regulations to address the emerging issues in corporate campaign financing. Moreover, transparency and accountability remain the standard

⁶³³ Adam Habib, 'The transition to democracy in South Africa: Developing a dynamic model' *Africa e-Journals* pp. 50-73.

⁶³⁴ The Party Funding Act 2019

⁶³⁵ International Peace Institute, 'Elections in Africa: Challenges and Opportunities' (September 2011) Meeting Note. (2010).

⁶³⁷ (1993).

principles to be upheld by the contributors together with the beneficiaries.⁶³⁸ Canada has managed to successfully regulate campaign spending by its citizens and political parties.

5.2 Lessons on Corporate Campaign Financing

5.2.1 Legal Framework and Electoral Commissions

The South African Constitution provides for the enactment of national legislations to regulate the funding of political parties participating in both national and provincial legislations, on a fair, equitable and proportionate basis.⁶³⁹ There are three Acts of Parliament which regulate funding of political parties. The South African Electoral Act contains a schedule on Electoral Code of Conduct which indicates that free political campaigning is one of the condition that can lead to a free and fair elections.⁶⁴⁰ The Code is however silent on electoral campaign financing and does not prohibit the use of public or state resources in electoral campaigns.⁶⁴¹

The Public Funding of Represented Political Parties Act⁶⁴² guides the South African Parliament on how to allocate funds to various successfully elected political parties after an electoral process.⁶⁴³ In March 2019, South Africa passed the Political Party Funding Act (PPFA).⁶⁴⁴ The Act regulates both public and private funding of political parties in South Africa. Further, it regulates donations and expenditure, provides for disclosure, the respective obligations of political parties as well as for enforcement of its provisions and sanctions for breach.

⁶³⁸Anthony M. Sayers and Lisa Young, 'Election campaign and party financing in Canada' (2004) <https://www.researchgate.net/publication/228457739_Election_Campaign_and_Party_Financing_in_Canada/link/53d7d7f80cf2e38c632de558/download> accessed 31 July 2019.

⁶³⁹ The Constitution of South Africa, s. 236.

⁶⁴⁰ Electoral Act No. 73 of 1998, schedule 2.

⁶⁴¹ Public Affairs Research Institute, 'Party political funding and the South African State' (July 2017) <<https://47zhevti0ul2ftip9rxo9fj9-wpengine.netdna-ssl.com/wp-content/uploads/2017/08/Party-political-funding-and-the-SA-state-.pdf>> accessed 31 July 2019.

⁶⁴² Now repealed by the Political Party Funding Act of 2018.

⁶⁴³ The Public Funding of Represented Political Parties Act No. 103 of 1997.

⁶⁴⁴ Party Funding Act, 2019.

Canada through its Elections Act as amended over time⁶⁴⁵ regulates both public and private contributions and expenditure of both candidates and political parties.⁶⁴⁶

5.2.2 Donations and Contributions

Until 2019, South Africa did not regulate or control private contributions to political parties' campaigns.⁶⁴⁷ The previous electoral laws only provided for public funding for political parties after the elections.⁶⁴⁸ The public funding was meant to be used by the successfully elected political parties to the various organs of the country's government, but not for election campaigns.⁶⁴⁹ South Africa's election laws did not restrict third parties from supporting political parties financially creating a glaring legislative loophole.⁶⁵⁰

With the passing of the Political Party Funding Act (PPFA), private funding of political parties has now been legislated.⁶⁵¹ The Act defines donations to include money lent to or paid on behalf of a political party or assets, services or facilities provided to a political party, other than on commercial terms.⁶⁵² All persons and corporations are permitted to make donations to political parties or party members on behalf of the political party provided they do not exceed fifteen (15) million rand within a financial year.⁶⁵³ However, donations from foreign governments or their agencies, foreign persons save for training of or development of skills or policy by a political party, organs of the

⁶⁴⁵ Canada Elections Act, 2000.

⁶⁴⁶ Regulation of campaign finance and free advertising: Canada < <https://www.loc.gov/law/help/campaign-finance-regulation/canada.php>> accessed 1 August 2019.

⁶⁴⁷ Magnus Ohman, 'The state of political finance regulations in Africa' (2016) International IDEA Discussion Paper 16/2016 < <https://www.idea.int/sites/default/files/publications/the-state-of-political-finance-regulations-in-africa.pdf>. accessed 31 July 2019.

⁶⁴⁸ Ibid. See also Lowry M. P. 'Legitimizing Elections Through the Regulation of Campaign Financing: A Comparative Constitutional Analysis and Hope for South Africa' (2008) 31(2), B.C Int'l & Comp. Rev. 185-212, 203-204.

⁶⁴⁹ Ibid. See also Sokomani A., 'Money in Southern African Politics' supra n. 187, 87.

⁶⁵⁰ Ibid.

⁶⁵¹ Political Party Funding Act No. 6 of 2018.

⁶⁵² Section 1 of the Act.

⁶⁵³ Sections 8(2) & 10 of the Act as read with regulation 7 of the Regulations on Political Party Funding, 2018.

state or state owned enterprises are expressly prohibited.⁶⁵⁴ Political parties are equally prohibited from accepting any donation which it knows or reasonably believes or suspects that is a proceed of crime.⁶⁵⁵ The parties must report it to the Electoral Commission all suspected proceeds of crime.⁶⁵⁶

In Canada, a contribution is defined as donated money, property, or services.⁶⁵⁷ Only Canadian citizens or permanent residents in Canada can contribute to a registered party or a candidate.⁶⁵⁸ Any contribution paid by an ineligible contributor is to be returned to the contributor or paid to the Chief Electoral Officer within thirty (30) days of receipt or notice of ineligibility.⁶⁵⁹ The Act limits contributions to not more than 1,500 Canadian Dollars in any one year to a candidate or a political party.⁶⁶⁰ This sum increases annually by 25 dollars.⁶⁶¹ Cash contributions must not exceed 20 Canadian Dollars.⁶⁶² Authorised persons receiving money are enjoined to issue receipts for each contributions of more than 20 Canadian Dollars.⁶⁶³

However, the Federal Accountability Act, 2006 completely bans contributions from corporations and unions to candidates and political parties.⁶⁶⁴ Similarly, there is a limit on loans and loan

⁶⁵⁴ Section 8(1) of the Act.

⁶⁵⁵ Section 8(3) of the Act.

⁶⁵⁶ This is different from the repealed law which did not provide for any reporting or otherwise of private donations made to political parties. See Gary Plenaar, 'Foundations and options for party funding reform in South Africa' (2014) Policy brief < http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170803Human_-_Annexure_1.pdf. accessed 31 July 2019.

⁶⁵⁷ Canada Elections Act, Section 364.

⁶⁵⁸ Section 363(1) of the Elections Act.

⁶⁵⁹ Section 363(2) of the Elections Act.

⁶⁶⁰ Section 367 of the Elections Act.

⁶⁶¹ Ibid.

⁶⁶² Section 371 of the Elections Act.

⁶⁶³ Section 366(1) of the Elections Act.

⁶⁶⁴ Gray Anthony, 'The Regulation of Electoral Financing' (2009), *Oxford U. Comparative L. Forum* 1-20, 6. See also Feasby Collin 'Constitutional Questions About Canada's New Political Finance Regime' (2007) 45 *Osgoode Hall Law Journal* 513.

guarantees to a registered party.⁶⁶⁵ For a registered party, only chief agents or authorized registered agents are allowed to accept contributions on its behalf.⁶⁶⁶

Moreover, the Act gives specific details on recording and accounting for contributions from joint accounts, online payment services partnerships or even an unincorporated proprietor.⁶⁶⁷ Anonymous contributions of less than 20 dollars can be received by the authorized person provided that the authorised person records the date of the function, the approximate number of people at the function and the total amount of anonymous contributions received.⁶⁶⁸ All anonymous contributions exceeding 20 dollars must be sent to the Electoral Body of Canada as soon as possible vide a cheque.⁶⁶⁹

From the foregoing analysis, South African laws provide for both public and private funding of political parties. Like Kenya, the South African laws also permit corporations to make contributions to candidates and political parties. To ensure transparency, integrity and accountability, such contributions are subject to limits, disclosure by both the donor and the recipient, reporting by the recipient as well as monitoring and supervision by the Electoral Commission(s). Canada permits both public and private funding but limits donors to citizens and permanent residents. Corporate contributions are outlawed as are foreign contributions which is common to all the three countries.

5.2.3 Disclosure Requirements

Due to restrictions on contributions in Canada, companies have no obligation to disclose their contributions to the Electoral Commission. In South Africa, corporations are required to disclose

⁶⁶⁵ Sections 373- 374 of the Elections Act.

⁶⁶⁶ Ibid.

⁶⁶⁷ Ibid.

⁶⁶⁸ Section 366 of the Elections Act.

⁶⁶⁹ Ibid.

their contributions to the Electoral Commission if such donations exceed the required threshold.⁶⁷⁰ Similarly, all political parties are tasked to disclose to the electoral commission all donations above the threshold. Political parties are also required to open separate accounts and deposit all donations in those accounts. They must appoint an Accounting Officer to account for all income to the political party, confirm that only permitted donations are received by the party and prepare financial statements showing all donations received and submit them to the auditor.⁶⁷¹ The political party is also required to appoint an auditor to confirm its compliance status with the law.⁶⁷² The Accounting Officer is to submit both the audited financial statements and the auditor's opinion on compliance to the Electoral Commission.⁶⁷³

The Electoral Commission is also tasked to publish the report of donations disclosed to it by individuals, juristic persons and political parties on a quarterly basis.⁶⁷⁴ These quarterly reports are accessible to the members of public both online on the Commission's website and from the Commission's offices.⁶⁷⁵ This enhances transparency and accountability by corporations, political parties and their candidates to voters, shareholders and all other stakeholders including the civil society.

In *My Vote Counts NPC v Minister of Justice and Correctional Services*⁶⁷⁶ My Vote Counts NPC had sought information relating to the private funding of some political parties under the Promotion of Access to Information Act (PAIA)⁶⁷⁷ as read with the South African Constitution.⁶⁷⁸ The Constitutional Court noted that although South African Parliament had not passed legislation

⁶⁷⁰ Section 9(2) of the Act.

⁶⁷¹ Section 12(2) of the Act.

⁶⁷² Section 12(3) of the Act.

⁶⁷³ Section 12(4) of the Act.

⁶⁷⁴ Section 9(1) of the Act.

⁶⁷⁵ You may visit the Commission's Website at <https://www.elections.org.za/content/Elections/Laws-and-Regulations-Political-Party-Funding/> accessed 30th September 2019.

⁶⁷⁶ CCT 249/17.

⁶⁷⁷ Promotion of Access to Information Act 2 of 2002 (PAIA).

⁶⁷⁸ Sections 7(2), 19 and 32 of the Constitution of the Republic of South Africa.

providing for the recording and disclosure of information on private funding of political parties and independent candidates, the Constitution required the Court to give practical and meaningful expression to the right of access to information and the right to vote. The Court further held that given that the right to vote must be based on an informed choice, there is a vital nexus between the right to vote and the right of access to information. The Court firmly found that without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in the political process would be severely undermined. The Court declared that the information on private funding of political parties must also be widely disseminated and be made easily accessible to the media, NGO's, academia and other political players to ensure the proper functioning and vibrancy of democracy.⁶⁷⁹

In Kenya, disclosure reports are deemed confidential and are not required to be published online. This makes enhances opacity and makes oversight and monitoring difficult. The South African experience should provide an impetus for increased transparency and disclosure of private funding to political parties.

5.2.4 Limit on Expenses

The Canadian Electoral Act defines an electoral campaign expense of a candidate to include expenses reasonably incurred in relation to elections, litigation, travelling and accommodation, accessibility, personal needs and fees paid to an auditor.⁶⁸⁰ It sets a maximum of \$700,000 for expenses to be incurred during the pre-election period.⁶⁸¹ Because of the ban on donations of any money or gift by a company to a political party, a candidate or for political purposes, companies

⁶⁷⁹ <http://www.saflii.org/za/cases/ZACC/2018/17media.pdf>.

⁶⁸⁰ Canada Elections Act, Section 375.

⁶⁸¹ Ibid, section 223.

have no disclosure obligations in Canada. However, they are permitted to independently incur expenses which they must account for.

In South Africa, there is no provision for juristic persons to independently spend any monies campaigning for a candidate or a political party. There is therefore no need for limits on independent expenditure. This different from Kenya where corporations are permitted to independently spend money in election campaigns.

5.2.5 Powers of the Electoral Commissions to impose Sanctions and Penalty

The Canadian and South African campaign financing laws have penal provisions for any infractions. The Electoral Commissions can impose penalties and sanctions against donors, candidates and political parties who contravene the provisions of the said laws.

Like the IEBC and the Registrar of Political Parties, the South African Electoral Commission and Elections Canada have powers to issue summons and directions, investigate, audits and call for reports and documents, enter and inspect premises, suspend the payment of any monies due, and recover money irregularly accepted or paid to a candidate or political party or even impose administrative fines, amongst others.⁶⁸²

Unlike Kenya's IEBC and the Registrar of Political Parties, South African Electoral Commission and Elections Canada are functional, always well-funded, well-staffed and upon conducting investigations, do proceed to impose sanctions. They are effective in discharging their duties.⁶⁸³

This compared to Kenya where there exists a law, however, in practice, enforcement never takes place and sanctions are never imposed on violators.⁶⁸⁴

⁶⁸² See Sections 14, 15 and 16 of the South Africa's Public Funding Act.

⁶⁸³ Feasby Collin 'Constitutional Questions About Canada's New Political Finance Regime' (2007) 45 *Osgoode Hall Law Journal* 513.

⁶⁸⁴ Ibid.

5.3 Challenges in Campaign Finance Regulation in the Select Benchmark Jurisdictions

In South Africa, private funding was largely unregulated. Political parties were not required to disclose their private sources of finance or expenditure. Political parties were equally not restrained from engaging in businesses or from receiving foreign donations. The lacuna created a viable channel for party financing corruption.⁶⁸⁵ However, public funding was strictly a regulated subject and the Electoral Commission ensured that the laws were complied with fully. Political parties filed reports which were publicly shared on a quarterly basis and are easily accessible and available to the members of public both online on the Commission's website and from the Commission's offices.⁶⁸⁶

South Africa ranks highly as one of the few countries within the African continent with a classic example of a working democracy and good governance. Without a campaign financing law regulating private donations, South Africa was able to hold its elections peacefully without squabbles as witnessed in Kenya which has enacted election campaign financing laws.⁶⁸⁷ The passing of PPFA is a welcome move to the Electoral Commission. Given the fact that it was postponed to the next general elections, the challenges in respect of its implementation are yet to be noted. The Commission has however developed draft regulations⁶⁸⁸ and conducted public participation immediately after the 2019 national and regional elections. In Kenya, the IEBC took three years to come up with the Regulations in 2016 just months to the 2017 general elections which were shelved by Parliament and have not been discussed three years later. The South African

⁶⁸⁵ Sokomani A., *supra* n 167, 88.

⁶⁸⁶ You may visit the Commission's Website at <https://www.elections.org.za/content/Elections/Laws-and-Regulations-Political-Party-Funding/> accessed 30th September 2019.

⁶⁸⁷ Fergal Keane, 'South Africa election: ANC wins with reduced majority' (BBC News, 2019) <<https://www.bbc.com/news/world-africa-48211598>> accessed 31 July 2019

⁶⁸⁸ The Political Party Funding Act Draft Regulations, 2019.

Electoral Commission is very proactive and is taking steps to effectively implement the Act. Kenya's IEBC is very lethargic.

In Canada, although corporate campaign contributions to candidates and political parties are prohibited and Elections Canada is strictly enforcing the law, there are corporations devising ingenious strategies to circumvent the law. A case in point is the 2016 case where an Engineering corporation, SNC Lavalin donated more than 117,000 Canadian Dollars to two federal political parties.⁶⁸⁹ The Company circumvented the law by encouraging its employees to donate to federal political parties⁶⁹⁰ and they subsequently reimbursed those donations disguised as personal expenses or payment for fictitious bonuses.⁶⁹¹

Mr. Norman Morin, a former Vice President of the Company pleaded guilty to two charges and was fined 2,000 Canadian Dollars.⁶⁹² The parties were also compelled to reimburse the money received to the Receiver General, Canada.⁶⁹³ A similar strategy was adopted by Groupe Axor Inc and Axor Experts-Conseils Inc. Between 2004 and 2009, the two companies donated Canadian Dollars 66,237.60 and 49,721 to both the Liberal and the Conservative parties in Canada. The Companies reimbursed the said sums as bonuses and personal expenses.⁶⁹⁴ They were equally fined three times the donations plus an additional investigative cost.⁶⁹⁵

⁶⁸⁹ Thompson E. 'Key Figures in Illegal Election Finance Scheme Quietly Pleads Guilty' Jan 19, 2019, CBC News available at <https://www.cbc.ca/news/politics/election-financing-snc-lavalin-charbonneau-1.4984823> accessed 30 September 2019.

⁶⁹⁰ These Parties include the Liberal Party of Canada which received \$83,534, its Liberal riding associations received \$13,552; contestants in the Liberal Party's 2006 leadership race got \$12,529; Conservative Party of Canada received \$3,137, while its riding associations and candidates were given \$5,050.

⁶⁹¹ Ibid.

⁶⁹² Ibid.

⁶⁹³ Ibid.

⁶⁹⁴ Pass-Lang Christian, 'Two Companies forced to pay \$ 450,000 for Illegal Donations for Federal Parties' Aug 29, 2019, The Canadian Press available at <https://www.ctvnews.ca/politics/two-companies-forced-to-pay-450-000-for-illegal-donations-to-federal-parties-1.4570458> accessed 30 September 2019.

⁶⁹⁵ Ibid.

5.4 Conclusion

The study has established that Canada prohibits corporate campaign contributions to candidates and political parties. South Africa and Kenya permit juristic persons including corporations to contribute to political parties and candidates. Canada and Kenya permit independent corporate campaign expenditure on the notion of not violating the right to free speech. South Africa does not permit independent corporate expenditure in its law, but these corporations continue to spend money in politics. The President of South Africa, Cyril Ramaphosa is presently subject to investigations for indirectly receiving \$ 36,000 from Bosasa, a corporation ahead of the May 2019 elections.⁶⁹⁶

The countries that permit contributions and expenditure require the political parties to disclose the contributions received and file reports of expenditure. There are also limitations on corporate campaign contributions imposed by law or set by the Electoral Bodies. A breach of the Campaign Financing laws attracts sanctions, fines and criminal charges as well. On enforcement, the Electoral bodies have wide powers of investigations, issue summons, audit, reviewing, monitoring and even prosecuting errant culprits.

Though South Africa at the time did not have a written legislation regulating private campaign financing, it made strides in effectively regulating public funding. However, politicians and parties continued to exploit private funding of political parties prompting the removal of President Jacob Zuma on account of his relationship with the Gupta Brothers and the enactment of the law to regulate private campaign contributions.⁶⁹⁷

⁶⁹⁶ Norimitsu Onishi, 'Who is Funding the A.N.C.'s Election Campaign? South Africans are in the Dark' (New York Times) 4 May 2019 available at <https://www.nytimes.com/2019/05/04/world/africa/south-africa-election-campaign-ramaphosa.html> accessed 15 November 2019.

⁶⁹⁷ Norimitsu Onishi and Selam Gebrekidan, 'In Gupta Brothers' Rise and Fall, the Tale of a Sullied A.N.C.' (New York Times) 22 December 2018.

Canada has revised its laws to regulate the innovative attempts to circumvent the laws. Further, there is evidence of successful implementation of the law and bringing law breakers to book. Kenya can strive to enforce its laws to effectively regulate campaign financing is well controlled resulting to peaceful campaigns and finally, peaceful elections. Despite this strict enforcement, some companies still innovate ways to circumvent the campaign finance law as found in the highlighted cases. There should be constant monitoring of all actors in the electoral system to ensure compliance with the law.

Canada and South Africa have gone a notch higher in promoting the right to access to information availed online financial returns, regulated fundraising events, reports on financial spending and even information on political entities' registries.⁶⁹⁸ The South African Constitutional Court and a vibrant Civil Society⁶⁹⁹ has provided checks and balances and ensured that Parliament amends the law to provide for disclosure of the private sources of funding to political parties and candidates.⁷⁰⁰ Kenya's Civil Society Organizations should take cue from South African and challenge the confidentiality of disclosure and expenditure reports.

⁶⁹⁸ Political financing < <https://www.elections.ca/content.aspx?section=fin&&document=index&lang=e>> accessed 1 August 2019

⁶⁹⁹ My Vote Counts is one of the active Civil Society Organizations. It has tracked the implementation of campaign financing laws and compliance with the Constitutional Court Order in South Africa. Visit their website at <https://us12.campaign-archive.com/home/?u=fd420c01b80ceb8e455924633&id=1b9fd17b97> or <https://us12.campaign-archive.com/?u=fd420c01b80ceb8e455924633&id=9840b7bafe> (accessed 18 November 2019).

⁷⁰⁰ Fergal Keane, 'South Africa election: ANC wins with reduced majority' (BBC News, 2019) < <https://www.bbc.com/news/world-africa-48211598>> accessed 31 July 2019.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Major Findings

The main aim of this study was to ascertain whether Kenya has designed a legal and policy framework that effectively regulates corporate campaign contributions in Kenya. This would be done by permitting corporations to contribute in the political process without compromising the integrity, transparency and fairness of the electoral process.

The study interrogated how corporations have been involved in Kenya's politics with a focus on Goldenberg Scandal. The study further asked what laws govern corporate campaign contributions in Kenya and what lessons can Kenya learn from South Africa and Canada in regulating corporate campaign contributions.

Chapter Two demonstrated that all elections in Kenya since 1979 have been conducted without regulation or compliance with the existing laws on campaign financing resulting in entrenched opacity and lack of control in party and candidates campaign financing. A legal framework existed for the disclosure of expenditure by political parties under the Societies Act and Election Laws Amendment Act. However, it was either inadequate to effectively regulate political parties campaign expenditure or it was never implemented, and its provisions enforced by the Electoral Commission of Kenya.

In Chapter Three, the study identified and analysed all the relevant laws, international instruments and regulations on corporate campaign financing in Kenya and their impact on corporate campaign contributions. A review of the international, regional and local legal and institutional framework in chapter three disclosed the principles and values geared towards achieving fairness, levelling the playing field and ensuring that there is equality in the marketplace of politics. The laws from

upon corruption, bribery and illegal influence of corporate money in politics. In accordance with the egalitarian theory, the laws strike a balance between the competing interests of protecting the right to free speech and expression and ensuring that the wealthy do not compromise the marketplace of politics.

The study established that Kenya has adopted a mixed policy strategy of both public and private campaign financing.⁷⁰¹ Through the Election Campaign Financing Act and the Political Parties Act, there are in built mechanisms that define and permit legal corporate campaign contributions but capping the amount of contributions to candidates and political parties. The laws further provide for public funding of political parties while proscribing illegal diversion or use of state resources to fund campaigns. The laws also prescribe items of expenditure, imposes expenditure caps for each position and requires mandatory disclosure and reporting of contributions and expenses by political parties and candidates. The IEBC and the Registrar of Political Parties have wide powers and discretion to enforce the laws, investigate, inspect, monitor, audit both candidates and political parties and impose sanctions on candidates and parties who fail to comply with the laws. All the statutory mechanisms seek to ensure that wealth does not translate into more control over the political process and poverty does not severely diminish a candidate's political power.⁷⁰²

A review of jurisprudence from the USA, EU and South Africa demonstrated the delicate balancing act where both free speech and equality are protected as proposed by the Rawlsian egalitarian school of thought. Kenya can draw vital lessons from the USA, EU and South Africa.

⁷⁰¹ Pippa Norris, et al, 'Checkbook Elections: Political Finance in Comparative Perspective' (2006) *Money, Politics and Transparency* Series available at < https://carnegieendowment.org/files/Checkbook_Elections_brief.pdf > accessed 15 November 2019.

⁷⁰² Keena Lipsitz, 'Democratic Theory and Political Campaigns' (2004) 12(2) *The Journal of Political Philosophy* 163-189.

A case study of the Goldenberg scandal in Chapter Four provided a critical insight on the role of corporations in Kenya's politics, the relationship between politicians, government officers and the corporations, and the risk of corruption and plunder of public resources. It was established that corporations spend huge sums of money to fund Kenya's politics and devise schemes to recover their money from the public coffers and peddle their influence and relationships with the political class to get government contracts or shield themselves from prosecution for corrupt practices and illegal practices. The lessons learnt from this scandal provided context for the adoption of the Constitution of Kenya 2010 and the passage of the Political Parties Act and Election Campaign Financing Act and justified the need to regulate corporate campaign contributions.

However, as observed in Chapters Three and Four, the Election Campaign Financing Act was not applied to the 2017 general elections. The Registrar of Political Parties has also been unable to effectively implement and enforce the provisions of the Political Parties Act. Parties and candidates are equally not cooperating with the Registrar and devise mechanisms like running parallel accounts and understating the contributions received to circumvent compliance with the campaign financing laws. The study further established that the IEBC, the Registrar of Political Parties, political parties and candidates lack adequate financial and institutional resources to comply with the law.

To address these challenges, this study drew lessons on regulation of corporate campaign financing from South Africa and Canada. Chapter Five demonstrated a need for Kenya to strictly implement its existing laws if it needs to effectively regulate corporate campaign contributions. A review of campaign financing laws in South Africa and Canada established that the Canadian, South African and Kenyan laws have common principles and provisions on contributions, expenditure, disclosure, reporting and on penal sanctions. Canada prohibits corporate campaign contributions to candidates and political parties while South Africa and Kenya permit corporations to contribute

to political parties and candidates. The study also revealed that Canada and Kenya permit independent corporate campaign expenditure while South Africa does not permit independent corporate expenditure in its law though corporations continue to spend monies.

The study also established that even with strict laws and a vibrant and effective Electoral Commissions, some companies still innovate ways to circumvent the campaign finance law. There should be constant monitoring by all actors in the electoral system to ensure compliance with the law.

Canada and South Africa have gone a notch higher in promoting the right to access to information availed online financial returns, regulated fundraising events, reports on financial spending and even information on political entities' registries.⁷⁰³ The South African Constitutional Court and a vibrant Civil Society⁷⁰⁴ has provided checks and balances and ensured that Parliament amends the law to provide for disclosure of the private sources of funding to political parties and candidates.⁷⁰⁵ Perhaps Kenya's Civil Society Organizations should take cue from South African and challenge the confidentiality of disclosure and expenditure reports to enhance transparency, deepen democracy and integrity in elections.

6.2 Conclusion

This study concludes that the Election Campaign Financing Act, 2013 and the Political Parties Act are a good start for regulating corporate campaign financing. These acts balance the public interest of ensuring equality and integrity in elections without compromising the right of candidates to

⁷⁰³ Political financing < <https://www.elections.ca/content.aspx?section=fin&&document=index&lang=e>> accessed 1 August 2019

⁷⁰⁴ My Vote Counts is one of the active Civil Society Organizations. It has tracked the implementation of campaign financing laws and compliance with the Constitutional Court Order in South Africa. Visit their website at <https://us12.campaign-archive.com/home/?u=fd420c01b80ceb8e455924633&id=1b9fd17b97> or <https://us12.campaign-archive.com/?u=fd420c01b80ceb8e455924633&id=9840b7baf> (accessed 18 November 2019).

⁷⁰⁵ Fergal Keane, 'South Africa election: ANC wins with reduced majority' (BBC News, 2019) < <https://www.bbc.com/news/world-africa-48211598>> accessed 31 July 2019.

contest in elections. However, the laws have gaps and contradictions especially on identifying illegal or unlawful sources and the regulation of corporate campaign contributions. These need to be harmonised. Secondly, the confidentiality of disclosure and expenditure reports is a threat to the right to access to information which is joined at the hip with the right to vote. Steps should be taken to amend the Election Campaign Finance Act 2013 to remove the bottlenecks to integrity, transparency and accountability in the electoral process. The IEBC and Registrar of Political Parties should also immediately commence the process of implementation of these laws as they are now in force. Political parties and political leaders should also support the enforcement of these laws in Kenya.

6.3 Recommendations

6.3.1 Short Term Recommendations

1. Enforcement mechanisms to be put in place for the already existing legal framework on campaign financing;
2. Build capacity of both IEBC and the Registrar of Political Parties to ensure that they are ready to commence the implementation of the laws;
3. Cooperation among all the State agencies involved in regulation of campaign financing, fighting corruption and ensuring integrity in Elections. The IEBC must work together with the EACC, Registrar of Political Parties, Auditor- General, the CBK, the Financial Reporting Centre, Business Registration Services in the Office of Attorney General, the Directorate of Criminal Investigations and the Office of the Director of Public Prosecutions to implement the campaign financing laws in Kenya and prosecute offenders.
4. Sensitizing Members of the public, political parties and those aspiring to join politics to appreciate their legal obligations under the law in preparation for the implementation thereof;

6.3.2 Mid-term Recommendations

1. Development of Regulations under the Election Campaign Financing and Political Parties Acts with clear and detailed provisions on all aspects of election campaign financing in time to enable adequate public participation by all concerned players;
2. IEBC and the Registrar of Political parties should design the reporting framework for candidates, political parties and third parties including corporations on independent expenditure;
3. Introduction of internal control mechanisms within political parties to oversee financial management and fundraising activities;
4. Involvement of Civil Society Organisations to help in civic education and help in monitoring and oversight over the compliance with the laws;

6.3.3 Long-Term Recommendations

1. The IEBC and the Registrar of Political Parties should establish an independent audit Committee or team to review the campaign financing reports handed over to the Commission by various political parties, candidates or even the referendum committees and make recommendations for their compliance with the laws;
2. Parliament should repeal the confidentiality of reports and open them up to scrutiny;
3. Parliament should harmonise the provisions of the Political Parties Act and the Election Campaign Finance Act.
4. Include provisions in the law disqualifying any party and party candidates that do not comply with the election campaign financing laws in Kenya and deny public funding to any party that does not comply with election campaign financing laws in Kenya. This will push political party candidates to change Kenya's political culture and push their parties to comply with the laws before elections.

5. Provide adequate funding to the IEBC and the Office of Registrar of Political parties and political parties to enable them to discharge their constitutional and statutory duties better.

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