

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**LIMITS OF THE LAW IN THE REGULATION OF PRESIDENTIAL ELECTIONS: A
CASE STUDY OF KENYA'S 2017 PRESIDENTIAL ELECTIONS**

BY

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DEDICATION

This work is dedicated to my beloved parents, Pius Kakai Wanyonyi and Violet Khaikwa Kakai who brought me up, laid the foundation for my education and instilled the reading culture. I also dedicate this work to my brother, Zakaria Mutoro Kakai and sister, Rael Muyindi Kakai for always encouraging me.

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Universal Declaration of Human Rights, 1948

OAU/AU Declaration on the Principles Governing Democratic Elections in Africa, 2002

LIST OF ABBREVIATIONS

ACDEG	African Charter on Democracy, Elections and Governance
AG	Attorney General
AU	African Union
BVR	Bio-Metric Voter Registration
CRO	County Returning Officer
CTC	County Tallying Center
ETAC	Elections Technology Advisory Committee
ECK	Electoral Commission of Kenya
EVI	Electronic Voter Identification
EOP	Elections Operation Plan
EMB	Election Management Body
GPS	Global Positioning System
HE	His Excellency
ICCPR	International Covenant on Civil and Political Rights
IIDEA	International Institute for Democracy and Electoral Assistance
IEBC	Independent Electoral and Boundaries Commission
IEMS	Integrated Elections Management System
IFES	International Foundation for Electoral Systems
IREC	Independent Review Commission

KIEMS	Kenya Integrated Elections Management System
MVR	Mass Voter Registration
NASA	National Super Alliance
NRO	National Returning Officer
NTC	National Tallying Center
OAU	Organization of African Unity
PO	Presiding Officer
PWDs	Persons Living With Disabilities
RO	Returning Officer
RTS	Results Transmission System
UN	United Nations
UNEP	United Nations Education Program

ABSTRACT

The study sought to find out the limits of the law in regulating presidential elections. Despite an enhanced legal framework, the history of elections in Kenya has been replete with presidential electoral disputes, sometimes characterized with violence. Post the 2010 constitutional enactment, the subsequent elections of 2013 and 2017 have not been free of political disputes and in particular presidential election disputes. On account of the above apparent failure of the law in delivering free fair and credible elections, the thesis sought to investigate why the law is not effective in regulating presidential elections. The study proceeded on the hypothesis that electoral law is limited to the extent that even though it provides for an elaborate procedure and roles to be performed by participants in a presidential election, the law is limited as a result of a culture of disobedience of the law. The principal objective of the study was to find out why the law is not effective in regulating presidential elections. The study made the findings that electoral laws in Kenya have undergone transformation. Electoral laws in the post-2010 constitutional dispensation were enacted to try and cure the failures of the electoral laws in the pre-2010 constitutional dispensation and make presidential elections more credible. However, those reforms have not lived up to their expectations. For instance, whereas Kenya has conducted three presidential elections since the enactment of the Constitution of Kenya, 2010, the conduct of those elections has been characterized by perennial disputes and electoral malpractices. It is on the above facts that the study found that the limits of the law in regulating presidential elections are; failure to follow the rule of law and the culture of disobedience of the law by participants in presidential elections, culture of voting based on ethnicity, poverty among the electorate, voter electoral illiteracy and the judicialisation of politics. It is from these limits that that this paper proceeds to make the following recommendations namely; education and sensitisation of the participants in the electoral process on the importance and benefits of the rule of law and obedience of the law, economic empowerment of the electorate, holding a national dialogue on ethnicity, increasing the levels of electoral literacy among voters and exercise of judicial restraint in political matters/ observing the political question doctrine.

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CHAPTER ONE: INTRODUCTION

1.1 Introduction

The role of the law in regulating presidential elections has been at the center of policy debate among scholars, governments and various interest groups.¹ As part of a system of good governance, the role of the law has been conceptualized as being a precursor for effective electoral reforms and the installation of electoral systems in any democratic society.² According to Patrick Merloe, electoral law establishes the “rules of the game” in elections.³ Merloe notes that owing to the fact that elections are a key concern to the candidates, citizens and political parties and citizens, the law regulating them should serve to guarantee democratic elections by providing an environment of fair and peaceful competition among political parties, candidates and the electorates.⁴ On the basis of the significance of electoral law, Merloe finds that there is need to guarantee that the guidelines governing electoral rivalry and the manner of enforcement of those rules serve as a guarantee of a genuine and democratic election.

Despite an enhanced legal framework, the history of elections in Kenya has been replete with presidential electoral disputes, sometimes characterized with violence.⁵ Post 2007 general elections, the IREC abbreviated for Independent Review Commission, generally called the Kriegler Commission⁶ made critical findings on the electoral framework at that time and with special regards to the mechanisms for electoral dispute resolution. For instance, IREC raised the concern that despite a ravaging electoral dispute, the parties had no direct means of addressing the perceived flaws in the results of the election.⁷

¹ Thomas Stratmann, Francisco J. and Aparicio-Castillo, ‘Competition Policy for Elections: Do Campaign Contribution Limits Matter?’ (2006) 127 Public Choice 177 < <http://web.mit.edu/lroyden/Public/spending2.pdf> > accessed on 20th September 2020.

² Ekaterina R Rashkova, ‘Setting-up the Stage?!: Party Competition and Electoral Law in Central and East-Europe’ (2020) Problems of Post-Communism 1.

³ Patrick Merloe, *Promoting Legal Frameworks for Democratic Elections: An NDI Guide for Developing Election Laws and Law Commentaries* (National Democratic Institute for International Affairs (NDI) 2008).

⁴ Merloe (n 3).

⁵ Nic Cheeseman, Karuti Kanyinga and Gabrielle Lynch, *Oxford Handbook Kenyan Politics* (New product, Oxford University Press 2020).

⁶ Independent Review Commission, *Report of the Independent Review Commission on the General Elections held in Kenya on 27th December, 2007* (Nairobi: Government Printer, 17 September 2008).

⁷ *ibid* 10

Francis Ang'ila recounts that nearly all presidential elections that Kenya has had since gaining independence have been mired with electoral disputes.⁸ These perennial post-election disputes have brought into question the role of electoral laws in regulating presidential elections. IREC notes that most of Kenya's presidential elections are said not to have met the international standards of conducting elections.⁹ Most of the presidential elections have been marred with claims of; rigging and stealing of votes, harassment of opposing groups, ethnicity, state-sponsored ethnic clashes, muzzling of the media, corruption and bribery.¹⁰ Equally, there have been concerns that good electoral laws have been used to manipulate electoral processes at the advantage of the elite thus resulting in a breakout of violence.¹¹

It is on the basis of the above concerns that this thesis sets out to find out the efficacy of the law post-2010 constitutional dispensation in regulating presidential elections. In so doing, the paper will seek to study the limits of the law in regulation of presidential elections.

1.2 Study Background

The now defunct Electoral Commission of Kenya (ECK) conducted the presidential elections in 2007. Prior to the elections, H.E. Mwai Kibaki, appointed nine (9) new commissioners. Subsequently, the incumbent was avowed as the winner instigating violence in various parts of Kenya¹² According to the *Report of the Commission of Inquiry into Post Election Violence*, at least 1,133 individuals deceased while 350,000 got exiled as an outcome of the ensuing instability¹³.

Pursuant to the violence witnessed after the 2007 elections, the IREC was formed to examine the presidential elections¹⁴. IREC's main findings included that: Kenya's electoral legal framework

⁸ Francis Ang'ila Away, 'A critique of the Raila Odinga vs IEBC Decision in Light of the Legal Standards for Presidential Elections in Kenya' in Collins Odote and Linda Musumba (eds), *Balancing Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence* (International Development Law Organization(IDLO) and Judicial Training Institute(JTI), 2016) 47.

⁹ Independent Review Commission (n6) 5.

¹⁰ Paul Collier and Pedro C Vicente, 'Violence, Bribery, and Fraud: The Political Economy of Elections in Sub-Saharan Africa' (2011) 153 *Public Choice* 117.

¹¹ *ibid.*

¹² Independent Review Commission (n6) ix.

¹³ Commission of Inquiry into Post-Election Violence, *Report of the Commission of Inquiry into Post Election Violence* (Government Printers, 2008) 346 and 352.

¹⁴ *ibid* vii.

had some inconsistencies and weaknesses which hampered its effectiveness; ECK was not independent and lacked the capacity and functionality arising from the flaws in its management, composition, and structure systems; the carrying out of the electoral procedure was impeded by the electoral setting, mostly by the media and the political parties; there existed grave faults in the voters' record which dented the truthfulness of the presidential votes even prior to the commencement of polls. There were several electoral malpractices identified such as stuffing of ballot boxes, vote buying, bribery and intimidation among others. The transmission and tallying of the outcomes were defective hence the electoral process was not up to snuff. As a consequence of inadequate planning, dispute resolution, public relations, and staff-selection/training, the results for the presidential elections were irretrievably polluted.¹⁵ IREC also came up with propositions on how to make the manner of future votes credible, including the need for commitment to electoral integrity by all Kenyans.¹⁶

Based on IREC's propositions, and on account of the decades of quest for a constitutional dispensation, the 2010 Constitution was enacted on the need for among other interests – to install a level playing system of politics. The Constitution of Kenya, 2010 re-invented the political field and in particular established certain legal dictates relating to presidential elections including - the adoption of a 50%+1 threshold; the inception of a Supreme Court empowered determine presidential electoral petitions; and the devolution of power to 47 county governments. Similarly, statutes such as- the Political Parties Act, 2011; the Independent Electoral and Boundaries Commission Act, 2011; the Elections Offenses Act, 2016; the Election Laws (Amendment) Act, 2016; and the Elections Act, 2011 have since been passed into law pursuant to the Constitution with the aim of revamping the electoral system in Kenya.

Despite the hopes for and installation of a new political order, the subsequent elections of 2013 and 2017 have not been free of political disputes and in particular presidential election disputes. On account of the above apparent failure of strategy for a better political order through legislation, this thesis investigates the ability/ limitations of the legal order to establish free and fair presidential elections.

¹⁵ Independent Review Commission, (n 6) ix.

¹⁶ Jørgen Elklit, 'The Role of International Organisations During Electoral Crises: The Case of Kenya 2007–08' (2011) 47 Representation 399, 2007–08.

1.3 Statement of the Problem

Since Kenya transitioned into multiparty democracy in 1991, the country has experienced perennial electoral violence.¹⁷ The violence has been attributed to ethnic mobilization of voters by Kenya's politicians¹⁸ and electoral malpractices leading to elections which were not free and fair. For instance, the 2007/8 case of electoral violence following a disputed presidential election led to the demise of about 1,133 people and the dislocation of over 350,000 individuals.¹⁹

The experience arising from the 2007–08 post –electoral violence instigated a lengthy process of constitutional review which ultimately resulted in numerous reforms including electoral reforms that were fused in the Kenyan Constitution of 2010.²⁰ A number of the electoral reforms included in the Constitution were designed to pre-empt and avert future conflict by *inter alia*: instituting a 2-tier level of government consisting of the national government and 47 county governments; establishing devolution of decision-making and economic power to governors and county assemblies; installing checks and balances on presidential powers; strengthening the Judiciary and safeguarding judicial independence; delimiting electoral boundaries and addressing the discrepancies that existed in regional representation; acquisition of a 50%+1 threshold for a winner of the presidential contest; and the creation of a Supreme Court with powers to determine presidential election appeals.

Notwithstanding the elaborate electoral framework established by the 2010 Constitution, all the ensuing elections (in 2013 and 2017) under the Constitution have been characterized by electoral disputes.²¹

Despite the elaborate legal framework, Cheeseman and others²² note that the controversy surrounding general elections post 2010 Constitution demonstrate that the competition in

¹⁷ W Ouma Oyugi and others (eds), *The Politics of Transition in Kenya: From KANU to NARC* (Heinrich Böll Foundation 2003).

¹⁸ Johan Brosché, Hanne Fjelde and Kristine Höglund, 'Electoral Violence and the Legacy of Authoritarian Rule in Kenya and Zambia' (2020) 57 *Journal of Peace Research* 111.

¹⁹ Commission of Inquiry into Post-Election Violence (n 13).

²⁰ 'Kenya: Constitutional Review Process: Internal Developments' (2010) 47 *Africa Research Bulletin: Political, Social and Cultural Series* 18327C.

²¹ Nic Cheeseman and others, 'Kenya's 2017 Elections: Winner-Takes-All Politics as Usual?' (2019) 13 *Journal of Eastern African Studies* 215.

²² Cheeseman and others (n 21).

Kenya's politics remains in high stakes. This has resulted in and is likely to result in future perennial post-election disputes. Notwithstanding the transformation of the electoral laws post 2010 to ensure delivery of free, fair and credible elections, the law has failed to do so. It is on the basis of that failure that this study finds problematic hence the study seeks to find out the reasons why the law fails (limits of the law).

1.4 Hypothesis

Despite the revolution of the electoral laws in the wake of the 2010 Constitution, Kenya has not achieved electoral credibility peace and stability.²³ On account of this fact, this thesis hypothesizes that electoral law is limited in the regulation of presidential elections as a result of a culture of disobedience of the law by participants in presidential elections.

1.5 Research Objectives

1.5.1 Principal Objective

The principal objective of the study is to establish why the law is not effective in regulating presidential elections.

1.5.2 Specific objectives of the Study

The specific objectives of the study comprise of:

- a) To establish the limits of the law in regulating presidential elections.
- b) To find out how the limits of the law in regulating presidential elections come about.
- c) To find out how the limits of the law affect presidential elections.
- d) To identify ways in which the limits of the law in regulating presidential elections can be eliminated.

1.6 Research Questions

²³ *ibid.*

This study will be led by the ensuing questions-

- a) What are the limits of the law in regulating presidential elections?
- b) How do the limits of the law in regulating presidential elections come about?
- c) How do the limits of the law affect presidential elections?
- d) What are the ways in which the limits of the law in regulating presidential elections can be eliminated?

1.7 Justification and Significance of the Study

Karuti Kanyinga and Collins Odote²⁴ argue that owing to the stagnant political culture in Kenya, the electoral process in Kenya is likely to remain judicialised. Odote and Kanyinga note that the environment in which Kenya's Judiciary operates is characterized by partisan political interests which in effect weaken all institutions. Additionally, the political environment serves as a platform where candidates pursue to utilise the courts in advancing their interests.²⁵ The above misgivings perhaps explain why despite the existence of an elaborate electoral infrastructure, Kenya's politics is still characterized by perennial electoral disputes. The above concerns necessitate a study not just on the reasons for the limits of the law on presidential elections but also a corresponding investigation on how to eliminate those limits.

The study is significant as its findings and recommendations, if heeded to by the relevant authorities, will be crucial in ensuring free and fair credible presidential elections in Kenya.

1.8 Theoretical Framework

1.8.1 Sociological school of jurisprudence

The sociological school of thought and its nexus with electoral laws and how they have failed to bring about valid elections guide this analysis. The sociological school of jurisprudence encompasses the study of law in its socio-historic context. It interrogates the sources, impact, and

²⁴ Karuti Kanyinga and Collins Odote, 'Judicialisation of Politics and Kenya's 2017 Elections' (2019) 13 *Journal of Eastern African Studies* 235.

²⁵ Kanyinga and Odote (n 24).

utilities of laws on the behavior and attitudes of actors in a society.²⁶ Some of its major advocates include, Roscoe Pound, Von Ehrlich, Leon Duguit, and Von Jhering. From the viewpoint of Von Jhering, the study of law needs to examine the social foundations of the institutions and law. He contends that the law objective encompasses social control and therefore a tool of helping the society.²⁷

According to Roscoe Pound, the purpose of the law includes social engineering, he argues that the law has to serve a specific function in civilization and its eventual purpose is controlling the social world. He further claims the existence of the law focuses on maintaining peace and balancing the interests in a society.²⁸ Roscoe Pound's theory has received several criticisms, for instance, his model of competing interests pressing for recognition and security is said to overlook the level to which the law recognizes vested rights.²⁹

Ehrlich's sociological conception of law placed the law in the present-day institutions of its society³⁰. He argues that at present as well as at any other time, the center of gravity of legal development lay not in legislation, nor in juristic science (jurisprudence), nor in judicial decision, but in society itself³¹. He further argues that legal provisions are thus dependent upon society both for their being and content³². According to him, law cannot come into being unless the institutions to which it pertains are available in the society³³.

The sociological school of jurisprudence applies to this research as this research looks at the electoral laws after having undergone a transformation have failed to ensure free, fair and credible presidential elections. Hence this theory is useful in guiding the researcher to identify the the limits of the law. This is done by considering how the law comes into exitance under the sociological school of jurisprudence and relating it to how Kenya's electoral laws post-2010

²⁶ Omony John Paul, *Key Issues in Jurisprudence: An in-depth Discourse on Jurisprudence Problems* (LawAfrica Publishing (K) Ltd 2014) 85

²⁷ *ibid* 86.

²⁸ *ibid* 88.

²⁹ Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd edn, Oxford University Press 2012) 165

³⁰ Eugen Ehrlich and Nathan Isaacs, 'The Sociology of Law' (1922)36 *Harvard Law Review* 142.

³¹ *ibid*.

³² *ibid*.

³³ *ibid*.

came into being, the purpose it was intended to serve and determining whether the law has achieved its purpose.

1.9 Research Methodology

This study was done through a desk appraisal of publications; the publications were sourced from the university's library and from online sources. This technique entailed the review of preceding study findings to realize a broad perception of the concepts of electoral legislation; political culture; and effective presidential elections. The paper studied relevant literature to discern the reasons for the limits of the law in presidential elections.

The literature to reviewed consisted of the relevant publications of authoritative scholars and institutions in the field of electoral law, electoral reforms, democracy and related concepts. Such authority included *inter alia*- African and international textbooks, journal articles, policies, guidelines, legislation and case laws as well as international treaties relating directly to the objective of this research. The literature reviewed comprised of books, reports, journals, bulletins, theses, and case laws. These materials enabled the researcher to identify the limits of the law, how the limits come about and how they affect presidential elections.

As a method of research, desk review is a secondary research method by which appropriate publications are studied to analyze the practice, law, opinions and trends in the subject of study. In the instant study, this analysis is important in establishing an informed understanding on the reasons for the limits of the law in regulating presidential elections.

1.10 Literature Review

1.10.1 The interaction between Democracy and Elections

The definition of the concept of democracy in the liberal western sense elicits an understanding of an electoral process that adheres to the wills of the electorate.³⁴ However, the experience relating to the electoral governance process in African States has negatively redefined the concept of democracy. Although some African authors such as Archie Mafeje and Claude Ake

³⁴ Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 American Journal of International Law 46.

have called for an Afrocentric definition of democracy,³⁵ the underlying concern in any such definition of the concept of democracy is that democratic States ought to be responsive to the will of the people.³⁶ Unlike in authoritarian regimes, in democracies, the people must have an opportunity to express their sovereignty through free and fair elections.³⁷

Free and fair elections are thus a central component of democracies. Notwithstanding the important role elections play in a democracy- a country's democratic identifications may not be assessed by the regularity or frequency of elections.³⁸

1.10.2 The Legal Framework and Electoral Process

Fareed Zakaria in the article *The Rise of Illiberal Democracy*³⁹ establishes a correlation between the electoral process, constitutionalism and democracy. According to Fareed, the emergence of the illiberal theory is as a result of the onset of the imperfections of liberal democracy. Fareed defines illiberal democracy as a governance system where the citizens are cut off from real power despite the occurrence of fairly free elections.⁴⁰ This is characterized by lack of civil liberties despite the existence of a constitution limiting government power. Governments in such democracies either expressly ignore liberties or fail to institute adequate constitutional and legal framework of liberties.⁴¹ According to Fareed, the pillars of a democracy constitute a framework of fundamental freedoms and rights. These freedoms and rights form the notion of constitutional liberalism as conceptualized by Fareed.⁴²

While proponents of the theory of illiberal democracy contend that the concepts of constitutional liberalism and democracy have no correlation, Fareed notes the fact that constitutional liberalism and democracy are inextricably linked and mutually reinforcing with elections being the best

³⁵ Bjorn Beckman, 'Imperialism and the "National Bourgeoisie"' (1981) 8 *Review of African Political Economy* 5.

³⁶ Jonas Linde and Yvette Peters, 'Responsiveness, Support, and Responsibility: How Democratic Responsiveness Facilitates Responsible Government' (2020) 26 *Party Politics* 291.

³⁷ Ludvig Beckman, 'Popular Sovereignty Facing the Deep State. The Rule of Recognition and the Powers of the People' [2019] *Critical Review of International Social and Political Philosophy* 1.

³⁸ Michael DH Robbins and Mark Tessler, 'The Effect of Elections on Public Opinion Toward Democracy: Evidence From Longitudinal Survey Research in Algeria' (2012) 45 *Comparative Political Studies* 1255.

³⁹ Zakaria (n 32).

⁴⁰ Zakaria (n 32).

⁴¹ Zakaria (n 32).

⁴² *ibid.*

way to install governments. Thus, according to Fareed, elections are the most significant manifestation of democracy. However, Fareed notes that the institutionalization of democracy should transcend the mere conduct of periodic elections. According to Fareed, the institutionalization of democracy is thus anchored on the foundation of a sound constitutional and legal framework.⁴³

Migai Aketch is also of the belief that the institutionalization of democracy should transcend the mere conduct of periodic elections.⁴⁴ Migai notes that while the concept of democracy in some African countries has been understood as being synonymous to elections, many countries which have held periodic multi-party elections for decades are still struggling with the process of consolidating liberal democratic ideals.⁴⁵ Fareed believes this misgiving is borne out of the misunderstanding surrounding the concepts of constitutional liberalism *vis a vis* democracy. Fareed notes that while constitutional liberalism entails the limitation of power, democracy on the flip refers to the process of accumulation and use of power.

Tocqueville referred to democracy as “Tyranny of the Majority.” According to Tocqueville, democracy is characterized by an element of obsession to power accumulation.⁴⁶ As more political communities embrace democratic forms, those democratic communities tend to increase the likelihood of embracing tyranny. For instance, “Tyranny of the Majority” has been characterized by the centralization of power by governments through usage of extra-constitutional means such as resorting to control EMBs as a means of accessing and accumulating power during elections.⁴⁷

Denis Kadima highlights that the presence of democratic formations without constitutional liberalism has resulted in elections characterized by ethnic tensions, violence and divisions.⁴⁸ Ideally, for best practice and for a functioning constitutional liberalism, there should be a synthesis between the presence of a constitutional and political culture and consolidation of democracy.

⁴³ Zakaria (n 32).

⁴⁴ Migai Akech, ‘Constraining Government Power in Africa’ (2011) 22(1) *Journal of Democracy* 96.

⁴⁵ *ibid*

⁴⁶ Donald J Maletz, ‘Tocqueville’s Tyranny of the Majority Reconsidered’ (2002) 64 *The Journal of Politics* 741.

⁴⁷ Maletz (n 58).

⁴⁸ Denis Kadima, *The Politics of Party Coalitions in Africa* (EISA : Konrad-Adenauer-Stiftung 2006).

Cheeseman and others while analysing devolution in the context of the 2017 Kenyan elections note that ethnicised political dynamics are still present; the difference being that in addition to a fiercely contested presidential race, there is also intense competition for positions at the county level⁴⁹. They further note that devolution has altered the politics in Kenyan in significant manner, however, it was yet to reach the revolution levels it was anticipated to bring when it was introduced⁵⁰. They argue that devolution has decentralized rather than change general hopes of political leaders, who are naturally adjudicated on their capacity to achieve the parochial prospects of their voters and members of their ethnic community⁵¹.

1.10.3 The impact of Electoral law on the independence of electoral systems

The IIDEA⁵² makes a comprehensive synthesis on the correlation between electoral legal framework, electoral systems, elections management and administration and organizational structure. IIDEA advances the argument that the design of the Electoral Commission and the choice of electoral system have an ultimate impact on the political process, election management and administration.⁵³ As a result of a non- responsive legal framework, the IREC Report⁵⁴ indicated in its findings that one of the reasons that instigated post- election dispute in Kenya's 2007 general elections was that the Election Management Body (EMB) lacked the necessary capacity, independence, and functionality owing to its composition, weak organizational structure and management system. Following its findings, the IREC made recommendations for electoral reform concerning the founding and operation of the EMB. The IREC thus advocated for an electoral body that could oversee elections that could be reflective of the aspirations of the Kenyan individuals through credible and democratic elections.⁵⁵

⁴⁹ Nic Cheeseman Gabrielle Lynch and Justin Willis, 'The Kenyan Elections of 2017: Devolution in the Spotlight' (2019) Leeds African Studies Bulletin, No. 80, Winter 2018/19, 6.

⁵⁰ *ibid* 4.

⁵¹ *ibid*.

⁵² Andrew Reynolds, Ben Reilly and Andrew Ellis, *Electoral System Design: The New International IDEA Handbook* (International Institute for Democracy and Electoral Assistance 2005).

⁵³ *ibid*.

⁵⁴ Independent Review Commission (n 6).

⁵⁵ *ibid* 153 -154.

According to Odote and Musumba, the electoral reforms pursuant to the constitutional enactment introduced a number of changes in Kenya's elections process⁵⁶. The Constitution, 2010 provides for principles that govern elections.⁵⁷ The order requires that elections in Kenya meet certain required standards such as that all elections are to be; free from violence; free and fair;⁵⁸ and are also to be administered in a neutral, unbiased, accurate, accountable, and efficient manner.⁵⁹ Odote and Musumba also take cognizance of the fact that the Constitution has introduced the devolved system of governance⁶⁰ thus diffusing power. As a result of these reforms, the independence and functionality of the EMB was anticipated to be enhanced. However, despite the elaborate legal framework, Cheeseman and others⁶¹ note that the controversy surrounding general elections post 2010 Constitution demonstrate that the competition in Kenya's politics remains in high stakes.

1.10.4 Conclusion

Despite there being authors who have written on the regulation of presidential elections in Kenya. They mainly deal with how the elections should be handled so as to serve its intended purpose in society. As discussed earlier on; some authors are of the view that the institutionalization of democracy should transcend the mere conduct of periodic elections⁶²; others opine that the presence of democratic formations without constitutional liberalism has resulted in elections characterized by ethnic tensions, violence and divisions⁶³; and others advocated for an electoral body that could oversee elections that could be reflective of the aspirations of the Kenyan citizens through credible and democratic elections.⁶⁴ Thus as can be seen, none of them categorically deals with the issue of what the limits of the law in regulating presidential elections are hence a gap exists necessitating the need for this study.

⁵⁶ Collins Odote and Linda Musumba (eds), *Balancing Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence* (International Development Law Organization(IDLO) and Judicial Training Institute(JTI), 2016)5.

⁵⁷ Constitution of Kenya, 2010, Article 81.

⁵⁸ *ibid* Article 81(e).

⁵⁹ *ibid* Article 81 (e) (v).

⁶⁰ Odote and Musumba (n 56) 6.

⁶¹ Cheeseman and others (n 21).

⁶² Migai Akech, 'Constraining Government Power in Africa' (2011) 22(1) *Journal of Democracy* 96.

⁶³ Denis Kadima, *The Politics of Party Coalitions in Africa* (EISA : Konrad-Adenauer-Stiftung 2006).

⁶⁴ *ibid* 153 -154.

1.11 Scope and Limitations of the Study

This study will be limited in scope to Kenyan electoral laws and how they are applied in the regulation of presidential elections. This study will also be limited to a case study of the 2017 presidential elections.

1.12 Chapter Breakdown

This project will be composed of four chapters classified as indicated below-

Chapter 1: An Introduction

This chapter provides the background, research problem, hypothesis, research objectives, research questions, theoretical outline, research method, a brief assessment of literature, significance of the research and sets out the chapter outlines.

Chapter 2: Analysis of the Legal Framework Governing Presidential Elections

This chapter discusses the institutional and legal structure governing presidential elections in Kenya. It will touch on the various aspects regulated by the law governing presidential elections. It will also look at the effectiveness of the law in regulating presidential elections.

Chapter 3: Application of the law in the 2017 Presidential Elections

This chapter consists of an analysis of the various aspects regulated by the law governing presidential elections and how those aspects were applied in the 2017 presidential elections.

Chapter 4: Limits of the Law in Regulating Presidential Elections in Kenya

This chapter highlights and discusses the limits of the law in regulating presidential elections as arising from chapter two and three.

Chapter 5: Conclusions and Recommendations

The chapter comprises of the conclusions and recommendations as established by the researcher.

CHAPTER TWO

ANALYSIS OF THE LEGAL FRAMEWORK OF PRESIDENTIAL ELECTIONS IN KENYA

2.1 Introduction

Kenya uses a presidential structure of governance in which the President is vested with a wide range of powers for instance the President is both the Head of Government and state; he is also the Commander in Chief of the Armed Forces and the Chairperson of the National Security Council¹. This chapter studies the legal framework governing the electoral course in Kenya's presidential elections. Hence, the chapter appraises the functioning of the electoral system of Kenya by examining the electoral procedure on account of performance indicators such as participation in the electoral process; campaign finance; transparency and tallying of votes; electoral technology; electoral body (IEBC); and elections dispute resolution. Specifically, the chapter evaluates substantive electoral rights in Kenya and the legal procedures aimed at attaining those rights within Kenya's legal framework. In so doing, the chapter seeks to evaluate whether the law has the ability of inspiring peace and credibility in presidential elections.

The chapter will analyze the following pieces of legislation that unswervingly oversee the electoral course in Kenya: - The 2010 Kenyan Constitution; the 2011 Political Parties Act; the 2011 Independent Electoral and Boundaries Commission Act; the 2016 Election Laws (Amendment) Act; 2016 Elections Offenses Act; and the 2011 Elections Act;. The chapter will also analyze key international law with view to finding out its implication on presidential elections. The analysis in this chapter will be in accordance with the sociological school of jurisprudence discussed in chapter one.

2.2 Analysis of the international legal framework affecting presidential elections

By feature of Articles 2(5) and (6) of the 2010 Constitution, the wide-ranging guidelines of international law and treaties or conventions sanctioned by Kenya form a portion of the law of Kenya. There are several treaties and conventions which directly and indirectly affect the

¹ Constitution of Kenya, 2010, Article 131(1)(a)(c) and (d). (Constitution).

workings of presidential elections in Kenya, the key international instruments will be discussed below.

2.2.1 Universal Declaration of Human Rights (UDHR)

In 1948, the United Nations' General Assembly adopted the UDHR following the Second World War². Despite not being a treaty UDHR has the status of customary international law as a result of its application by many countries for a period of over fifty years³. UDHR provides for the right to the freedom of individual opinion on issues devoid of interference and to search for, obtain and convey information and ideas regardless of the frontiers⁴. It is vital for political autonomy and promotion for the accommodation of the choice by the law⁵. This is reflected in Kenya's Constitution in various Articles which provide for the freedom of opinion⁶, freedom of expression⁷ and political rights⁸. The incorporation of the aforesaid freedoms in Kenya's Constitution affects presidential elections positively by allowing presidential candidates and their sponsoring parties to freely articulate their issues to the public so as to woo them to vote for them. This facilitates an equal playing field for presidential candidates to selling their manifestos to the voters.

Under Article 20, UDHR guarantees the right to assemble and associate peaceably, this right outlaws compulsion of people to join associations. UDHR thus allows civic participation and forments a spirit of institutional protection of that right⁹. In line with this provision of the UDHR, the Constitution of Kenya, 2010, offers for the freedom of association¹⁰ and the right to assemble¹¹. This has the effect of allowing presidential candidates and their supporters to

² Amnesty International, 'Universal Declaration of Human Rights' available at <<https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/>> accessed on 13th September 2019.

³ Ongoya Elisha and Otieno Willis, *Handbook on Kenya's Electoral Laws and System* (Electoral Institute for Sustainable Democracy in Africa, (EISA), 2012)6

⁴ Universal Declaration of Human Rights, 1948, Article 19 (UDHR).

⁵ Elisha Ongoya and Willis Otieno, *Handbook on Kenya's Electoral Laws and System* (Electoral Institute for Sustainable Democracy in Africa, (EISA), 2012)7

⁶ Constitution of Kenya, 2010, Article 32

⁷ *ibid* Article 33.

⁸ *ibid* Article 38.

⁹ UDHR Article 21(1).

¹⁰ Constitution Article 36.

¹¹ *ibid* Article 37.

assemble in political gatherings/rallies while campaigning and also this encourages citizens to either form or join political outfits which they best identify with.

UDHR proceeds to affirm that the governments' authority rests on the will of the population. The expression of that authority was through genuine election cycles with secret balloting and universal suffrage.¹² The 2010 Constitution captures these vital requirements of the UDHR by providing for periodic presidential elections which are to be conducted after each five years¹³ and the same are obliged to be by worldwide suffrage¹⁴.

In the Constitution, article 1 of offers all sovereign authority to the Kenyan residents and affords that it shall only be implemented in accord with the Constitution. Also, the sovereign power can be worked out lone in two methods by the citizens; straight or by democratically voted representatives¹⁵. This is crucial as flowing from it all institutions or individuals involved in the conducting the presidential elections are required to follow the Constitution and it also gives the citizens the power to elect a person running for the office of President. The UDHR is thus vital in the regulation of presidential elections in Kenya as it provides for essential rights which are crucial in achieving free and fair presidential elections.

2.2.2 International Covenant on Civil and Political Rights (ICCPR)

The UN adopted ICCPR in 1966, and it gives effect to the UDHR¹⁶. It conditions civic engagement in all signatory states.¹⁷ The treaty recognizes the right to self-determination in all peoples¹⁸. People ought to have the right to autonomy in choosing their leaders and enjoy their socio-cultural and economic proclivities¹⁹. This can be located in Article 1 of Kenya's Constitution on the sovereignty of the people, and this is basically where citizens derive their

¹² UDHR Article 21(3).

¹³ Constitution Article 136(2)(a).

¹⁴ *ibid* Article 81(d).

¹⁵ *ibid* Article 1(2).

¹⁶ Equality and Human Rights Commission, 'International Covenant on Civil and Political Rights' available at <<https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/international-covenant-civil-and>> accessed on 13th September 2019.

¹⁷ Canadian Civil Liberties Association, 'Summary: International Covenant on Civil and Political Rights (ICCPR)' (2015) available at <<https://ccla.org/summary-international-covenant-on-civil-and-political-rights-iccpr/>> accessed on 13th September 2019.

¹⁸ International Covenant on Civil and Political Rights, 1966, Article 1 (ICCPR).

¹⁹ *ibid*.

power to participate in presidential elections and to choose their preferred candidates. This thus allows all eligible citizens an equal opportunity to choose a presidential candidate of their choice freely.

ICCPR signatories are obliged to advance the comprehension of the right of self-determination, and to respecting that right in line with the UN Charter.²⁰ Furthermore, the Covenant's application must not be gender specific²¹. In that regard, Article 27 of Kenya's Constitution affords for the freedom from discrimination and right to equality. This is important in the conduct of presidential elections in a country which is largely viewed as a patriarchal society where women seeking elective positions face a difficult time in the electoral process, for instance they are more prone to violence and abuse. This in turn leads to women avoiding to contest for the presidential seat. ICCPR is therefore important with respect to Kenya's presidential elections as it provides a reference point for those measures promoting self-determination, specifically around the enactment of electoral laws.

2.2.3 The African Charter on Democracy, Elections and Governance (ACDEG)

It is a roadmap for better governance across the continent²². Parties commit to promote democracy, reverence for human rights in addition to the rule of law. That happens through acknowledging the inalienability of universal suffrage.²³ In this context, Kenya has recognized the inalienability of universal suffrage by including it as one of the principles in the electoral system²⁴. State Parties are required to instigate equality before the law to sustain an equitable democratic society²⁵. Under Kenya's Constitution, each individual is alike before the nation's law and is eligible to equivalent gain and protection of the law²⁶. This affects the regulation of presidential elections by ensuring that while conducting presidential elections, all candidates are

²⁰ *ibid* Article 1(3).

²¹ *ibid* Article 3.

²² United Nations Educational, Scientific and Cultural Organization, 'The African Charter on Democracy, Elections and Governance: The Role of National Human Rights Institutions (NHRIs)' (UNESCO 2010) available at <<https://www.movedemocracy.org/wp-content/uploads/2018/06/African-Charter-on-Democracy-Elections-and-Governance.pdf>> accessed on 13th September 2019

²³ African Charter on Democracy, Elections and Governance, Article 4 (ACDEG).

²⁴ Constitution, Article 81(d).

²⁵ ACDEG, Article 10(3).

²⁶ Constitution, Article 27(1).

treated equally despite their stature in society or position in Government previously held. This ensures an equal playing field for all and enhances free and fair presidential elections.

State parties are further required to foster a culture of democratic peace supported by strong institutions and legal provision²⁷. State Parties are also required to create public institutions that will enhance democracy principles and practices²⁸. They are also required to guarantee the independence of those bodies and accountability to national organs of governance.²⁹ Parties are further required to adequately fund these bodies. In this regard Kenya's Constitution has created several institutions to enhance democracy principles and practices key among them are the IEBC, Parliament and the Supreme Court.

The IEBC is instructed to conduct presidential elections and in doing so it is expected to carry out its duties in an impartial manner. Parliament is the organ that has the authority to approve budgets and hence it is responsible for the funding of IEBC so that it can conduct free and fair presidential elections. The Supreme Court as established by the Constitution is given the power to determine presidential disputes and hence ensure the will of the people in presidential elections is respected and thus enhances democracy.

State Parties are also required to work together through exchange of experiences regionally and even continentally. It generates and sustains an international culture of democracy³⁰. Furthermore, the parties affirm their commitment to regularly hold elections, *per* the Declaration.³¹ That can only happen *vide* autonomous electoral bodies that maintain order and swiftly redress disputes. Electoral processes that are fair and equitable ensure valid contests. Such organizations maintain a code of conduct between all stakeholders prior, after, and even during the election exercise. The basis of all these structures and normative standards is to instigate a respect for the legal dispute resolution mechanisms.

2.3 The law governing participation in the electoral process in Kenya

²⁷ ACDEG, Article 11.

²⁸ *ibid*, Article 12.

²⁹ *ibid*, Article 15.

³⁰ *ibid*, Article 16

³¹ *ibid*, Article 17

2.3.1 Introduction

The Constitution establishes certain cadres of rights that entitle the citizenry the right to partake in the electoral course. These comprise of; the right to be elected; the right to be registered as a voter; and the right to vote in any election. This section will study the provision and breadth of these rights in Kenya's legal framework.

2.3.2 Right to be elected- Elections to the office of the President

2.3.2.1 Introduction

The Constitution delivers that the President is to be voted by enumerated electorates in a nationwide election. Such election shall be done in compliance with the Constitution and any statute checking the presidential elections.³² The Office of the President elections shall be conducted on the subsequent Tuesday in August, in each fifth year, the same day as that of the Members of Parliament.³³ The IEBC is mandated to initiate the course of the election for Presidency by publishing a notice of such an electoral process in the Gazette and in electronic and print media of national flow.³⁴

2.3.2.2 Qualifications and ineligibilities for election as President.

For one to qualify as a presidential candidate, one must bear the following qualifications. Such an individual must- be a resident through birth; be designated by a political party, or is an independent contender; be qualified to vie for election as an MP; and be nominated by more than 2,000 voters from more than half of the counties.³⁵ In the contrary, one is disqualified from nomination as a presidential contender where the individual- is serving as a public officer or is currently standing-in in public or State office; and where he/she is indebted allegiance to a

³² Constitution, Article 136(1).

³³ *ibid* 136(2)

³⁴ Elections Act, Section 14(1).

³⁵ Constitution, Article.137. (1).

foreign nation.³⁶ The holders of the offices of the President, Deputy President or MP are however not ineligible for nominations.³⁷

The provision of an independent candidate was well crafted as a preemptive measure to curb the injustice where contestants were locked out of political parties with the intent of locking them out of the presidential race. These stringent qualifications also serve the purpose of limiting the occurrence of conflict of interest. For instance, the persons qualified are limited to a select few who are not likely to misuse the current offices they hold for personal gain.

2.3.2.3 Procedure at presidential election.

In the Constitution, Article 138(1) offers that a contender shall be avowed elected where only one contender for the position of President is nominated.³⁸ However, where at least two contenders are nominated for voting to the Office of the President, an election shall be conducted in respective constituency.³⁹ The method of voting in a presidential voting is by secret ballot.⁴⁰ The vote numeration process in the polling places is succeeded by the tallying and verification of the count and thereafter pronouncement of the outcome by the IEBC.⁴¹

For a runner to be avowed elected as President, such a candidate ought to have garnered more 25% or surpassing the total votes cast in every of more than half of the counties; and at least half of all the cast votes in the voting.⁴² The requirement for a candidate to garner 25% in over half of the counties is meant to ensure that the person so elected is acceptable to majority of Kenyans as opposed only to a certain county which could be highly populated.

Where no contender is voted, a new election shall be conducted in a period of 30 days past the preceding election. In that new election, the solitary contenders who shall vie shall only be two in number (the contender(s) who garnered the uppermost number of votes; and the one who

³⁶ *ibid* 137(2).

³⁷ *Ibid*.

³⁸ *ibid* 138(1).

³⁹ *ibid* 138(2).

⁴⁰ *ibid* 138(3)b.

⁴¹ *ibid* 138(3)(c).

⁴² *ibid* 138(4).

obtained the second uppermost sum of votes).⁴³ This provision serves the objective of eliminating a further repeat poll as having more than 2 candidates in the ballot has the ability of distributing votes among the contestants thus the possibility of a candidate missing the requisite 50 + 1 vote. After the repeat vote, the IEBC declares the contender who obtains the greatest votes in the new election as President.⁴⁴

2.3.2.4 Cancellation of presidential elections

Elections to the President Office shall be cancelled where either:- prior to the termination of the time directed for the distribution of nominations, nobody has been chosen as a candidate; a contender for voting as President or his Deputy passes away on or prior to the planned date of election; or a contender who would have been eligible to be acknowledged President-elect, pass on before his or her declaration as President-elect.⁴⁵ In the event of cancellation of presidential elections, a new election to the Office of the President shall be conducted in a period 60 days past the date set for the preceding presidential election.⁴⁶ The sixty days in which to conduct such an election in such situations if utilized by the IEBC effectively, is sufficient to enable it to conduct the new presidential elections efficiently hence facilitating free and fair elections.

2.3.2.5 Pronouncement of outcomes of presidential votes

The process of vote counting in the polling stations is succeeded by the process of tallying and verification of vote count by the IEBC.⁴⁷ Immediately after all the constituency polling station results are complete, the returning officer (RO) must verify the results and if he finds irregularities in the total votes per polling station, he can disregard the outcomes and develop a declaration to that effect. The RO should complete Forms 34 and 35, sign and date the document then give it to the agent of the candidate or candidate. Subsequently the original forms 34, 35 and 37 as the case may be are submitted to IEBC.⁴⁸

⁴³ *ibid* 138(5).

⁴⁴ *ibid* 138(7).

⁴⁵ Constitution Art.138(8).

⁴⁶ *ibid* Article 138(9).

⁴⁷ *ibid* Article.138 (3)(c).

⁴⁸ Elections (General) Regulations, 2012, Regulation 83 (Elections General Regulations).

The Form 34 is subjected to validation by the IEBC after tallying the votes casted in the election.⁴⁹ However, in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others*⁵⁰ the court held that the election results are final at the polling station. This serves a prevention mechanism for tampering with the results after they are declared at the polling station, this maintains the authenticity of the results hence fostering free and fair presidential elections.

The RO is required to allow some people in the tallying center, they include; the candidate or their nominees, IEBC member, agents or vote presiding officers.⁵¹ This plays a critical role as it enhances transparency and reduces chances of electoral malpractice occurring in the tallying center. However, in as much as that enhances transparency, that does not absolutely guarantee that no malpractice will happen in the tallying center.

The IEBC Chair ought to confirm the polling station results against Forms 34A and 34B to create Form 34C. Subsequently, the Chair declares the presidential votes per constituency, signing and dating the votes for each constituency. Afterwards, the Chair gives the candidate elected president a certificate in the Form 34D. In addition to that, the Chair should deliver written notifications to the incumbent and the Chief Justice at least within seven days after declaration of presidency.

The IEBC Chair may pronounce the outcomes of an election before each of the results are due if the remaining totals cannot make a difference to the winner of the election.⁵² This reduces the delay in announcing results occasioned by difficulties faced by certain polling stations such as break out of violence affecting the electoral process. In this regard, during the repeat presidential elections in October 2017, IEBC declared the winner without factoring the areas where voting had not been conducted as a result of violence⁵³.

⁴⁹ *ibid* Regulation 83(2).

⁵⁰ Civil Appeal 105 of 2017 available at <http://kenyalaw.org/caselaw/cases/view/137601/> accessed on 10th October, 2020.

⁵¹ Elections General Regulations, Regulation 85(1).

⁵² Elections Act, Section 39(2).

⁵³ Kenya National Commission on Human Rights, *A Human Rights Monitoring Report on the 2017 Repeat Presidential Elections* (2017) 6.

A candidate shall only be acknowledged chosen as President where the candidate obtains at least 25% or more of the votes casted in all of more than half of the counties and surpassing half of all the votes cast in the election.⁵⁴ This has the effect of enabling a person elected as president to have a wider backing throughout the country as opposed to being elected only by voters of particular region which happens to be heavily populated. This has the effect of having the presidential results to be widely accepted and also enhances national unity as the president will be viewed as chosen by a wide spectrum of people.

Article 138(4) of the Constitution holds that the valid votes cast do not comprise votes rejected for non-compliance according to current law and Regulations⁵⁵. This prevents the rejected votes cast from having any impact on the percentages required before one is declared a winner in a presidential contest. In the absence of a clear winner, fresh elections are held within thirty days⁵⁶ and only the top two candidates from the previous election can participate in this runoff.⁵⁷

2.3.3 Right to be registered as a voter

2.3.3.1 Right to be enumerated as an elector

Each adult resident is accorded the right to be enumerated as an elector with no irrational limitations.⁵⁸ The Constitution further affords that an individual only meets the requirements for registering as an elector at referenda or elections where the individual: - is of sound mind; is an adult citizen; and has not been imprisoned of an election crime during the prior five years to the elections.⁵⁹

The Elections Act also recognizes the legitimate right to be a registered voter. The Act also affords that any Kenyan resident who has reached 18 years of age as demonstrated by either a Kenyan passport or a national identity card and whose designation is not in the record of electorates shall be enumerated as an elector upon submission in the agreed method to the

⁵⁴ Constitution, Article.138(4).

⁵⁵ Petition 5, 3 & 4 of 2013 available at < <http://kenyalaw.org/caselaw/cases/view/87380/> > accessed on 9th October, 2020.

⁵⁶ Constitution, Article 138(5).

⁵⁷ *ibid*.

⁵⁸ Constitution, Article 38 (3).

⁵⁹ *ibid* Article 831).

Commission.⁶⁰ This right to be a voter who is registered also covers to an individual who has enumerated for a card of identification and has an acceptance of registration credential as proof of such registering.

An application for registering for voting shall only be made by an individual who meets the requirements to be enumerated as a voter under the Elections Act in section 5. The application shall be made in a structure prescribed under the Commission.⁶¹ All persons who make applications to be registered shall be registered by the registration officer in the appropriate register.⁶² The registered voter information shall be transmitted to the IEBC for attachment in the Principal Register of voters.⁶³

The Elections Act requires the registration officer, in an application for a new registration as a voter, to amass such biometric data which comprise facial impressions and palm print of the individuals applying for registration, as the IEBC may determine⁶⁴. This has come to be known as biometric voter registering and it comprises the use of the Biometric Voter Registration (BVR) System which encompasses a camera, a finger print scanner, and a laptop. The BVR system detects a facial image of voter, telephone number, identity card/passport number, gender, Personally Identifiable Information (PII)-Name or finger prints and civil data among others⁶⁵. The rationale for the introduction of the BVR was to ensure 'one man, one vote'⁶⁶. BVR is regarded in some quarters as the epitome of democratic electoral processes since they view it as efficient and guarantees a high-speed voter registration process with minimal errors⁶⁷.

⁶⁰ Elections Act, Section 5(3).

⁶¹ *ibid*.

⁶² Elections Act. Section 5(4).

⁶³ *ibid* Section 5(5).

⁶⁴ *ibid* Section 13(3).

⁶⁵ Independent Electoral and Boundaries Commission, 'Biometric Voter Registration System (BVR)' available at [https://www.iebc.or.ke/election/technology/?Biometric_Voter_Registration_System_\(BVR\)](https://www.iebc.or.ke/election/technology/?Biometric_Voter_Registration_System_(BVR)) accessed on 28th May 2019

⁶⁶ Robert Muthuri and 3 others, 'Biometric Technology, Elections, and Privacy: Investigating Privacy Implications of Biometric Voter Registration in Kenya's 2017 Election Process' (Strathmore University) accessible on <https://blog.cipit.org/wp-content/uploads/2018/05/FinalReport.pdf> accessed on 28th May 2019.

⁶⁷ Namunane B & Ongiri I, 'Fraud fears as IEBC turns to old poll kit' (Daily Nation, 2nd August, 2012) available at <https://www.nation.co.ke/News/politics/Fraud+fears+as+IEBC+turns+to+old+poll+kit/-/1064/1468990/-/d8hkn9/-/index.html> accessed on 28th May, 2019.

The IEBC is mandated by the Act to unclutter the Voter's Principal Register for inspection for a time of more than two weeks from the time of the announcement for a general voting.⁶⁸ This ensures voters confirm their details and prevent instances of voters being turned away on voting day as a result of wrong particulars appearing in the Register of Voters.

2.4 The law on transparency and tallying of votes

The Constitution lists transparency as one of the national standards and ideologies of authority in which State departments are expected to adhere to while carrying out their functions⁶⁹. At every election, the Constitution enforces an obligation on the IEBC to guarantee that the outcomes from the polling locations are accurately and openly organized and punctually declared by the RO.⁷⁰ The IEBC is also mandated to tally and authenticate the total and announce the outcome in a election of the president after enumerating the polls in the polling positions.⁷¹ For transparency in the tallying process, the IEBC may announce the provisional results prior to defining and announcing the final election outcomes.⁷² The announcement of the provisional outcomes shall be dependent on the arrangement in which the tallying of the results is finalized.⁷³

As to the finality of the provisional results, the case of *Maina Kiai & 2 others v Independent Electoral and Boundaries Commission & 2 others*⁷⁴ found that the outcomes confirmed by the RO for every presidential candidate concerning that constituency were ultimate and could only be contested in an election petition in the Supreme Court.⁷⁵ The counting of votes for the presidential race was thus held to be a function of the constituency polling station which function was final at that stage.⁷⁶ This has the effect of reduce chances of the results being changed or manipulated and thus strengthening the credibility of the result.

2.5 The law on Electoral Management Body (IEBC)

⁶⁸ *ibid* Section 6(2).

⁶⁹ Constitution, Article 10(2)(c).

⁷⁰ *ibid* Article 86(c).

⁷¹ *ibid* Article 138.

⁷² Elections Act, Section 39(1).

⁷³ *ibid*, Section 39(3).

⁷⁴ Civil Appeal 105 of 2017 (n 61)

⁷⁵ Elections Act, Section 39(3).

⁷⁶ *ibid*, Section 39(3).

2.5.1 Establishment of the IEBC

Kenya's electoral body is the IEBC.⁷⁷ The mandate of the IEBC is to *inter alia* - conduct / oversee voting/referenda to an elective office recognized under the Constitution or by an Act of Parliament.⁷⁸ The Constitution further makes offering for definite roles of the commission including:- registration of electorates; review of the register of voters; the regulation of parties' nominations; demarcation of wards and constituencies; the clearance of electoral disagreements; voter education; the registering of contenders for election; and the enablement of the evaluation, monitoring, and observation of elections among other functions.⁷⁹

2.5.2 Composition and appointment of commissioners

2.5.2.1 Commissioners Appointment

The parent Act - the IEBC Act makes provision to the effect that the IEBC shall comprise of a chair and eight additional commissioners.⁸⁰ The First Schedule to the Act establishes the course for members appointment of the IEBC and the chairperson.⁸¹ For one to be qualified for selection as a Commission member, the individual should not have at any period within the previous five years, either vied for election or held office as:- a Member of a Parliament or County Assembly; or holds any State office⁸²; a member of political party's governing body. Equally, a member of the IEBC is precluded from holding another public office.⁸³

The Schedule bestows on the President a duty to appoint a Selection Panel⁸⁴ whose mandate shall be to request for applications and proceed to issue every applicant's names. The Board is then obligated to deliberate the interview, shortlist, and applications the candidates.⁸⁵ Following the conduct of the interviews, the Selection Board is mandated to choose and direct to the President names of three qualified persons to be appointed as chairperson. The Panel shall also forward

⁷⁷ Constitution, Article 88(1).

⁷⁸ *ibid.*

⁷⁹ *ibid.*, Article 88(4).

⁸⁰ Independent Elections and Boundaries Act, 2011, Section 5(1) (IEBC Act).

⁸¹ *ibid* Section 5 (2)

⁸² Constitution, Article 88(2).

⁸³ *ibid* Article 88(3).

⁸⁴ Independent Elections and Boundaries Act, 2011, First Schedule. Para 1 (1-11).

⁸⁵ *ibid* Para 3(1).

names of 13 individuals eligible to be selected as members of the IEBC. The President shall then nominate eight persons to be appointed as members and one person to be appointed as the chairperson. Subsequent to this, the President shall forward the list to the National Assembly which body shall approve or reject such nominations.⁸⁶ Where the National Assembly approves, the names shall be forwarded to the President for appointment.⁸⁷

This elaborate procedure provided for the appointment of commissioners to the IEBC plays an important role in the handling of presidential elections as it minimizes the risk of cronyism, nepotism, tribalism among others in the appointment of the commissioners who are expected to oversee the delivery of a free and fair presidential election. The elaborate process also ensures that the most qualified persons are appointed to oversee the presidential elections.

2.5.2.2 Code of Conduct for the Commission staff and members

In every election, the Constitution mandates all candidates and political parties to conform with the IEBC prescribed code of conduct.⁸⁸ The Code of Conduct governing the staff and members of the Commission is contained in the Fourth Schedule to the IEBC Act.⁸⁹ As a comprehensive Code, it plays a fundamental role not only through obligating political parties and contenders to observe the Constitutional values and principles but also strengthens the professionalism of employees of the IEBC.

The employees of the IEBC are also mandated by the Code to conduct themselves with neutrality and integrity.⁹⁰ The members of the IEBC are also obligated by the Fourth Schedule to embrace professionalism. Further, all members of the IEBC are needed to accomplish their responsibilities in a way that inspires the confidence of the public while they are discharging their duties. Members of the IEBC are thus required to act in an efficient and professional manner and equally respect the freedoms and rights of all persons.⁹¹

⁸⁶ *ibid.*

⁸⁷ *ibid* para 3(5)

⁸⁸ Constitution, Article 84.

⁸⁹ IEBC Act, Section 16.

⁹⁰ *ibid* Fourth Schedule Para 1(1).

⁹¹ *ibid.*

In particular, it is incumbent upon the employees and members of the IEBC to observe to the standards of integrity and ethics as specified by the Code. Those standards include *inter alia*—professionalism, independence of members, not engaging in improper enrichment, revelation of conflicting integrity and interests in private dealings among others. Additionally, the conduct of IEBC members is also guided by the provisions of the Public Officers Ethics Act.⁹² This Code of Conduct is crucial in the handling of presidential elections as if it is observed to the letter, there is a likelihood of there not being cases of the IEBC being accused of bungling presidential elections. This will ensure that the results of presidential elections are an accurate image of the resolve of the people.

2.6 Law on campaigns

2.6.1 Law on the role of the media in campaigns

All forms of media enjoy unequivocal constitutional protection, guaranteed under the 2010 constitutional dispensation⁹³. Access to and obligation of media is dealt with under the Elections Act, 2011 obliging all state-owned media to broadcast political parties during electioneering periods⁹⁴. IEBC's sole mandate is to maintain equity in political party exposure through airtime during this period.⁹⁵ Impartiality is to be a guiding tenet of all interactions in the campaign period.⁹⁶ Further, all broadcasting media during the campaign period are required to allocate all candidates reasonable airtime⁹⁷.

The purpose of the law on the role of the media in campaigns has the effect of ensuring all presidential candidates get the same amount of air time while campaigning, hence leveling the playing field with regard to visibility in the media during presidential election campaigns.

2.6.2 Law on election campaign financing

The Election Campaign Financing Act, 2013 came into being mainly to create a normative and codified standard to the financing of political activity. This Act was enacted in 2013. However,

⁹² *ibid* para 10

⁹³ Constitution, Article 34.

⁹⁴ *ibid* Section 41.

⁹⁵ *ibid*, Section 41(2).

⁹⁶ *ibid*, Section 41(3).

⁹⁷ *ibid*, Section 108.

its operation was suspended, coming into effect after the 2017 general elections.⁹⁸ The functions of IEBC under the Act include monitoring and regulating campaign funding. It involves setting and enforcing spending ceilings. The IEBC also vets the sources of contributions. The body monitors and regulates general campaign expenses monitoring and regulating campaign expenses; and providing an outline for the reporting of campaign expenditures among others⁹⁹. The law does not state clearly what the factors considered in setting the ceiling on the amount of money to be utilized in campaigns are, this can lead to IEBC setting high ceilings which will give candidates with deep pockets an advantage over the rest.

The said Act bars presidential candidates and political parties from any public source¹⁰⁰. That builds on to prohibit the use of public resources to campaigns or, support, any candidate or proxy in support of a candidate.¹⁰¹ Any party or individual that benefits in this regard must report the incident to the IEBC in 48 hours and remit the amount; at the risk of disqualification or complicity.¹⁰² This reduces the misuse of money from public coffers by the ruling party or an incumbent president in using the said money to campaign. This ensures that no presidential candidate has an unfair upper hand in campaigns as a result of public resources.

2.7 The law on presidential dispute resolution

The 2010 Constitution of Kenya requires tribunals and courts in working out judicial authority to direct justice deprived of unwarranted respect to routine procedures among others¹⁰³. With regard to enquiries as to the legitimacy of presidential election, the Constitution allows for filing an appeal by any person to the Supreme Court challenging the president-elect election in a period of seven days past the date of the declaration of the presidential election¹⁰⁴. The Supreme Court is then obligated to hear and figure out the said challenge within two weeks past the presentation of

⁹⁸ Election Campaign Financing Act, 2013, Section 1A.

⁹⁹ *ibid*, Section 3.

¹⁰⁰ *ibid* Section 14(1).

¹⁰¹ *ibid* Section 14(2).

¹⁰² *ibid* Section 14(3).

¹⁰³ Constitution, Article 159(2).

¹⁰⁴ *ibid* Article 140(1).

the petition¹⁰⁵. If the Supreme Court determines the election to be unacceptable, a new election is to be conducted in a period of 60 days past the determination¹⁰⁶.

The law on election of the presidents petitions as can be seen above is quite elaborate, however, the time within which the Supreme Court is entitled to complete and render its decisions appears not to be sufficient considering the huge volumes of material presented for the court's consideration. This can lead to a case not being determined effectively and thus poses a danger of upholding a presidential election which was not free and fair.

2.8 Law on technology use in the process of election

The Elections Act establishes a cohesive electronic electoral scheme that allows voter registration done biometrically, voter documentation electronically, and electronic broadcast of outcomes¹⁰⁷. IEBC is required to guarantee that the technology used is transparent, accountable, secure, verifiable, accurate, and simple¹⁰⁸. IEBC is further required in a transparent and open manner to; acquire and develop the technology essential for conducting a general election not less than 120 days prior to such votes and to deploy, authenticate, and test the technology not less than 60 days prior to a general election¹⁰⁹. IEBC is further required to develop complementary mechanism for voters identification of which is transparent, accountable, secure, verifiable, accurate, and simple¹¹⁰.

IEBC is required to involve a specialized reputable organisation to conduct a system audit of the technology used in the election annually¹¹¹. A system audit needs to be performed by IEBC in order to appraise availability, integrity, and confidentiality of the voting technology by evaluating the following: the completeness and accuracy of the data; the susceptibility of the

¹⁰⁵ *ibid* Article 140(2)

¹⁰⁶ *ibid* Article 140(3)

¹⁰⁷ Elections Act, Section 44(1).

¹⁰⁸ Constitution, Article 81 and Elections Act, Section 44(3).

¹⁰⁹ Elections Act, Section 44(4).

¹¹⁰ *ibid* Section 44A.

¹¹¹ Elections (Technology) Regulations, 2017, Regulation 12(1) (Election Technology Regulations).

scheme configurations; the security access to the system; and any other instruments that may be identified by it¹¹².

IEBC is further required to develop frameworks to guarantee data integrity, accuracy, availability, and confidentiality¹¹³. In this regard, IEBC is further required to implement apparatuses to spot, avert and guard against attacks and compromise of the election technology¹¹⁴. With regard to telecommunication network, IEBC is under an obligation to print on its official website particulars of the telecommunication network service deliverers to be utilized during an election¹¹⁵.

IEBC is required to adopt an ongoing and inclusive training package on election technology for its staff¹¹⁶. The training exercise on election technology should employ an all-inclusive training curriculum permitted by IEBC and should include both practical training as well as theoretical aspects¹¹⁷. The technical training is to be done by competent personnel on the subject matter; and providers of service and retailers of such election technology¹¹⁸.

Regarding the transmission of election outcomes, the Elections (Amendment) Act, 2016 necessitates IEBC to convey, in the agreed form, the charted outcomes of a Presidential election from a voting place to the tallying location of the community and to the nationwide tallying center. The said Act further necessitates IEBC to present all outcomes through an online portal¹¹⁹.

The Elections Act Section 44(8) offers for the formation of a practical commission to supervise the espousal of technology in the election procedure and to enact the usage of the technology. The technical commission was to encompass the officers and associates of the IEBC and such

¹¹²ibid Regulation 12(2).

¹¹³ibid Regulation 14(1).

¹¹⁴ ibid Regulation 14(2).

¹¹⁵ ibid Regulation 19(1).

¹¹⁶ ibid Regulation 29.

¹¹⁷ ibid Regulation 30(2).

¹¹⁸ ibid Regulation 30(3).

¹¹⁹ Independent Electoral and Boundaries Commission, *'The Post Election Evaluation Report for the August 8, 2017 General Election and October 26, 2017 Fresh Presidential Election'* (Independent Electoral and Boundaries Commission, 2018)127 available at < <https://www.iebc.or.ke/uploads/resources/V9UUoGqVBK.pdf>> accessed on 4th June 2019.

additional pertinent stakeholders, institutions or agencies as the IEBC considered essential. This Section was, however, declared unconstitutional by the High Court three-judge bench in *Kenneth Otieno v Attorney General & another*¹²⁰ as it allowed for addition of individuals expressly omitted from being members of IEBC under the Constitution Article 88(2) in the technical commission. The court held that structure of the technical commission and the functions given to it endangered the organizational individuality of the IEBC.

The introduction on the law on use of technology has the latency of fostering the credibility of presidency elections, for instance, voter registration utilizes technology by means of biometric voter registration (BVR). BVR encompasses the usage of the Biometric Voter Registration (BVR) System which includes a camera, a laptop, and finger print scanner. The BVR scheme obtains facial image of voters, telephone number, identity card/passport number, gender, civil data and finger prints or Personally Identifiable Information (PII)-Name, among others¹²¹. The rationale for the introduction of the BVR was to ensure 'one man, one vote'¹²². BVR is regarded in some quarters as the epitome of democratic electoral processes since they view it as efficient and guarantees a high-speed voter registration process with minimal errors¹²³.

2.9 Conclusion

This chapter focuses on studying the legal framework central to the Kenyan electoral process in presidential elections. It set out to evaluate the functioning of the electoral system of Kenya by examining the electoral procedure on account of performance indicators such as- participation in the electoral process; campaigns; transparency and tallying of votes; electoral technology; and electoral body (IEBC) among others.

The chapter concludes that there exists an all-inclusive legal outline governing the essential elements of a presidential election. The issue as to whether the same has been complied with is a

¹²⁰ Petition 127 of 2017 available at <http://kenyalaw.org/caselaw/cases/view/137864/> accessed on 30th August, 2020.

¹²¹ Independent Electoral and Boundaries Commission (n 90).

¹²² Muthuri and 3 others, (n 66).

¹²³ Namunane B & Ongiri I, 'Fraud fears as IEBC turns to old poll kit' (Daily Nation, 2nd August, 2012) available at <https://www.nation.co.ke/News/politics/Fraud+fears+as+IEBC+turns+to+old+poll+kit/-/1064/1468990/-/d8hkn9/-/index.html> accessed on 28th May, 2019.

different consideration that this thesis will determine in the next chapter by evaluating the application of the law in the process of presidential elections of 2017.

CHAPTER THREE

APPLICATION OF THE LAW IN THE 2017 PRESIDENTIAL ELECTIONS

3.1 Introduction

The period proceeding the promulgation of the Kenyan Constitution in 2010, the general elections of 2017 were Kenya's second elections to take place under the 2010 Constitution. The mischief behind the electoral reforms was to among other objectives; forestall the numerous episodes of post-electoral disputes that had characterized Kenya's elections since the commencement of multi-party democracy.

On the basis of Kenya's post electoral history, and on the basis of the post 2010 reforms as discussed under the legislative framework in chapter two, the logical inference one would draw is that the post-2010 electoral reforms would serve as a panacea to post electoral disputes. An evaluation of those reforms leads to the conclusion that elections in Kenya post 2010 constitutional dispensation would not only be free, fair and credible but also devoid of post electoral disputes.

However, as history would have it, all the succeeding presidential elections in Kenya since 2010 have been marred by election disputes. Using Kenya's 2017 presidential elections as a case study, this chapter will seek to find out whether the law as applied in the 2017 presidential elections has the ability to ensure free, just and credible elections. A free and just presidential election is one characterized by the winner celebrating his/her triumph while the losers accepting the results as legitimate¹. The study settled on the 2017 general elections as a case study on account of the facts that- the 2017 elections were held under the enhanced legal framework; the elections were also characterized by disputes; and ultimately, the court's resolution of the electoral disputes was jurisprudential worth this study.

¹ P Anyang' Nyong'o, *Presidential or Parliamentary Democracy in Kenya; Choices to be made* (Booktalk Africa, 2019) 18.

3.1 Application of the law governing participation in electoral processes

3.1.1 Application of the law at the pre-poll and polling stage

In the August 2017 General Election, there was a huge number of candidates vying for various positions². Polling stations were ideally supposed to open for the voters to cast their votes at 6.00am³. However, this was not the position as was witnessed in the August 2017 elections where some polling stations were opened to the public way after 6.00 am⁴. IEBC related delays to opening of polling stations in some areas were because of various security, technical, weather, and logistical challenges⁵. However, the said difficulties were handled, and the stations were unlocked and polling occurred and the voting period was prolonged to cover for the amount of time lost⁶.

Despite the Election Offences Act and the Electoral Code of Conduct barring campaigns around polling stations, there were several incidences of campaigns⁷. This was manifested by among others; issuing of notes to voters to direct them on whom to vote for, use of posters, branding, use of persons wearing party-coloured/candidates' attires around polling stations⁸. This had the effect of affecting delivery of a fair and free presidential election as it gave the presidential candidate being campaigned for, an undue advantage over the rest.

Voter bribery was frowned upon the Election Offences Act and engrossed a consequence of a fine not surpassing KES 2 million or incarceration of a period of less than six years or to both⁹. The Black's Law Dictionary describes bribery as "the offering, giving, receiving, or soliciting of

² Independent Electoral and Boundaries Commission, 'The Post Election Evaluation Report for the August 8, 2017 General Election and October 26, 2017 Fresh Presidential Election' (Independent Electoral and Boundaries Commission, 2018)122 available at < <https://www.iebc.or.ke/uploads/resources/V9UUoGqVBK.pdf>> accessed on 9th June 2019.

³ *ibid* 118.

⁴ Independent Electoral and Boundaries Commission, 123 (n 3).

⁵ Kenya National Commission on Human Rights, *A Human Rights Monitoring Report on the 2017 Repeat Presidential Elections* (Kenya National Commission on Human Rights, 2017) 44

⁶ Independent Electoral and Boundaries Commission, 122 (n 2).

⁷ Kenya National Commission on Human Rights, *Mirage at Dusk : A human rights account of the 2017 general elections; Preliminary Report* (Kenya National Commission on Human Rights, 2017) 102-106.

⁸ *ibid* 102.

⁹ Election Offences Act, 2016, Section 9(3) (Election Offences Act).

anything of value to influence action as official or in discharge of legal or public duty”¹⁰. In the August 2017 presidential elections, voter bribery manifested itself through the handing out of money and foodstuffs to voters. This might have prejudiced candidates who did not engage in the vice and to a great extent unduly influenced voters to vote for presidential contestants who might have offered bribes, thus hampering the delivery of fair and free elections.

With regard to the number of voters to vote in a polling location, the Elections Act provided that a polling station should not have more than seven hundred voters¹¹. In the presidential elections, of August 2017 the purpose of that provision of the law was not realized fully as huge crowds were witnessed in many polling stations¹². This provision was applied by IEBC to classrooms, desks in tents and halls which were renamed to polling stations in order to meet the said requirement¹³. In the 2017 elections as a result of unmanageable queues due to each polling station having one queue, special interest groups, especially, Muslim women opted out of the queue¹⁴.

Under the Election (Technology) Regulations¹⁵ IEBC was obligated to install election technology to augment transparency, effectiveness, and integrity of the process of election. During the August 2017 elections IEBC deployed 40,388 KIEMS kits whose two main mechanisms that were utilised were the Results Transmission System (RTS) and Electronic Voter Identification (EVI).

IEBC was also mandated to assess, verify and roll out technology essential for conducting of the general election more than 120 days before the election¹⁶. In this regard, a week to the August 2017 elections IEBC conducted a simulation exercise to test its level of preparedness, especially, on the use of technology¹⁷. Despite the deployment of the KIEMS kits and the holding of the simulation exercise by IEBC, there were several reported incidents of malfunctioning or total

¹⁰ Henry Campbell Black, *Black's Law Dictionary; Revised Fourth Edition* (St Paul, Minn West Publishing Co, 1968) 315.

¹¹ Elections Act, 2011, Section 38A (Elections Act).

¹² Kenya National Commission on Human Rights, 112 (n 5).

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ Election (Technology) Regulations, 2017, Regulations 3-5 (Election (Technology) Regulations).

¹⁶ Elections Act, 2011, Section 44(4).

¹⁷ Independent Electoral and Boundaries Commission, 121 (n 2).

failure of the KIEMS kits to perform its functions¹⁸. This in turn led to delays in voting, thus voters had to be first identified using the KIEMS kits before proceeding to vote.

The failure of several KIEMS kits shows that despite the law providing for the use of technology, its implementation could face challenges such as failure of the said kits. This could lead to the electorate reading malice and viewing such failure as a ploy to frustrate voters in a perceived presidential candidate's stronghold¹⁹. To this extent the law requiring the use of technology at the re-poll and during polling appears not to have been completely effective.

3.1.2 Application of the law in the counting, tallying and transmission of presidential outcomes

Activities undertaken after casting of ballots has ended include; numeration of votes, totaling of results and filling of forms, transmission of outcomes and announcement and declaration of results.

Counting of votes involves the manual process of physically determining the number of votes each candidate in an election garnered²⁰. At this stage polling stations are transformed into numeration rooms and individuals permitted in the numeration rooms include; Presiding Officers, IEBC officials, accredited observers, media, accredited party/candidate agents, Voting/Counting Clerks, and Deputy Presiding Officers²¹. Before the counting commences, ballot boxes are required to be closed at every moment and the seals serial numbers are logged in the Polling Station Diary (PSD), prior to and after numeration. Candidate agents and Political party are required to be in the counting room all through the time of counting. During the August 2017 elections, according to IEBC the counting process largely went on smoothly especially with regard to the presidential elections with no major incident being reported²². However, according

¹⁸ Harry Misiko, Chris Msando death: What we know' *Daily Nation* (Nairobi , 31st July, 2017) available at <<https://www.nation.co.ke/news/IEBC-ICT-manager-Chris-Musando-dead/1056-4039424-8r8f7v/index.html>> accessed on 30th July 2019

¹⁹ Fay Ngina, 'Kenyan in parts of Kisumu disappointed with KIEMS failure' *Standard Digital* (Nairobi, 8th August, 2019) available at < <https://www.standardmedia.co.ke/ureport/article/2001250668/kenyans-in-parts-of-kisumu-disappointed-with-kiems-failure>> accessed on 3rd August, 2019.

²⁰ Independent Electoral and Boundaries Commission, 125 (n 2).

²¹ *ibid.*

²² African Union Election Observation Mission to the 8 August 2017 General Elections and The 26 October 2017 Fresh Presidential Election in the Republic of Kenya, *African Union Election Observation Mission Report: Kenya*

to the Carter Center (an election observer group) the IEBC staff in some polling stations poorly administered that process²³.

In the prisons which had been gazetted as polling stations for the 2017 presidential elections, there were no party agents available²⁴. Despite the absence of party agents' POs proceeded as per the law and regulations, however, there were some of the procedures which required the presence of agents²⁵. The absence of agents could affect the credibility of presidential elections as agents were required to check and ensure that in the polling stations all went according to the law and that their candidates were not disenfranchised.

After the counting of votes, the votes are tallied. The Cambridge Dictionary defines a tally as a count or record of a number of things. Once the tallying process is done that is when the process of filling of forms could begin. Correctly completed, signed and stamped statutory forms are the most important outcome of the tallying process²⁶. There are various forms which are filled by the election officials at various places namely, at the polling location, tallying center of constituency, county tallying center and at the countrywide tallying center.

Before the August 2017 election, IEBC entered into an agreement with the mobile network Operators for provision of their services during the elections²⁷. IEBC and the mobile operators charted out the nation to fix signal strength; though, 3,000 polling stations in various parts of Kenya were recognized as not possessing 3G connectivity network essential for result broadcast²⁸. IEBC in an attempt to mitigate this problem, instructed the POs in the affected areas

2017(African Union, 2017) 30 available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&ved=2ahUKEwj-2s-s0sTkAhU67uAKHTKeC084ChAWMAV6BAgGEAI&url=https%3A%2F%2Fau.int%2Fsites%2Fdefault%2Ffiles%2Fdocuments%2F36626-doc-report_of_the_african_union_election_observation_mission_to_the_8_august_general_elections_and_26_october_2017_fresh_presidential_elections_in_the_republic_of_kenya.docx&usq=AOvVaw1HCy7sNwtI4oJ5qEqdIpoe accessed on 11th September 2019.

²³ The Carter Center, *Kenya 2017 General and Presidential Elections Final Report*, (The Carter Center, 2018) 25 available at https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-2017-final-election-report.pdf accessed on 10th September 2019.

²⁴ Kenya National Commission on Human Rights, 153 (n 7).

²⁵ Kenya National Commission on Human Rights, 153 (n 5).

²⁶ Independent Electoral and Boundaries Commission, 125 (n 2).

²⁷ Kenya National Commission on Human Rights, 60 (n 5)

²⁸ Independent Electoral and Boundaries Commission, 127 (n 2).

to transfer to the tallying centres to convey outcomes by means of satellite modems that were obtainable at the voting centres.²⁹

For the transmission of results in the presidential elections, IEBC is required by the Elections Act to convey, in the prescribed structure, the tabularized outcomes of a Presidential election from a polling location to the national tallying centre (NTC) and to the constituency tallying centre³⁰. IEBC is also obligated to make available all the outcomes to the public by an online portal³¹. In the August 2017 elections, the results were transmitted by the POs using the KIEMS (RTS) kit, the results were transmitted beginning with the outcomes of presidency, logs of election and the additional five elective places³². The statutory form for the presidential election (Form 34A) was perused and referred along with the writing outcomes and the records were subsequently printed on the public portal after effective proposal.³³

It became apparent in the August 2017 presidential election that some portions of the organization had not been reinforced³⁴. It appeared that in the weeks prior to the elections there was political interference which led to there not being procedural improvements³⁵ and this negatively affected the transmission of the results. About a quarter of the scanned statutory records had not been conveyed and availed by the period the August 2017 presidential election results were proclaimed³⁶. It also emerged that keywords of senior IEBC officers were utilized to contact the system numerous times—probably by diverse individuals³⁷, this opened the window for possibility of unauthorized people accessing the system and doctoring the results.

The IEBC during one of their briefings during the October 2017 presidential election period stated that the outcomes transmitted via the KIEMs kits were not accurate in terms of absolute

²⁹ Kenya National Commission on Human Rights, 142 -143 (n 5)..

³⁰ Elections Act, Section 39 (1C).

³¹ The Carter Center, 27 (n 23).

³² Independent Electoral and Boundaries Commission, 127 (n 2).

³³ Kenya National Commission on Human Rights, 112 (n 5).

³⁴ Nic Cheeseman & others 'Digital dilemmas: the unintended consequences of election technology'

(Democratization Volume 25, 2018 - Issue 8) 1408 available at

<https://www.tandfonline.com/doi/full/10.1080/13510347.2018.1470165?scroll=top&needAccess=true> accessed on 20th October, 2020.

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ *ibid.*

numbers thus making IEBC to revert to Form 34Bs³⁸. This brought to light the issue of legality of the outcomes and damaged the tallying and verification process³⁹. During the transmission of the results in the October election, POs would after the physical filing in the Form 34As, enter the outcomes in the KIEMS kit, take a picture of the Form 34As and convey the similar electronically to the CTCs and the NTC⁴⁰.

The polling stations results are required to be openly and precisely organized and promptly publicized by the RO⁴¹. The Court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others*⁴² held that the election outcomes from the polling stations were final. The NRO was tasked with announcing, declaring and issuing certificate for the winner of the presidential elections. In the elections of August 2017, the IEBC chairperson avowed Mr. Uhuru Muigai Kenyatta as the suitably elected President of Kenya⁴³. This declaration did not go down well with the NASA Coalition which then filed presidential petition 1 of 2017 through its flag bearer and his deputy⁴⁴.

In the October 2017 repeat presidential election, IEBC implemented a fresh process for the electronic transmission of outcomes which involved scanning the picture of the outcomes forms 34A from the polling station and transmitting it to the CTCs and the NTCs⁴⁵. A new process was

³⁸ KTN News, “Transmission by KIEMS kits will not accurate “IEBC admits to having error in transmission’ (KTN News, 28th October, 2017) available at https://www.youtube.com/watch?v=PLYUkkaYp_s accessed on September 20, 2020.

³⁹ Vellah Kedogo Kigwiru, ‘The Adoption of Technology in the Kenyan Electoral Process: Lessons from the 2013 and 2017 Presidential Election.’ (Research Gate, May 2020) 26 available at https://www.researchgate.net/publication/341234333_The_Adoption_of_Technology_in_the_Kenyan_Electoral_Process_Lessons_from_the_2013_and_2017_Presidential_Election accessed on September 20, 2020.

⁴⁰ *ibid.*

⁴¹ Constitution of Kenya, 2010, Article 86(c).

⁴² Civil Appeal 105 of 2017, available at <<http://kenyalaw.org/caselaw/cases/view/137601/>> accessed on 18th September 2020.

⁴³ Beatrice Obwocha and Martin Kinyanjui, ‘Celebrations as Chebukati declares Uhuru winner’ (Daily Nation, 11th August, 2017) available at <<https://www.nation.co.ke/news/politics/Kenya-elections-results-president-uhuru-raila/1064-4053260-rko2c6/index.html>> accessed on 10th June, 2019

⁴⁴ *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & 2 others*[2017] eKLR available at <<http://kenyalaw.org/caselaw/cases/view/140716/>> accessed on 21st September 2020.

⁴⁵ Kenya National Commission on Human Rights, 61 (n 5).

also developed which involved electronically transmitting the scanned images and physically delivering them to the national returning officer⁴⁶.

After the announcement of Uhuru Kenyatta as the victor of the repeated election, John Harun Mwau, Njonjo Mue and Khelef Khalifa filed petitions in the Supreme Court which were later consolidated⁴⁷.

From the foregoing it appears that the electoral law as applied after polling was effective. However, the issue of its effectiveness in delivering a fair and free presidential election came to light in the Supreme Court⁴⁸ where the NASA presidential runner in the August 2017 elections, Raila Odinga, made damning allegations that there was hacking of the electronic transmission of outcomes system and that the hackers substituted the authentic results with cooked results⁴⁹. He also alleged that the results inserted by the hackers contradicted the actual results announced at various polling stations⁵⁰. In the *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & 2 others*⁵¹ IEBC did not allow viewing to two key sections namely its servers and logs which had Forms 34A & B which were transmitted electronically from CTCs and polling stations. The information from those servers was critical in determining whether indeed the system was hacked and results manipulated.⁵² This shows that despite the law in this regard appearing to have been followed, the law is limited to the degree that it is not full proof in preventing the manipulation of outcomes.

⁴⁶ Independent Electoral and Boundaries Commission, 125 (n 2).

⁴⁷ *ibid*; *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 3 others*, Petition 2 & 4 of 2017 (Consolidated) [2017] eKLR.

⁴⁸ *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & 2 others*[2017] eKLR

⁴⁹ Benard Onyinkwa, The Election Curse: Challenges Facing Independent Electoral and Boundary Commission in the Delivery of Free, Fair and Transparent Elections (December 12, 2017) 4, Available at <SSRN: <https://ssrn.com/abstract=3086592> or <http://dx.doi.org/10.2139/ssrn.3086592>> accessed on 3rd August 2019

⁵⁰ *Ibid*

⁵¹ *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & 2 others* (n 44).

⁵² *ibid*.

3.1.3 Application of the law on voter registration

Under the Constitution, each adult resident has the right to be enumerated as a voter with no irrational restrictions⁵³. On the registration of voters, IEBC used quasi-periodic “mass voter registration” (MVR) drives in detailed intermissions directed to elections. The MVR exercises developed on previous voters’ records and usually does not need supporters previously enumerated to re-register, there is no possibility to simply register outside of the stipulated time frames for the MVR exercises. Towards the holding of the August 2017 elections, IEBC conducted two MVR exercises throughout the country⁵⁴. These exercises were held in 2016 and in 2017.⁵⁵

The MVR exercises were not usually as smooth as they ought to, they were in fact faced by several challenges such as; difficulties in obtaining national identity cards (IDs) which were a requirement for registration, varying numerical information concerning the total number of registered voters in the country, verifiable register, the lack of a single, administrative and technological problems, and procurement scandals⁵⁶. The 2017 MVR exercise faced several challenges such as procurement challenges and ‘importation of voters’⁵⁷.

In preparation for the August 2017 elections, the IEBC revoked the tender for the Integrated Elections Management System (IEMS), which was a technological instrument for registering voters, voter proof of identity and outcomes broadcast⁵⁸. The termination was due to oppositions to the manner in which the tendering procedure was conducted⁵⁹. IEBC subsequently decided to straight acquire the IEMS from Safran Identity and Security Company (Morpho), IEBC argued

⁵³ Constitution, Article 38(3)(a).

⁵⁴ The Carter Center, 33 (n 23).

⁵⁵ *ibid* 27.

⁵⁶ Kenyans for peace with truth & justice and Africa Centre for Open Governance ‘Ready or Not: An Assessment of Kenya’s Preparedness for the 8 August 2017 General Election’ KPTJ Election Series 2012, (2017) 15.

⁵⁷ *ibid*.

⁵⁸ Nancy Angutu and William Mwangi, ‘IEBC cancels integrated elections management system tender’ *The Star* (Nairobi , 28th February 2017) available at < <https://www.the-star.co.ke/news/2017-02-28-iebc-cancels-integrated-elections-management-system-tender/>> accessed on 26th August, 2019.

⁵⁹ *ibid*.

that the reason for the direct procurement was that the said company could meet the tight schedules and that it had already supplied the BVR kits.⁶⁰

In the 2017 MVR exercise there were claims of use of coercive registration techniques to get members of the public to register⁶¹. Such techniques included; the use of criminal rings to limit access to public areas and transportation for residents who could not attest that they had enumerated as electorates; misuse of chiefs by political leaders, especially in the Jubilee Party's perceived stronghold zones, to guarantee that all qualified electorates were registered; and some religious leaders using their position to attempt to force congregants to register, for instance in Embu, an Anglican clergyman by the name Isaiah Njagi, threatened to repudiate the Holy Eucharist to his audience unless they enumerated as voters⁶².

Pursuant to the case of *Kituo Cha Sheria v Independent Electoral and Boundaries Commission & another*⁶³, the right of prisoners to vote under Article 38 of the Constitution was affirmed. In January 2017, 118 prisons were gazetted as registration centers and polling stations for prisoners and a total of 5,528 prisoners were registered to vote for their preferred presidential candidate⁶⁴. However, some prisoners faced difficulty during voting as they had been transferred from the prisons in which they had registered to other prisons⁶⁵.

The Constitution offers for the progressive citizens registration living in foreign countries and the advanced awareness of the right to vote⁶⁶. In the 2013 presidential elections Kenyan citizens residing in only four East African countries were registered to vote in the said elections⁶⁷. In the 2017 presidential elections the number of countries in which Kenyan citizens were registered increased by one, namely South Africa was now included⁶⁸. The number of Kenyans registered

⁶⁰ Kenyans for peace with truth & justice and Africa Centre for Open Governance, 15 (n 56).

⁶¹ *ibid* 18.

⁶² *ibid*.

⁶³ Petition 574 of 2012 available at <<http://kenyalaw.org/caselaw/cases/view/87145>> accessed on 18th September, 2020.

⁶⁴ The Carter Center, 145 (n 23).

⁶⁵ *ibid* 154.

⁶⁶ Constitution, Article 82(1)(e).

⁶⁷ Independent Electoral and Boundaries Commission, 88 (n 2).

⁶⁸ *ibid*.

as voters in the diaspora in 2017 was 4,224⁶⁹, this figure compares dismally to the number of Kenyans residing abroad as the number of Kenyans residing in the diaspora in the year 2014 was estimated at around 3 million⁷⁰ and that number by now has greatly risen. A huge number of Kenyans in the diaspora did not vote and this led to some candidates who stood to be voted for, losing the votes of those Kenyans.

3.1.4 Application of the law on opening of the Voters Register for inspection

The IEBC is expected under Elections Act section 6 to open up the Record of Voters for review by the public within 90 days to the elections date. In 2017, with two months remaining to the date of the August 8 elections, IEBC was yet to open up the register for inspection⁷¹. This led to the institution of a suit to coerce IEBC to open up the record for scrutiny in *Republic v Independent Electoral and Boundaries Commission Ex-Parte Gladwell Otieno & another*⁷².

The Ex Parte Applicant in the aforementioned case sought guidelines of court to: coerce the IEBC to issue and allow for opening up for public review the record of electorates as grouped per polling location and to consider suggestions by disturbed individuals and review the list consequently within a sensible time beforehand the general elections programmed for August 8, 2017; induce IEBC to advertise and gazette the last record of electorates per polling station; prohibit IEBC and its employees from installing a voter record for usage in the general election prior to the same was exposed to a public examination. The court ordered IEBC to in a period of 48 hours issue in the media a validation that the list of voters was available for review and the way of and the time for such examination by the people.

The actions of the IEBC in the failure in opening up the Register of Voters points to a clear picture that despite the law allowing for the inspection to ensure the accuracy of the Register, the IEBC limit the effectiveness of that provision of the law. Thus, the failure to implement the law

⁶⁹ *ibid* 89.

⁷⁰ Ministry of Foreign Affairs, 'Kenya Diaspora Policy' (June 2014)⁸ available at <<http://www.mfa.go.ke/wp-content/uploads/2016/09/Kenya-Diaspora-Policy.pdf>> accessed on 29th July 2019.

⁷¹ *Republic v Independent Electoral and Boundaries Commission Ex-Parte Gladwell Otieno & another*, Judicial Review Miscellaneous Application 447 of 2017 [2017] eKLR available at <<http://kenyalaw.org/caselaw/cases/view/139803/>> accessed on 18th September, 2020.

⁷² *ibid*.

by IEBC as the body mandated to conduct elections in this regard limits the provision of fair and free elections.

At least seven days to the election, IEBC posted a printed Record of Voters at each polling station with the aim of assisting voters to determine their polling stations prior to the day of the elections⁷³. This indeed assisted in queue management⁷⁴ as a good number of the voters who arrived at the polling station to vote went straight to their respective queues to line up for voting as opposed to previous elections where one would queue for long periods only to find that one was in the wrong queue.

3.1.5 Application of the law on campaigns

In the period to the August 2017 general elections there were several campaign tools which were employed by various contestants which were against the law or appeared to be against the law. These included; use of government resources to campaign for the incumbent⁷⁵, cabinet secretaries and civil servants engaging in campaigns, advertising and publishing of government achievements, encouragement of voting along ethnic lines among others.

One of the campaign tactics employed was the use of ethnic identity⁷⁶, this entailed urging voters to vote for certain candidates based on their ethnic background and not necessarily on the candidates' manifestos or ideologies. There were also incidences of hate speech reported⁷⁷.

Under the law, it was an offence to use public resources in campaigns⁷⁸. The misuse of government resources in the 2017 elections included the usage of government vehicles and cars belonging to public schools, distribution of food for relief, and commissioning and launching of projects⁷⁹. During the campaign period, several cabinet secretaries openly campaigned for the incumbent President, this led to concerns being raised by the opposition as it expected cabinet

⁷³ Independent Electoral and Boundaries Commission, 121 (n 2).

⁷⁴ *ibid.*

⁷⁵ Kenya National Commission on Human Rights, 54 (n 3).

⁷⁶ The Carter Center, 146 (n 23).

⁷⁷ *ibid.*

⁷⁸ Election Offences Act, Section 14.

⁷⁹ Kenya National Commission on Human Rights, 54 (n 5).

secretaries to be neutral during elections⁸⁰. Following the concerns of the Opposition, IEBC's chairperson issued a statement to the effect that there was nothing in law barring cabinet secretaries against campaigning for their preferred candidates⁸¹.

The government during the campaign period advertised its achievements on various media platforms as a way of campaigning; this was done through the Presidential delivery unit⁸². It was against the law for the government to advertise its achievements in print, electronic media or even bill-boards⁸³. The rationale behind this was stated in the Supreme Court in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others*⁸⁴ that the achievements of the government of the day were made from utilization of public funds and as such need not be exploited and used as an instrument of campaign.

3.2 Application of the law on the conduct of the Electoral Management Body (IEBC)

Under the Constitution, IEBC is mandated to supervise presidential elections⁸⁵. The date of the August 8, 2017 general elections was announced to the public via Gazette Notice No. 2692 on 17th March 2017⁸⁶, approximately 5 months to the election. Prior to the holding of the said elections, IEBC identified crucial areas which needed to be improved on for better handling of the elections. These crucial areas included: the logistical, infrastructural, and legal parameters for delivering a credible election.⁸⁷

⁸⁰ Patrick Lang'at, 'IEBC says Cabinet Secretaries are free to campaign for Uhuru' *Daily Nation* (Nairobi, 12th April, 2017) available at <https://www.nation.co.ke/news/politics/Ministers-campaign-for-Uhuru/1064-3887366-sprv43z/index.html> accessed on 3rd August 2019

⁸¹ *ibid.*

⁸² *Apollo Mboya v Attorney General & 15 others*, Petition 162 of 2017 [2017] eKLR available at <http://kenyalaw.org/caselaw/cases/view/142822> accessed on 2nd October, 2020.

⁸³ Election Offences Act, Section 14.

⁸⁴ *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* (n 44).

⁸⁵ Constitution, Article 88(4).

⁸⁶ WW Chebukati, Vol. CXIX—No. 35 Gazette Notice No. 2692 (Government Printers, 17th March, 2017) available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&ved=2ahUKEwjNn7_T_9biAhWEyIU KHXKnCQ4QFjAJegQIABAC&url=http%3A%2F%2Fkenyalaw.org%2Fkenya_gazette%2Fgazette%2Fdownload%2FVol.CXIX-No._35_.pdf&usg=AOvVaw3Cofvq_BbxVPJMnTmArcaw accessed on 7th June 2019

⁸⁷ Independent Electoral and Boundaries Commission, 'The Post Election Evaluation Report for the August 8, 2017 General Election and October 26, 2017 Fresh Presidential Election' (2018)13 available at <<https://www.iebc.or.ke/uploads/resources/V9UUoGqVBK.pdf>> accessed on 7th June 2019.

IEBC utilized various avenues in an attempt to educate the voters. The avenues utilized by IEBC include: mounting of mass-media drives using media scripts, newspaper adverts, television and radio interviews by IEBC officers. IEBC also utilized social media platforms such as twitter and facebook⁸⁸. This was so as to educate the voters on the electoral process and what to expect on the date of the elections as well as to encourage a high voter turnout.

On the financing of the 2017 presidential elections, IEBC was financed by the Government through an independent budget to Parliament; this budget has no ties to that of the Ministry of Finance⁸⁹. Other sources of funds for IEBC include; gifts, grants, donations among others⁹⁰. For there to be free, fair and credible elections, IEBC needs to be properly funded so as to conduct its activities with ease.

The financing of the 2017 presidential elections was done over a period of three financial years namely; 2015/2016, 2016/2017 and 2017/2018. The overall budgetary allocation for the 2017 elections was Kshs 49,981, 666, 599 billion⁹¹ despite IEBC having requested for approximately Kshs 61 billion⁹². IEBC in its Elections Operation Plan 2015-2017(EOP) identified and listed priority zones and events vital in improving education of voter for the August 2017 elections⁹³. The said priority areas included: General Election interventions, pre-election, campaigns on registration of voters, continuous voter education programme, and voter education regulatory framework.

The inadequate financing of IEBC affected it in performing some of its functions, for instance it affected the voter registration exercise in the diaspora⁹⁴. Inadequate funding also led to the deployment of fewer BVR kits to registration centers thus discommoding citizens who wanted to register as voters. Despite not being adequately funded, the funds allocated to IEBC are not

⁸⁸ ibid 18

⁸⁹ Emma Kinya, 'Electoral Process in Kenya' available at <<http://kenyalaw.org/kenyalawblog/electoral-process-in-kenya/>> accessed on 3rd August 2019.

⁹⁰ ibid.

⁹¹ The National Treasury, *Pre-Election Economic and Fiscal Report, 2017*(The National Treasury, 2017) 10 available at <http://www.treasury.go.ke/fiscalreport2017/PRE-ELECTION%20ECONOMIC%20AND%20FISCAL%20REPORT%202017.pdf> accessed on 10th June 2019

⁹² Independent Electoral and Boundaries Commission, 88 (n 2).

⁹³ ibid 17.

⁹⁴ ibid 88.

usually released to it as and when required⁹⁵. This hampers IEBC's ability to conduct its functions in a timely fashion. Some of the activities IEBC requires funds for include the conducting of regular audits of the election technology⁹⁶.

Before the October 2017 election was held, Dr Roselyne Akombe, one of the IEBC's commissioners resigned and in her resignation letter she revealed how during plenary meetings commissioners used to vote on partisan lines⁹⁷. Her resignation cast doubts as to the capabilities of IEBC delivering a credible election and the capabilities of its chair in electoral process.

3.2.1 Application of the law on procurement of election materials

With regard to election materials such as ballot papers, IEBC put out a tender advertisement for supplying and delivering elections ballot papers, declaration forms of the outcome of election and poll records on an *as and when necessitated* foundation for a time between 2016 to 2018. Al Ghurair Printing and Publishing Company limited won the bid to supply the said materials. However, the award of the tender was challenged both in the Public Procurement Administrative Review Board and the courts.

In *Republic v Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others*⁹⁸ the Ex parte Claimant (Coalition for Reforms and Democracy, CORD) challenged the tender at the High Court on various grounds including that the requirement for poll registers encompassed an item code IEBC 131:2015 labeled as a "Principal Voters Register", tender documents but such a list was not portion of the Amendment Act or the Elections Act. CORD explained lack of indication that the Principal Voters Record was proficient of being upheld on a web portal available to the public in a set-up that might be examined or confirmed for precision and can display the voter's biometric data. CORD also

⁹⁵ *ibid* 64.

⁹⁶ *ibid* 152.

⁹⁷ Roseyne Akombe, 'IEBC Commissioner Roselyn Akombe's full statement on why she resigned' *Standard Digital Ureport*(Nairobi, 18th October, 2017) available at <<https://www.standardmedia.co.ke/ureport/article/2001257687/iebc-commissioner-roselyn-akombe-s-full-statement-on-why-she-resigned>> accessed on 3rd August 2019

⁹⁸ Miscellaneous Application 637 of 2016 available at <http://kenyalaw.org/caselaw/cases/view/131509/> accessed on 2nd October, 2020.

argued that tender item code IEBC 20:2015 involved election forms 34, 35, 36 and 38, which were not well-matched with the envisioned unified electronic system.

The High Court in this case quashed the award of the said tender to Al Ghurair Print and Publishing Company Limited of Dubai and required that IEBC was at authorization to start again the tender procedure and that the equivalent was to be conducted in acquiescence with the Constitution, necessities of the Public Procurement and Asset Disposal Act (PPADA), and the pertinent election regulations among other orders. Dissatisfied with the High Court's decision a petition was chosen to the Court of Appeal which sustained the High Court's decision⁹⁹.

IEBC subsequently started what it viewed was a process of procurement in agreement with the courts' decision. Nevertheless, halfway through the procedure, the way the procurement strategy was being conducted was tested at the Public Procurement Administrative Review Board, mainly on the basis that the course was against with the supplies of PPADA as read with the Constitution Article 227. The Review Board terminated the said tendering process for being incurably flawed and directed IEBC to re-tender and acquire again the resources, the topic of the tender by means of such technique as it might ponder suitable taking into factors as it may consider necessary¹⁰⁰.

Aggrieved by the Review Board's decision, one Cecil Oyugi appealed against the said decision at the High Court in *Cecil James Oyugi v Public Procurement Administrative Review Board & another*¹⁰¹ in search of stopping IEBC from taking part in direct procurement. The court discharged the aforementioned case and reminded IEBC that the requirements of the Constitution Article 129 that administrative power is a derivative from the citizens and is to be worked out in agreement with the Constitution in a way well-matched with the code of service to Kenyan individuals, and for their benefit and well-being. The court proceeded on to state that IEBC was not projected to intentionally set out to aggravate the resolve of the citizens in an voting procedure by tasking its work in a sloppy method.

⁹⁹ *Al Ghurair Printing And Publishing LLC v Coalition for Reforms and Democracy , Independent Electoral and Boundaries Commission & Public Procurement Administrative Review Board*, Civil Appeal 63 of 2017 [2017] eKLR available at < <http://kenyalaw.org/caselaw/cases/view/134851/>> accessed on 2nd October, 2020.

¹⁰⁰ *Cecil James Oyugi v Public Procurement Administrative Review Board & another*, Constitutional Petition 241 of 2017 [2017] eKLR available at < <http://kenyalaw.org/caselaw/cases/view/136171> > accessed on 2nd October, 2020.

¹⁰¹ *ibid.*

Pursuant to the High Court's decision in *Cecil James Oyugi v Public Procurement Administrative Review Board & another*¹⁰² IEBC chose straight procurement in Section 103 (2) (b) of the Public Procurement and Disposal Act¹⁰³. The National Super Alliance(NASA) challenged the tender award at the High Court in *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others*¹⁰⁴ on various grounds including that: the tender was given while deprived of public contribution and might potentially bias the authentic prospect of Kenyans for democratic, fair, and free elections; the tender award dishonored the necessities of the Constitution Article 227 on public procurement; the choice to awarding the tender was actuated by underhanded motives; the tender was founded on unrelated contemplations and overlooked pertinent deliberations.

NASA also claimed that the representatives of the Al Ghurair Printing and Publishing met the President Uhuru Kenyatta, who was seeking re-election, before the tender award. The court in quashing IEBC's decision stated that it was not content, grounded on the evidence placed before it that it is difficult or unviable for the IEBC to conform with the statutory and constitutional requirements in accordance to the obtaining of the printing of Ballot Papers and Election Materials for the Presidential Elections to carry out a credible, fair, and free August 8, 2017 Presidential Elections.

Aggrieved by the High Court's verdict IEBC moved to the Court of Appeal in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others*¹⁰⁵ [2017] eKLR. The Appellate Court upheld the petition and held that IEBC was justified to resort to direct procurement, explaining that it was impossible to float an open tender for a supplier for the presidential ballot papers and still hold the elections on time.

The conduct of IEBC in the procurement of election materials coupled with the numerous suits against it point to a picture of failure to strictly follow the law. This has the effect of hampering

¹⁰² *ibid.*

¹⁰³ *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others*, Judicial Review 378 of 2017 [2017] eKLR, available at <http://kenyalaw.org/caselaw/cases/view/138205/> accessed on 18th September, 2020.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

the delivery of free and fair elections as it brings about fears by various presidential contestants that the elections will be biased towards a certain presidential hopeful.

3.3 Application of the law in presidential election disputes

The Constitution requires courts and tribunals in working out judicial authority to direct justice deprived of undue respect to procedural technicalities among others¹⁰⁶. With regard to enquiries as to the legitimacy of presidential election, the Constitution permits any individual to file an appeal to the Supreme Court challenging the president-elect voting in a period of seven days preceding the date of the pronouncement of the presidential election¹⁰⁷. The Supreme Court is then required to listen and decide the said appeal in a period of 14 days after registering of the petition¹⁰⁸. If the Supreme Court determines the election to be unacceptable, a new election is to be conducted within 60 days after the resolve¹⁰⁹. There have been three presidential election petitions since the proclamation of the Constitution of Kenya, 2010 with one petition nullifying the elections.

3.3.1 Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others, Presidential Election Petition No 1 of 2017

In the August 2017 presidential election, the NASA Coalition's flag bearers for the position of President and Deputy President instituted a petition at the Supreme Court challenging declared results of that presidential election on 18th August, 2017. They averred that; *"14]... the conduct of the 2017 presidential election violated the principles of a free and fair election as well as the electoral process set out in the Constitution, electoral laws and regulations and that the respondents committed errors in the voting, counting and tabulation of results; committed irregularities and improprieties that significantly affected the election result; illegally declared as rejected unprecedented and contradictory quantity of votes; failed in the entire process of relaying and transmitting election results as required by law; and generally committed other contraventions and violations of the electoral process"* .

¹⁰⁶ Constitution, Article 159(2).

¹⁰⁷ *ibid* Article 140(1).

¹⁰⁸ *ibid* Article 140(2).

¹⁰⁹ *ibid* Article 140(3).

Various allegations were made by the petitioners on the conduct of the elections, they imputed improper conduct, in the petition it is stated that: “[21] *The petitioners also imputed improper conduct on several Cabinet Secretaries for allegedly campaigning for the 3rd respondent (Uhuru Kenyatta)... They thus demanded that the Cabinet Secretaries who campaigned for the 3rd respondent should be prosecuted.... [24]... after polling stations were closed on 8th August, 2017, IEBC inordinately delayed in the transmission of the results. As a matter of fact, on 17th August, 2017, (9 days after the elections) the IEBC’s CEO, Ezra Chiloba, allegedly admitted that IEBC had not received all Forms 34A and 34B. That delay, coupled with the fact that IEBC had ignored advice from the Communication Authority of Kenya (CAK) to host in Kenya its primary and disaster recovery sites but had gone ahead and contracted OP Morpho SAS of France to host it, compromised the security of KIEMS exposing it to unlawful interference and manipulation of results by third parties rendering the 2017 presidential election a sham”.*

The Petitioners’ also alleged that: “[25]... *IEBC tested it (the technology to be used in the election) only 2 days to the elections. That together with the disbandment of the Elections Technology Advisory Committee (ETAC) and IEBC’s unsuccessful attempt to declare Section 39(1C) of the Elections Act unconstitutional, is clear testimony that IEBC was not keen to electronically transmit election results... [27] the IEBC failed to electronically collate, tally and transmit the results accurately, and declared results per county thus failing to recognize the finality of the results at the polling stations... [29]... given the unprecedented case of varying results in the IEBC’s portal and Form 34B provided; inconsistencies between the results displayed and those in the Forms 34A and 34B, the electronic system of transmission was compromised by third parties who manipulated it and generated numbers for transmission to the NTC*”. The Petitioners thus sought the nullification of the August 8, 2017 presidential elections.

A command for analysis was granted by the Supreme Court during the pre-trial stage, which was to be carried out under the Court Registrar’s supervision. The findings of the said exercise included; “[345] *On Form 34C... the IEBC did not avail to parties and the Court the original Form 34C but a copy certified by an advocate. [349] Some of the issues emanating from the scrutiny of Forms 34A were that: (a) some forms were carbon copies; (b) others were the original Forms 34As but did not bear the IEBC stamp; (c) other forms were stamped & scanned while others were photocopies; (d) others had not been signed.*”

The Respondents on the other hand argued their case and stated that; “[74] ...the alleged inaccuracies and inconsistencies in Forms 34A and 34B were minor, inadvertent and in their totality did not materially affect the declared results... [83]...a party seeking the nullification of a presidential election, bears the burden of proving that not only was there non-compliance with the election law but that the non-compliance also affected the results of the election. He (Uhuru Kenyatta) thus submitted that the only way the petitioners can impugn the results reflected in Forms 34A and 34B is through demonstrating either that legal votes were rejected or that illegal votes were allowed and that this had an effect on the election”.

Based on the evidence presented to the court and parties submissions, the court issued various orders on the behavior of the impugned elections, the orders listed included; “(i) A declaration... that the Presidential Election...was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void; (ii) A declaration is hereby issued that the irregularities and illegalities in the Presidential election...were substantial and significant that they affected the integrity of the election, the results notwithstanding. (iii) A declaration... that the 3rd respondent (Uhuru Kenyatta) was not validly declared as the President elect and that the declaration is invalid, null and void; (iv) An Order is hereby issued directing the 1st respondent to organize and conduct a fresh Presidential Election in strict conformity with the Constitution and the applicable election laws within 60 days of the determination ...”

The said decision shows how by the actions of IEBC at various stages in the electoral process hampered the delivery of credible presidential elections. This is so especially with respect to the transmission of results as it shows despite the law stating how technology applies, it can also be prone to manipulation hence affecting the integrity of the electoral process. The decision also points to an unbecoming behavior of IEBC in failure to strictly implement the electoral laws and disobedience of court orders by failing to open up its servers.

The nullification of the election underscored the fact that in conducting presidential elections the law should be followed to the letter so as to avoid cases of illegalities and irregularities which curtail the delivery of credible presidential elections. The nullification shows that the Supreme Court is independent and has the ability to ensure credible elections are held as elections which are not held in line with the law are likely to be nullified.

3.3.2 Effect of the nullification of the August 2017 presidential election

Pursuant to the Supreme Court's verdict to invalidate the August 2017 elections a new presidential election was conducted on October 26, 2017.¹¹⁰ The nullification of the elections led to public outbursts by the incumbent President Uhuru Kenyatta who verbally attacked the Supreme Court Judges who nullified his election and referred to them as thugs and emphasized that there was a problem with the Judiciary and that the problem had to be fixed¹¹¹. The Opposition gave the IEBC a list of *irreducible minimums* which included conditions to be met before they could participate in the fresh presidential elections¹¹². The *irreducible minimums* included; physical inspection of IEBC servers and data bases used and access to the GPS coordinates of the KIEMS kits¹¹³. IEBC did not accede to these demands thus prompting Raila Odinga to pull out of the race and urged his supporters to boycott the election¹¹⁴.

The attack on the Judiciary, an independent arm of the government had the effect of intimidating not only the Judiciary but also the players in the electoral process to execute their responsibilities in accord to the Presidents wishes and thus hampering the delivery of credible elections.

There were several incidences of break out of violence after the October 2017 elections which appeared to be ethnic based. In Kawangware 56, on the evening of the voting day marauding gangs went into a looting spree, looting from shops and residences and burning business establishments¹¹⁵. The gangs claimed to be protesting against the October 2017 repeat poll¹¹⁶. There was also a group of machete wielding youth in Kawangware who lit fires in the middle of the streets claiming that they were protesting against the looting that had occurred.¹¹⁷ There were claims that the chaos in Kawangware was instigated by the area Member of Parliament,

¹¹⁰ Joe Khamisi, *Looters and Grabbers: 54 years of corruption and plunder by the elite 1963-2017* (Jodey Book Publishers 2018) 622.

¹¹¹ *ibid* 621.

¹¹² Kenya National Commission on Human Rights, 3 (n 5).

¹¹³ Khamisi, 621 (n 108).

¹¹⁴ Kenya National Commission on Human Rights, 4 (n 5).

¹¹⁵ John Ashihundu, 'Gangs destroy property in Kawangware' *Business Daily* (Nairobi, 27th October, 2017) available at < <https://www.businessdailyafrica.com/economy/Police-battle-rival-gangs-in-Nairobi-s-Kawangware/3946234-4159200-5arb9oz/index.html>> accessed on 26th August 2019

¹¹⁶ *ibid*.

¹¹⁷ Mercy Adhiambo and Sara Okuoro, 'Journalists attacked as rival gangs clash in Kawangware' *Standard Digital* (Nairobi, 27th October, 2017) available at < <https://www.standardmedia.co.ke/article/2001258605/journalists-attacked-as-rival-gangs-clash-in-kawangware>> accessed on 26th August, 2019.

Simba Arati. These claims led him to go to the High Court and successfully stopped his imminent arrest¹¹⁸.

3.3.3 John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others, Petitions Nos. 2 and 4 of 2017

After the announcement of Uhuru Kenyatta as the victor of the repeated election, John Harun Mwau, Khelef Khalifa, and Njonjo Mue filed petitions in the Supreme Court which were later consolidated¹¹⁹. The petitions challenged the election on the following grounds: that IEBC was unsuccessful in conducting new nominations for the repeat; that the said election did not meet the general principles of universal right to vote founded on the goal for fair depiction and parity of vote; and that it was not free and fair election¹²⁰.

In terminating the appeal, the court held that the fresh election only transpired since the August 8, 2017 election did not conclude in its rational deduction, that of confirming the winner¹²¹. The court further held that the purpose of the repeat election was to accomplish a five-year electoral series, ordinarily concluding on August 8, 2017, and to induce additional electoral series of five years, culminating on the second Tuesday in August five years later¹²².

The court then went on to hold that, it is not rational that an individual who was not a presidential contender during the election conducted in 2017 to be a participant in a recurrence election, and to subject applicants to a new recommendation when the subject did not arise in the appeal rejecting that election, nor in the Court final Orders¹²³. The court also held that the nominations for contenders for the election for the president which was conducted on May 28 and 29, 2017, persisted valid and lack of additional nomination was mandatory for the drive of the repeat election¹²⁴.

¹¹⁸ Maureen Kakah, 'Simba Arati breathes easy as court stops imminent arrest' *Daily Nation* (Nairobi, 3rd November, 2017) available at < <https://www.nation.co.ke/counties/nairobi/Simba-Arati-arrest-stopped/1954174-4172284-prpgq5/index.html>> accessed on 26th August, 2019.

¹¹⁹ *ibid*; *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 3 others* (n 47).

¹²⁰ *ibid*.

¹²¹ *ibid*.

¹²² *ibid*.

¹²³ *ibid*.

¹²⁴ *ibid*.

From *Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others* and *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others*, it is distinct that the law on presidential election disagreements is being followed. Further the proceedings were handled in a professional and rigorous style¹²⁵. Parties before the Court were given an opportunity to present and argue their case and the entire process was transparent as it was conducted in full glare of the media who transmitted the proceedings live. However, the time limit in which the Supreme Court is required to render its decision appears to be insufficient¹²⁶ considering the number of materials presented to the court for its consideration.

3.4 Conclusion

Under the framework of a new constitution and an enhanced legal order, this chapter sought to find out whether the law has the ability to ensure free, fair and credible elections. From the foregoing, it is apparent that even though the elections were conducted under a revamped legal order, there were various features of the electoral process in the 2017 presidential elections which did not go as expected by the electoral laws. This assertion is evidenced by the number of suits the IEBC was subjected to on account of various issues at different stages of the 2017 elections.

Despite the reforms undertaken in the legal framework governing the presidential election, the conduct of the presidential elections appears not to have made the process credible as was noted by the Supreme Court in the judgment resulting to the nullification of the August 8, 2017 elections. There were various factors that can be identified as limiting the delivery of credible and free fair presidential elections from the 2017 presidential elections, key among them being the culture of blatant disregard of the law by actors in the election process. It is those limits that the next chapter seeks to expound on and how they limit the provision of fair and free presidential elections.

¹²⁵ The Carter Center, 52 (n 23).

¹²⁶ *ibid* 50.

CHAPTER FOUR

LIMITS OF THE LAW IN REGULATING PRESIDENTIAL ELECTIONS IN KENYA

4.1 Introduction

This chapter highlights the limits of the law in regulating presidential elections as can be identified from the previous chapters. The limits reduce the effectiveness of electoral laws in delivering credible and free, fair elections. This chapter discusses the limits of the law and how they affect the provision of credible and free, fair presidential elections in Kenya.

4.2 Failure to follow the rule of law and the culture of disobedience of the law by participants in presidential elections

The phrase “rule of law” has been interpreted to refer to a situation where the citizens as well as the rulers are equally subjected and protected by the law.¹ The concept of ‘rule of law’ has been interpreted to denote a standard where the government is both subjected and bound by the law.² According to Joseph Raz, a genuine interpretation of the phrase ‘rule of law’ only attracts a genuine appeal where it posits government action as excluding unlawful governmental actions³ James R Silkenat views the notion of the rule of law as forming more than just a ‘rule’ in the technical sense. Silkenat writes that the concept denotes a collection of principles and ideas propagated in free societies which in totality act as a guide to lawmakers, judges, law-enforcement agencies and administrators.⁴

Dicey advanced a *classical theory of the rule of law* comprising the following ideals- that every person is subjected to the regular law of the land and is open to the jurisdiction of the courts; and that law prevails over discretionary power and arbitrariness. According to Dicey’s works, those ideals assure that everyone is under the rules.⁵

¹ Guido Pincione, ‘Rule of Law: Theoretical Perspectives’ in Mortimer Sellers and Stephan Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer Netherlands 2019) <http://link.springer.com/10.1007/978-94-007-6730-0_135-1> accessed 6 October 2020.

² Adriaan Bedner, ‘An Elementary Approach to the Rule of Law’ (2010) 2 *Hague Journal on the Rule of Law* 48.

³ Pincione (n 1).

⁴ James R Silkenat (ed), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer 2014).

⁵ Pincione (n 1).

In a nutshell, the notion of the rule of law seeks to reaffirm the notion that both the governors and the governed are equally subjected to the same law of the land.⁶ The rule of law therefore necessitates that the law ought to be supreme and that every person ought to be subject to equal law.⁷ From the viewpoint of presidential elections, the rule of law has been conceptualized as bearing the ability to produce a variety of political, economic and social goods.⁸ Such goods include- political stability; economic growth; and general human welfare. The rule of law is thus a pre-requisite for the prosperous and just society and in particular for transparent, free, and fair and presidential elections.⁹

As already discussed in the previous chapters, the law is elaborate on what each participant should or should not do in the electoral process. However, despite the elaborateness of the law we have incidences of contestants in the electoral procedure blatantly acting contrary to the law. In the 2017 presidential elections despite voter bribery being forbidden by the Election Offences Act and attracting a consequence of a fine not surpassing KES 2 million or incarceration for a period not beyond six years or to both¹⁰, voter bribery via handing out of money and foodstuffs to voters was witnessed in several areas. This gave an unfair advantage to candidates who participated or allowed the violation of the law in this regard thus hampering the delivery of free and fair elections as a result of undue influence on the voter.

This culture of blatant disobedience of the law was also witnessed where campaigns were witnessed around polling centers on the Election Day¹¹. This is despite the same being outlawed by the Electoral Code of Conduct and the Elections Offences Act. This was manifested by among others; issuing of notes to voters to direct them on whom to vote for, use of posters, branding, use of persons wearing party-coloured/candidates' attires around polling stations¹². This has the effect of affecting delivery of a free and fair presidential election as it gives the presidential candidate being campaigned for, an undue advantage over the rest. Thus, despite

⁶ Mirko Canevaro, 'The Rule of Law as the Measure of Political Legitimacy in the Greek City States' (2017) 9 Hague Journal on the Rule of Law 211.

⁷ *ibid.*

⁸ *ibid.*

⁹ *ibid.*

¹⁰ Election Offences Act, 2016, Section 9(3).

¹¹ Kenya National Commission on Human Rights, *Mirage at Dusk : A human rights account of the 2017 general elections; Preliminary Report* (Kenya National Commission on Human Rights, 2017) 102-106.

¹² *ibid* 102.

provisions of the law being tailored to ensure credible presidential elections the failure to follow the rule of law and the culture of disobedience of participants in presidential elections hinder the law from delivering credible elections.

4.3 Culture of voting based on ethnicity

In order to understand what ethnicity is, one needs to first comprehend what an ethnic group is. An ethnic cohort entails a group in which individuals have a communal proper name, the fable of shared ancestry, collective historical recollection, joint culture, sense of harmony and a specific homeland¹³. Thus, ethnicity is a relational idea that stems from a cluster of people¹⁴. It therefore follows that the culture of voting based on ethnicity entails the behavior of the electorate voting for election contestants based on their ethnicity only.

Presidential elections post-2010 are usually preceded by a protracted time of deal-making and negotiating¹⁵. The elections avail politicians with apparatuses for discussions by representing the vote-pool size they may take to the election and their capacity to turn individuals out on to the streets if they are dissatisfied¹⁶. The 2017 elections reveal that ethnicised political dynamics persist¹⁷, this can be seen from chapter three as some contestants used the ethnic card during campaigns¹⁸.

Contact to political power is a significant certainty to most ethnic clusters in Africa as a result of supposed privileges that are brought by political power¹⁹. This insight offers an inducement for ethnic groups and individuals to pursue control of the state²⁰. As a result of the perceived benefits of having a president coming from one's ethnic community, a good number of voters fall prey to voting for presidential candidates based on one criteria alone, that is ethnic

¹³ MO Kisaka and IN Nyareda 'Ethnicity and Politics in Kenya's Turbulent Path to Democracy and Development' (2019) 162 *Sosyal Siyaset Konferansları Dergisi/Journal of Social Policy Conferences*.

¹⁴ *ibid*.

¹⁵ Nic Cheeseman and others, 'The Kenyan Elections of 2017: Devolution in the Spotlight' (2018) 7 *Leeds African Studies Bulletin*, No. 80, Winter 2018/19.

¹⁶ *ibid*.

¹⁷ *ibid* 6.

¹⁸ The Carter Center, *Kenya 2017 General and Presidential Elections Final Report*, (The Carter Center, 2018) 146 available at https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-2017-final-election-report.pdf accessed on 22nd July 2021.

¹⁹ MO Kisaka and IN Nyareda, 163 (n 13).

²⁰ *ibid*.

background. This leads to instances in which some of the electorates engage in electoral malpractices so as to ensure their preferred contestants emerge victorious in the elections. Hence despite the law providing for the roles of each and every person in the presidential election process, the culture of voting based along ethnic lines leads to the disregard of electoral laws and in the procedure impairing delivery of credible, free, and fair presidential elections.

4.4 Poverty among the electorate

The word “poverty” is derived from a French word “*pauvrete*” from a Latin terminology “*paupertas*” (from the noun pauper)²¹. Largely, the word poverty signifies a state or a situation of scarcity or being without money or to a state of being in dearth of something that is necessary or methods of supply²². It is basically disparity of some level of deprivation²³. Various scholars have indeed defined the term poverty in different ways, for instance Amartya Sen describes it as being a disavowal of a person’s liberty which prevents the growth of one’s development²⁴. Some of the freedoms pointed out by Sen include the right to participate in dissent and politics, chances to get basic education. He argues that absence of economic freedom breeds an absence of political independences and *vice versa*²⁵.

Bribery as defined in the Black’s Law Dictionary means “the offering, giving, receiving, or soliciting of anything of value to influence action as official or in discharge of legal or public duty”²⁶. Bribery in the context of presidential elections involves a wide range of participants namely the political aspirants, political party agents, political party leaders, and voters²⁷. The exercise of voter bribery is deeply-founded in Kenya and traces its history to the 1970s and during the reign of the KANU administration where it is alleged that political leaders visited

²¹ W Skeat, *An Etymological Dictionary of the English Language*. (Dover Publications, 2005).

²² Muli Stephen Musili, ‘The Link Between Poverty and the Right to Free, and Fair Elections in Kenya’ (LLM Thesis, University of Nairobi, 2020)9-10.

²³ Gupta Shiv, ‘Conceptualizing Poverty’(1984)33(1/2) Sociological Bulletin, 63-74 available at <<http://www.jstor.org/stable/23620096>> Accessed 23rd July 2021.

²⁴ Amartya Sen, *Development as Freedom*, (1st edn, Oxford University Press1999).

²⁵ *ibid*.

²⁶ Henry Campbell Black, *Black's Law Dictionary; Revised Fourth Edition* (St Paul, Minn West Publishing Co, 1968) 315.

²⁷ Kenya National Commission on Human Rights, 66 (n 11).

State House and left with huge sums of money to handout to voters as a way of enticing them to vote for certain candidates²⁸.

In Kenya, the scarcity of economic prospects to the youth and women brings about their susceptibility to the dirty tricks of political actors seeking their votes²⁹. Voter bribery prevents the electorate engaged in the vice from participating effectively in the elections. The failure to effectively participate in elections by the voters who are engaged in voter bribery, who are mostly the poor in society, leads to a system in which the administration is an assortment of the resolve of few individuals and not an indication of the will of the majority³⁰.

In the August 2017 presidential elections, voter bribery manifested itself through the handing out of money and foodstuffs to voters³¹. It is reported that even some State and Public Officers were seen on the campaign trajectory overtly involving in acts of bribery³². This might have prejudiced candidates who did not engage in the vice and to a great extent unduly influenced voters to vote for presidential contestants who might have offered bribes, thus hampering the delivery of free and fair elections.

Despite the wide-ranging amendments and reforms in the electoral laws which required to overtly forbid elections wrongdoings and levy firm sanctions and penalties, the political players and actors from both opposition and government continue with comparable voter-bribery patterns and trends observed in the past elections³³. This is as result of the existing poverty levels in Kenya which enables voters to accept bribes in order to vote for the parties or individuals who bribe them.

4.5 Voter electoral illiteracy

²⁸ Vitalis Musebe 'Opinion: Voter bribery greatest threat to fair, credible polls', The Standard Newspaper (Nairobi, 13 August 2017) available at www.standardmedia.co.ke/article/2001251114/opinion-voter-bribery-greatest-threat-to-fair-credible-polls accessed 21st July 2020.

²⁹ UNDP Kenya, 'Strengthening the Electoral Processes in Kenya' (2013) available at <<https://www.ke.undp.org/content/kenya/en/home/projects/strengthening-the-electoral-processes-in-kenya.html>> accessed 23rd July 2021.

³⁰ Musili, 18 (n 22).

³¹ Kenya National Commission on Human Rights, 109 (n 11).

³² *ibid* 74.

³³ *ibid* 73.

In order to understand what electoral illiteracy is, it is vital to understand what literacy is. The word “literacy” comes from the word literate which is defined by the Cambridge Dictionary as “having knowledge of a particular subject, or a particular type of knowledge”³⁴. Electoral literacy is thus defined as the understanding and knowledge of political issues and processes which allow individuals to achieve their role as residents well³⁵. Basically, electoral literacy denotes to the basic concepts and facts that create a necessary condition of comprehending the contents of public discussions³⁶.

Citizens have various roles in the society, one of which is the responsibility to choose how to be governed and the people to shoulder the task of governing them; electoral literacy is thus crucial in ensuring citizens make such decisions³⁷. Therefore, electoral literacy aims at ensuring informed participation of voters in making political choices³⁸. The making of informed choices by the electorate in elections needs some level of education and time to be abreast with what is happening in the political world; this a luxury to some voters, especially the poor³⁹.

The financially underprivileged in society, as a consequence of generational poverty may not have attained the essential education to empower them to make informed selections in elections and may also not be capable of affording means of information to follow political news⁴⁰. From the foregoing electoral illiteracy involves the inability by voters to fully comprehend and appreciate the reasons for taking part in elections⁴¹. Therefore, due to electoral illiteracy some voters, especially the poor, end up voting based irrelevant information such as rumours⁴².

Electoral illiteracy is displayed during elections if a voter is manipulated by political actors in various ways such as through voter bribery with the result being the hindering of having a free,

³⁴ Cambridge Dictionary available at <https://dictionary.cambridge.org/> accessed on 22nd July 2021.

³⁵ Monicah Zembere, ‘Electoral Illiteracy and Democratic Citizenship in Zimbabwe’ (2020) 58 available at <file:///C:/Users/Hp/AppData/Local/Temp/198243-Article%20Text-498869-1-10-20200731.pdf> accessed on 23rd July 2021.

³⁶ *ibid* 59.

³⁷ *ibid* 58.

³⁸ *ibid* 59.

³⁹ Musili, 18 (n 22).

⁴⁰ *ibid*.

⁴¹ Zembere, 59 (n 35).

⁴² Musili, 18 (n 22).

fair and credible elections⁴³. Further, electoral illiteracy makes it difficult for voters to cast their votes on election day and also makes it much more difficult for the electorate to understand the electoral process. In the 2017 presidential elections, electoral illiteracy was on display as there were several incidences of voter bribery in different forms reported in various parts of the country⁴⁴.

As a result of electoral illiteracy in Kenya, election crimes and offenses have been reported during the election period as the illiterate are easily be influenced by unscrupulous candidates⁴⁵. Thus, despite the elaborate electoral laws the regulation of presidential elections in Kenya is hampered by electoral illiteracy among a portion of Kenyan voters.

4.6 Judicialisation of politics

Judicialisation of politics is an umbrella-like terminology denoting to the utilisation of judicial and courts processes to determine moral disputes, public policy, and core political; it involves the extending of the Judiciary's mandate into shaping the political and moral landscape and public policy formulation⁴⁶. Judicialisation of politics currently encompasses the comprehensive transfer of some of the utmost apposite and critical political arguments that could face a democratic society⁴⁷.

Judicialisation of politics has brought matters, which were in the past determined in an informal or non-judicial method, to now be dominated by legal rules and procedures⁴⁸. The emergence of the judiciliasation of politics has increased the level of courts' participation in the political domain past federalism jurisprudence or constitutional rights⁴⁹. This trend is usually reinforced,

⁴³ Zembere, 59 (n 35).

⁴⁴ Kenya National Commission on Human Rights, 109 (n 11).

⁴⁵ Musili, 18 (n 22).

⁴⁶ Otieno-Odek, 'Election Technology Law and the Concept of "Did the Irregularity Affect the Result of the Elections?"' (Judiciary) 56 available at < <https://www.judiciary.go.ke/wp-content/uploads/2017/12/LIST-OF-AUTHORITIES-DR.EKURU-AUKOT.pdf>> accessed on 24th July 2020.

⁴⁷ Ran Hirschl, 'The Judicialization of Politics' in Robert E. Goodin (ed), *The Oxford Handbook of Political Science* (Oxford University Press, 2011) 2 available at < <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-013?print-pdf>> accessed on 24th July 2021.

⁴⁸ Sieder R Schjolden and Angell A (eds) 2005 *The Judicialization of Politics in Latin America*. (New York: Palgrave Macmillan) 5.

⁴⁹ Hirschl, 5(n 47).

tacitly or explicitly, by influential political shareholders and this in turn has resulted in the transformation of courts into a vital component of national policymaking apparatus⁵⁰.

There are various possible explanations for the judicialisation of politics. Judicialisation of politics necessitates the presence of a rationally autonomous judiciary, with an equally and well-respected lively apex court⁵¹. There is also a close relationship between existence of bills of rights in constitutions and viable judicial appraisal apparatuses in a society, and judicial crusading on the part of that society's judiciary⁵².

Although oversight of routine features of democratic processes was within the directive of courts, questions as to; a regime's legality, a country's collective identity or a polity's coming to footings with its often-non-admirable past, indicate principally deep political and moral dilemmas, not legal ones⁵³. Thus, they should as an aspect of principle be determined by the general public, through their accountable and elected representatives⁵⁴. Determination of the said questions by courts extends past the application provisions touching on rights and basic procedural justice norms; determination of such questions is intrinsically and practically a political exercise⁵⁵. It is unclear why under the judicialisation of politics, courts are best suited for determining the said clear political quandaries⁵⁶.

Kenya's Judiciary plays a pivotal role in the determination of presidential election disputes and all electoral disputes⁵⁷. As can be seen from chapter three, Kenya's 2017 presidential elections saw several disputes being determined by courts; the disputes largely dealt with rules and regulations before the holding of the elections and presidential election petitions⁵⁸. The decisions of the courts determining the said disputes were met with controversy as losers ferociously

⁵⁰ *ibid.*

⁵¹ *ibid* 11.

⁵² *ibid.*

⁵³ *ibid* 5.

⁵⁴ *ibid.*

⁵⁵ *ibid* 5.

⁵⁶ *ibid.*

⁵⁷ Teddy JO Musiga, 'Implications Arising from Judicial Resolution of Presidential Election Disputes in Kenya' (Master of Master of Public Policy and Administration Thesis, Kenyatta University, 2016)1.

⁵⁸ Karuti Kanyinga and Collins Odote, 'Judicialisation of Politics and Kenya's 2017 Elections' (2019) 13 *Journal of Eastern African Studies*.

attacked the judicial officers presiding over those courts⁵⁹, a good example of this is the reaction of President Kenyatta to the nullification of the results of the August 2017 presidential elections declaring him as the winner⁶⁰. Courts played a serious role during the 2017 presidential elections that it eventually overshadowed the IEBC which was the body mandated to conduct presidential elections⁶¹.

Owing to the stagnant political culture in Kenya, the electoral process in Kenya is likely to remain judicialised⁶². The environment in which Kenya's Judiciary operates is characterized by partisan political interests which in effect weaken all institutions⁶³. Additionally, the political environment serves as a platform where candidates pursue to utilise the courts in advancing their interests⁶⁴.

4.4 Conclusion

This chapter has highlighted the limits of the law as established from the previous chapters and shows how these limits hamper the law in regulating presidential elections in Kenya and hence make it difficult for there to be free, fair and credible presidential elections. How to best mitigate on the highlighted limits will be discussed in the next chapter which states suitable recommendations.

⁵⁹ *ibid.*

⁶⁰ Joe Khamisi, *Looters and Grabbers: 54 years of corruption and plunder by the elite 1963-2017* (Jodey Book Publishers 2018) 621.

⁶¹ Kanyinga and Odote, (n 58).

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ *ibid.*

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusion

Kenya has undergone a transformation of electoral laws with the main objective being to deliver free, fair and credible elections. The electoral reforms were enhanced with the proclamation of the Constitution of Kenya, 2010 and the enactment of several other electoral laws. Kenya has conducted three presidential elections in the post-2010 constitutional dispensation. The outcome of these elections has been viewed in some quarters as not being free, fair and credible thus leading to the filing of presidential election appeals rejecting the outcomes of presidential elections.

This research involved the study of the legal framework governing the Kenya's electoral process in presidential elections. It set out to evaluate the functioning of the electoral system of Kenya by examining the electoral process on account of performance indicators such as- participation in the electoral process; campaign finance; transparency and tallying of votes; electoral technology; and electoral body (IEBC) among others. The study established that there occurs a comprehensive legal outline governing the essential elements of a presidential election.

The study utilized a case study of the 2017 presidential elections to determine whether the legal framework in presidential elections had been complied with and to establish the limits of the law in delivering free and fair presidential elections. From the case study, it is apparent that even though the elections were conducted under a revamped legal order, there were various features of the electoral process in the 2017 presidential elections which did not go as expected by the electoral laws. This assertion is evidenced by the number of suits the IEBC was subjected to on account of various issues at different stages of the 2017 elections.

Despite the reforms undertaken in the legal framework leading the presidential elections, the conduct of the presidential elections appears not to have made the process credible as illustrated by the nullification of the August 2017 presidential elections. This study establishes several limiting factors of the law which include; failure to follow the rule of law and the culture of disobedience of the law by participants in presidential elections, culture of voting based on

ethnicity, poverty among the electorate, voter electoral illiteracy and the judicialisation of politics. It is on that basis that this research proceeds to make the following recommendations.

5.2 Recommendations

The main aim of this research was to establish why the law is not effective in regulating presidential elections. From the research it is evident that the law is limited by the; failure to follow the rule of law and the culture of disobedience of the law by participants in presidential elections, culture of voting based on ethnicity, poverty among the electorate, voter electoral illiteracy and the judicialisation of politics. It is from these limits that that this study proceeds to make the following recommendations namely; education and sensitisation of the participants in the electoral process on the importance and benefits of the rule of law and obedience of the law, economic empowerment of the electorate, holding of a national dialogue on ethnicity, increasing the levels of electoral literacy among voters and exercise of judicial restraint in political matters/ Observing the political question doctrine.

5.2.1 Education and sensitisation of the participants in the electoral process on the importance and benefits of the rule of law and obedience of the law

The notion of the rule of law seeks to reaffirm the notion that both the governors and the governed are equally subjected to the same law of the land.¹ The rule of law therefore necessitates that the law ought to be supreme and that every person ought to be subject to equal law.² From the outlook of presidential elections, the rule of law has been conceptualized as bearing the ability to produce a variety of political, social, and economic goods.³ Such goods include- political stability; economic growth; and general human welfare. The rule of law is thus a pre-requisite for the prosperous and just society and in particular for free, fair and transparent presidential elections.⁴

¹ Mirko Canevaro, 'The Rule of Law as the Measure of Political Legitimacy in the Greek City States' (2017) 9 Hague Journal on the Rule of Law 211.

² *ibid.*

³ *ibid.*

⁴ *ibid.*

During the 2017 presidential elections, there were several instances in which there was disregard of electoral laws, for instance, campaigns were witnessed around polling centers on the Election Day⁵. This is despite the same being outlawed by the Elections Offences Act and the Electoral Code of Conduct. This was manifested by among others; issuing of notes to voters to direct them on whom to vote for, use of posters, branding, use of persons wearing party-coloured/candidates' attires around polling stations⁶. This affected delivery of a free and fair presidential election as it gave the presidential candidate being campaigned for, an undue advantage over the rest. Thus, despite provisions of the law being tailored to ensure credible presidential elections the failure to follow the rule of law and the culture of disobedience of participants in presidential elections hinder the law from delivering credible elections.

The electoral laws are elaborate on the roles of everyone involved in the electoral process. However, this elaborateness has done little to prevent incidences of participants in the electoral process blatantly acting contrary to the law. In that regard this study recommends a comprehensive voter education and sensitization of the benefits of adhering to the rule of law. This should be done as being introduced as subject to be taught to all students at the primary, secondary and university levels of education. This is to enable the population to be able to appreciate the benefits at a young age and thus when they get to the age when they qualify to vote, they can strictly adhere to the law and perform their respective duties in the electoral cycle, be it as members of the EMB, presidential contestants or even as voters. This will greatly reduce instances of participants in the electoral process disregarding the law.

This study further recommends that the education and sensitisation of the participants in the electoral process should be done by the Government, its agencies and the nation's leaders leading from the front by acting in accordance with the laws of the land. This can be done by for instance Government officials and political leaders adhering to court orders. This will increase public confidence among the voters to follow the law and hence reduce instances of participants in the electoral process acting contrary to the law the law.

⁵ Kenya National Commission on Human Rights, *Mirage at Dusk : A human rights account of the 2017 general elections; Preliminary Report* (Kenya National Commission on Human Rights, 2017) 102-106.

⁶ *ibid* 102.

5.2.1 Economic empowerment of the electorate

One of the limits of the law in regulating presidential elections identified in chapter four is poverty among the electorate. The term poverty signifies a state or a situation of scarcity or being without money or to a state of being in dearth of something that is necessary or means of supply⁷. It is basically disparity of some level of deprivation⁸. Amartya Sen describes it as being a renunciation of a person's independence which prevents the growth of one's development⁹. Some of the freedoms pointed out by Sen include the right to participate in politics and opposition, chances to get basic education. He argues that lack of economic freedom breeds absence of political freedoms and *vice versa*¹⁰.

One way in which poverty acts as a limit of the law is through voter bribery. Bribery is basically the soliciting, receiving, giving, or offering of anything of value to impact action as in discharge of public or legal duty¹¹. Bribery in the context of presidential elections comprises an extensive range of participants namely the political aspirants, political party agents, political party leaders, and voters¹². In Kenya, poverty brings about susceptibility of the economically weak to the dirty tricks of political actors seeking their votes¹³. Voter bribery prevents the electorate engaged in the vice from participating effectively in the elections. The failure to effectively participate in elections leads to a system in which the government is a assortment of the resolve of few individuals and not an indication of the will of the majority¹⁴.

Voter bribery in the 2017 presidential elections was witnessed in various forms such as through the handing out of money and foodstuffs to voters¹⁵ and some State and Public Officers while on

⁷ Muli Stephen Musili, 'The Link Between Poverty and the Right to Free, and Fair Elections in Kenya' (LLM Thesis, University of Nairobi, 2020)9-10.

⁸ Gupta Shiv, 'Conceptualizing Poverty'(1984)33(1/2) Sociological Bulletin, 63-74 available at <<http://www.jstor.org/stable/23620096>> Accessed 23rd July 2021.

⁹ Amartya Sen, *Development as Freedom*, (1st edn, Oxford University Press 1999).

¹⁰ *ibid*.

¹¹ Henry Campbell Black, *Black's Law Dictionary; Revised Fourth Edition* (St Paul, Minn West Publishing Co, 1968) 315.

¹² Kenya National Commission on Human Rights, 66 (n 5).

¹³ UNDP Kenya, 'Strengthening the Electoral Processes in Kenya'(2013) available at <<https://www.ke.undp.org/content/kenya/en/home/projects/strengthening-the-electoral-processes-in-kenya.html>> accessed 23rd July 2021.

¹⁴ Musili, 18 (n 7).

¹⁵ Kenya National Commission on Human Rights, 109 (n 5).

the campaign trail overtly engaging in acts of bribery¹⁶. This prejudiced candidates who did not engage in the vice and to a great extent unduly influenced voters to vote for presidential contestants who might have offered bribes, thus hampering the delivery of free and fair elections.

Despite the wide-ranging amendments and reforms in the electoral laws which seek to overtly ban elections crimes and levy firm sanctions and penalties, the political players and actors from both opposition and government continue with same patterns and trends of voter-bribery witnessed in the previous elections¹⁷. This is as result of the existing poverty levels in Kenya which enables voters to accept bribes in order to vote for the parties or individuals who bribe them. It is because of this that this study recommends the improvement of the economy and livelihood of voters.

This study recommends that the economic empowerment of the electorate; this entails improving the economy and the livelihood of Kenyans. This study recommends that this be improved by the government creating a suitable environment in which the populace can easily engage in gainful economic activities. This can be done by, among others; reducing the amount of taxes paid, lower of bank interest rates so as to lessen the cost of borrowing and hence increasing consumer spending and investment; increasing the number of goods being exported and reduction of corruption among those in influential positions. Once the economy and livelihood of Kenyans is improved, the electorate will not fall prey to voter bribery as they will have enough resources in which to live by. The political actors across the political divide will also not attempt to bribe voters once the voters are economically empowered.

5.2.3 National dialogue on ethnicity

The culture of voting based on ethnicity is one of the limits of the law identified in chapter four; it entails the behavior of the electorate voting for election contestants based on their ethnicity only. Presidential elections post-2010 are usually comes before a protracted time of deal-making and negotiating¹⁸. The elections avail legislators with paraphernalia for discussions by representing the vote-pool size they may take to the election and their capability of turning

¹⁶ *ibid* 74.

¹⁷ *ibid* 73.

¹⁸ Nic Cheeseman and others, 'The Kenyan Elections of 2017: Devolution in the Spotlight' (2018) 7 Leeds African Studies Bulletin, No. 80, Winter 2018/19.

people out on to the streets if they are dissatisfied¹⁹. The 2017 elections reveal that ethnicised political dynamics persist²⁰.

Contact to political power is a significant certainty to most ethnic clusters in Africa as a result of supposed privileges that are brought by political power²¹. This insight offers an inducement for ethnic groups and individuals to pursue control of the state²². As a result of the perceived benefits of having a president coming from one's ethnic community, a good number of voters fall prey to voting for presidential candidates based on one criteria alone, that is ethnic background. This leads to instances in which some of the electorates engage in electoral malpractices so as to ensure their preferred contestants emerge victorious in the elections. Thus, despite the law providing for the roles of each and every person in the presidential election process, the culture of voting based along ethnic lines limits the role of laws in the regulation of presidential elections.

Being a multi-ethnic nation should not be an obstacle to the holding of credible presidential elections, national cohesion and progressive development of Kenya²³. Multi-ethnicity becomes a thorn in the society only when there is deliberate marginalization of certain ethnic communities as a consequence of lobbying of ethnicity by political leaders whipping up ethnic sentiments so as to have their community back them in their pursuit for power²⁴.

Whereas Kenya's 2017 presidential elections depicted a set-back in its democratic processes, it is crucial for political actors and their supporters to be on the same page on matters ethnicity²⁵. It is in that regard that this study recommends that a national dialogue be instituted so as the entire nation can find workable ways of slaying the monster, that is ethnic rifts.

¹⁹ *ibid.*

²⁰ *ibid* 6.

²¹ MO Kisaka and IN Nyareda 'Ethnicity and Politics in Kenya's Turbulent Path to Democracy and Development' (2019) 163 *Sosyal Siyaset Konferansları Dergisi/Journal of Social Policy Conferences*.

²² *Ibid.*

²³ *ibid* 175.

²⁴ *ibid*

²⁵ The Carter Center, *Kenya 2017 General and Presidential Elections Final Report*, (The Carter Center, 2018) 164 available at https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-2017-final-election-report.pdf accessed on 22nd July 2021.

This study recommends that the said dialogue takes a bottom-up approach which entails discussions at the lowest unit of the society, that is the family ascending up to the top leadership of the country. This will also entail views of each unit of the society being considered. This study has intentionally not given the ways in which voting based on ethnicity can be dealt with; this is because once the national dialogue comes up with solutions the population are likely to own them and adhere to them as they will have participated in coming up with the solution. This study is of the view that the national dialogue will address the issue of politicization of ethnicity during presidential elections which in turn leads to the electorate voting along tribal lines.

In order to further strengthen societal ties and encourage unity among all the ethnic groups in Kenya, this study further recommends that the curricula in schools starting from pre-primary to primary and further to secondary schools introduce and integrate teaching of national unity, character, and cohesion to the students. This will enable students to appreciate the benefits of being a multi-ethnic society at tender ages and greatly reduce chances of them voting along ethnic lines when they qualify to be voters.

5.2.4 Increasing the levels of electoral literacy among voters

Electoral literacy is the understanding and knowledge of political issues and processes which allow individuals to partake their role as citizens well²⁶. It denotes to the basic concepts and facts that create a necessary condition of comprehending the contents of public discussions²⁷. People have various roles in the society, one of which is the responsibility to choose how to be governed and the people to shoulder the task of governing them; electoral literacy is thus crucial in ensuring citizens make such decisions²⁸.

Electoral literacy aims at ensuring informed participation of voters in making political choices²⁹. The making of informed choices by the electorate in elections needs some level of education and time to be abreast with what is happening in the political world; this a luxury to some voters,

²⁶ Monicah Zembere, 'Electoral Illiteracy and Democratic Citizenship in Zimbabwe' (2020) 58 available at <file:///C:/Users/Hp/AppData/Local/Temp/198243-Article%20Text-498869-1-10-20200731.pdf> accessed on 23rd July 2021.

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid* 59.

especially the poor³⁰. The financially underprivileged in society, as a consequence of generational poverty may not have attained the essential education to empower them to make informed selections in elections and may also not be capable of affording means of information to follow political news³¹.

Due to electoral illiteracy some voters, especially the poor, end up voting based irrelevant information such as rumours³². Electoral illiteracy makes it difficult for voters to cast their votes on election day and also makes it much more difficult for the electorate to understand the electoral process. In the 2017 presidential elections, electoral illiteracy was manifested *via* voter bribery in different forms reported in various parts of the country³³. Electoral illiteracy in Kenya has led to election crimes and offenses being reported during the election period as the illiterate are easily influenced by unscrupulous candidates³⁴. Thus, despite the elaborate electoral laws the regulation of presidential elections in Kenya is hampered by electoral illiteracy among a portion of Kenyan voters. It is on that basis that this study recommends the increase in levels of electoral literacy among the electorate.

Increase of voter literacy levels can be achieved by the EMB continuously educating members of the public on their roles as voters, informing the electorate to what to expect on the electorate and publicizing of election offences so as people do not end up committing unlawful acts unknowingly. This study acknowledges that IEBC conducted voter education through various avenues, however, this was done just a few months to the presidential elections. Conducting voter education only when elections a few months away is not effective.

This study also recommends ensuring of a suitable environment for education to flourish, this includes the reduction of school fees, reducing the costs of educational books and increasing accessibility of internet services. This study further recommends the inclusion in the education curricular in all educational institutions of a unit, which should be mandatory to the learners, about the electoral processes and the roles of each participant. That will enable learners to internalize their respective roles when they qualify to be voters. Increasing the levels of electoral

³⁰ Musili, 18 (n 7).

³¹ *ibid.*

³² *ibid.*

³³ Kenya National Commission on Human Rights, 109 (n 5).

³⁴ Musili, 18 (n 7).

literacy among voters can also be increased by the economic empowerment of voters as discussed earlier in 5.2.1. Based on the foregoing this study finds increasing of the levels of electoral literacy among voters vital in fostering the role of the law in regulating presidential elections.

5.2.5 Exercise of judicial restraint in political matters/ Observing the political question doctrine

One of the limits of the law established in chapter four is the judicialisation of politics. Judicialization of politics is the utilisation of judicial and courts procedures to settle moral disputes, public policy, and core political; it involves extending of the Judiciary's directive into formulation of public policy and shaping the moral and political landscape³⁵. The emergence of the judiciliasation of politics has increased the level of courts' participation in the political sphere past constitutional rights³⁶. This trend is usually reinforced, explicitly or tacitly, by influential political stakeholders and this in turn has resulted in the transformation of courts into a vital component of national policymaking apparatus³⁷.

Although oversight of practical features of democratic processes was within the directive of courts, questions as to; a regime's legality, a country's collective identity or a policy coming to footings with its non-admirable past, indicate principally profound political and moral dilemmas, not legal ones³⁸. Thus, they should as an aspect of principle be determined by the general public, through their accountable and elected representatives³⁹. Determination of the said questions by courts extends past the application provisions touching on rights and basic procedural justice norms; determination of such questions is intrinsically and practically a political exercise⁴⁰.

³⁵ Otieno-Odek, 'Election Technology Law and the Concept of "Did the Irregularity Affect the Result of the Elections?"' (Judiciary) 56 available at < https://www.judiciary.go.ke/wp-content/uploads/2017/12/LIST-OF-AUTHORITIES-DR_EKURU-AUKOT.pdf> accessed on 24th July 2020.

³⁶ Ran Hirschl, 'The Judicialization of Politics' in Robert E. Goodin (ed), *The Oxford Handbook of Political Science* (Oxford University Press, 2011) 5 available at < <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-013?print-pdf>> accessed on 24th July 2021.

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ *ibid.*

The Judiciary in Kenya plays a pivotal role in the determination of all electoral disputes⁴¹. Kenya's 2017 presidential elections saw several disputes being determined by courts; the disputes largely dealt with rules and regulations prior to the holding of the elections and presidential election petitions⁴². Courts played a serious role during the 2017 presidential elections that it eventually overshadowed the IEBC which was the body mandated to conduct presidential elections⁴³. Owing to the stagnant political culture in Kenya, the electoral process in Kenya is likely to remain judicialised⁴⁴. The environment in which Kenya's Judiciary operates is characterized by partisan political interests which in effect weaken all institutions⁴⁵. Additionally, the political environment serves as a platform where candidates pursue to utilise the courts in advancing their interests⁴⁶. Judicialisation of politics has the potential to undermine democracy⁴⁷. It is on that basis that this study recommends judicial restraint and observing the political question doctrine when faced with disputes of a political nature.

The political question policy is a notion of justiciability in which courts do not arbitrate specific debates because their determination is better handled by the political divisions of government⁴⁸. Under the classical conception of the political question principle, a political question only comes about when the constitution plainly obligates the determination of a question to another arm of government⁴⁹. By applying the political question doctrine, the judiciary is not relinquishing its responsibility, but construes the Constitution as assigning discretion over a problem to another branch of government⁵⁰.

⁴¹ Teddy JO Musiga, 'Implications Arising from Judicial Resolution of Presidential Election Disputes in Kenya' (Master of Master of Public Policy and Administration Thesis, Kenyatta University, 2016)1.

⁴² Karuti Kanyinga and Collins Odote, 'Judicialisation of Politics and Kenya's 2017 Elections' (2019) 13 *Journal of Eastern African Studies*.

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ Benard Mweresa Eboso, 'Judicialization of Politics Under the Constitution of Kenya 2010' (LLM Thesis, University of Nairobi) 10.

⁴⁸ Jared P. Cole 'The Political Question Doctrine: Justiciability and the Separation of Powers' (2014) Congressional Research Service.

⁴⁹ *ibid.*

⁵⁰ Eboso, 9 (n 47).

Election petitions are a way by which courts can decide a representative of the masses while preferably, that representative is supposed to be generally elected⁵¹. If courts are to decline authority over an appeal or a specific facet of it, it would be for sagacious reasons⁵². The political question doctrine permits courts to decline jurisdiction⁵³.

Courts may call into use this doctrine for purposes of prudence once it feels that it court absences the ability to decide; it might lack capacity to decide as a result of among others; the peculiarity of the subject and its intractability to righteous resolve; the absolute momentousness of it; and uncertainty of an organization which is electorally reckless and has no ground to draw strength from⁵⁴. From the foregoing, the political question doctrine is a flexible instrument that Kenyan courts can use to decline jurisdiction in matters of political fragility⁵⁵.

It is crucial for judicial officers to be alerted on the topic of judicialization of politics as they are the ones who are confronted with the difficulty of protecting the judiciary from the dangers of judicialization of politics⁵⁶. They therefore require appropriate understanding of the idea and its dangers⁵⁷. The sensitization need to aim at informing and not deterring since judicialization of politics is potentially but not inherently harmful⁵⁸.

⁵¹ *ibid* 58.

⁵² *ibid* 59.

⁵³ *ibid* 91.

⁵⁴ Cole, 7 (n 48).

⁵⁵ Eboso, 91 (n 47).

⁵⁶ *ibid* 99.

⁵⁷ *ibid*.

⁵⁸ *ibid*.

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