

**THE LINK BETWEEN POVERTY AND THE RIGHT TO FREE, AND FAIR
ELECTIONS IN KENYA.**



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DECLARATION

I, **MULI STEPHEN MUSILI** do hereby declare that this Research Project is my original work except where indicated by special reference in the text. This Research Project has not been submitted to any other institution for the award of a postgraduate degree or any other award in Kenya or elsewhere.

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University of Nairobi Law School and Sihanya Mentoring.

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This study was a success because of all your efforts. May the almighty God bless you abundantly in all your endeavors. And may All the Glory be to the Almighty God.

DEDICATION

This research project is dedicated to Joy Muller who has been a mother to me and sacrificed a lot to see me reach this far in terms of academics; My parents; My brother Benjamin; and lastly to all persons who kept encouraging me to finalize the project.

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2. Fredrick Outa v Jared Oduyo Okello & 4 Others (2014) eKLR
3. Gilphine Omwenga v Independent Electoral & Boundaries Commission & 2 Others [2018] eKLR
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22. Scheme and 3 Others, Petition No. 65 of 2010 [2013] Eklr
23. Susan Kariuki & 4 Others v Town Clerk of Nairobi and 3 Others Petition No. 66 of 2010 [2013] eKLR
24. Timamy Abdalla v Independent Electoral and Boundaries Commission & 3 Others [2018] eKLR.
25. Wavinya Ndeti & Another v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR
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LIST OF CONSTITUTIONS AND CONSTITUTIONAL INSTRUMENTS

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Constitution of Kenya 1969

Constitution of Kenya 2010

LIST OF TRANSNATIONAL INSTRUMENTS

African Charter on Human and People's Rights (“Banjul Charter”) (adopted 27 June 1981, entered into force 21 October 1986 CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982))

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

Millennium Development Goals (adopted September 2000) (MDGs)

Universal Declaration on Democracy (adopted 16 September 1997, Inter-Parliamentary Council (161st session))

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR))

United Nations Millennium Declaration (adopted 18 September 2000 A/RES/55/2 UN General Assembly (55th sess.: 2000-2001))

LIST OF KENYAN STATUTES

Elections Act No. 24 of 2011

Election Offences Act No. 37 of 2016

Election Campaign Finance Act No. 42 of 2013

Ethics and Anti-Corruption Commission Act No. 22 of 2011

Independent Electoral and Boundaries Commission Act No. 9 of 2011

Leadership and Integrity Act No. 19 of 2012

Political Parties Act No. 11 Of 2011

ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples Rights
ADR	Alternative Dispute Resolution
AG	Attorney General
CMD	Centre for Multiparty Democracy
CoK	Constitution of Kenya
ERS	Economic Recovery Strategies
ICESCR	International Covenant on Economic, Social, and Cultural Rights
IEBC	Independent Electoral and Boundaries Commission
JSC	Judicial Service Commission
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KLR	Kenya Law Reports
KNCHR	Kenya National Commission on Human Rights
MCA	Member of County Assembly
MDG	Millennium Development Goals
NARC	National Alliance Rainbow Coalition
NASA	National Super Alliance
NGO	Non-Governmental Organization
ODM	Orange Democratic Movement
SDG	Sustainable Development Goals
UDHR	Universal Declaration of Human Rights
UN	United Nations
URP	United Republican Party
UNMD	United Nations Millennium Declaration

ABSTRACT

This study examines the interplay between poverty and free, and fair elections in Kenya. It explores historical, the legal, and institutional framework for elections in Kenya and, a few selected election irregularities common in Kenya to demonstrate that there is a correlation between poverty prevalence and the various election challenges inhibiting free, and fair elections.

Although Kenya has held several elections even before independence with the institutional framework and the right to participate in free and fair elections expressly anchored in the law, nevertheless, the realization of the same has remained a mirage because of poverty. Poverty makes elections in Kenya costly for both the government and the electorates, attracts voter bribery, elections violence, costly electoral justice and, voters' apathy amongst other ways that adversely affect the election process and the results thereof. The study argues further that poverty is largely perpetuated by political reasons in Kenya through deprivation of economic rights such as the hegemonic system created by the British administration and inherited by the post-colonial political elites, corruption which deters economic growth, unequal distribution of public resources, and power abuse by the government. Free and Fair election breeds good governance and deters the election of bad leaders, holds bad leaders accountable through de-election, and enables citizens' participation in decision making vital for economic development.

The study relies on the Marxist theory of political economy to demonstrate the interplay between politics and the domination of the poor by the rich in politics, the elite theory, and the rational choice theory to demonstrate how poverty is applied to predict the voters' behavior and actions at any particular time and the utilitarian theory to extrapolate the importance of addressing poverty challenge in Kenya. Using the doctrinal research methodology, the study exposes the historical antecedents of poverty challenges to free, and fair elections and the ineptness of the legal and institutional framework for the realization of free, and fair elections in Kenya. The study concludes that there is a link between Poverty challenges and free, and fair elections in Kenya in that, it limits the citizen's participation in an election either as electorates or aspirants. That the free will of the voters and fairness of the process get negated by poverty and the current legal framework is not a panacea for the same. The study makes recommendations for the eradication of poverty, economic and legal reforms for the realization of free, and fair elections.

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CHAPTER 1

METHODOLOGY ON THE POVERTY CHALLENGE ON FREE, AND FAIR ELECTIONS IN KENYA

1.0 Introduction

Regular, free, credible and fair elections are the hallmarks of democratic preambles and virtues of a country where democracy and the rule of law prevail. Kenya has held elections regularly before and after independence in 1963. The first general election was conducted on 6th December 1969. These elections have been conducted under various electoral systems and electoral processes. The elections have also been held under various electoral management bodies and the legal procedures designed to attain the credible and verifiable elections. Nevertheless, the belief that democracy and by extension elections are simply about political and civil rights has always remained one of the democratic delusions all through.

Whilst political rights form the important elements for democracy, economic rights such as freedom from hunger, water, food, disease, want, money, a shelter cannot be understated. Poverty is the greatest threat to Kenya's democracy and elections as it amongst others, encumbers the actualization and the enjoyment of the democratic and political right to free, and fair elections. This study argues that, in a country where the majority of the citizens are poor and elections are highly commercialized, the right to free, and fair elections remains a mirage.

It is not doubtful that most people living in Kenya today are poor. Indeed a majority are amongst the abjectly underprivileged. Almost half of the Kenyans survive in with less than a dollar on a daily basis.¹ Sadly, this has been the situation and the economic condition since independence in Kenya. It is upon realization of the same by the independent government which necessitating the independent government to declare its commitment to poverty eradication via various policy

¹ Muniyoki, Samson, 'THE CULTURE OF POVERTY: AN IMPEDIMENT TO DEVELOPMENT' (1994)24, *Journal of Eastern African Research & Development*, 54, 73< <http://www.jstor.org/stable/24326312> >Accessed 8 June 2019.

Research Projects like the Kanu Manifesto of 1963, sessional Research Project No. 1 of 1965 amongst others whose aspirations never materialized.

It is for that reason that this Research Project embarks on establishing the challenges posed by poverty on the realization of an election which is free, and fair in Kenya. It also seeks to examine the poverty sensitivity of the current existing laws and principles in the international, regional, and local statutes and other regulations enacted to provide for and to guarantee verifiable, free, and impartial elections. This will also entail a discussion on historical underpinning of the poverty election interlinks.

This study will bring up the intrinsic nexus between poverty and elections as the very basic components of democracy. As the Research Project discusses the politics-poverty intrigues, it will be bringing on the surface the realization that the enactment of the law *per se* to provide for the political rights is not a guarantee that the same would be actualized as itself is not sufficient for democratic development if the same is not poverty sensitive or generally interrelated to amongst other, the enjoyment of the economic rights by the subjects. It will cover the period before colonization briefly, during colonization and post-colonization.

The study will develop and conceptualize the argument on the interdependence of human rights and in this instance on how poverty (deprivation of economic right) affects the exercise of the political rights to free, and fair elections in Kenya. Finally, the Research Project will make recommendations as to how the political rights in general, can be effectively be actualized despite the existing poverty state in Kenya.

1.1 Background of the study

For any country to realize the full meaning of democracy, people legitimization of the government in an election which is, regular, free, and fair is key.² The Government's authority in a state ought to emanate from the will of the people expressed through a sincere, free, and unbiased elections held regularly and based on the universal, equivalent, and secret ballot.³

The principles of free, and fair elections in Kenya are anchored in the Constitution under Article 81. This Article embeds and defines the atmosphere in which elections are to be conducted.⁴ The Constitution defines 'free and fair' elections to comprise an election which is violence free, without intimidation, with no improper influence, and free from fraud. The constitution provides further that the election procedure should be transparent and managed in a fair, competent, and precise manner.⁵

The foregoing Constitutional underpinnings notwithstanding, it is a general knowledge that money and politics are inseparable and elections in Kenya are highly commercialized and punctuated by incidents of voter bribery, vote-buying, violence, and voter apathy.⁶ Voter treating skirmishes during campaigns, and on the Election Day involving poor and jobless youths, result manipulation and vote-rigging characterize the process.⁷

This means that if any person wishes to contest in an election in Kenya and carry out an election campaign successfully and meet other electoral related costs, requires money.⁸ Further for citizens to avoid being easily swindled, influenced, and corrupted, freedom from hunger and

² The expression "Free, and fair Elections" originated in the first post-apartheid elections in South Africa in 1994.

³ Declaration on Criteria for Free, and fair Elections, s1.

⁴ Otieno-Odek, 'Election Technology Law and the Concept of "Did the Irregularity Affect the Result of the Elections?" (2017) < [www.judiciary.go.ke > wp-content > uploads >](http://www.judiciary.go.ke/wp-content/uploads) accessed 4 January 2018.

⁵ *Ibid*; Constitution of Kenya, 2010, Art 81.

⁶ see the nullification of election due to allegations of bribery by the supreme court of Kenya in *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* [2015] eKLR.

⁷ Government of Kenya "Report of Judicial Commission appointed to inquire into Tribal Clashes in Kenya," (1999), Green Leaf Library.

⁸ These include payment for party subscription, nomination, mobilization, payment of nomination fees to the electoral management body etc.

other necessities are overriding. These coupled with the inability of any citizen to contest in an election for lack of funds to campaign implies that a fair poll could not be held.⁹

The foregoing informs the argument in this study that, Poverty remains a challenge in the realization of an election which is free, verifiable and fair in Kenya. It is for instance in poverty where election malpractices flourish such voter bribery, vote-buying, and treatment, election-related violence, and participation in elections as candidates is a challenge.¹⁰

To finer details, this study demonstrates the interface between poverty and elections in Kenya on two fronts namely: the poverty challenges on political aspirations and the poverty challenges on the electorates. This research contents that elections are likely to be free, credible and fair if poverty is addressed. The drafters of the elections legal and regulatory framework should also ensure that every person can participate in elections their economic status notwithstanding while enacting the said laws.

The study will confine itself to critical analysis and discussion on the interface between elections in Kenya and the economic status of the people involved. It shall demonstrate how poverty is a challenge on the realization of an election which is free, and fair and how the challenge can be overcome. In as much as the study will emphasis on the electoral the legal and institutional framework on elections, other particular goals will comprise a highlight of possible solutions that the Government can apply to assuage the level of poverty in Kenya and thus eliminate the existing impediment for free and fair elections in Kenya.

⁹ Sadrul Hasan, 'what makes an election free and fair?' *The Daily Star* (London, 27 November 2018) <https://www.thedailystar.net/opinion/politics/news/what-makes-election-free-and-fair-1665028> accessed on 23 November,2019.

¹⁰ Vitalis Musebe 'Opinion: Voter bribery greatest threat to fair, credible polls', *The Standard Newspaper*," (Nairobi,13 August 2017)> www.standardmedia.co.ke/article/2001251114/opinion-voter-bribery-greatest-threat-to-fair-credible-polls<accessed 15 October 2018.

1.2 Statement of the problem

Although Kenya has held several elections even before independence with the institutional framework and the right to participate in free, and fair elections expressly anchored in the law, the realization of the same has remained a mirage. This has been due to poverty which has remained a challenge in the realization of a free, and fair election. As a consequence of poverty, Kenya has experienced elections which are have been pigeon-holed by voter bribery, elections violence, expensive elections and election campaigns, costly electoral justice, and voter apathy amongst others which adversely affect the election process and the results thereof.

This study seeks to demonstrate the nexus between poverty and elections in Kenya which subscribes to the universally accepted principles of being free, and fair. It is a demonstration that, despite Kenya having several numerous laws providing for the actualization of the political rights to elections which meets the standards of free and fairness, poverty has not been addressed as an underlying challenge affecting the actualization of the same and seeks to illustrate on how by reviewing the current electoral legal framework and economic policies can help in its realization.

1.3 Objectives of the Study

This study's key objective is to demonstrate the correlation between elections and the challenges posed by poverty in the realization of an election which meets the standards of being free, credible and fair in Kenya. The objectives are:

- 1) To investigate the historical antecedents on poverty challenges on elections in Kenya;
- 2) To explore the institutional and the legal framework relating to elections in Kenya;
- 3) To contextualize on how poverty is a challenge on the realization of a free, and fair election in Kenya;
- 4) To deliberate on the findings, conclusions, and recommendations of this study.

1.4 Research questions

The problem that the study contends can be captured by the ensuing research questions:

- 1) First, what were the historical antecedents that led to the existing poverty challenges on elections in Kenya?
- 2) Secondly, what are the institutional, policy, and legal frameworks relating to elections in Kenya?
- 3) Thirdly, how is poverty a challenge in holding elections which are free, credible and fair in Kenya?
- 4) Fourth, what are the findings, conclusions, and recommendations of this study?

1.5 Research Hypothesis

This study embarks on the following hypothesis

- 1) That poverty has in the history of elections in Kenya has been used as a determinant for election success or otherwise and thus a challenge in the realization of an election which is free and fair.
- 2) That Kenya has elaborate policies, institutional and legal frameworks that provide for the exercise of political rights to elections which however do not address the underlying poverty challenge on free, and fair elections in Kenya.
- 3) That poverty; escalates the cost of holding elections in Kenya at the expense of the provision of other essential services to the citizens and development programs. That poverty negatively affects one's ability to make the right choice in elections. Poverty further causes low self-esteem and a lack of courage limiting one's ability to participate in society's civil, cultural, and political activities. Poor people are more concerned about their current challenge to access basic needs in which voting is not part of the potential for voter apathy. Contesting for an election in Kenya is a costly affair involving costs for

campaigns and other related costs such as cost for election disputes limiting the people's ability to contest in an election. Poverty entrenches the culture of voter bribery and election violence which are some of the major challenges to free, and fair elections in Kenya.

- 4) That Poverty is a key impediment in holding, administering and participating in an election that is free, and fair in Kenya. It interferes with the citizen's participation in an election either as electorates or aspirants. That the free will of the voters and fairness of the process is negated by poverty and the current legal framework is not a panacea for the same.

1.6 Justification of the study

This study is vindicated on the premise that the sovereign power belongs to the Kenyan citizens. That the foreign power unreservedly is exercisable under the Constitution either exclusively or through the constitutionally voted representatives.¹¹ It is thus through elections that serve as the basis of democratic representation. Elections grant Citizens an opportunity to (s) elect, de-elect, and to be elected as representative.¹² It accords a plinth for the people to exercise their sovereignty and indirectly play a part in government through their elected representatives.

In exercising the said right to elections, the Constitution of Kenya stipulates the general principles that ought to be adhered to in the election process. These include the principle on freeness and the fairness of the election process.¹³ The right to participate in election has also a universal underpinning.¹⁴ UDHR for instance decrees that 'elections ought to be regular, open,

¹¹ Constitution of Kenya 2010, Art 1.

¹² Mtapuri Oliver, *Holding 'Free but not fair' and 'Fair but not free' elections: Be the judge*, In Joseph Rudigi Rukema (Ed), *Elections and Governance in Africa, Sub-Saharan Africa*; (University Press, ISBN 978-0-421-73643-2,2017) ,24, 56.

¹³ Constitution of Kenya 2010, Art 81.

¹⁴ Elisha Ongoya and Willis Otieno *A Handbook on Kenya's Electoral Laws and System*, (Nairobi, EISA, 2012).

by universal and equal suffrage and be conducted via a secret vote or by a similar unrestricted voting procedures.¹⁵

From the foregoing, it can correctly be held that Kenya does not suffer from any deficiency as far as the legal basis for the suffrage right. Thus one can safely argue that Kenya subscribes to electoral democracy as her people have been participating in the governance through their elected representatives since independence in the year 1963.

However, despite the foregoing, Kenya's adherence to the very basics of freeness and fairness in elections remains a major challenge since independence and even before. That not everyone can participate as a contestant in an election and campaign at the level ground with other contestants and the ability of electorates to participate in an election process free of influence, bribery, and treatment amongst other election vices disturbs my peace.

Several measures such as enactment and amendment of the existing laws aimed at the realization of an election which is free and fair. However, these efforts have all been in futility as it has been hard to achieve their intended purpose. The ability of all the citizens to participate and campaign in an election contest fairly has been but a wish. The citizens craving for handouts during election campaigns and the inability to resist the same finds a good place in the hearts of the seasoned rich politicians who finds favor in the practice during elections.

This study goes to disentangle the main obstacle to the realization of an election which is free and fair as required under the law. The study, therefore, is very relevant considering that it addresses a concern that is of practical concern to an important governance process to Kenya as a country. Following the 2017 general elections, 388 election petitions were filed in various election Courts in Kenya, representing over one hundred percent upsurge in the number of

¹⁵ Universal Declaration of Human Rights 1948, Arts 21(1) (3).

petitions filed in the preceding General elections held in 2013 when 188 petitions were filed.¹⁶ This called for research to assess and establish the underlying challenge that contributes to the occurrence of similar electoral malpractices and suggest appropriate preemptive measures.

It will be a source of knowledge for the academicians as well as the policymakers. Researchers, stakeholders, and policymakers will be able to understand and appreciate the poverty challenge on the realization of free and fair elections and thus address the challenge accordingly. The Research Project will also contribute to the existing knowledge and literature on elections and democracy both in Kenya and Africa at Large as poverty which inhibits the realization of elections which are free, and fair is evident in most parts of Africa.

Through recommendations, intended to seek amendment of the law and also to provide guidance on the obligation of the state to the poor to enhance participation and actualization of the right to free, and fair elections. The study will also be useful in deterring future impoverisation of the people by the state.

1.7 Conceptual and Theoretical Framework

1.7.1 Conceptual Framework

1.7.1.1 Poverty conceptualization

Poverty is defined differently by different authors depending on the context in which it is intended. The expression poverty was coined from a French term *pauvrete* from a Latin term *paupertas* (from the noun *pauper*).¹⁷ Generally, the term poverty denotes a situation or a state of

¹⁶ Lucianna Thuo, 'ICJ Kenya Compendium of 2017 Election Petitions' –Select Decisions Issues and Themes Arising from the 2017 General Elections in Kenya.(ICJ Kenya, 2019) 4.

¹⁷ Walter Skeat, *An Etymological Dictionary of the English Language*. (Dover Publications [ISBN 978-0-486-44052-1](https://www.doverpublications.com/9780486440521), 2005).

scarcity or being in lack of cash or means of supply or to a state of being in dearth of something that is necessary. It is inequality of some degree of deprivation.¹⁸

World Bank defines poverty as a situation where there are no schools for one to access and acquire education, lack of food (hunger), lack of hospitals to be attended to when sick, starvation, lack of voice, disrespect and low self-esteem, lack of land for farming, isolation, and degradation, lack of jobs, insecurity, powerlessness, discriminative treatment, inability to access credit. It infers proneness to chaos, living on marginal or crumbly environs with no clean water and hygiene.¹⁹

David Gordon's adopts the United Nations definition of poverty as abuse of human rights and dignity caused by denial of choices and opportunities.²⁰ He equates poverty with one's inability to efficiently take part in society's activities.²¹

While contending corruption to have the biggest economic relative impact on the poor people, Green, Duncan Defines Poverty as a state of hopelessness and helplessness, frustration, enervation, and segregation from decision-making. It further denotes inability to access public amenities, the financial system, and just about any other source of official support. Poverty has the ability to deprive one or their families the prospect to develop and grow which can be for a very long time. For Green Duncan, corruption which also breeds poverty breeds a deep sense of hopelessness and marginalization, discouraging measures to bring up lively citizenship.²²

¹⁸ Gupta Shiv, 'CONCEPTUALIZING POVERTY', *Sociological Bulletin*, (1984) 33(1/2), 63-74 <<http://www.jstor.org/stable/23620096>> Accessed 27September 2020.

¹⁹ Administrative Committee On Coordination, *Poverty and Inequality Analysis, (Statement Of Commitment For Action To Eradicate POVERTY, 1998)*<<https://www.worldbank.org/en/topic/poverty/overview>>Accessed 18 June 2019.

²⁰ David Gordon, *Indicators of Poverty & Hunger*, (New York 2005).

²¹ Ibid.

²² Green, Duncan, 'From Poverty to Power: How active citizens and effective states can change the world,' (2nd ed. Rugby, UK: Practical Action Publishing and Oxford: Oxfam International, 2012).

Duncan Kennedy on the other hand defines African extreme poverty as a situation where the government is not able to raise enough revenue to fund public policies which are aimed at the provisions of food, water and for the alleviation of disease. According to Duncan, the balkanized after colonial political relations of Africa and the revenue sharing created by a naturally pertinacious African political economy amongst other reasons.²³ For Duncan, impoverished countries lack their resource allocation for the alleviation of poverty and thus the need for foreign aid.

He argues further that balkanization coupled with the anticommunism policies influenced by the Western Great Powers contributed significantly to the poor economic performance of Africa.²⁴ That the form of political economy advocated for by the Western Great Powers failed to apportion surplus for much-needed development in Africa. Balkanization of Africa which also led to the distribution of resources, and population amongst others, left the independent states in the hands of untrained African elites not only to run the government but also incapable to manage development.²⁵

Amartya Sen defines poverty as a denial of one's freedom which deters the expansion of one's development.²⁶ Sen identifies some freedoms like the right to take part in politics and dissent, opportunities to obtain basic education as some of the key components of development important for the economic progress of a country. Freedom entails not just the doing of something, but the capabilities to do so. He espouses that a lack of economic freedom can breed a lack of political freedoms and *vice versa*. Political rights, social supremacies, empowering conditions for good health, access to basic education, Economic opportunities influences what people can positively achieve.

²³ Kennedy Duncan, 'African poverty' (Washington Law Review, 2012) 87(1) <<https://digitalcommons.law.uw.edu/wlr/vol87/iss1/6>> accessed 20 August 2019.

²⁴ Ibid.

²⁵ For instance, by 1950 when most of African countries gained independence had less than 50 PHD holders who were required to run and administer the central Banks established in all the independent states.

²⁶ Amartya Sen, 'Development as Freedom', (1st edn, Oxford University Press 1999).

Political freedoms such as free speech and elections promote economic security.²⁷ Authoritative rulers who are rarely themselves affected by poverty, lack incentives to take timely preventive measures as opposed to the democratic government which has to win elections and faces public criticism.²⁸ It is the obligation of the state to support freedoms by providing basic education, health upkeep, social safeguards, decent macroeconomic policies, output and caring for the environment.

Ellis G categorizes poverty into different dimensions namely; economic, psychological, political, social, ideological, legal poverty, and conceptual poverty. Economic poverty is determined by the households' ability to earn below the minimum standard accepted level. The United Nations global standards of intense impoverishment defines the minimum accepted level as 1 dollar per day. That is if a family earns less than a dollar per day, then it falls below the poverty line and thus unable to afford the necessities of life.²⁹ As economic poverty is defined in terms of access to basic needs, this can be termed as the main reason behind the politicians' use of handouts, distribution of food and clothing in an economically poverty-stricken population as opposed to other needs which may be termed as secondary such as cars and lands for the poor.³⁰

Geographical poverty is defined in terms of poor people concentration in a certain region or locality. This can, for instance, be poor people living in rural areas, poor people in slum areas, or urban poor people. Geographical regions such as ghettos, slums, and the rural areas with poor people are characterized by a lack of basic needs, amenities, poor infrastructures, and illiteracy amongst others which are ideal situations for the political elites during campaigns as they can

²⁷ He identifies economic security as one dimension of economic development apart from economic climate. Economic security relates to lack of democratic rights and liberties and that the working of a democracy and political rights can even prevent famine and other economic disasters.

²⁸ For instance territories which were governed by rulers from elsewhere such as Kenya by British, one party states such as Ukraine in 1930s, China between 1958-1961. See also contemporary Western Europe who have had democratic governments since long.

²⁹ GFR Ellis, 'The Dimensions of Poverty Social Indicators Research', (1984)15(3); Springer Publications, 229, 253, <<https://www.jstor.org/stable/27521247>> accessed 9 November 2019.

³⁰ Aluko, Opeyemi, Ogunseye and Adeyemi, 'Poverty and Electoral Challenges in Nigeria', (2019)10(1), Lapai Journal of Humanities, <<https://www.academia.edu/41547865/>> accessed 30 September 2019.

pull crowds with unattainable and imaginary political promises to deliver them from the chains of poverty once elected.³¹ These regions are often also characterized by monetary induced campaigns and election violence. An example would be Kibra, Mathare, Nyalenda slums in Kisumu which were some of the hotbeds of 2007 post-election skirmishes in Kenya.³²

Political poverty and which is very central in this study connotes a situation where the poor are always on the losing end when it comes to political activities. This is where the poor are dejected and at times precluded from voting. The people in this category are described as being politically poor as they are unable or lack a forum or an individual who would express their opinions to the government as their elected leaders do not pay attention to them. As a result, the poor after being denied an opportunity at the ballot to express their will or to be elected due to their poor income level they are hoodwinked with political goods by the rich political elites or those who are moneyed that after being voted for they would change the poor's' fortune.³³

Though the definition of poverty adopted for purposes of this study does not in any way exclude any of the foregoing definitions, the study will specifically adopt the definition of poverty by Sen as deprivation of one's economic capability to the detriment of other freedoms. My concern would be to evaluate and analyze the effect of depriving one's economic capability on social and political rights.

That poverty is the deprivation of one's job opportunities caused by unequal access to opportunities and unequal resource distribution, deprivation of empowerment, deprivation of necessities, deprivation of choices, and lack of access to school and health services amongst others. It is further deprivation of stable living conditions and shelters and thus lives in

³¹ Ibid.

³² Jacobs, Andreas, 'Nairobi Burning: Kenya's post-election violence from the perspective of the urban poor' (PRIF Reports, 110 2011). <https://www.ssoar.info/ssoar/handle/document/31995>>accessed 13 August 2020.

³³ Philip Alston, 'Poverty Is Political; These 3 Things Will Help Us Eliminate It' (2017) https://www.huffpost.com/entry/poverty-eradication-is-possible-united-nations-economics_b_59e5d3b9e4b0a2324d1d64ab>accessed 18 June 2019.

overcrowded shanties with no proper sanitation which all are intentional products of social inequality and inequity by elitism and series of continual and imposed ways of life.

Some effects of this deprivation on political rights would be hopelessness and lack of commitment to civil duties caused by demanding structural constraints for survival such as pursuit for basic needs, poor health, violence during elections, an inability to interact and participate in civic duties such as voting, being unable to vote correctly and wisely for lack of proper education to enable one discern the right candidate and their manifestos, inability to resist bribery being offered by political aspirants, one being unable to participate in elections as an aspirant for lack of campaign and other related costs. Others would include a lack of self-esteem that deters one from leaving the poverty cycle and negative societal discernment et al.

The study argues that poverty is largely perpetuated by political reasons in Kenya. That deprivation of economic rights in Kenya is caused by corruption, the unwillingness to distribute public resources equally and equitably, and power abuse by the government. It is thus as a result of bad governance. That good governance whose features include citizens' participation, the pursuit of public goods, and accountability by the government and observance to the canons of law is a product of free and fair elections. Free and Fair election deters the election of bad leaders, holds bad leaders accountable through de-election and enables citizens' participation in decision making vital for economic development.³⁴

The evidence on the foregoing is very clear in Kenya where the hegemonic system which was created by the British administration and inherited by the post-colonial political elites in Kenya

³⁴ Modernization theory contends that decrease in poverty during the development process lead to among others, broader socio-cultural and political transformations that increase the likelihood of the emergence of stable democracies. An example herein would be the increased incidences of popular protests experienced by countries with advanced democracies significant poverty reduction such as Brazil and China and Russia for improved government accountability. See Frank-Borge Wietzke (2019) Poverty reduction and democratization – new cross-country evidence, *Democratization*, 26:6, 935-958, < DOI: [10.1080/13510347.2019.1575369](https://doi.org/10.1080/13510347.2019.1575369)> accessed 30 September 2020.

created an unequal society. While the colonial government had successfully managed to marginalize Africans from the political power and resources on the bases of race, this was taken over by postcolonial political elites who perpetuated the seclusion and the exclusion on the bases of ethnicity and nepotism. For instance, the elites from the Kikuyu community were the greatest beneficiaries of President *Mzee* Jomo Kenyatta's administration, and the Kalenjins during President Moi's administration while depriving the other ethnic groups of Kenya political, social, and economic wise.³⁵ The deprivation thereof would also see the Kikuyu community produce two other presidents subsequently in a country occupied by more than 43 ethnic communities.

Other evidence of bad governance would include corruption which has been rampant in Kenya making Kenya one of the most corrupt countries in Africa at position 143 out of the total 180 by the Transparency international in 2017.³⁶ Corruption makes investment by foreigners a toll order to the detriment of economic development.³⁷ This would be evidenced by some of the major corruption scandals such as the 1990s golden berg scandal where the Kenyan government paid Goldenberg Company 35 percent more than its foreign currency earning Eurobond loan scandals etc.

Poor governance breeds to a lack of economic growth by the government which affects peoples' development as was espoused by Amartya Sen.³⁸ Failure by the government to grow the economy would for instance lead to a lack of job opportunities which in turn would affect the peoples' ability to invest in their children's education ultimately. As a result, there would be a vicious cycle of poverty and a hopeless generation. Economic growth, on the other hand, would

³⁵ Kinyanjui Felistus 'CAUSES OF PERSISTENT RURAL POVERTY IN THIKA DISTRICT OF KENYA, c.1953-2000'(2007), A Thesis Submitted in Fulfilment of the Requirements of the Degree of Doctor of Philosophy at Rhodes University< <https://core.ac.uk/download/pdf/145055618.pdf>> accessed 30 September 2020.

³⁶ Transparency International Kenya, 'The Corruption Perception Index 2017' (2018), <<https://tikenya.org/the-corruption-perception-index-2017/>>accessed 30September 2020.

³⁷ Kaleja T.M., 'An Institutional Analysis of Corruption in Kenya. In: Priddat B., Schmid M. (eds) Korruption als Ordnung zweiter Art. VS Verlag für Sozial wissens chaften'. (2011) https://doi.org/10.1007/978-3-531-93011-4_9 accessed 30 September2020.

³⁸ Sen (n 26)

for instance increase the government's tax base which would enable it to spend more on the provision of services beneficial to the poor such as health and education.³⁹

In 1960, Kenya had a similar economic level with Botswana and then two countries would spend at least 9 percent of their GDP on health and education for more than two decades. However, fast forward, by 1990, Botswana was spending 5 times more on the same after having grown its economy by 6.5 % per year as compared to Kenya whose economic growth was only 1.6%.⁴⁰

Deprivation of one's economic capacity poses a threat to elections in that it obliterates the fairness essential for election participation. Poverty creates unfairness by making the poor susceptible to voter bribery and offers their votes in exchange for tokens. It further creates an environment for the rich to enjoy excessive and exclusive influence as compared to the poor and thus be elected and lastly that it makes the poor vulnerable to obtain a remedy from the established institutions such as courts for being unaffordable to them.

Voter bribery is a common occurrence in Kenya. The practice is historical and deeply-rooted in Kenya. It dates back to the 1970s and during the days of the KANU regime where political leaders would visit State House and leave with bags full of money handouts ready to dish out to the voters and woo them for their votes.⁴¹ Politicians would also use Youth support groups such as Youth of KANU '92 and Toroitich Till 2000 during election campaigns and in this exercise of vote bribery and buying disbursing approximately a total of almost Kenya shillings four (4) Billions on that project alone.⁴²

³⁹ DFID, 'Growth Building Jobs and Prosperity in Developing Countries; Economic growth; the impact on poverty reduction, inequality, human development and jobs' <<https://www.oecd.org/derec/unitedkingdom/40700982.pdf>> accessed 30 September 2020.

⁴⁰ Ibid.

⁴¹ Vitalis (n10).

⁴² Harrison Graham, 'Governance Reform in Africa: International and Domestic Pressures and Counter-Pressures by Jerome Bachelard New York: Routledge, Taylor and Francis, (2014) 52(4), *The Journal of Modern African Studies*, 674-675. doi:10.1017/S0022278X14000500.

In the case of 1992 and 1997 elections, for instance, it was estimated that vote-buying took place on the day of the election in about 13 percent of polling stations where they won with a wide margin against their counterparts attributed largely to voter treatment by KANU. This was also the trend during the 2002 and 2007 elections as voters were only bribed with money in open.⁴³ Voter bribery was quoted as one of the reasons why political parties and politicians would spend much in their campaigns as almost 40 % of the campaign expenditure is spent on vote-buying and bribery.

Further, according to UNDP Kenya (2013), lack of economic opportunities to the youth and women in Kenya breeds vulnerability to them and ends up to the dirty tricks of politicians. That jobless youth get influenced by bribes and drugs and substances by scrupulous politicians to either vote for them or not to participate in voting for their opponents in elections and probably cause violence in political rallies of opponents.⁴⁴

This cripples the ability of the poor to substantively participate in elections. This may have a result in poverty, lead to voter apathy after the poor have lost apathy in the concept of elections, and opt not to participate. The inability to secure a job and access to public services, necessities, and choices are likely to make one lose hope in the government and its institutions leading to voter apathy and mostly where voting is not a mandatory obligation like in Kenya.

Statistics in terms of election participation in Kenya for instance would show that the 2002 Kenya's General elections registered the lowest number of people who turned up to vote at 57.2%. This could be attributed to the previous economic situation in Kenya under the KANU

⁴³ Ibid.

⁴⁴ UNDP Kenya, 'Strengthening the Electoral Processes in Kenya'(2013)<<https://www.ke.undp.org/content/kenya/en/home/projects/strengthening-the-electoral-processes-in-kenya.html>> accessed 8 February 2018.

regime.⁴⁵ However, this changed in 2007 where the voter turnout was at 69.1 percent.⁴⁶ The highest voter turnout in Kenya ever recorded was in the 2013 general elections where there was recorded an unprecedented 86 percent voter turnout of the registered voters. In 2017, the number of registered voters in Kenya was about 19.6 million and those who turned up to vote were 77.48 percent.⁴⁷

The nonparticipation of the poor in the elections creates a system whereby the government is a selection of the will of few people and not a reflection of the will of the majority since all the participation was not expected in a democracy in the election process by all the people.

The deprivation also may lead to poor decision making during elections by the poor. Making an informed decision in voting requires some level of education and time to follow up on political news which is a luxury mostly to the poor. The poor due to generational poverty may not have acquired the necessary education to enable them to discern choices during elections. They would also not be able to watch news probably for not being able to read newspaper or afford a television set or other means of information to be abreast of political happenings. As a result, they would vote based on probably rumors or sound bites or end up spoiling the ballot Research Project. Alternatively, they would end up making the wrong choice as a result of sound bites or random political news.

This is very common in Kenya. For instance, a research publication by NATIONAL CRIME RESEARCH CENTRE on ELECTION CRIMES AND OFFENCES IN KENYA Illiteracy significantly contributed to election crimes and offenses during the 2013 elections. The research

⁴⁵ There was an economic revival between 2002-2007 at the reign of president Kibaki with a national growth from 0.6% in 2002 under Kanu's regime to 3.0% in 2003, then to 4.9% in 2004, 5.8% in 2005 and 6.3% in 2006 all under the reign of President Mwai Kibaki. There was also a fall in number for the population living below poverty line from 52.4% in 1997 to 40.3% in 2006. See data from Kenya National Bureau of statistics 2005/2006 welfare survey.

⁴⁶ Elections in Kenya, 'African Elections Database' (2012) < <http://africanelections.tripod.com/ke.html> > accessed 27 November 2019.

⁴⁷ The Carter Center, 'Final Report 2017 Kenya General and Presidential Elections' (2018) < www.cartercenter.org > Accessed on 27 November 2019.

found further that, illiterate voters and who were unable to declaim and inscribe were to rely on a trusted friend in voting and were susceptible to misguidance and end up voting for a different candidate who was not their preferred choice. The illiterate would also easily be influenced by unscrupulous candidates to cast their votes in their favor.⁴⁸

Lack of stable living conditions and shelters are the cornerstones for the creation of highly populated slum dwellings. Just akin to the rural poor which are a conglomeration of poor people living in a certain region together, slums are characterized by poor sanitation, hopelessness with no access to basic needs, and opportunities for self-development, amenities, poor infrastructures, and illiteracy amongst others.

These conditions create an ideal environment for the political elites during campaigns as they can pull crowds with unattainable and imaginary political promises to deliver them from the chains of poverty once elected. These regions are often also characterized by monetary induced campaigns and election violence. An example would be Kibra, Mathare, Nyalenda slums in Kisumu which were some of the hotbeds of the 2007 post-election clashes in Kenya.⁴⁹

The desperation of living in this condition would make the residents there die and even be more than willing to die for a politician who promises them miraculous salvation from poverty. This was well captured on page 203 of Justice Waki [CIPEV] Report in the following terms: “We, therefore, find that during the post-election violence, the brunt of the suffering in Nairobi was borne by poor people living in low-income neighborhoods... The citizens of some of Nairobi’s poorest neighborhoods found themselves in a quandary since those who were entrusted to protect them were either not present, did not seem to care and in the cases where they were present, they were just as brutal as the marauding gangs causing the violence.”

⁴⁸ National Crime Research Centre ‘Election Crimes and Offences in Kenya’ (Nairobi 2016).

⁴⁹ Jacobs (n 32).

Kenya is very rich in talent, tourism destination centers, and home to famous technologies in the world such as M-Pesa and other resources which if well utilized; can achieve social-economic development.⁵⁰ Sadly, the contrary is the case. This is further although its economy being the largest and most developed in eastern and central Africa. Poor governance, corruption, lack of education (illiteracy), unemployment, poor economic policies and lack of political goodwill to implement the few sound economic policies have seen more than half of the nation's population wallow in abject poverty.⁵¹

Poverty has far-reaching consequences on society. It leads to a low standard of living. Poor People cannot afford to pay for education and also lack access to health care services and basic education. Poverty leads to political instability and higher risk of war, genocide, and terrorism.⁵² The poor may also be forced to move to areas perceived to be greener pastures and where the cost of living is low with job opportunities. As a result of migration, the poor lose the opportunity to participate in their Countries Political live for either failing to register as voters or failing to vote for being absent.⁵³

1.7.1.1.1 Poverty challenge in Kenya

Though poverty is a worldwide challenge, it is more perverse in Africa Kenya included. is a developing country in Africa and ranks high in the list of countries ravaged by poverty in the world. In the World Poverty Clock report of 2018, Kenya was placed at the eighth position

⁵⁰ Roxy Kruger, 'Why is Kenya more famous than most other African countries?' (2020) <<https://acacia-africa.com/blog/2020/01/14/why-is-kenya-more-famous-than-most-other-african-countries/>>accessed 12 March, 2020.

⁵¹ World Bank report, 'Poverty Incidence in Kenya Declined Significantly, but Unlikely to be Eradicated by 2030' (2018)<<https://www.worldbank.org/en/country/kenya/publication/kenya-economic-update-poverty-incidence-in-kenya-declined-significantly-but-unlikely-to-be-eradicated-by-2030>>accessed 30 December.2018.

⁵² For example, Uganda under the regime of Idi Amin, Uganda landed in a total economic mess caused by Idi Amin spending spree. To keep the Uganda's battered economy afloat, the president resulted to mass killing of his citizens. Relatives of the victims were to pay an exorbitant sum to "recover" the bodies.

⁵³ This is common in Kenya amongst the pastoral communities who migrate in search of water and pasture in most times of the year. Other Kenyans in search for green pastures have shifted to Gulf and other Middle East Countries where they work under contracts and cannot come back to kenya before the term of the contract come to an end.

worldwide, and at position number six in Africa amongst states perceived to constitute the biggest number of persons living in extreme poverty.⁵⁴ Estimate about 29% (14.7 million) of the people living in Kenya lives under the subsistence minimum. This percentage survives on a budget of less than Kenya shillings two hundred (KSh200) in a day.⁵⁵

The report further held that the approximate number of poor people in Kenya is about 11 million. This means that whereas the Kenyan economy experienced a growth rate of 4.9% the population of the poor people on the other side increased by about three (3) million.⁵⁶

According to the 2015/2016 Basic Report by the Bureau of Statistics in Kenya (KNBS), the national headcount for individuals concerning food *vis-a-vis* poverty was 32%. This connotes that 14.5 million people were not able to achieve the food poverty line edge.⁵⁷ This means that out of every three people in Kenya, one is not able to afford the minimum daily calorific requirement of 2,250 Kcal.⁵⁸ Similarly, according to the report, 23.8% of households in Kenya were food poor in 2015/2016 and that about 3.9 million Kenyans would not afford the minimum food consumption even if all their earnings were channeled towards buying food.⁵⁹

The information in Kenya reveals that poverty is not a new occurrence in Kenya. In 1963 when Kenya attained its liberation from the colonialist, the Kenyan Government acknowledged poverty as one of the major pitfalls which were to be addressed after independence if the Country

⁵⁴ Adonijah Ochieng, 'Kenya 8th on extreme poverty list' Business Daily Newspaper (Nairobi, 2018) <<https://www.businessdailyafrica.com/economy/Kenya-8th-on-extreme-poverty-list/3946234-4635310-79pa9rz/index.html>> accessed 23 July 2019.

⁵⁵ With a poverty escape rate of 0.5 people per minute, the drive to achieve the United Nation's Sustainable Development Goals (sdgs) is at risk. UN's sdgs aim at reducing the number of people living in extreme poverty by 2030.

⁵⁶ World poverty Clock is a tool to monitor progress against poverty globally, and regionally. It provides real-time poverty data across countries. Created by the Vienna-based NGO, World Data Lab, it was launched in Berlin at the republica conference in 2017, and is funded by Germany's Federal Ministry for Economic Cooperation and Development. The clock seeks to address a gap in development data around social progress indicators, starting with poverty numbers, and tries to align them with economic and demographic indicators like Gross Domestic Product (GDP), and population clocks and forecast respectively, which already have real-time and forward looking estimates

⁵⁷ KNBS report based on the 2015/16 Kenya integrated household budget survey (kihbs).

⁵⁸ Ibid.

⁵⁹ Ibid.

was to realize sustainable national development.⁶⁰ Against what was the expectations of the majority, the poverty rate in Kenya kept increasing. For instance, Kenya in the year 1972 had approximately 3.7 million people living below the poverty line. This number increased to around 11.5million in the year 1994, 12.5millions in the year 1997 and inflated to around 15million people in 2000 being approximately 56% of the entire population.⁶¹

Poverty is more rampant in Kenya's rural areas as compared to the poverty incidence in urban centers. It is estimated that 47% of the people living in rural arrears in Kenya are poor as compared to 29% of the poor urban dwellers.⁶² The rural households have been distinguished by their lack of profitable ventures. They are characterized by a lack of food, poor health standards, and poor production. Rural areas have also unreliable incomes as it keeps fluctuating. There is also a lack of markets, credit facilities, communication, and technological challenges amongst other challenges in rural areas.⁶³

Poverty in Kenya has been linked to numerous and various causes in Kenya. Some of the causes are natural and other man-made or related to human activities and intentions. Some of the natural causes include; overpopulation, unemployment, limited economic diversity amongst others. The manmade causes include; poor economic policies, bad governance, unjust social system, corruption, and unequal distribution of wealth amongst others.

Donella Meadows holds that there is a direct correlation between poverty and population. She contends that it is a common occurrence all over the world and also in every sort of culture, the

⁶⁰ Government of Kenya, *African Socialism and its Application to Planning in Kenya*, Sessional paper No. 1 of 1965 (1965).

⁶¹ Paul Odundo, Wycliffe Otieno, Wasunna Owino and John Omiti 'Poverty Reduction Efforts in Kenya: Institutions, Capacity and Policy' (2002).

⁶² Ibid.

⁶³ Mohajan, Haradhan, 'Poverty and economic development of Kenya' (2013) (18) (1) *International Journal of Information Technology and Business Management*, 72,82.

lowliest people have the highest number of children.⁶⁴The uncontrolled population is a major challenge in Kenya in tackling poverty and enhancing democracy.

Kenya was in 2019 ranked 27th in the world with an estimated population of over 47.57 million.⁶⁵ Kenya's population is growing at 1 million per annum according to the previous census reports. For instance, KNBS in 2016 estimated Kenya's population at 45.8 million.⁶⁶Overpopulation leads to decreased employment opportunities, decreased land for agricultural activities, rural-urban migration and attendant insecurity, health problems, and pressure on available public facilities.⁶⁷

Gikoro Wainaina holds that lack of education has contributed to poverty levels and outcomes in various parts of Kenya.⁶⁸ Capital returns increase as the level of education goes higher and vice versa. Accessing quality education in Kenya is a challenge. Lack of school fees to advance one's education in tertiary or university education is common leaving each generation to continue trying to find work with no advanced education.⁶⁹ Though the benefits of free primary and subsidized secondary school education in Kenya cannot be gainsaid, the same has conversely left many Kenyans poor through heavy taxation.⁷⁰ This reciprocates everything and makes those out of school remain poor despite having acquired the education and disregard for democracy.⁷¹

⁶⁴ Donella Meadows 'Poverty Causes Population Growth Causes Poverty' (1986) <<http://donellameadows.org/archives/poverty-causes-population-growth-causes-poverty>>accessed 26 November 2019.

⁶⁵ Mukimemia, 'Kenya Population' (2019) < <http://worldpopulationreview.com/countries/kenya>>accessed 26 August 2019.

⁶⁶ Wanjiku Maina, '7 Most populated counties in Kenya' (2018) <https://www.nation.co.ke/lifestyle/population-Kenya/1190-4654094-j3vn1lz/index.html> accessed 26 August 2019.

⁶⁷ Caroline Wayua 'Causes and Solutions of Kenyan Poverty' (2014) <http://www.zakenya.com/politics/causes-and-solutions-of-kenyan-poverty.html> accessed 26 August 2019.

⁶⁸ Dr. Gikoro Wainaina, An inequality perspective of education structure and performance in Kenya <https://profiles.uonbi.ac.ke/wgituro/files/an_inequality_perspective_of_education_structure_and_performance_in_kenya.pdf>accessed 26 November 2019.

⁶⁹ Kenya Advisor "Causes of Poverty in Kenya" (2017) <<http://www.kenya-advisor.com/poverty-in-kenya.html> > accessed 21 August 2019.

⁷⁰ Délice Williams, 'What are the Causes of Poverty?'(2016) <<https://borgenproject.org/what-causes-global-poverty>>accessed 21 August 2019.

⁷¹ Briana White, 'Causes of Poverty In Kenya: The Relevance of Education'(2017)<<https://borgenproject.org/causes-of-poverty-in-kenya/>> accessed 2 August 2019

Oyugi and Mwabu argue that lack of employment opportunities in Kenya leads to poverty.⁷² Kenya's youth and who comprise the majority of the Kenyan population has one unemployed youth in every five youths.⁷³ This translates to around seven active million Kenyans unemployed.⁷⁴

Boniface Kamiti argues that the widest spread and well-orchestrated causes of poverty in Kenya is corruption.⁷⁵ As per the Transparency International survey report of 2018,⁷⁶ Kenya stood in the list of the most corrupt nations in the world at position 143 in a total of 180 in the world corruption index.⁷⁷ Kenya loses close to a third of its budget estimates to corruption per year.⁷⁸

Added to the list is poor Governance which is characterized by incompetence, poor prioritization of policies; Lack of economic diversity and over-reliance on agriculture; ⁷⁹ethnic conflict and political instability; bad politics, and politics of self-aggradation by political elites. Political elites are mostly in control of everything, hard to persecute when involved in corruption and other vices. They amass wealth through corruption with money meant for development and also by allocating themselves huge salaries and allowances at the expense of everyone else.⁸⁰

⁷² LN Oyugi, GM Mwabu and WS Masai 'The Determinants of Poverty in Kenya' (2000) (7) (1) African Journal of Economic Policy, 44-67.

⁷³ Muyela Roberto 'Kenya has the highest rate of unemployment in East Africa, UNDP Report 'Tuko (2018) <<https://www.tuko.co.ke/282232-kenya-highest-rate-unemployment-east-africa-undp-report.html#282232>> accessed 26 August 2019.

⁷⁴ Dominic Omondi, 'Latest survey reveals unemployment crisis facing the country' *The Standard* (23 March 2018).

⁷⁵ Boniface Kamiti, 'Does Corruption Affect Poverty?' The Cases study Of Kenya (2000);' A Research Paper submitted to the department of Economics in partial fulfillment of the requirement for the degree of Masters of Arts (Economic Policy Management) of University of Nairobi.

⁷⁶ Transparency International Kenya, 'Corruption Perceptions Index 2018' (2019) <<https://tikenya.org/corruption-perception-index-2018-press-release/>> accessed on 27 November 2019.

⁷⁷ The Corruption Perceptions Index ranks countries and territories based on how corrupt their public sector is perceived to be. A country or territory's rank indicates its position relative to the other countries and territories in the index.

⁷⁸ Peter Kagwanja, 'How corruption is sinking the 'Kenya model' and Uhuru legacy' *Daily Nation* (Nairobi, 9 March 2019).

⁷⁹ Muchiri Gachie 'Poverty in Kenya: Causes, levels and effects of poverty in Kenya' (2019) <<https://informationcradle.com/kenya/poverty-in-kenya/>> accessed 26 August 2019.

⁸⁰ Chris Hart, "Bad Politics Create Poverty," *Daily Nation* (Nairobi, 27 October 2012).

1.7.1.2 Democracy and Election conceptualized

Democracy in modern usage involves the direct election of the people represented by the people who form the government of the day. Under this system of democracy, resolution of disputes entails the involvement of participants but the implementation of the resolution is determined by a single source of power.⁸¹

Some topographies of democracy include; the rule of law, an independent judiciary, good governance, existence of active political parties. Additionally, in a proper democracy, there ought to be some reasonable economic and social growth to guarantee the realization of people's intellectual potential and their participation in the political affairs of the society.⁸²

Democracy further involves the freedom to elect leaders and possession of the election procedure by the whole populace through inclusiveness and throughout the process.⁸³ This entails involvement in the doings of political parties, engagements, pressure groups amongst others to fairness in elections. Democracy is in this instance termed as an equalizer among different classes of socio-economic, humankind, societies, sex, and age sets and groups.⁸⁴ This implies that democracy is operational and meaningful only when the electorate participates in decision making on the manner they are governed.

While adopting Abraham Lincoln's definition of democracy, Othieno Nyanjom employs the phrases "' of", "by", and "for" the people" to hold that, both "for and of" implies the Government's obligations and service to its people. Further that "by" implies the people's responsibility to elect the government. In this instance, the government's responsibility to serve

⁸¹ Greek word *demokratia*, literally "rule of the people".

⁸² A. O. Oluwatusin, 'Poverty and the Sustainability of Democracy in Nigeria' (2014) (20) (2) *IOSR Journal of Humanities and Social Science (IOSR-JHSS)*, 2279, 0845. www.iosrjournals.org accessed 23 June 2018.

⁸³ People (public) participation.

⁸⁴ Charity Ngilu (2012) IEBC's high nomination fees will make political participation costly, at <https://www.standardmedia.co.ke/article/2000064821/iebc-s-high-nomination-fees-will-make-political-participation-costly> (accessed on 18.02.2018).

the people would entail the realization of the economic rights enshrined in different legal instruments to ensure equality and for the alleviation of poverty.⁸⁵

The present democratic situation in Kenya falls short of the foregoing description. The ordinary poor people in Kenya are only recognized during the formalistic democratic rites branded as elections which cannot meaningfully qualify as democracy. This can also translate to a failed elected government on the other hand for not performing their obligations a conclusion which can also be linked to irregular activities surrounding electioneering periods such as voter bribery, tokenism, and votes buying in Kenya.⁸⁶

An election on the other hand is “a process by which citizens chose leaders to represent them at National and County levels by way of a secret ballot for a fixed period”.⁸⁷ It is the process through which the general resolution of the electorate is converted into a representative government.⁸⁸ Elisha Ongoya opines that transparency of the electoral process is what determines the legitimacy of a government that accedes to power. This depends on people’s confidence that there has been a free, fair, and credible election.⁸⁹

Free, and fair elections as per Agora should fulfill these conditions; first is the elections should be held transparently.⁹⁰ Second is that the privacy of the voter should be upheld.⁹¹ The third requirement is integrity in that only the qualified electors ought to be allowed to participate in the

⁸⁵ Nyanjom, Othieno, ‘The Political Economy of Poverty, Tokenism and Free, and fair Elections in Kenya’ In Okoth Okombo (Ed.), Discourses on Kenya’s 2007 General Elections: perspectives and prospects for a democratic society. (Nairobi, CLARION, 2009).

⁸⁶ Ibid.

⁸⁷ Transparency International Kenya; Free & Fair Election < <https://tikenya.org/wp-content/uploads/2018/09/Free-Fair-Election-Brochure.pdf>>accessed 5.June 2019.

⁸⁸ International IDEA, International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections (2002)>www.idea.int/publications/pub_electoral_main.html>accessed 1 December 2019. According to International Institute for Democracy and Electoral Assistance, for an election to be free and fair; it must guarantee universal, equal and free right to vote without coercion or intimidation; regular elections at prescribed periods; all parties and candidates should be able to put out their manifestos freely to the electorates during the electoral campaign; the electoral campaign period be well defined; and that the legal framework should provide for the right to freedom of expression, equitable access to the media for all parties and candidates and equal political rights.

⁸⁹ Ongoya (n 14).

⁹⁰ Each step of the election process is easily understood and open to scrutiny by all stakeholders and the election results be independently verifiable and auditable.

⁹¹ The choices the voters make should remain private both during and after the election.

poll and the votes must not be tampered with. Fourth and which is very relevant to this study is the financial aspect where the process should be inexpensive to governments and their people. Accessibility is also key that there should be reasonable and equal opportunity for all qualified electors, irrespective of locality, group membership, or disability to cast their ballot.⁹²

Elections involve a process as opposed to being a one-time event. The process entails a combination of guidelines, structures, and activities. The activities herein would include registration of voters, candidate nominations, voting, and vote counting, announcing the results, and training of election officials, conducting voter education, and overseeing the nominations in political parties amongst others.⁹³

The Ugandan Supreme Court defined free, and fair elections to mean, an electoral procedure which is free of any coercion, corruption, inducement, violence, bullying, and whose outcomes are publicized timely.⁹⁴ Similarly, the Constitutional Court of South African held in *Kham and Others v Electoral Commission and another* held that the right to be involved in elections as contenders and to the right to vie for a public office as one of the ingredients for a free, and fair election.⁹⁵

The Constitution of Kenya provides that, for an election to be within the purview of freeness and fairness, “it should be; by secret ballot; free from violence, intimidation, improper influence or

⁹² Jaron Lukas, ‘What are the Requirements of a Free, and fair Election?’ (2018) <<https://medium.com/agorablockchain/what-are-the-requirements-of-a-free-and-fair-election-7f734b13b04d>>accessed 13 November 2019.

⁹³ Jinado Adele, ‘matters Arising; African Elections and the Problem of Electoral Administrations African (1997) 2(1) Journal of Political Science, 1-11.

⁹⁴ *Rtd. Col. Dr. Kiza Besigye v. Yoweri Kaguta Museveni and Electoral Commission* [2001] UGSC 3; see also *Karanja Kabage v. Joseph Kiuna Kariambegu Nganga & 2 Others* [108] Eklr, where the High Court observed that..The concept of free and fair elections is expressed not only on the voting day but throughout the election process....Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament.”

⁹⁵ CCT64/15 [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC).

corruption - Conducted by an independent body - Transparent; and - Administered in an impartial, neutral, efficient, accurate and accountable manner.”⁹⁶

The fairness of an election as opposed to its freeness relies not only on the Constitutional underpinnings but also on the other legal instruments enacted to provide for the same and their implementations.⁹⁷ A fair election is one aimed at providing judiciously equal opportunities and footing for all the parties involved in an election.⁹⁸ These for instance would entail equal opportunities for the elections candidates to access media, polling stations, ability to meet their supporters and campaign expenses, and nomination costs.

Of great concern to this study is the realization of the above conditions for a free, and fair election amidst poverty challenges. This study argues that poverty presents a challenge in conducting an election that is inter alia, free of chaos, inducements, influence, conducted secretly at the ballot, and with the ability to challenge the results thereof at the court of law. Additionally, there can be no equal opportunities to participate in elections as contesters if some of the contesters are poor.

Applying the above concept and the principles of free, genuine, fair and verifiable elections in the Kenyan context, it is only the general elections held in 2002 which were credited for being conducted per the requirements of free, and fair election though not entirely.⁹⁹ The rests of the elections were full of controversy and manipulation. Incidences of voter bribery, election violence amongst other electoral vices characterize the exercises.¹⁰⁰

⁹⁶ Constitution of Kenya 2010. Art 81.

⁹⁷ See discussion at chapter 3 of this study on the legal underpinnings of free, and fair elections in Kenya.

⁹⁸ Nyanjom (n 85).

⁹⁹ Dr. Collins Odote and Dr. Linda Musumba Balancing the Scales of Electoral Justice: Kenyan Election Disputes Resolution and Emerging Jurisprudence, International Development Law Organization (IDLO) and Judicial Training Institute (JTI) (2013) <http://kenyalaw.org/ki/fileadmin/pdfdownloads/JWCReports/Balancing_the_Scales_of_Electoral-Justice.pdf>accessed 1 December 2019.

¹⁰⁰ See discussion at chapter 4 of this study.

1.7.2 Theoretical Framework

To establish the nexus between poverty and elections in Kenya, this study will refer to a few political, economic, and social science theories which shall aid in the analysis.

The study on how poverty affects the free and fair elections is underpinned by the Political economy theory. This theory is founded on the earliest works of Adam Smith, Thomas Malthus, and David Ricardo amongst others.¹⁰¹ The political-economic theory seeks to explain the interdisciplinary relations between economy, politics, and the law. The theory explicates how politics, political settings, and the economic structure impact on each other.¹⁰² Karl Marx places the political economy theory on dialectical materialism which centers on material or monetary facets of the people.¹⁰³ As per Karl Marx, dialectical materialism is pegged on the idea of man's intrinsic stimuli of commercial quests and needs.¹⁰⁴ He argues that the need and quest by man to acquire control and exercise political influence at all costs could result in the use of clandestine means and practices.¹⁰⁵

The political-economic theory will be useful in this study to explain the interdisciplinary relations between economy, politics, and the law in Kenya. It will explain how Kenyan politics influences the increase or the alleviation of poverty in Kenya.

¹⁰¹ Duncan K. Notes on the Theoretical Foundations of Political Economy, <<http://www.economia.unam.mx/jarojas/poleconprintFoley.pdf>> accessed 18 May 2019.

¹⁰² Weingast, Barry R., and Donald Wittman, 'The Oxford Handbook of Political Economy' (Oxford UP. Description Archived 2013-01-25 at the Wayback Machine and preview, ed., 2008).

¹⁰³ Political economy is an interdisciplinary branch of the social sciences that focuses on the interrelationships among individuals, governments, and public policy. It is a study of how economic theories such as capitalism, socialism, and communism work in the real world. The interdisciplinary approach draws upon sociology, economics, and political science to define how government institutions, an economic system, and a political environment affect and influence each other. WILL KENTON (2019) political economy at <https://www.investopedia.com/terms/p/political-economy.asp> accessed 9 January 2020.

¹⁰⁴ Dialectical materialism is a philosophy of science and nature based on the writings of Karl Marx and Friedrich Engels. It is a way of understanding reality; whether thoughts, emotions, or the material world. It emphasizes the importance of real-world conditions, in terms of class, labor, and socioeconomic interactions. This is in contrast to the Hegelian dialectic, which emphasized the idealist observation that human experience is dependent on the mind's perceptions.

¹⁰⁵ John Kenned, Tersoo Ikyase & Anthony Ejue, 'Political Violence and Democratic Stability in Nigeria' (2015) 4(8), *Review of Public Administration and Management* <https://www.arabianjbm.com/pdfs/RPAM_VOL_4_8/4.pdf> accessed 5 November 2017.

To interlink between economy and politics in Kenya will further be appreciated in the relationship between the political class and the citizens. Elite theory is applied in this instance to explain the domination culture of the political class over the electorates. According to Paieto, Mosca, and other proponents of the elite theory, human beings can never be saved from the domination of an elite arrangement.¹⁰⁶ That it is indeed difficult to have a rule by the ordinary citizens. This is because the conventional elite theoreticians classify the ruling elite in terms of higher individual abilities of those who govern.¹⁰⁷

According to elites, authority is constantly exercised by a privileged few. The theory propounds that society is always classified into a reigning minority and the ruled.¹⁰⁸ The elite are the most significant group in the political structure since they are endowed with the resources and political power to influence policy in society.¹⁰⁹ The elite theory posits that the privileged few who are at the helm of power cannot be trusted to steer development within society. As it were, they are concerned with their self-preservation and perpetuation. Their energies are thus geared towards attaining their own goals.¹¹⁰ The theory argues further that the elite's ambitious efforts to maintain themselves in power are not in line with the developmental policies that ought to be fronted to improve the welfare of the populace.¹¹¹

This study will borrow heavily from the elite theory in analyzing the social-economic alienation of the poor by the political elites in Kenya. The arguments will be backed by Marx's alienation theory to argue that the political elites would prefer when the mass is desperately poor to easily

¹⁰⁶ Nye Robert, *the Anti-Democratic Sources of Elite Theory: Pareto, Mosca, Michels,* (Sage, ISBN-10 : 0803998724,1977).

¹⁰⁷ Ibid.

¹⁰⁸ Duru, Onyekachi, 'The Relationship between the Elite Theory of Politics and the Concept of Liberal Democracy' (2012)<<https://ssrn.com/abstract=2147363>>accessed on 20 October 2019

¹⁰⁹ *ibid.*

¹¹⁰ Elite theory argues either that democracy is a utopian folly, or that it is not realizable within capitalism.

¹¹¹ Sen (n 26).

swindle them with bribes during an election.¹¹² The state being a crucial element of political economy in Kenya, the alienation process is highly encouraged in determining the direction of the output, circulation, and distribution of the resources to the detriment of the poor. This also creates inequality and the structural hegemony ideal for exploitation by the political elites.

The elites who hold power would not want to lose it but to hold on to it perpetually. To this end, the people's economic welfare comes at the bottom of their priority and they would mostly frustrate any efforts aimed at the improvement of the people's wellbeing as it happens in Kenya. Kenya has had since independence several policies and plans aimed at the eradication of poverty. However, the implementation of these policies by the government remains futile. The government has however been able to instill the culture of tokenism to appeal to the voters which work to preserve their social-economic status.¹¹³ For lack of jobs and opportunities, the voters would always rely upon the handouts distributed by the political elites during elections to make a living such that they cannot reject the repressive rule of the political elites.¹¹⁴

In seeking to explain the rationale behind the voters' choice of the "undesirable candidates" while leaving out others with realistic and ideal political ideologies, the rational choice theory will come in hand to explain the import of economic goals during elections.¹¹⁵ This theory contends that human beings are purposive and goal-oriented in their preferences or utilities that are set

¹¹² Ajisafe Blessing, 'Misery, The Alienated Class And The Nigerian Monied Democracy' (2019).<https://www.researchgate.net/publication/334771430_MISERY_THE_ALIENATED_CLASS_AND_THE_NIGERIAN_MONIED_DEMOCRACY/citation/download>accessed 13 September 2019.

¹¹³ Nyanjom (n 85).

¹¹⁴ Seyi Obafemi. 'Social Alienation, Voting-Buying And Choicless Democracy In Nigeria' (2019)<https://www.researchgate.net/publication/334771430_MISERY_THE_ALIENATED_CLASS_AND_THE_NIGERIAN_MONIED_DEMOCRACY/citation/download> accessed 8 October 2019.

¹¹⁵ Rational choice theory a study of political life influenced by the economic model of man captured under various headings of public choice, social choice and collective choice.

hierarchically in society.¹¹⁶ It is the view that discrete behavior is inspired by egocentricity or rather goal-oriented.¹¹⁷

It begins with the assumption that people have different wants, goals, and values. Since human beings live in a world of scarce resources, they have to choose between different options of action that lead towards the most preferred goal. It also assumes that in making the aforementioned choices, one will make the choice which s/he perceives to be most beneficial at the time. People observe and calculate based on various actions available to them and equate the benefits linked to each option and the probability of receiving the benefit. In rational choice theory, the highly valued rewards will be devalued if the actor thinks that it will be impossible to attain while enhancing the lesser valued reward in case the actor sees it is attainable.¹¹⁸

Rational choice theory gives a stab at elucidating the reasons why human beings go for choices with certain results; in what way they do so; and to envisage the kind of choices they will make in certain situations. The rational choice theory thus in this regard will help us to realize that politicians take advantage of the poverty state and seduce them with instant material incentives while soliciting for their votes and placing themselves at vantage positions as compared to their counterparts' poor contesters. The decisions made at that time are predictable given the economic circumstances of the people. It has been said that this theory is likely to be used in balloting conduct, political commitment, and collective organization.¹¹⁹

Rational choice theory is commonly employed in microeconomics. However, the same concepts or the theoretical fundamentals are used in political science Public Choice Theory or political

¹¹⁶ Mark Petracca, 'The Rational Choice Approach to Politics: A Challenge to Democratic Theory' (1991)53 *The Review of Politics*, 289 <www.jstor.org/> accessed 19 January, 2018.

¹¹⁷ Ibid.

¹¹⁸ Petracca (n 116).

¹¹⁹ William Goode "Rational Choice Theory," *The American Sociologist*, (1997)28(2), 22, 41 <<http://www.jstor.org/stable/27698826>> accessed 15 December 2017.

economy. Just as it happens in rational choice theory, public choice theory employs economic methods and tools to explain the patterns through which political choices and public decisions are made.¹²⁰ It is a study on how collective choices and decisions are made using economic concepts.

The theory argues further that, People's choices are self-interest and involve costs. That people select options that represent the best set of costs and benefits. That for instance, the voter would likely evaluate the cost of voting and that of not voting and opt for the least costly.¹²¹ This would therefore explain the reason why where voters are poor and voting would probably take them a whole day (queuing and voting), the majority would elect not to be involved in election matters such as voter registration or voting leading to a low voter turnout in Kenya.¹²² The theory holds further that people or individuals in political systems retort to inducements in foreseeable ways and lastly that People come up with economic systems capable of influencing people choices and incentives.¹²³ This will be useful in this study to bring forth the rationale behind economic inequality and the political tokenism in Kenya.

Significant to this study will be the Utilitarian theory to explain the importance of addressing the poverty challenge in Kenya to attain collective goodness and satisfaction. According to Bentham and Mill the proponents of this theory, the law should be enacted to yield "the Greatest Good, for

¹²⁰ Tullock Gordon, "public choice," *The New Palgrave Dictionary of Economics* (2008).

¹²¹ Mark Schug and Jennifer Fontanini 'Public Choice Theory and the Role of Government in the Past' (1994) 58(1)20,22<<http://www.socialstudies.org/sites/default/files/publications/se/5801/580107.html>>(accessed 16.August 2020).

¹²² Atascience Ltd, 'Poverty Levels in Kenya: How does it correlate with Election-related Matters?' <<https://www.datascience.co.ke/poverty-levels-in-kenya-how-does-it-correlate-with-election-related-matters/>>accessed 12 May 2019.

¹²³ Anthony Downs, 'Economic Theory of Political Action in a Democracy' (1957) 65(2) Journal of Political Economy,135,150 <<https://www.jstor.org/stable/1827369>>accessed on 30 August 2019.

the Greatest Number.”¹²⁴ Meaning that the objective of coming up with any law should primarily be to maximize utility and wellbeing of everyone intended to be applied upon.¹²⁵

Bentham termed utility as "that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness or to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered."¹²⁶ For utilitarianism, the law should not be drafted in unclear language. For instance, there should be no law that provides for the right to participate in elections and then another law that imposes cost obligations for participating in elections.¹²⁷ It is through voting where the government would ultimately know the utility implications of its actions where if the majority votes in favor of the government, then it implies that the government acted in the best interest of the majority and who are happy with the government's policy and vice versa.¹²⁸

The critics of the utilitarian theory have however raised concern over the interest of the minority in a state where the principle of utilitarianism is embraced in democracy. That unless the majority in such a state embraces concepts of equal protection, rule of law, human dignity, individual liberty, and the majority would pass a law to incriminate the minority without any recourse for the later. Further, in a state where the numbers elections can easily be manipulated or cooked, the state can imply utility in voting to continue with actions which in a real sense do not cause maximum happiness to the greatest number of the people.¹²⁹

¹²⁴ Jeremy Bentham is the founder of utilitarianism theory.

¹²⁵ Legal Theory Blog, 'Legal Theory Lexicon: Utilitarianism' (2009)<<https://lsolum.typepad.com/legaltheory/2009/04/legal-theory-lexicon-utilitarianism.html>>accessed on 15 August 2020.

¹²⁶ Bentham Jeremy, 'Of the Principle of Utility' in an Introduction to the Principles of Morals and Legislation. (London: T. Payne and Sons 1780) 1, 6.

¹²⁷ West's Encyclopedia of American Law, 'Utilitarianism' (2nd edn 2008)<<https://legal-dictionary.thefreedictionary.com/Utilitarianism>>accessed 20 August 2020.

¹²⁸ Richard Flathma, 'Forms and Limits of Utilitarianism'<<https://www.journals.uchicago.edu/doi/pdf/10.1086/291603>>accessed 12 August 2020.

¹²⁹ Ibid.

For utilitarianism, the distribution of happiness moves hand in hand with the distribution of means of happiness. To this end, the theory proposes an equal approach for the distribution of resources herein termed as the means of happiness by the government.¹³⁰ The theory further through its principle of “diminishing marginal utility” proposes for equity approach in favor of the poor to maximize happiness. The theory advocates for an increase to the poor where the poor would be given more than their rich counterparts. The rationale here is that the poor would be happier to receive more than the rich who would feel less pain to receive less.¹³¹

This study borrows profoundly on the above stated and explained theories to explain the interplay between poverty and elections in Kenya and the need to address poverty as the underlying problem in Kenya.

1.8 Literature Review

There exists a wealth of literature on democracy and elections by many legal scholars all over the world. It would thus be a fallacy for this Research Project to claim pioneer authorship in matters democracy, election law, and election practices generally, or even with specific reference to Kenya. However, there is scarcity as far as the underlying factors that hinder the realization of an election which is free, and fair is concerned.

Though this Research Project acknowledges the existence of literature on Kenya’s political economy, few of the authors have linked the two variables of economic status and elections in Kenya. Most of the literature available is generally on the importance of having a free, transparent, and fair election in Kenya with some also highlighting the challenges but rarely on

¹³⁰ Jeremy Bentham postulated that the greatest happiness of the people “requires that the external instruments of felicity be shared by the whole number in a proportion so near to equality as is consistent with universal security. Proposals to alter the distribution of wealth in line with diminishing marginal utility must, therefore, be conducted in accordance with the “disappointment-prevention principle”.

¹³¹ Stanford Encyclopedia of Philosophy, ‘Jeremy Bentham’ (2015) < <https://plato.stanford.edu/entries/bentham/#CivLawPolEco> > accessed 2 September 2020.

the underlying factor. This Research Project will seek to be inspired, recognize, acknowledge, and heavily rely on already written literature by several writers on this aspect.

Othieno Nyanjom's link of good governance to the practice elections and poverty fits well in this study. He opines that the practice of tokenism which flourishes mostly in the poverty-stricken population undermines the right to credible elections. This is very evident in Kenya going by the past elections held.¹³² That voter bribery undercuts the culture of good governance and the continuation of poverty and disparity.¹³³ He argues further that the challenges that encounter the participation and the conduct of elections in Kenya do not manifest themselves only at the election time but are always present and have some historical underpinnings.¹³⁴ This is well illustrated in Kenya where poverty has been perverse for a long and was indeed identified and pointed out as one of the enemies the country was to deal with at independence.¹³⁵

In his study, Galtung J. opines that the political system and its running in a state has a bearing in its economic welfare and poverty dominance. He categorizes poverty and which has an influence on the citizens' participation in politics as one of the unperceived forms of violence meted upon the citizens by the government. He argues further that where the citizens perceive their government as illegitimate the citizens may result in the chaos which affects the investment opportunities in the said country by the foreigners intensifying poverty.¹³⁶

After the contested presidential election in 2007 which led to violence in Kenya, in their piece Oluoko-Odingo and Alice Atieno posit that destitution and lack of food are prevailing problems for Kenya just as they are a constant problem for many developing countries. This is underscored

¹³² See discussion in chapter 4 of this study on poverty and voter bribery.

¹³³ Nyanjom (n 85).

¹³⁴ Ibid.

¹³⁵ Poverty was amongst the three notorious enemies; health, illiteracy and ignorance the independent government had identified at independence and undertook to eradicate. Unfortunately, there was no success on the same.

¹³⁶ Galtung, Johan, 'Cultural Violence' (1990) 27(3) Journal of Peace Research, 291, 305 <<https://doi.org/10.1177/0022343390027003005>>accessed 18 August 2020.

by the inability of many affected people in the country to be unable to lead dignified and sustainable lifestyles.¹³⁷

The authors opined that, notwithstanding the numerous resources and efforts directed towards the eradication of poverty since independence, the situation remains rather gloomy. They further expressed their fear that as an aftermath of the post-election chaos of 2007, that the country risked facing famine-like conditions which would spur increased helplessness for a big chunk of the rural population. That unless the government adequately addresses the primary causes of disparity, its efforts to eliminate poverty and ensure food security as outlined in the vision 2030 policy will be fruitless.

The piece also comprises proposals on how to address poverty and food insecurity. What the authors here, unfortunately, failed to capture was the link between the poverty state in Kenya and its relation to election malpractices to which some resulted in the post-election chaos in 2007 and the reason as to why each government has been unable to fight the poverty menace something which this study seeks to link. They failed to place or trace poverty as an existing condition pre and post 2007 election violence.

In his Research Project “Consequences of a flawed presidential election”, Abuya EO assesses the effect of a flawed presidential election with Kenya as a case study.¹³⁸ In his view, there exists a nexus between elections and the enjoyment of fundamental freedoms. He argues that sitting incumbent governments in Africa have to conform to the international standards of electoral conduct for the African States to tow the democratic line.¹³⁹

¹³⁷ Oluoko-Odingo and Atieno Alice, ‘Determinants of Poverty: Lessons from Kenya’ (2009) 74(4) *GeoJournal*, 311, 31 <<http://www.jstor.org/stable/41148341>>accessed 3 June 2018.

¹³⁸ Abuya Edwin, ‘Consequences of a flawed presidential election’ (2009) <<https://doi.org/10.1111/j.1748-121X.2008.00110.x>>accessed 11 November 2017.

¹³⁹ The author contends that there is a link between free and fair elections and the enjoyment of human rights. While focusing on the violence that rocked Kenya in 2007, he concludes by asserting that a rule of law culture must be embraced if human rights and democracy are to flourish in Africa.

The paper centers on the 2007 post-election chaos and reviews the possible causes and consequences of the impugned election. The author concludes with an observation that adherence to the canons of the law has to be observed to enjoy human rights and democracy in Africa. This Research Project will endeavor to unpack the normative content of the concepts of free, and fair elections and the rule of law and thereby interrogate the author's analysis of the concept of free, credible and fair elections.

The study will also rely on the writings of Kibwana, K., Akivaga, S. Kichamu., Wanjala, S. C. (2002).¹⁴⁰ These writers emphasized on what Civic Educators ought to inform the Electorates on the proposal for strengthening civic education in making a case for reform in the electoral. The writers also point out on the (mis)use of young people during the electoral process by the affluent politicians. Here the Research Project will examine the negative use of the energies of young people to perpetrate acts of violence during election periods while bribing them with as little as Kenya shillings one hundred.

While explaining the nexus between poverty and credible elections, Amartya Sen espouses that fundamental liberties are the principal levers that lead to development. There is a significant pragmatic link between different types of freedoms. To Sen, development entails set linked freedoms. For instance, civil liberties like the right to elections aid in the realization of economic stability and vice versa. He suggests that economic opportunities like taking part in trade and production can facilitate individual growth together with available public resources for society's social needs.¹⁴¹ Sen points out to the presence of Poverty as described by failure or inability to enjoy at least one freedom.¹⁴²

¹⁴⁰ Smokin Wanjala, Akivaga & Kibwana, *Yearning for Democracy: Kenya at the Dawn of a New Century*, (1st Edn, Nairobi Claripress 2002).

¹⁴¹ Sen (n 26).

¹⁴² Sen, Amartya, and 'Development as freedom' (2nd edn Oxford New York: Oxford University Press, 2001).

On poverty, Sen espouses further that, poverty anywhere is a threat to prosperity everywhere. Lack of freedom from want leads to lack of freedom of choice and the free will to exercise political rights accordingly. Where there is poverty, prosperity even in the exercise of one's Constitutional rights, like political rights to participate in elections as a voter and the right to contest in an election is a threat. Conversely, political liberties like the right to freely participate in an election enhance economic security. Hence, various classes of freedoms reinforce each other.¹⁴³

In Haggard and Kauffman's view, the dissemination and organization of interests determine the impact of democracy on social policy. The authors assess the impact of historical leanings of countries in terms of social policies and discuss how the same can determine future decisions on social policy. Critical realignments and political coalitions produce typical dictatorial models that further, create areas that influence how social policies are developed in emerging democracies.¹⁴⁴ They posit that the social question of how to deal with poverty ought to be at the forefront and be dealt with. This is because extreme poverty and disparity affect democracy negatively and facilitate the entrenchment of authoritarian and populist regimes.¹⁴⁵

Free-market-oriented economists espouse that voters are irrational, among other things.¹⁴⁶ They maintain that many of the electorates have little knowledge and awareness about political issues more so those dealing with economics. On the contrary, they are strongly biased towards the few matters on which they are fairly informed.¹⁴⁷

¹⁴³ Sen (n26).

¹⁴⁴ Haggard and Kaufmann, 'Poverty, Inequality, and Democracy' (2009) A Conference of the Network of Democracy Research Institutes (NDRI) organized and cosponsored by The International Forum for Democratic Studies, The Center on Democracy, Development, and the Rule of Law, The Institute for Public Affairs, with the financial support of the United Nations Democracy Fund (UNDEF).

¹⁴⁵ Ibid.

¹⁴⁶ David Apter. 'The Politics of Modernization' (the University of Chicago Press, Chicago 1965).

¹⁴⁷ Caplan Bryan 'From Friedman to Wittman: The Transformation of Chicago Political Economy' (2005) *Econ Journal Watch*.

Democratic enthusiasm dictates that, in such an environment, policies, regulations, and laws aimed at the actualization of the right to free, and fair election, should have regard to the prevailing challenge of poverty. Poverty creates a sense of hopelessness which is manifested by a pulling out from public matters leading to lethargy or triviality. Poverty leads to hopelessness in the government's ability to improve the welfare of its citizens. It weakens the resolve of citizens to act in elections freely and independently.¹⁴⁸

According to Makau Mutua and Salim Ahmed Salim, the politics of destitution lead to the poverty of politics. They opine that Kenya is a forsaken country as long as the majority of its people live in destitution. With the prevalence of hunger, no meaning can be attached to the political rights and civil liberties. Unless democracy caters for basic need especially food, there will be a setback on democracy in Africa.¹⁴⁹

As Poverty has different dimensions, poverty of education plays a significant role in electoral challenges. Dominica opines that an illiterate person would mostly make an uninformed decision in elections. That such a person would easily be swayed by the charisma of the elite candidate coupled with other mundane things leading to a high likelihood of casting a wrong vote. Poverty may make an uneducated voter fall for promises of financial help among other petty and superficial promises in exchange for their vote.¹⁵⁰ This is very common in Kenya. As in the opinion of Othieno, election campaigns in Kenya are often characterized by roadside declarations and promises such as road constructions, construction of public facilities, water, and electricity provision which are hardly delivered but promised in all elections cycles.¹⁵¹

¹⁴⁸ GNA, 'Poverty is the greatest threat to democracy' (2005) <<https://www.modernghana.com/news/92269/poverty-is-the-greatest-threat-to-democracy.html>>accessed 30 October 2019.

¹⁴⁹ Kwame Boafo-Arthur, 'Democracy and Stability in West Africa: The Ghanaian Experience' (2008), Claude Ake Memorial Papers No. 4; Department of Peace and Conflict Research Uppsala University & Nordic Africa Institute Uppsala > <http://nai.diva-portal.org/smash/get/diva2:279373/FULLTEXT01.pdf>.>Accessed 30 October 2019.

¹⁵⁰ Dominica F, 'Free Market and Democracy' (2018) < <http://www.hrpub.org/> >Accessed 5 June 2018.

¹⁵¹ Nyanjom (n85).

1.9 Research Methodology

This critical and analytical discourse shall while adopting the Sihanya Mentoring LLM Research Project Research Project Guidelines method of citation, make constructive usage of a mixed research methodological approach.

It relies on both the Doctrinal and historical methodologies in chapters one and two to examine and appreciate the historical background of poverty challenges in free, and fair elections in Kenya. Chapter three employs the doctrinal research methodology to evaluate and appreciate the various international, regional, and domestic laws which have been adopted and enacted for the realization of an election which is free, and fair in Kenya. Chapters four and five adopt also some doctrinal case study, as well as the library and desktop-based research methodologies to test the hypothesis under the study.

1.10 Research Project Structure and Chapter Outline

In the quest to answer the research questions, the study has 5 Chapters.

Chapter 1 provides an over-all introduction to the topic of study. The chapter provides the research background, research problem, research objective, research questions, and the research hypothetical responses to the research queries. The chapter also contains a review of the existing literature, theoretical and contextual framework, research methodology, and chapter outline. This is necessary to provide an overview at a glance of the research.

Chapter 2 reviews the historical background of poverty as a challenge to free, and fair elections in Kenya. The chapter examines this through historical social, economic, political, and legal contexts in Kenya. The chapter brings out the historical antecedents that entrenched political and economic domination of one group over another. Those policies and laws were used as tools of impoverishing and for the perpetuation of the political alienation of the poor. It traces this from pre-colonial, colonial, and post-colonial periods in Kenya.

Chapter 3 analyzes the legal and institutional framework on the practice of elections in Kenya. This chapter lays down the Institutions and the body of constitutional, statutory, and delegated legislation governing elections in Kenya. The chapter seeks to examine whether the text of the law as it is in Kenya addresses poverty as a challenge to free, and fair elections.

Chapter 4 presents a discussion on the interlink between the poverty challenge and the actualization of the right to free, credible and fair elections in Kenya. The study under this chapter reflects poverty as the underlying challenge to the realization of free, and fair elections in Kenya at the government level, voters, and candidate of elections.

Chapter 5 is a compendious of findings, conclusions, and recommendations on the poverty challenges on free, and fair elections in Kenya. The Chapter then offers recommendations on how the right to free and fair elections in Kenya can be actualized.

CHAPTER 2

HISTORICAL ANTECEDENTS ON POVERTY CHALLENGE ON FREE, AND FAIR ELECTIONS IN KENYA

2.0 Introduction

It is generally agreed that people's present existence is dictated to a large extent by the very people's history. In light of this general avowal, the past in the context of democratic and electoral participation by the poor mass in Kenya must be assessed.

This chapter traces the historical link between poverty and elections in Kenya. It traces the historical democratic challenges occasioned by perpetual poverty and politics defined by money; use of money and material incentives in Kenya during elections and the challenges experienced by the voters and election candidates for being poor. This is starting from the traditional mode of governance and election practices and the subsequent advent of the current democratic electoral structure by the colonial government as the official electoral structure.

The chapter proceeds further to bring out the British model of governance *vis a vis* economic deprivation of the natives limited participation in elections only for those who had properties and some level of education to participate in politics. The last segment of the chapter continues the discussion and the link between poverty and election post-independence and how the independent government continued with the colonial political economic legacy.

That the globally established standards for electoral systems are universal franchise aimed at just representation and parity of poll; and free, and fair polls, which are free from chaos, intimidation, inapt influence, or fraud. That the said standards may only be achieved when people can meet the cost of the elections, campaign funds, electoral justice amongst others.

Poverty would inter alia limit both the freedom and the choice of voters during elections. That lack of resources to run for a political office would lead to a choiceless democracy and the ultimate choice would not be based on political manifesto but based on who pays more during

campaigns. How this cardinal concept has been propagated and adhered to shall be our main preoccupation while discussing the historical democratic underpinnings in Kenya.

The Chapter traces the commercialization of politics and the link between poverty and elections from the foregoing perspective. In undertaking this task, the chapter acts as a background archive thus anticipating and anchoring our first objective.

The core argument in this chapter is that Kenya should have been in a position to note the election challenges posed by poverty in its realization of an election that is free and fair. That this realization would aid in the betterment of the election practices in Kenya which are free and fair, enactment of various election laws, and the institutions mandated to conduct elections. The chapter reveals further that, poverty or deprivation of one's means of resources or the ability thereof, stripes one's dignity and esteem which are key in the pursuit of the electoral position.

To this end, the chapter is split in three segments. The first segment deals with the concept of governance and elections in Kenya pre-independent. The second section will be governance and elections in Kenya during the colonial period and then governance and elections in Kenya post-independence in section three.

2.1 Governance and Democratic Alienation of the Poor in Pre-colonial Kenya

Political domination and alienation of the poor is not a recent phenomenon in Kenya and Africa at a large. Indeed, it dates back to the African democracy and governance practices in pre-colonial periods. This is even though the concept of the election being alien to Africans.¹⁵²

Traditionally, the African political system was largely based on the concept of consensus rather than competitive elections.¹⁵³ Leaders occupied power either through inheritance, gerontocracy,

¹⁵² Paul David, Heinz Eulau & Roger Gibbins 'Election political science'(2015) Encyclopedia Britannica<<https://www.britannica.com/topic/election-political-science>>accessed 14 June 2019; Globally, the practice of elections is said to have its roots initially in ancient Greece and ancient Rome where it was practiced during the medieval age to choose leaders like the Holy Roman Emperor and the Pope. However, the origin of polls in the modern world is associated with the steady development of representative government in Europe and North America beginning in the 17th century.

or by being selected.¹⁵⁴ Though the attributes of free and fair, neutrality, truthfulness to the customary edicts, tolerance, and liberty from personal preference were highly observed, the poor were indirectly suppressed systemically through traditions and practices which negatively affected their participation.¹⁵⁵

In Pre-colonial Kenya, there was no centralized authority for executive governance and an official justice system.¹⁵⁶ Kenya just like many of the African countries was inhabited by a variety of groups living separately.¹⁵⁷ Except for Wanga community, none of the other Kenyan tribes had established themselves as a kingdom as it was the case with Baganda, Bunyore, Ankore, and Toro in Uganda.¹⁵⁸ Professor Peter Ndege opines that during the pre-colonial period, little motivation existed to spur big state-formation. As it were, the principal administrative unit was what he terms as the ‘collectivity of a few families related by blood’.¹⁵⁹

There thus were no established systems of elections or governance applied to all the groups around. Each group had a tribal system of governance represented by groups of elders but possessed no specific centralized government. The basic unit of control was the extended family and the clan. Above the family were clans demarcated by shared ancestry and were often loosely ruled by a tribal council of elders.¹⁶⁰

¹⁵³ Mtapuri (n12).

¹⁵⁴ Seyi (n112).

¹⁵⁵ Christoffer Cappelen & Jason Sorens, ‘Pre-colonial centralisation, traditional indirect rule, and state capacity in Africa, Commonwealth & Comparative Politics’ (2018), 56:2, 195-215, DOI: [10.1080/14662043.2017.1404666](https://doi.org/10.1080/14662043.2017.1404666) (accessed on 08.09.2019).

¹⁵⁶ John Hatchard, ‘J. B. Ojwang, Constitutional Development in Kenya: Institutional Adaptation and Social Change, Nairobi, ACTS Press, 1990, 257 Pp. (1991) 35 Journal of African Law 213.

¹⁵⁷ owili j. Social, economic and political organisation of kenyan societies in the 19th century; at <https://studylib.net/doc/6907162/social--economic-and-political-organisation-of-kenyan-soc>. Accessed 18 October 2019.

¹⁵⁸ Ben Nwabueze, *Constitutionalism in Emergent States*, (Hurst Publishers, London, 1973) 2.

¹⁵⁹ Ndege Peter ‘Colonialism and its legacies in Kenya’ (2009)” Lecture delivered during Fulbright-Hays Group project abroad program: July 5th to August 6th 2009 at Moi University Main Campus<<http://africanphilanthropy.issuelab.org/resources/19699/19699.pdf>>accessed 25 May 2019.

¹⁶⁰ Ministry of East African Community and Regional Development, ‘History of Kenya’ (2019)<<https://meac.go.ke/history-of-kenya>>accessed on 30 May 2019.

Among the Kamba tribe, for instance, it was not possible to point out at any single person as the leader of the entire tribe. If an important issue requiring attention, the tribal or clan council of elders *Thome wa atumia or atumia ma thome* would convene a meeting to discuss the issue.¹⁶¹ There was however no permanent council of elders.¹⁶² The elders and who were only men were given this task because they were deemed experienced to deal with the issues at hand.¹⁶³ Like in early Greece, male chauvinism was displayed to a great extent among the Kamba as women and youth were not allowed to participate in the decision-making process nor own any means of production. The men were deemed as the head and the owners of all the properties belonging to the family. This system was a replica in other Kenyan tribes such as the Kikuyus who had a *kiama*, Merus with *NjuriNjekes* et al.

Wanga community was the only community in the precolonial era which had established a kingdom as early as in the 18th century called the Wanga Kingdom. The wanga kingdom had an integrated organization of leadership headed by the king, whom they call a Nabongo.¹⁶⁴ One got to be a King not through a democratic process but inheritance. Currently, Peter Shitawa Mumia II is the King and the 14th Nabongo of the Wanga.

The pre-colonial era mode of governance and democracy has been criticized for lack of avenues for enunciating unconventional views from those supposed by the governing gerontocracy. Those imprudent enough to voice their discontentment had to escape with their factions to start their new communities.¹⁶⁵ Igboin Benson while quoting Keuder and Williams posits that, in pre-colonial Africa, the king was supreme. He was above the law. He was not answerable to anyone

¹⁶¹ Cyrus Mutiso, 'Creation of the Kitui Asomi' (1977) Working Paper No. 304 <erepository.uonbi.ac.ke/bitstream/handle/wp304-316643> accessed 3 March 2019.

¹⁶² Guyo Fatuma, 'Colonial and post-colonial changes and impact on pastoral women's roles and status' (2017) 7 10.1186/s13570-017-0076-2.

¹⁶³ Rose Mutunga, 'The Akamba traditional religion and Christianity: a philosophical study' (1989); A Thesis submitted in partial fulfilment for the degree of Master of Arts in Philosophy in the University of Nairobi.

¹⁶⁴ Kruger (n50).

¹⁶⁵ Tee Ngugi, "Pre-colonial era was no democratic paradise, our histories are records of brutal tyranny," *The East African* (Nairobi, 25 October 2014) < <https://www.theeastafrican.co.ke/oped/comment/Pre-colonial-era-was-no-democratic-paradise/434750-2498954-jpxdyaz/index.html>> accessed 14 June 2019.

regarding his leadership style, resource allocation, or collection of taxes. The king was viewed as an embodiment of God on earth.¹⁶⁶ The same way no one could question God, his agent could not be questioned either.¹⁶⁷

There was no limitation to the powers of the King. Everyone living in his kingdom together with their properties was subject to the King's rule. For instance, the King could take another man's wife to be his own without resistance from him. Kings were like demigods with absolute power. They spearheaded the operations of the army, they controlled religious affairs like priest-hood and they presided over political affairs.¹⁶⁸

2.2 Governance and Economic and Democratic alienation of the Poor in Kenya's Colonial Era

Political alienation of the poor during the Colonial period in Kenya assumed a different dimension from governance by the elders and kings to administration by the Imperial British East Africa Company (IBEAC).¹⁶⁹ The British Government which had taken over the region comprising Uganda and Kenya in 1885 engaged the Company (IBEAC) to administer the newly acquired region on their behalf.¹⁷⁰

The exclusion and the alienation of the Natives by the British government were however met by ruthless resistance by the Africans. This was however despite conflicts between rival factions such as the Kabaka, French Catholics, and Protestants leading to a civil war in January 1892 making it difficult for IBEAC to execute the duties conferred upon it by the British

¹⁶⁶ Ishola Williams, 'Can our culture and traditions overcome corruption?' (Malthouse Press, Lagos 2007).

¹⁶⁷ Christian Keulder, 'Traditional leadership' in Christian Keulder *State, society and democracy: A Leader in Namibian Politics* (Macmillan Publishers 2008) 152.

¹⁶⁸ Benson Igboin, 'Traditional leadership and corruption in pre-colonial Africa: How the past affects the present' (2016) 42(3) *Studia Historiae Ecclesiasticae*, 142,160< <https://dx.doi.org/10.17159/2412-4265/2016/228>>accessed 16 June 2019.

¹⁶⁹ The Berlin conference of 1885 saw the division of Africa into distinct territories. This marked the beginning of colonization Kenya and the Africa at large.

¹⁷⁰ Oliver Roland, 'Some factors in the British occupation of East Africa, 1884-1894' (1951)15 (1) *Uganda Journal*, 49, 64.

government.¹⁷¹ Direct administration by the British Government was the next option in 1895 and eventually declaring what would later become Kenya, the East African Protectorate with its headquarters in Mombasa.

Several strategic factors raced the process of colonization in Kenya and Africa, however, the economic one was the most dominant intended to make the colony more profitable by preferential treatment of the whites and the natives.¹⁷² For instance, there was a concentration on the white agricultural highlands by the colonial government while neglecting development on the native reserves effectively reducing the Natives into cheap laborers.¹⁷³

There was also a need to acquire new sources for raw materials to feed the industries which had increased following the Industrial Uprising in Europe. The British needed to seek markets to buy the goods produced by the established industries. It was at the same time that the Industrial Revolution had accelerated the growth of surplus capital and it was essential to find areas where this capital could be invested and Africa provided such fertile ground.¹⁷⁴ For the smooth realization of these economic goals, the British had first to stamp their political authority in Africa exclusively.¹⁷⁵

The foregoing saw the establishment of the Legislative Council (LEGCO) in 1907 by the British colonial administration whose membership was drawn from the colonial administration. The LEGCO initially comprised of members who were nominees and or appointees as opposed to

¹⁷¹ Maina, Ephalina, Oboka, Wycliffe, Makong'o and Julius, 'History and Government Form 2'. (East African Publishers, 2004) 78.

¹⁷² Winans Edgar, 'E. A. Brett. Colonialism and Underdevelopment in East Africa: The Politics of Economic Change, 1919-1939. Pp. Xi, 330. New York: NOK, 1973. \$16.00. Paperbound, \$4.95' (1974)412(1) The ANNALS of the American Academy of Political and Social Science, 171,172, doi: 10.1177/000271627441200124.

¹⁷³ Ibid.

¹⁷⁴ Caroline Elkins, 'Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya' (Henry Holt and Company, New York 2005) 5.

¹⁷⁵ G.M. Njuguna, *A Critical Appraisal Of The Electoral Laws In Kenya With Special Reference To The 1979 General Elections*'(1982) A Dissertation Submitted In Partial Fulfillment Of The Requirement For The LLB Degree, University Of Nairobi.

being elected purely of European descent.¹⁷⁶ There was no single African or any representative until the year 1909 when though with an indomitable opposition from the then governor Sir Percy, saw the first Asian and non-European member, being appointed to the Council.¹⁷⁷

The concept of elections in Kenya for representatives in the Legislative Council started in 1924 after the Ordinance was amended to provide for the election of five Indian-communities and one representative of the Arab community.¹⁷⁸ The next polls held in 1924 brought in for the first time one a missionary Reverend J.W. Arthur who was nominated as the first official member of the Legislative Council to represent Africans.

The initial assumption here was that Africans were unable to represent themselves for they were illiterate (a view which is attributed to the poor) and thus a representative was nominated to speak on their behalf notwithstanding that the views of Missionaries and the Africans did not always coincide, nor was the effectiveness of the African case enhanced by the discretion given to the member to put the African case as he judged best.¹⁷⁹

This went on until the 1944 elections when after agitation by African through regional political parties led to the nomination of Eliud Mathu as the first African nominated to the Council as a representative of the African interests; and Benaiah Ohanga who became the second African member in 1946. These were only nominated on behalf of Africans by the Colonial Government as opposed to Settlers, Arabs, and Indians who had been granted the right to vote for their representative after the 1919 Ordinance.¹⁸⁰

¹⁷⁶ Parliament of Kenya, 'Parliament Historical Background' <[http://www.parliament.go.ke/Parliament Historical Background](http://www.parliament.go.ke/Parliament_Historical_Background)> accessed 15 June 2019.

¹⁷⁷ Abdullahi Sara "Kenya at a Crossroads: Administration and Economy Under Sir Percy Girouard 1909–1912 (Lexington Books, Lanham 2015).

¹⁷⁸ The Legislative Council (Amendment) Ordinance of 1924.

¹⁷⁹ Yash Pal Ghai and McAuslan, *Public Law and Political Change in Kenya* (Oxford University Press 1970)36.

¹⁸⁰ The Cabinet, 'The Lyttleton Constitution' (2017)<<https://cabinets.kenyayearbook.co.ke/the-lyttleton-constitution/>>accessed 18 August 2018.

The Lyttleton Constitution of 1954 was the first broad-based constitution inculcating all races as for the 1st time granted Africans the voting rights. This Constitution however for the first time brought about the nexus between politics and poverty. Africans who had no properties or with a certain level of education were not allowed to vote. One would only qualify to vote if they were over 40 years of age and with substantial assets, or those who were educated and over 21 years.¹⁸¹ The following 1957 polls were conducted to elect members to fill the eight seats.¹⁸² The Lennox-Boyd Constitution which was introduced in 1958 enlarged membership of the Council of Ministers to 16 members, whereby eight were elected and eight were appointed.¹⁸³

Demand for full independence under an African majority government was garnering support. There was a push by Africans for a constitutional conference for purposes of negotiating independence. The push led to the Macleod Constitution in 1960 which provided for a bulk of Africans in LEGCO (65 members) and Council of Ministers. It also alluded to the independence and self-governance of Africans.¹⁸⁴ This also led to the first election connoting one man one vote which was conducted in 1961. During this elections, the Kenya African National Union (KANU) garnered the highest number of seats in parliament despite the European dominance.¹⁸⁵

Under the Lancaster Constitution, 1962, LEGCO was a bilateral parliament comprising of a Senate and a House of Representatives consisting of 38 Senators and 129 members in the House of Representatives. Majority of the seats were won by KANU with Mzee Jomo Kenyatta becoming the inaugural Prime Minister of Kenya.¹⁸⁶

¹⁸¹ Douglas Kiereini (2018) "Constitutional changes in Kenya between 1952-1963," *Business Daily Newspaper*, at <https://www.businessdailyafrica.com/lifestyle/society/Constitutional-changes-in-Kenya-between-/3405664-4269542-3epia4/index.html> >accessed 16 June 2019.

¹⁸² Bernard Mate, Ronald Ngala, Tom Mboya, OgingaOdinga, MasindeMuliuro, Lawrence Oguda, Daniel arapMoi and James Muimi became the first African elected members.

¹⁸³ S. N. Mwangi, Media Development Association (Kenya), & Konrad-Adenauer-Stiftung (Kenya), *A History of Constitution Making in Kenya* (2012).

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Factsheet , 'History of The Parliament of Kenya, The National Assembly of Kenya'(2017) <[www.parliament.go.ke > sites > default > files > 24_History_of_the_Parliame.](http://www.parliament.go.ke/sites/default/files/24_History_of_the_Parliame.)>accessed 25 May 2019.

The 1963 Independence Constitution contemplated a federal arrangement as it divided the country into six regions.¹⁸⁷ In 1964, Kenya ceased to be British Colony and gained the status of being a Republic with Mzee Jomo Kenyatta becoming its inaugural autonomous President not answerable to the Queen of England. The bicameral parliament was short-lived following a merger between the Senate and the House of Representatives to form the National Assembly in 1966.¹⁸⁸

By this time the franchise had been extended. Requirements for qualification were the capability to read and write one's language, to be over forty years of age, and to hold an office in a wide variety of schedule positions during registration. One had to be earning a minimum income of £75 per annum. These requirements were very discriminative for the poor Africans native as the majority had not acquired any education or properties.¹⁸⁹

It is noteworthy that, the foregoing economic status of the natives had a bearing from the colonial administration which impoverished the natives by forcible migration and resettlement of different communities in different places, forced labor, and high taxes.¹⁹⁰

As African political alienation was taking place, the Africans impoverishment was also ongoing with the British government's introduction of capitalism in the protectorate. The construction of the Ugandan Railway radically altered trade and other economic activities in Kenya.¹⁹¹ Upon completion of the Ugandan railway in 1902, the Colonial government to ensure that the Railway was economically viable invited more Europeans settlers from Britain and started large scale

¹⁸⁷ The Legislative Council (Amendment) Ordinance of 1924.

¹⁸⁸ Mtapuri (n12).

¹⁸⁹ Ibid.

¹⁹⁰ Peter Ndege, 'Colonialism and its Legacies in Kenya' (2009) Lecture delivered during Fulbright – Hays Group project abroad program: July 5th to August 6th 2009 at the Moi University Main Campus.

¹⁹¹ The Uganda Railways was constructed in the period 1896-1902.

farming in the said fertile (white) highlands. The white highlands were prime agricultural land that was alienated from Africans for white settlers.¹⁹²

The White Highlands which comprised the most fertile soils, with constant rainfall and cool climate were excluded from non-white people through the adoption of the Kenya Highlands Ordinance introduced by the British government. Indeed the European settlers had by 1930 occupied more than 70% of the fertile agricultural lands in Kenya.¹⁹³ Those who had been in occupation of the White Highlands before were shifted to other places. For instance, the Maasai,¹⁹⁴ Kikuyu of Southern Kiambu, Nandi, northern Luhyaland were dispossessed and settled in less fertile drier lands, otherwise referred to as African reserves or settlement schemes.¹⁹⁵

Alienation of land and dispossession of Africans from their lands led to the restructuring of the social and economic arrangements of the society. It resulted in a shortage of arable land among Africans affecting the livelihood of many communities and who used to rely on the same land. Population pressure in settlement schemes disrupted the social set up of families as men who were supposed to be heads and breadwinners in the society relocated to urban centers and settlers' farms as workers. Most of the families became poor as a result.¹⁹⁶

Apart and upon acquisition of the Land from the locals, the settlers required Labor without which the agricultural economy would not flourish. The British came up with several policies aimed at ensuring that there would be a constant supply of cheap African-wage labor. They employed five key policies to acquire and administer African labor.¹⁹⁷

¹⁹² William Ochieng' and Robert Maxon, *An Economic History of Kenya* (East African Publishers 1992) 113.

¹⁹³ Bracking Sarah, 'The Political Economy of Chronic Poverty' (2003) < <http://dx.doi.org/10.2139/ssrn.1754446>> accessed on 30.05.2019).

¹⁹⁴ Maasai had been displaced by 1914 by the colonial settlers and confined to 20% of their ancestral land.

¹⁹⁵ David Anderson, *Histories of the Hanged: The Dirty War In Kenya And The End Of Empire*, at. 21.

¹⁹⁶ Nwabueze (n 158).

¹⁹⁷ Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (Henry Holt and Company, New York 2005) 15.

To ensure that there was no unity or any clamor for political inclusion, the settlement schemes or African reserves above mentioned were set specifically to settle each African ethnic group that had been relocated differently. Since the European administration did not open up alternative tracks of land where Africans would migrate to as population surged, the people were forced to move to the settler wage-earning labor.¹⁹⁸

The pass or *kipande* system was also introduced by the settler government in 1919 to regulate the passage of the African labor force and to monitor the history of their occupation. The system required all the men of African native departing from their native reserves to carry a license, which had the details of their name, thumbprint, ethnic group, previous engagement history, and their present employer's signature.¹⁹⁹

Through the skewed legal frameworks, the native taxes such as hut tax and a poll tax were increased unduly to create the need for money to settle the taxes. This pushed Africans to seek wage-paying employment in the Kenya Highlands.²⁰⁰ Hut and poll taxes were paid based on one's wealth in that the wealthier you were the more you paid.

The colonial government further came up with laws restraining Africans from planting some of the then most profitable cash crops like coffee, tea, and sisal to ensure that there was no economic competition with the white settlers. Whereas coffee farming among Kenyans was not illegal, coffee growers needed to acquire a license which was extremely hard for Kenyans to get. This increased poverty and vulnerability to the natives living in rural areas and which persist to date.²⁰¹

¹⁹⁸ *Ibid.*

¹⁹⁹ Van der Straaten, Jaap. (2019). Hundred Years of Servitude. From Kipande to Huduma Namba in Kenya. 10.13140/RG.2.2.27401.29281.

²⁰⁰ Tiyambe Zeleza, 'The Colonial Labour System in Kenya' in William Robert Ochieng' and Robert M. Maxon, (eds) *An Economic History of Kenya* (East African Publishers, Nairobi 1992) 178.

²⁰¹ Nwabueze (n158).

The foregoing was aimed at ensuring that Africans were at the periphery of the economy working in the poorly paid European settlers farms. Furthermore, the involvement of Africans in politics was limited to the local government level. Thus, Africans could not compete with British farmers and the government either economically or politically.²⁰²

Peter Ndege while on the question of land smears blame Kenya's adoption of the Swynnerton Plan of 1954, which assigned land to a few persons. He argues further that the Swynnerton Plan was amongst other plans to promote several individuals who would support colonialists during the fight for independence.²⁰³ This plan created landed and titled village elites with small uneconomical lands.

The colonial destructive import of the Swynnerton plan was the push for land to be held not majorly for agricultural purposes, but speculation. In that regard, even after independence, the few elites who acquired land were either civil servants or powerful politicians. The land they held was not optimally used for farming since they were not full-time farmers. Rather, they used the land for speculation.²⁰⁴

The above is a clear manifestation of how colonization which was thought to bring civilization and enlightenment to Africans was for economic exploitation and wealth accumulation by whites with little regard to Africans development.²⁰⁵ Unfortunately, this persisted into the post-colonial period as demonstrated hereinbelow.

²⁰² Muteshi Alexander, *'Ethnicity and Kenya's Transition to Democracy, 1990 to 2007'* (2010) Thesis Submitted In Partial Fulfillment Of The Requirements For Award of A Degree of Master of Arts In Political Science And Public Administration, University of Nairobi.

²⁰³ Odhiambo Ndege, 'From accumulation of women and children to "land grabbing," Agrarian Kleptocracy and the Land Question in Kenya' (2012) Inaugural Lecture Moi University, Moi University Press, Moi University, Eldoret<<http://ir.mu.ac.ke:8080/xmlui/bitstream/handle/123456789/564/Ndege%20Inaugural%20Lecture%2016-.pdf?sequence=1&isAllowed=y>>accessed 28 June 2019.

²⁰⁴ Bracking (n193).

²⁰⁵ Nick Wanjohi, *Political Parties in Kenya: Formation, Policies and Manifestoes*, (Views Media, Nairobi 1997)44, 47.

2.3 Economic and Democratic alienation of the Poor Post-colonial era in Kenya (1963-2017)

As will be demonstrated in this segment, the attainment of independence in Kenya in 1963 ushered in a new era of economic and political alienation of the poor by the African Political elites.²⁰⁶

The first election held in 1963 was conducted comprising of several political parties where Jomo Kenyatta emerged the winner with Kenya National Democratic Union (KANU).²⁰⁷ However, this was short-lived as in 1969 and 1974 the elections were conducted under a *de facto* one-party system.²⁰⁸ This happened after the KADU Parliamentarians who were then in the opposition joined the ruling party KANU.²⁰⁹

There were a series of Constitutional amendments that were aimed at the centralization of executive powers as opposed to the decentralized *majimbo* system. This coupled with a lack of organized opposition parties to express alternative views, saw amongst others a weakened economy to the detriment of the citizens. It is during this time when the economy dropped significantly (between 1974 and 1979) from 6.6 percent to an average of 5.2 percent per annum.²¹⁰

Incidences of election manipulation and compromise post-independence started immediately with political alienation of the poor and election malpractices. It started with the weakening of

²⁰⁶ Ibid.

²⁰⁷ The 1963 elections were conducted in May, 1963 with Jomo Kenyatta won under the KANU ticket. The other party was KADU.

²⁰⁸ In 1966 there was a little election which was conducted after there was a defection of members from KANU led by Jaramogi Oginga (then Vice President) to form Kenya Peoples Party (KPU). KPU comprised of members mainly from Luo Community, urban workers trade unionist and students. They advocated for socialist policies to social-economic and political development. It was later on proscribed in 1969 and its leadership detained resulting to a defacto one party state.

²⁰⁹ Nyanjom (n85).

²¹⁰ Oita Etyang and Oscar Otele, 'Institutionalization of Political Parties? A Reflection On the 2013 Elections In Kenya (2014) 3(3) Research Journal in Organizational Psychology & Educational Studies 135,144 © Emerging Academy Resources <www.emergingresource.org>accessed 16 October 2019.

the economy coupled with a lack of alternative political parties, political assassination, and exiling of the protesters of President Jomo Kenyatta's era.²¹¹

The joining of KANU by KADU led to the absence of opposition parties in Kenya post-colonial. This made the government increasingly become intolerant of any dissent. As a result and further due to the disagreement between the President and his Vice President, Oginga Odinga, ditched KANU and registered his Kenya People's Party (KPU) in 1966.²¹² He was joined by his supporters in Parliament. This did not go well with president Kenyatta who effected an amendment to the Constitution forcing all those who had defected from KANU alongside Odinga to lose their parliamentary seats. This resulted in a series of elections called the little general elections.²¹³

Many of the popular leaders who had defected from KANU to KPU were not allowed to participate in the elections as they were either detained politically or put under house arrest.²¹⁴ This would lead to choices-less democracy for the supporters of such detained leaders and subsequent representation at Parliament. The Kenyatta government would also marginalize such regions where the protest candidates came from with constrained resource allocations.²¹⁵

Keen to consolidate power without rival, Kenyatta converted Kenya from being a multiparty state to a single-party nation in 1969. Emancipation of opposition parties through the detention of its leaders, intimidation, assassinations of critical MPs, and also through constitutional amendments. KPU was later on banned making KANU the only political party. As a result, KANU acquired all the seats in the subsequent polls under the aegis of Kenyatta and later on

²¹¹ Nyanjom (*n85*).

²¹² Ibid.

²¹³ Wachira Maina, 'Flawed election could turn out to be Uhuru Kenyatta's poisoned chalice' *The East Africa* (Nairobi, 28 October, 2017)> <https://www.theeastafrican.co.ke/oped/comment/Kenyatta-options-and-lessons-Kenya-elections/434750-4160112-wgrqyr/index.html>>accessed 18 June 2019.

²¹⁴ Majority were victims of detention without trial.

²¹⁵ Bigsten Arne 'Regional Inequality and Development: a case study of Kenya' (Farnborough, Hants.: Gower Press, 1980).

Moi.²¹⁶ KANU was the only political party with unrestricted dominance. The Constitution was further amended to centralize power in the executive.²¹⁷

Jomo Kenyatta's administration also applied and exercised autocratic legalism in that where the Constitution had not granted him with the power to do something that he preferred to do; he simply overlooked or altered it.²¹⁸ For instance, keen to ensure that those he 'wanted' in power remained as opposed to the popular political candidates, President Kenyatta altered the Constitution in 1975 and then predated the amendment, to ensure that he could exonerate his political ally Paul Ngei, after being barred from a by-election for having perpetrated an election offense which offence the president had no powers to pardon in the constitution as it was by then.²¹⁹

The electoral challenges were also noted as voter bribery and treatment aimed at influencing voters took place during Kenyatta's era. For instance, Paul Ngei and who was a cabinet minister in the government of President Jomo Kenyatta had his win nullified by the court for voter bribery leading to his bar to vie in the election.²²⁰

Economic deprivation which is key in this study was also very timorously and intelligently employed as a political tool effectively in the post-colonial era. It should be noted that, at the dawn of independence, the nascent state was already experiencing hegemony and deprivation emanating from the colonial regime of land alienation leading to a state of scarcity.

²¹⁶ Ministry of East African Community and Regional Development (n 160).

²¹⁷ Kanyinga Karuti, 'Kenya Democracy and Political Participation; Open Society Initiative of East Africa' (2014)><https://profiles.uonbi.ac.ke/karutikanyinga/publications/kenya-democracy-and-political-participation>>accessed on 21 June 2019.

²¹⁸ Laurance Rockefeller, 'Autocratic Legalism; When electoral mandates plus constitutional and legal change are used in the service of an illiberal agenda' (2017)< <https://lawreview.uchicago.edu/publication/autocratic-legalism#>>accessed 27 June 2019.

²¹⁹ Ibid.

²²⁰ Kenya National Assembly, 'Official Record (Hansard) 1 Oct 1997< <https://books.google.co.ke/books>>accessed 16 May 2019.

Thus, the core issues revolved on the action of land as the main source of production and by inference state power. People who had lost land aspired to regain it. To psyche, Kenyans hope on this, poverty, disease, and ignorance was declared by Kenyatta as the three enemies which the government would strive to eradicate.

Sessional Research Project No. 10 of 1965 on African Socialism, was a government policy developed enshrining poverty, disease, and ignorance as to the core enemies to Kenya and laying out a structure to be followed to eradicate them. The said sessional Research Project was to act as a guide to the country's socio-economic development route. However, this was not going to happen as the 1970s and early 1980s showed how weak and unaccountable the centralized government turned out to be.²²¹

In the spirit of sessional Research Project no. 10 of 1965, the post-colonial government succeeded in creating imbalanced regions in Kenya as development was channeled in the regions perceived to have "better returns". This perpetuated the unequal distribution of government resources within the country. Development projects were channeled towards the former white highlands which majority were in both central and rift valley areas together with urban centers, while neglecting the other regions in Kenya. This led to unemployment, financial inequality, and upsurge of the rural to urban relocation of the people.²²² The unequal and concentration of the economy also led to the political domination of the said two regions producing all the four presidents since independence.²²³

Post-independence, the independent government came up with several schemes for the settlement of the landless people who had been alienated from their land by the colonial

²²¹ Kenya's Sessional Paper Number 10 of 1965; conceptually based on government planning as a tool for socio-economic development. This tool was meant to guide economic growth – that was built around equity informed by African Socialism.

²²² Scheaffer Okore (2019) "It's not yet Uhuru for most Kenyans," *Daily Nation* (Nairobi, 1 June 2019).

²²³ Ngala Chome, 'devolution is only for development? Decentralization and elite vulnerability on the Kenyan Coast' (Critical African Studies 2015) <<http://dx.doi.org/Dol:10.1080/21681392.2015.1075750>>accessed 3 June 2019.

government. However, this scheme did not its intended purpose as it was frustrated by the independent government by issuing more than one-third of the European settlers' farms to less than 1,000 people and privately-owned companies.²²⁴ These schemes also intensified poverty in the rural areas and created two categories of people in Kenya those heavily landed and the landless people. The landed beneficiaries of the redistributed lands were not mostly the original owners. The majority of the original owners such as the Maasai community and some *Mau Mau* warriors remained landless.²²⁵

Additionally, working in cahoots with the ruling regime, they created modern-day “cartels” who capitalize on cheap imports of basic agricultural requirements like fertilizer and sell the same to farmers at exorbitant prices to make a killing. The same cartels would then import cheap products like maize and sugar, flood them in the market thus impoverishing the citizens more.²²⁶ Meanwhile, land held by other Africans who were not covered by the plan kept on being subdivided resulting in small uneconomical pieces held by the majority of farmers today.²²⁷

Significantly enhancing poverty and inequality in Kenya, Jomo Kenyatta’s government brought about the idea of *harambees* as a substitute to the government’s obligation to provide development to the people on the grassroots. This coupled with the government’s skewed appointments of Kenyatta’s corrupt tribal allies into government public bodies and ministerial positions led to uneven development. As a result, some areas such as the central province and some areas of rift valley developed while the rest such as Northeastern remained poor.²²⁸

²²⁴ Leo Christopher, ‘Who Benefited from the Million-Acre Scheme? Toward a Class Analysis of Kenya's Transition to Independence’ (1981)15(2) *Canadian Journal of African Studies / Revue Canadienne Des Études Africaines*,201,222.*JSTOR* www.jstor.org/stable/484409 Accessed 10 July 2019.

²²⁵ Bracking (n193).

²²⁶ Julius Sigei, ‘How Kenya land system has killed agriculture’ (2019)><https://www.nation.co.ke/news/How-Kenya-land-system-has-killed-agriculture/1056-5163922-114i9k/index.html> accessed on 10.06.2019>accessed 28 June 2019.

²²⁷ Ibid.

²²⁸ Nyanjom (n 85).

Upon the demise of President Kenyatta while in office in 1978, his then Vice President Daniel Moi took over as the President. President Moi emerged winner unopposed in 1978 under a *de facto* single political party system. Moi was further re-elected without opposition in both the 1983 and the 1988 elections under a *de jure* one-party system. This was after the Kenyan Constitution was amended in 1981 to make Kenya a one party state by law.

Elections during President Moi's era just like his predecessor were characterized by Cases of irregularities falling short of being free and fair. Voter bribery, treatment, voter intimidation, compromised electoral management bodies, election violence, the involvement of hired goons, and manipulation of election dates amongst others was very common.²²⁹

A raft of changes aimed at the concentration of power and upfront to free and fair elections by president Moi started immediately after President Moi took power and amended the law and converted Kenya into a single-political party system by *de jure*. This deterred any attempt to register opposition Parties by the KANU dissents and protesters to the KANU dictatorship. The government also introduced a *mlolongo* system of voting where the electorates would queue behind their favorite candidates for voting. This system would expose all the dissenters of the KANU regime even though KANU was then the only political party, the party had its favorite candidates in all elections.²³⁰

The *mlolongo* system of voting was abolished in the 1992 elections. This was also after the Constitution was amendment at Section 2(A) by the Parliament in 1991 reinstating multiparty democracy. There was also the introduction of the presidential term limit whereby the president's tenure was restricted to a two five-year terms only. In the subsequent elections conducted in

²²⁹ Oscar Obonyo, History of elections rigging in Kenya since independence (2017) <<https://www.nation.co.ke/news/politics/Why-rigging-claims-haunt-Kenya-s-elections-/1064-4055180-o80fbdz/index.html>>accessed on 18 August 2019.

²³⁰ Nyanjom (n 85).

1992 and 1997, though conducted with several presidential candidates with different political parties, president Moi emerged the winner against a disjointed opposition.²³¹

However, Moi's triumph into power was attributed highly to the economic condition created by his regime before the reintroduction of multi-partyism. This had natured a conducive environment in which the use of money to influence voters and also to triumph over the poor contesters would thrive. For instance, the Kenya African National Union (KANU) spent a large amount of money putting up national secretariats with full-time staff in preparation for the elections and also to fund the campaigns of candidates representing the ruling party.²³² It is estimated that around KSh 2-billion were allocated to the government by the CBK intended to garner support amongst the poor population of Kenyans, most of whom were persuaded by one meal to cast their vote.²³³

President Moi also took advantage of the economically vulnerable youth through recruitment into unscrupulous groups. These groups included the Youth of KANU '92 (YK '92), and Operation Moi Wins and Toroitich Till 2000.²³⁴ The groups were used to gather money from the executive, buy votes on a large scale, and intimidate voters and candidates to the advantage of the ruling party.²³⁵

The 1992 and 1997 were also marred by incidences of election violence which were concentrated in the professed opposition arrears organized and perpetrated by KANU agents to disrupt and to displace the opposition supporters. That this would lead to the creation of a Judicial Commission

²³¹ Ibid.

²³² Lukong Stellah, Wilson & Stephen, 'Monetary Clout and Electoral Politics in Kenya - Presidential Elections in Focus' (2014) 13 Journal of African Elections, 196. 10.20940/JAE/2014/v13i2a9.

²³³ Throup David & Charles Hornsby, 'Multi-party Politics in Kenya: The Kenyatta and Moi States & the Triumph of the System in the 1992 Election' (1st Edn, Ohio University Press 1998).

²³⁴ The leaders of these groups included Cyrus Jirongo, Julius Sunkuli and William Ruto (the current Deputy President).

²³⁵ Ibid, n.118.

for inquiry led by Justice (rtd) Akiwumi and whose findings on tribal clashes were never acted upon.²³⁶

The 2002 election saw the defeat of the then ruling KANU for the 1st time in history. As president Moi retired, Kibaki through a united opposition NARC secured the presidency against the KANU presidential candidate Uhuru Muigai Kenyatta. As the NARC government took over, the state of affairs in the country was not good. The economy was bad, poverty levels were high, unemployment, and high inflation. In that regard, the new administration embarked on a serious task of restoring economic development, creating employment opportunities, and reducing poverty among the citizenry.

In that regard, Kibaki adopted the Economic Recovery Strategy for Wealth and Employment (ERS) creation 2003- 2007. This was the channel through which services like education, health, and infrastructure would be improved and new jobs created by the government.

The ERS strategy adopted by the Kibaki administration saw an improvement in many fields of the economy. For instance, there was growth in GDP, revenue collection increased as well as improvement in foreign exchange services. Other improvements were realized in other sectors like the construction and building industry, manufacturing, tourism, and ICT sectors. The national economic growth level was estimated to rise from 0.6% KANU's to 6.3% in 2006. The national population below the poverty line also fell from KANU's 52.4% in 1997 to 46% in 2006.²³⁷

Though Kibaki's administration is applauded for restoring hope in Kenyans and particularly those who had suffered from historical injustices, post-election violence of 2007/08 which escalated into ethnic violence destroyed property, the killing of over 1,000 people, and

²³⁶ See The Human Rights Watch analysts <<http://www.hrw.org/update/2002/11.html>> accessed 7 May 2019.

²³⁷ Commission Reports, 'Kenya Integrated Household Budget Survey (KIHBSL) 2005/06' (2006) <<http://kenyalaw.org/kl/fileadmin/CommissionReports/Kenya-Integrated-Household-Budget-Survey-2005-2006.pdf>> accessed 12 April 2019.

displacement of over 600,000. This is a locus classicus case of matters still lacking and pending permanent resolve in Kenya. This chaos was attributed mostly to lack of transparency in the election process in that people felt that the election carried out in December 2007 were not free and fair.²³⁸

This was also attributed to Kibaki's failure to deliver constitutional changes he had promised while ascending into power in 2003. This amongst other issues is what coxswained the need for and review of the Constitution. Kenyans later on and through the committee of experts came up with a different Constitution and which was overwhelmingly voted for in 2010.

It was during Kibaki's tenure that the Constitution of Kenya 2010 was adopted bringing a raft of changes in the election arena. The first elections under the 2010 constitution were held in 2013 and Uhuru Kenyatta won the presidency. Uhuru Kenyatta won the presidency again on August 8, 2017, which though nullified by Kenya's Supreme Court on September 1, 2017, for electoral malpractice was confirmed after the repeat polls of 26.10.2017.²³⁹

Though Kenyans were optimistic about the changes enshrined in the new Constitution, the implementation of the same has largely remained unattended. This is more so regarding the social-economic rights which Kenyans were hoping would bring about equality and promote equal distribution of resources and transforming our elections as well to be free and fair. Whether this has been achieved or not will be a subject of discussion in the following chapter 3 which lays down all the current legal underpinnings for election and democracy in Kenya.

2.4 Conclusion

As we conclude this chapter, it is edifying from the forgoing historical discussion that there has been a consistent interplay between economy, election, and democracy in Kenya. Further that there are political reasons that affect the participation of the poor in the election. It is thus this

²³⁸ Nic Cheeseman, 'The Kenyan Elections of 2007' (2008) 2(2) *An Introduction Journal of Eastern African Studies* 166,184, DOI: [10.1080/17531050802058286](https://doi.org/10.1080/17531050802058286).

²³⁹ *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR.

Research Project contention that elections and democracy cannot be defined by their frequency and the outcomes thereof but through the actualization of the widely accepted principles of free, and fair elections to wit effective participation by all is key.

This chapter has demonstrated that despite elections having taken place in Kenya since independence and even pre-independence, there is a lot to be worked on given the discussed election violence, election malpractices, and poor economy where the majorities are still poor to attain an election which is free and fair.

The chapter has attempted to trace the development of representative democracy from pre-colonial to post-independence and it's intertwined with poverty. The author has portrayed how the council of elders and the traditional kings were controlling aristocratic, repressive, and ruthless to those who opposed their ways. That there was an unequal distribution of resources to the advantage of the few fledging their political muscles effectively. The political elites would then unjustly, amass wealth more than their subjects to remain controlling and manipulative to their poor subjects. The study intended to show that politics and control of the economy through means of production has been the norm since time immemorial.

The study has also depicted how the colonial administration was authoritarian with little regard and blatant abuse for the rights of the natives. It has been seen that the colonial regime was then a complete antithesis of representative democracy as the majority of the members of LEGCO were nominees of the Governor as opposed to being elected by the electorates. The colonial government also deprived the Africans of their means of livelihood such as land which was the main means of production and introduced them to forced labor with meager salaries. This made them poor and poor. Upon being made poor, the right to vote would only be granted subsequently discriminately and in complete disregard of the poor and the illiterate.

The chapter has further depicted how the trend continued with African elitism replacing colonial elitism after Kenya gained independence in the year 1963. Further, the African elitisms advanced an insatiable appetite for acquiring and consumption of public resources. Both the acquisition and the alienation of public resources became a preserve for a select few individuals and communities at the apex of the political power while on the other side neglecting, marginalizing and sidelining the rest of the population and delegating them to the whims of poverty. This unfortunately continues to date.

That as it was at the birth of the country's independence in 1963 that most of the Kenyan people still suffer from ignorance, poverty, disease, and hunger. Some critics have even argued that the conditions under colonialism were better than those after independence.²⁴⁰ Poverty has continued to constrain the electorate's ability to participate in elections as independent minds and hindering potential candidates with ideal political manifestos. All these have been systematized by the political elites who have been in power since time memorial and or those who sponsor their bid to Parliament.

The chapter also unleashed the intertwined between poverty and money politics to influence the voters' choice during the Kanu regime. The economy weakened by the Kanu regime leading to inflation rise after squandering the state's resources to mobilize support and influence poor youths and voters. That the ruling party would even sponsor vulnerable youths to cause violence during elections to displace supporters of the opposition parties. The political elites would also place many Kenyan communities and individuals in a financially starved position easy for manipulation and political gain.

²⁴⁰ Cabral Pinto, "Not yet 'uhuru' should still be Kenyans' clarion call' *Daily Nation* (Nairobi, 2009)<<https://www.nation.co.ke/oped/opinion/440808-673040-g3u02tz/index.html>>accessed 28 June 2019.

The task before the new Kenyan Government post-2010 was to try and resolve the contradictions of the colonial systems and post-colonial laws - its laws, institutions, policies, etc. How this has been done about electoral laws is the objective of the forthcoming chapter.

CHAPTER 3

THE LEGAL, REGULATORY AND INSTITUTIONAL FRAMEWORK ON DEMOCRACY AND ELECTIONS IN KENYA

3.0 Introduction

This chapter seeks to analyze the current laws, regulations, and institutions governing elections in Kenya. It also in a nutshell discusses the legal and the policy frameworks on economic rights in Kenya. The chapter is generally geared towards discussing whether the practice of elections in Kenya is well anchored in the Law. The chapter will also discuss the effectiveness of the institutional frameworks put in place to ensure fairness and freeness in elections in a country where its mass population is poor. Are the elections laws in Kenya poverty sensitive?²⁴¹

The chapter argues that the electoral legislative and policy framework in Kenya is in as much as it provides for the full exercise of peoples political rights to either vote or be voted for, is also enacted in a way that curtails the exercise of the said rights. This is through the identification of the existing exploitive law and the gaps in the legal framework to argue that with the election laws or with the legal and the institutional framework as they are, free, and fair elections cannot be achieved by the electorates.

This chapter is broken into four segments. The first segment examines the legal framework at the International level, the second at regional level while the third segment examines the electoral legal framework at the local level. The fourth segment analyzes the legal and the policy frameworks on economic rights in Kenya. The chapter will reveal the feebleness in the election laws and institutions put in place in Kenya in pursuit of elections that are free and fair and the unwillingness of the government to implement the economic rights and policies put in place.

²⁴¹ Do the elections Laws in Kenya as enacted have regard for the poor population to whom the laws are enacted and applied to?

3.1 International Legal Framework on Democracy and Elections

The validity of the International law in Kenya is well anchored in the Constitution of Kenya, 2010.²⁴² The Constitution recognizes international law as a binding norm and part of the Kenyan laws.²⁴³ There are various international legal instruments on elections which Kenya has ratified. These include the Universal Declaration of Human Rights(UDHR), the International Covenant on Civil and Political Rights(ICCPR), General Comment No. 25, and the Declaration on Criteria for Free, and Fair Elections.

3.1.1 The Universal Declaration of Human Rights (UDHR) 1948

UDHR is the baseline in the history of human rights. The Declaration was drawn by agents from the world over with different legal and cultural backgrounds. On 10th December 1948, the Declaration was asserted in Paris by the UN's General Assembly as a mutual yardstick of attainments for all persons and all nations.²⁴⁴ Though not legally binding to the states, the UDHR singularly established the basic human rights underscoring the importance of their universal protection.²⁴⁵

Article 21 of the UDHR enshrines the people's prerogative to participate in their Country's government. This can be done through direct participation or agents selected freely. The Article provides further that the government authority should be drawn from the will of the people; and that the expression of the will ought to be through open elections held periodically. The said elections should be guided by the principles of universality, equality, procedures that provide for free voting and beheld through a secret ballot.

²⁴² Constitution of Kenya 2010, Arts 2(5) and 2(6).

²⁴³ Tom Kabau and John Ambani, 'the 2010 Constitution and the Application of International Law in Kenya: A Case of Migration to Monism or Regression to Dualism?'(2013)1(1) Africa Nazarene University Law Journal, 36,55

²⁴⁴ General Assembly resolution 217 A.

²⁴⁵ The Universal Declaration of Human Rights (UDHR) 1948.

This article provided for the participation of the people in elections as a matter of right. That for an election to pass this test, all the people should be allowed or accorded an opportunity to participate in an election as voters or as candidates for elections. The Article further underscores the standard adherence which all the states should adhere to while conducting an election to pass the test of freeness and fairness. Nevertheless, the Declaration fails to capture the fate of the poor electorates who would be vulnerable during elections.

There are no prescribed mechanisms provided under the Declaration to safeguard the conduct of elections within the purview of the prescribed international standards and also to ensure that all the people irrespective of their economic status can actualize the said rights. The Declaration fails to acknowledge the fact that the free will of the voters and which is a key canon of elections can easily be tampered with by for instance money politics where voters are hopelessly poor.

3.1.2 International Covenant on Civil and Political Rights (ICCPR)

ICCPR was adopted immediately after the Universal Declaration on Human Rights to entrench the civil and political rights entrenched in the UDHR in a legally binding instrument.²⁴⁶ The provisions most relevant to this study are Articles 25 and 26.

The ICCPR provides that every citizen has a right and should have an opportunity to partake in the public affairs of their Country. It contemplates both direct involvement and representative participation through elected leaders. The Covenant embeds for the freedom to vote and the freedom to contest in elections which is open and held periodically by universal suffrage and secret ballot. It further guarantees that electors be allowed to exercise their free will and access to their country's public service on equal footing.²⁴⁷

²⁴⁶ Adopted and opened for signature, ratification and accession by the General Assembly resolution 2200A (XXI) of 16th December 1996, entry into force 23rd March 1976, in accordance with Article 49.

²⁴⁷ ICCPR, Art 25.

Article 26 of the Covenant fortifies the equality of all persons and equal treatment and protection of all by the law. The Article outlaws any form of perceptiveness centered on any basis including race, skin pigmentation, wealth, birth, or another status.

3.1.3 General Comment No. 25

This Comment was drafted for the interpretation and clarification of political rights enshrined in the ICCPR by the UN's Rights Committee.²⁴⁸ According to the Rights Committee, the right of citizens to participate in public affairs of their country is as provided in Article 25 of the Covenant. In that regard, states are called upon to come up with laws and other processes to ensure that citizens can exercise the freedoms it provides.

The Article is the backbone of the egalitarian government hinged on approval by citizens and aligned to the principles of the Covenant. The comment provides that:

“Having regard to the provision of Article 5, paragraph 1, of the Covenant, any rights recognized and protected by Article 25 may not be interpreted as implying a right to act or as validating any act aimed at the destruction or limitation of the rights and freedoms protected by the Covenant to a greater extent than what is provided for in the present Covenant.”

3.1.4 Declaration on Criteria for Free, and fair elections

This declaration reaffirms the significance of the UDHR and the ICCPR. It affirms the requirement for the government's authority to be based on the people will be conveyed through fair and periodic elections.²⁴⁹ The Declaration was adopted by the Inter-Parliamentary Union in

²⁴⁸ General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25 of ICCPR), Adopted by the Committee at its 1510th meeting (Fifty Seventh Session) on 12th July 1996.

²⁴⁹ Unanimously adopted by the Inter-Parliamentary Council at its 154th Session, Paris, 26th March 1994

1994.²⁵⁰ It calls upon States the world over to abide by its principles and standards while conducting their respective elections.²⁵¹

Just like the UDHR and the ICCPR, its major aim is to achieve the people's will as expressed through genuine periodic elections. Further that elections should be conducted at fixed intervals, where its universality, equality, and secret suffrage is reflected in government.²⁵² As per the declaration, any person of the majority age should be allowed to participate in elections that are held secretly and in a nondiscriminatory manner.²⁵³

Participation in elections as candidates and membership to a political party entail responsibilities that include ensuring that citizens exercise their right to govern through elections, to join and form political parties, freedom of expression, and the freedom to traverse freely within the state during election campaigns.²⁵⁴

A further principle describes the responsibilities of the states to take necessary measures as mandated by their constitutions to ensure that they have established credible institutions that can conduct fair elections periodically and as per the International law principles.²⁵⁵

The Declaration is a pointer as far as the laxity of the state in the implementation of the measures stated therein. Nevertheless, the Declaration though ratified 25 years ago (since 1994), there is little or nothing to show by the states and more so in Africa to ensure for instance that there are equal opportunities for all the candidates, political parties, and campaign rights and the right of free movement across the country for purposes of campaigning for elections. This has been left

²⁵⁰ The Organization was established in 1889 by the United Kingdom and France. Current members of the organization are 157 parliaments of sovereign states www.ipu.org accessed 6 December 2011.

²⁵¹ An international organization of parliaments of sovereign states. It is not a legislative body and its declarations and resolutions are not attributable to States.

²⁵² UDHR, Art 21.

²⁵³ Declaration on the Criteria for Free, and fair Elections, s1.

²⁵⁴,
²⁵⁵ *ibid*, s3.

²⁵⁵ Guy Goodwin-Gill, (2006) *Free, and fair Elections* (Inter-Parliamentary Union 2006) 3.

as the sole responsibility of the concerned party and candidates of elections to the disadvantage of the financially constrained candidates.

3.1.5 Overview of the International Framework on Democracy and Elections

The foregoing discussed international legal frameworks uphold the ideals of democracy as recognized internationally for elections. In summary, these are; the right to elections which reflects the will of the people; the freedom and opportunity of every citizen to participate in their Countries' public activities either openly or through representation by freely elected representatives; the right to participate as a voter or as a candidate in free, and fair elections which are all-inclusive with equality of voters and protection by the law.

3.2 Regional Framework on Democracy and Elections

The regional instruments discussed here are the Banjul Charter, African Commission on Human Rights, 2001 Resolution, the African Charter on Democracy, Elections, and Governance, and the Harare Declaration on Criteria for Free, and Fair Elections.

3.2.1 African Charter on Human and Peoples' Rights

This Charter also referred to as the Banjul Charter contains the rights of the people in the context of the African Continent.²⁵⁶ The provision that is most germane to this Research Project is that all citizens have the freedom to take part in the affairs of the public in their country which participation can be indirectly through their leaders who are elected freely in line with legal requirements or participate directly.²⁵⁷

²⁵⁶ Enacted subsequent to Decision 115 (XVI) of the Assembly of Heads of States and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17th to 20th July 1979 on the preparation of a preliminary draft on an African Charter on Human and Peoples' Rights, providing, inter alia, for the establishment of bodies to promote and protect human and peoples' rights.'

²⁵⁷ Banjul Charter, Art 13.

3.2.2 African Charter on Democracy, Elections, and Governance

This Charter advocate for the practice the respect to human rights, good governance, protection of people's rights and democratic principles, people involvement in the government as captured in the Constitutive Act of the African Union.²⁵⁸

The Charter has several aims cutting across governance, democracy, and elections.²⁵⁹ Those relevant to elections are aimed at the promotion of periodic free, and fair polls, the institutionalization of legitimate government that is freely democratically chosen, and to promote best practices in election management to achieve political certainty and good governance.²⁶⁰ The charter calls further for the obedience to the canons of law, active involvement of the people in leadership and development dealings, and the management of public matters, and the recognition of the inalienable right of popular participation of the people via universal suffrage.²⁶¹

Very important to this study is the interplay between political rights and the social-economic rights brought about in the Charter. The Charter provides that for the enhancement of democratic political rights, promotion of the social-economic rights is key by mandating Parties to the Charter to come up with some social and economic strategies and plans that would lead to sustainable development and human reservation and also to ensure their implementation.²⁶² The Parties to the Charter are further required to establish and incorporate ideal economic and corporate control through, amongst others: Proficient and competent public sector administration; Encouraging pellucidity in public finance management; Inhibiting and fighting corruption and interrelated offenses; Effective administration of public debt; Judicious and

²⁵⁸ The African Union Act, Arts 3 and 4.

²⁵⁹ Adopted by the Eighth Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia, 30th January 2001.

²⁶⁰ African Charter on Democracy, Elections and Governance, Art 2.

²⁶¹ Ibid, Arts 3 and 4.

²⁶² Ibid, Art 9.

sustainable use of public funds; Impartial apportionment of the nation's affluence and natural resources and poverty assuagement.²⁶³

Unfortunately, Kenya is still amongst the states that are yet to sign or endorse this charter. This is despite appeals having been made for the Kenyan Government to ensure its progressive provisions enrich the national legal framework on election, democracy, economy, and governance.²⁶⁴ The Charter would also go far in reinforcing the Constitutional values, principles of governance, enforcement, and implementation of the social-economic rights.²⁶⁵

3.2.3 Constitutive Act of the African Union²⁶⁶

The Act²⁶⁷ was approved in the Capital city of Togo on 11th July 2000 for the establishment of the African Union (AU) and its operations as its main objectives.²⁶⁸ The other aims of the union included the promotion of the democratic ideologies and establishments; popular involvement of the people and good governance; to speed up the political, social, and economic union of Africa, to promote development at the economic and the integration of Africans economies and for the attainment of independence of the remaining states amongst others.²⁶⁹

²⁶³ Ibid, Art 33.

²⁶⁴ Press statement by State and Non- State actors 'Building a Framework for Credible Elections and Democratic Governance in Kenya' *Daily Nation* (Nairobi, 26 October 2011) 46.

²⁶⁵ Ben Kioko, 'The African Charter on Democracy, Elections and Governance as a Justiciable Instrument' (2019) 63(S1) *Journal of African Law*, 39-61. doi:10.1017/S0021855319000044, quoting decision of the African Court on Human and Peoples' Rights in *APDH v Côte d'Ivoire* which held that the charter is a human rights instrument and that one can seek its enforcement before a court of law.

²⁶⁶ African Union, 'Constitutive Act of the African Union' <<https://au.int/en/treaties/constitutive-act-african-union>> accessed 12 July 2019.

²⁶⁷ The Constitutive Act of the African Union entered into force on 26th May, 2001 after two thirds of the 53 signatories ratified the convention.

²⁶⁸ Ibid, Art 2.

²⁶⁹ Ibid, Art 3.

3.2.4 The Harare Commonwealth Declaration

The Harare Commonwealth Declaration is a reaffirmation of the values to which the former British colonial countries adhere to.²⁷⁰ The commonwealth values include democracy, regard for the rule of law, judicial independence, a rightful and fair government, essential liberties, equality before the law, and equal opportunities for all indiscriminately.

3.3.5 Overview on the Regional Legal Instruments on Democracy and Elections

The regional framework seeks to address legal and political problems in Africa region. As contained in the various charters, Acts, and protocols discussed, the said regional framework is inspired by the UDHR and ICCPR.

In summary, the regional framework upholds the liberty to vie or to vote in genuine elections held periodically by way of one man one vote; and the entitlements by citizens to take part in public affairs. The instruments also advocate for the promotion of the social-economic policies aimed at developing the African at large. This can be said to be a clear link between political and economic rights in the actualization of the right to credible elections.

However, these regional legal frameworks do not prescribe the mechanisms through which these rights can be implemented and enforced where the party states are reluctant so to do. As discussed above, despite Kenya being a party to most of these regional instruments, it has not ratified some to the detriment of the people of Kenya.²⁷¹ It leaves the poor at the mercies of the host state. Further, international law being a soft law does not have an enforcement mechanism if a state fails to implement the provisions thereof.

²⁷⁰ Adopted in Harare on 20th October 1991 by the Heads of Governments of the Countries of the Commonwealth

²⁷¹ For instance The African Charter on Democracy, Elections and Governance.

3.3 National Framework on Democracy and Elections in Kenya

There is a multiplicity of laws that in various ways relate to elections in Kenya discussed as hereunder.²⁷²

3.3.1 The Constitution of Kenya, 2010

Ben Sihanya argues that the Kenyan Constitution is one very transformative and progressive Constitution that can meet the aspirations of Kenyans for democratic governance if faithfully implemented. He maintains further that if it is implemented wholly, political and socio-economic aspirations of the country can be attained.²⁷³ The Constitution of Kenya is the grund norm.²⁷⁴ It bestows all the power to the Kenyans exercisable in line with its provisions.²⁷⁵ The Constitution provides further that people can exercise this supremacy either directly or via their constitutionally elected leaders.²⁷⁶

Regarding elections, the 2010 Constitution provides for the citizens to be registered to participate in polls,²⁷⁷ suffrage right by secret ballot,²⁷⁸ right to contest in an election and to hold a public office once elected,²⁷⁹ and for the citizens to be members of a political party.²⁸⁰

²⁷² These laws include; The Constitution of Kenya, The National Assembly and Presidential Elections Act, The Local Government Act, The Election Offences Act, The Societies Act, The Penal Code, The Police Act, The Interpretations and General Provisions Act, The Electoral Code of Conduct, and The Constitutions and Manifestos of Political Parties.

²⁷³ Ben Sihanya, 'Electoral justice in Kenya under the 2010 Constitution Implementation, enforcement, reversals and reforms' Forthcoming as Chapter 13 in Ben Sihanya (forthcoming 2019) Constitutional Democracy in Kenya and Africa.; Tribalism, Elections, Governance, Human Rights, the Rule of Law and Due Process, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (2017)1.

²⁷⁴ Constitution of Kenya 2010, Art 2.

²⁷⁵ Ibid, Art 1(1).

²⁷⁶ Ibid, Art 1(2).

²⁷⁷ Ibid, Art 38(3) (a); See also Article. 83 of the Constitution contains the requirements for registration as a voter that any administrative arrangement for the registration of voters must be designed to facilitate, and not deny, an eligible citizen the right to vote as provided for under Article 81 of the Constitution.

²⁷⁸ Ibid, Art 38(3) (b).

²⁷⁹ Ibid, 38(3) (c).

²⁸⁰ Ibid, Art 38(1).

It is further decreed that the electoral system to be used during any voting to be in the accordance to the following standards; that the people be free to actualize their civil rights in the Constitution.²⁸¹ It further requires that gender parity be observed in elective public offices;²⁸² that the disabled be fairly represented; and that all adult persons has the freedom to vote, fair representation, and equal suffrage.²⁸³

The Constitution further decrees some of the features of a free, credible and fair elections as elections which are held by secret vote, peacefully, free from bullying, without improper influence and bribery, conducted by a self-ruling body; with openness; and managed in a neutral, effective, precise and responsible way to ensure the sanctity of the ballot and the balloting process.²⁸⁴

The Constitution establishes the electoral body (IEBC) with its core duty being to run, manage, and to supervise elections and referenda.²⁸⁵ The commission is well cushioned by the law such that, it is supposed to operate independently without direction or influence from any individual or institution but only the Constitution and the law.²⁸⁶

While conducting elections, IEBC has to provide suitable mechanisms aimed at ensuring that the voting system is not marred by electoral malpractices. To that end, the system should be, precise,

²⁸¹ Meaning that the citizens should be free from any influence, fear and intimidation while making their choices
²⁸² *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinion No.2 of 2012, that the legislative measures for giving effect to the ‘not more than two-thirds of one gender principle’ enshrined in Article 81(b) of the Constitution in relation to the National Assembly and the Senate should be realized progressively [rather than immediately for purposes of elections that were held on 4th March 2013]. See also *in Centre for Rights Education and Awareness & 2 Others v. Speaker the National Assembly & 6 Others*, Petition No. 371 of 2016. The court in this case ordered the Attorney General and the Commission on the Implementation of Constitution to prepare a legislation for tabling in Parliament within forty (40) days but to do so even after extending the deadline by one year.

²⁸³ 27th August, 2016.

²⁸⁴ Constitution of Kenya 2010, Art 81(e).

²⁸⁵ *Ibid*, Art 88(1).

²⁸⁶ *Ibid*, Art 88(5).

verifiable, safe, accountable, and open. On voting day, cast ballots ought to be tallied, and the outcomes publicized forthwith by the officers in charge of each voting station.²⁸⁷

IEBC has been criticized severally for lack of independence and its exposure to executive interference. Following the nullification of the presidential elections in 2017 for instance saw the then-presidential candidate Raila Amolo Odinga boycott the fresh presidential elections citing a lack of trust with the IEBC.²⁸⁸

There was also interference through the Parliament where the IEBC Act was amended to reduce the prescribed quorum from a minimum of five to three commissioners.²⁸⁹ The law was also amended to ensure that the commissioners themselves could appoint a chairperson to preside over in case of resignation by the sitting chairperson. This was as a result of frustrations within the commission following up the resignation of four commissioners almost crippling the operations of the commission.²⁹⁰

Concerning the determination of electoral disputes, parliament is mandated under the Constitution to adopt laws to establish mechanisms for their timely resolution.²⁹¹

Though the Constitution of Kenya, 2010 is to a large extent seen as effectively addressing the requisite legal threshold for free, and fair elections, the real challenge lies in its implementation as expressly stated by Ben Sihanya.²⁹²

3.3.2 The Elections Act, 2011

This law on elections was legislated in 2011 by the National Assembly of Kenya. The goal of the Act is to regulate voting rights; registering electorates; appointment of candidates, and the

²⁸⁷ Ibid, Art 86.

²⁸⁸ Emmanuel Igunza, 'Kenya General Elections; Kenya election: 'Voting marred by boycott' (BBC News, 26 October 2017) <<https://www.bbc.com/news/world-africa-41757612>>accessed 12 September.2019.

²⁸⁹ Elections Laws Amendment Act 1 of 2017.

²⁹⁰ The commissioners who resigned were Roseline Akombe, Ms Maina, Ms Mwachanya and Mr Kurga

²⁹¹ Constitution of Kenya 2010, Art 87.

²⁹² Ibid (n143).

required qualifications for aspirant candidates in elective offices and to provide for election offenses and dispute resolution.²⁹³

The Act reiterates the rights of all adult citizens of Kenya to vote as long as they are duly registered as voters. Section 4 of the Act provides for a Principal register which should contain details of all voters in every polling station; details of voters in every ward; details of voters in every constituency in a Constituency register; details of voters in every County in a County Register; and a register of voters domiciled out of Kenya.²⁹⁴

The other key provision in this Act is on the electorate's right to recall a parliamentarian during their terms if any of the grounds provided in the Act are met.²⁹⁵ The grounds include a finding, after a legal due process, a violation of any of the provisions of Leadership and Integrity²⁹⁶; a finding that after a legal due process that a member has misappropriated money meant for the public; or has been convicted of an offense under the Election law.²⁹⁷

Political parties and contestants in an election are required under sections 51 and 110 to adhere to the code of election conduct as recommended by the IEBC and as outlined under schedule II to the Elections Act.²⁹⁸ The Electoral Code of Conduct calls upon every political actor to support its aim which is to ensure that campaigns and public debate occur peacefully throughout Kenya during the election period.

²⁹³ Act No.24 of 2011 laws of Kenya.

²⁹⁴ The details of voters in each polling station are contained in a polling register, ward register contains details of voters in that particular ward, them for every ward, every constituency has a Constituency registers with details of all the voters in the Constituencies and County register with details of all the voters in every Constituency.

²⁹⁵ Election Act no. 24 of 2011, s 45.

²⁹⁶ Constitution of Kenya 2010, Ch6.

²⁹⁷ Ibid (n295), s45 (2).

²⁹⁸ Ibid, s110 failure to subscribe to the Electoral Code of Conduct or any contravention of the same are considered an offence.

All the disputes relating to elections and nominations are placed squarely under the IEBC except any dispute post declaration of results of elections.²⁹⁹ The latter is resolved by different courts within limited timelines as specified in the Act.³⁰⁰ The implementation of the section is one of the main tasks experienced by the poor. The operations of the dispute tribunal are carried out only in Nairobi which impedes the poor mass whose access to the city is limited by lack of resources. Most of the people and particularly the poor would opt not to file a claim before the IEBC dispute tribunal given the cost implication for traveling and subsistence.

Of special consideration in the Act is the threshold for nullification of any election provided for in the Act.³⁰¹ The Act allows the Courts to declare an election void only where there was a failure to comply with the mandatory Constitutional requirement and any statutory requirement relating to that election and that the non-compliance with the said mandatory Constitutional and legislative requirements substantially meddled with the outcome of the polls.³⁰²

Generally, it requires a good lawyer and substantive evidence to invalidate an election. Good and experienced lawyers in election-related disputes are costly.³⁰³ There are also costs appurtenant to the election disputes which includes the costs for witnesses and accommodation which is not affordable by everyone.³⁰⁴

²⁹⁹ Ibid, s 74.

³⁰⁰ Section 75 of the Election Act provides for the forum in which disputes post declaration of election results in that, a question as to validity of an election of a county governor is determined by High Court within the county or nearest to the county. (1A) A question as to the validity of the election of a member of a county assembly is heard and determined by the Resident Magistrate's Court designated by the Chief Justice. Disputes concerning the elections of a County Member of Parliament, Senator and National Member of Parliament are also handled and determined by High Court within the County. Presidential election dispute is an exclusive jurisdiction of the Supreme Court.

³⁰¹ In *Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR where the Supreme Court nullified the presidential elections for noncompliance with the law.

³⁰² Section 83 of the Election Act 2011 as amended by Election Laws (Amendment) Act, 2017.

³⁰³ The Advocate Remuneration Order in regard to the minimum legal fees payable to an advocate in an election disputes prescribes a minimum of Kenya shillings, five hundred Thousands (kshs.500, 000/-).

³⁰⁴ See detailed discussed in chapter 4 of this study.

3.3.3 The Election Offences Act, 2016

This Act was enacted in the year 2016 and it sets out election offenses.³⁰⁵ Through the provision of various penalties, the Act intended to prevent the commission of offenses and illegalities during and related to elections. This Act is of particular importance, in this study, as it seeks to either nullify or uphold the election of any person under challenge either in Court, Political Party Dispute Tribunal or before the IEBC dispute tribunal.

The Act classifies the election offenses into different categories including those that relate to the voter's register;³⁰⁶ those that involve multiple voter registration;³⁰⁷ voting offenses;³⁰⁸ those accruing from commission or omission by the commission or any of its staff;³⁰⁹ failure to observe elections confidentiality;³¹⁰ impersonation;³¹¹ Bribery;³¹² improper influence;³¹³ causing violence during an election; deployment of state security organs; allowing public officers to take part in elections; Unsanctioned spending; misuse of technology in elections; employers not allowing their employees sufficient time to vote; facilitating the commission of electoral irregularities; not observing the dictates of the code of elections.

The Act further places the responsibility to order for investigations and to prosecute the violations under the Act to the Office of Public Prosecutions led by the DPP within two years.³¹⁴

More relatable to this study in this Act is the various penalties to persons who commit any of the offenses listed. The penalties are very punitive. For instance, if one is convicted of any crime under the Act, such person can be suspended from contesting or from being nominated in any

³⁰⁵ Act No. 37 of 2016; Date of commencement; 4th October, 2016.

³⁰⁶ Elections Act 2011, s 56.

³⁰⁷ Ibid, s57.

³⁰⁸ Elections Act 2011, s58.

³⁰⁹ Ibid, s 59.

³¹⁰ Ibid, s60.

³¹¹ Ibid, s61.

³¹² Ibid, s 62.

³¹³ Ibid, s 63.

³¹⁴ Ibid, ss 21-22.

election for five years from the date when he or she was found guilty.³¹⁵ Generally, any person who is convicted of any offense linked to the electorates' 'record and electorates card is supposed on conviction to pay a fine or to be held in jail for particular jail term or to both.³¹⁶

These fines are very punitive to the poor mass and may in a skewed justice system lead to disqualification and or imprisonment of an innocent poor aspirant and/or voter. The rich may easily pay the fine but the poor could find it hard. It thus creates fear amongst the poor and may shy away from participating in politics surging the very element of democratic participation.

3.3.4 Political Parties Act, No. 11 of 2011

The Political Parties Act was enacted by the Parliament of Kenya to regularize the formation,³¹⁷ requirements³¹⁸ , and procedure for the registration of political parties in Kenya. It also provides for the sourcing, funding, and accounting of political parties funds. The Act also establishes funds is administered by the Political Parties Registrar for the Political Parties.³¹⁹

The Act further provides guidelines on how the funds meant for elections ought to be distributed, regulation on the sources of the said funds, and requirements to disclose and auditing.³²⁰ The funds are intended to provide for equity, openness, and accountability in politics. This does not however relay well with the fact that one of the qualifications by political parties to acquire funding in the Act requires the party to have garnered a minimum of 5% of the ballots cast in the previous general elections.

This is not easily achievable by small emerging political parties effectively locking them out of funding. The Act requires further for the Political Parties to ensure gender parity as per the

³¹⁵ Election Offences Act, s24.

³¹⁶ The Fine should not be more than Kenya shillings one million or for a jail term of more than six years.

³¹⁷ Political Parties Act 2011, s 3.

³¹⁸ Ibid, s 4.

³¹⁹ Ibid, s 7.

³²⁰ Ibid, Part III on Funding and Accounts of Political Parties.

Constitution in that the parties office holders should not be of the same gender. The distribution of the fund is proportional to the national vote garnered by each party that qualifies under the above-mentioned criteria.

The study herein argues that the distribution of funds on the basis provided under the Act does not favor or have regard to the small political parties and Independent Candidates.³²¹ Most of these small political parties do struggle financially given their little contribution by their poor members and lack of donors.³²² Thus failure to fund a party for failure to secure a certain number of votes is discriminatory, punitive and an impediment to suffrage right. This further threatens the survival of such political parties limiting platforms for ventilating varying political opinions.³²³

There is established also the Political Parties Disputes Tribunal (PPDT)³²⁴ in the Act which is mandated to handle disputes involving political parties. Currently, the Tribunal sits only in Nairobi. Not everyone can comfortably travel to Nairobi in case of any dispute to be resolved there. One has to travel for instance from Lodwar to Nairobi. This requires transport, accommodation amongst others. It is an impediment to justice to the poor who cannot afford to have their dispute resolved by the Tribunal. There is a need to devolve the operations of this tribunal to ensure access to the poor.

Political parties in Kenya charge various fees ranging from registration to nomination fees. For instance, under the Maendeleo Chapchap Political party, for one to be nominated as a

³²¹ Most of what may be considered as small political parties is those which do not manage to secure the 5% of the total votes cast.

³²² Nyadera Israel Nyaburi, Agwanda and Maulani, 'Evolution of Kenya's Political System and Challenges to Democracy' (2020) In Farazmand A. (eds), *Global Encyclopedia of Public Administration, Public Policy, and Governance* (Springer, Cham 2020).

³²³ Oloo Adams, 'The contemporary opposition in Kenya: Between internal traits and state manipulation' in Godwin Murunga, and Shadrack Nasongo,(eds.), *The struggle for democracy*, (LONDON, 2007); Oloo holds that the presence of many opposition political parties in a country implies presence of democracy which creates an environment for ventilation of varying opinions by fostering debate within legally prescribed limits.

³²⁴ Political Parties Act 2011, s39.

presidential candidate, nomination fees of Kenya shillings one million is required. To be nominated as a candidate for the position of governor, one should pay a nomination fee of Kenya Shillings two hundred and fifty thousand. This implies that if one cannot raise the said amount for the nomination, then he cannot be nominated.³²⁵

This Act has also been criticized for failure to actualize the constitutional requirements for political parties.³²⁶ Today, some of the characteristics and features associated with most political parties in Kenya include the use of violence and intimidation of opponents, ethnic-based mobilization of support lack of democracy within the party among others. The Act has also failed in upholding its provision regarding political parties' funding and expenditure in Kenya raise and spend their funds as required under section 29 of the Act.³²⁷ As a result, the Political Parties have become conveyor belts of convening leaders from one electoral period to another with little or no activity in between election cycles.³²⁸

3.3.5 The Independent Electoral and Boundaries Commission (IEBC) Act, 2011

This Act provides for the internal and external operations of the election commission established in the Constitution.³²⁹ As to how the commission members and staff are selected and works and the manner of selection and operation of the commission, its members, and staff.³³⁰

³²⁵ IEBC, 'Maendeleo Chap Chap Party Nomination and Elections Rules' <<https://www.iebc.or.ke/uploads/resources/yjzf2zdC2L.pdf>> accessed 13 October 2019.

³²⁶ Article 91 of the Constitution provides that; (a) Every political party must have a national character as prescribed by an Act of Parliament.(b) Every political party must have a democratically elected governing body.(c) Every political party must promote and uphold national unity.(d) Every political party must abide by the democratic principles of good governance, promote and practice democracy through regular, fair and free elections within the party.(e) Every political party must respect the right of all persons to participate in the political process, including minorities and marginalized groups.(f) Every political party must respect and promote human rights and fundamental freedoms and gender equality and equity.(g) Every political party must promote the objects and principles of the Constitution and the rule of law; and(h) Every political party must subscribe to and observe the code of conduct for political parties.

³²⁷ Shulika, Lukong & Muna, Wilson & Mutula, Stephen. 'MONETARY CLOUT AND ELECTORAL POLITICS IN KENYA - Presidential Elections in Focus. Journal of African Elections' (2014)<https://www.researchgate.net/publication/281451951_MONETARY_CLOUT_AND_ELECTORAL_POLITICS_IN_KENYA_-_Presidential_Elections_in_Focus/citation/download> accessed 30 October 2019.

³²⁸ Katiba institute, 'How political parties are failing Kenya yet again' (2016) <<https://www.katibainstitute.org/how-political-parties-are-failing-kenya-yet-again/>> accessed on 18 October 2019.

³²⁹ IEBC Commission Established under article 88 of the Constitution.

The Commission is constituted of a chairperson and who are the leader of the commission and 6 (six) other commissioners appointed per the law.³³¹ There is also the Commission secretariat which is led by a Chief Executive Officer (CEO) in his capacity as the secretary to the commission as well.

The Commissioners are the President's appointees who upon being approved by the Parliament serve for one term of (6) six years nonrenewable.³³² Mirroring its name, the commission is supposed to be independent and not to be controlled or influenced by any individual or institution in the conduct of its mandate. During the performance of its duties and responsibilities, the IEBC is required to involve stakeholders through public participation.³³³

The functions of the IEBC are inscribed in the Constitution and which include: ³³⁴to organize and administer elections to any elective body as well as any other election as prescribed by both the and referenda; to conduct registration of voters; to regularly revise the electorates register; to delimit boundaries, and resolving pre-election disputes like those that emanate from nominations.³³⁵

Though IEBC's draws its funds from the consolidated fund, the Commission faces problems in obtaining sufficient funding on time from the appropriate authorities to undertake its elections processes. These affect the operations of the commissions such as undertaking voter education, registration, and others.³³⁶

³³⁰ Objective of the of Political Parties Act on Funding and Accounts of Political Parties.

³³¹ Independent Electoral and Boundaries Commission Act 2011, s 5.

³³² Independent Electoral and Boundaries Commission Act 2011, s 7.

³³³ Ibid, s26.

³³⁴ Constitution of Kenya 2010, Art 88(4).

³³⁵ Independent Electoral and Boundaries Commission Act, 2011, s 4 ;In *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR*. The Court held that public participation even in direct tendering is a mandatory component of the principles of transparency and accountability acclaimed in Article 227 of the Constitution.

³³⁶ Shumbana Karume, 'The Independent Electoral and Boundaries Commission' <http://aceproject.org/ace-en/topics/em/electoral-management-case-studies/kenya-compromised-independence-of-the-emb/mobile_browsing/onePag> accessed 29 October 2019.

IEBC has been criticized for having failed in its specific mandate and objectives. It has failed in conducting elections as per the dictates of the Constitution. This has subjected Kenyans to unnecessary costs and loss of lives.³³⁷ The Commission has also failed to protect the people's will at the ballot, democratic ethics, and the principles of constitutionalism.³³⁸

IEBC has also received backlash for making political participation in Kenya expensive through nomination fees for candidates and thus making it an affair meant only for the rich.³³⁹ For instance, for the last general elections held in 2017, youth and women Presidential candidates were required to part with Kshs. 100,000 as nomination fees. The youths, women, and the disabled who were vying for the gubernatorial position were to pay at least Kshs. 25,000 per candidate to be in the ballot Research Projects.³⁴⁰

3.3.6 The Election Campaign Financing Act, 2013

This Act was legislated and adopted in 2013. The objectives of the Act were to direct IEBC as per the Constitution³⁴¹ to regularize, administer, and to provide for accountability on campaign

³³⁷ *Godfrey Mwaki Kimathi & Others vs. Jubilee Alliance Party & Others* [2015] eKLR (Odunga J), the court held that the integrity of the electoral process encompasses the integrity of the players thereat and it is the duty of the Commission to ensure that the electoral process it presides over is free, fair and transparent. Therefore integrity of the candidates is part and parcel of the integrity of the electoral process. The Commission cannot conduct a sham or mock elections simply because it does not have the machinery to undertake its legal and constitutional obligations. Therefore where an issue of integrity is properly raised before the Commission, the Commission must make a determination thereon one way or the other. It cannot shirk its responsibility by shifting the onus to other bodies. If it does not fulfill its legal and constitutional obligations, this Court will not hesitate to intervene and right the wrong.

³³⁸ Ben Sihanya, *Constitutional Democracy Law in Kenya and Africa: Tribalism, Elections, Governance, Human Rights, the Rule of Law and Due Process*, (Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya 2019).

³³⁹ Charity Ngilu, 'IEBC's high nomination fees will make political participation costly' *The standard* (Nairobi, 26 August 2012) <<https://www.standardmedia.co.ke/article/2000064821/iebc-s-high-nomination-fees-will-make-political-participation-costly>> accessed 12 October 2019

³⁴⁰ IEBC, 'Qualifications and Requirements for Nomination of Candidates for the Different Elective Positions' (2017) <<https://www.iebc.or.ke/uploads/resources>> accessed 30 september.2019

³⁴¹ Constitution of Kenya 2010, Art 88(2)

expenditure and financing during campaigns for election and referendum.³⁴² This would include regulating the amount of money to be spent by-election candidates and political parties.³⁴³

IEBC is required to undertake supervision of elections contestants, political parties involved in an election, committees manning referendum and to come up with spending limits and administer adherence thereof.³⁴⁴

The Act requires political parties to present to IEBC their Party Campaign expenditure rules at least three months before they nominate their candidates.³⁴⁵ It further requires any party planning to take part in an election to set up a nine (9) member party committee in charge of its expenditures. The work of the party expenditure committee is to provide expenditure guidance to the party on financial matters for party nominations and campaign.³⁴⁶

Though enacted in the year 2013, this Act has never been operationalized in any of the elections conducted in Kenya since then. The IEBC attempts to operationalize it in the year 2017 were unfortunately thwarted by a suit filed by the National Super Alliance (ODM/NASA)³⁴⁷ at the High Court leading to the suspension of its operation to post 2017 Elections.³⁴⁸

³⁴² The Act provides that any Political party which receives Contributions under the Act to utilize the same to pay for party nominations expenses amongst other expenses, issue a receipt for every contribution received and keep the receipts as evidence of all the expenditures.

³⁴³ Shulika Lukong, Muna Wilson & Mutula, Stephen. 'MONETARY CLOUT AND ELECTORAL POLITICS IN KENYA - Presidential Elections in Focus'(2014).Journal of African Elections<https://www.researchgate.net/publication/281451951_MONETARY_CLOUT_AND_ELECTORAL_POLITICS_IN_KENYA_-_Presidential_Elections_in_Focus/citation/download>accessed 30 October 2019.

³⁴⁴ Election Campaign and Financing Act 2013, s3.

³⁴⁵ Ibid, s 5.

³⁴⁶ Ibid, s 6.

³⁴⁷ The Applicant alleged that IEBC has been sleeping on its job for the last three years until December 6 2016 when it (ODM) asked what steps has taken to operationalize the Election Campaign Financing Act, 2013”.

³⁴⁸ Ibid, s1A.

3.3.7 The Leadership and Integrity Act, 2012

This main objective of this Act is for the state officers to encompass irreproachable values and conduct since they are the main drivers of the Republic carrying the highest responsibility.³⁴⁹ State officers are expected to uphold the ideals, standards, and the Constitutional values³⁵⁰

The Act prescribes the penalties for the breach of the Constitution by the state officers, breach of any prescribed provisions for public officers on citizenship, public trust, and financial transparency. Additionally, matters touching on the personal conduct of state officers are addressed. These include issues relating to impartiality, declaration of conflict of interest, bullying, and observation of the code in the conduct of private matters. Besides providing for penalties, it further provides for enforcement measures of the specific penalties meant to secure adherence to the code by public officers.

To ensure that the Act is implemented, the Act places the responsibility of overseeing its implementation on the Commission on anti-corruption (EACC).³⁵¹ All state organs are mandated under the Act to support EACC enforce compliance. Accordingly, EACC has the authority to prevail over any government organization to undertake the duties and use any other powers as may be necessitated by the Act. If the need arises, EACC may move a Court of law for such orders as may be necessary to compel the public body to comply.

Though Chapter six and the subsequent enactment of this Act was seen as salvage to the institution of public leadership, the enforcement thereof has suffered serial impediments watering down the Constitutional hopes for good leadership. This has also seen the Judiciary receive its

³⁴⁹ Integrity is “the consistency between what a leader says and what the leader does.

³⁵⁰ This Act was enacted to operationalize Chapter six of the Constitution of Kenya 2010 on leadership and integrity.

³⁵¹ George Kegoro, ‘Integrity in Leadership? Enforcing Chapter Six of The Constitution: An Assessment of the Country’s Performance’ (2015)<<https://africog.org/wp-content/uploads/2015/10/Integrity-in-Leadership-An-assessment-of-Kenya%E2%80%99s-performance-in-enforcing-constitutional-values1.pdf>>accessed 31 May 2019.

portion of blame from the public as the avenue for the ‘sanitization’ of the perceived corrupt and bad leaders.

For instance, it has been said that most of the cases which have been filed in court and regarding the Act to have been thwarted by the judiciary citing technicalities such as failure by the parties to exhaust other mechanisms for addressing such grievances. The case in hand is the one which sought to challenge the qualification or otherwise of Uhuru Muigai Kenyatta and William Samoei Ruto as presidential candidates for 2013 elections with pending criminal charges at the International Criminal Court (ICC). While dismissing the petition filed before the High Court, the court took what would be considered as an intimidating attitude and condemned the Petitioners to pay the costs of the suit.³⁵²

Fredrick Odhiambo has argued that one of the challenges in the implementation of this Act is that EACC lacks the political goodwill to implement the Act as mandated under article 79 to oversee the implementation of chapter six.³⁵³

3.3.8 The Ethics and Anti-Corruption Commission (EACC) Act 2011³⁵⁴

The Ethics and Anti-Corruption Act was passed by the National Assembly in 2011 to establish the Anti-Corruption Commission (EACC) in compliance with the Constitution.³⁵⁵ The Act outlines the duties and powers of EACC, qualification for membership to the Commission, and the process for their appointment.³⁵⁶

³⁵² *International Centre for Policy & Conflict & 5 others v. Attorney General & 4 others* [2013] eKLR.

³⁵³ Odhiambo Fredrick, ‘Obligations Under Leadership and Integrity Law’ a continuation of 2 earlier debates on Ethics and Values’(2017) < <https://www.icpak.com/wp-content/uploads/2017/05/8-Leadership-Integrity-Law-Fredrick-Odhiambo.pdf> >accessed 28 May 2019.

³⁵⁴ Act No. 22 of 2011.

³⁵⁵ This Act was enacted as an amendment to the Anti-Corruption and Economic Crimes Act, first enacted in 2003, renaming it, the Ethics and Anti-Corruption Act and creating the EACC in place of the Kenya Anti-Corruption Commission (created under the Anti-Corruption and Economic Crimes Act).

³⁵⁶ Constitution of Kenya 2010, Art 79.

The Act establishes the Commission which constitutes the chair and four other members.³⁵⁷ With other functions bestowed upon the EACC in the Constitution, the EACC is mandated to fight corruption by preventing its commission and by prosecuting those involved. The EACC is further mandated to fight economic crimes by enforcing relevant laws, educating the public, and encouraging high standards of ethics and integrity among the Kenyan population.³⁵⁸

The EACC is also required concerning state offices, to fight corruption by coming up and nurturing the best values and practices in honesty; to generate a code of ethics; be the recipient of complaints involving the violation of the ethical code; conduct investigations and issue recommendations on the prosecution of suspected violators of the code; coordinate with other public and government offices in developing principles and ideal practices of integrity and honesty and encouraging people to put up with by the said principles.

The EACC is further required to conduct investigations on corruption-related acts and recommend those involved in the Office of the Public Prosecution (ODPP) for prosecution. The role to recommend offenders for prosecution notwithstanding, the EACC also has the mandate to start cases in court aimed at recovering public property or confiscating proceeds of corruption, recovering compensation for corruption, safeguarding public property among others.³⁵⁹

3.3.9 Overview of the institutional and the legal provisions on Democracy and Elections in Kenya

The legal framework and institutional framework providing for and governing the political rights in Kenya is very broad.

We have seen that, at the top, there is the Constitution which has an elaborate chapter providing for amongst others; political and economic rights. We have also seen various statutes enacted for

³⁵⁷ Ethics and Anti-Corruption Commission Act 2011, s 3.

³⁵⁸ Constitution of Kenya 2010, Art 252 and Ch6.

³⁵⁹ Ethics and Anti-Corruption Commission Act 2011, s11.

the advancement and safeguard of the sufferance rights which ought to be free, and fair in Kenya. This denotes that Kenya does not suffer from any in deficiency as far as election legal and Institutional framework is concerned. Whether the same has achieved its intended objects or not is a subject of discussion in this study.

3.4.10 The Legal frameworks and Policies on Economic rights In Kenya

Internationally, UDHR provides for a status of life that is suitable for the health and welfare of everyone including their families. Life standards entail the basics requirements such as food, clothing, and shelter.³⁶⁰ While appreciating the same rights, countries that are parties to ICESCR are obligated to safeguard their inhabitants from hunger. In that regard, the Covenant provides a list of measures that States parties ought to take either separately or through collaboration with the international community to ensure that hunger is eliminated.³⁶¹ According to CRC, children are entitled to a basic life that is adequate for their bodily, psychological, spiritual, ethical, and social growth.³⁶²

States Parties have responsibilities under the said international instruments to act within their means according to resources available to them to ensure that there is a progressive realization of socio-economic liberties.³⁶³ To realize this, states are required to take active steps to increase their respective production measures, preservation, and supply of food through technical and modern means and by evolving the agricultural sector.³⁶⁴

Kenya is a signatory and a party to most of the international instruments discussed above and thus bound.³⁶⁵ Kenya has also domesticated the foregoing Economic rights and captured them

³⁶⁰ UDHR, Art 25.

³⁶¹ ICESCR, Art 11.

³⁶² CRC, Art 27.

³⁶³ ICESCR, Art 2.

³⁶⁴ ICESCR, Art 11(2).

³⁶⁵ Constitution of Kenya 2010, Arts 2(5) and 2(6).

almost verbatim in its Constitution.³⁶⁶ The said Constitution is acclaimed to be amongst the liberal Constitutions world over. Amongst many Provisions, The Constitution has inscribed in its Chapter 4 the Socio-economic Rights.³⁶⁷ Nevertheless, despite these social-economic rights being enshrined in our Constitution, it has been observed severally that there is a lack of full implementation of these rights by the Government which has inhibited social transformation.³⁶⁸

For almost the first ten years since its promulgation, there has been a clear lack of enthusiasm towards the realization and the implementation of these social-economic rights in Kenya. This is despite the various Court decisions directing the Government to ensure compliance regarding Social Economic Rights.³⁶⁹ In its defense, the Kenyan government has constantly held that it is impossible to claim and for the implementation of the socio `Economic Rights enshrined instantaneously as they are supposed to be realized progressively.³⁷⁰

3.4.10.1 Policies related to poverty reduction in Kenya

Since independence, Kenya has had several policies aimed at alleviation of poverty by the Kenyan government some of which yielded very little and the majority, unfortunately, failed to achieve their intended purpose downright. The policies would include the Swynnerton Plan 1952/ 54 which was just before independence; the KANU Manifesto of 1963 amongst others and the latest; Sessional Paper No. 10 of 1965 on African Socialism; the District Focus for Rural

³⁶⁶ Ibid, Art 43.

³⁶⁷ The Constitution of Kenya 2010 at Article 43 provides for the right to the highest attainable standard of health, which includes the right to health care services including the reproductive health care. (b) The right to accessible and adequate housing and to reasonable standards of sanitation. (c) The right to be free from hunger and to have adequate food of acceptable quality. (d) The right to clean and safe water in adequate quantities. (e) The right to social security; and (f) the right to education. Additionally under Article 43 (2) a person shall not be denied emergency medical treatment while Article 43 (3) obligates the State shall to provide appropriate social security to persons who are unable to support themselves and their dependants.

³⁶⁸ Petition No. 15 of 2011 [2011] eKLR.

³⁶⁹ Ibid.

³⁷⁰ The progressive realization of socio – economic rights arguments advanced by the Government of Kenya ‘in the cases of *Satrose Ayuma and Others vs. The Registered Trustees Kenya Railways Staff Retirement Benefit Scheme and 3 Others*, High Court of Kenya at Nairobi Petition No. 65 of 2010 [2013] eKLR, *Mitubell Welfare Society vs. Hon. Attorney General and 2 Others* High Court of Kenya at Nairobi Petition No. 164 of 2011 [2013] eKLR, *Susan Waihera Kariuki & 4 Others v. Town Clerk of Nairobi and 3 Others* High Court of Kenya at Nairobi Petition No. 66 of 2010 [2013] eKLR, *Mathew Okwanda v. Minister of Health and Medical Services* High Court of Kenya at Nairobi Petition No. 94 of 2013 [2013] eKLR and *Michael Mutinda Mutemi v. The Permanent Secretary Ministry of Education & Others* High Court of Kenya at Nairobi Petition No. 133 of 2013 [2013] eKLR.

Development 1983 and Sessional Research Project No. 1 of 1986 on Economic Management for Renewed Growth; Structural Adjustment Programs (SAPs) aimed at stimulating economic recovery within the first 18 months of their implementation.;³⁷¹ Millenium Development Goals; Vision 2030; sustainable development goals(SDGs) and others.

Swynnerton Plan was an agricultural policy adopted by the colonial government and its purpose was to increase the adoption of agricultural practice in Kenya. Among its aims was to increase the surface area covered by cash crops in the colony. To that end, it aimed at improving infrastructure and markets. The plan also wanted to enhance the distribution of necessary farm inputs, and to gradually consolidate land into massive tracks as opposed to smallholder policies.³⁷²

The KANU Manifesto of 1963 was founded on the KANU's Objectives which were; to fasten economic growth, to secure even distribution of the national cake among individuals and different regions in the country.³⁷³ This Manifesto is criticized as being the basis for KANU's poor performance in the alleviation of poverty since it lacked specific strategies that would be employed to fight poverty.

The African socialism Paper was designed by the government founded on the government organization as an instrument for the socio-economic growth. The paper aimed to create a mechanism that would enhance political, social, and economic growth founded on practicality and open markets. There was also recognition of both the private and government sectors as important actors in the country's quest for economic development.³⁷⁴

³⁷¹ Odundo P, Otieno W, Omiti J and Owino W, 'Poverty Reduction Efforts in Kenya: Institutions, Capacity And Policy' (2002) Institute of Policy Analysis and Research Nairobi, Kenya, Discussion Paper No. 033/2002 February 2002.

³⁷² Kanogo Tabitha, *Squatters and the Roots of Mau Mau, 1905-63*, Nairobi: East African Educational Publishers(1993)

³⁷³ Kenya African National Union, 'The Kanu Manifesto For Independence, Social Democracy And Stability. [Kenya?], [Kanu]' (1960). <<https://searchworks.stanford.edu/view/3876630>>accessed 5 November 2019

³⁷⁴ Omiti and Odundo, (n371)

The District Focus for Rural Development (DRFD) – 1983 DFRD had the intention of shifting the development and application of strategies from the national government to the local government. This move had the intention of activating development in rural areas and to initiate ideas in rural areas that would add to the central government's initiatives. It was hoped that it would help identify problems, mobilize resources, and help prioritize the type of projects to be implemented in rural areas.

The Sessional Paper No. 1 of 1986 on Economic Management for Renewed Growth changed how issues were approached. The paper fronted a more altruistic approach rather than the inward-looking approach that had been the business of the day. By hinging its focus on support of the private sector, regulating the high deficits in the budget, and regulating the foreign trade policies that distorted the economy, the paper hoped to shake the country out of economic stagnation.

National Poverty Eradication Plan (NPEP1999-2015) was launched to succeed in the previous national development plans and poverty-specific programs which were unsuccessful in fighting poverty. Through appropriate home-grown community initiatives, the government aimed at reducing poverty prevalence in Kenya by fifty percent (50%) by 2015. The Government also sought to reinforce the ability of poor people to earn a living. This method was mostly suitable in the investigations and understanding of poverty for the subsequent Poverty Reduction Strategy papers.

There was later on the Poverty Reduction Strategy Research Project, 2000-2003 whose objective was to complement other poverty reduction efforts such as NPEP. It recognized that Kenya was to first improve the welfare of the majority of Kenyans by focusing on ways that would reduce the incidence of poverty. PRSP emerged to be the most far-reaching policy document dedicated as far as poverty eradication is concerned in Kenya.

The Millennium Development Goals, (MDGs), 2000-2015 were eight (8) goals that were obtained from the UN's Millennium Declaration, approved on September 2000. The Declaration committed heads of states; to fight poverty, starvation, illness, ignorance, environmental deprivation, and percipience against women. The declaration was adopted by 191 United Nations member states who undertook to attain the millennium goals by 2015.³⁷⁵ Critics of the MDGs have decried inadequate examination and validation as to why the objectives were chosen, and the obscurity of measurements for some goals among others.³⁷⁶

The Sustainable Development Goals (SDGs) were adopted in the year 2015 as a worldwide appeal to act to eradicate poverty and to ensure that people all over the world have peace and are prosperous by 2030. These goals are part of the UN Resolution 70/1, the 2030 Agenda, and were adopted to substitute the Millennium Development Goals MDGs).³⁷⁷

To make the SDGs a success, the Government of Kenya took steps to convert the 2030 Agenda into concrete results for its people by incorporating the SDGs in the Government visions and policies such as vision 2030, the big 4 agendas amongst others. The vision 2030 is a government development road map for the period between 2008 and 2030. The main aim of the vision 2030 is to further consolidate the economic recovery momentum gained from the implementation of the ERS to make Kenya a middle-income state with the ability to make its citizens live a quality standard life by 2030.³⁷⁸

The big Four Point agenda on the other hand is an agenda of four major items that President Uhuru Kenyatta, had promised to concentrate on during his second presidential term between the

³⁷⁵ WHO INT, 'Millennium Development Goals (MDGs)' <https://www.who.int/topics/millennium_development_goals/about/en/>accessed 10 November 2019.

³⁷⁶ Njeru Paeohn, 'Policy-Based Approaches to Poverty Reduction in Kenya: Strategies And Civil Society Engagement. Nairobi: Undp' (2005) < <https://profiles.uonbi.ac.ke/enjeru/publications/policy-based-approaches-poverty-reduction-kenya-strategies-and-civil-society-eng>>accessed 10 November 2019.

³⁷⁷ UNDP, 'Sustainable Development Goals'<<https://www.undp.org/content/undp/en/home/sustainable-development-goals.html> >accessed 11 November 2019.

³⁷⁸ Treasury, 'Electronic Project monitoring Information System development projects in Kenya, Vision 2030' <http://e-promis.treasury.go.ke/portal/development-strategy/vision-2030/>>accessed 11 November 2019.

years 2017-2022. The agenda was aimed at raising the living standard of Kenyans, improve the Country's economy, and to ensure a lifelong legacy for his tenure. These would entail ensuring that the country has food security, built capacity for job creation through manufacturing, quality, and affordable health care for everyone in Kenya and affordable shelter.³⁷⁹ Whether this would be successful or just like the previous policies, only time will tell.

3.5 Conclusion

As intimated from the beginning, this chapter analyzes the law and the institutions put in place for the realization of suffrage right in the Kenyan context. True to the same, we have seen that there exists a superfluity of the legal framework on elections at the international, regional, and at the local levels. Examined together was also the legal framework and policies about economic rights as this study seeks to examine the interplay between the two.

We have also seen that there is no legal vacuum as far as the rights, principles, and procedures for the participation, conducting, and resolving elections disputes at the various levels are concerned.

To start with, there is international law which is very emphatic on the principles governing the conduct of elections so as to be free and fair. This is the same with the Regional legal frameworks receiving strong backing from the National Legislations.

It has also emanated from the overview of the foregoing statutes that incidents of election malpractices are anticipated and provided for as a matter of law. In case of any election malpractice or any grievance suffered by any person as far as elections are concerned, there is a very elaborate provision of the law dealing with all such disputes and vices.

³⁷⁹ Simon Muturi Ngugi, 'Big Four Agenda: Manufacturing' (JKUAT University 2018) <<https://kippra.or.ke/big-four-agenda-manufacturing/>> accessed 11 November 2019.

Institutionally, we have seen that there are EACC and IEBC established by various statutes. We have also seen at the lower level, the office of the Political Parties Dispute Tribunal with jurisdiction to handle disputes involving political parties. Then there is IEBC with the principal mandate of conducting free, and fair election in Kenya and also with jurisdiction to resolve disputes arising from Nomination. After elections disputes are dealt with by several Courts starting with the Resident Magistrates court and at the apex, the Supreme Court with an exclusionary original to handle elections disputes arising from Presidential elections.

Nevertheless, the foregoing notwithstanding, there has been dreary observance, unwillingness to implement, and lack of enforcement mechanisms mostly on the economic rights and policies which are important to facilitate the enjoyment and the actualization of the political rights to free, and fair elections granted by the various instruments discussed.

We have also seen that most of the general principles espoused by the various international, regional, and local legal frameworks are to accord and for the regulation of free, and fair elections. However, the foregoing is not without numerous loopholes and gaps which work to the detriment of the poor.

Free, and fair elections remain a mirage at this instance. The reason being that, the legal frameworks provide for a free, and fair elections on one hand while it take away with the other. For instance, the law provides for the right to be part of elections as aspirants but on the other hand, makes it expensive for nomination. Further, the law provides for electoral justice but prescribes punitive court costs.

Further on that list is the inaccessibility to some of the tribunals established to deal with election-related disputes such as the dispute tribunal established under the IEBC and the PPDT. The poor mostly do not make it to the nomination list by the popular parties forcing them to proceed as

independent candidates. Independent candidates do not receive any funding from the Government amongst other shortfalls. All these amongst other highlighted legal shortfalls effectively consign the poor and the marginalized to the peripheries of democracy.

On economic rights, the study has revealed that the same lacks implementation by the government giving it a wide berth of progressive realization with no timeliness. The same has unsuccessfully been a subject of several court proceedings. The same trend applies to various government policies since independence which were aimed at the alleviation of poverty with no success at all for various reasons above all being lack of political goodwill. This is enough prove that the current poverty status in Kenya has been by and large been as a result of poor governance.

This study recommends complete auditing and review of the existing legal framework on elections in Kenya. There is a need to amend the law and the institutions governing the exercise and the conduct of elections in Kenya to reflect and also to capture the fate of the economic status of the poor candidates and the electorates. The study concludes that this review should involve the people at large for public participation and civil societies and the institutions concerned. The study highly discourages a review and the amendment of the law by the political class alone since this will not alleviate the position for they are the grant beneficiaries of the law as it is.

As the study in section 1.7.1.1.1 had noted that the number of Kenyans living below the poverty line to be approximately 14.5 million, the study proceeds now to Chapter 4 and discuss the challenges imposed upon by poverty in Kenya, in conducting and participation of Kenyans in elections.

CHAPTER 4

THE POVERTY CHALLENGES ON FREE, AND FAIR ELECTIONS IN KENYA

4.0 Introduction

Having examined the legal and the institutional framework on free, and fair elections in Kenya, the social and economic legal and policy frameworks, this chapter presents study findings in detail on the correlation between poverty and the suffrage right in Kenya. The chapter will rely heavily on the findings in chapter 3, briefly on the historical context discussed in chapter 2, and discussion on poverty and poverty status developed in chapter 1. The Chapter will then discuss the interplay between poverty and the exercise of free, and fair elections to argue that the various election challenges in Kenya have a direct correlation with poverty incidences in Kenya. The chapter is a contextualization of how poverty inhibits the actualization of the right to free, and fair elections in Kenya.

Poverty is a barrier to Kenya's quest for true democracy. There are both direct and indirect correlations between poverty (economic rights) and the political rights to free and fair elections. Poverty impedes the Government's ability to run a cost-effective election in Kenya as well as the citizens' participation in elections as either candidates or electorates.

The chapter is divided into three segments; the first segment analyses the poverty challenge on governments; the segment is on the poverty challenge on the electorates and finally the poverty challenge on the eligible aspirants.

4.1 Poverty Challenges and the right to free, and fair elections at government level

The cost of running an election in Kenya is one of the most expensive in the world.³⁸⁰ The cost of holding the 2017 general elections was approximately Ksh 65 billion as compared to Ksh26

³⁸⁰ Samuel Gebre, 'Kenya's Turbulent 2017 Elections Cost Half a Billion Dollars' (2018) <<https://www.bloomberg.com/news/articles/2019-11-25/ford-challenges-tesla-to-an-apples-to-apples-truck-tug-of-war>> accessed 26 November 2019.

billion that was spent in the 2013 General Elections. This translates to Ksh2, 500 costs per registered voter compared to Ksh1, 800 costs in the 2013 general elections.³⁸¹

Resulting from the nullification of the outcome of the presidential election in 2017 by the Court, the cost had to escalate further leading to an adjustment of the election budget to cater for the 26th October 2017 repeat presidential polls. The preparation and the conduct of the 2017 general elections were allocated money twice both in the year 2016 and the 2017 budgets.³⁸²

Other incidental costs connected to the holding of the 2017 general elections would include Kshs Ksh. 79.2 billion for the provision of security by the Ministry in charge of Interior and Coordination of National Government during the elections. The Registrar of Political Parties' office was allocated a budget of Kshs 123.7 million was set aside and spend for the preparation of the said 2017 elections.³⁸³

The cost of running elections in Kenya is far higher than in its counterpart such as Ghana which spent an equivalent of Ksh105 in the 2016 elections as cost per registered voters to hold their General Election.³⁸⁴

To conduct its 2017 election, Rwanda spent an amount equivalent to Kenya shillings six point five million (\$6.5 million) with a population of 6.8 million registered voters. This figure would translate to less than a dollar per voter. A similar low expenditure would be reflected in Tanzania whose population and the number of registered voters is more than that of Kenya, expended \$300 million lower than Kenya during the 2015 general elections.

³⁸¹ The National Treasury, 'Pre-Election Economic and Fiscal Report' (2017) <<https://www.treasury.go.ke/fiscalreport2017/PREELECTION%20ECONOMIC%20AND%20FISCAL%20REPORT%202017.pdf>>Accessed 9 June 2019.

³⁸² The budget allocation was for Kshs. 22.6 billion in 2016/17 financial and Kshs. 31.5 billion allocation for 2017/18 financial year.

³⁸³ Agnes Kariuki, 'Rethinking Our Electoral Processes: Kenya 2017 General Elections' (2018) Research Project submitted in Partial fulfilment for the Bachelors of Arts at the University of Nairobi.

³⁸⁴ Julius Mwatu, *Accountants call for review of election costs* (2017) <<https://www.businessdailyafrica.com/economy/ICPAK-call-review-of-Kenya-election-costs/3946234-4034676-149o4ygz/index.html>>accessed 26 November 2019.

Some of the underlying causes for the escalated cost of elections in Kenya relate to poverty and the high levels of unemployment and as opposed to other countries like Rwanda, Kenyans would not volunteer and offer their time and knowledge to reduce the costs. Kenyans if not paid to do the job, would prefer doing something else profitable. Poverty-related challenges in some parts of the country such as poor infrastructures like roads, lack of electricity, and telecommunication facilities make the business of IEBC very challenging while performing its duties. Use of alternative means of transport that are friendly to poor roads such as motorbikes, generators where there is no electricity pushes the cost of conducting an election by the IEBC higher.

To meet these costs, the government would opt not to finance other critical sectors such as the provision of free and affordable health services to its poverty-stricken population and agriculture where about its rural population rely on. The resources would instead be diverted resources to cater for the expensive elections. It is for this reason amongst others which makes it very costly to carry out elections in Kenya due to the prevailing circumstances.³⁸⁵

The costs herein cannot adequately be funded by the state leading to delayed delivery of election materials, prolonged periods of vote counting and announcements of results, or even postponement of the whole process. These pose a challenge to the IEBC in its role to conduct a seamless free and fair election.³⁸⁶

4.2 The effect of poverty on the right to free, and fair elections to the voters

There are various ways in which poverty affects the voters' participation in elections. This chapter argues that the pre-requisites for having free, and fair elections cannot do any better in an environment where the voters are affected by social, political, economic, psychological, and

³⁸⁵ Michael Chepkwony, 'Voters do not trust us, says IEBC commissioner' *The Standard* (Nairobi, 17 October 2018) <<https://www.standardmedia.co.ke/article/2001299334/why-cost-of-elections-is-high-in-kenya-iebc-reveals>> accessed 26 November 2019.

³⁸⁶ Oliver Mtapuri, *Holding 'Free but not fair' and 'Fair but not free' elections'* In Joseph Rudigi Rukema (Ed), *Elections and Governance in Africa, Sub-Saharan Africa*; (University Press 2017)24 -56, ISBN 978-0-421-73643-2.

educational poverty. Any person dispossessed of the basic means of living is unable to effectively take part in the political affairs of his country.

Poverty results in apathy for various reasons. One is that in a country where the middle class has to work extra hard for basic needs, struggle to go to school, experience hardship in securing a job whose pay is commensurate to their needs, taxed heavily, pay exorbitantly for rent, electricity, and water after the government has failed in its responsibility to provide affordable housing and the rest, they would opt not to vote and do something else more beneficial and which brings them food.³⁸⁷ Such a situation leads one to lose track and the concern of what is happening in their country as they feel let down by the government and also left out of the political process.³⁸⁸

Further, political poverty breeds hopelessness in democracy. As such, the majority of the population would rather get concerned with earning their daily bread than participate in an abstract concept of free, and fair elections which they feel is no relief.³⁸⁹ This in effect inhibits the citizens' participation in the governance of the country by not participating in the election of the people who would represent their interests in Parliament for five years or more.³⁹⁰ The inability of the people to participate in an election for being steeped in pursuing basic needs defeats the very basic democratic presumption of civic virtue.³⁹¹

Statistics in terms of election participation in Kenya for instance would show that the 2002 Kenya's General elections registered the lowest number of people who turned up to vote at 57.2%. This could be attributed to the previous economic situation in Kenya under the KANU

³⁸⁷ Inioluwa Ogunseye and Hannah Andeyemi, 'Poverty And Electoral Challenges In Nigeria' (2019)10(1)Lapai Journal of Humanities.

³⁸⁸ Ruth Patrick, 'how poverty makes people less likely to vote' (2017) <https://www.theguardian.com/society/2017/may/16/poverty-election-vote-apathy> (accessed on 26.11.2019).

³⁸⁹ Oluwatusin Audu and Abolarin-Egbebi, 'Poverty and the Sustainability of Democracy in Nigeria' (2015)20(2) IOSR Journal of Humanities and Social Science (IOSR-JHSS), 36-42 <www.iosrjournals.org>accessed 26 November 2019.

³⁹⁰ Mtapuri (n386).

³⁹¹ Richard Epstein, 'Beyond the Rule of Law: Civic Virtue and Constitutional Structure' (1987)56 George Washington Law Review, 149.

regime.³⁹² However, this changed in 2007 where the voter turnout was at 69.1 percent.³⁹³ The highest voter turnout in Kenya ever recorded was in the 2013 general elections where there was recorded an unprecedented 86 percent voter turnout of the registered voters. In 2017, the number of registered voters in Kenya was about 19.6 million and those who turned up to vote were 77.48 percent.³⁹⁴

The foregoing is a clear pointer that though not entirely a cause for voter apathy, poverty significantly contributes by for instance breeding hopelessness in the electoral process which ironically should alleviate them from the whims of poverty. This is true where Poor governance and misappropriation of funds in government-owned entities are common. Misappropriation of funds leads to a lack of funds intended for the expansion of industries for employment opportunities.

Poverty illiteracy affects the voters' exercise of their political rights adversely. Poverty affects one's ability to acquire money for school fees to acquire basic education which would enlighten their consciousness to interpret and understand political choices and information leads to a bunch of uncritical thinkers.³⁹⁵ According to Leah Muthoni, a lack of political education and literacy is a major problem in Kenya.³⁹⁶ This is attributed majorly to the economic, social, and political domination and authoritarianism that characterizes Kenya and other African Countries.³⁹⁷

³⁹² There was an economic revival between 2002-2007 at the reign of president Kibaki with a national growth from 0.6% in 2002 under Kanu's regime to 3.0% in 2003, then to 4.9% in 2004, 5.8% in 2005 and 6.3% in 2006 all under the reign of President Mwai Kibaki. There was also a fall in number for the population living below poverty line from 52.4% in 1997 to 40.3% in 2006. See data from Kenya National Bureau of statistics 2005/2006 welfare survey.

³⁹³ African Elections Database, 'Elections in Kenya' (2012) <<http://africanelections.tripod.com/ke.html>>accessed 27 November 2019.

³⁹⁴ The Carter Center, 'Final Report 2017 Kenya General and Presidential Elections' (2018) <www.cartercenter.org>Accessed on 27 November 2019.

³⁹⁵ Ogunseye and Andeyemi (n387).

³⁹⁶ Leah Muthoni Waiganjo, *A Justification of Political Education in Kenya* (2013) Research Project in Partial Fulfillment of the Requirement for the Award of Masters of Education Degree, University of Nairobi.

³⁹⁷ Ibid.

Poverty Illiteracy significantly encumbers people's effective involvement in elections. Most of the illiterate people have limited access to information on the political process and thus unable to make informed decisions in voting.³⁹⁸

Economic Poverty facilitates voter bribery and consequently poor choices in elections. As the social and economic status of an individual determines their participation level in elections, the voters for being poor would in this instance, opt for the need-based or cost-benefit approach in elections.³⁹⁹ Economic poverty which works closely with psychological poverty affects the voters' ability to discern the integrity and the candidate's credibility to make the correct decision in an election.⁴⁰⁰ They would (people) instead focus on material incentives at the time of the election campaigns and also on Election Day. Being cognizant of this fact, the elite Politicians would then take advantage of the poverty incident to bribe the voters and get elected as opposed to being elected on merit.⁴⁰¹ This would unfortunately then become the trend in every election cycle.

Bribery of voters is an egregious method of manipulating the Kenyan population that has beleaguered the Kenyan politics since time memorial and became much more proliferated after the return of the multi-party system in 1992.⁴⁰² Due to poverty incidences in Kenya, the culture of voter bribery remains the biggest challenge for open, polls as the choice of leaders is pegged not on merit but on who offers a bigger token. Voter bribery is very entrenched in Kenya such that some voters would feel much entitled to the bribe to an extent of claiming it directly from

³⁹⁸ Ibid.

³⁹⁹ "Need based or hierarchy of need" is a motivational theory in psychology developed by American psychologist Abraham Maslow. The theory provides that; needs lower down in the hierarchy must be satisfied before individuals can attend to needs higher up. From the bottom of the hierarchy upwards, the needs are: physiological, safety, love and belonging, esteem, and self-actualization.

⁴⁰⁰ Ogunseye and Andeyemi (n387).

⁴⁰¹ Veronica Onjoro, 'how money and bribes influence voting patterns in Kenya' (2016) <https://www.academia.edu/6853335/how_money_and_bribes_influence_voting_patterns_in_kenya (accessed 27 November 2019).

⁴⁰² Vitalis (n10).

the aspiring candidates even when they have no intention of supporting their political ambitions or electing them.⁴⁰³

In a Survey report conducted in ten Counties by Konrad Adenauer Foundation in 2016, it was established that one of the drivers or causes of voter bribery in Kenya is the high threshold of poverty that exposes individuals to the whims of those who have money and are ready to give it out in return for votes. The report held further that the majority of Kenyans are ready to receive such ready money to expend the same towards meeting their daily bread without even a second thought.⁴⁰⁴

4.3 The poverty challenges on election aspirants in Kenya

Poverty has various adverse effects on those who wish or seek to participate in an election as a candidate. These range from low self-esteem, lack of resources to campaign and the attendant costs, and the ghost of bribery and voter treatment. These are discussed in details below:

4.3.1 Low self-esteem to contest for an Election in Kenya

Poverty causes inferiority complex low self-esteem to the detriment of one's social life.⁴⁰⁵ It leads to one's feeling of self-worthlessness limiting their contribution and participation in society and political engagement which are important for democracy.⁴⁰⁶ The biggest worry and focus of the people living in poverty is dealing with the instant or present state of affairs depressing them. As a result, poor people would hardly think or plan for the future and are often likely not to take

⁴⁰³ Ibid.

⁴⁰⁴ Richard Lough, 'Rights group cites 'vote-buying' in Kenya' (2013) *World News March* <<https://www.reuters.com/article/uk-kenya-elections-bribery/rights-group-cites-vote-buying-in-kenya-idUKBRE9200J720130301>>accessed 28 August 2019.

⁴⁰⁵ Anita Alig, 'Does Poverty Affect Self-Esteem?' (2018) <<https://wordnews27.com/does-poverty-affect-self-esteem> (accessed on 07.07. 2020); Dawn Foster, 'How being poor can lead to a negative spiral of fear and self-loathing' (2015) <<https://www.theguardian.com/society/2015/jun/30/poverty-negative-spiral-fear-self-loathing>>accessed 07 July 2020.

⁴⁰⁶ Carina Mood and Jan Jonsson, 'The Social Consequences of Poverty: An Empirical Test on Longitudinal Data. (2016)127, *Social indicators research*, 633–652. <<https://doi.org/10.1007/s11205-015-0983-9>>accessed 10 August 2020.

a risk by engaging in politics as candidates as they hardly think of being successful.⁴⁰⁷ Poverty would, in this case, would be defined over and above the economic deprivation, to also entail lack of participation in the cultural, civil, and public life of the society.⁴⁰⁸

Poverty as a result denies the society an opportunity to benefit from brilliant ideas held by individuals who apart from being unable to cater for the costs involved such as nomination fees, travel, and other related campaign costs, low self-esteem, and their skepticism in political participation would opt not even to participate as candidates.⁴⁰⁹

Our good example here would be Kibra Constituency. Kibra is the second-largest slum in Africa whose leadership is always dominated by people from outside.⁴¹⁰ It has always been led by the rich elites who include the former Prime Minister of Kenya Raila Odinga. Raila and who is a son of Kenya's 1st Vice President resides in affluent Karen. The same applies to the late Ken Okoth who although alleged to have been born and bred in Kibra, was not a resident therein at the time of his death. This applies to other poverty-stricken areas such as Mathare amongst others.

Poverty stricken youths would only be involved as militants and thugs employed by the rich contestants to cause chaos in exchange for handouts. For instance, in the just concluded by-election for the 12 member of National Assembly held in November 2019, the Deputy President William Ruto accused the opposition and former Prime Minister Raila Odinga of using outlawed groups for his candidate Imran Okoth to win.⁴¹¹

⁴⁰⁷ Jennifer Sheehy and Jessica Rea, *How poverty affects people's decision-making processes* (2017) <www.jrf.org.uk> accessed 30 November 2019.

⁴⁰⁸ United Nations, 'Report of the World Summit for Social Development Copenhagen' (1996) 166/9 United Nations publication Sales No. 96.IV.8.

⁴⁰⁹ Mood and Jonsson (n 406).

⁴¹⁰ UN Habitat, 'Sanitation – vacutug' <<http://mirror.unhabitat.org/categories.asp?catid=548>> accessed 27 November 2019.

⁴¹¹ Patrick Vidiji, 'Raila used militia to disrupt Kibra by election - DP Ruto' *The Star* (Nairobi, 9 November 2019) <<https://www.the-star.co.ke/news/2019-11-09-raila-used-militia-to-disrupt-kibra-by-election-dp-ruto/>> accessed 26 November 2019.

The same is the case in other parts of Kenya where we have a Self-proclaimed militia ‘Kalenjin Warriors’ of the Rift Valley,⁴¹² the outlawed *Mungiki* sect, and the *Chinkororo* militia group used by Kisii politicians just to mention but a few.⁴¹³

4.3.2 The cost of the election campaign in Kenya

Elections in Kenya are highly commercialized. This technology reduces the involvement of the economically underprivileged masses who cannot afford to raise funds for campaigns among other expenses. Consequently, there have been societal stratification in matters electoral empowerment in that the poor have perpetually remained as electorates while the rich qualify to be contestants. This effectively inhibits their ability to participate in polls as contestants.⁴¹⁴

The expenses run from the obvious costs of paying for the nomination, printing posters, fuel, transport, and accommodation or even relocating if you are not ordinarily a resident from the place you are vying at.

Starting with the topmost seats in Kenya being presidency and which carries the mantle of the winner takes it all, the election of any individual to the said office is a very costly affair. It is all about money as where there is poverty, money speaks louder and the voters listen keenly.⁴¹⁵ For instance, back in the year 2017, it is estimated that the Jubilee Political Party led by the then and the incumbent President Uhuru Kenyatta spent more than Kshs 5 billion in running campaigns for the presidency. This is also said to have been an increase from Kshs 3 billion the same party

⁴¹² Dai Kurokawa, Kenya’s history of political violence: colonialism, vigilantes and militias’ (2017) <<https://theconversation.com/kenyas-history-of-political-violence-colonialism-vigilantes-and-militias-83888>>accessed 26 November 2019.

⁴¹³ George Kegoro, *The Rise of Militia Groups In Political Violence: A Case Study of Chinkororo with Special Reference to the Post Election Violence in Kenya* (2009) Thesis submitted in Partial Fulfilment for the Award of A Degree of Master of Arts in International Conflict Management at the Institute of Diplomacy and International Studies (Idis), University Of Nairobi University.

⁴¹⁴ Constitution of Kenya 2010, Art 38(2) (a).

⁴¹⁵ Winner takes it all democracy is where there is no power sharing with the losers in an election.

had spent back in the year 2013 implying that the cost keeps escalating after every election by almost 100%.⁴¹⁶

The same applies to mutatis mutandis to the post of the County Boss-governor. It is estimated that the costs involved to become a governor in Kenya is at least Kshs 6,000,000 to billions.⁴¹⁷

In other elective seats, a report carried out by the Coalition for Accountable Political Financing (CAPF) revealed that there has been a 200,000% rise in campaign expenditure in Kenya since the year 1957 to 2012. That whereas in the year 1957 the cost for running for the elections and campaign for a Member of Parliament cost one a mere Kshs 4,000/=, the same seat would cost at least a whopping Kshs. 14,000,000/= in 2013! Fast forward to 2016, the IEBC downscaled the cost of running a successful parliamentary campaign to Kshs 33 million as from Kshs 14 million which would be spent in 2013.⁴¹⁸

This amount is quite a lot to be spent in the name of public service. It is instead very obvious that once someone spends such a big amount of money they would always be led by a different motive probably to acquire power and robe the public more and thus spend the next five years recovering while plotting re-election.⁴¹⁹

Although there is some party funding available, it does little depending on the party and the seat in question. You would find most of the aspirants spending more than they could afford to the extent of breaking banks for election campaigns and other elections attendant expenses. They run into debts to an extent of being declared bankrupt due to elections in Kenya.⁴²⁰

⁴¹⁶ Luke Mulunda, 'Money, money everywhere' *Nairobi Business Monthly* (Nairobi, 6 July 2017).

⁴¹⁷ Justus Wanga, 'Governors to spend millions in upcoming elections' *Daily Nation* (Sunday April Nairobi, 24 April 2016).

⁴¹⁸ An alliance of governance-focused civil society groups in Kenya.

⁴¹⁹ Okech Kendo, 'Campaign Costs Fuel grand sleaze' *The Star* (Nairobi, 11 August 2016) <<https://www.the-star.co.ke/opinion/columnists/2016-08-17-campaign-costs-fuel-grand-sleaze/>> accessed 28 August 2019.

⁴²⁰ Kamau Muthoni, 'Court declares former presidential candidate Cyrus Jirongo bankrupt' *The Standard* (Nairobi, 10 October 2017) <<https://www.standardmedia.co.ke/article/2001256860/court-declares-jirongo-bankrupt>> accessed 3 September 2019.

To maintain elections sanity and integrity, there is a need to regulate the use of funds and funding during election campaigns. There is an urgent need to come up with measures that would uphold fairness, transparency, and responsibility in elections funding and spending. It is through that any person who wishes to participate in an election as a candidate would do so without the being hindered by unregulated use and funding of campaign funds and expenses thus enhancing democracy.⁴²¹

The Constitution of Kenya decrees upon the Kenyan Parliament to come up with a law to control and to oversee the political parties' financing.⁴²² This is what led to the enactment of the law providing for the Political Parties Fund⁴²³ administered by the Registrar of Political Parties.⁴²⁴ However, this law was not properly enacted as it does not regard poor candidates who are eventually subjugated by the rich and thus need for its review.⁴²⁵ The Money under the Act is only allocated to registered political parties for purposes compatible with democracy should take into account the independent candidates with no funding from any political party and also the individuals from political parties whose access to the said funds is crippled by mere failure to meet the conditions precedent in the Act regarding the percentage of votes secured in the prior general elections.⁴²⁶

The suspension of the Election Campaign Financing Act, 2013⁴²⁷ by the National Assembly is a drawback in the pursuit of free and credible pools and also in the fight against illegal, irregular,

⁴²¹ Philip Gochana, "Campaign financing and corruption in Kenya," *Fifth Estate* (Nairobi, 12 September 2018) < <https://www.capitalfm.co.ke/eblog/campaign-financing-and-corruption-in-kenya/>>accessed 4 September 2019.

⁴²² Constitution of Kenya 2010, Art 92.

⁴²³ Political Parties Act 2011.

⁴²⁴ *Ibid*, s 23.

⁴²⁵ The Act establishes a framework for the registration, regulation and funding of political parties. The Act provides for the establishment of a political parties fund and the manner in which the funds should be sourced and allocated to political parties.

⁴²⁶ Section 26 of the Political Parties Act 2011 provides for Ninety-five per cent of the Fund shall be distributed proportionately by reference to the total number of votes secured by each political party in the preceding general election; and five per cent for the administration expenses of the Fund.

⁴²⁷ Enacted into law in December 2013.

and uncontrolled funding and spending in elections. This Act has the hope and the potential to bring some financial sanity and some equal footing among political competitors. IEBC should be put into a task to gazette the required regulations in time to operationalize this statute.

As it happens in other nations like the United States with state public financing, the state come up with measures such as the introduction of elections bursary schemes, election subsidies intended for poor aspirants or those from a poor background, and regional funds to reflect varying local costs as opposed to the ordinary party funding whose benefit is only felt by the popular parties.⁴²⁸

To ensure that there is some level playfield in campaign expenditure and cost, each political party and persons should have equal access to publicly available resources. This would be in efforts to avoid a situation where the incumbents would use state resources in carrying out party activities such as funds, vehicles, and state media in campaigns that are not accessible by the other candidates and political parties.

4.3.3 Costs for Electoral Justice in Kenya

The other challenge in pursuit of free and credible elections in Kenya is the costs implications in the pursuit for electoral justice by the poor. These costs apply when prosecuting, defending, appealing and the costs payable after judgment for losing the petition.

The costs involved in prosecuting election suits filed in court would include payment for the compulsory security for the eventual costs required by the Election Act, legal fees for the advocates, and direct costs for summoning, transportation, and preparing witnesses and the outcome where the court would dismiss the petition with condemnation that the losers do pay huge punitive costs to the winning candidate.

⁴²⁸ GAO -03-453, Campaign Finance Reform: Early Experiences of Two States That Offer Full Public Funding for Political Candidates (2003) <<https://www.govinfo.gov/content/pkg/GAOREPORTS-GAO-03-453/pdf/GAOREPORTS-GAO-03-453.pdf>>accessed 18 May 2019.

The law decrees upon any person who seeks to challenge election outcomes in a presidential election to deposit a sum of KSh1 million. Those who wish to challenge the election outcome for the election of any Member of the National Assembly (MPs) have to part with KSh500, 000 which amount also applies to those who wish to challenge the election results of the office of Women Representative and governors. The security costs of KSh100, 000 is also required for those who file a suit to contest the election outcome for the office of the Member of County Assembly.⁴²⁹

The Act requires further that the petitioner should make such payment within a period 10 days after filing the suit in Court. In an event where one fails to deposit the stated amount for costs or where an objection is sustained and not set aside, the court can fail to proceed further with to hear the suit.⁴³⁰ The court can also allow an application filed by the Respondent seeking to have the election petition dismissed or struck out and order for payment of the costs incurred by the Respondent. For instance, the election Court sitting in Busia High Court allowed an application which sought to dismiss the election petition by the Respondent after the petitioner failed to deposit the security of Kshs. 500,000.⁴³¹ Further in *Leo Oduyo Obambo v. Bonface Ouma Oremo & Another* failure to pay the deposit security for cost saw the court struck and dismiss the appeal on that reason alone.⁴³²

The minimum legal fees payable to an advocate is provided for in the Advocates Remuneration Order 2014. For an advocate to appear and represent the Petitioner or the Respondent in any dispute related to polls, the minimum amount prescribed by the Order as the instructions or legal fees, the order prescribes KSh500, 000 as payable to an advocate. This being the minimum legal

⁴²⁹ Election Act 2011, s 78 (2) (a-c).

⁴³⁰ Ibid, s78 (3).

⁴³¹ *Henry Okello Nadimo v. the Independent Electoral and Bounderies Commission & 2 others* [2013] eKLR.

⁴³² *Leo Oduyo Obambo v. Bonface Ouma Oremo & Another* [2017] eKLR Magistrate's Court At Migori Election Petition No.2 Of 2017.

fees prescribed under the order, the figure can go upwards depending on the advocate charging. Just having come from an election campaign, this is not manageable by all.

Further encumbering costs in the pursuit of electoral justice and in also in pursuit of free, credible, and fair elections are the costs involved in between the process which may be very prohibitive. For instance, in Kenya's Presidential election Petition No. 2 & 4 of 2017,⁴³³ the petitioners who had filed the petition challenging the presidential election results of the elections held on 26th October 2017⁴³⁴ were required to pay Kshs 80million to access the certified voters' register which would have enabled them to prove their case before the court.⁴³⁵

The other dreadful blow to election candidates in their endeavor to participate in elections contests and by extension electoral justice is the fear for the punitive costs often slapped on those who lose in an election petition dispute. Those who lose their cases get slapped with costs to the respondents, the IEBC, and its officials. This is pegged on the argument that some costs were incurred and the court has to make a judgment on who should bear that cost. Those who also withdraw their petitions midway are accordingly punished as well.

For instance, Justice Francis Gikonyo sitting in an election court at Meru High Court ordered the petitioner who had sought to withdraw the election suit to meet the costs incurred by the Respondents and the IEBC. While justifying the costs, the court held that the same was to cater for the payments incurred in reclosing of ballot containers by the election commission and the

⁴³³ *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 3 others*. The consolidated petition challenging President Uhuru Kenyatta's win in the October 26, 2017 election.

⁴³⁴ The petitioners Njonjo Mue and Khelef Khalifa had filed an Application to be furnished with a hard copy of the voters register to bolster their case that there were issues with the number of votes cast. The Supreme Court granted the orders but directed that the Petitioners should bear the cost of printing the Register. Consequently, IEBC agreed to avail the Register, but on condition that the petitioners deposit Ksh.80 million in the commission's accounts as cost for printing the 450,000- page document at a factory.

⁴³⁵ Elections Observation Group, 'Minding the Gaps: Policy Brief on Access to Information on Complaints and Electoral Disputes and Resolution Processes' (2018) ELOG Policy Brief No. 2file:///C:/Users/Hp/Downloads/Policy_Brief_on_Kenya_Open_Elections_Focusing_on_Access_to_Information_on_Complaints_and_Electoral.pdf accessed 4 September 2019.

court.⁴³⁶ This also happened to the petitioner in an election petition filed at Kakamega High Court Where the Court directed that he do part with Ksh2 million as payment to both the IEBC and its returning officer resolved to withdraw the election suit he had filed challenging the election of Moses Injendi as Malava MP.⁴³⁷

Some of the punitive costs slapped upon the losers include Nick Salat in 2013 when after failure to cap the cost saw the cost being assessed at Kenya Shillings Sixty Seven Million (KSh67 million) to the Respondents as costs.⁴³⁸ Wavinya Ndeti and Mr. Peter Mathuki were ordered to pay Sh10 million to both Governor Alfred Mutua's advocates and the IEBC in a petition they had filed against the Machakos Governor's win.⁴³⁹

Further in the election petition filed by Martha Karua at the Kerugoya High Court seeking to challenge the announcement of Anne Waiguru as the Kirinyaga governor, while dismissing the matter, the court ordered that she pays KSh10 million as costs to the respondents (Anne Waiguru, the Returning Officer and the IEBC) award prompting her to pursue an appeal.⁴⁴⁰

The cost challenge is not only visited upon those who had taken part in the polls as candidates but also to any other person who would file any claim challenging the outcome of the said elections in court. This is evident when Two (2)Voters who had filed a suit at the election Court at Busia disputing the election of Sospeter Ojaamong as the governor for Busia County were condemned to reimbursement him KSh12 million as costs⁴⁴¹ and his Laikipia counterpart Nderitu Muriithi, respectively. Justice Dorah Chepkwony ordered former Lamu Governor Issa

⁴³⁶ *Peter Gatirau Munya v. Independent Electoral and Boundaries Commission, Meru County Returning Officer & Kiraitu Murungi* [2017] eKLR.

⁴³⁷ *Gilphine Mokeita Omwenga v. Independent Electoral & Boundaries Commission & 2 Others* [2018] eKLR.

⁴³⁸ *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral And Boundaries Commission & 7 Others* [2013] eKLR.

⁴³⁹ *Wavinya Ndeti & Another v. Independent Electoral and Boundaries Commission (IEBC) & 2 Others* [2018] eKLR.

⁴⁴⁰ *Martha Karua & Another v. Independent Electoral & Boundaries Commission & 3 Others* [2018] eKLR.

⁴⁴¹ *Peter Odima Khasamule v. Independent Electoral and Boundaries Commission (IEBC) & 2 Others* [2018] eKLR.

Timamy to pay costs of Sh12 million to Governor Fahim Twaha after losing the petition he had filed at the High Court in Malindi.⁴⁴² This also happened in Trans-Nzoia where voters Robinson Simiyu and Alpha Katai unsuccessfully filed a case against Governor Patrick Khaemba.⁴⁴³

Apart from being a threat to the suffrage right and pursuit for credible elections, this punitive costs awarded by the courts saw the Court of Appeal Justices Warsame, Musinga, and Odek, term the same as a penance or a restrictive measure whose objective would be for scaring away citizens from seeking justice in courts contrary to the principle of access to courts and justice system entrenched in the Constitutional.⁴⁴⁴

In its effort to cap the costs of the election involved, the Judiciary back in the year 2017 formulated guidelines on how the courts ought to cap costs. The principle purpose of these guidelines by the judiciary was to restraint and act as guidelines to the election courts while awarding costs and also to safeguard litigants who would approach courts to do so without being imperiled by undue costs.⁴⁴⁵ However, despite the rules, the last election conducted in 2017 showed no effect as far as these rules are concerned since the costs were still inordinately high.

For the parties who incur or cause unnecessary expenses to be incurred by filing frivolous, scandalous petitions or just busybodies whose intention is to abuse the justice system, the court may, under the rules, order that such a person bear the costs of the court process whether they have won the petition or not.⁴⁴⁶

⁴⁴² *Timamy Issa Abdalla v. Independent Electoral and Boundaries Commission & 3 Others* [2018] eKLR.

⁴⁴³ *Robinson Simiyu Mwangi & another v. IEBC & 2 Others* [2017] eKLR.

⁴⁴⁴ Election petition Appeal No. 1 of 2017; Cf. *Martha Wangari Karua v. Independent Electoral & Boundaries Commission & 3 Others* [2018] eKLR.

⁴⁴⁵ Provides that the election court may, at the conclusion of a petition, make an order specifying the total or maximum amount of cost payable.

⁴⁴⁶ Everlyn Kwamboka, 'Double tragedy for election petitioners facing millions in court costs' *The Standard* (Nairobi, 18 February 2018) <<https://www.standardmedia.co.ke/article/2001270178/double-tragedy-for-petitioners-facing-millions-in-court-costs>> accessed 6 September 2019.

There is a need to ensure full implementation of these rules and also to scrap off some of the costs required for one to file an election petition which discourages aggrieved poor parties from seeking electoral justice and thus an impediment to their democratic rights to free, and fair elections. The courts should not interpret an act of filing an election petition in court as only beneficial to the petitioner but as a matter intended for the public good for the interest of the public at large. Thus, it would be in the best interest of justice to have the same treatment as public interest litigation which does not attract costs.

4.3.4 Vote-buying, Voter bribery and Treating in Kenya

Voter bribery, vote-buying, or voter treating is one of the most rampant election irregularities in Kenya. It has survived the test of time as the most effective way of voter manipulation.⁴⁴⁷ Voter bribery also known as voter buying is the exchange of money or other material benefits to voters in exchange with votes.⁴⁴⁸ Though manifested world-widely, vote-buying is more prevalent in a society where the poor form the majority.⁴⁴⁹

The practice of voter bribery is historical and deeply-rooted in Kenya. It dates back to the 1970s and during the days of the KANU regime where political leaders would visit State House and leave with bags full of money handouts ready to dish out to the voters and woo them for their votes.⁴⁵⁰ Politicians would also use Youth support groups such as Youth of KANU '92 and Toroitich Till 2000 during election campaigns and in this exercise of vote bribery and buying

⁴⁴⁷ Vote buying is a particular form of political clientelism, i.e. The direct exchange at the individual level of rewards and material goods by political patrons in return for electoral support by voters.

⁴⁴⁸ Justesen, Mogens and Manzetti Luigi, 'Poverty, Partisanship and Vote Buying' (2017) <<https://ssrn.com/abstract=2902515> or <http://dx.doi.org/10.2139/ssrn.2902515>> accessed 19 June 2020.

⁴⁴⁹ Jensen Peter & Justesen Mogens, 'Poverty and vote buying: Survey-based evidence from Africa' (2014)33, *Electoral Studies*, 220–232.

⁴⁵⁰ Vitalis (n10).

disbursing approximately a total of almost Kenya shillings four (4) Billions on that project alone.⁴⁵¹

In the case of 1992 and 1997 elections, for instance, it was estimated that vote-buying took place on the day of the election in about 13 percent of polling stations where they won with a wide margin against their counterparts attributed largely to voter treatment by KANU. This was also the trend during the 2002 and 2007 elections as voters were only bribed with money in open.⁴⁵² Voter bribery was quoted as one of the reasons why political parties and politicians would spend much in their campaigns as almost 40 % of the campaign expenditure is spent on vote-buying and bribery.⁴⁵³

The practice of voter bribery has been evolving as time goes on. Initially, political leaders would just walk around with money buying election cards from the people in their opponent's strongholds. The purchased votes would either be used by imposters or be destroyed to ensure that they (supporters of the opponent) do not vote for their preferred candidate.⁴⁵⁴ The random issuance of voter's cards by then without a requirement for an identification card as the practice is today, made buying of votes easy.⁴⁵⁵

At present, voter bribery encompasses other practices such as participation in fundraising activities(*harambees*) during the election period, a suspicious show of charity like settling hospital bills and paying school fees for needy students that were never supported previously especially during the electioneering period, promises for kickbacks through tender awards or

⁴⁵¹ Harrison Graham, 'Governance Reform in Africa: International and Domestic Pressures and Counter-Pressures by Jerome Bachelard' (New York: Routledge, Taylor and Francis,) (2014) 52 (4) 256 *The Journal of Modern African Studies*, 674-675.

⁴⁵² Ibid (n323).

⁴⁵³ *ibid.*

⁴⁵⁴ For instance, in 1992, the Cyrus Jirongo led YK'92 lobby was accused of buying voters' cards for Kshs. 500 per vote.

⁴⁵⁵ John Kamau, 'Kenya's long journey to electronic voting system' *Daily Nation* (Nairobi, 10 August 2017)<<https://nation.africa/kenya/news/politics/kenya-s-long-journey-to-electronic-voting-system-436304>>accessed 28 August 2019.

jobs among others.⁴⁵⁶ It also encompasses giving a token to the poor people and make them show up in the political gatherings, cash handouts, and distribution of goods like clothing purposely to influence the voter's choice in the ballot.⁴⁵⁷

As much as it amounts to an election irregularity, voter bribery is also treated as a criminal offense in Kenya under the Election Offences Act.⁴⁵⁸ As such, it places a heavy burden of proof to those that must be proven with a preponderance standard of evidence just like in other criminal offenses.⁴⁵⁹ In *Hassan Abdalla Albeity v. Abu Mohammed Chiba & Another*, the election court was of the view that the standard of proof in election suits is in between the equilibrium of probabilities contemplated in civil suits and beyond reasonable doubt in criminal cases. However, proof of standard where election offenses are alleged is on the same pedestal as that in criminal suits.⁴⁶⁰

In *Fredrick Outa v. Jared Okello*,⁴⁶¹ the court held that evidence of bribery must be clear cogent and Credible, that it should not leave or create doubt that the offense was committed and by who. The law places a higher standard of proof than a sheer preponderance of likelihoods.

This was also the case in *Wavinya Ndeti v. IEBC & 3 Others*,⁴⁶² where the court stated, in determining whether there were aspects of bribery or not, held that; the Petitioner has to plead with particularly the allegations of bribery against the 3rd Respondent, evidence should be sufficient to show that money exchanged hands intending to influence voters either to elect a

⁴⁵⁶ Javas Bigambo "Voter Bribery as an Election Malpractice in Kenya," Konrad Adenauer Foundation in partnership with Centre for Multi-Party Democracy –Kenya (2016) https://www.kas.de/c/document_library/get_file?uuid=d95d9679-de9d-cfa9-0761-9b17bd5e3eea&groupId=252038 accessed 1 September 2019.

⁴⁵⁷ Ameli Inyangu, 'Voter Bribery: The Treatment of this Pervasive Electoral Offence in Kenya (2014)<<http://aip-advocates.com/wp-content/uploads/2017/03/Voter-Bribery.pdf>> accessed 27 November 2019.

⁴⁵⁸ Elections Offences Act No. 37 of 2016.

⁴⁵⁹ *Levi Simiyu Makali v. Koyi John Waluke & 2 others* [2018] eKLR, Bungoma Election Petition No. 4 OF 2017 (Mrima J), para 53.

⁴⁶⁰ *Hassan Abdalla Albeity v. Abu Mohammed Chiaba & Another* (2013)Eklr.

⁴⁶¹ *Fredrick Otieno Outa v. Jared Odoyo Okello & 4 Others* (2014) eKLR.

⁴⁶² *Wavinya Ndeti v. IEBC & 3 Others*, Machakos Election Petition No. 4 of 2013(eKLR).

particular contestant or to refrain from electing the petitioner and that the evidence of witnesses should have a causal connection with the 3rd Respondent and his agents.

In the case of *Musikari Kombo -v- Moses Masika*⁴⁶³, Judge Gikonyo at paragraphs 173 and 174 of the judgment expressed that if it is proved that the offense of bribery was committed by the candidate himself or herself, his election becomes void; that it does not require evidence for a series of bribery incidences to nullify an election as only one instance of voter bribery by the contesting candidate is enough to nullify an election.

The law also makes it an offense to the receiver of a bribe.⁴⁶⁴ A person can be convicted to three years imprisonment or a fine of Kshs two million if found guilty of receiving or accepting a bribe during an election.⁴⁶⁵

The effects of Voter bribery on people are adverse to their participation in free, and fair elections regarding their election choices and good governance in a manner that accentuates poverty and marginalization.⁴⁶⁶ Voter bribery infringes on the people's free will and ability to express their choices independently. Second, it breeds unfairness of the electoral process as the rich candidates with financial means to buy votes can potentially defeat their competitors. Third, it has the potential to give way for the election of incompetent and/or corrupt leaders who use public office to aggrandize their interest and that of their cronies diminishing the funds available for the universal provision of public goods. Fourth, it erodes the citizens' morals to seek accountability from their leaders even where they are mandated by the law to do so. Finally, where such a practice is entrenched, it may lead to political alienation and distrust.⁴⁶⁷

⁴⁶³ *Musikari Nazi Kombo -v- Moses Masika Wetangula & 2 Other*, Bungoma High Court Election Petition No. 3 of 2013.

⁴⁶⁴ Elections Offences Act, No. 37 of 2016, s 9 (2)

⁴⁶⁵ Ibid, s 9(3).

⁴⁶⁶ Othieno (n85).

⁴⁶⁷ Justesen, Mogens. and Manzetti, Luigi, 'Poverty, Partisanship and Vote Buying' (2017)<<https://ssrn.com/abstract=2902515> or <http://dx.doi.org/10.2139/ssrn.2902515>>accessed 19 June 2020).

As much as vote-buying negates the basic tenets of democracy and free, fair, and credible elections, this also affects the practice of good governance and people's welfare for its schemes to maintain the *status quo*. This happens with the incumbent contestants using public resources to cater to the bribes leading to aborted development. Though the new contestants on the other hand may use their private resources to fund the vice, the same is recovered immediately after getting into office.⁴⁶⁸

The blatant exchange of political manifestos by the aspirants with bribes fails to reach onto the root cause of poverty bedeviling the voters. Indeed, where the voters are poor, the vice translates to a case of offering a fish instead of showing the voters how to catch the fish from the pond effectively perpetuating poverty. This can be concluded as one of the main reasons that despite the rigidity of the law against voter bribery in Kenya that the vice remains rampant.⁴⁶⁹

4.3.5 Poverty and Election violence in Kenya

Election violence is not a foreign concept in Kenya but instead a common phenomenon. Election violence can occur at any stage of the voting process. This may be at the registration period to even after the voting, tallying and the announcements of results stage depending on the goals of the political actors involved.⁴⁷⁰ Election violence involves the destruction of properties, violent actions against innocent people, or violence intended to interfere with the electoral process. The main goal of election violence is intended to interfere with the peaceful electoral process and its outcome.⁴⁷¹

⁴⁶⁸ Othieno Nyanja (2017), the political economy of poverty, Tokenism and free, and fair elections.

⁴⁶⁹ Ibid.

⁴⁷⁰ Ongoya Elisha, 'Election Violence in Multiparty Kenya and the Courts' Jurisprudence on Election Matters: Interrogating the Rule of Law and Free, and fair Elections' (2007), Thesis submitted for examination for the award of Master of Laws Degree. <<http://erepository.uonbi.ac.ke/handle/11295/2/browse?value=Ongoya%2C+Zebedee+Elisha&type=author>> accessed 15 April 2018.

⁴⁷¹ Dmitri Bondarenko, 'International Conference; "Elections in Africa"'. Book of Abstracts. (2018).

As discussed above, violence related to polls in Kenya substantially dates back to the year the 1980s after the formation of various ethnic-based political parties and their contests for power. This escalated in the year 1992 after the re-introduction of the multiparty system of elections. The 1992 chaos affected people in excess of 300,000 with thousands of others displaced from their ancestral homes. This would, later on, be succeeded by the worst ever election violence of 2007/2008 where many people lost their lives, raped, killed and scores left homeless.⁴⁷²

The causes of the 1992 clashes were largely attributed to economic frustrations, inequalities associated with land ownership in Rift Valley Kenya, and unemployment arising from unfulfilled promises of job opportunities for young people.⁴⁷³ Rekindled by the introduction of multiparty politics in the 1990s where most political parties were formed on an ethnic basis, poverty, illiteracy, ignorance, and failure to address the genesis of the previous violence and displacements were attributed to the election violence of 2007/2008.⁴⁷⁴

It is thus very clear that election violence is strongly linked to poverty.⁴⁷⁵ Poverty, caused by unemployment, inequality, and historical injustices is likely to lead to election violence as people try to vent their anger at elections.⁴⁷⁶ Poverty makes one high tempered and easily provoked even when less serious arguments, such as misunderstanding related to electoral processes

⁴⁷² Mohammed Yusuf, 'Historical Injustices Threaten another Violent Kenya Vote' (2017) <<https://www.voanews.com/africa/historical-injustices-threaten-another-violent-kenya-vote>> accessed 3 July 2019.

⁴⁷³ Roberts Mara, *Conflict Analysis of the 2007 Post-election Violence in Kenya* (Charlottesville, Va.: New Dominion Philanthropy Metrics, 2009) <http://www.ndpmetrics.com/papers/Kenya_Conflict_2007.pdf> accessed 18 June 2019.

⁴⁷⁴ Adeagbo Oluwafemi, 'Post-Election Crisis in Kenya and Internally Displaced Persons: A Critical Appraisal' (2011) 4 *Journal of Politics and Law*, 174, 179.

⁴⁷⁵ Krug, Etienne G. et al (eds), *World Report on Violence and Health* (Geneva: World Health Organization, (2002) 37 <http://www.who.int/violence_injury_prevention/violence/world_report/en/full_en.pdf> accessed 9 July 2019.

⁴⁷⁶ Houghton, Jonathan and Khandker, Shahidur, 'Handbook on Poverty and Inequality' (Washington, DC: World Bank 2009) 1.

capable of leading to chaos. Moreover, during elections, those who as a result of poverty have little or nothing to lose are easily mobilized for violent action.⁴⁷⁷

Poverty as a result of the economic gap between one ethnic community and another founded on an unequal distribution of economic opportunities and resources creates tension within the two groups' potential for election violence. Those who fail to get the economic opportunities seem to hope to do so only if they get one of them in power. The political entrepreneurs would then promise the poor to alleviate them from poverty once they acquire power by availing economic opportunities to them once they get into power which never seems to be the case. These influence most election violence especially from the poor as they vent their economic frustrations.⁴⁷⁸

4.4 Conclusion

Several insights on election challenges posed by poverty have been offered in this chapter in-depth. The study has established clearly that the deprivation of economic rights leading to poverty affects the actualization of the political democratic rights to free, and fair elections in equal measures. Indeed, high poverty levels harm the democratic process, since democracy which is anticipated to improve the livelihoods of the people has turned out to be a disappointment in Kenya.

Prevalence of poverty has barred those affected from taking part in the political process yet participation in politics is a primary and basic feature of democracy, free, and fair elections.

⁴⁷⁷ Laakso, Liisa, *Insights into Electoral Violence in Africa* in Matthias Basedau, Gero Erdmann and Andreas Mehler (eds), *Votes, Money and Violence: Political Parties and Elections in Sub-Saharan Africa* (Uppsala: Nordiska Afrikainstitutet and Scottsville: University of KwaZulu-Natal Press 2007) 228–30.

⁴⁷⁸ Cherop Nelly, 'Election Violence in Kenya' (2015) Thesis Submitted to the graduate degree program in Global and International Studies and the Graduate Faculty of the University of Kansas in partial fulfillment of the requirements for the degree of Master of Arts.

Poverty has hindered the realization of their goals since the expenses attendant to the electoral process are not favorable to the underprivileged poor who may wish to venture into politics.

Although the scourge of poverty and the need to eradicate it was recognized even before Kenya gained independence, there has been little success in the efforts employed to eradicate poverty because the policies adopted are neither specific, cogent nor realistic. Lack of political goodwill is one of the main concerns as leaders fail to take active steps to rid the country of poverty.

The chapter has further sought to test the intrusion and influence of poverty in the democratic space in Kenya and to assess the correlation between poverty and the freedom to free, and fair elections. The study has revealed that as a result of the poverty, the political field is first not leveled for all the candidates as those who are loaded with money take advantage of the others who are not well loaded. The implication is that the poor citizens' capability to exercise their political rights to vie and or contest for the elections is incapacitated. The cost involved as discussed is beyond their reach.

The voters, on the other hand, are left with limited choices in that the practice of democracy is compromised as far as quality is concerned for lack of sufficient choices.

We have also discussed on how the money politics affect the quality of election as the rich freely engage in election malpractices through votes buying, voter bribery, and treating amongst others taking advantage of poverty struck voters who would not resist participating in such a vice. That in return, those who gave out some good handouts stand a good chance to be elected as opposed to those with good manifestos and political ideologies.

In chapter 5 I will sum up the study and offer some recommendations towards alleviating poverty to enhance the democratic right to free, and fair elections.

CHAPTER 5

SUMMARY OF FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

5.0 Introduction

The predominant argument in this research project is that although Kenya has since independence in 1963 put in place numerous policies, legal and administrative strategies aimed at the realization of elections which are free and fair, free and fair elections remains a mirage to date in Kenya.

I specifically argue that, despite the effectiveness and efficiency of various regulations, laws, and institutional frameworks aimed at streamlining the democratic process in Kenya, Kenya has failed to address poverty as the underlying challenge affecting the right to free, and fair elections. Thus, the major hostility facing Kenya is how to curb poverty in her democratic development.

In this last chapter, I revisit the research objectives, research questions, hypotheses, and arguments. I will start by discussing the findings of each chapter as they relate to my research objectives and questions. Secondly, I will give recommendations and a concluding statement on the study on the challenges posed by poverty on the right to free, and fair elections in Kenya.

5.1 Objectives of the study

The overall objective of this study was guided by three key research objectives.⁴⁷⁹ These are: First to explore the historical correlation between poverty challenges and the right to free, and fair elections in Kenya.⁴⁸⁰

Second, to examine the institutional, legal, and policy framework relating to elections in Kenya;

The third was to contextualize on various ways through which poverty is linked to free, and fair election challenges in Kenya;

⁴⁷⁹ See discussion on Chapter 1.

⁴⁸⁰ See discussion at Chapter 4.

The fourth was to deliberate on the findings, conclusions, and recommendations of this study.

5.2 Research Questions

This study has explored the following three (3) research questions.⁴⁸¹

First, what are the historical antecedents that led to the existing poverty challenges on free, and fair elections in Kenya?

Secondly, what are the institutional, policy, and legal frameworks relating to elections in Kenya?

Thirdly, how is poverty a challenge in the realization of free, and fair elections in Kenya?

Fourth, what are the findings, conclusions, and recommendations of this study?

5.3 Research Hypothesis, Assumptions, and Arguments

The research hypotheses of this study were threefold:

That poverty has in the history of elections in Kenya has been used as a determinant for election success or otherwise and thus a challenge in the realization of an election which is free and fair.

That Kenya has elaborate policies, institutional and legal frameworks that provide the conduct of fair elections which however do not address the underlying poverty challenge on free, and fair in Kenya.

That poverty imposes a challenge on free, and fair elections in Kenya by escalating the cost of holding elections in Kenya at the expense of the provision of other essential services to the citizens and development programs. That poverty negatively affects one's ability to make the right choice in elections. Poverty further causes low self-esteem and a lack of courage limiting one's ability to participate in society's civil, cultural, and political activities.

Poor people are more concerned about their current challenge to access basic needs in which voting is not part of the potential for voter apathy. Contesting for an election in Kenya is a costly

⁴⁸¹ See discussion at Chapter 1.6.

affair involving costs for campaigns and other related costs such as cost for election disputes limiting the people's ability to contest in an election. Poverty entrenches the culture of voter bribery and election violence which are some of the major challenges to free, and fair elections in Kenya.

That Poverty is a major challenge in the realization of an election that is free, and fair in Kenya. It interferes with the citizen's participation in an election either as electorates or aspirants. That the free will of the voters and fairness of the process is negated by poverty and the current legal framework fails to address the challenge.

5.4 Scope, Limitations, and Contributions of the Study

The scope of this study is restricted only to the effects of poverty on democracy and the right to free, and fair elections in Kenya. There are various obstacles to the realization of the right to free, and fair elections as provided in the Constitution and other statutes and advanced by other scholars. This study was only focused on the correlation between poverty and the right to free and free elections in Kenya.

Owing to financial, logistical, and time limitations, the study had to adopt convenience and purposive sampling particular sections of the Kenyan population that was believed to have the information the study was out to gather.

This study was useful in providing an insight into the success of the actualization of the right to free, and fair elections in Kenya. The study will also add to the existing literature on the impacts of poverty on democracy and the right to free, and fair elections in Kenya. It is also intended to avert the future and further impoverishing the poor for political reasons.

5.5 Research Findings

The upshots of this study mainly stream from the analysis in Chapters 2, 3, and 4. In Chapter 2 the historical background on poverty challenges in free, and fair elections in Kenya established that there has been a historical and intentional exclusion of the poor from political participation. That for instance, the traditional leaders would use all the means to impoverish any individual who dared to interfere with their authority and or expel them from their region. Further that during the pre-colonial period, some of the kings was mostly guided by selfish interest to accumulate wealth as opposed to serving their subjects.

Chapter 2 further revealed that wealth accumulation through cheap labor, depriving Africans of their fertile lands, and denying natives the right to plant and cultivate cash crops, and further by relocating them from the fertile highlands contributed to enriching the colonist while impoverishing the natives. That after being impoverished, the right to vote was only a reserve for those who had acquired assets and were literate.⁴⁸² The foregoing instilled and nurtured the hegemonic culture in Kenya developing the country inequitably.

Chapter 2 further has reviewed and analyzed how even after Kenya attained independence the African Political elites exploited the citizens to dominate political power. That there were little efforts by the government to alleviate poverty amongst the citizens despite the government has identified it as one of the phenomena's to deal with amongst diseases and ignorance.

That the political elites would instead take advantage of the poverty conditions in Kenya to develop the culture of neopatrimonialism, tokenism, uneven distribution of resources adverse to the opposition, commercialization of politics amongst other legal disadvantages.⁴⁸³

⁴⁸² See Chapter 2 generally.

⁴⁸³ *Raphael Samson Kithika Mbondo V Luka Daudi Galgalo and Paul Joseph Ngei*, Election Petition No. 16 of 1974 (unreported).

The study also revealed that despite the government developing several policies and plans aimed at the eradication of poverty in Kenya, there was nothing or little achieved from the same due to political frustration and lack of government goodwill to implement the same.

Chapter 3 of the study analyzed and problematized the legal and institutional framework that relates to elections in Kenya. The chapter found that the democratic right to elections which are free and fair in Kenya is well anchored in the Constitution and other statutes. That the same is also provided for under various regional and international treaties and conventions to which Kenya is a signatory.⁴⁸⁴

Remarkably, Chapter 3 reviewed that the Constitution of Kenya provides for political rights which includes to be registered as voters, to vote, and the freedom to participate in an election as a candidate and to be voted.⁴⁸⁵

That the Constitution further provides that the polls should be free and unbiased. The Constitution goes ahead and lists the requirements for a free, and fair election or the principle standards to which the elections must adhere to pass the test of being free and fair.⁴⁸⁶

Some of the statutes discussed include the Political Parties Act, the Election Act, the Independent Electoral and Boundaries Commission (IEBC), Campaign Financing Act amongst others. The research found that conduct and the participation in elections which are free and fair to be the main objective as to why these statutes were enacted.

That under the Election Act, everyone has a right to be listed as a voter and to vote and be voted for an election which is free and fair. The research also found that the pursuit for free and fair election led to the formation of a political party dispute tribunal under the Political Parties Act

⁴⁸⁴ See Chapter 3.

⁴⁸⁵ Constitution of Kenya 2010, Art 38, discussed at Chapter 3

⁴⁸⁶ Ibid, Art 81, discussed at Chapter 3.

and also for the creation of the Independent Electoral and Boundaries Commission Tribunal to adjudicate on any dispute arising before elections.

The study also found that the law regulating Election campaign financing was suspended and it has never been applied at any elections since its enactment in 2013. That the suspension of the said law was founded on the failure by the IEBC to come up with regulations as required under the Act.⁴⁸⁷

The findings in this chapter were that the legal and institutional frameworks leave out some loopholes which defeat the very purpose of providing for free, and fair elections in Kenya.

For instance, it was found that the framework does not have regard to the plight of the poor who would fail to get registered as voters whilst entangled in economic activities aimed at providing the basic needs for their families. That voter registration is opened and closed at a particular time which ought to be continuous and within the reach of the citizens. All these interfere with the political participation of all the people in an election which is the cornerstone of democracy.

The legal system also does not address the plight of the poor candidates who for lack of political connections or simply because of their poor background, do not get to be nominated by the popular political parties in Kenya. That funding is only done to popular political parties while ignoring the plight of independent poor candidates and Political Parties that fail to attain the stipulated percentage in the preceding election.

It was also found in chapter 3 that the various dispute resolutions institutions established for adjudicating disputes related to elections before election day are all based in Nairobi. That

⁴⁸⁷ Constitutional Petition filed by National Super Alliance (Nasa) discussed at chapter 3.

Nairobi is not easily accessible to those who lack resources to enable them to litigate their disputes related to elections.⁴⁸⁸

That though the law provides for the independence of the IEBC commission, there has been some executive interference through the introduction of statutory amendments via Parliamentarians aligned to the executive.⁴⁸⁹ The IEBC commission has also been found to have failed in its mandate to deliver elections that are free, and fair by various election courts.⁴⁹⁰

Under Chapter 4, contextualization of the study topic on how poverty affects the right to free, and fair elections was discussed in depth. The Chapter in a nutshell evaluated the status of poverty in Kenya, various causes of poverty, and the government's failed efforts in alleviating poverty in Kenya since independence.⁴⁹¹

That poverty renders one hopeless and thus unable to fathom and actualize his political dreams. Examples here included the residents of Kibra and Mathare Constituencies who are governed by the rich who reside in affluent areas. That this is despite the fact that some of the residents who reside there are qualified and well competent to vie and be elected. As a result of poverty, the poor disregard the essence of democracy and would fail to either register as voters and or fail to participate in the election process.

Chapter 4 further contextualized various ways in which the right to free and fair elections in Kenya is affected by poverty. The poor are very susceptible to voter bribery, vote-buying, and treating which negatively affects their free will in elections. This practice negatively influences the voters' choice in an election. The researcher has also established that the rich flourish in the

⁴⁸⁸ The Political Party dispute tribunal and IEBC dispute tribunal sits in Nairobi at Milimani Law Courts.

⁴⁸⁹ See for instance the amendment of the election Act after the August general election, 2017. The resignation of Roselyn Akombe due to pressure within the commission.

⁴⁹⁰ See for instance Presidential Election Petition No. 1 of 2017 discussed in Chapter 3.

⁴⁹¹ See chapter 4 in general.

said practice taking advantage of their poor counterparts. That for instant gratification, the poor would rather vote for the candidates who bribe them as opposed to those who fail to do so.

The Chapter found that the cost of running an election in Kenya is very high. That this is caused by the government having to incur expenses in employing and paying its citizens to do some of the works which in other countries such as Rwanda, the citizens volunteer to do.

Elections in Kenya are highly commercialized as the cost of running a successful election campaign in Kenya is very high and cannot be afforded by the poor was also revealed in Chapter 4. That the costs involved in an election dispute and electoral justice are not within the reach of the poor mass.

Violence at the time of elections has been discussed in length in Chapter 4. That election violence is correlated to poverty and or factors related thereto. That hungry and poor people who would have nothing to lose are easily provoked resulting in violence during elections. That election violence before, during, or after the elections, creates tension, fear, death, bodily injuries, and relocation forced or voluntary. This adversely interferes with the election process rendering it void of freeness and fairness as some people would fail to participate in the exercise.

5.6 Conclusion

This Research Project generally concludes and affirms one of the general human rights principles that human rights cannot be applied separately as there exists a symbiotic correlation in that they are inseparable, inter-reliant, and interconnected.⁴⁹²

The foregoing has been demonstrated in this study to the extent that political rights cum democratic rights are intrinsically connected and cannot be viewed in isolation of economic rights. That for the enjoyment and the actualization of the democratic right to free, credible, and

⁴⁹² Council of Europe, 'What are human rights?' (2017)<<https://www.coe.int/en/web/compass/what-are-human-rights>>accessed 8 October 2019.

fair elections depends on among other rights on the enjoyment of economic rights. Thus, the efforts to actualize the right to free and fair elections require a multifaceted approach to the social-economic welfare of the people.

The ability of the poor to effectively participate in the political process has been greatly hindered due to the inadvertently commercialized politics in Kenya. The poor would fail to develop their potentials for lack of capital and fully participate in the democratic process freely. As a result, democracy, through which citizens would otherwise wish to improve their livelihoods, has turned into a failure and is loathed by the citizenry.

Though Kenya has many laws and institutions intended to conduct an election that is free and fair, these cannot be applied in a vacuum. The people to whom the law is applied to should be economically empowered to avert any temptation to succumb to election malpractices.

It has also emerged that, despite the country having gained its momentum for democracy over fifty years ago, that the rate of poverty remains high in Kenya with approximately 45% of its population surviving on less than \$1.25 a day, and more than 65% on less than \$2. This is notwithstanding the double-digit economic growth in the past years. The gap between poor and rich has continued to grow, and Corruption has constantly increased, and elections are highly commercialized.⁴⁹³ Consequently, the right to free, and fair elections remaining a phantasm.

There have also been little efforts and or inordinate delay as far as the fight against hunger is concerned by the Government since independence. The Government has never successfully implemented any policy aimed at the alleviation of poverty. Thus, poverty has remained a cycled calamity since independence up to date. The economic difference between the haves and the have not had constantly widened.

⁴⁹³ See Chapter 4.

The foremost causes of poverty have also been discussed, which include; mismanagement of public resources, lack of adequate education, corruption, overpopulation, unemployment, and bad governance. Despite the various causes of poverty in Kenya, corruption and bad governance stand as the main causes.

The implications for democracy on the other hand are grave: the level playfield in politics has never been equal for all the parties and participants. The affluent political elites have always been at a vantage point as compared to the disadvantaged poor. Running for any elective seat in Kenya has never been an easy task for the poor and the less privileged as it requires a lot of financing for campaigns and other prohibitive costs incidental to elections.

Pursuing electoral justice in election petitions in Kenya is a very expensive affair inhibiting the poor from challenging an election where election malpractices are involved by the rich. These include the mandatory requirement on deposit of security for costs and eventual punitive costs to the looser. This acts as both a bar to the right of access to justice recognized in the Constitution and the right to free, and fair elections also provided for under the same bill of rights.⁴⁹⁴

The poverty level in Kenya has created a conducive environment for breeding electoral malpractices and in particular voter bribery and treatment, vote-buying, amongst others which are a serious concern shaking public trust in the institutions of democracy.

There is also a barrier implied against the poor by the electoral laws in Kenya. The election law in Kenya makes election expensive in terms of how much candidates for political offices have to pay to secure their nomination tickets to run for an election. This political trend implies that politics is made expensive inadvertently locking out the poor.

⁴⁹⁴ The right of access to justice is provided for under Article 48 of the Constitution of Kenya that; the state shall ensure access to justice for all persons and if any fees is required, it shall be reasonable and shall not impede access to justice. Article 159(2) (a) provides further that justice shall be administered to all irrespective of status.

To resolve this menace, there is a need to have concerted efforts to ensure that economic liberty is at parity with the principles of democracy such as regular elections, rule of law, human rights, freedom of association, and freedom of speech. As a result, both the National and County governments must invest more and ensure the successful implementation of policies aimed at alleviation of poverty.

The focus should be on basic services such as food production, accessible roads, health care, resource use and management, quality and affordable education, and agriculture. These could inform more relevant and up-to-date policy initiatives aimed at alleviating poverty within the Counties in particular and Kenya in general. It is thus my considered view that the following recommendation would go a long way in alleviating poverty and improving the lives of Kenyans leading to a successful actualization of the right to free, and fair elections.

This study thus concludes that the hypoResearch Project upon which the study proceeded has satisfactorily been affirmed.

5.7 Recommendations

Participation of all the people in free and fair elections is central to the business of democracy. Moreover, the need to ensure effective participation in elections by the poor and who the majority remains sacrosanct especially in a fledgling democracy as we have in Kenya. Given the economic struggles and the highly commercialized politics in Kenya, it requires a multifaceted and multi-sectorial approach to actualize the right to free, and fair elections. It is not a one-stop-shop in that it could be addressed by legal means alone. There is a need to incorporate political, economic, social, legal, and administrative aspects so that being poor per se does not act as a barrier in the practice of democracy.

From the foregoing findings and conclusion, I make recommendations on the actualization of the right to free, and fair elections under 2 limbs.

First I make commendations on legal and institutional improvements to enhance democracy in free, and fair elections.

Second I will general recommendations on means in which the government can alleviate poverty which affects the right to free, and fair elections in Kenya.

5.7.1 Recommendations on Legal and institutional reforms

The findings and the conclusions in this chapter pointed out that there are legal and institutional loopholes hindering the exercise of the democratic right to free, and fair elections in Kenya for not being sensitive to the poor population. To actualize the right to free, and fair elections in such a citizenry, I make the following proposals.

Firstly, there is a need to amend the Political Parties Act to allow for the funding of independent candidates and also for a certain percentage of funding to be allocated to the small and unpopular political parties. The foregoing is being pragmatic to the realization that money and politics are inseparable and thus the need to factor in the two categories aforesaid by the government.

Secondly, to allow political participation in politics by the poor, there is an urgent need to reduce or struck off entirely the nomination charges required by the IEBC for candidates from poor backgrounds. The amount payable by women, youth, and people with disabilities should be struck off and particularly those who do not come from popular political parties and independent candidates to safeguard their increased participation in the electoral process.⁴⁹⁵ This would call for the amendment of the Political Parties Act.

Thirdly, there should be strict enforcement mechanisms for the political parties in Kenya to observe the basic Constitutional requirements for membership and nominations.⁴⁹⁶ For instance,

⁴⁹⁵ Lack of the clearance fee locks out Poor Kenyans who can lead but do not have money.

⁴⁹⁶ Article 97 of the Constitution requires the list for nominated members of parliament to include members of minority groups, especially women and persons with disabilities.

there should be no justification by any political party for failure to ensure the inclusion of the disadvantaged in the society such as the poor and the marginalized in their structures. This should also apply to their lists of nominees and candidates.⁴⁹⁷

Fourth, the law on Election Campaign Financing should be implemented with an immediate effect. This will go far in the fight against the practice of over and illegal spending in election campaigns as all the political parties will have to disclose the source of funding and give the maximum limit usable in campaigns. The Independent Electoral and Boundaries Commission should fast track the operationalization of the said Act by enacting the regulations and monitor strict adherence thereto.

Sixth, there should be support capacity enhancement of candidates from poor backgrounds in the same manner in which support has been extended to women candidates.

Last but not least under this limb, one way in which poverty in a democracy can effectively be alleviated is through the election of people who have integrity into power. The basis of ascendance to power should be the enthusiasm to serve people rather than the economic prowess of officeholders. To achieve this, there should be serious civic education carried out, and civic virtues instilled to the citizens a duty placed squarely under the IEBC. There has been laxity as far as this one is concerned.

5.7.2 Recommendations on poverty alleviate in Kenya

The findings of this study also call for reforms intended to alleviate poverty in Kenya to actualize the democratic rights to free, credible, and fair elections.

It is therefore recommended that there should be access to quality and affordable education for the people to be able to actualize their democratic rights effectively. Political education should

⁴⁹⁷ Constitution of Kenya 2010, Art 10.

be taught and civic virtues instilled in primary school. There is a need to carry on with the current restructuring of the education system to introduce a curriculum that promotes both skill and course work to broaden the employment sectors and opportunities for school leavers. There is a further requirement to widen the tenets of the country's economy so that the GDP is not dependent on one sector alone. A good education makes one cultured lowering the chances of an individual becoming poor while increasing his democratic awareness.

Secondly, strengthen devolution as it is best suited to address the abject poverty in rural areas. Based on the fact that Poverty levels in Kenya vary from One County to the other, it becomes very easy to plan differently as different counties would embrace county-specific programs and sustainable poverty reduction strategies to improve the welfare of its people. There is a need to increase funding in Counties to around 45%.⁴⁹⁸

Third, and as it has been featured in this study, corruption has a way of cycling poverty. Corrupt leaders ensure that they get elected through dubious elections. They can buy votes, bribe, and treat voters using proceeds of corruption and public money intended for development. Such a system sets out a playground where political offices are used to gain economic prowess which in turn is used to buy votes. The general public remains on the receiving end as they get deprived of the desired services by the skewed system. This promotes poverty and the eventual democracy breaks down.⁴⁹⁹

Democracy is about service to the peoples by the elected leaders. The Kenya Politicians should have a wakeup call and discover that they represent a population through whose elections they have become poor and elected them to improve their economic and social wellbeing. The elected leaders and representatives of the public at the Senate and the National Assembly having

⁴⁹⁸ Mutula Junior, 'Devolution a case for reform' (2019) presentation at LSK Annual Conference at Pride Inn Mombasa.

⁴⁹⁹ Babayo Sule, 'Corruption and Electoral process in Nigeria' (2018)10(1), Journal of Techno Social.

been vested with the people's trust, should ensure that programs that would unchain the people from poverty take priority. This is not to forget Members of County Assemblies (MCAs) whose responsibilities equal those of Members of Parliament at the County level.

The government ought to change its operations and ensure that its institutions are primarily aimed at the provision of quality and desired services for the people which in a way would alleviate poverty and advance democracy. The government should thus improve its vision, ensure adherence to the rule of law; protects rights of individuals to property, ensure timely disposal of disputes; advance the health provisions and the quality of learning for the citizens; collaborate with the private sector in improving infrastructure and production; oversee the use of resources openly and transparently; and, distribute goods and services efficiently to its population.

Democracy is about people's participation. Public participation should therefore be the hallmark for development projects carried out by the government. This may entail the Provision of better opportunities for the public to pinpoint their corresponding needs, prioritizing, planning, and budgeting for the execution of such development plans. For communities to feel involved as part-owners of their development projects, they should contribute a certain percentage of the total budget required for the said projects.

Improvement of rural infrastructure will also promote the actualization of the right to free, and fair elections in a big way. The government should therefore aim to improve the primary infrastructural facilities such as transport, sewer lines, water, electricity, waste management and disposal, environmental conservation among others. This would ensure that an enabling environment is provided for democracy to thrive.

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