



**PRESIDENTIAL ELECTIONS IN KENYA AND THE NOTION OF ACCEPT AND
MOVE ON**

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Award of Degree in the Fulfillment of the Master of Law to the University of Nairobi**

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Declaration

I, OKUTTA KELVIN DANIEL OTIENO do hereby declare that this LLM Research Project Paper is my original work. It has not been submitted for award of any degree or any other academic credit in any other University or learning institution. I also declare that any reference made to books, texts, articles, journal articles, papers, websites and journals, and any other pertinent materials have been duly acknowledged.

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Abstract

This research project paper seeks to assess the effectiveness of the Kenyan electoral laws and institutional frameworks, including identifying any gaps in the laws that hinder the realization of electoral democracy in presidential elections. The paper evaluated the laws applicable, statutes, regulations, electoral policies and the jurisprudence from the Kenyan courts.

The study postulates that despite the constitutionalization of electoral principles and emerging jurisprudence from the Supreme Court after the 2013, 2017 and the 2022 presidential election petitions, electoral democracy has still been considered an elusive concept in Kenya. The practice in Kenya was contrasted to the electoral processes and debates in Nigeria and South Africa due to their unique socio-political economy.

Although, there are electoral laws and regulations across these states, nevertheless, political players have taken advantage of the weak institutional independence and gaps in these electoral laws to undermine electoral integrity. As a result, this research project seeks to debunk the formalistic conduct of elections by the electoral management bodies and the Judiciary as the arbiter, as pushing citizens to “accept and move on” rather than question the fidelity to electoral law principles.

The study therefore makes several important findings. First, the Constitution 2010 and the relevant statutory frameworks are transformative and critical to the realization of electoral democracy. However, the study notes that the lack of good faith among the political elite and key players in the electoral process have been the key agents of reversing the gains made in Kenya’s electoral democracy. Second, that unlike the Judiciary which has played a major role through the growth of landmark electoral jurisprudence, the electoral management body has been a culprit of non-compliance with the law and Constitution 2010.

Based on such findings, the research project proposes that electoral technology is necessary and should be integrated in electoral processes. However, transparency and accountability must be upheld to address external interference in electoral processes. Further, the study recommends that

there is need for institutional restructuring of the electoral management bodies to ensure public confidence in these institutions. Other key recommendations include effective implementation and fidelity to both substantive and procedural electoral laws and regulations. The study therefore concludes that the challenges facing electoral management are not unique to Kenya based on the findings of the comparative analysis under Chapter 4. Hence, this paper recommends a holistic review of the existing electoral laws, regulations and policies to address the challenges evident locally and the challenges learnt from Nigeria and South Africa.

Dedication

This research project is dedicated to my parents Dickson Okutta and Jane Okutta for their support and encouragement to always strive to achieve good and make the World a better place than how we found it.

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I humbly express my gratitude to Prof Ben Sihanya (JSD Stanford) for taking his time to guide me through out this academic work and for his insight, patience and wisdom. I am forever indebted to this great favour and assistance to contribute to an academic discourse.

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Abbreviations and Acronyms

eKLR	Electronic Kenya Report
EP	Election Petition
HC	High Court
IEBC	Independent Electoral and Boundaries Commission
IIEC	Interim Independent Electoral Commission
JSC	Judicial Service Commission
LSK	Law Society of Kenya

List of Constitutions and Constitutional Instruments

Constitution of Kenya 1963

Constitution of Kenya 1969

Constitution of Kenya, 2010

Constitution of Nigeria, 1999

Constitution of South Africa, 1997

List of Transnational Legal Instruments

African Charter on Democracy, Elections and Governance 2007

African Charter on Human and People's Rights 1981

Durban Declaration on the Principles of Governance, Democracy and Elections in Africa 2002

International Covenant on Civil and Political Rights 1981

Statute of the International Court of Justice 1946

Universal Declaration on Human Rights 1948

List of Kenyan Statutes And Regulations

Election Regulations, 2012

Elections (Technology) Regulations 2017

Elections Act, 2011

Elections Laws (Amendment) Act 2017

Independent Electoral and Boundaries Commission Act, 2011

Political Parties Act No. 11 of 2011

Public Procurement and Asset Disposal Act No. 33 of 2015

Public Procurement and Disposal Regulations, 2006

Supreme Court of Kenya Act No. 7 of 2011

Supreme Court Rules, 2012

List of Cases

[*Odinga & 16 Others v. Ruto & 10 Others; Law Society of Kenya & 4 Others \(Amicus Curiae\) \(Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 \(Consolidated\)\) \[2022\] KESC 54 \(KLR\) \(Election Petitions\) \(5 September 2022\) \(Judgment\)*](#)

Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission (IEBC) & 2 Others [2017] eKLR

Diana Kethi Kilonzo and Another v. Independent Electoral and Boundaries Commission (IEBC) and 2 Others, High Court Petition No. 359 of 2013

Jose Sivan Pillai and Others (1984) AIR 921, India

Kalembe Ndile v. Patrick Musimba & Others HC EP No. 1 of 2013

Raila Odinga v. IEBC and 3 Others, Supreme Court Petition No. 5 of 2013

CHAPTER 1

THE EFFICACY OF THE ELECTORAL LAWS IN KENYA AND THE NOTION OF ACCEPT AND MOVE ON: A CASE STUDY OF THE PRESIDENTIAL ELECTIONS IN KENYA

1.1 Introduction and Background

The overarching argument of this research is that while the Constitution of Kenya is a transformative and progressive legal instrument that if properly implemented can guide the electoral process in Kenya, there is need for electoral integrity to ensure free, fair and credible presidential elections in Kenya.¹

The electoral laws in Kenya lack effective implementation, enforcement and suffers reversals from the reform agenda intended in the constitutional dispensation. While Kenya has made steps on electoral reforms and passed a new Constitution in 2010 which saw the first elections being held under the new law in the year 2013 and 2017, there has still been fierce contestation and disputation of the Presidential elections in Kenya especially in the context of the 2017 and 2022 General elections, an indication that either the law is not well thought out to adapt to political exigencies or that the so called democratic practices cannot secure overall electoral integrity.²

The emerging electoral jurisprudence show lack of fidelity by the Courts to the progressive electoral regime which prescribes for general governance system.³ The Constitution embodies rules and principles for representation and values for governance in Kenya. This was an encapsulation of internal law and standards of practice. Chapter seven of the Constitution refers to the principles of an electoral process should be free, fair, accurate, transparent and verifiable. The main types of elections under the 2010 Constitution are presidential, parliamentary and county level.

¹ Ben Sihanya (forthcoming 2022) “Electoral justice in Kenya under the 2010 Constitution: Implementation, enforcement, reversals and reforms,” in Ben Sihanya *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa* (CODRALKKA) Vol 1, Sihanya Mentoring & Prof Ben Sihanya Advocates, Nairobi & Siaya. Cf Ben Sihanya (2017) “Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms,” Vol 13 Issue 1, *Law Society of Kenya Journal* 1-30.

² See Ben Sihanya (forthcoming 2022) *Constitutional Democracy in Kenya and Africa* Vol. 1, 2 & 3, Sihanya Mentoring & Prof Ben Sihanya Advocates, Nairobi & Siaya.

³ *Ibid.*

The problem affecting elections in Kenya can be attributed to systemic institutional failure. Historically, the body marred with the responsibility for holding free and fair elections is normally unable to undertake their mandate as required.⁴

For instance, the disbanded Hasan-led IEBC and the ECK were mainly due to lack of independence, especially from President Uhuru Kenyatta's Jubilee Party or Mwai Kibaki's Party of National Unity (PNU) and their tribalised Governments, respectively. The lawless government operatives have occasionally been reprimanded based on accusations of their endeavouring to compromise or influence elections. The same pitfall befell the Chebukati-led IEBC which was accused of being manipulated or intimidated by Kenyatta's Jubilee Party.⁵

Since the advent the Constitution 2010 and the 3 general elections (2013-2022), amendments have been made to the electoral laws which has only brought mistrust among competitors in elections. Whilst some have been successfully challenged in court, others have been unprocedurally implemented. For instance the Election Laws (Amendment) Act, 2016 No. 36 of 2016 which prescribed for the exit of Issack Hassan and other commissioners who had been implicated in electoral fraud, timelines for nominations and dealing with party hopping menace.⁶

The controversial amendment of the Election Laws (Amendment) Act, No 1 of 2017) which was unconstitutionally passed by Jubilee legislators amending section 44 of the Elections Act 2011 with the addition of section 44A.⁷ IEBC was allowed to put in place a complementary mechanism for identification of voters and transmission of election results.⁸ The amendment did not specify when it was to be put in use which opened the system to manipulation by IEBC.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Franceschi, Luis, and Emmah Wabuke. "Mapping the legal contours of presidential electoral law in Kenya: A case review of *Raila Odinga v. Independent Electoral and Boundaries Commission Presidential Election 1 of 2017*." *The Routledge Handbook of African Law*. Routledge, 2021. 215-229.

⁷ Dennis Odunga (2017) "What controversial changes in lection law mean," *Daily Nation*, Nairobi, 15/1/2017, at <http://www.nation.co.ke/news/What-changes-in-controversial-election-law-passed-by-House-mean/1056-3518708-b7a2mo/index.html> (accessed 29/6/2017).

⁸ *Ibid.*

This was challenged in court by the opposition in the case of National Supper Alliance v. Independent Electoral and Boundaries Commission, the petitioners argued that IEBC had failed to establish the complementary to electronic voter identification (EVID) and electronic results transmission system (ERTS) as was contemplated under Sec 44A of the Election Laws (Amendment) Act, 2017.⁹

The petitioner's prayers sought to establish 'what is the complementary mechanism provided for under s.44A of the Elections Act.' IEBC argued they would use the electronic voter identification devices (EVID), electronic results transmission system (ERTS) however, still arguing that technology was inherently unreliable. They emphasised the failure of electronic voting but the case was about EVID and ERTS, and not voting which was still manual under the law.¹⁰

The other issue dogging the electoral system in Kenya is the register of voters. According to the electoral laws, the voter register should be verifiable and accurate and published for scrutiny by the public in due time before the elections. However, in most instances this is not the case. Pursuant to Election Laws (Amendment) Act, No. 36 of 2016 mandated IEBC to procure the services of an independent professional firm to audit the register of voters. IEBC settled on KPMG. The register of voters was audited by KPMG and the outcome was devastating. The objective of the audit was three pronged.¹¹ First, to verifying the accuracy of the register. Second, to recommend mechanisms of enhancing the accuracy of the register. And third, to update the Register. The KPMG report indicated that about one million dead voters were still in the register.

⁹ *National Supper Alliance v. Independent Electoral and Boundaries Commission*, Petition No. 328 of 2017

¹⁰ *Ibid.*

¹¹ Ben Sihanya (forthcoming 2022) "Electoral justice in Kenya under the 2010 Constitution: Implementation, enforcement, reversals and reforms," in Ben Sihanya *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa* (CODRALKKA) Vol 1, Sihanya Mentoring & Prof Ben Sihanya Advocates, Nairobi & Siaya. Cf Ben Sihanya (2017) "Electoral Justice in Kenya under the 2010 Constitution implementation, enforcement, reversals and reforms," Vol 13 Issue 1, *Law Society of Kenya Journal* 1-30.

According to a Kenya Human Rights Commission, the lack of oversight of electoral actors and processes is a concern with no repercussions to persons involved in electoral malpractices which leads to unscrupulous leaders who buy, threaten or trick their way into power.¹²

According to reports from human rights' election monitors as highlighted by the Kenya Human Rights Commission during presidential campaigns there is misuse of public funds where State resources are used, human rights violations during party nominations, electoral campaigns and voting, politicians use ethnicity to mobilize votes and whip up emotions that lead to tensions with the end result of cross-community violence.

For instance, the disputed Presidential elections in 2007 led to the death of 1,100 people, thousands injured, at least 40,000 incidents of sexual and gender-based violence and over 600,000 being displaced.¹³

According to this article the lack of oversight of elections has led to violence, threats of violence, militias and criminal gangs against all persons. It also led to use of hate speech and unsavoury language in electoral campaigns; and vote buying, voter bribery, unwarranted assisted voting, voter intimidation and theft of IDs, marginalized groups such as women, persons with disabilities, youth and other minorities also saw discrimination during these processes.¹⁴ This curtails electoral integrity and the electoral laws are weak to put in place measures to curb the vice.

There are at least three (3) factors that affect our electoral system. First, the notion of tyranny of numbers is a reality that ethnic arithmetic affects the outcome of electoral cycle. The majority bulldoze their way driven by the need of self-preservation in power.¹⁵ Second, there is

¹² Julie Kingsland (2013) "Electoral Reforms for lasting peace," at <https://www.khrc.or.ke/achievements/success-stories/502-electoral-reform-for-lasting-peace-in-kenya.html> (accessed 27/1/2021).

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Daisy Maritim (2017) "Why current Constitution is setting us up for more failure," *Standard*, Nairobi, at <https://www.standardmedia.co.ke/article/2001259932/opinion-why-current-constitution-is-setting-us-up-for-more-failure> (accessed 27/1/2021).

desperation to get power which has taken new debilitating dimensions and it is inevitable that other means of attaining power will be used when the ballot seems not be route to achieve it.¹⁶

For instance, the 2017 elections revived calls for secession and withdrawal from polls. This can be seen as a means of engineering conflict which precipitates into a stalemate with the end result of sharing power.

Third, it can also be observed that the 2017 presidential and general elections laid the inadequacies of the Constitution in dealing with equitable distribution of political power whereby the winner takes all. This raises the stakes in elections which can easily degenerate into violence due to poor public oversight.¹⁷

1.2 Statement of the Problem

Although the Constitution of Kenya provides for the enactment of electoral laws to govern the electoral process, the achievement of electoral integrity still remains a mirage in Kenya. The electoral process in Kenya is dogged with suspicion of unaccountability, lack of integrity and credibility.

This is characterized with numerous calls for electoral reforms each time the country approaches an electoral cycle or immediately after an electoral cycle.

Nevertheless, there are still gaps between whether the lack of achievement of electoral integrity in Kenya is due to the gaps or lapses in the electoral laws or whether the implementation of electoral laws has not been efficient or effective.

¹⁶ *Ibid.*

¹⁷ Cheeseman, N., Kanyinga, K., Lynch, G., Ruteere, M., & Willis, J. (2019). Kenya's 2017 elections: winner-takes-all politics as usual?. *Journal of Eastern African Studies*, 13(2), 215-234.

As a result, this research project shall evaluate both aspects, particularly the nature of implementation of Kenya's electoral laws to realize electoral integrity as a fundamental element of the transformative Constitution of Kenya, 2010.¹⁸

1.3 Research Objectives

This study is guided by the following three (3) research objectives.

First, to critically interrogate evaluate the efficacy of the electoral laws in handling and managing the electoral process in Kenya. Second, scrutinize the gaps in Kenya's electoral laws and whether the electoral laws as presently constituted are efficient and sufficient in handling and managing a presidential electoral process. And third, to suggest appropriate recommendations on how Kenya's electoral process can be improved to guarantee credible presidential elections.

1.4 Research Questions

The research study will strive to answer the following three (3) research questions.

First, are the current electoral laws in Kenya efficient and sufficient in handling and managing the electoral process in Kenya? Second, what are the gaps in Kenya's current electoral laws hindering free, fair and credible presidential elections in Kenya? And third, what electoral reforms are necessary to ensure efficiency in Kenya's electoral process?

1.5 Hypotheses and Assumptions

The research study argues that there is need to review and re-evaluate Kenya's electoral laws and policies in presidential elections in Kenya. This study adopts the following two (2) interrelated assumptions or hypotheses.

¹⁸ Ben Sihanya (forthcoming 2022) "Electoral justice in Kenya under the 2010 Constitution: Implementation, enforcement, reversals and reforms," *Op. Cit.*

First, Kenya's current electoral laws and system has failed to ensure free, fair and credible presidential elections. Second, there is need for Kenya to review Kenya's current electoral system in order to ensure that presidential elections in Kenya are free, fair and credible.

1.6 Literature Review

For this study, literature means and includes Constitutions, statutes, regulations, books, journal articles, book chapters, newspaper and magazine articles, conference papers and presentations and online sources. The literature below are organized thematically and from a broader system of analyzing the efficacy of electoral democracy to specific literature on the effectiveness of legal frameworks on electoral processes- which is the main focus of this research project paper.

Prof Ben Sihanya observes that Constitution of Kenya 2010 is transformative and a progressive legal instrument that if fully implemented, it can fulfil Kenya's aspirations for democratic governance and Kenya can achieve its political and socio-economic aspirations.¹⁹ He observes that Kenya's electoral justice has been compromised at the altar of political expediency, especially tribal MIBSA: manipulation, intimidation, bribery, stealing of votes at the stage of counting, polling and even scrutinising, as well as threatened or actual arson, assault and assassination.²⁰ Presidential electoral injustices are part of tribal domination or hegemony, or what Prof ES Atieno Odhiambo has called "ethnic-based hegemonic enterprises."²¹

Prof Sihanya states that for Kenya to achieve electoral justice, there is need for legitimate, valid, and acceptable electoral laws.²² He indicates that this can only be achieved if at least two parameters are met. First, there has to be the enactment of electoral laws within reasonable time

¹⁹ Ben Sihanya (forthcoming 2022) "Electoral justice in Kenya under the 2010 Constitution: Implementation, enforcement, reversals and reforms," *Op. Cit.*

²⁰ Gabrielle Lynch (2015) "So, why aren't we putting our house in order way ahead of 2017 elections?" *Saturday Nation*, 2/12015, at <http://www.nation.co.ke/oped/Opinion/General-Election-2017-IEBC-Polls/-/440808/2576818/-/makhmjz/-/index.html> (accessed 13/3/2015).

²¹ ES Atieno Odhiambo (2002) "Hegemonic enterprises and instrumentalities of survival: Ethnicity and democracy in Kenya," 61, *African Studies Review* 223- 249; E.S. Atieno Odhiambo (2004) "Hegemonic enterprises and instrumentalities of survival: Ethnicity and democracy in Kenya," in Bruce Berman, Dickson Eyoh & Will Kymlicka (eds) *Ethnicity & Democracy in Africa*, James Currey, Oxford, 167-182.

²² Ben Sihanya (forthcoming 2022) "Electoral justice in Kenya under the 2010 Constitution: Implementation, enforcement, reversals and reforms," *Op. Cit.*

prior to presidential elections in Kenya to help shield against misinformed ideologies with an aim of manipulating the said laws to favour the interests of certain political factions. And second, the implementation and interpretation of electoral laws in time.²³

According to Prof Edwin Abuya in *Can African States conduct free and fair Presidential elections* penned his thoughts on elections in Africa with Kenya and Zimbabwe being the case studies, he observed that, “*although most African states recognize voting rights in theory, an examination of what states do in practice paints a different picture. It shows that the process faces several challenges as a result of human interference.*”²⁴ He observes that outcomes of elections are highly contested with numerous irregularities with concerns being made whether electoral rules are followed with the resultant effect of human rights violations and disregard of the rule of law.

Prof Abuya gives an example of the Kenya elections in 2007. It is his observation in the article that an electoral process is vulnerable to fraud and reiterates in his article on the central aspects such as management of elections, voting procedures and resolution of electoral disputes. He observes that in order to secure successful elections which can be considered to be free and fair electoral reforms should be undertaken in this area.

At this end, it imperative to note that the disputed elections in Kenya 2007 led to the Kriegler Report which observed that the Electoral Commission of Kenya bungled the 2007 elections and it could not be considered to be free and fair.²⁵ It was observed in that report that the Commission lacked independence, accountability due to a weak institutional structure. According to the report the management of the commission and credibility was grossly and

²³ *Ibid.*

²⁴ Prof Edwin Odhiambo Abuya (2010) “Can African States conduct free and fair Presidential elections,” 8 NW. J. HUM. RTS. 122 at <https://scholarlycommons.law.northwestern.edu/njihr/vol8/iss2/1/> (accessed 27/1/2021).

²⁵ Kenya National Commission on Human Rights (2007) “The Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007,” at www.knchr.org/Portals/0/Reports/Kriegler_Report.pdf?ver=2013-02-12-095936 (accessed 27/1/2021).

negatively affected. The report recommended the necessary reforms of the electoral institution on order to conduct credible elections and uphold democracy.²⁶

Amongst the many recommendations and just to mention a few the report recommended the separation of roles between the secretariat and the sitting Commissioners of the electoral commission, it also recommended the introduction of technology to enhance credibility of elections. The Kriegler Report shall be an important document in interrogating whether the recommendation were implemented in the preparation to the 2013 and 2017 elections in Kenya.

Human rights groups such as the Kenya Human Rights Commission (KHRC) have also given an overview on the elections that preceded the 2007 after the recommendations of the Kriegler Report. In an article *The Democratic Paradox: A Report on Kenya's 2013 General Elections*, the Kenya Human Rights Commission interrogates the electoral process in the year 2013 and paints a grotesque picture of poor election administration characterized with poor preparations of elections, opaque modes of transmission of results and general failure in handling logistical issues in handling the elections.²⁷

Such an argument can also be traced in Susanne D. Muller's paper on "*Dying to win: Elections, political violence, and institutional decay in Kenya*," where she analysed the socio-economic and political economy around the violence that followed the 2007 General elections. Muller stated that endemic issues including historical land injustices and breakdown in the observance of the rule of law by state institutions that contributed to the violence, have not been adequately reformed. She therefore cast doubt on Kenya's transition to a constitutional democracy. The author further acknowledged that the challenges facing Kenya's electoral system was characteristic of the general practice in African states- whose main cause was a systemic breakdown in constitutional fidelity and gross violation of the rule of law. This paper despite being cast during the transitional phase 2010-2011, demonstrates the nature of the struggle to

²⁶ Richard Downie (2015) "Building on success: Advancing electoral reform in Nigeria."

²⁷ Kenya Human Rights Commission (2014) "The Democratic Paradox: A Report on Kenya's 2013 General Elections," at <https://www.khrc.or.ke/mobile-publications/civil-political-rights/21-democratic-paradox-a-report-on-kenya-s-2013-general-election/file.html> (accessed 27/1/2021).

implement laws and regulations in a system that is hijacked by state interference and weak institutional independence, reminiscent of the modern day electoral institutions. Relatedly, this research project presents a more contemporary post-2010 analysis of constitutional compliance and electoral management.²⁸

Fast forward to the 2017 General Elections, Kelvin Kakai in “*Limits of the law in the regulation of Presidential Elections,*” hypothesized that one of the key limiting factors in electoral processes is the “culture of disobedience of the law.” The author then contextualized the electoral laws reforms in Kenya as an answer to addressing the challenges that bedeviled the pre-2010 General elections in Kenya. Among the key findings of Kakai was the fact that the failed implementation of laws can be attributed to electoral institutions, electoral players and the Judiciary which according to the author, has “judicialized” politics.²⁹

This paper acknowledges the author’s attempt to evaluate the limits of the electoral laws on presidential elections, however, this research project notes that the recommendations do not succinctly capture novel issues including the place of electoral technology. Equally, this paper distinguishes Kakai’s paper to the extent that inasmuch as the Judiciary may be perceived to have “judicialized” politics, the intervention of the Supreme Court in presidential election petitions is a constitutional mandate guided by relevant laws and procedures. Hence, this argument was not adequately supported by evidence. This paper argues that the Judiciary can instead be said to have an unsettled jurisprudence on the weight of substantive versus procedural law in nullifying elections based on the 2013, 2017 and 2022 experiences in Kenya.³⁰

This assertion is quite relevant in the context of the electoral law reform processes in Kenya and Africa, generally, Duncan Okubasu in “*Lessons for Sub-Saharan Africa from Kenya on Electoral Reforms: The Role and Limitations of the Law*” acknowledges that electoral processes are

²⁸ Mueller, Susanne D. "Dying to win: Elections, political violence, and institutional decay in Kenya." *Journal of Contemporary African Studies* 29.1 (2011): 99-117.

²⁹ Kelvin Kakai (2021) *Limits of the Law in the Regulations of the Presidential Elections: a Case Study of Kenya’s 2017 Presidential Elections*, LLM Research project submitted to the University of Nairobi Law School, at <http://erepository.uonbi.ac.ke/handle/11295/157307>.

³⁰ *Ibid.*

multifaceted and faces various challenges especially through interference by the ruling regimes and the lack of institutional independence. The author contextualized Kenya's electoral law reform and postulates that despite the enactment of laws and regulations on elections, and the promulgation of the Constitution 2010, law reform as a standalone reform policy is counter-active to electoral democracy. This relates to this research project paper's contention that evaluating electoral processes should not be a matter of assessing laws and regulation in exclusion of other intervening socio-economic and political factors. Thus, a positive measure would require a multidisciplinary approach that adopts a socio-legal approach as adopted in this research study.³¹

Additionally, Western Scholars such as Staffan Lindberg in *Democracy and Elections in Africa*, he gathered data concerning nationally contested election in Africa during the period between 1989 to 2003 and covered 232 elections in 44 countries arguing that democratizing nations learn to become democratic through repeated democratic behavior, even if their elections are often flawed, according to Lindberg the inception of multiparty elections usually initiates liberalization, and repeated electoral activities create incentives for political actors that fostering the expansion and deepening of democratic values.³²

He further observes that the democratic qualities of political regimes characterized by a sequence of elections shall expand and solidify de facto civil liberties in society and are an important causal factor in the development of democracy.³³

Other scholars such as Jacques Thamssen in *Election and Democracy* interrogate two views being elections as a mechanism to hold government accountable while on the other hand, viewing elections as a means to ensure that citizens' views and interests are properly represented

³¹ Okubasu, Duncan. "Lessons for sub-Saharan Africa from Kenya on electoral reforms: The role and limitations of the law." *Election Law Journal: Rules, Politics, and Policy* 16.2 (2017): 306-315.

³² Staffan I. Lindberg (2006) "Democracy and Elections in Africa," at <https://muse.jhu.edu/book/3263> (accessed 27/1/2021).

³³ See also Richard Vengroff & Momar Ndiaye (1998) "The impact of electoral reform at the local level in Africa: the case of Senegal's 1996 local elections," 17(4) *Electoral Studies*, 463-482.

in the democratic process, however both view the majoritarian and consensus models of democracy as the embodiment in institutional structures of democracy.³⁴

According to the majoritarian view the major importance of an election is the selection of a government and it is observed that the concentration of power by an elected majority government is accountable to the people.³⁵ On the other hand in a consensus model of democracy the main function of elections is to elect the members of parliament who are representative of the electorate. According democracy is established by how representative a parliamentary system is.

1.7 Justification of the Study, Significance, and Scope of the Study

This research argues for the need to review and re-evaluate Kenya's electoral laws and policies in presidential elections in Kenya. First, the electoral laws and system has failed to ensure transparent and credible elections. Second, there is need for review of Kenya's current electoral system in order to ensure that elections in Kenya are free, fair and credible.³⁶

Kenya has gone through numerous electoral cycles since it first held its elections in 1920 through the Colonial Legislative Council. The electoral cycles have been subjected to numerous changes both in law and the electoral systems. It is imperative to note that historically the political space in Kenya has been a preserve of the elite and it has been subject to divisive political agenda that has survived through successive governments up until today.³⁷

The resultant effect is that elections have become emotive and in certain instances a do or die process simply because the person accedes to power control the socioeconomic machinery of a country with the resultant effect of determining developmental growth within a country. This leads to polarization and the inevitable effect of leaving certain ethnic groups outside the

³⁴ Jacques Thamssen (2015) "Election and democracy: Representation and accountability," *Democratization*, 23(7), pp 1315–1316.

³⁵ *Ibid.*

³⁶ Peter Kagwanja & Roger Southall (2009) "Kenya's uncertain democracy: the electoral crisis of 2008," 27(3) *Journal of Contemporary African Studies*, 257-461.

³⁷ Carlian Brashier (2011) "Changing Incentives: How Electoral Reform Can Help Remove an Ethnic Focus in Political Competitions in Kenya."

development agenda and in turn marginalization of certain ethnic minority. The fact that resource allocation mirrors the political power of the day leads to under development in certain areas, rise in ethnicity, poor socio-economic distribution such as social amenities and employment.

At the core of this quagmire is elections which is a facilitating process to the rise to political power. According to the Kenya Human Rights Commission during this process there is misuse of public funds by those in political office, human rights violations during party nominations, electoral campaigns and voting.³⁸ The use of ethnicity in mobilizing votes and whipping emotions and tensions. There is poor oversight of elections which leads to threats or violence, rise of militia gang.³⁹

An analysis and discussion is required to interrogate whether the constitution of Kenya and electoral legislations as enacted after the promulgation of the constitution is adequate to efficiently and sufficiently manage all these factors surrounding an electoral cycle. There is need for a reflection as why there is unending calls for electoral reforms in Kenya prior and after an election has taken place.⁴⁰

The current constitution was promulgated in the year 2010 after numerous stakeholder engagement after Kenya embraced multiparty politics. Chapter Seven of the Constitution expressly provides for the principles of electoral system, the legislations on elections, registration of voters, handling of electoral disputes et al.⁴¹

However, with the laws in place Kenya has not yet achieved a position of electoral integrity. For instance, in the case of *Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission (IEBC)*, a majority of the Supreme Court Judges observed that:

³⁸ *Ibid.*

³⁹ Roger Southall (2013) "Alternatives for electoral reform in Kenya: Lessons from southern Africa. In *Kenya's Uncertain Democracy*," (pp. 185-202). Routledge.

⁴⁰ Tim Murithi (2009) "Kenya—A Year After The Crisis: The Quest for Electoral Reform and Transitional Justice."

⁴¹ See Ben Sihanya (forthcoming 2022) *Constitutional Democracy in Kenya and Africa* Vol. 1, 2 & 3, Sihanya Mentoring & Prof Ben Sihanya Advocates, Nairobi & Siaya.

“The presidential election was not conducted in accordance with the Constitution. That illegalities and irregularities were substantial, a declaration is hereby issued that the third respondent was not validly elected. The IEBC should conduct a fresh election within 60 days.”⁴²

1.8 Conceptual and Theoretical Framework

This study draws and examines afro-kenyanist concepts and theories that relate to Kenya’s electoral process system. It focuses on two main (2) concepts and theories. First, constitutional democracy. And second, constitutionalism and the rule of law. These two (2) core concepts constitute what are deemed the foundations of any modern democracy. The overarching argument of this research project is that the observance of these concepts is key in upholding electoral democracy in Kenya and Africa.

1.8.1 Constitutional Democracy

Prof Ben Sihanya describes constitutional democracy as an omnibus concept or doctrine that captures, incorporates, and deploys numerous concepts including constitution, constitutionalism, democracy, separation of powers, checks and balances, human rights and the rule of law.⁴³

Constitutional democracy is very important and key in not only Kenya’s electoral system but also in Africa and globally. For there to be any free, fair and credible presidential elections in Kenya, constitutional democracy has to be achieved and practiced by all parties and actors entrusted by the people of Kenya to safeguard the integrity of these elections.

1.8.2 The Rule of Law and Constitutionalism in Kenya’s Electoral System

The concept of rule of law and constitutionalism go hand in hand. One cannot exist without the other.

⁴² *Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission (IEBC) & 2 Others* [2017] eKLR.

⁴³ Ben Sihanya (forthcoming 2022) “Conceptualising People, Sovereignty, Constitution, State, Government, Society and Market in Kenya and Africa,” in Ben Sihanya *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa (CODRALKAI) Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring & Prof Ben Sihanya Advocates, Nairobi & Siaya.

The concept of constitutionalism has been discussed by various leading African scholars. Prof H.W.O. Okoth Ogendo describes constitutionalism as;

“The idea of constitutionalism must, in the very first instance imply that a society acknowledges its constitution as a living standard with which the conduct of public behaviour should conform and against which it must be evaluated. The minimum evidence of adherence to the principles of constitutionalism is therefore public respect for the constitution, in whatever form, of the society of which one is a member. Other elements must include – fidelity of life under law i.e. respect for the rule of law and – protection of human rights, including those of communities and minorities.”⁴⁴

Constitutionalism can also be defined as where the rule of law applies to the citizenry of a state or country or nation with an independent judiciary which respects basic human rights and freedoms.⁴⁵

The concept of constitutionalism is the doctrine that governments must act within the constraints of a known constitution whether it is written or not.⁴⁶ Rather than merely being a static exercise in historical retrieval, constitutionalism is an on-going process in which each new generation engages and which necessarily alters in the process of such engagement.⁴⁷

Constitutionalism lays the foundation for external checks that are designed to safeguard the people’s rights and liberties which as very important in any democratic system.

⁴⁴ *Ibid.*

⁴⁵ Vicki Jackson & Mark Tushnet (2006) *Comparative Constitutional Law* Foundation Press, New York (2nd ed) at 243.

⁴⁶ Morris Kiwinda & Tom Ojienda (2013) “Introduction to and an overview of Constitutionalism and democratic governance in Africa,” in Morris Kiwinda and Tom Ojienda *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa*, Pretoria University Law Press, South Africa.

⁴⁷ *Ibid.*

The rule of law on the other hand calls for the legal, lawful and authoritative exercise of power in accordance with the law.⁴⁸ The rule of law must meet substantive, procedural and jurisdictional electoral standards. Substantively the electoral rules must be fair and equitable. Second, the rule-giver must make efforts to disseminate the electoral rules, including through civic education.⁴⁹

1.9 Research Methodology

The research methodology adopted in this research project paper is socio-legal research whereas the effects of electoral law and relevant institutional practices are assessed with particular focus relevant measures to be implemented in order to achieve electoral integrity. The research project paper shall use the primary and secondary data from an evaluation of the of Constitution, statutes, regulations, books, journal articles, book chapters, newspaper and magazine articles, conference papers and presentations and online sources.⁵⁰

This research paper is also enriched by comparative analysis of the electoral systems in Nigeria and South Africa which are constitutional democracies whose electoral processes are characterized by unique divisive factors just like Kenya's electoral processes. These will inform some of the lessons and best practices that can be adopted by Kenya towards promoting electoral integrity.

1.10 Challenges and Limitations to the Study

The research study is a live to the fact that apart from information that is publicly available certain information that may be required from the major electoral players such as the Independent Electoral Boundaries Commission may be difficult to obtain due the duty of confidentiality.

⁴⁸ Ben Sihanya (2013) "Public participation and public interest lawyering under the Kenyan Constitution: Theory, process and reforms," Vol. 9 (1) (2013) *Law Society of Kenya Journal* 1-32. Cf. Paul Craig (2012) *Administrative Law* 7th ed. Sweet and Maxwell, London, at 19.

⁴⁹ Ben Sihanya (forthcoming 2022) "Constitutionalism, the rule of law, and human rights in Kenya's electoral process," in Ben Sihanya *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa(CODRALKAI) Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring & Prof Ben Sihanya Advocates, Nairobi & Siaya.

⁵⁰ See Ben Sihanya (forthcoming 2022) *Sihanya Mentoring PhD, LLM and LLB Proposal, Research Project Paper and Thesis Guidelines*, Sihanya Mentoring & Prof Ben Sihanya Advocates, Nairobi & Siaya.

The research study shall also face certain limitations when it comes to providing detailed evidence of cases such as bribery or corruption before or during the electioneering process which may have encouraged electoral fraud. Most of these cases were either not formally reported or if reported few exceptional cases can be a point of reference.

1.11 Chapter Outline on the Efficacy of Electoral Laws in Kenya and the Notion of Accept and Move On

The research has five (5) chapters.

Chapter 1 shall set out the basis of the research study with an introduction of the research topic and give a detailed background of the study, statement of the problem, justification of the research study, research questions, the research hypothesis, theoretical framework, the research methodology, literature review, limitations of the research study and the chapter breakdown.

Chapter 2 shall appraise and take stock of the Kenya electoral laws as presently constituted and demonstrate the efficiency of these laws pointing out the gaps and lapses encountered during the research study and provide an analysis of best practices in other jurisdictions that have achieved electoral integrity.

Chapter 3 shall look at the institutional framework governing the electoral system in Kenya. The discussion shall be centred on the independence, accountability and confidence of these institutions and whether electoral reforms such as envisaged under the Kriegler Report were adopted in the establishment and constitution of the electoral institution.

Chapter 4 shall focus on a comparative analysis of electoral laws and policies in other jurisdictions specifically Nigeria and South Africa. It will discuss the electoral systems in these countries and how they have fared in ensuring free, fair and credible presidential elections in their jurisdictions.

Chapter 5 shall provide a summary of the findings, conclusion and recommendations. The discussion shall attempt to answer the question of the unending calls for electoral reforms. It shall be characterized with an overview of the significance of an effective legislative and institutional framework. It shall provide a summary of the findings of the research study and the recommendations proposed.

1.12 Conclusion

The overarching argument of this research is that while the Constitution of Kenya is a transformative and progressive legal instrument that if properly implemented can guide the electoral process in Kenya, there is need for electoral integrity to ensure free, fair and credible presidential elections in Kenya.⁵¹

This study is guided by the following three (3) research objectives. First, to critically interrogate evaluate the efficacy of the electoral laws in handling and managing the electoral process in Kenya. Second, scrutinize the gaps in Kenya's electoral laws and whether the electoral laws as presently constituted are efficient and sufficient in handling and managing a presidential electoral process. And third, to suggest appropriate recommendations on how Kenya's electoral process can be improved to guarantee credible presidential elections.

This research argues that there is need to review and re-evaluate Kenya's electoral laws and policies in presidential elections in Kenya. This study adopts the following two (2) interrelated assumptions or hypotheses. First, Kenya's current electoral laws and system has failed to ensure free, fair and credible presidential elections. Second, there is need for Kenya to review Kenya's current electoral system in order to ensure that presidential elections in Kenya are free, fair and credible.

⁵¹ Ben Sihanya (forthcoming 2022) "Electoral justice in Kenya under the 2010 Constitution: Implementation, enforcement, reversals and reforms," *Op. Cit.*

CHAPTER 2

IMPLEMENTATION AND ENFORCEMENT OF THE LEGAL FRAMEWORK IN THE PRESIDENTIAL ELECTORAL PROCESS IN KENYA

2.1. Introduction to the Study

The overarching research objective and research question in this chapter is that the Constitution of Kenya, 2010 was promulgated to address various concerns regarding the free, fair, credible and verifiable presidential elections.⁵² However, this has not been achieved because the implementation of the Constitution has come under attack coupled with lack of good faith and reversals to the electoral process.⁵³

The Chapter shall review Kenya's presidential electoral laws as presently constituted and demonstrate the efficiency of these laws pointing out the gaps and lapses encountered during the research study and provide an analysis of best practices in other jurisdictions that have achieved electoral integrity.

The 2010 Constitution is transformative and a progressive legal instrument that if fully implemented, it can fulfill Kenya's aspirations for democratic governance and Kenya can achieve its political and socio-economic aspirations.⁵⁴ The Constitution seeks to rationalize and the role of the State, reduce authoritarianism and secure liberties through rule of law, social justice and democracy. The 2010 Constitution was designed to address challenges experienced since independence and also future aspirations.⁵⁵

⁵² Ben Sihanya (forthcoming 2022) "Electoral justice in Kenya under the 2010 Constitution: Implementation, enforcement, reversals and reforms," *op. cit.*

⁵³ *Ibid.*

⁵⁴ Ben Sihanya (forthcoming 2022) "Constitutional Values, Principles and Policy in Kenya and Africa: Agency, Structure, Politics and Political Cultures," *op. cit.*

⁵⁵ *Ibid.*

In view of the foregoing, election play a pivotal role and form one of the cornerstones of sovereignty and constitutional democracy.⁵⁶ Through elections, an opportunity is provided to the people of Kenya to fill the offices in governance and public administration being the President, Deputy President, 47 County Governors, 47 Senators, 47 County Women representatives of the National Assembly together with other members of the National Assembly and, and thousands of Members of County Assembly (MCA).⁵⁷

Presidential elections provide the people with an opportunity to debate and make decisions on how to be governed.⁵⁸ Thus, it is imperative to note that free, fair and credible presidential elections provide a basis for good governance. The elected persons are representatives of the people and the power is with the people. Therefore, the elected president has to abide by the rule of law, failure of which they are to be held accountable for their actions and conduct.⁵⁹

Presidential elections in Kenya have been used as a tool of chaos, anarchy and tribal tensions because incumbents are reluctant to cede political power to their opponents.⁶⁰ This is worsened by the context where the Independent Electoral and Boundaries Commission is incompetent, partisan and lawless.⁶¹ Kenya's presidential electoral justice has been compromised at the altar of political expediency, especially what Prof Ben Sihanya calls tribal MIBSA: manipulation, intimidation, bribery, stealing of votes at the stage of counting, polling and even scrutinizing, as well as threatened or actual arson, assault and assassination.⁶²

⁵⁶ Benjamin Obi Nwabueze (1974) *Presidentialism in Commonwealth Africa*, St. Martin's Press, New York.

⁵⁷ Article 136 Constitution of Kenya 2010 provides for the election of the President; Article 180 Constitution of Kenya 2010 provides for the election of Governors; Article 97(1)(b) and 98 (1)(a); Article 89(1) Constitution of Kenya 2010 provide election of Members of the National Assembly.

⁵⁸ Benjamin Obi Nwabueze (2003) *Constitutional Democracy in Africa Vol. 1: Structures, Powers and Organising Principles of Government*, Spectrum Books, Ibadan, Nigeria.

⁵⁹ *Ibid.*

⁶⁰ Karuti Kanyinga & Duncan Okello (eds) (2010) *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections*, Society for International Development(SID) & Institute for Development Studies (IDS), University of Nairobi, Nairobi, Kenya. Cf. Ben Sihanya (forthcoming 2022) "Mediating Kenya's Post-Election Crises the Politics and Limits of Power Sharing Agreement," in Ben Sihanya (due 2022) *Constitutional Democracy, Regulatory, and Administrative Law in Kenya and Africa (CODRALKA)* Vol. 2, Sihanya Advocates and Sihanya Mentoring, Nairobi & Siaya.

⁶¹ *Ibid.*

⁶² Ben Sihanya (forthcoming 2022) "Electoral justice in Kenya under the 2010 Constitution: Implementation, enforcement, reversals and reforms," *op. cit.*

The challenge facing management of presidential elections in Kenya is not specific to Kenya alone but is seen as endemic in Africa generally. This challenge has been attributed to weak and malaise constitutional and institutional framework, which is evident in various presidential electoral cycles conducted in African countries.⁶³

Thus, the management of a presidential electoral process is core to electoral democracy and the abrogation of this principle in an election can easily lead to tensions and anarchy as earlier stated and shall be stressed in the preceding paragraphs.

2.2. Conceptualizing and Problematizing Kenya’s Presidential Electoral and Transition Process

The overarching question in this sub topic what are the issues surrounding presidential electoral cycle in Kenya? How do those issues affect the transition process?

After every five years the people of Kenya hold elections where they go out to vote for their preferred candidate for different elective positions. In the last elections on 8th August 2017 over 78% of the registered Kenyan voters went to make their choice at the ballot.⁶⁴ The manual voting process was largely free, fair, secure and transparent and violence free as required under Articles 1 on Sovereignty of the people, 10 on national values and principles of governance, 38 on political rights, 81 on gender principles for the electoral system, and 86 on voting of the Constitution. However, it was largely non-accurate, and non-accountable contrary to the same constitutional provisions.⁶⁵

⁶³ The Carter Center (2014) “Elections Obligations and Standards; A Carter Center Assessment Manual,” at < <https://www.cartercenter.org/resources/pdfs/peace/democracy/cc-OES-handbook-10172014.pdf>> (accessed 18/7/2021).

⁶⁴ Ben Sihanya (forthcoming 2022) “Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Secession Debates and Movements,” in Ben Sihanya (forthcoming 2022) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa* (CODRALKA) Vol. 1, Sihanya Advocates & Sihanya Mentoring, Nairobi & Siaya.

⁶⁵ *Ibid.*

Prior to the presidential election there were many notable cases of non-compliance, illegalities and irregularities of the part of the IEBC.⁶⁶ The voter register was missing names of voters, pre stamped ballot papers, involuntary reallocation to different polling stations around the country. All this went against the doctrine of universal suffrage under Article 38 and fair administrative action under Article 47 of the Constitution of Kenya.⁶⁷

The main challenges arose when the Independent Electoral and Boundaries Commission (IEBC) refused or failed to follow the constitutional, legal and regulatory process and procedure of transmitting presidential election results through deliberate sabotage and manipulation of the Kenya Integrated Electronic Elections Management System (KIE(E)MS) and process.⁶⁸

These irregularities were discussed following a challenge to presidential elections in *Hon Raila Odinga & Hon Stephen Kalonzo Musyoka v. IEBC & 2 Others*⁶⁹ where one of the major findings of the petition was that IEBC servers and the password or the Chairperson of the IEBC, Mr Wafula Chebukati had been illegally accessed by “strangers” who manipulated the system leading to the announcement of Kenyatta of the Jubilee Party as President. The Supreme Court nullified the presidential election and ordered a fresh presidential election.

In its decision the Supreme Court of Kenya observed that,

“a declaration is hereby issued that the Presidential Election held on 8th August 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void.”⁷⁰

⁶⁶ The Carter Center (2017) “Kenya 2017 General and Presidential Elections Final Report,” at https://reliefweb.int/sites/reliefweb.int/files/resources/kenya-2017-final-election-report_0.pdf (accessed 13/7/2021).

⁶⁷ *Ibid.*

⁶⁸ Ben Sihanya (forthcoming 2022) “Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Secession Debates and Movements,” *op. cit.*

⁶⁹ *Hon Raila Odinga & Hon Stephen Kalonzo Musyoka v. Independent Electoral & Boundaries Commission, Wafula Chebukati and Uhuru Kenyatta* Presidential Election Petition No. 1 of 2017.

⁷⁰ The majority consisted of Chief Justice David Maraga, Deputy Chief Justice Philomena Mwilu, Justice Smokin Wanjala and Justice Isaac Lenaola. Only two Judges dissented, Justices Jackton B Ojwang’ and Njoki Ndung’u which notable pundits criticised and predicted their position in the election Petition.

In addition, the Supreme Court observed that,

“a declaration is hereby issued that the 3rd Respondent was not validly declared as the President elect and that the declaration is invalid, null and void.”

Further, the court held that,

“an order is hereby issued directing the 1st Respondent to organize and conduct a fresh Presidential Election in strict conformity with the Constitution and the applicable election laws within 60 days of this determination under Article 140(3) of the Constitution.”⁷¹

Historically, there are only two presidential elections that were considered to be relatively free and fair. The May 1963 and December 2002 presidential elections are regarded as the most relatively free, fair and accountable parliamentary and presidential elections.⁷² This is attributed to the fact that in both presidential elections, the leader of the winning party was actually or perceived to be favoured by the system. These were Jomo Kenyatta (1963) and Mwai Kibaki (2002).⁷³ Further, in both 1963 and 2002 the key beneficiaries were Kikuyus who had started entertaining a sense of entitlement from the end of Mau Mau revolt (1960) and especially or the release of Kenyatta (1961).⁷⁴

Remarkably, the 2007 Presidential Elections were marred by pre-election and post-election violence (PEV) mainly because the Electoral Commission of Kenya (ECK) allowed and presided over constitutional non-compliance, illegality, irregularities and malpractices.⁷⁵ Previous pre-

⁷¹ *Ibid.*

⁷² Ben Sihanya (forthcoming 2022) “Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Secession Debates and Movements,” *op. cit.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Ben Sihanya & Duncan Okello (2010) “Mediating Kenya’s Post-Election Crises: The Politics and Limits of Power Sharing Agreement,” in Dr Karuti Kanyinga and Duncan Okello (eds) *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections*, Institute of Development Studies (IDS), University of Nairobi, and the Society for International Development (SID) Eastern & Central Africa, Nairobi.

electoral and post electoral violence have been a major component of electoral injustice to retain or capture power since President Jomo Kenyatta invented and used them to ensure his unopposed presidential “election” in 1969.⁷⁶

The 2007 presidential election begun with a peaceful voting in different polling centres across the country. The counting, tallying transmission of votes counted was marred with intentional delays by the electoral commission which sparked tensions and eventually sporadic violence broke out in different parts of the country.⁷⁷

The delayed results were mainly from perceived Mwai Kibaki strongholds such as Juja while most of the results from Raila Odinga’s strongholds like Nyanza and Western Kenya had been announced. This was a strategy so as to vet Raila’s results, then calculate what was needed to top-up Kibaki’s so that he may win by a pre-determined margin.⁷⁸

Kibaki was declared the winner despite protests by Orange Democratic Movement (ODM). Kibaki was sworn in immediately at night in a hurried ceremony which immediately led to violence, targeted killings, displacement of people, damage of property and eventually chaos.⁷⁹

The violence lead to intervention by the international community which led to two commissions being established to investigate the 2007 Post Election Violence (PEV) led by retired South African Judge Johan Kriegler and by Judge Phillip Waki of the Kenyan Court of Appeal, respectively.⁸⁰

⁷⁶ *Ibid.*

⁷⁷ Independent Review Commission (2008) “Report of the Independent Review Commission on the General Elections Held in Kenya on 27th December 2010,” at <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Independent-Review-Commission-on-the-General-Elections-held-in-Kenya-on-27th-December-2007.pdf> (accessed 13/7/2021).

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Ben Sihanya & Duncan Okello (2010) “Mediating Kenya’s Post-Election Crises: The Politics and Limits of Power Sharing Agreement,” *op. cit.*

They made a scathing indictment on the Kenyan electoral process and the manner in which the 2007 presidential elections were conducted.⁸¹ The commission work led to numerous reforms being made to correct electoral fraud in Kenya, key among them was the promulgation of the 2010 Constitution and the establishment of an independent electoral commission.⁸²

The 2013 Presidential elections pitted Raila Odinga against Uhuru Kenyatta with the main issues at the centre of discussion being tribalism and deep rooted corruption.⁸³ In the 2013 General Elections, the security, electoral and administrative state elite affiliated to the then outgoing President Mwai Kibaki and presidential candidate Uhuru Kenyatta and the media introduced a peace crusade and (self) censorship that promoted electoral irregularities and fraud.⁸⁴ There was use of online propaganda which portrayed Luo tribe as violent people and labeled Raila Odinga as being responsible for the 2007 post-election violence despite the fact that Uhuru Kenyatta had been an indictee at ICC for crimes committed during that period.⁸⁵

Mr Isaack Hassan the then IEBC chairman declared Uhuru Kenyatta as the winner of the 2013 Presidential election. Raila Odinga petitioned the Supreme Court challenging the results of the Presidential elections. The Court grossly violated article 159 of the Constitution in refusing to admit Raila Odinga's 900 page affidavit hence defeating the course of justice. The Supreme Court dismissed Odinga's petition.⁸⁶

The Supreme Court in its highly criticised decision stated that although there were irregularities, they were not so substantial as to affect the credibility of the electoral process. Uhuru Kenyatta's controversial election and declaration was thus upheld.⁸⁷

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Ben Sihanya (2013) "Constitutionalism and the rule of law in Kenya's electoral process," *Handbook on Elections Disputes in Kenya* under the auspices of the Judiciary Working Committee on Elections Preparation (JWCEP) and the Law Society of Kenya.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ See *Raila Odinga & 5 Others v. Independent Electoral and Boundaries commission & 3 Others* Supreme Court Petition No. 5 of 2013.

⁸⁷ *Ibid.*

Raila Odinga and the Coalition for the Restoration of Democracy (CORD) decided to “accept the court’s decision” even if they “did not agree,” so that the country may “move on.” “Accept and move on” was Uhuru Kenyatta’s mantra, Kenyatta focused on celebrating the unconstitutional, invalid and illegitimate win even as the 2017 Presidential elections were approaching.⁸⁸

2.3. Implementation of a Just Presidential Electoral Framework

Several key features buttress the integrity of a presidential electoral system such as the accuracy, verifiability and accountability, method and the electoral process.

First, the laws affecting presidential elections should be enacted within an acceptable time in order to take into account the considerations of the participants and stakeholders in the electoral process.⁸⁹ Further, it relates to the right of all voters to participate in the presidential, parliamentary and county electoral process without hindrance, or any other undue influence or intimidation.

Second, to provide for open, credible, free and fair presidential elections, the process of registration of voters should be undertaken in an open manner.⁹⁰ This refers to the compilation and verification of the register of voters should meet all the constitutional and statutory standards. There have been numerous cases in courts that always seek to compel IEBC to comply with the constitutional, statutory and regulatory standards as was the case of *Gladwell Otieno v. IEBC and 2 Others*, the Petitioner, Ms Gladwell Otieno sought to compel the IEBC to open up the register of voters for public scrutiny as is required by the law.⁹¹

⁸⁸ Ben Sihanya (forthcoming 2022) “Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Secession Debates and Movements,” *op. cit.*

⁸⁹ Ben Sihanya (2016) “Constitutional change of Government in Kenya: Constraints and Opportunities,” *Advocate magazine*, the Law Society of Kenya, 52-53.

⁹⁰ *Ibid.*

⁹¹ *Gladwell Otieno v. IEBC* Petition No. 447 of 2017. Cf. Paul O Ogemba (2017) “Activist Gladwell Otieno sues IEBC for failing to make voters’ roll public,” *Standard Digital*, Nairobi, July 19, 2017, at <https://www.standardmedia.co.ke/article/2001248240/activist-gladwell-otieno-sues-iebc-for-failing-to-make-votersroll-public> (accessed 20/7/2021).

The Elections Act under section 6 on the inspection of register of voters⁹² and section 6A on the verification of biometric data⁹³ provides that IEBC must open up the register of voters for verification by the voters for a period of thirty days. After the lapse of the thirty days of verification, the Commission shall revise the register and then publish the register online for the general public. However, the IEBC failed to adhere to the timelines and instead directed that the register would be available upon request and at a fee of KES 20, 000.⁹⁴

This was contrary to the Access of information Act and as well as sections 6 and 6A of the Elections Act. The illegality was continued by the fact that fourteen days to the presidential elections the IEBC published incomplete National Identification Numbers.⁹⁵

Third, the political party nomination process for presidential candidates should be procedural under the auspices of fair administrative action and rules of natural justice.⁹⁶ The party presidential nominations are normally marred with a lot of secrecy and underhand deals through political jostling.

The presidential candidates that should be rightfully nominated after party elections normally have their victory changed and others awarded on their behalf. This leads to last minute party hopping in order to out maneuver an opponent or proponents of one's former political party. Political parties should ensure that they are guided by section 23 of the Elections Act 2011 on the qualifications and disqualifications for in their nomination of presidential candidates.

Fourth, the campaign period should be controlled and governed under the presidential electoral rules.⁹⁷ The freedom to campaign should be guaranteed to all the players in the presidential elections. All political parties should be allowed to sell their agenda and manifesto to the

⁹² Section 6(2) Elections Act 2011.

⁹³ Section 6A Elections Act 2011.

⁹⁴ Lynet Igadwa (2017) "IEBC register Sh 20, 000 price tag questioned," *Business Daily*, Nairobi, July 5, 2017, at <http://www.businessdailyafrica.com/news/IEBC-register-Sh20-000-price-tag-questioned/539546-4002054fdm6p9/index.html> (accessed 26/7/2021).

⁹⁵ *Ibid.*

⁹⁶ Ben Sihanya (2016) "Constitutional change of Government in Kenya: Constraints and Opportunities," *op. cit.*

⁹⁷ *Ibid.*

electorates. There should be fairness to each political party whether an opposition party or a minority political party.

The campaigners, candidates and observers should not be harassed and their security should be guaranteed at all times. The incumbent party should also not use state machinery during the political campaigns. The Executive arm of Government should be put in check during general elections to minimize interference and restrain the likely undue advantage over other candidates.⁹⁸

Fifth, there should be stakeholder initiative for all the relevant stakeholders to actively participate and play their role in securing the integrity of the ballots, electoral materials, and all electoral personnel, including poll clerks, Presiding Officers (POs), Returning Officers (ROs), Deputy Returning Officers (DROs), and agents and the accreditation and security of election observers and monitors.⁹⁹ This gives confidence to the process by the participants who feel part and parcel to the electoral process itself.

Sixth, there should be a prompt, transparent, verifiable and accountable counting and tallying of votes ballots at the polling station; verifiable tallying and declaration of presidential election results at all levels; and efficient, timely, fair and transparent disposal of pre- electoral, electoral and post electoral disputes.¹⁰⁰

2.4. Amendments to the Presidential Electoral Law in Kenya since 2013

Since the promulgation of the 2010 Constitution concerted efforts have been made by different actors to amend the electoral laws in spirit to the Constitution. Political coalitions such as Coalition for the Restoration of Democracy (CORD), National Super Alliance (NASA) and civil

⁹⁸ Ben Sihanya (forthcoming 2022) “Executive Power, Function, and Structure in Kenya and Africa: Concepts, Theory and History (Practice, Tradition, Custom, Convention),” in Ben Sihanya (forthcoming 2022) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa* (CODRALKA) Vol. 1, Sihanya Advocates & Sihanya Mentoring, Nairobi & Siaya.

⁹⁹ Ben Sihanya (2016) “Constitutional change of Government in Kenya: Constraints and Opportunities,” *op. cit.*

¹⁰⁰ *Ibid.* Cf. Ben Sihanya (forthcoming 2022) “Electoral justice in Kenya under the 2010 Constitution: Implementation, Enforcement, reversals and reforms,” *op. cit.*

society organizations have been on the fore front pushing for the amendment of presidential electoral laws in Kenya.¹⁰¹ Unfortunately the support has not cut across the political divide since the IEBC and the Jubilee coalition has preferred *status quo*.

First, there is the Election Laws (Amendment) Act, 2016 No. 36 of 2016. This was a result of protracted debate and clamor for the exit of Issack Hassan and other commissioners from after they had been implicated in serious presidential electoral fraud, as well as criminal cases.¹⁰² The Act amended some sections of the Elections Act, Political Parties Act, Independent Electoral and Boundaries Commission Act, Supreme Court Act and Registration of Persons Act.

The amendments sought to address the new procedure for exit of IEBC Commissioners and the appointment of new commissioners to be in charge of the presidential, parliamentary and county elections. It also provided reasonable timeliness for the nomination process and resolution of presidential, parliamentary and county election disputes. Under the Act, political parties were henceforth required to carry out their nominations at least 60 days to the elections rather than the 45 days that were allowed under the previous provision of the Elections Act.¹⁰³

Presidential, parliamentary and county aspirants or politicians were also compelled to join or choose parties at least 90 days to the elections. This was to stop “party hopping” as a result of general consensus among the key political parties and formations, especially CORD/NASA and Jubilee. The Act sought to change the academic or education qualifications of the candidates for the various elective positions.

Third, the Election Offences Act, 2016, No. 37 of 2016. The Act provided for offences relating to voting, register of voters, multiple registration as a voter, and offences by members and staff

¹⁰¹ Sekou Toure Otondi (2017) “Why Odinga’s resistance movement could be important for democracy in Kenya,” *The Conversation*, at <https://theconversation.com/why-odingas-resistance-movement-could-be-important-for-democracy-in-kenya-86562> (accessed 7/10/2021).

¹⁰² East African Reporter (2016) “Kenya’s polling body officials to exit office ahead of election,” *The EastAfrican* Newspaper, August 3, 2016, at <https://www.theeastafrican.co.ke/tea/news/east-africa/kenya-s-polling-body-officials-to-exit-office-ahead-of-election-1353286> (accessed 30/7/2021).

¹⁰³ Consider Alan Ware (1996) “Parties in government,” in Alan Ware *Political Parties and Party Systems*, Chapter 12, Oxford University Press.

of the IEBC, among others. This amendment was enacted in an effort to deter the potential electoral malpractice in order to ensure that presidential, parliamentary and county elections are free, fair, and credible.¹⁰⁴

Fourth, there is the Election Laws (Amendment) Act, No 1 of 2017). This legislation was unconstitutionally, illegally, irregularly, procedurally and controversially introduced in Parliament passed by Jubilee-affiliated MPs and Senators, with opposition legislators in Senate and National Assembly opposing it. The controversial point was the amendment to section 44 of the Elections Act 2011 through the addition of section 44A to allow IEBC to put in place a complementary mechanism for identification of voters and transmission of presidential election results.¹⁰⁵

Opposition legislators contended that the amendment did not specify instances when a complementary system could be used. The provision was prone to abuse, for instance deliberately ignoring or subverting technology and going manual as happened in 2013 General and Presidential Elections. This position was supported by the Kenya National Chamber of Commerce, the Council of Governors, Media Owners Association and other stakeholders.¹⁰⁶ Interestingly, as at July, 2017 IEBC had not published regulations to put into effect the Amendments brought by section 44A and it was not clear how IEBC was going to use the complementary system.¹⁰⁷

In *National Supper Alliance v. Independent Electoral and Boundaries Commission*,¹⁰⁸ the petitioners argued that IEBC had failed to establish the complementary to electronic voter

¹⁰⁴ Karuti Kanyinga & Duncan Okello (eds) (2010) “Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections,” Society for International Development (SID) & Institute for Development Studies (IDS), University of Nairobi, Nairobi, Kenya.

¹⁰⁵ BBC Reporter (2017) “Kenya election law amendment takes effect,” BBC News, at <https://www.bbc.com/news/world-africa-41859171> (accessed 30/7/2021).

¹⁰⁶ Ben Sihanya (forthcoming 2022) “Electoral justice in Kenya under the 2010 Constitution: Implementation, enforcement, reversals and reforms,” *op. cit.*

¹⁰⁷ George Okongo and Nicholas Matatu (2017) “Kenya: The potential and limitations of electoral technology,” International Institutes for Democracy and Electoral Assistance, at <https://www.idea.int/news-media/news/kenya-potential-and-limitations-electoral-technology> (accessed 30/7/2021).

¹⁰⁸ *National Supper Alliance v. Independent Electoral and Boundaries Commission* Petition No. 328 of 2017.

identification (EVID) and electronic results transmission system (ERTS) as was contemplated under Sec 44A of the Election Laws (Amendment) Act, 2017.

The petitioner's prayers were three pronged.¹⁰⁹ First, what is the complementary mechanism provided for under s. 44A of the Elections Act? The argument was that the complimentary mechanism must be electronic and not mechanical; that one technology can complement another; that is not to an alternative by complementary. And that the mechanism must be read in the context of section 39 on determination and declaration of electoral results, 44 on the use of technology in general and presidential elections and 44A on use of complimentary mechanisms for voter identification in general and presidential elections.¹¹⁰

Second, had IEBC established that mechanism sixty (60) days to the presidential and general elections on 8/8/2017 or within a reasonable time? That regulations 69 and 83 of the Elections (General) Regulations 2012 as amended in April 2017 provided for a manual mechanism for voter identification and election results transmission.¹¹¹

And that these read like the mainstream mechanism or if they were the complementary mechanism, then what was the mainstream mechanism for voter identification and results transmission, respectively? And had the IEBC and Parliament ensured public participation under Articles 10 which provides for national values and principles, 118 on public access and participation, among others of the Constitution? ¹¹²

Third, that the court should grant an appropriate remedy under Articles 23 which provides for the authority of courts to uphold and enforce the Bill of Rights ,and 47 which provides for fair

¹⁰⁹ Ben Sihanya (forthcoming 2022) "Electoral justice in Kenya under the 2010 Constitution: Implementation, enforcement, reversals and reforms," *op. cit.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² Ben Sihanya (2020) "Constitutional implementation in Kenya, 2010-2020: Challenges and prospects," revised from a study under the auspices of the Friedrich Ebert Stiftung (FES), Occasional Paper No. 5, Nairobi, January 2013, Chapter 31 in Ben Sihanya (forthcoming 2022) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa* (CODRALKA) Vol. 1: q.v.

administrative action of the Constitution including compelling IEBC to resort to the exclusive use of electronic means of voter identification and result transmission.¹¹³

The respondents on the other hand argued that the application lacked merit and was frivolous as the commission was independent, free and fair and would carry out their functions in an accountable manner, IEBC failed to substantially respond to the issues raised by the Petitioners to only raising two grounds of objections and no affidavit (or evidentiary basis).¹¹⁴

The Chair said IEBC would use the electronic voter identification devices (EVID), electronic results transmission system (ERTS) but in the court papers and submissions, IEBC, Jubilee and the A-G argued that technology was inherently unreliable.¹¹⁵ They emphasized the failure of electronic voting in the United States and other jurisdictions. Yet the case was about EVID and ERTS, and not voting which was still manual under the law.¹¹⁶

Fifth, IEBC published the Election Campaign Finance Regulations that were meant to put into effect the Election Campaign Finance Act of 2013. The Regulations set contribution and spending limits for presidential, parliamentary and county political seat aspirants. The implementation of these regulations were suspended until after the 2017 presidential and general elections which begs one to wonder they were published in the first place.¹¹⁷

Sixth, the role of IEBC Chairperson in the 2017 Presidential and General Elections changed from high level executive decision making under the previous IEBC regulations administrative and ceremonial. This followed the declaration by the High Court and the Court of Appeal that

¹¹³ See *National Supper Alliance v. Independent Electoral and Boundaries Commission* Petition No. 328 of 2017.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ Ben Sihanya (forthcoming 2022) “Electoral justice in Kenya under the 2010 Constitution: Implementation, enforcement, reversals and reforms,” *op. cit.*

¹¹⁷ Ben Sihanya (forthcoming 2022) “Presidential election and transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, and the Secession Debate,” Chapter 12, Ben Sihanya (forthcoming 2022) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol 3: Tribalism, Elections, Governance, Human rights, the just rule of law, and Due Process*, [CODRALKA 3].

presidential election results announced by Returning Officers at the Constituency level are final and are not subject to alteration by the IEBC Chairman.¹¹⁸

A reading of Article 138(2) read together with Article 86(c) of the Constitution, the word “returning officer” is construed to mean an officer of the IEBC who is in charge of elections at the constituency level.¹¹⁹ Article 86(c) states;

“the results from the polling stations are openly and accurately collated and promptly announced by the returning officer.”

While article 138(2) states;

“if two or more candidates for president are nominated, an election shall be held in each constituency.”

It was unconstitutional for the IEBC through the Elections (General) Regulations to appoint the IEBC Chairman as the returning officer in a presidential election. For this reason the High Court and the Court of Appeal in *Maina Kiai and Others v. IEBC and Another* declared section 39 of the Elections Act and Regulations 83(4) of the Elections (General) Regulations 2012 as unconstitutional as they violate Articles 86 and 138 of the Constitution.¹²⁰

2.5. Transparency, accuracy, accountability and verifiability in registration and voter registers

A just and fair presidential electoral process must be seen to be accurate, verifiable and accountable from the start to the end of the electoral process.¹²¹ The beginning of a presidential

¹¹⁸ *Maina Kiai and Others v. IEBC and Another* Petition No. 207 of 2016. The Advocates in this case were Willis E.O. Otieno & Ben Sihanya (for Petitioners), Waikwa Wanyoike & Christine Nkonge (for the *amicus*). The Judges at the High Court were Justice Aggrey Muchelule, Justice Weldon Korir and Justice Chacha Mwita.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.* Cf. Ben Sihanya (forthcoming 2022) “Electoral justice in Kenya under the 2010 Constitution: Implementation, enforcement, reversals and reforms,” *op. cit.*

¹²¹ Ben Sihanya (forthcoming 2022) “Reforming Kenya’s Presidential, Political, Governance and Constitutional Crises Beyond 2017,” *op. cit.*

electoral process is at the voter registration exercise which should have onboard all stakeholder participation. The accuracy goes to the root of the precision in capturing the voter's data. The register's verifiability is essential in guaranteeing the right to vote.¹²²

A voter should be in a position to cross check their details whenever necessary at the register of voters without any hindrance or interference.¹²³ This is a matter which is not only obligatory upon the IEBC but also a constitutional right of a voter.

The IEBC officials are mandated to become directly accountable for the management of presidential election affairs. They must also guarantee the accuracy and verifiability of the register of voters to the electorate. This is to ensure that qualified voters are registered and the data held by the IEBC is accurate. It goes without saying that unqualified persons such as non-citizens, foreigners or aliens, under age or dead persons should not be registered as voters and their data should not form part of the information captured by the voter register.

Kenya has had history of failed IEBC personnel who could not guarantee the transparency, accuracy, accountability and verifiability of voter registers. Ahmed Issack Hassan and former IEBC Commissioners failed in to deliver in this aspect in the 2013 General Elections.¹²⁴ In the 2007 general and presidential elections Samuel Kivuitu led Electoral Commission of Kenya (ECK) plunged Kenya into chaos through fraudulent management, mismanagement or bungling of elections.¹²⁵ In the 2017 electoral cycle, Kenyans remained vigilant and hopeful that IEBC would put in place mechanisms to deliver on these critical electoral process issues. However, the performance by IEBC remained a poor and dismal.¹²⁶

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ Nic Cheeseman, Gabrielle Lynch and Justin Willis (2014) "Democracy and Its Discontents: Understanding Kenya's 2013 Elections," 8(1) *Journal of Eastern African Studies*.

¹²⁵ Karuti Kanyinga and Duncan Okello (eds) *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections, op. cit.*

¹²⁶ The Carter Center (2017) "Kenya 2017 General and Presidential Elections Final Report," *op. cit.*

Pursuant to political consensus in 2016 and the subsequent amendments to the Elections Act 2011, section 8A of the Election Laws (Amendment) Act, No. 36 of 2016 mandated IEBC to procure the services of an independent professional firm to audit the register of voters (RoV). IEBC settled on Klynveld Peat Marwick Goerdeler (KPMG). The Coalition for the Restoration of Democracy (CORD) filed a case contesting the award on the following issues:¹²⁷

“...at the time of awarding the tender to KPMG, IEBC had no Commissioners in office, of which the audit subject of the impugned decision being a policy issue within the ambit of the Commissioners mandate and could not be conducted in the absence of Commissioners... In awarding the tender for the audit of the register of voters, IEBC proceeded without consultation and or engagement with the stakeholders including political parties including in designing the criteria and or the methodology for the audit... That KPMG was incompetent as it had never audited a register of voters in Kenya or elsewhere before.”¹²⁸

The audit of the register was conducted by KPMG with the objective of verifying the accuracy of the register. It was also to recommend mechanisms of enhancing the accuracy of the register. Lastly, the register was to be updated. The KPMG report indicated that about one million dead voters were still in the register.¹²⁹ Interestingly, as at July, 2017 which was a month to the general and presidential elections IEBC had not deleted names of the dead voters from the register.¹³⁰

2.6. International Principles of Presidential Electoral Management

The presidential and general electoral management process is underpinned and buttressed under the Constitution of Kenya which provides the cornerstone and anchor of the law governing

¹²⁷ *Coalition for Reforms and Democracy (CORD) v. Independent Electoral and Boundaries Commission (IEBC) & KPMG* JR No. 648 of 2016.

¹²⁸ *Ibid.*

¹²⁹ Patrick Vidija (2017) “Over One Million Dead Voters Could be in IEBC Register, KPMG Says in Audit Report,” *Star Newspaper*, Nairobi, at https://www.the-star.co.ke/news/2017/06/09/over-one-million-dead-voters-could-be-in-iebc-register-kpmg-says-in_c1577635 (accessed 8/8/2021).

¹³⁰ *Ibid.*

elections in Kenya.¹³¹ Article 2 (5) and 2(6) of the 2010 Constitution introduce the aspect of international obligations that are materially extrapolated from various treaties and conventions and which entail a positive state duty to take the necessary steps to enable citizens to effectively exercise their political and voting rights.¹³²

Article 2 (5) and 2(6) of the Constitution domesticates the general rules of international laws and the application of treaties, conventions that has been ratified by Kenya. Efforts have been made through the Constitution of Kenya 2010 to address the deficiencies in our electoral laws through various proposed legislations and amendments that were made to the Election Act.¹³³

The international election standards thus entail the principles and implementation guidelines that help improve the quality of elections across the international sphere. The treaties and conventions and particularly those made under the United Nations Framework provide for a set of obligations of universal relevance, as United Nations membership entails acceptance of UN Charter obligations.¹³⁴

The member states of the United Nations (UN) are bound by the guiding principles and obligation to promote duty the fundamental rights of its citizens which includes the right to free and fair elections. Treaties and Conventions formalize agreements between sovereign states. On becoming a party to a treaty, a state limits their sovereign rights by voluntarily accepting international obligations.¹³⁵

¹³¹ Ben Sihanya (forthcoming 2022) “Constitutionalism, the Rule of Law and Human Rights in Kenya’s Electoral Process,” in Ben Sihanya (forthcoming 2022) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa* (CODRALKA) Vol. 1, Sihanya Advocates & Sihanya Mentoring, Nairobi & Siaya.

¹³² Article 2(5) and (6) Constitution of Kenya 2010.

¹³³ Ben Sihanya (forthcoming 2022) “Reforming Kenya’s Presidential, Political, Governance and Constitutional Crises Beyond 2017,” *op. cit.* Cf. Wilberforce Akello (2020) *The Role of Technology in Elections in Kenya: A Case Study of the 2017 Presidential Election*, An LLM Thesis Submitted to the University of Nairobi.

¹³⁴ Domenico Tuccinardi (2014) “International Obligations for Elections: Guidelines for Legal Frameworks,” *op. cit.*

¹³⁵ *Ibid.*

As such, the transfer of public sovereign rights to the people subject to their jurisdiction. Citizenry of the member states can legally invoke the treaty against the state if their rights are violated by the state.¹³⁶

2.7 Summary of Findings and Conclusion

The overarching objective and research question in this Chapter 2 is that while the Constitution of Kenya, 2010 was promulgated to address various concerns regarding the free, fair, credible and verifiable presidential elections this has not been fully achieved. This is because the implementation of the Constitution has come under attack coupled with lack of good faith and reversals to the presidential electoral process.¹³⁷

The presidential election process in Kenya over the years has been marred by claims of electoral fraud and malfeasance which has often led to post election chaos and violence as witnessed in 2007, 2013 and 2017.¹³⁸ The lack of electoral integrity can be attributed to the failure of the IEBC to implement and enforce the legal framework governing the electoral process in Kenya.

The full adherence and implementation of the available presidential electoral laws in Kenya is crucial in order to ensure that the electoral process provides Kenyans a free and fair opportunity to vote for their preferred presidential candidate without the fear of their votes being rigged.

The next Chapter 3 will focus on the legal and institutional frameworks governing the electoral system in Kenya.

¹³⁶ *Ibid.*

¹³⁷ Ben Sihanya (2017) "Electoral Justice in Kenya under the 2010 Constitution implementation, enforcement, reversals and reforms," Vol 13, Issue 1, 1-30, *Law Society of Kenya Journal*.

¹³⁸ Ben Sihanya and Duncan Okello (2010) "Mediating Kenya's Post-Election Crises: The Politics and Limits of Power Sharing Agreement," *op. cit.*

CHAPTER 3

THE INSTITUTIONAL FRAMEWORK GOVERNING THE ELECTORAL SYSTEM IN KENYA

3.1. Introduction to the Study

The overarching argument in this Chapter is that the relevant institutions governing presidential elections in Kenya, play an important role in ensuring free, fair and credible presidential elections.¹³⁹ This chapter is centred on the independence, accountability and confidence of these institutions governing electoral management systems in Kenya.¹⁴⁰ It investigates whether the institutions indeed undertake their core mandate as required by the law.

The chapter also focuses on whether the relevant institutions governing elections in Kenya have proposed electoral reforms in order to efficiently operate in the governance of elections. Further, an evaluation of whether in instances where reforms have been made through policy statements or legislation whether the same has been implemented by the relevant institutions.

The chapter also seeks to examine the electoral reforms proposed in the Independent Review Commission (IREC) commonly referred to as the Kriegler Commission's Report¹⁴¹ and establish whether they were adopted and implemented as previously proposed following the skirmishes and violence that erupted after the 2007 General Elections and the post-election violence (PEV) in Kenya. The Kriegler Report made at least two (2) key comments and recommendations that reverberate across the architecture of this research project paper. First, that Kenya's electoral reform would require fundamental restructuring of the electoral management body (EMB) to ensure its institutional and decisional independence,¹⁴² addressing corruption and reducing Government influence over electoral processes.

¹³⁹ Ben Sihanya (forthcoming 2022) "Constitutional Values, Principles and Policy in Kenya and Africa: Agency, Structure, Politics and Political Cultures," *op. cit.*

¹⁴⁰ *Ibid.*

¹⁴¹ Independent Review Commission Report, 2008.

¹⁴² This referred to the Electoral Commission of Kenya (ECK) established under section 41 of the then Constitution.

The Kriegler Report stated thus:

“...the image, name and influence of the all-powerful President extending down to the grassroots, where the DC [District Commissioner] and the galaxy of uniformed and plainclothes agents of the Commander-in-Chief hold unquestioned sway. ... The solution [to Kenya’s problems] does not merely lie in constitutional and legislative changes. The culture of impunity in Kenya needs a fix too. The relevant law-enforcement institutions also need to do their jobs properly.”¹⁴³

Second, the Kriegler Report noted that there was no clear delineation of what constitutes the Kenyan electoral cycle given that elections are continuous processes that begin from pre-polling, polling, tallying, transmission, verification and declaration of winners. The pre-polling stage involved voter registration which according to the Kriegler Report, was irregular, discriminatory against women since a majority of women were unregistered, while instead retaining “ghost” or dead voters. Then the nomination stage which was mainly conducted by political parties was skewed and were characterised by polling violence. Subsequent to the nomination stage, there would be the campaign period which was also unregulated due to the lack of national policy guidelines on campaign period limitations.¹⁴⁴

The polling stage could comprehensively be viewed as involving polling, tallying, transmission, verification and declaration of winners. The Kriegler Report noted that:

“Counting and tallying during the period 27-30 December 2007 (and even thereafter) and the announcement of individual results were so confused – and so confusing – that many Kenyans lost whatever confidence they might have had in the results as announced. Rumours of rigging and fraud during the counting and tallying process spread like wildfire, and the consequences were tragic.”¹⁴⁵

Relatedly that:

¹⁴³ *Ibid*, at 23-24.

¹⁴⁴ *Ibid*.

¹⁴⁵ Kriegler Report, at 115.

“conduct of the results transfer from polling stations to constituencies, the tallying in constituencies, the transfer of constituency-level presidential election results and the tallying at national level is – generally speaking – of incredibly low quality: it is actually not acceptable.”¹⁴⁶

3.2. The Independent Electoral and Boundaries Commission (IEBC)

The establishment and functions of the IEBC are provided for under Article 88 of the Constitution 2010. It provides that the Commission shall be responsible for conducting and supervising referenda and elections to any elective body or office established the Constitution or elections as prescribed by an Act of Parliament.¹⁴⁷

The Constitution 2010 established the IEBC as a successor to the Interim Independent Boundaries Commission (IIBC) and Interim Independent Electoral Commission of Kenya (IIEC). These two (2) electoral bodies had been formed to cure the electoral fraud, irregularity and incompetence overseen during the 2007-2008 General elections by the Electoral Commission of Kenya, under Chair Samwel Kivuitu.¹⁴⁸ It was argued that a revamped and reformed electoral body under new management would guarantee free, fair and transparent elections in 2012/2013, 2017 and beyond.¹⁴⁹

Further, the enabling provision under Article 88 of the Constitution are given effect by the Independent Electoral and Boundaries Act (IEBC). This Act of Parliament provides the following seven (7) functions of the IEBC. First, the continuous registration of citizens as voters. Second, the regular revision of the voter’s roll. Third, the delimitation of the constituencies and wards. Fourth, voter education. Fifth, settlement of electoral disputes. Sixth, the development of a code of conduct for candidates and parties contesting elections; and seventh, registration of candidates for elections.¹⁵⁰

¹⁴⁶ Kriegler Report, at 127.

¹⁴⁷ Article 88(4) Constitution of Kenya 2010. Cf. Ben Sihanya (forthcoming 2022) “Constitutional Implementation in Kenya 2010-2019: Challenges and Prospects,” *op. cit.*

¹⁴⁸ See the IREC (2008) *Report of the Independent Review Commission (IREC) on the General Elections held in Kenya in December 27, 2007*

¹⁴⁹ See Ben Sihanya (2017) “Conduct of IEBC Commissioners key to 2017 General Elections,” Vol 1, Issue 8, *Advocate*, Magazine of the *Law Society of Kenya*, at 8.

¹⁵⁰ *Ibid.*

The Constitution 2010 provides for the delimitation of electoral units,¹⁵¹ of which outlines the process and criteria for delimitation of boundaries of constituencies and wards. Article 89 also provides that there shall be two hundred and ninety (290) constituencies for the purposes of the election of the members of the National Assembly provided under article 97(1)(e).¹⁵²

The independence of the IEBC is underpinned in law under Chapter 15 of the Constitution of Kenya.¹⁵³ This is in order to protect the integrity and independence of the Commission from external factors. The Constitution provides that Commissions such as IEBC are to protect the sovereignty of the people of Kenya and promote constitutionalism.¹⁵⁴ This emphasizes the fact that the Commissions and holders of such offices are subject to the Constitution and not direction from external interference.¹⁵⁵

The IEBC composition is provided for under Article 250 of the Constitution which also provides for the appointment and terms of office of the members of the Commission.¹⁵⁶ The IEBC Act provides for procedural requirements in terms of appointment of the commissioners to the commission. The financial plans, the tenure, conduct and general operations of the IEBC Commission.¹⁵⁷

The Commission is to consist of a Chairperson and six (6) other members appointed in accordance with Article 250(4) of the Constitution and the provisions of this Act.¹⁵⁸ The

¹⁵¹ Article 89 Constitution of Kenya 2010.

¹⁵² Ben Sihanya (forthcoming 2022) "Constitutionalism, The Rule of Law and Human Rights in Kenya's Electoral Process," in Ben Sihanya *Constitutional Democracy, Regulatory, and Administrative Law in Kenya and Africa* (CODRALKA) Vol. 2, Sihanya Advocates and Sihanya Mentoring, Nairobi & Siaya.

¹⁵³ See Chapter 15 of the Constitution of Kenya 2010 which provides for Commissions and independent offices. Cf. Ben Sihanya (forthcoming 2022) "Constitutional Commissions and Independent Offices in Kenya: Experiences, Challenges and Opportunities," in Ben Sihanya *Constitutional Democracy, Regulatory, and Administrative Law in Kenya and Africa* (CODRALKA) Vol. 1, Sihanya Advocates and Sihanya Mentoring, Nairobi & Siaya, *op. cit.*

¹⁵⁴ Article 249 of Constitution of Kenya 2010, *op. cit.*

¹⁵⁵ Steve Schwalbe "Independent commissions: their history, utilization and effectiveness," NASPAA Initiatives, Volume 5, at http://www.naspaa.org/initiatives/paa/pdf/Steve_Schwalbe.pdf (last accessed on March 15, 2011).

¹⁵⁶ Ben Sihanya (forthcoming 2022) "Constitutional Commissions and Independent Offices in Kenya: Experiences, Challenges and Opportunities," *op. cit.*

¹⁵⁷ *Ibid.*

¹⁵⁸ Section 5 Independent Electoral and Boundaries Commission Act 2011.

Commissioners are to be appointed for a single term of six (6) years and are not be eligible for reappointment. The membership of the Commission serves on a full-time basis. The membership of the IEBC, especially, the Chairperson and Chief Executive Officer (CEO) were particularly debated in the context of the IEBC's role in the 2013 and 2017 General Elections.¹⁵⁹

Justice Byram Ong'aya in *Chama Cha Mawakili (CCM) v. Chairperson Independent Electoral and Boundaries Commission & 2 Others* (2020) even ordered that the recruitment of the Chief Executive Officer (CEO) of the IEBC ought to be open and transparent in accordance with section 10(1) and 27 of the IEBC Act and Article 10 of the Constitution 2010. Commissioner Marjan Marjan had held the position for more than months after the resignation of Ezra Chiloba.¹⁶⁰

There were increased calls for the reform and restructuring of the IEBC before the 2022 General elections, with major political players arguing that the IEBC had lost confidence of the public, and was likely to delivery skewed results, where the proposed constitutional, policy, legislative and administrative reforms were not implemented. Among the major reform proposals include the Building Bridges Initiative (BBI) Report 2020 that sought to fundamentally restructure the composition, structure and funding of the IEBC.¹⁶¹

The Act provides that the Commission may create within itself such directorates, field offices, units, divisions or committees and may appoint thereto such employees as it may determine.¹⁶² The Commissioners shall form committees which formulate policies and strategies of the Commission on operational and technical aspects of election planning and management. The mandate of operation of such committees and strategic teams are to operate within the Act.

¹⁵⁹ Moses Odhiambo (2020) "IEBC on the spot over delayed chief executive hiring," *Star*, Nairobi, May 19, 2020, at <https://www.the-star.co.ke/news/2020-05-19-iebc-on-the-spot-over-delayed-chief-executive-hiring/> (accessed September 29, 2021).

¹⁶⁰ *Chama Cha Mawakili (CCM) v. Chairperson Independent Electoral and Boundaries Commission & 2 Others* [2020] eKLR.

¹⁶¹ Daily Nation (2020) "IEBC Reforms Critical in the Race Against Time," *Daily Nation*, Nairobi, October 23, 2020, at <https://nation.africa/kenya/blogs-opinion/editorials/iebc-reforms-race-against-time-2719494> (accessed September 25, 2021).

¹⁶² Section 12 Independent Electoral and Boundaries Commission Act, 2011.

The IEBC Act provides for the relationship between the Commissioners and the Secretariat.¹⁶³ The Secretariat performs the administrative functions of the Commission and implements the policies and strategies formulated by the Commission through the committees, while the Commissioners formulate policy and strategy of the Commission and oversight of the Secretariat. The relationship between the Wafula Chebukati-Ezra Chiloba led Commission was marred by mistrust, abuse of office and professional misconduct, leading to the dismissal of Ezra Chiloba from IEBC in 2019.¹⁶⁴

The Secretariat is a professional body of the Commission composed of the Chief Executive Officer (CEO) and Directorates. It contains the professional and technical, administrative and support staff that assists the IEBC and committees to discharge their mandate. Indeed, at the center of the disputed 2017 presidential elections, was the CEO Ezra Chiloba who was accused of bipartisanship and partiality. He was later forced to resign in 2019.¹⁶⁵

The process of the recruitment was also marred by conflict of interest and vested political interests. For instance, Ezra Chiloba alleged that the Chairperson, Chebukati sought to control procurement and tenders at the IEBC. He stated thus:

“There is no doubt that the proposal by Ren-form was known to Chebukati and (most probably Dr Akombe). Why did they not feel free to have the name of Ren-form discussed at the plenary like all others before the decision was reached? Who requested Ren-form to submit a proposal?”¹⁶⁶

¹⁶³ Section 11A Independent Electoral and Boundaries Commission Act, 2011.

¹⁶⁴ James Mbaka (2020) “Chiloba exposes how Chebukati abused his office,” *Star*, Nairobi, February 22, 2019, at <https://www.the-star.co.ke/news/2019-02-22-chiloba-exposes-how-chebukati-abused-his-office/> (accessed September 26, 2021).

¹⁶⁵ Moses Odhiambo (2020) “IEBC on the spot over delayed chief executive hiring,” *Star*, Nairobi, May 19, 2020, at <https://www.the-star.co.ke/news/2020-05-19-iebc-on-the-spot-over-delayed-chief-executive-hiring/> (accessed September 29, 2021).

¹⁶⁶ James Mbaka (2020) “Chiloba exposes how Chebukati abused his office,” *Star*, Nairobi, February 22, 2019, at <https://www.the-star.co.ke/news/2019-02-22-chiloba-exposes-how-chebukati-abused-his-office/> (accessed September 26, 2021).

The contention was the appearance of vested interests by the Chairperson, Wafula Chebukati over procurement of ballot papers in preparation for the 2017 General Elections. The CEO and Directorate during this period at the IEBC, was therefore according to Chiloba, a rubber stamp of the Chairperson's interests, as opposed to a collective decision making. These are some of the instances in which the debates on the restructuring of the composition of the poll agency arose.

The Directorate department has electoral officers depending on the functions assigned to the Directorate. The structure is designed as a functional model where by Directorates and Departments complement each other to achieve common objectives but are jointly accountable under the Chief Executive Officer (CEO).¹⁶⁷

The financial expenditure of the IEBC is an administrative process of the Commission which captures the staff salaries, allowances, gratuities which is paid from the consolidated fund. This was deliberate in order for the Commission to obtain complete financial autonomy. Relatedly, Article 249(3) of the Constitution 2010 states:

“Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote.”

The above provision shows that constitutional commissions and independent offices were to be delinked from Executive control under the 2010 Constitution. However, this remains on paper as in practice it is a different issue entirely.¹⁶⁸ The IEBC operations budget has been at the core of political manoeuvres and intrigues with politicians from the Executive trying as much to control their budget, and thereby control the Commission itself. In 2021, the IEBC blamed the National

¹⁶⁷ Ben Sihanya (2017) “Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms,” *op. cit.* Cf. Felix Owuor (2016) “Reforming Elections Management and Administration in Kenya: A case for Independent Electoral and Boundaries Commission,” *op. cit.*

¹⁶⁸ Ben Sihanya (due 2022) “Constitutional Commissions and Independent Offices in Kenya: Experiences, Challenges and Opportunities,” Chapter 20 in Ben Sihanya (due 2022) *Constitutional Democracy, Regulatory, and Administrative Law in Kenya and Africa Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring Prof Ben Sihanya Advocates, Nairobi & Siaya, *op. cit.*

Treasury for budgetary constraints for releasing allocated funds only when Kenya approaches General elections, thus inhibiting the Commission’s preparedness.¹⁶⁹

These issues have aroused varying debate. For instance, in preparing for the 2017 elections, it spent more than KES 45 Billion. For the 2022 General Elections, the IEBC sought KES 40 Billion. This is despite Kenya being hailed as having one of the most expensive elections in Africa.¹⁷⁰

National Assembly Majority Leader Amos Kimunya argued that:

“I know in India an election that takes millions and millions of voters if you look at per capita cost per vote in this country you can tell that we are actually being taken for a ride.”¹⁷¹

Former National Assembly Majority Leader, Aden Duale, on his part, argued that:

“What is Sh40 billion if that can give us a credible, free, fair and peaceful election?”

These have been especially debated in terms of whether the IEBC (mis)manages electoral funds as conceptualized under the Constitution 2010 and relevant statutes.

The “Kriegler Report” made findings of serious misappropriation and mismanagement of funds at the electoral body and recommended for proper and transparent election budgeting process and financial autonomy.¹⁷²

¹⁶⁹ Ben Sihanya (2013) “Constitutional implementation in Kenya, 2010-2015: challenges and prospects,” A study under the auspices of the Friedrich Ebert Stiftung (FES), Occasional Paper No. 5, Nairobi, January 2013, ISBN: 9966-957-20-0.

¹⁷⁰ Davis Ayega (2021) “MPs Want Answers in Sh40bn Election Budget By IEBC,” *Capital FM*, Nairobi, August 10, 2021, at <https://www.capitalfm.co.ke/news/2021/08/mps-want-answers-in-sh40bn-election-budget-by-iebc/> (accessed September 28, 2021).

¹⁷¹ *Ibid.*

¹⁷² The Report of the Independent Review Commission (IREC) popularly referred to as the (Kriegler Commission Report) made far reaching conclusions on the management capacity of the ECK. The IEBC has also been subject to critical observations on its financial management and allegations of impropriety in procurement of electoral materials. See Office of the Auditor General, Special Audit Report on the Procurement of Electronic Voting Devices for the 2013 General Election by the Independent Electoral and Boundaries Commission (06 June 2014), at

The IEBC Act mandates the Secretary of the Commission to prepare estimates of revenue and estimates of the Commission for that year.¹⁷³ The Cabinet Secretary responsible For finance is obliged to present the estimates approved by the Commission for consideration and approval by the National Assembly. Despite such efforts, the cautioning of the IEBC from the external factors remains an uphill task in order or it to achieve complete financial autonomy.¹⁷⁴

Therefore, how do these factors affect the role and mandate of the IEBC in ensuring electoral democracy in Kenya?

3.3. Role of IEBC in Elections Management in Kenya

The promulgation of the 2010 Constitution gave Kenyans hope of a new dawn when it came to general elections in Kenya.¹⁷⁵ It was a sign of a break from the past electoral grievances which were eminent immediately before and during the General Elections. Kenyans expected free, fair, verifiable and accountable general elections under the new promulgation.¹⁷⁶

During this time the Commission had conducted by-elections and gave all positive signs of the advent of reforms in elections in Kenya. Some of the by-elections between 2011 and 2013 include in Kirinyaga Central Constituency where Joseph Gitari emerged victorious after John Ngata Kariuki's election was successfully challenged at the High Court.¹⁷⁷

http://www.kenao.go.ke/index.php/reports/doc_download/148-iebc-special-auditreport-on-procurement-of-evds (accessed 7/2/2021).

¹⁷³ Section 21 of Independent Electoral and Boundaries Commission Act, 2011.

¹⁷⁴ Ben Sihanya (forthcoming 2022) "Electoral Justice in Kenya under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.*

¹⁷⁵ Ben Sihanya (forthcoming 2022) "Constitutional Values, Principles and Policy in Kenya and Africa: Agency, Structure, Politics and Political Cultures," in Ben Sihanya (due 2022) *Constitutional Democracy, Regulatory, and Administrative Law in Kenya and Africa* (CODRALKKA) Vol. 1, Sihanya Advocates and Sihanya Mentoring, Nairobi & Siaya, *op. cit.*

¹⁷⁶ *Ibid.*

¹⁷⁷ Roseleen Nzioka (2011) "PNU's Joseph Gitari is Kirinyaga Central MP-elect," *Standard*, Nairobi, at <https://www.standardmedia.co.ke/business/business/article/2000029297/pnus-joseph-gitari-is-kirinyaga-central-mp-elect> (accessed 7/8/2021).

Subsequently, the IEBC engaged in electoral and related non-feasance, malfeasance and misfeasance. IEBC flouted the procurement process in the equipment for conducting the 2013 General Elections with similar mistakes were repeated by IEBC in procurement of ballot papers during the run-up to the 2017 General Elections.¹⁷⁸

The real test of the IEBC crux during the gear up to the 2017 general elections was seen during the party nominations and preparations for the elections. In its administrative, regulatory and quasi-judicial role, IEBC has the power to hear and determine complaints relating to nominations of political parties and independent candidates for elections to the following six (6) public offices: President, Governor, Senator, Women’s Representative, Member of the National Assembly and the Member of the County Assembly (Article 88(4)(e)).¹⁷⁹

The following administrative, quasi-judicial and judicial tribunals have had to entertain various disputes regarding the party primaries: Political Parties Dispute Tribunal (PPDT), IEBC’s Dispute Resolution Committee, the High Court, and Court of Appeal (CoA). This conflux may cause a clash of mandates where there is lack of a clear separation of powers. Relatedly, the Chairperson of the IEBC, Wafula Cebukati, signed a Memorandum of Understanding (MoU) with the Chairperson of the Political Parties Dispute Tribunal (PPDT), Kyalo Mbobu in March 2017. This would guarantee a seamless relationship between the constitutional commission and the independent tribunal.

In the run up to the 2017 General Elections, a classic case of IEBC’s injustice, inequity, incompetence and political partisanship was *Wavinya Ndeti v. IEBC*¹⁸⁰ Wavinya Ndeti was the Wiper Democratic Movement (WDM) candidate for Machakos Gubernatorial elections. She was opposing the incumbent Dr Alfred Mutua of Maendeleo Chap Chap (MCC) party, President Kenyatta II’s point man in Ukambani or “lower Eastern” (region).

¹⁷⁸ Cf. The procurement cases against IEBC by CORD/NASA in 2016 and 2017.

¹⁷⁹ That power is also found in Section 74 of the Elections Act and Regulation 27 of the Elections (Party Primaries and Party Lists) Regulations, 2017.

¹⁸⁰ *Wavinya Ndeti & Another v. Independent Electoral and Boundaries Commission (IEBC) & 2 Others* [2017] eKLR

The Wavinya Ndeti case was heard by the IEBC, PPDT,¹⁸¹ IEBC, High Court to the Court of Appeal (CoA). The Appellate Court later directed the IEBC to clear her Machakos Gubernatorial race under Wiper Party led by former Vice President Kalonzo Musyoka.¹⁸²

The political party nominations in the year 2013 attracted 600 nomination disputes as reported by IEBC.¹⁸³ Presidential disputes were raised against the “Hague duo” (Kenyatta and Ruto) citing their lack of suitability to run for political office following the pending indictment of cases that were present at the ICC.¹⁸⁴ However, IEBC glossed over these disputes and cleared the duo to run for political office.¹⁸⁵

The Commission also dealt with numerous nomination disputes relating to the National Assembly, Senate and Gubernatorial seats. In the post 2013 and pre-2017 process, IEBC was faulted for the biased approach it took in handling numerous disputes including the Kethi Kilonzo’s nomination dispute for the Senate by-elections in Makueni that resulted from the death of CORD Senator Mutula Kilonzo.¹⁸⁶

Article 88(4)(d) provides that:

“The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for-

“The regulation of the process by which parties nominate candidates for elections.”¹⁸⁷

¹⁸¹ See also *Joseph Ibrahim Musyoki v. Wiper Democratic Movement- Kenya & Another* [2017] eKLR.

¹⁸² *Ibid.*

¹⁸³ Independent Electoral and Boundaries Commission (2015) “Case Digest: Decisions of the IEBC Dispute Resolution Committee, Electoral Institute for Sustainable Democracy in Africa (EISA),” at <https://eisa.org.za/pdf/eh2014ken.pdf> (accessed 25/7/2021).

¹⁸⁴ Ben Sihanya (forthcoming 2022) “Electoral Justice in Kenya under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms,” *Op. Cit.*

¹⁸⁵ *Ibid.*

¹⁸⁶ Daniel Nzia and Geoffrey Mosoku (2013) “CORD, Jubilee row over Makueni senate seat,” *Standard*, Nairobi, at <https://www.standardmedia.co.ke/politics/article/2000085697/cord-jubilee-row-over-mutula-seat> (accessed 7/8/2021).

¹⁸⁷ Article 88(4)(d) Constitution of Kenya 2010.

The Commission is mandated to regulate the process by which parties nominate candidates for elections and to act as an arbiter in the electoral disputes relating to or arising from party nominations.¹⁸⁸

During the lead up to the 2017 general elections glaring irregularities were seen on the IEBC part as playing partisan politics with the Jubilee coalition.¹⁸⁹ The Commission was alleged to have conducted the party nominations of Jubilee Coalition Party. The Jubilee Party also acquired smart election cards that were likely linked to the IEBC database.¹⁹⁰

Arguably according to the stakeholders this would greatly compromise the preparations of the general elections in favour of the Jubilee Coalition. The Commission was not seen as an independent arbitrator but they played partisan politics with one of the contenders of the general elections.¹⁹¹

As a response to the calls for a complete overhaul of the Commission for its perceived impartiality, Chairperson Wafula Chebukati stated thus:

“The source of the current attacks on the Commission is founded on the outcome of one Supreme Court Presidential Petition No. 1 of 2017 and disregards all the other petitions where about 95 per cent of the 301 election petitions were dismissed and the election results declared by IEBC upheld by the various courts, including the consolidated Supreme Court Presidential Petition No. 2 & 4 of 2017.”¹⁹²

¹⁸⁸ Section 4 Independent Electoral and Boundaries Commission Act, 2011.

¹⁸⁹ The Carter Center (2017) “Kenya 2017 General and Presidential Elections Final Report,” *op. cit.*

¹⁹⁰ Tony Mukere (2017) “Jubilee Smart Card Technology Allowed Access to IEBC Database,” *Kenyans.Co.Ke*, at <https://www.kenyans.co.ke/news/jubilee-smart-card-technology-allowed-access-iebc-database> (accessed 11/7/2021). Section. 12 of the Election Laws (Amendment) Act, 2016.

¹⁹¹ The Carter Center (2017) “Kenya 2017 General and Presidential Elections Final Report,” *op. cit.*

¹⁹² Carolyne Tanui (2020) “BBI Proposal on a Clean Slate Commission for 2022 Polls Ill-Founded – IEBC,” *Capital FM*, Nairobi, October 24, 2020, at <https://www.capitalfm.co.ke/news/2020/10/bbi-proposal-on-a-clean-slate-commission-for-2022-polls-ill-founded-iebc/> (accessed September 28, 2021).

Kenyans consistently demand radical action for socio-economic and electoral injustice caused by corruption, waste, ethnic partisanship, incompetence and unfair, inaccurate, not transparent, unverifiable, and unaccountable processes.¹⁹³ It was the moment to implement key electoral reforms already in the Constitution, Acts, regulations, rules, court decisions, codes of conduct, and international best practices.¹⁹⁴

The IEBC through the leadership of Wafula Chebukati had lost independence and could not make independent decisions.¹⁹⁵ The Jubilee wing under the leadership of Kenyatta hurried Parliament legislation that were not clearly thought out with partisan vested interest. The Commission itself had been infiltrated by Jubilee-leaning commissioners who hampered the independence and integrity of the entire Commission. This led to one of the Commissioners to coming out publicly to shed light on the affairs of the Commission and immediately resigning from her position.¹⁹⁶

In the resignation letter of Dr Roselyne Akombe stated:

“It has become increasingly difficult to continue attending plenary meetings where Commissioners come ready to vote along partisan lines and not to discuss the merit of issues before them. It has become increasingly difficult to appear on television to defend positions I disagree with in the name of collective responsibility..... We need the Commission to be courageous and speak out, that this election as planned cannot meet the basic expectations of a CREDIBLE election. Not when the staff are getting last minute instructions on changes in technology and electronic transmission of results.”¹⁹⁷

¹⁹³ Ben Sihanya (forthcoming 2022) “Electoral justice in Kenya under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms,” *Op. Cit.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ BBC Reporter (2017) “Kenya election official Roselyn Akombe flees to US,” *BBC News*, at <https://www.bbc.com/news/world-africa-41660880> (accessed 7/8/2021).

¹⁹⁷ *Ibid.*

The situation was aggravated by the IEBC chair's statement that they could not guarantee a free and fair credible elections on 26th October, 2017.¹⁹⁸

Notably, NASA withdrew Raila Odinga's candidature from the race on 10th October, 2017 due to the IEBC's and Kenyatta-led Jubilee intransigence and refusal to implement Supreme Court sanctioned and necessary reforms.¹⁹⁹ NASA's withdrawal of Raila Odinga followed the failure to consult on or otherwise implement undisputed 12 point irreducible minimum conditions required to make the fresh election fully compliant with the Supreme Court decision and eliminate the non-compliance, illegality and irregularities that the Supreme Court had found. It was incumbent upon IEBC to conduct fresh elections under Article 140 of the Constitution 2010.²⁰⁰

3.4. External interference at the Independent Electoral and Boundaries Commission

In the 2013 *Raila* case²⁰¹ it was observed that elections must be on the constitutionally scheduled dates, and fresh elections should be on an agreed date beginning with nominations. After the Supreme Court nullification of the August, 2017 presidential elections, the IEBC announced that only Raila Odinga and Uhuru Kenyatta would be candidates.²⁰²

Raila Odinga argued that this would defeat democracy and the field should be opened. IEBC illegally allowed all the presidential candidates of 8th August, 2017, and abandoned the Supreme Court 2013 judgment which it had relied on in excluding Ekuru Aukot and gazetting Raila Odinga and Uhuru Kenyatta without fresh nominations.²⁰³

The Commission proceeded with the 26th October, 2017 election despite glaring constitutional non-compliance, illegalities and irregularities that needed to be addressed. The Kenyatta II

¹⁹⁸ See Wafula Chebukati's statement entitled "Chairman's Address on Status of Preparedness for the Elections issued on 18/10/2017."

¹⁹⁹ Ben Sihanya (forthcoming 2022) "Electoral Justice in Kenya under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.*

²⁰⁰ *Ibid.*

²⁰¹ *Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR

²⁰² Ben Sihanya (2017) "Electoral Justice in Kenya under the 2010 Constitution implementation, enforcement, reversals and reforms," Vol. 13(1), *Law Society of Kenya Journal*, 1-30.

²⁰³ *Ibid.*

Government through the Ministry of Interior Co-ordination under Dr Fred Matiang’i, also sought to frustrate the judicial processes surrounding the 26th October, 2017 presidential elections.²⁰⁴ Dr Matiang’i had declared 26th October, 2017 a public holiday. On 24th October, 2017, he declared 25th October, 2017 also a public holiday.²⁰⁵

Remarkably, a case seeking to stop the 26th October, 2017 presidential elections was filed and was scheduled to be heard by the Supreme Court on 25th October, 2017, however, in a well calculated move by President Uhuru Kenyatta’s administration, the Supreme Court failed to realize quorum.²⁰⁶ Only the then Chief Justice David Maraga and Justice Isaac Lenaola turned up in court on 25th October, 2017.²⁰⁷

Deputy Chief Justice (DCJ) Philomena Mwilu was reportedly attending to her driver who had been shot at on the evening of 24th October, 2017, a day to the hearing, while Justice Njoki Ndung’u said she was out of town and could not get a flight from Mombasa.²⁰⁸ Justice JB Ojwang’ and Justice Smokin Wanjala reportedly did not give reasons for their failure to turn up.²⁰⁹ Justice Mohamed Ibrahim had been taken ill since August 2017 and had not participated in the decision through the intervening period.²¹⁰

The central issue that under-girded the second presidential election petition in 2017 was the question of whether or not IEBC ought to have conducted fresh elections before the repeat

²⁰⁴ Machanga Michale (2017) “Government declares Wednesday, Thursday as public holidays,” *Citizen Digital*, 24/10/2018, at <https://citizentv.co.ke/news/matiangi-declares-wednesday-a-public-holiday-179680/> (accessed 19/7/2021).

²⁰⁵ *Ibid.*

²⁰⁶ Ben Sihanya (forthcoming 2022) “Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Secession Debates and Movements,” *op. cit.*

²⁰⁷ *Ibid.*

²⁰⁸ Cyrus Ombati (2017) “Deputy CJ Philomena Mwilu’s driver shot in an attack along Ngong Road,” *Standard*, Nairobi, at <https://www.standardmedia.co.ke/nairobi/article/2001258320/deputy-cj-philomena-mwilus-driver-shot-in-an-attack> (accessed 7/8/2021).

²⁰⁹ *Ibid.*

²¹⁰ Kamau Muthoni (2017) “Judge Mohamed Ibrahim still unwell, says court officer,” *Standard*, Nairobi, <https://www.standardmedia.co.ke/counties/article/2001260296/judge-mohamed-ibrahim-misses-hearing> (accessed 7/8/2021).

poll.²¹¹ In vacating the 26th October, 2017 election, former Prime Minister (PM) Raila Odinga had placed his legitimate expectation on the implementation of the directions given in the *Raila Odinga 2013* Supreme Court judgment at paragraph 289 and 290 to the effect that fresh nominations would ensue under Article 138(8)(b) arising from the vacation of any candidature.²¹²

The 25th October, 2017 petition thus sought a declaration that by operation of law, the presidential elections that had been scheduled for 26th October, 2018 be vacated.²¹³

The other issue in the petition was the question of voter turnout and legitimacy of the process. However, after massaging the data to meet President Uhuru Kenyatta's and Deputy President William Ruto's predictions, the voter turnout in the "repeat" poll was a paltry 38.8% or even less, meaning that more than 60% of the electorate (70-75%) boycotted the 26/10/2017 elections.²¹⁴ It was thus argued that a mere 6.5 million voter turnout was a mockery to the total of more than 15 million votes that President Kenyatta and Raila Odinga had received in the first round of elections when at least 80% voted.²¹⁵

The Supreme Court dismissed the petition in what may be seen as calculated move to cripple its operations as indicated above. President Uhuru Kenyatta was thereafter sworn in for his second term on 28th November, 2017. It was clear that Kenyans had lost faith in the credibility of the IEBC.

It is for these and other reasons that the hopes for free, fair, accurate, transparent, credible, verifiable and accountable elections have faded, and Kenyans have been exploring alternatives

²¹¹ The Carter Center (2017) "Kenya 2017 General and Presidential Elections Final Report," *op. cit.*

²¹² Ben Sihanya (forthcoming 2022) "Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Secession Debates and Movements," *op. cit.*

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ Ben Sihanya (2011) "The Presidency and Public Authority in Kenya's New Constitutional Order," Constitution Working Paper series No. 2 Society for International Development (SID) Eastern & Central Africa, Nairobi Printed by The Regal Press Ltd, Nairobi.

including electoral justice, socio-economic justice, the direct exercise of popular sovereignty and even self-determination through secession or separation.²¹⁶

3.5. The Kriegler Report and Recommendations on the Electoral Management

A historical perspective is important in understanding the clamour for the much needed reforms at the IEBC which followed the skirmishes in 2007/2008 general elections. Kenyans lost their lives and in restoration of peace various African leaders were involved to mediate the peaceful deal President Mwai Kibaki (declared winner) and the Opposition Leader Hon Raila Odinga.²¹⁷

Deliberations led by Koffi Annan lead to a Grand Coalition Government being formed and a motion was initiated in Parliament to form a Special Tribunal to investigate and prepare a report on the 2007/2008 post-election violence (PEV). However, this motion was rejected on two (2) occasions by members of the National Assembly.²¹⁸

A task force was formed to interrogate the Kenya's electoral issues and provide recommendations to the electoral system. The Commission was chaired by a retired South African Judge, Justice Johann Kriegler. Justice Kriegler had chaired the South African electoral commission from 1993 to 1999. The other members of the Commission were Tanzanian Justice Imani Daudi Aboud and an Argentinian expert in electoral law matters, Horacio Boneo.²¹⁹

The "Kriegler Commission" thus conducted investigations with a committee and tabled their authoritative recommendations in electoral reforms touching on policy and institutional reforms. Some of these included the question of ballot stuffing and double voter registration.²²⁰

²¹⁶ Ben Sihanya (forthcoming 2022) "Electoral Justice in Kenya under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.*

²¹⁷ Ben Sihanya & Duncan Okello (2010) "Mediating Kenya's Post-Election Crises: The Politics and Limits of Power Sharing Agreement," *op. cit.*

²¹⁸ *Ibid.*

²¹⁹ Felix Odhiambo Owuor (2008) "The 2007 general elections in Kenya Electoral laws and process," 7(2), *Journal of African Elections*, 113-123.

²²⁰ Karuti Kanyinga & Duncan Okello (eds) (2010) *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections*, Society for International Development (SID) & Institute for Development Studies (IDS), University of Nairobi, Nairobi, Kenya.

The Kriegler Commission found moral decadence in Kenya's political culture, institutional weakness and a broken electoral management framework. The system was deliberately weakened in order not to function or operate.²²¹ The Kriegler Commission made authoritative recommendations touching on the legislation, policy, procedures, electoral body management, financing among others.²²²

The Kriegler Commission pointed out the glaring deficiencies such as double voter registration, ballot stuffing, voter register verifiability, illegalities in the electoral process and noting that electoral system was entirely manual. The Kriegler commission came up with a number of recommendations key among them as highlighted below:²²³

The Commission recommended that there be integration of one document describing the counting and tallying of votes by the Electoral Commission of Kenya (ECK).²²⁴ Second, the electoral commission to develop a tallying and data transmission system to allow for the computerized entry of data from all tallying stations to the national tallying centre.²²⁵ Third, there be enough time before the declaration of a winner in elections to allow verification of provisional results.²²⁶

The question of the declaration vis-à-vis announcement of results under Article 86(c) of the Constitution 2010 was litigated in *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others* (2014) where it was argued that the effect of a declaration is that it is a finality of the presidential election process, and or results made by the Chairperson of IEBC, as compared to an announcement which is merely making results of a presidential elections public. A declaration must also be accompanied by a Gazette notice.²²⁷

²²¹ *Ibid.*

²²² *Ibid.* See also Chapter 2 of the Research Proejct.

²²³ Government of Kenya (2008) *Truth, Justice, and Reconciliations Commission: Commissions of Inquiry*, Government Press.

²²⁴ *Ibid.*

²²⁵ Ben Sihanya (forthcoming 2022) "Mediating Kenya's Post-Election Violence Crises: The politics and limits of power sharing agreement," *op. cit*

²²⁶ *Ibid.*

²²⁷ *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others* [2014] eKLR.

The Supreme Court stated thus on this matter;

72] “Declaration” takes place at every stage of tallying. For example, the first declaration takes place at the polling station; the second declaration at the Constituency tallying centre; and the third declaration at the County tallying centre. Thus, the declaration of election results is the aggregate of the requirements set out in the various forms, involving a plurality of officers. The finality of the set of stages of declaration is depicted in the issuance of the certificate in Form 38 to the winner of the election. This marks the end of the electoral process by affirming and declaring the election results, which could not be altered or disturbed by any authority.”²²⁸

The totality is that what is declared at the polling stations by returning officers is provisional results, while the Chairperson of the IEBC retains the constitutional and statutory mandate to declare the presidential election results.²²⁹

The Kriegler Commission also recommended the use of technology to address some of the vulnerabilities inherent in the manual process which included the introduction of a biometric voter registration, electronic voter identification and a results transmission system.²³⁰ Law reform was recommended in order to give integrity into the electoral process.²³¹

The Kriegler Commission made damning revelations that the staff of ECK were not well equipped to conduct the 2007 general elections and thereby they could not have guaranteed a free and fair elections.²³² Kenya was on the brink of a precipice which rebirthed national conversation on constitutional reforms and electoral management in Kenya. The time was nigh

²²⁸ *Ibid.*

²²⁹ The Supreme Court argued in a similar manner and dismissed the case of *Independent Electoral & Boundaries Commission v. Maina Kiai & 5 Others* [2017] eKLR for lack of merit.

²³⁰ *Ibid.*

²³¹ Cf. IREC (2008) *Report of the Independent Review Commission (IREC) on the General Elections held in Kenya in December 27, 2007*, issued on September 17, 2008, Government Press, Nairobi.

²³² Independent Review Commission (2008) “Report of the Independent Review Commission on the General Elections Held in Kenya on 27th December 2010,” *op. cit.*

despite historical resistance to the change that had been agitated for a very long time during the second liberation struggle movement in Kenya.²³³

The Kriegler Commission recommended an overhaul of the electoral commission and the establishment of a professional secretariat.²³⁴ This led to Constitutional Amendment Act No. 10 of 2008, the then ECK was replaced by the Interim Independent Electoral Commission (IIEC) and Interim Independent Boundaries Review Commission (IIBRC) charged with electoral management and boundary delimitation mandates respectively.²³⁵

The Interim Independent Electoral Commission (IIEC) and Interim Independent Boundaries Review Commission (IIBRC) were established.²³⁶ For the better part of their transformative time the commissions made great strides in administrative structures and process in the much needed electoral reforms. This has the resultant effect of increasing confidence in these institutions as Kenya made preparations in reforming the electoral management body in Kenya.²³⁷

Unfortunately, the much gains that had been made during this period was only to be later reversed through the lack of implementation of the Kriegler's Report.²³⁸ The proposed electoral laws were not promulgated in time and the necessary action that flows their promulgation was either skipped or ignored or abandoned. This brought about gaps and fault lines in the new electoral structure which still required a lot of nurturing in order to realize its full potential.²³⁹

²³³ *Ibid.*

²³⁴ Karuti Kanyinga & Duncan Okello (eds) (2010) *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections*, Society for International Development (SID) & Institute for Development Studies (IDS), University of Nairobi, Nairobi, Kenya.

²³⁵ *Ibid.*

²³⁶ Ben Sihanya (forthcoming 2022) "Mediating Kenya's Post-Election Violence Crises: The politics and limits of power sharing agreement," *op. cit*

²³⁷ *Ibid.*

²³⁸ Ben Sihanya (forthcoming 2022) "Electoral Justice in Kenya under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.*

²³⁹ *Ibid.*

The underlying problems were later evident in the preceding elections of the year 2013 and the year 2017. The systemic institutional failure is a deliberate move by the Government of the day in order to muzzle their way in power to retain it.

3.6 Gaps in Electoral Law

There are three (3) major gaps that have been highlighted by the discussions under this Chapter. These are reiterated below:

First, Kenya has embraced electoral technology to promote transparency and fairness in electoral processes. However, there have been cases of electronic interference with electoral processes in 2017 and 2022. The continued interference demonstrates that there are inadequate and ineffective legal frameworks to address external interference.

Second, relatedly, the law does not sufficiently clarify the relevant threshold for achieving the test of electoral integrity where electoral technology is adopted by the electoral management body, especially where there is evidence of interference with such electoral technology. This is because Kenyan electoral process has transitioned from manual tampering to electronic tampering which has not been addressed sufficiently.

Third, as much as Kenya has adopted technology, the law is silent on the consequences of human interference with electoral technology. The law and electoral regulations provide for electoral offences but the law is silent on establishing the burden of proof and the threshold of determining that interference.

3.7 Summary of Findings, Recommendations and Conclusions

The overarching argument in this research project is that the institutions governing elections plays an important role in ensuring free fair and credible presidential elections. The Constitution of Kenya 2010 mandates the IEBC with the duty and responsibility of governing the electoral

process in Kenya.²⁴⁰ The IEBC is mandated to ensure that there are free, fair, credible and verifiable elections in Kenya.

However, the IEBC has failed in its mandate in ensuring free, fair, credible and verifiable elections in Kenya as is seen in the discussions above. The IEBC has been at the centre of electoral mismanagement in Kenya's election process. It has failed the people of Kenya in the 2013 and 2017 elections.

As discussed above, the IEBC has failed in its mandate of being impartial in the electoral process and has allowed itself to be controlled by a select few individuals in the government of the day. For there to be free, fair, credible and verifiable elections in Kenya, there is need for a total overhaul of the IEBC and replace the existing commissioners with individuals of the values and principles provided for under Article 10 and Chapter 6 of the Constitution of Kenya 2010.

The next Chapter 4 will be a comparative analysis of the electoral system in other African jurisdictions with a specific focus to Nigeria and South Africa.

²⁴⁰ See Article 88 of the Constitution of Kenya 2010.

CHAPTER 4

COMPARATIVE ANALYSIS OF KENYAN ELECTORAL LAWS AND POLICIES AND SOUTH AFRICA AND NIGERIA

4.1. Introduction to the Comparative Study

The overarching research question and argument in this Chapter 4 is an analysis of the electoral laws in South Africa and Nigeria as compared to Kenya.

This Chapter seeks to draw lessons from Nigeria and South Africa on how they have managed to conduct their Presidential elections. How are the laws and policies working for them? What are the institutional standards set in ensuring that their systems work for them? This comes from the backdrop that elections generally are hotly contested and controversial in Africa.

In Africa, general elections are marred with voter bribery, voter intimidation, voter register manipulation and at times voter violence. A case example was the 2007-2008 post-election violence (PEV) in Kenya after the heavily contested 2007 general elections.²⁴¹ There have been persistent difficulties in the conduct of transparent, free, fair and credible presidential elections as most have been marred by gross electoral irregularities, electoral fraud, violence and inconclusive ballots.²⁴²

The Kenyan practice of elections from 2013, 2017 and 2022 point to the emergence and evolution of new forms of digital electoral rigging, irregularities; electoral malpractices; manipulation of voter data, the disappearance and murder of electoral officials. It was reported and even the subject of the Presidential Election Petition (PEP) in *Raila Odinga & Another v. Independent Electoral and Boundaries Commission & 9 Others* (2022). Raila Odinga and

²⁴¹ Godwin Murunga (2011) "Spontaneous or premeditated?: Post-election violence in Kenya," Nordiska Afrikainstitutet.

²⁴² Victor Chidubem (2018) "ICT and elections in Nigeria: Rural dynamics of biometric voting technology adoption," *Africa Spectrum*, 53, 3, at 89-113. Cf. Ben Sihanya (forthcoming 2022) "Presidential election and transition in 2017 and beyond electoral Protests, Revolutions, and Secession Debates and Movements," *Op. Cit.*

Azimio La Umoja-One Kenya Alliance advocates argued that the results in the original Form 34As in more than forty-one (41) polling stations were manipulated with the results in the physical forms differing from the results in the digital Form 34As in the IEBC portal.²⁴³ This was termed as “fraudulent interference with the electronic copies” by foreign unauthorized individuals hence eliciting the debate on the legitimacy of elections in Kenya and Africa.

Reflective of the democratic backsliding observed on the continent in recent years, more than a third of these polls are little more than political theater – aimed at garnering a fig leaf of legitimacy for leaders who arguably lack a popular mandate.²⁴⁴ Incumbents ban opposition parties or criminalize media reporting to uneven the playing field with other contestants.

Other tactics included the suspension of campaigns in opposition strongholds under the vestiges of coronavirus disease 2019 (COVID-19) pandemic containment measures. This was the situation in Uganda in 2020 where opposition regions like Kasese and Mbarara were locked down during a period when the incumbent, President Yoweri Kaguta Museveni faced heavy opposition from Hon. Bobi Wine of the National Unity Platform (NUP) in 2021.²⁴⁵

In Africa, security is vital factor when it comes to elections and electoral democracy. Security is closely tied to issues of legitimacy and electoral integrity. Five (5) countries undertaking elections in 2022 were facing armed conflict and insurgency, including Chad, Ethiopia, Libya, Niger, and Somalia.²⁴⁶ The legitimacy these countries’ leaders may gain by winning popular endorsement could be a powerful tool for navigating these civil conflicts.

However, perceptions that entrenched leaders cannot be removed constitutionally via the ballot box will likely only fuel the grievances that lead to more violent forms of confrontation

²⁴³ *Raila Odinga & Another v. Independent Electoral and Boundaries Commission & 9 Others* (Presidential Election Petition E005 of 2022) [2022] KESC 45 (KLR).

²⁴⁴ Joseph Siegle and Candace Cook (2021) “Taking Stock of Africa’s 2021 Elections,” *Africa Centre for Strategic Studies*, at <https://africacenter.org/spotlight/2021-elections/> (accessed on 20/9/2021).

²⁴⁵ Emmanuel Akinwotu and Samuel Okiror (2021) “Museveni declared election winner in Uganda as rival Bobi Wine alleges fraud,” *The Guardian*, January 16, 2021, at <https://www.theguardian.com/world/2021/jan/16/uganda-president-wins-decisive-election-as-bobi-wine-alleges> (accessed September 18, 2022).

²⁴⁶ *Ibid.*

including electoral violence. This is especially critical in deeply divisive countries. For instance, Kenya is widely perceived as deeply divided along ethnic lines wherein voting patterns have largely conformed to tribal inclinations.²⁴⁷

Similarly, Nigeria is deeply divided between the North and South wherein the main contention is access to socio-economic power and Government authority.²⁴⁸ A key issue in the context of such socio-economic struggle is the fact that both Kenya and Nigeria have faced the prospect of secession. For Nigeria, it was the Biafran war in the 1960s to 1970s while there were calls for secession in Kenya post the 2017 General election between the People's Republic of Kenya and Central Republic of Kenya.

Clearly, while each context is unique, certain patterns have been identified that put countries at risk of electoral violence.²⁴⁹ In the same measure, elections are not inherently a source of violence, however, they can exacerbate political, ethnic, regional, and religious tensions and spill over into violence, especially if they are not conducted within an appropriate institutional framework.²⁵⁰

The unemployed youth, marginalized groups, uneducated and poor citizens are susceptible to recruitment by political actors who would want to misuse them to commit acts of electoral-related violence. Thus, special attention must be paid to the manner in which elections are structured and sequenced in Kenya and Africa. It has become evident that political systems that are partly democratic and partly autocratic have proven to be especially vulnerable to electoral violence, as they lack the institutional fabric required to channel grievances in a constructive manner.²⁵¹

²⁴⁷ Bratton, Michael, and Mwangi S. Kimenyi (2008) "Voting in Kenya: Putting ethnicity in perspective," 2(2) *Journal of Eastern African Studies*, 272-289.

²⁴⁸ Allison McCulloch (2014) "Power-sharing and political stability in deeply divided societies," Routledge.

²⁴⁹ International Peace Institute (IPI) (2011) "Elections in Africa: Challenges and Opportunities," September 2011, at https://www.ipinst.org/wp-content/uploads/publications/ipi_e_pub_elections_in_africa_2_.pdf (accessed on 20/9/2021).

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

This is a notable cause for concern in Africa, because most countries on the African continent are classified as mixed regimes, which are neither full democracies nor full autocracies. This chapter evaluates the systems in Nigeria and South Africa as classic comparative examples to the nature of elections in Kenya.²⁵²

4.2. Electoral systems in South Africa

South Africa transitioned to modern democracy in April 1994 when the African National Congress (ANC) won a landslide election and took leadership of the National Government. The electoral institutions guiding these elections emerged from a lengthy negotiation process, a key goal of which was the representation in Parliament of South Africa's many diverse groups and political traditions.²⁵³

South Africa's cultural diversity is evidenced by the co-existence of at least five (5) major groups including first, Nguni (Xhosa, Zulu and Swazi). Second, Venda. Third, Shangaan-Tsonga. Fourth, Sotho and fifth, Indianas. This is why South Africa is referred to as the "Rainbow" nation characterized by more than ten (10) official languages including Afrikaans, Venda and Tswana, among others. These require a legal system and political economy focused on integration and cohesion.²⁵⁴

Reflecting these goals of inclusion and representation, South Africa's electoral institutions fell on the far end of the consensual or majoritarian spectrum: they combined parliamentary rules with an extreme form of proportional representation, one that would allow parties with as little as a quarter of 1 percent (%) of the national vote to obtain a seat in the National Assembly.²⁵⁵ This is a design that was endorsed by constitutional engineers and seen as the most favorable to democracies with deep social divisions.

²⁵² Michael Bratton and Eric CC Chang (2006) "State Building and Democratization in Sub-Saharan Africa: Forwards, Backwards, or Together?" 39(9) *Comparative Political Studies*, 1059-1083.

²⁵³ Karen Ferree (2018) "Electoral Systems in Context," in *The Oxford Handbook of Electoral Systems*.

²⁵⁴ Susan Booysen (2014) "Causes and Impact of Party Alliances and Coalitions on the Party System and National Cohesion in South Africa," 13(1) *Journal of African Elections*, 66-92.

²⁵⁵ *Ibid.*

In spite of this highly proportional electoral system, South Africa has consistently experienced majoritarian outcomes. The leading party which is the ANC has prevailed in national elections since 1994.²⁵⁶ The ANC has won over 60% of the vote in elections and forms majority governments from 1999.²⁵⁷ The remainder of the electorate votes for a large and fluctuating set of opposition parties, some of which do not cross the threshold for representation at the national level.

The most successful opposition party during the post-apartheid period has been the Democratic Alliance (DA), which wins less than 20% of the national vote and controls only one provincial legislature.²⁵⁸ South Africa's highly proportional electoral system was adopted in part to ensure wide representation and coalition governments, South Africa has a low effective number of parties and majority party domination.

Several contextual factors explain single-party dominance in South Africa including the following three (3) factors. First, the formidable salience of racial cleavages in South Africa strongly impacts the party system. In the early post-apartheid period, the opposition parties with the most resources lacked legitimacy with black voters due to their roots in apartheid, which sharply limited their ability to win votes.²⁵⁹

Actually, it was reported that a majority of the white voters in South Africa leaned towards the opposition party, the Democratic Alliance (DA). Second, the ANC successfully unified most of the anti-apartheid movement in the early democratic period, starving alternative political parties engaged in the liberation struggle, of resources and organization.²⁶⁰

²⁵⁶ Michael Krennerich, and Jacques De Ville (1997) "A Systematic View on the Electoral Reform Debate in South Africa," *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America*, 26-41.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ Shaheen Mozaffar (1997) "Electoral systems and their political effects in Africa: A preliminary analysis," *Representation*, 34(3-4), 148-156.

²⁶⁰ *Ibid.*

Third, once in power, the ANC exploited secondary electoral channels like floor crossing and public financing rules to enhance its dominance.²⁶¹ Finally, like dominant parties everywhere, the ANC has used its control over the state's fiscal resources to encourage and reward loyalty. Combined, these factors enabled the ANC to prevent elite defections, present itself as the only reasonable option to govern South Africa, and preserve its dominance in spite of electoral rules that place virtually no constraints on the number of parties that can win seats.²⁶²

Equally compelling is the argument that through ANC's dominance, the ruling party necessitated state capture given that elected representatives were answerable to the ruling party, and not the electorate as conceptualized under modern democracy under the 1996 Constitution of South Africa.²⁶³ This is the context upon which section 42(3) of the South African Constitution 1996 to ensure accountability of elected representatives to the people through the National Assembly, and not party organs.

“The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.”

The South African situation indicates the importance of putting electoral rules in their context. From the case example, the electoral institutions shape party systems. Relatedly, it is worth noting that unlike the Kenyan electoral democracy regarding political party systems, South

²⁶¹ *Ibid.*

²⁶² Murray Faure and Albert Venter (2003) “Electoral systems and accountability: A Proposal for electoral reform in South Africa,” Unpublished paper.

²⁶³ See Kate Jean Dent (2021) “Lawfare and Legitimacy: The Wicked Problem of Judicial Resilience at a time of Judicialisation of Politics in South Africa.” This PhD thesis argued that state capture in South Africa can also be evidenced by the judicialization of politics where the other arms of Government fail to perform their mandates in accordance with the law. Most ANC's officials being from the major political party, have been accused of having a controlling stake in the Government and were subject of investigations on grounds of state capture.

African democracy does not give much consideration to independent candidates. This has led to several calls for proposed reforms²⁶⁴ as discussed under the section below.

4.3. Electoral laws in South Africa

South Africa is a parliamentary democracy, with parliamentary institutions at both the national and provincial levels. At the national level, it has a bicameral parliament, consisting of a ninety-seat Upper House, the National Council of the Provinces (NCOP), and a four-hundred-seat lower house, the National Assembly.²⁶⁵ Kenya also has such a similar bicameral Parliament. The key difference lies in the composition, membership and increasing debates on which House should be the Upper House between the Senate and the National Assembly.²⁶⁶

In contrast to the discussions on the accountability of elected representatives in the previous section, the NCOP does not strictly exercise national oversight powers as it is not explicitly provided for under the South African Constitution except to the extent that a particular matter or function affects provinces under sections 66(2) and 92 of the 1996 Constitution.

Instead, it is the National Assembly that oversees electoral and Government institutions. The House of Parliament selects the Head of State and Government, the President, who then selects the Cabinet. Parliament can dismiss the President and or cabinet through a vote of no confidence, although this has not happened in the post-apartheid period.²⁶⁷ In 2008, the ANC put forth a motion for the recall of President Thabo Mbeki on allegations of misuse of state power. This was an exercise of showing political party muscle, which was in contravention of the 1996

²⁶⁴ Roger Southall (2022) “A referendum on electoral reform in South Africa might stir up trouble,” *The Conversation*, July 11, 2022, at <https://theconversation.com/a-referendum-on-electoral-reform-in-south-africa-might-stir-up-trouble-186478> (accessed September 19, 2022).

²⁶⁵ Constitution of the Republic of South Africa, 1996.

²⁶⁶ Ben Sihanya (forthcoming 2022) “Legislative Power and Process in Kenya and Africa,” in Ben Sihanya (forthcoming 2022) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa, Vol. 1, Ibid.*

²⁶⁷ *Ibid.*

Constitution that provided for removal of a President only upon approval by a two-thirds majority in the National Assembly, where there are serious breaches of the Constitution 1996.²⁶⁸

The other argument is that elected representatives must serve the interests of the voters wherein the Court in *Merafong Demarcation Forum v. President of the Republic of South Africa* (2008) held thus:

“...if voters perceive that their democratically elected politicians have disrespected them or believe that the politicians have failed to fulfill promises made by the same politicians without adequate explanation, then the politicians should be held accountable by the voters. Courts deal with bad law; voters must deal with bad politics.... A democracy such as ours provides a powerful method for voters to hold politicians accountable when they engage in bad or dishonest politics: regular, free and fair elections....”²⁶⁹

The nature of the South African democracy as a parliamentary system therefore reflects upon the relationship between the elected and electors. South Africa has nine (9) provincial parliaments.²⁷⁰ These range in size from eighty (80) seats in KwaZulu-Natal to thirty (30) seats in Free State, Mpumalanga, and Northern Cape. Provincial parliaments select Provincial Premiers, who then select provincial cabinets, called executive councils. Provincial Parliaments can dismiss executive councils and premiers through no-confidence votes.²⁷¹

Elections in South Africa occur after every five (5) years where voters cast their ballots for the National Assembly (NA) and the provincial legislature. The term for elective post is five (5) years however, the President can call for earlier election if Parliament is dissolved.

²⁶⁸ Roger Southall (2016) “Thabo Mbeki undermined South Africa’s constitution by putting his party first,” November 13, 2016, at <https://theconversation.com/thabo-mbeki-undermined-south-africas-constitution-by-putting-his-party-first-68627> (accessed September 21, 2022).

²⁶⁹ *Merafong Demarcation Forum v. President of the Republic of South Africa* (2008) 5 SA 171 (CC).

²⁷⁰ Robert Obiyo (2013) “Oversight of the Executive in the Eastern Cape Province, South Africa” 31(1) *Journal of contemporary African studies*, 95-116.

²⁷¹ Roger Southall (2000) “The state of democracy in South Africa,” 38(3) *Journal of Commonwealth & Comparative Politics*, 147-170.

Similar to the Kenya system, political parties submit a list of candidates to the Independent Boundaries and Electoral Commission (IEBC) and it depends on a parties' discretion to veto names on a list. The ballot does not include the names of the candidates but it includes the party symbol and a photo of the party leader. During the August 9th 2022 General Elections, the ballot papers contained the images of Azimio La Umoja-One Kenya Alliance leaders Raila Odinga and Martha Karua, and Kenya Kwanza Alliance (KKA) candidates, William Ruto and Rigathi Gachagua, respectively.²⁷² The voters vote for a party and the seats are allocated proportionally according to the votes.

During allocation a party submits two (2) lists. First, the national list. Second, the regional list. This allows candidates from regions whereby a party has performed well to get more seats. Therefore, the system acts *as if* it is one national district with a magnitude of a large district magnitude, with no legal threshold for gaining representation, makes South Africa's electoral system one of the most proportional in the world.²⁷³ Equally compelling as indicated in the section above, is the ruling by the South African Constitutional Court under Justice Mbuyiseli Madlanga which held that the South African Electoral Act was unconstitutional to the extent that it denied aspirants from vying for electoral seats as independent candidates.²⁷⁴

The provincial electoral system is similar and involves submission of a closed list proportional representation (PR) where political parties are allocated seats in the National Assembly depending on the number of votes garnered during the election.²⁷⁵ The parties submit their lists together with national and regional lists to the Electoral Commission of South Africa. In adopting proportional representation, South Africa followed the endorsements of prominent

²⁷² Kamau Muthoni (2022) "Poll body ordered to include running mates photos on ballot papers," *Standard*, at <https://www.standardmedia.co.ke/national/article/2001449123/poll-body-ordered-to-include-running-mates-photos-on-ballot-papers> (accessed September 21, 2022).

²⁷³ Karen Ferree (2018) "Electoral Systems in Context: South Africa," in Erik S. Herron, Robert J. Pekkanen, and Matthew S. Shugart (eds) *The Oxford Handbook of Electoral Systems*, Oxford Handbooks, at <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190258658.001.0001/oxfordhb-9780190258658-e-38> (accessed on 20/9/2021).

²⁷⁴ See *New Nation Movement NPC and Others v. President of the Republic of South Africa and Others*, [2020] ZACC 11.

²⁷⁵ Fick, Glenda (2002) "Constitutional Constraints on South Africa's Electoral System," *1(2), Journal of African Elections*, 69-78.

constitutional engineers like Arend Lijphart, who had longed advocated proportional rules as optimal for countries with deep racial and political fissures.²⁷⁶

They argued that parties with anti-system tendencies might moderate with the promise of parliamentary representation. In contrast, a majoritarian system or First Past The Post (FPTP) could freeze them out, stewing in their discontent.²⁷⁷ The hoped-for outcome of the design was consensual democracy, with a large multiparty system, coalition or minority Governments, and the benefits such a system brings: inclusion, representation, moderation, and compromise.²⁷⁸

Relatedly, in Kenya, there were debates especially in the context of the Building Bridges Initiative (BBI) around the adoption of a Mixed Member Proportional Representation (MMPR) System. Under this system as proposed in the Constitution of Kenya (Amendment) Bill, 2020, voters cast votes for the party and a candidate. It has been argued that such a system is especially convenient in a legal system where party political are not efficient.²⁷⁹

As at the time of this writing (September 2022), there were debates regarding the nature of representation system to be applied in South Africa in light of the ruling by Justice Mbuyiseli Madlanga allowing the participation of independent candidates. Would the representation system be shifted to a constituency-based representation system or a proportional representation system?

²⁷⁶ The choice of Proportional Representation (PR) was not without intellectual critics. Donald Horowitz (1991) “questioned the consensus on proportional representation. He argued that an alternative vote (AV) system was preferable because it would create incentives for politicians to build coalitions and pursue “vote pooling,” which would help bridge racial and ethnic divisions. Joel Barkan (1998) registered a second critique, arguing that a constituency-based system was more appropriate for Africa’s rural electorates, which needed a local, embedded elected representative. PR risked disconnecting the state from the population. Finally, Davis (2003), building off of Horowitz (1991) and Pippa Norris (2004), argued that PR encourages parties to engage in “bonding” campaign strategies (i.e., appealing to a narrow base), as opposed to “bridging” strategies that attempt to appeal to many groups and suggested PR has had this effect in South Africa.”

²⁷⁷ *Ibid.*

²⁷⁸ See the discussions under Chapter 2 and 3 of this research project paper.

²⁷⁹ Ben Sihanya (forthcoming 2022) “Participation and Representation in Kenya and Africa,” in Ben Sihanya (2022) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 1, op. cit.* From personal communication with Prof Ben Sihanya, he argued that there was an understanding during the Building Bridges Initiative (BBI) debates that South Africa could more easily implement the proportional system because it was having a new democratic start unlike Kenya, Nigeria and other African states.

4.4. Electoral systems in Nigeria

Britain granted political independence to Nigeria in 1960.²⁸⁰ At independence, Nigeria adopted a federal parliamentary system of Government. Under this system, there was the Federal Government at the national level, and constituencies at the second level. During Nigeria's first immediate pre-independence general elections on December 12, 1959, the voting was in three (3) levels, including the regional, local councils and for parliamentarians.²⁸¹

There were debates around the restriction of voting ages in the Eastern and Northern Nigeria. The fragile state also faced threats of overthrowing of the federal Government especially Chief Obafemi Awolowo, the Yoruba Leader, who was convicted and sentenced in *Adegbenro v. Akintola* (1962).²⁸²

The brief facts of that case were that Chief Akintola had been removed as Premier by the Governor of Western Nigeria in May 1962 for no longer commanding the support of the House of Assembly. Akintola then instituted the suit against his successor Chief Adegbenro and the Governor of Western Nigeria for wrongful removal from office.

He argued that such action was unlawful as the Governor could not remove him minus the concurrence of the House of Assembly by a motion moved before the Assembly. The Federal Supreme Court of Nigeria thereafter concurred with Chief Akintola. These issues shaped the constitutional economy of Nigeria especially with regard to constitutionalism and the relationship between the Executive arm and the Judiciary.

In 1963-1964, the 1963 Nigerian Constitution was adopted and it constitutionalized human rights and voter rights. However, the general elections scheduled for 1964 were dominated by two (2) main political parties that is, the United Progressive Grand Alliance (UPGA) mainly representing

²⁸⁰ Olankule A. Lawal (2010) "From colonial reforms to decolonization: Britain and the transfer of power in Nigeria, 1947-1960," 19 *Journal of the Historical Society of Nigeria*, 39-62.

²⁸¹ John P. Mackintosh (1964) "Nigeria since independence," 20(8) *The World Today*, 328-337.

²⁸² *Adegbenro v. Akintola* (1962) All NLR 462

the Southern Nigerian states, and the Nigerian National Alliance (NNA) mainly representing the North and Western areas.

However, the election was not conducted in this year due to widespread violence and intimidation of voters. Later in 1966, there was a military coup which led to the introduction of the *Constitution (Suspension and Modification) Decree No. 1 of 1966*. This led to the suspension of the Nigerian Constitution and the adoption of military rule as opposed to civilian rule. Therefore, the Nigerian citizens could not exercise civilian liberties like the right to vote, universal suffrage and the enjoyment of human rights and fundamental freedoms.²⁸³

Generally, the state of elections in Nigeria can be best captured in the words of Omobolaji Ololade Olarinmoye who argued that Nigeria faces a “horrible cycle of corrupt, inept and despotic civilian and pseudo-civilian rules.”²⁸⁴ This is a derivative of the militaristic change of governments in Nigeria and a constant shift from civilian to military rule. Further, the reversal to civilian rule was only occasioned in 1978 by President Olusegun Obasanjo who signed *Decree No. 25*, leading to multiparty politics and the expansion of the civic space to allow participation in elections.

However, these were short-lived as voting patterns were largely along ethnic and regional lines, even as political violence reigned in Nigeria.²⁸⁵ Relatedly, the Nigerian elections from the 1970s, 2003 and 2007 were characterized by voter manipulation, political violence and vote rigging.²⁸⁶ The European Union (EU) acting as observers stated that the Nigerian electoral system under the Nigerian Independent National Electoral Commission (INEC) had organized the worst elections ever in 2007 due to the various electoral malpractices during that electoral period. The Supreme Court in *Alhaji Atiku Abubakar v. INEC* ((2007) actually proclaimed that the law at the time,

²⁸³ Dhikru Adewale Yagboyaju and Adeoye O. Akinola (2019) “Nigerian state and the crisis of governance: A critical exposition,” 9(3) *Sage Open*, 2158244019865810.

²⁸⁴ Daniel Esem Gberevbie (2014) “Democracy, democratic institutions and good governance in Nigeria,” 30(1) *Eastern Africa Social Science Research Review*, 133-152.

²⁸⁵ Samuel Oni, Felix Chidozie, and Godwyns Agbude (2013) “Electoral politics in the fourth republic of Nigeria's democratic governance,” 3(12) *Developing Country Studies*.

²⁸⁶ Omotola J. Shola (2010) “Elections and democratic transition in Nigeria under the Fourth Republic,” 109(437) *African Affairs*, 535-553.

allowed for the then Vice President (VP) Alhaji Atiku Abubakar to cross from the ruling party under President Obasanjo to the opposition- Action Congress (AC).²⁸⁷

Indeed, even the 2011 general elections, despite being deemed to be fair and transparent, occasioned the post election violence (PEV) that claimed the lives of at least 1000 individuals. During this election, the predominantly Christian South voted in favour of President Goodluck Jonathan of People's Democratic Party (PDP) while the predominantly Muslim North voted in favour of Mohammed Buhari of the Congress for Progressive Change (CPC). This shows the continued stratification and division of universal suffrage on ethnic and religious lines. This is similar to the underlying issues that contributed to the Kenyan 2007-2008 post election violence (PEV).²⁸⁸

The Nigerian electoral system is thus almost similar to the legal, institutional and electoral policy in Kenya and South Africa as discussed under Chapters 2 and 3 of this research project paper. There are also two (2) major political parties that is, the People's Democratic Party (PDP) and the All Progressive Change (APC) which have dominated the Nigerian electoral process.²⁸⁹

Further and relatedly, the Nigerian elections has also been characterized by the lack of electoral integrity and manipulation, which have in turn promoted poor governance and lack of constitutional democracy. This is despite the proclamation under the Preamble of the 1999 Nigerian Constitution which states thus:

“We, the people of the Federal Republic of Nigeria have firmly adopted this document for the purpose of promoting the good government and welfare of all persons in our country on the principles of freedom, equality and justice, and for the purpose of consolidating the unity of our people.”

²⁸⁷ *Alhaji Atiku Abubakar v. INEC* ((2007) 6 NWLR.

²⁸⁸ Nkwachukwu Orji (2010) “Responses to Election Outcomes: The aftermath of 2007 elections in Nigeria and Kenya,” 9(4) *African and Asian Studies*, 436-461.

²⁸⁹ Ernest Tooichi (2018) “The ‘David and Goliath’ and 2015 election outcomes in Nigeria: From the opposition to the ruling party,” 10(1) *Insight on Africa*, 21-36.

Actually, the Electoral Integrity Worldwide (EIW) ranks Nigeria as one of the countries that rank low in terms of civic engagement and electoral integrity. However, Nigeria is ranked with an index of 53 as compared to Kenya which ranks lower at an index of 43.²⁹⁰ There could be several factors that contribute to this. For instance, it was expected that the enactment and amendment of the Nigerian Election Act No. 6 of 2010 under section 87 of the Constitution would promote electoral legitimacy and electoral democracy in Nigeria. However, the 2015 general elections were fraught with manipulation and malpractices despite the inaugural deployment of Smart Card Readers to promote transparency and accountability in the 2010 general elections.

Just like the disputed Kenyan general elections in 2007-08, the 2007 general elections in Nigeria were characterized by manipulation, voter bribery and fraud. Some of the challenges raised included the deep polarization between the Northern and Southern Nigeria which was exacerbated by the lack of fairness, transparency and credibility at the ballot. It is worth noting that the nature of Nigerian elections has largely been manual with recent developments pointing towards a shift towards embracing modern democracy through electoral technology. Relatedly, Kenya also adopted Kenya Integrated Election Management System (KIEMS) kits to manage elections albeit with reservations as to its credibility and security.²⁹¹

The Nigerian electoral system has also largely shifted from multiparty systems to near single party democracy from the 1970s to the 2010s where there were several coups and mutinies in Nigeria. Among the key instances, was during the reign of General Ibrahim Babangida who introduced the open ballot electoral system which was similar to the Kenyan queue voting (*Mlolongo*) system under President Daniel Arap Moi in the 1980s.

Under this system, voters would line up behind placards of their choice candidates. It was introduced by KANU delegates through a resolution passed on August 20, 1986 to guide the

²⁹⁰ Pippa Norris and Max Grömping (2019) "Electoral Integrity Worldwide," May 2019, at <https://static1.squarespace.com/static/58533f31bebafe99c85dc9b/t/5ce60bd6b208fcd93be49430/1558580197717/Electoral+Integrity+Worldwide.pdf> (accessed July 18, 2022).

²⁹¹ Micheni, Elyjoy, and Julius Murumba (2018) "The role of ICT in electoral processes: case of Kenya," In *2018 IST-Africa Week Conference (IST-Africa)* (pp. Page-1), IEEE.

conduct of primaries. This was opposed to the secret ballot system which gave voters more privacy and removed the likelihood of victimization by the incumbent Government.²⁹²

The other major issue at play in Nigerian elections is the system of governance, which is federal in Nigeria,²⁹³ as opposed to the presidential system in Kenya. The common denominator across both the Nigerian and Kenyan electoral systems is the First Past The Post (FPTP) system which is more or less a winner takes all system. This has been characterized by primitive accumulation of state resources by elected leaders and regional imbalance in terms of distribution of development whenever there is a regime change, at the expense of other regions or ethnicities.²⁹⁴

The lack of effective implementation of electoral campaign financing regulation in Nigeria and Kenya has also been a common thread across both electoral systems and processes. This is despite the enactment of the Kenyan Election Campaign Financing Act, 2013 and the amendment or introduction of section 91(2) of the Nigerian Electoral Act which states that “*an individual or other entity shall not donate more than N1 Million to any candidate.*” This is equivalent to about USD 2326.²⁹⁵

However, as indicated above, the major challenge has been the lack of effective implementation and institutional commitment towards such implementation. Political parties and political aspirants still conduct early campaigns which is basically a fundamental breach of the electoral code where the electoral campaign laws state otherwise.²⁹⁶

²⁹² Waweru Mugo (2014) “How the 'mlolongo' system doomed polls,” *Standard*, at <https://www.standardmedia.co.ke/kenya-at-50/article/2000098159/how-the-mlolongo-system-doomed-polls> (accessed September 20, 2022).

²⁹³ Nigeria also a (semi) presidential system.

²⁹⁴ Itua, Paul Okhaide (2012) “Quest for internal party democracy in Nigeria: Amendment of electoral act 2010 as an albatross,” 3(3) *International Journal of Peace and Development Studies*, 57-75; Eugene Owade (2021) “Reconceptualizing Nationhood in Kenya and Africa vis-à-vis Citizen *Wanjiku*: The Norm Versus Practise of Popular Sovereignty,” a Dissertation Submitted the University of Nairobi Law School in partial fulfilment of requirements for the award of the Degree of Bachelor of Laws (LLB).

²⁹⁵ Okeke, GS Mmaduabuchi, and Uche Nwali (2020) “Campaign funding laws and the political economy of money politics in Nigeria,” 47(164) *Review of African Political Economy*, 238-255.

²⁹⁶ Awopeju, Ayo (2011) “Election rigging and the problems of electoral act in Nigeria,” 2(2) *Afro Asian Journal of Social Sciences*, 1-17.

As Nigeria approached the February 25th 2023 general elections, the same are expected to be conducted under the reformed Electoral Act, 2022 which proposed and introduced several amendments to the institutional and operational framework of the Independent National Electoral Commission (INEC) and the place of technology in the conduct of elections. This came against a backdrop of the incumbent President Muhammad Buhari's efforts to deter the amendments to the amended Nigerian Electoral Act, 2010. He had returned the Bill to Parliament for at least five (5) times before finally assenting to the proposed amendments.²⁹⁷ This reluctance was also exhibited in the conduct and interference with the 2015 General elections which were fraught with voter rigging and vote manipulation which ushered in the Buhari regime.²⁹⁸

Also, the statute sought to regulate the conduct of political party primaries in Nigeria. Just like the Kenyan electoral debate, this Nigerian legislation was focused on reforming and clarifying the nature of electoral vote transmission through electoral technology to promote accountability, transparency and fairness at the ballot. Electronic vote transmission and collation has always been debated especially in the context of the likelihood of political players interfering with the integrity of the ballots.²⁹⁹

The Kenyan 2013, 2017 and 2022 experience with electoral technology pointed towards the manipulation of technology by third-parties to subvert the will of the electorate as argued during the presidential election petition (PEP) in *Odinga & 16 Others v. Ruto & 10 Others* (2022).³⁰⁰

Furthermore, the Nigerian Independent National Electoral Commission (INEC) has also introduced the electronic fingerprint identification systems to enable accurate voter

²⁹⁷ Queenesther Iroanusi (2022) "Amid Disagreement, Senate Rejects Buhari's Request to Amend Electoral Act," *All Africa*, March 9, 2022, at <https://www.premiumtimesng.com/news/headlines/516253-amid-disagreement-senate-rejects-buharis-request-to-amend-electoral-act.html> (accessed September 22, 2022).

²⁹⁸ Oguntola-Laguda, Danoye (2015) "Religion, leadership and struggle for power in Nigeria: A case study of the 2011 presidential election in Nigeria," 41(2) *Studia Historiae Ecclesiasticae*, 219-233.

²⁹⁹ Bisong, Daniel Bisong (2019) "e-Voting, A Panacea for Credible Election in Nigeria," 6(12) *International Journal of Recent Advances in Multidisciplinary Research*, 5391-5396.

³⁰⁰ *Odinga & 16 Others v. Ruto & 10 Others; Law Society of Kenya & 4 Others (Amicus Curiae)* [2022] KESC 54 (KLR) (Election Petitions).

identification.³⁰¹ This would in the long-term address the issue of multiple voter registration and likelihood of vote manipulation. Relatedly, the electoral body introduced a permanent voter identification or permanent voter' card (PVC) in the general elections of 2015 for the biometric identification of voters. However, as indicated above, this did not guarantee procedural and substantive electoral democracy in 2010 and 2015 in Nigeria.³⁰²

At this point, it would be worth recalling the words of Ronald Dworkin as quoted by Justice Musdapher in the case of *Amechi v. INEC* (2008) where he stated at paragraph 457-458 thus:

“true democracy is not just statistical democracy in which anything, a majority or plurality wants is legitimate for that reason, but communal democracy in which majority decision is legitimate only when it is a majority decision within a community of equals....”³⁰³

Therefore, this research project paper argues that despite such progressive reforms, the Nigerian electoral system still faces at least three (3) challenges. First, the lack of citizenry trust and confidence in the Nigerian electoral body (INEC) owing to the history of manipulated elections in Nigeria. This has generally led to a mere 30% voter turnout in the previous elections.

Second, elections as a key element to good governance in the broader perspective whereas the Electoral Act 2022 grants the INEC broad decision-making powers including deregistration of political parties, prior budgeting and funding, and in the context of the increasing insecurity levels in Nigeria. The incumbent administration of President Muhammad Buhari interfered with the functions of the INEC through budget shortfalls in 2019, thereby leading to the postponement of elections in some areas.³⁰⁴

³⁰¹ Bill Sweeney (2015) “Nigeria’s Election Commission Introduces New Technologies and Processes for the 2015 Vote,” *International Foundation for Electoral Systems*, April 1, 2015, at <https://www.ifes.org/news/nigerias-election-commission-introduces-new-technologies-and-processes-2015-vote> (accessed September 21, 2022).

³⁰² Madubuegwu, Chibuike Emmanuel (2016) “The Crisis of Permanent Voter Cards and the 2015 General Elections: Exploring measures to strengthen Nigeria’s electoral democracy,” 2(2) *South East Journal of Political Science*.

³⁰³ *Amechi v. INEC* [2008] 33 NSCQ, para 457-458.

³⁰⁴ Biereenu-Nnabugwu, Makodi (2013) “Between Election Management Bodies and General Elections in Nigeria: A Prognostic Analysis,” in *RONPE Review of Nigerian Political Economy. A Journal of the Department of Political Science and International Relations*, University of Abuja, Nigeria 2(1).

4.5 Financial Autonomy of the Nigerian Electoral Body

Furthermore, the Electoral Act 2022 establishes the Independent National Electoral Commission Fund (INECF) to safeguard the financial independence of the Electoral Commission from the arbitrary interference by the Federal Government under section 81(3) of the Constitution. Initially, the funds due to the Electoral Commission would be subjected to vetting by a Federal Government Ministry before allocation and disbursement. This plainly violated the constitutionalized requirement for financial autonomy of the electoral body.³⁰⁵ In contrast, the Kenyan Independent Electoral and Boundaries Commission (IEBC) has been critiqued on several grounds *inter alia* what is deemed conducting one of the most expensive elections in the continent.³⁰⁶

4.6 Adoption of Electoral Technology

Third, the political economy around electoral democracy in South Africa and Kenya is the transition towards the adoption of electoral technology for the conduct of general elections. The Nigerian law introduced the use of electronic card readers and vote transmission between polling stations to promote transparency and voter integrity in Nigeria. Relatedly, the key opposition to the adoption of these electronic methods have been Nigerian politicians and the political elite which have argued that the Nigerian telecommunication systems are still fraught with risks, and hence the electoral technology may not guarantee electoral transparency.

Indeed, even the incumbent President Muhammad Buhari acknowledged that the introduction of the electoral technology “*could positively revolutionise elections in Nigeria through the introduction of new technological innovations.*” Furthermore, he stated thus:

“These innovations would guarantee the constitutional rights of citizens to vote and to do so effectively.”

³⁰⁵ Woleola J. Ekunday (2015) “A Critical Evaluation of Electoral management Bodies in Nigeria and the Perennial Problem of Electoral Management since Independence in 1960,” 2(5) *International Journal of Public Administration and Management Research* (IJPAMR), at 86-98.

³⁰⁶ Jørgen Elklit (2020) “The structure and performance of African electoral commissions,” in Nic Cheeseman (ed.), *The Oxford Encyclopedia of African Politics*, Oxford University Press, 1662-1675.

However, the increasing risks associated with electoral technology pose a challenge to the future of electoral democracy in Kenya, Nigeria and other African states. Thus, there is need to audit the electronic technology and vet the staff including the Returning officers to ensure that the electoral system is manned by qualified and impartial human resource. This will go a long way in ensuring impartiality, credibility and verifiability of elections in Kenya and Nigeria.³⁰⁷

4.7 Political Party Financing in Nigerian Elections

The other key question of debate in relation to Nigerian elections is political party financing. According to section 84(1) of the amended Nigerian Elections Act, electoral funding was defined as “expenses incurred by a political party within the period from the date notice is given by the commission to conduct election up to and including the polling day in respect of the particular election....” From the statutory definition, it would appear as if political parties solely bear electoral campaign funding.

However, in practice, elections in Nigeria just like in Kenya, have turned into an affair of the “haves” against the “have nots.” Despite subsequent introduction of campaign financing ceilings, there has been no compliance and regulation especially on the limit of private or third-party contributions to electoral related financing.³⁰⁸

Additionally, political parties are guaranteed political funding by the Federal Government under Section 228(c) of the 1999 Constitution. However, despite section 84(3) of the amended Nigerian Electoral Act, 2002 averring that “*election expenses of Political Party shall be submitted to the Commission in a separate audited return within three months after polling day and such shall be signed by the party’s auditors and countersigned by the Chairman of the Party*

³⁰⁷ Gitau Warigi (2022) “Let’s go manual, electronic gizmos in elections not worth the trouble,” *Sunday Nation*, September 11, 2022, at https://nation.africa/kenya/blogs-opinion/opinion/let-s-go-manual-electronic-gizmos-in-elections-not-worth-the-trouble-3944108?fbclid=IwAR09d_Q5HrTpJZiT07CglCcJgEq31OqUbvHZbkx_bd2QC5pPYrRCY9rPrXI (accessed September 20, 2022).

³⁰⁸ Arthur E. Davies (2021) “Money politics in the Nigerian electoral process,” In *Nigerian Politics* (pp. 341-352). Springer, Cham.

as the case may be and shall be supported by a sworn affidavit by the signatories as to the correctness of its contents,” the practice has been that a majority of political parties fail to submit their audit reports for the Independent National Electoral Commission (INEC) to properly account and audit their usage of campaign finances.³⁰⁹

Therefore, the overarching argument therefore, is that there is need for fiscal accountability among political parties in Kenya, South Africa and Nigeria. Thus, the lack of reliable empirical data for the action of the Independent National Electoral Commission (INEC) in campaign financing regulation, has contributed further to political corruption, lack of transparency, accountability and creation of a level playing field for aspirants.

4.8 Lack of Institutional Capacity to Promote Electoral Democracy

However, there are still challenges to be addressed even where electronic technology is adopted in Nigeria and Kenya.³¹⁰ For instance, the contention around the ability of the Nigerian Independent National Electoral Commission (INEC) to ensure proper identification and accreditation of voters. Further, the tallying, collation, transfer or transmission, and publication of voter results is also a matter that must be considered for reform. Other critics including the civil society organisations under the umbrella of the Nigeria Civil Society Situation Room (NCSR) have indicated that part of the problems facing the Nigerian electoral systems including non-compliance by the relevant institutional actors.

4.9 Conclusion of the Comparative Study

This chapter 4 analysed the electoral laws in South Africa and Nigeria as compared to Kenya. There is need or constitutional, administrative, policy and regulatory stability, certainty and clarity in electoral law in Kenya, Nigeria and South Africa. As discussed above, the political economy of electoral law, process and practice are still subject to various challenges including

³⁰⁹ Nicholas Kerr (2013) “Popular evaluations of election quality in Africa: Evidence from Nigeria,” 32(4) *Electoral Studies*, 819-837.

³¹⁰ The susceptibility of the Kenya Integrated Electoral Systems (KIEMS) to manipulation by unauthorized actors was debated in the context of the August 9, 2022 General Elections in Kenya. This called into question whether the voice and will of the people is actually and accurately expressed at the ballot or through algorithms.

manipulation, lack of effective implementation of electoral campaign financing laws, voter bribery, among others.

Furthermore, this study argues that electoral law and process must be analysed from an interdisciplinary perspective given that substantive and procedural fairness in electoral processes are determined based on both objective and subjective variables like political cohesion or national unity (Nigeria and Kenya), and national security and its effect on electoral processes or governance as evidenced by the evolution of the Nigerian state, and inequality in South Africa.

However, it is also noteworthy that elections in Kenya, Nigeria and South Africa post-2010 have focused on a transition to the use of technology to promote transparency, accountability and the integrity of the ballot. The next Chapter 5 provides recommendations and proposed reforms to the legal, regulatory, policy and administrative frameworks in Kenya, Nigeria and South Africa as measures of promoting electoral democracy in Kenya and Africa.

CHAPTER 5

SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction to the Study

This Chapter 5 provides a summary of the findings, conclusion and recommendations of this study with a key focus on answering the question of the unending calls for presidential electoral reforms in Kenya and Africa. The chapter also provides a comprehensive overview of the significance of an effective legislative and institutional frameworks on electoral democracy in Kenya as discussed in the previous chapters of this research project. It also provides a summary of the findings and the recommendations proposed in the research study.

This study is guided by three (3) research objectives. First, to critically interrogate evaluate the efficacy of the electoral laws in handling and managing the presidential and related electoral process in Kenya. Second, scrutinize the gaps in Kenya's electoral laws and whether the electoral laws as presently constituted are efficient and sufficient in handling and managing a presidential electoral process. Third, to recommend suggest appropriate recommendations on how Kenya's electoral process can be improved to guarantee credible presidential elections.

Three (3) key research questions guided the research and writing of this research project. First, whether the existing electoral laws in Kenya efficient and sufficient in handling and managing the electoral process in Kenya? Second, whether the gaps in Kenya's current electoral laws and regulations hinder the conduct of free, fair and credible presidential elections in Kenya? And third, what electoral reforms are necessary to ensure efficiency, credibility, transparency and accountability in Kenya's electoral process, as discussed under Chapter 4 and this Chapter 5?³¹¹

³¹¹ See the comparative analysis of the practice in South Africa and Nigeria in Chapters 4.2, 4.3 and 4.4 above, respectively.

5.2 Summary of Findings

The overarching finding of this research study is that the Constitution of Kenya 2010 is a transformative and progressive legal instrument. However, the lack of its effective implementation by relevant personnel and institutional frameworks to guide the electoral process in Kenya has been the major challenge. This has occasioned the prevalent calls for constitutional, institutional, administrative and regulatory reform to guarantee electoral integrity to ensure free, fair and credible presidential elections in Kenya as clarified under Chapter 5.3 below.

There are three (3) key findings. First, the Kenyan Constitution seeks to rationalize the role of the State, reduce authoritarianism and secure liberties through rule of law, social justice and democracy. The 2010 Constitution was designed to address challenges experienced since independence and also future aspirations as analyzed under Chapter 2 above. Equally, the research hypothesized and analyzed under Chapters 1 and 2 above that the lack of good faith especially among the political elite and key players in the electoral process has occasioned significant reversals to electoral democracy.

Second, issues including cases of constitutional non-compliance, illegalities and irregularities on the part of the relevant institutional frameworks like the Independent Electoral Boundaries Commission (IEBC) have also bedeviled the fidelity to the law and compliance with electoral law, rules and regulations in Kenya and Africa. Relatedly, the Judiciary especially the Supreme Court has a pivotal role in upholding electoral democracy and the legitimacy of regimes through the hearing and determination of the presidential election petitions under the Constitution of Kenya 2010.

This study argues in Chapter 2 that the jurisprudence from the Supreme Court of Kenya has been ambivalent especially after the 2022 decision in *Odinga & 16 Others v. Ruto & 10 Others* (2022) where the language of the Supreme Court was perceived to be likely to indirectly limit

petitioners’, in presidential election petitions, the ease of access to the Supreme Court in the future.³¹²

Third, the integration of transparency and accountability principles including data protection, security and access of the backend systems to the key political players, should be a core obligation when dealing with electronic electoral management systems like the Kenya Integrated Electronic Elections Management System (KIEMS). This will mitigate the illegal, unlawful and criminal access of IEBC servers and passwords by third-parties to give effect to the will of the people as expressed at the ballot.

5.3 Recommendations of the Study

This section provides general and specific recommendations on how to enhance electoral democracy in Kenya and Africa, with some comparative practices adopted from South Africa and Nigeria.

5.3.1 Reforming Institutional Frameworks in Kenya

The overarching research question is the effect of electoral institutions in Kenyan electoral democracy. The key argument is that the institutional frameworks governing elections in Kenya play a key role in ensuring free, fair, transparent and credible presidential elections. These include the Independent Electoral and Boundaries Commission (IEBC) and the Judiciary.

However, public confidence in the independence, accountability and confidence of these institutional frameworks in Kenya, especially based on the practice on presidential elections.

Relatedly, there is need for a total overhaul of the IEBC and to replace the existing Commissioners and Secretariat as proposed during the Building Bridges Initiative (BBI) constitutional reform process and the post-2022 General Elections. These individuals must be vetted and appointed on merit on fixed terms to avoid politicization of the electoral management body (EMB), and to ensure free, fair, credible and verifiable elections in Kenya.

³¹² *Odinga & 16 Others v. Ruto & 10 Others; Law Society of Kenya & 4 Others (Amicus Curiae)* [2022] KESC 54 (KLR) (Election Petitions).

5.3.2 Recognizing and Integrating Interdisciplinarity in Presidential Electoral Management in Kenya

The study postulates that the implementation of electoral law, policy, regulations and processes need to not only focus on substantive propriety but also procedural fairness in the electoral processes and adjudication of electoral disputes. Relatedly, there is need for coherence in the electoral jurisprudence from the Supreme Court of Kenya (SCORC) in the context of the disparity in the 2017 and 2022 presidential election petitions. The Courts should resolve the substance versus process debate in order to not only guarantee legitimacy of winners, but all national cohesion, economic prosperity, good governance and national security in Kenya, Nigeria and South Africa.

5.3.3 Comparative Presidential Electoral Practices from Nigeria and South Africa

The study postulates that elections in Kenya and Africa have been characterized with voter bribery, voter intimidation, voter register manipulation, voter violence and the lack of fidelity to the implementation of electoral laws, rules and regulations. As argued under Chapter 4 of this study, there is need for constitutional, policy, administrative, or regulatory reforms in order to establish a culture and practice of stability, certainty and clarity in electoral law implementation in Kenya, Nigeria and South Africa.

Key among these is the sustainable, transparent and domestication of the use of technology to promote transparency, accountability and the integrity of the ballot. The overreliance on foreign entities like OT-Morpho, Smartmatic International BV and their antecedents,³¹³ for the oversight and provision of Afro-Kenyan electoral management hardware and software and related solutions or services has largely undermined and subverted the will of the people through restricted access of servers on grounds of geographical and time zone differences, and the emerging integration of data protection into modern democracies. Instead, there is need to build

³¹³ Smartmatic BV was the company that was awarded the tender to procure, test and supply KIEMS kits in Kenya for the August 9th 2022 General Elections. Questions were raised regarding its ownership structure and history of allegations of interference in domestic elections. These were matters raised in *Raila Odinga (2022)* discussed substantively in Chapters 3 and 4 above.

local Kenyan capacity and expertise for electronic management of electoral processes in Kenya and Africa.

5.4 Key Findings

From the discussions above, the key findings can be summarised as follows:

Chapter 1 finds that there is need to review and re-evaluate Kenya's electoral laws and policies in presidential elections in Kenya. This was arrived at through the adoption of two (2) interrelated assumptions or hypotheses. First, that Kenya's current electoral laws and system has failed to ensure free, fair and credible presidential elections. Second, that there is need for Kenya to review Kenya's current electoral system in order to ensure that presidential elections in Kenya are free, fair and credible.

Further, the overarching finding from Chapter 2 of the research project was that while the Constitution of Kenya, 2010 was promulgated to address various concerns regarding the free, fair, credible and verifiable presidential elections this has not been fully achieved. This is because the implementation of the Constitution has come under attack coupled with lack of good faith and reversals to the presidential electoral process.

Third, Chapter 3 interrogated whether the relevant institutions governing elections in Kenya have proposed electoral reforms in order to efficiently operate in the governance of elections. The Chapter finds that the IEBC has failed in its mandate of being impartial in the electoral process and has allowed itself to be controlled by political players. Thus, the Chapter recommends that there is need for a total overhaul of the IEBC and replace the existing commissioners with individuals of the values and principles provided for under Article 10 and Chapter 6 of the Constitution of Kenya 2010.

Fourth, under Chapter 4 of the study, it was noted that there is need or constitutional, administrative, policy and regulatory stability, certainty and clarity in electoral law in Kenya, Nigeria and South Africa. This is introduced an inter-disciplinary or socio-legal approach to the discourse on electoral democracy in Kenya and Africa to the extent that elections cannot be delinked from socio-economic conditions, the contemporary and historical political economy of states.

5.5 Conclusion of the Study

The overarching research objective, research question and argument of this research project paper is that Kenya's presidential and related electoral laws and system have failed to ensure free, fair and credible presidential elections. These were elaborated under Chapters 2 and 3 above. Further, it is also noteworthy under Chapter 4 above that the challenge facing the management of elections in Kenya is not specific to Kenya alone but can be seen as characteristic of South Africa, Nigeria and Africa generally. Generally, the common trait is the disjointed implementation of constitutional, policy, regulatory or institutional frameworks, which is characteristic of electoral management in Kenya and Africa.

Therefore, there is need for a holistic and participatory review of Kenya's existing laws, regulations and policies on electoral processes to ensure that presidential and related elections are free, fair and credible. The author argues that presidential and related electoral management in Kenya and Africa may be conjunction with relevant constitutional reform processes and peaceful political transition and transfer of power.

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