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RESEARCH ARTICLE

THE CONSTITUTION AND ELECTORAL PROCESSES IN KENYA: AN ELUSIVE QUEST FOR DEMOCRATIC GOVERNANCE, THE RULE OF LAW AND CONSTITUTIONALISM

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Abstract

Democratic governance in Kenya is anchored on the twin constitutional principles of sovereignty of the people and the rule of law. Kenya's Constitution reflects the long journey travelled on the quest for good governance in the electoral cycle process and the need for informed citizen action, for an effective electoral process a credible election management body, and viable political parties. As Kenya approached the General elections in 2022, an audit of the electoral infrastructure, laws, political parties, and the voter, revealed a cocktail of mixed recipes, an uncertain electoral process, unpredictable political party processes and a plethora of hits and misses by elections management body. This article is borne out of a review of literature and statute laws, qualitative descriptive research, case law. In particular, attention is given to the settlement of disputes in tribunals and the Judiciary. The research methodology was augmented by the qualitative data from key informant persons drawn from the electoral management body, political parties, members of political parties and political party candidates in the forthcoming General elections. The research highlights the challenges in Kenya's democratic governance, noting uncertainties in rule of law and electoral processes. This is due to gaps in appreciation and understanding of the intentions of the framers of the 2010 constitution, architects of new legislation, and the role of the Independent Election and Boundaries Commission (IEBC). The study advocates for legislative reforms to strengthen the electoral system democratic governance, rule of law, and constitutionalism in the Kenyan electoral system.

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Introduction:-

The electoral process involves managing the system that decides how votes translate into seats for candidates and parties. An electoral system's rules determine how elections and referendums are conducted and results determined, including voting logistics, candidate eligibility, and campaign spending limits¹. Key aspects are democratic governance, rule of law, and constitutionalism.²

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Democratic governance in elections means allowing citizens and stakeholders to influence decisions, vital for a fair process.³ The rule of law ensures power is exercised according to established laws during elections.⁴ Constitutionalism limits government powers in elections, requiring adherence to constitutional and legal guidelines.⁵

Effective democratic governance calls for constitutions which consist of overarching arrangements for the legal, social, and political structures through to govern the society. Constitutional provisions are important or fundamental law.⁶ Under these circumstances, the constitutional law ought to adequately spell out the nature of democracy and rule of law within a country. The structure of modern nations has been shaped with government being divided into executive, legislative and judicial bodies, with the commonly accepted notion that these bodies and their powers must be separated.⁷ The separation of powers does not mean these bodies function alone, rather they maintain their autonomy while working interdependently. Other tenets include the idea of limited government and the supremacy of law.

Political electoral systems are defined by constitutions and electoral laws. Elections are typically conducted by election commissions.⁸ The strength of a democratic society is reflected in how well its electoral system is managed. Elections allow people to choose their leaders within a specified period. In addition, the political power around the world is obtained and maintained through the electoral process. Given the competitive nature of the political process, where electoral processes are not properly structured and managed, violence and conflict are likely to obtain. Therefore, democratic governance, rule of law and constitutionalism are important anchors to a credible and autonomous electoral process.

Kenya joins countries around the world that have developed and reviewed their Constitutions and electoral laws. However, the conduct of elections, the way elections related disputes are managed, and judicial interventions, indicates a need for a continued strengthening of constitutionalism, electoral systems and the rule of law to anchor effective democratic governance⁹. While the United States is considered one of the most democratic nations around the world, in the year 2020, it experienced election violence associated with the results of the Presidentials elections.

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² Seidman, Louis Michael (2006). Critical Constitutionalism Now. *Fordham Law Review*, 75, 575.

³ David Pottie (2001) Electoral management and democratic governance in Southern Africa. *Politikon*, 28(2), 133-155.

⁴ Maseh Elsebah and Katuu Shadrack. (2017). The Kenyan Judiciary's Open Government Initiative : prospects and challenges. *Journal of Science and Technology Policy Management*, 8(1), 76-94.

⁵ Serra Gilles (2016). Vote Buying with Illegal Resources: Manifestation of a Weak Rule of Law in Mexico. *Journal of Politics in Latin America*, 8(1), 129-150.

⁶ Lee Fred. (2011). Mark Bevir's democratic governance in radical democratic perspective. *International Journal of Organization Theory & Behavior*, 14(4), 554-575

⁷ Bevir Mark (2011), "Response: Interpretive social science and democratic theory. *International Journal of Organization Theory & Behavior*, 14(4), 576-596

⁸ Sønderskov Mette. (2019). Do local politicians really want collaborative governance? *International Journal of Public Sector Management*, 32(3), 320-330.

⁹ Zeini Nahed (2021). Diagnose the viability of separation of power in Egypt: cybernetics perspective. *Kybernetes*, 10, 89-101.

There were reported incidences of violent protests as protesters occupied the Capitol Hill¹⁰. The People's Assembly elections in 2005 were marred by fraud and violence in Egypt. Members of the banned Muslim Brotherhood organization won 88 seats, which was 60 percent of the total seats they contested¹¹. In 2010, security officials disrupted political rallies, public protests, and efforts by members and supporters of the Muslim Brotherhood to compete in elections were evidently frustrated. The April 6 Youth Activist Movement, named after a strike of workers and opposition activists on that date in 2008, organized a demonstration on April 6, 2010, to call for an end to the state of emergency and amend the constitution to allow for open and inclusive presidential elections. Authorities refused them permission to demonstrate, using their authority under the Emergency Law to ban all demonstrations.

Electoral reforms are undertaken on continuous basis in Ghana, especially before and after voter registration, voting as well as post-election evaluation where the effectiveness of certain administrative and legal provisions is assessed and reforms are initiated¹². A major electoral reform took place prior to the 2012 elections whereby the EC revoked the Public Elections Regulations of 1996. Facing strong pressure from the political parties and to reduce multiple registration and voter fraud, the EC decided to introduce biometric technology in voter registration and verification processes. Political parties vehemently agitated for the introduction of biometric verification as a requirement for voting without much technical knowledge of the system¹³. Prior to the 2012 elections, the electoral atmosphere was heating fast and potentially threatened the stability of the country. The EC accepted the request by adopting a "buy your peace approach" with the introduction of legal provisions which probably could have been managed better at the administrative level. The failure of many of the verification kits resulted in the rejection of the election results by the major opposition party, thus threatening democratic stability.

In Namibia, despite the electoral reforms leading to Electoral Amendment Act of 2009, the electoral process was still experiencing both political and technical challenges.¹⁴ The political challenges emanated from the perceptions of the stakeholders especially political parties' views on the impartiality of the Electoral Commission of Namibia (ECN) and its ability to advocate for reforms that "serve" the interests of all political parties in Namibia. The technical challenges were due to the institutional capacity of the ECN on in house expertise and support, for example on gender mainstreaming and legal reforms as well as its institutional presence/spread in the different regions of the country¹⁵. In Nigeria, the Independent National Electoral Commission (INEC) in its engagement in the reform processes was characterized by lack of political will by the political class including members of parliament. For instance, the INEC made a proposal to restrict political office holders from voting as delegates in party conventions to improve the fairness of the electoral process, improve internal party democracy and limit the influence of incumbents in internal party processes. However, this proposal was dropped by the parliamentary committees as it was deemed not to favour the political class.¹⁶

The last two decades in Kenya have witnessed numerous attempts to reform and consolidate the electoral laws. This was necessitated by the fact that the elections were most of the times characterised by controversies and utter disregard of the rule of law¹⁷. Nonetheless, the promulgation of the new constitutional order has led to drastic changes in the various governance arena, including the electoral arena. Before the year 2010, laws governing the elections in Kenya were scattered in various Acts, which presented a significant challenge to the political parties,

¹⁰ Daniel L. Byman & Colin P. Clarke. 2020. Why the risk of election violence is high. Retrieved from <https://www.brookings.edu>

¹¹ Human Rights Watch. 2010. Elections in Egypt State of Permanent Emergency Incompatible with Free and Fair Vote. Retrieved from <https://www.hrw.org/sites/default/files/reports/egypt1110WebforPosting.pdf>

¹² Go Seon. (2017). Electoral Democracy and the Role of the Electoral Management Body in South Korea. *Public Policy and Governance*, 28, 23-52.

¹³ Ameyaw Domfeh, K. (2004). Managing the environment in a decade of administrative reforms in Ghana. *International Journal of Public Sector Management*, 17(7), 606-620.

¹⁴ Electoral Commission of Namibia, 2012 : Draft Strategic Plan 2012/13 – 2016/2017

¹⁵ Oxford Analytica (2019). *Namibia's president faces increased election troubles*, *Expert Briefings*. Retrieved from <https://doi.org/10.1108/OXAN-DB247898>

¹⁶ Oyekami Wole (2013). The Politics of Electoral Reform in Nigeria. *Covenant University Journal of Politics and International Affairs*, 1(2), 258- 259.

¹⁷ Oxford Analytica (2017). *Local dynamics may spur Kenyan electoral violence*. *Expert Briefings*. Retrieved from <https://doi.org/10.1108/OXAN-DB217068>

voters and candidates as well as those charged with the responsibility of ensuring the rule of law. After the adoption of the Constitution of Kenya 2010, the scattered laws were revised and consolidated leading to three main legislations, Political Parties Act, the Elections Act and the Independent Electoral and Boundaries Commission Act (IEBC) to guide the electoral process and the management of the elections. The IEBC Act guides the provision for the appointment of the commissioners, and the management of the commission.

Statement of the Problem

Democratic governance is premised on free and fair elections. The election management body plays a crucial role in ensuring free and fair elections. According to the International Institute for Democracy and Electoral Assistance (IDEA)¹⁸, there are typically about three designs of Electoral Management Bodies (EMBs). The Independent Model, the governmental EMB Model and Mixed Model EMBs. There are countries that have EMBs with full judicial powers such as Brazil and Costa Rica. These have the power to legislate, adjudicate disputes and election petitions and enforce compliance. Article 88 of the Constitution of Kenya 2010 creates the independent Electoral and Boundaries Commission, to among others, continuously conduct voter registration, revisions of the voters' roll, delimit constituency and ward boundaries, to regulate the way political parties nominate their candidates, settlement of electoral disputes, registration of candidates for elections, voter education, facilitation of the observation, monitoring and voter education, regulation of campaign financing, the development of a code of conduct for candidates and parties contesting in elections, and monitoring compliance with the legislation and attendant regulations.

However, the ensuing legislation especially the Elections Act, through the code of conduct in the second schedule to the Act, grants unconstitutional powers to the electoral management body which inter-alia, includes investigations, framing of charges, and presiding over what is called breaches on the electoral code of conduct. These provisions raise questions: 1) Considering chapter 15 of the constitution of Kenya, is the design of the IEBC and its mandates consistent with the spirit of constitutionalism? 2) Did the Constitution intent to clothe the IEBC with jurisdiction to investigate, prosecute, and preside over breaches or election offences including offences against the Elections Code of Conduct? 3) Is the Committee on the enforcement of Electoral code of conduct constitutional? and 4) Are there elements of the Elections Act, 2011 and especially schedule two which is the Electoral Code of conduct, that are unconstitutional and illegal?

Despite the promulgation of the new constitution with enabling provisions, electoral processes in Kenya are still marred by irregularities. There is yet to be asserted that free, fair, and democratic electoral processes obtain. After the 2017 general elections, the opposition leader, Raila Odinga claimed that the election results were hacked and rigged in favor of the incumbent and hence in his opinion they were invalid¹⁹. Odinga challenged Kenyatta's victory in court and for the first time in Kenya, the election of a sitting president was nullified on September 1, 2017, by a majority, the Supreme Court judges ruled that the presidential election was illegal, null and void, and ordered a repeat poll.

Democratic Governance

Democracy is a form of government in which the people have the authority to deliberate and decide legislation, or to choose governing officials to do so. Constitutionalism cannot function in isolation from democracy²⁰. Constitutionalism needs democracy for two main reasons. First, constitutionalism has always been embedded concrete polities – a situated discourse, not an abstract universalism. Secondly, abstract readings of constitutionalism lack a 'meta-democratic founding' – a concrete constitutive act that brings into existence a political community.

Authoritarian governments are by their very nature unconstitutional. Such governments think of themselves as above the law and therefore see no necessity for the separation of powers or representative governance²¹. Constitutionalism, however, is primarily based on the notion of people's sovereignty, which is to be exercised--in a limited manner--by a representative government. The only consensual and representative form of governance in

¹⁸ Electoral Management Design, Revised edition, 2014.

¹⁹ Nic Cheeseman, Karuti Kanyinga, Gabrielle Lynch, Mutuma Ruteere & Justin Willis (2019). Kenya's 2017 elections: winner-takes-all politics as usual? *Journal of Eastern African Studies*, 13(2), 215-234.

²⁰ Dahl, Robert A., Shapiro, Ian, Cheibub, José Antônio (2003). *The democracy sourcebook*. Cambridge, Massachusetts : MIT Press.

²¹ Gagnon, Jean-Paul (2018). Descriptions of Democracy. *Democratic Theory*, 5(1), 92-113.

existence today, is democratic government. In this way, there is a very important and basic link between democracy and constitutionalism²². Just as mere constitutions do not make countries constitutional, political parties and elections do not make governments democratic. Genuine democracies rest on the sovereignty of the people, not the rulers. Elected representatives are to exercise authority on behalf of the people, based on the will of the people. Without genuine democracy, there can be no constitutionalism.

Constitutionalism

Constitutionalism refers to a belief in constitutional government. It can also be defined as the doctrine that governs the legitimacy of government action, and it implies something far more important than the idea of legality that requires official conduct to be in accordance with pre-fixed legal rules²³. Constitutionalism checks whether the act of a government is legitimate and whether officials conduct their public duties in accordance with laws pre-fixed/ pre-determined in advance. Except for a few states which have unwritten constitutions, today almost all the nations/states in the world have constitutions. This does not, however, mean that all these states practice constitutionalism. That is why constitutionalism is far more important than a constitution.

Constitutionalism embraces limitation of power (limited government), separation of powers (checks and balances) and responsible and accountable government. The main features (characteristics) of constitutionalism include rule of law, limited government, separation of powers (checks and balances), an independent judiciary, respect for individual rights as well as police governed by law and judicial control²⁴. The focus of this paper is on Rule of law, democratic governance and an independent judiciary.

In the United States, constitutionalism has been defined as a complex set of ideas, attitudes, and patterns of behaviour elaborating the principle that the authority of government derives from the people and is limited by a body of fundamental law²⁵. In the history of the United States, constitutionalism—in both its descriptive and prescriptive sense—has traditionally focused on the federal Constitution. The United Kingdom is perhaps the best instance of constitutionalism in a country that has an uncoded constitution. A variety of developments in seventeenth-century England, including "the protracted struggle for power between the king and Parliament was accompanied by an efflorescence of political ideas in which the concept of countervailing powers was clearly defined, which led to a well-developed polity with multiple governmental and private institutions that counter the power of the state"²⁶.

India is a democratic country with a written Constitution. Rule of Law is the basis for governance of the country and all the administrative structures are expected to follow it in both letter and spirit. It is expected that Constitutionalism is a natural corollary to governance in India²⁷. But the experience with the process of governance in India in the last six decades is a mixed one. On the one hand, there are excellent administrative structures put in place to oversee even the minutest of details related to welfare maximization but crucially on the other it has only resulted in excessive bureaucratization and eventual alienation of the rulers from the ruled. Since independence, those regions which backward remained the same, the gap between the rich and poor has widened, people at the bottom level of the pyramid remained at the periphery of developmental process, bureaucracy retained colonial characters and overall development remained much below the expectations of the people.

In Africa, years of economic exploitation, mal administration and bad governance fan the embers of conflicts and crises in the continent. From Togo to Democratic Republic of Congo, Nigeria to Kenya and Zimbabwe to Ivory

²²Tangian, Andranik (2020). *Analytical Theory of Democracy: History, Mathematics and Applications*. Studies in Choice and Welfare. Cham, Switzerland: Springer.

²³ Michael Rosenfield 1994. *Constitutionalism, Identity, Difference and legitimacy, Theoretical Perspectives*. Durham : Duke University Press.

²⁴ David E. Pozen. 2010. *Judicial Elections as Popular Constitutionalism*. Retrieved from <https://scholarship.law.columbia.edu>

²⁵ Thomas, George. (2008). Popular constitutionalism: The new living constitutionalism. *Studies in Law, Politics, and Society*, 44, 73-105.

²⁶ Thornhill Chris. (2020). Citizenship, Democracy, and the Transformation of Public Law. *Studies in Law, Politics, and Society*, 84, 69-108.

²⁷ Habib Arman (2016). Primacy and efficacy of preamble propositions in India and Bangladesh: A comparative understanding of interpretative constitutionalism. *International Journal of Law and Management*, 58(6), 660-672.

Coast, general elections have been widely disputed²⁸. The violence they spawn comes from manmade barriers on the part of smooth electoral processes. Beyond constraints of funds, manpower and other logistics, obstacles to health electoral processes emanate from the inordinate ambition of the political elite to win elections at all costs²⁹. To achieve their goal, they manipulate the constitutive and regulative instruments that safeguard credible electoral contest. All institutions and agencies of government are used by those in possession of state power and authority to remain in government. Because of the premium on power, the political elites mobilize to remain in power against the will of the electorates. Where the results emanating from the general elections contain no evidence demonstrating the preference of the governed, chances are that there is less likelihood of the transfer of political power from one party to another in a peaceful manner which signifies the grave danger into which democracy (liberal or not) finds itself.

Rule of law

Rule of law refers to the supremacy of law. It means that society is governed by law. Thus, law applies equally to all persons, including government and state officials. Following basic principles of constitutionalism, common institutional provisions used to maintain the rule of law include the separation of powers, judicial review, the prohibition of retroactive legislation and habeas corpus³⁰. Genuine constitutionalism therefore provides a minimal guarantee of the justice of both the content and the form of law. On the other hand, constitutionalism is safeguarded by the rule of law. Only when the supremacy of the rule of law is established, can supremacy of the constitution exist. Constitutionalism additionally requires effective laws and their enforcement to provide structure to its framework.

In enhancing the Rule of Law individuals working within the state machinery are expected to exercise their official duties and responsibilities in accordance with the provisions of the provisionslaw. In other words, rule of law represents the supremacy of law³¹. Generally, the rule of law envisages the following: -

1. No one is punishable except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land, 2) No person is above the law; and 3) Courts play a vital role in protecting the rights of individuals.

The first component of rule of law is related to the principle of legality. If a certain behavior is not categorized as a criminal act by the constitutionally mandated lawmaking organ, it is not treated as a criminal act and is not punishable. It is treated as an innocent act. Secondly for an act to be punishable, the act must be classified or identified as a criminal act by the legislature through the law-making process enshrined in a constitution and other laws. Finally, once a certain behavior is classified as a criminal act, the accused should be tried and punished by the ordinary courts. Ordinary courts refer to courts established in accordance with a country's constitution. It may not include any extra-judicial or extraordinary court not recognized by the constitution of the land³².

The second component of the Rule of Law is "no one is above the law".

These words express the absolute supremacy of law over arbitrary power including widespread discretionary power of government. All individuals should be treated equally before or under the law without discrimination on the basis of status, wealth, race, nationality, gender and sex among others. Every person from a president down to a shoe-shiner should equally become subject to the law. Similarly, even though avoidance of discretionary power is totally impossible, the manner in which such power is to be exercised is strictly monitored. Discretionary power is one of the reasons for the prevalence of corruption.

²⁸ David E. Pozen. 2010. *Judicial Elections as Popular Constitutionalism*. Retrieved from <https://scholarship.law.columbia.edu>

²⁹ Yusuf Hakeem. (2008). Democratic transition, judicial accountability and judicialisation of politics in Africa: The Nigerian experience. *International Journal of Law and Management*, 50(5), 236-261.

³⁰ Yost Benjamin (2008). Rule of law abolitionism. *Studies in Law, Politics, and Society*, 42, 53-89.

³¹ Kasianiuk Krzysztof (2018). A system-cybernetic approach to the study of political power. Introductory remarks. *Kybernetes*, 47(6), 1262-1276.

³² Lane Jan-Erik. (2011). Law and economics in the ASEAN+3 region: the rule of law deficit. *International Journal of Social Economics*, 38(10), 847-857.

The third component of the Rule of Law is that “Rights are based on the actual decision of courts”. The mere recognition of rights in a constitution alone does not secure or ensure the rights of an individual. The rights recognized by a constitution and other laws are to be protected or defended through the medium of courts whenever these rights are infringed³³.

In 2010, Kenya adopted a new, progressive constitution that established a more decentralized governing system. In addition to the fact that the new constitution entrenched the concept of separation of powers with checks and balances, it significantly reduced the powers of what had heretofore been an imperial presidency. Significantly, the new constitution established what most Kenyans believe is an independent judiciary, capable of making certain that government activities are only undertaken strictly in conformity with the constitution³⁴. The August 8, 2017 presidential election represented an opportunity for the Kenyan judiciary to perform an important rule of law function and establish, once and for all, the critical role of an independent judiciary in governance generally and in the maintenance of law and order, as well as democratic living, in particular. Kenyans had, once again, as they did in the violent aftermath of the 2007 elections, come to a fork in the road: This time, however, they made the right choice and instead of opting for destructive mobilization, chose to allow the courts to resolve their conflicts. In doing so, they set the country on the road to peaceful coexistence and hopefully, sustainable economic growth and development.

The 2017 presidential elections were, by and large, conducted peacefully. However, there was an attack on the home of Deputy President William Ruto in late July 2017 and several people were murdered just before the election, including Christopher Msando, the head of information, communication, and technology at the Independent Electoral and Boundaries Commission (IEBC) of Kenya, the organization charged with conducting the elections. The official results showed that Kenyatta had been re-elected with 54.27 percent to main opposition leader Odinga's 44.74 percent. In addition to the fact that the country's top election official, Wafula Chebukati, had stated that the election was “free, fair and credible,” both the incumbent and several international officers-including former U.S. Secretary of State John Kerry-made similar claims³⁵.

Despite these pronouncements, Odinga argued that the election had been marred with irregularities and called for strike action to support his claim - that the election results were “hacked and rigged in favor of the incumbent” and hence, in his opinion and that of his supporters, were invalid³⁶. Although most observers stated that the casting of ballots went without any major problems, the opposition argued that the electronic transmission of the results was severely flawed and that errors introduced through the transmission process cheated them out of a victory. Kenyatta, who had been declared re-elected, urged the opposition to avoid violent mobilization and instead, take their concerns about the election to the courts. Thus, on August 18, 2017, lawyers representing the National Super Alliance, the opposition coalition led by Odinga, filed a petition with the Supreme Court of Kenya. The six-judge Supreme Court panel found that Kenyatta and his administration had not engaged in any election malpractice. Instead, they found that the Independent Electoral and Boundaries Commission had engaged in various “irregularities and illegalities in the transmission of the results,” as well as other unspecified malpractices that seriously affected the “integrity of the poll.”

Legal Framework

The laws governing the electoral system of Kenya include: a) The Constitution of Kenya, 2010. b) The Elections Act, 2011; c) Elections Offenses Act, 2016. d) The Political Parties Act, 2011; e) The Independent Electoral and Boundaries Commission Act, 2011; f) The Elections Campaign Financing Act, 2013; g) The Leadership and Integrity Act, 2012

³³Tanjina Sharmin and Emmanuel Laryea (2021). Application of MFN to investment dispute settlement: rule of law issues. *Journal of International Trade Law and Policy*, 20(1), 21-41.

³⁴ Oxford Analytica (2017). Kenya election controversy increasingly likely. *Expert Briefings*. Retrieved from <https://doi.org/10.1108/OXAN-DB223556>

³⁵Ibid

³⁶ Oxford Analytica (2018). Kenya's primaries may not portend a violent election. *Expert Briefings*. <https://doi.org/10.1108/OXAN-DB220939>

The Constitution of Kenya, 2010

The Constitution establishes the Independent Electoral and Boundaries Commission, IEBC. The IEBC is the electoral body in Kenya³⁷. The Commission has the major responsibility of conducting elections and referenda. In the performance of its functions, the Commission is subject only to the Constitution and the law and hence not subject to the direction or control by any person or authority³⁸. The Constitution grants four (4) types of rights to participate in an election which are:

- Right to be registered as a voter;
- Right to vote by secret ballot in any election or referendum;
- Right to be a candidate and if elected, right to hold a public office; and
- Right to join and participate in a political party

Article 10 of the Constitution provides for national values and principles that is required to be observed during elections. These values include: good governance, integrity, transparency and accountability³⁹. The constitution requires that the electoral system be subject to the following principles:

- The citizens must be given the freedom to exercise their political rights.
- Not more than two-thirds of members of elective public bodies shall be of the same gender.
- Persons with disabilities must be fairly represented.
- The electoral system must comply with the principle of free and fair elections that bear the following characteristics:
 - By secret ballot;
 - Free from violence, intimidation, improper influence or corruption;
 - Conducted by an independent body;
 - Transparent; and
 - Administered in an impartial, neutral, efficient, accurate and accountable manner.

The Elections Act, 2011

This Act provides for the conduct of both elections and referenda; the registration of voters, and the determination of questions concerning registration; and election offences and resolution of election disputes⁴⁰. All adult Kenyan citizens have the right to vote provided they are registered in the Register of Voters. The Register of Voters comprises —

- A poll register in respect of every polling station;
- A ward register in respect of every ward;
- A constituency register in respect of every constituency;
- A county register in respect of every county; and
- A register of voters residing outside Kenya

The registered voters in a county or constituency may remove their Member of Parliament before the end of the term of the relevant House of Parliament if he/ she is:

- found, after due process of the law, to have violated the provisions of Chapter Six of the Constitution;
- found, after due process of the law, to have mismanaged public resources;
- convicted of an offence under this Act.

A recall can only be started twenty-four months after the election of the Member of Parliament and not later than twelve months immediately preceding the next general election. The Act indicates that a recall petition cannot be filed against a Member of Parliament more than once during the term of that member in Parliament⁴¹. In addition,

³⁷ The Constitution of Kenya, 2010

³⁸ <https://aceproject.org/ero-en/regions/africa/KE/kenya-handbook-on-kenyas-electoral-laws-and-system>

³⁹ <https://www.klrc.go.ke/index.php/constitution-of-kenya/170-chapter-seven-representation-of-the-people/part-1-electoral-system-and-process>

⁴⁰ The Elections Act, 2011

⁴¹ <https://www.klrc.go.ke/index.php/constitution-of-kenya/170-chapter-seven-representation-of-the-people/part-1-electoral-system-and-process/248-81-general-principles-for-the-electoral-system>

the Act indicates that a person who unsuccessfully contested an election cannot initiate a petition for the removal of the Member of Parliament. The IEBC is responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but this excludes election petitions and disputes after the declaration of election results.

The Election Offences Act, 2016

This Act came in the year 2016. Election offences will cause warning, disqualification, prosecution or imprisonment⁴². These are some of the offences that a Kenyan citizen need to be familiar with:

- a. Multiple registration: your name appearing more than once on the voters' register
- b. Having more than one voter's card
- c. Impersonation: using somebody else's voter's card
- d. Selling or buying voter's card. Do not exchange your card for money, food, beer or any other gift, you will be selling your ethics and your democratic right
- e. Deliberately destroying a voter's card
- f. Offences relating to voting
- g. Voting more than once
- h. Carrying out campaigns on the polling day
- i. Soliciting or receiving bribes to encourage voting for a candidate
- j. Hate speech targeting the opposing side
- k. Destruction of campaign materials of the opposing candidate.
- l. Use of another person's elector's card and ID to vote
- m. Prevention, obstruction or barring of a person from voting
- n. Use of threats, force, or violence during the election to compel someone to vote in a particular way or refrain from voting

It is the duty of a citizen to -

- a. Report election offences as soon as possible to Designated IEBC Security Officer's desk, Designated Peace Committees or the nearest Police Station
- b. Conduct campaigns in a peaceful manner and to always adhere to the laws, rules and regulations guiding elections in Kenya
- c. Participate in peaceful elections

Political Parties Act, 2011

This Act regulates the formation and operation of political parties⁴³. It provides for the registration of political parties and how they are regulated. It also provides for the funding and accounting of political parties, and the resolution of disputes within political parties. The Act has created the office of the Registrar of Political Parties that is independent that cannot be directed or controlled by any person or authority. It is mandatory for any political party to be registered before it can be allowed to operate. It establishes a fund called the Political Parties Fund, which is administered by the Registrar of Political Parties. The fund promotes accountability, transparency and fair competition between parties. The Act provides for distribution of the fund, restriction of sources, disclosure and audit of the Fund.

The Independent Electoral and Boundaries Commission (IEBC) Act 2011

The EBC is responsible for conducting or supervising elections to any elective office. Under this Act, the Commission is made up of the commissioners headed by a chairperson and a secretariat headed by a Chief Executive Officer who also is also the secretary to the commission⁴⁴. The Commission consists of nine (9) Members with the Chair and Vice Chair. The commissioners are appointed by the President of Kenya and confirmed by the Kenyan Parliament. The term of office of the members of the commission is a single term of six (6) years.

The Commission is independent from the control or influence of any person or authority. In carrying out its functions, the commission is required to observe the principle of public participation and the requirement for consultation with stakeholders.

⁴² Election Offences Act, 2016

⁴³ Political Parties Act, 2011

⁴⁴ The Independent Electoral and Boundaries Commission (IEBC) Act 2011

The functions of the IEBC are:

- 1) Conducting or supervising referenda
- 2) Conducting or supervising elections to any elective body established by the constitution
- 3) Conducting and supervising any other election as may be as may be prescribed by an Act of Parliament
- 4) Registration of citizens as voters
- 5) Regular revision of voters registers
- 6) Delimitation of constituencies and wards
- 7) Settlement of electoral disputes such as disputes arising from nominations

There is a code of conduct for members and staff of the Commission. The Code is comprehensive. The Code requires the Commission's employees to conduct themselves with integrity and neutrality. All the members are expected to perform their duties in a manner that maintains public confidence and to discharge their duties in a professional and efficient manner and respect the rights and freedoms of all persons.

The Election Campaign Financing Act, 2013

This law was passed by parliament in 2013 to provide for the regulation, management, expenditure and accountability of election campaign funds during election and referendum campaigns⁴⁵. The IEBC is responsible for the regulation and administration of campaign financing and is required to—

- a. keep a register of authorized persons under this Act.
- b. Supervise candidates, political parties, referendum committees and authorized persons in relation to campaign expenses.
- c. Set spending limits and enforce compliance with such limits

A political party intending to contest in an election is required to constitute a party expenditure committee which shall consist of nine members whose mandate is to advise the political party on all financial matters related to the party nomination or to the party campaign expenditure.

The Leadership and Integrity Act, 2012

This Act came into place in 2012 to give effect to the provisions of the Constitution on leadership and integrity under Chapter six, (6)⁴⁶. This law requires leaders to have the following leadership qualities:

- a. State officers are required to abide by the Constitution and the law.
- b. State officers are required to use the power given to them in the interest of Kenyans
- c. State officers are required to carry out their duties efficiently and with honesty
- d. State officers are required to carry out duties of the office in a manner that maintains public confidence in the integrity of the office
- e. A State officer shall not use the office to unlawfully enrich himself or herself or any other person
- f. A State officer shall not use the office to wrongfully or unlawfully influence the acquisition of property

Methodology:-

The research used the descriptive research design. The design was selected because it is reliable in providing answers to questions about where, who, how and when, that are related to the phenomenon under investigation. The target population was key informant persons drawn from the electoral management body, political parties, members of political parties and political party candidates in the forthcoming General elections. The purposive sampling technique applied in the selection of the target individuals.

Secondary data was obtained from statutes, Case law, IEBC reports and research journals among others. Primary data was collected through in-depth interviews with the help of key informant interview guides. Opportunity for follow ups questions was capitalized on during the interviews. One of the advantages of in-depth interviews is that they are more personal as the person being interviewed is seeing the interviewer face to face⁴⁷. In addition, interviews can capture more truthful answers from the respondent.

⁴⁵ The Election Campaign Financing Act, 2013

⁴⁶ The Leadership and Integrity Act, 2012

⁴⁷ Suganda Devi. (2017). *Research methodology: A handbook for beginners*. New Delhi: Notion Press.

Secondary data sources will generate qualitative data that will be analyzed by use of document review analysis. The document review process provides you with a systematic procedure for identifying, analyzing, and deriving useful information from these existing documents. Document analysis is a form of qualitative research in which documents are interpreted by the researcher to give voice and meaning around an assessment topic⁴⁸. The in-depth interviews generated qualitative data, which was analyzed by use of thematic analysis and the results and presented in a prose form. Thematic analysis emphasizes pinpointing, examining, and recording patterns (or "themes") within data⁴⁹. Themes are patterns across data sets that are important to the description of a phenomenon and are associated to a specific research question. The themes were the categories for analysis.

Case Study

Hon. Sabina Wanjiru Chege Vs IEBC

On 11th of February 2022 Hon. Sabina Wanjiru Chege received summons from the Enforcement Committee in the Independent Electoral and Boundaries Commission to attend a hearing on 15th of February 2022 on grounds that she had violated the Electoral Code of Conduct. Further, she received a statement of breach, informing her of the words she allegedly uttered during a public rally at Isibuye area within Vihiga County. The Enforcement Committee at the Independent Electoral and Boundaries Commission alleged that the words contained in the statement created an impression that "Jubilee Party" in which she belonged to rigged that 2017 elections and that the party had plans to rig and compromise the 2022 general elections. The IEBC also argued that Hon. Sabina Wanjiru Chege indicated that the integrity of 2017 generation elections was in question and specifically the voting system developed by the IEBC was penetrable, insecure and falls foul of the requirement of Article 86 of the Constitution.

In her argument, Hon. Sabina Wanjiru Chege, contended that the IEBC was obligated to furnish her with a copy of their investigation report, materials in their possession as well as to have documented procedure on how the Enforcement Committee exercises its mandate as a quasi-judicial body in enforcing the Electoral Code of Conduct. Specifically, in her submissions filed on 9th of March 2022, Hon. Sabina Wanjiru Chege raised the following issues:

1. Is the design of the IEBC and its mandates considering Chapter 15 of the constitution and respective Articles, consistent with the spirit of constitutionalism?
2. Does the Constitution clothe the IEBC with jurisdiction to investigate, prosecute, and preside over breaches of election offences or election offences including offences against the Elections Code of Conduct?
3. Is the IEBC acting within its constitutional mandate by failing to prescribe regulations to enforce the Electoral Code of Conduct?
4. Is the IEBC's hurriedly appointed and convened Committee on the enforcement of Electoral Code of Conduct proper at law, and reflective of the rule of law?
5. Are there elements of Elections Act, 2011 and especially Schedule Two which is the Electoral Code of Conduct that are unconstitutional and illegal?
6. Is there a real and potential threat to the Petitioner's rights under Article 50 going by the reckless way the Respondent seeks to enforce its "mandate"?
7. Is the Respondent, an administrative body, in violation of Article 47 of the Constitution?

In relation to whether the Enforcement Committee has the jurisdiction to entertain the violations of the Electoral Code, the Court indicated that while any constitutional commission has the powers to conduct investigations based on the complaints made by the members of the public, the IEBC was an exemption. Powers to issue summonses to a witness are limited to four such entities, which include Kenya National Human Rights, the National Land Commission, The Judicial Commission and the Auditor General. As such it was unconstitutional for IEBC to issue summonses to a witness. In addition, the ruling indicated that while the Enforcement Committee was vested with powers to summon witnesses and to conduct hearings in respect to complaints relating to Electoral Code of Conduct, the vesting of powers was unconstitutional.

The judgment also indicated the IEBC had "no jurisdiction to either summon any witness or to conduct any hearing in relation to a complaint on breach of the Electoral Code or at all". In addition, the "Electoral Code of Conduct

⁴⁸Creswell John. & Creswell David. (2017). *Research design: Qualitative, quantitative, and mixed methods approaches*. New York: SAGE Publications, Inc.

⁴⁹Ibid

Enforcement Committee has no jurisdiction to enforce the Electoral Code by summoning any witness or conducting any hearing in relation to a complaint on breach of the Electoral Code or at all.” Also, the ruling indicated that “the Electoral Code of Conduct Enforcement Committee is an unconstitutional outfit and lacks any legality”.

The next issue in question was whether “the Electoral Code is in force and if so, whether the Electoral Code is binding upon the Petitioner”. The IEBC could not show that Hon. Sabina Wanjiru Chege and the Jubilee Party had subscribed to the Electoral Code for the current period running from 20th January 2022 to the declaration of the results of the general election to be held on 9th August 2022. In addition, by the time Hon. Sabina Wanjiru Chege was issuing the alleged statement, party nominations were yet to be conducted, there were yet to be formal submission of nominations to the IEBC. As such, the petitioner, Hon. Sabina Wanjiru Chege, could not be deemed to be a candidate in the 2022 general elections.

On the question of whether the IEBC’s “chairperson erred in chairing the sittings of the Enforcement Committee”, the court ruled that since the Enforcement Committee had been found to be unconstitutional, its activities were null and void. Regarding “whether the IEBC had formulated regulations to guide the enforcement of the Electoral Code”, the court ruled that the IEBC failed to publish the regulations contemplated under Section 109(cc) and (ff) of the Electoral Code for the enforcement of the Electoral Code.

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