



**Global Scientific** JOURNALS

GSI: Volume 10, Issue 1, January 2022, Online: ISSN 2320-9186

[www.globalscientificjournal.com](http://www.globalscientificjournal.com)

**ANALYZING THE DRAWBACKS OF KENYAN ELECTORAL SYSTEM:  
COMPARATIVE STUDY OF CANADA, SOUTH AFRICA, UK AND USA**

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# **ANALYZING THE DRAWBACKS OF KENYAN ELECTORAL SYSTEM: COMPARATIVE STUDY OF CANADA, SOUTH AFRICA, UK, AND USA**

## **1.0 Introduction**

Elections systems are one of the cornerstone tenets of liberal democracies in which the people express their popular sovereignty.<sup>1</sup> Through periodic regular, free and fair elections, the people get the opportunity to put their representatives to account.<sup>2</sup> In Kenya, the right to take part in the political decision making of the country is anchored under the Constitution of Kenya, 2010 (COK) as an integral part of the Bill of Rights.<sup>3</sup> Importantly, Article 81 of the COK enumerates the general principles against which the electoral system should be assessed.<sup>4</sup>

More critically, the promulgation of the Constitution of Kenya in 2010 remarked a rebirth in the governance system of the country through the introduction of the devolved system of governance in Kenya. Thus, at present, the governance system in Kenya is constituted of the national and the county government. Some of the rationales for the integration of the devolved system of governance entailed; ensuring equitable division in national resources, enhancing political participation at the grass-root level, enhancing the ability of the people to manage their affairs and solve the problems that they face, and fostering national unity and enhancing the recognition of diversity among others. Indeed, since the introduction of the devolved system of governance, there has been experienced improvement in regional developments across Kenya. Today, two major elections have been conducted under the devolved system of governance since its inception in 2013.

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<sup>1</sup> Patrick Tandoh-Offin and Gbensuglo Alidu Bukari, 'Towards a less contentious outcome in Sub-Saharan Africa' (2019) 2 African Journal of Public Sector Development and Governance 39, 43. See Majanja J in *Kituo Cha Sheria v Independent Electoral and Boundaries Commission & another* [2013] eKLR.

<sup>2</sup> Said Adejumobi, 'Elections in Africa: A fading shadow of democracy?' (2000) 21 (1) International Political Science Review 59.

<sup>3</sup> The Constitution of Kenya, 2010, Art. 38.

<sup>4</sup> Ibid, Art. 81.

While the promulgation of the Constitution of Kenya has to a greater extent enhanced the efficiency of the electoral system, the two major elections that have been undertaken under the two devolved system of governance certain challenges are still associated with the electoral system. For instance, in the 2013 and 2017 both the presidential elections were disputed with the disputants seeking refuge in the Supreme Court. This is an indication of lack of integrity in the electoral process. Moreover, the Independent Electoral and Boundaries Commission (IEBC) has not been effective in undertaking its mandate due to interferences with their independence. More worrying is the prevalence of electoral violence that are associated with deaths, injuries and destruction of property.

Considering the preceding trend in the Kenyan electoral system, the paper proceeds on the hypothesis that the Kenyan electoral system is inefficient and that Kenya can borrow best practices from Canada, South Africa, UK and the USA. Some of the recommendations would be enhancing the independence of the IEBC, enhancing the implementation of the electoral laws through political goodwill and ensuring effective resolution of electoral disputes.

## **2.0 Literature Review**

This section of the paper provides review of the existing literature on the state of the Kenyan electoral system. Bogaards' literature offers analysis of the electoral systems, party systems and ethnicity in Africa.<sup>5</sup> At the inception of his paper, the author remarks that democratization has traditionally been linked to fears of emergence of ethnic conflicts in Sub Saharan Africa.<sup>6</sup> Further, Bogaards also notes that in heterogeneous society where people differ in terms of language, social origin, ethnicity, religion, colour of the skin and other socio-cultural attributes, the choice of the electoral system is significantly influenced by the choice of party-system

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<sup>5</sup> Matthijis Bogaards, 'Electoral Systems, Party Systems, and Ethnicity in Africa' (2007) *Votes, Money and Violence*, 168.

<sup>6</sup>*Ibid*, p.168.

function that acts as intermediary between social and political cleavages.<sup>7</sup> Against that backdrop, Bogaards' paper proposes rather than banning particularistic parties, the constitutional and electoral engineers should design institutions that promote aggregation.<sup>8</sup>

More interestingly, the role of ICT in electoral processes in Kenya is discussed by Micheni and Murumba.<sup>9</sup> According to Micheni and Murumba, ICT is a strategy that when used properly can enhance the citizen participation in the political affairs of their country. In this regard, the two posit that embracing the use of technology through biometric voter registration and transmission offers prospects for improving the state of electoral processes in Kenya. Therefore, their paper urges that the various legislative and regulatory items need to be reviewed to cope up with technological advancements. However, in implementing the use of technology in electoral processes, Micheni and Murumbi suggests that electoral management bodies should undertake adequate feasibility studies and proper planning to ensure that the technology is timely and appropriately incorporated within the electoral system.

According to Marjoriea and James, candidate registration system and results transmission system are at the heart of the credibility of the Kenyan electoral system.<sup>10</sup> Thus, the duo observes that there has been post-election violence in Kenya owing to disputed electoral results. For instance, the 2007-2008 post-election violence erupted due to the disputed announcement of 2007 presidential election results in Kenya, a challenge that was rooted in the failed results transmission system. Consequently, Marjoriea and James posit that there should be adequate policy and strict protocols for supervision, management, transmission and storage of electoral data.

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<sup>7</sup> Ibid, p.169.

<sup>8</sup> Ibid, p.188.

<sup>9</sup> Elyjoy Micheni and Julius Murumba, "The role of ICT in electoral processes: a case of Kenya." 2018 IST-Africa Week Conference (IST-Africa)(IEEE, 2018).

<sup>10</sup> Owino Patience Marjoriea and Mwikya Reuben James, 'Candidate Registration System on Credibility of the Electoral System in Kenya' (2020).

In tandem with the paper by Ahere, political parties play key role in the election violence in Kenya and South Africa.<sup>11</sup> Ahere opines that since 1991, every election cycle in Kenya has been accompanied by displacements, deaths, injuries and destruction of property.<sup>12</sup> In his view, political parties are linked to the violence during election cycles as they constitute the clearing houses for the various candidates who seek elective positions. Moreover, political parties also seek to obtain and control political power, in what results in heated contestations during elections. Therefore, owing to the activities of political parties, much violence is bred as the supporters of contesting political parties turn against each other.<sup>13</sup> For example, Ahere notes that the 2007 post-election violence was triggered by contestations between supporters of the Orange Democratic Movement (ODM) and those of the Party of National Unity (PNU).<sup>14</sup> Some of the root causes of contestations between political parties in Kenya during election period include; recruit of political parties members along ethnic lines, poor internal democracy on the management of political parties leadership, weak political party ideology and poor dispute resolution within and between political parties.<sup>15</sup>

The decline and fall of electoral integrity in Kenya is as well evaluated by Maina.<sup>16</sup> Maina hold the view that since 1992, elections in Kenya have failed to deliver elections that have integrity and desired legitimacy. That while Kenya has changed the electoral management body commissioners at least thrice over 1997, 2008 and in 2016, coupled with review of existing laws, electoral problems have nonetheless kept recurring. In similar vein, changes in voter registration and election transmission processes have only created fresh avenues for fraud. Again, Maina also opines that the authorities have failed to resolve electoral conflicts as soon

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<sup>11</sup> John Rabuogi Ahere, 'When a Compatriot Becomes a Foe: Political Parties and Violent Elections in Kenya and South Africa' (2018) 17(1) Journal of African Elections 25.

<sup>12</sup> Ibid, p.26.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid, p.26.

<sup>15</sup> Ibid, p.43.

<sup>16</sup> Wachira Maina, 'The Decline and Fall of Electoral Integrity' (2020).

as they emerge. In light of the above shortcoming, Maina suggest that the electoral management body (EMB) needs to be properly reconstituted. The EMB should be devoid of state capture and political good will also need to be heightened.

Further, Carrier and Kochore's paper assess how the challenge of ethnicity may be navigated in electoral politics in Kenya.<sup>17</sup> According to Carrier and Kochore, even though for a longer period the northern part of Kenya has been regarded as peripheral to the Kenyan politics, the position has changed since the implementation of the devolved system of governance in Kenya.<sup>18</sup> However, with the increased significance in Kenya elections, the northern part of Kenya has been susceptible to election-related violence hence the need for electoral reform.<sup>19</sup> In the view of the two authors, the violence within the northern part of Kenya is attributed to the high level of election ethnic strategizing. More particularly, the council leaders within the northern part of Kenya were keen on mobilizing the youth to vote along ethnic and clan lines.<sup>20</sup> However, Carrier and Kochore do not offer recommendations on how to address ethnicity during elections in the northern part of Kenya.

The challenge of ethnicity as the root cause of political violence in Kenya is also analyzed by Fjelde and Høglund.<sup>21</sup> Similar to the position held by other scholars, Fjelde and Høglund opine writes that since the reintroduction of multiparty politics in Kenya, elections have been characterized with violence. In their view, election-related violence in Kenya has been rooted in divisions along ethnic lines as ethnic divisions have become powerful tool for violent

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<sup>17</sup> Neil Carrier and Hassan H. Kochore, 'Navigating ethnicity and electoral politics in northern Kenya: the case of the 2013 election' (2014) 8(1) *Journal of Eastern African Studies* 135.

<sup>18</sup> *Ibid*, p.135.

<sup>19</sup> *Ibid*, p.136.

<sup>20</sup> *Ibid*, p.147.

<sup>21</sup> Hanne Fjelde and Kristine Høglund, 'Ethnic politics and elite competition: the roots of electoral violence in Kenya' (2018) *Violence in African Elections: Between Democracy and Big Man Politics* 27.

electoral mobilization. In remedy, their paper argues that the Kenyan electoral system should be revised to avoid politicization along ethnic lines.

On the other hand, Southall's literature analyzes the alternatives for electoral reforms in Kenya, through the lenses of the lessons from South Africa.<sup>22</sup> According to Southall, while the Kriegler Report did not point out who won the Kenyan elections in the 2007 presidential elections, it nonetheless demonstrated the challenges that hamper the realization of ideal functioning electoral democracy.<sup>23</sup> Along this line, the Kriegler Report found that Kenyans had engaged in a raft of undemocratic practices encompassing buying of votes, selling and misuse of public resources, ballot stuffing, and the use of violence against the opponents. Further, the Kriegler Commission also found out that the electoral management body, the Electoral Commission of Kenya (ECK), as it then was, was incompetent in overseeing the electoral process.<sup>24</sup> Therefore, the alternative proposals made were; the continuance of FPTP with equitable delimitation of constituencies; a two-round system of parliamentary elections; mixed-member proportional representation; and closed list PR at provincial and national levels.

According to Okubasu, proper electoral reforms should be informed by reviewing of the electoral laws.<sup>25</sup> The electoral laws should anchor principles of sound electoral systems. Some of the key electoral principles that need to be integrated in the electoral system are; free exercise of political right to vote and take part in political affairs, equitable and fair representation of the people, groups and communities, gender equality in elections and effective electoral management bodies. The preceding literature review illustrates that the Kenyan electoral system has various drawbacks that hampers its efficiency.

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<sup>22</sup> Roger Southall, 'Alternatives for electoral reforms in Kenya: Lessons from Southern Africa' (2009) 27(3) *Journal of Contemporary African Studies* 445.

<sup>23</sup> *Ibid*, p.446.

<sup>24</sup> *Ibid*, p.447.

<sup>25</sup> Duncan Okubasu, 'Lessons for Sub-Saharan Africa from Kenya on electoral reforms: The role and limitations of the law' (2017) 16 (2) *Election Law Journal: Rules, Politics, and Policy* 306.



### 3.0 Legal Environment of the Electoral System in Kenya

The Constitution of Kenya, 2010 provides the overarching legal environment of the Kenyan electoral system.<sup>26</sup> The above is against the backdrop that the Constitution of Kenya is the supreme law of the Republic that binds every person at both levels of government.<sup>27</sup> However, more fundamental to the discourse, the Constitution of Kenya, 2010 under Article 10 thereof anchors the national values and principles of governance in Kenya.<sup>28</sup> In the terms of Article 10 (1) of the Constitution, the principles bind all person, the State and all the State organs whenever they implement any policy decision.<sup>29</sup> As a result, the electoral system of Kenya is also founded on the national values and principles of governance. Some of the key national values and principles of governance in the context of the electoral system include, the rule of law, democracy and participation of the people, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, good governance, integrity, transparency and accountability. Indeed, as the Supreme Court of Kenya held in the case of *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR,<sup>30</sup> the above national values informs the structure and management of the Kenyan electoral system.

Every person's right to take part in the Kenyan political affairs, including the right to take part in electoral system of the country is anchored under the Bill of Rights, Chapter Four of the Constitution of Kenya. Noteworthy, in pursuance of Article 19 of the Constitution of Kenya, the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural developments.<sup>31</sup> In this regard, it is the fundamental duty of the State

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<sup>26</sup> Constitution of Kenya, 2010.

<sup>27</sup> Ibid, Article 2.

<sup>28</sup> Ibid, Article 10.

<sup>29</sup> Ibid, Article 10(1).

<sup>30</sup> *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.

<sup>31</sup> Constitution of Kenya, 2010, Article 19.

and every State organ to observe, respect, protect and promote the rights and fundamental freedoms under the Bill of Rights. Under the Bill of Rights section, the hallmark for the protection of political right is Article 38 of the Constitution. Article 38 of the Constitution thus reads;

*“Every citizen is free to make political choices, which includes the right-*

- (a) To form, or participate in forming, a political party;*
- (b) To participate in the activities of, or recruit members for, a political party; or*
- (c) To campaign for a political party or cause.”<sup>32</sup>*

According to the High Court of Kenya in the case of *Maendeleo Chap Chap Party & 2 others v Independent Electoral and Boundaries Commission & another* [2017] eKLR,<sup>33</sup> the above provisions of Article 38 of the Constitution is the basis upon which every person can fully enjoy their political rights. Moreover, it should be appreciated that the above right is to be fully realized without any discrimination on any of the ground specified under Article 27 of the Constitution, a position that was reinforced by the High Court in the case of *Kituo Cha Sheria v Independent Electoral and Boundaries Commission & another* [2013] eKLR.<sup>34</sup>

Article 38 (2) of the Constitution of Kenya, 2010 goes further to elaborate on other political rights guarantees.<sup>35</sup> There under, every citizen is entitled to free, fair and regular elections based on universal adult suffrage and the free expression of will for any elective seat. Alongside the preceding guarantee is the right of every adult citizen to be registered as a voter, to vote by secret ballot during elections and to be a candidate for public office. To succinctly outline the

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<sup>32</sup> Ibid, Article 38.

<sup>33</sup> *Maendeleo Chap Chap Party & 2 others v Independent Electoral and Boundaries Commission & another* [2017] eKLR.

<sup>34</sup> *Kituo Cha Sheria v Independent Electoral and Boundaries Commission & another* [2013] eKLR.

<sup>35</sup> Constitution of Kenya, 2010, Article 38(2).

realization of the above political rights, Chapter Sixteen of the Constitution provides for the representation of the people.

At the very apex of Chapter Sixteen of the Constitution, Article 81 thereof anchors the general principles for the electoral system.<sup>36</sup> The principles include; freedom to exercise political right, two-thirds gender rule in elective public bodies, fair representation of persons with disabilities, universal suffrage, and free and fair elections. Under the last limb, free and fair elections encompass elections by secret ballot, freedom from violence, intimidation, improper influence, election by an independent body, transparency and the administration of election in an impartial, neutral, efficient, accurate and accountable manner.<sup>37</sup> Also, Article 82 of the Constitution mandates Parliament to enact legislation to provide for various aspects of the electoral system. Parliament rose to the occasion and enacted *inter alia* the Independent Electoral and Boundaries Commission Act, the Election Act, the Political Parties Act, among others. Moreover, Article 83 of the Constitution of Kenya provides for the registration as a voter while under Article 84 of the Constitution, provides for election candidate to comply with code of conduct. Again, alive to the independence of candidature, Article 85 of the Constitution outlines eligibility for one to stand as an independent candidate.<sup>38</sup>

To manage the electoral system in Kenya, Article 88 of the Constitution of Kenya establishes the Independent Electoral and Boundaries Commission (IEBC). In the case of *David Ndi & others v Attorney General & others* [2021] eKLR,<sup>39</sup> the Court of Appeal affirmed that the constitutionalisation of the IEBC has heightened the mandate of the institution in overseeing the Kenyan electoral system. Indeed Article 88 (4) of the Constitution provides that the mandate of the IEBC is conducting or supervising of referenda and elections to any elective

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<sup>36</sup> Ibid, Article 81.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid, Article 85.

<sup>39</sup> *David Ndi & others v Attorney General & others* [2021] eKLR.

body or office, with particular duties being; the continuous registration of voters, regular revision of voters roll, delimitation of constituencies and wards, settlement of election disputes, voter education, registration of election candidates, and the facilitation of elections.<sup>40</sup>

In pursuance of Article 86 of the Constitution, at every election, the IEBC shall ensure that; the voting system is simple, accurate, verifiable, secure, accountable and transparent, the votes are promptly announced, and appropriate structures and mechanisms to eliminate electoral malpractices are put in place.<sup>41</sup> Further, alive to the occurrence of electoral disputes, Article 87 of the Constitution outlines the procedure for the elimination of electoral disputes.<sup>42</sup> In fact, there under, the timelines for the filing election petitions are outlined under the Constitution. It should also be appreciated that Article 91 of the Constitution of Kenya elaborates the basic requirements for political parties.<sup>43</sup> This is very integral since political parties constitute major pillars of the electoral system. Therefore, every political party shall *inter alia* have a national character, have democratically elected governing body, promote and uphold national unity, observe code of conduct for political parties, respect and promote human rights.

Essentially therefore, the Constitution of Kenya provides a desirable legal environment of the electoral system. Moreover, as highlighted above, Parliament has enacted various statutes to further elaborate on the electoral system. For instance, the Elections Act, 2011 provides more in-depth regulatory environment on the conduct of elections, and even election malpractices.<sup>44</sup> On the other hand, the Independent Electoral and Boundaries Commission Act outline the legal status of the IEBC, qualifications for appointment of the Commissioners, and the conduct of the Commission.<sup>45</sup> It thus suffices to assert that to a greater extent, the legal environment

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<sup>40</sup> Constitution of Kenya, 2010, Article 88(4).

<sup>41</sup> Ibid, Article 86.

<sup>42</sup> Ibid, Article 87.

<sup>43</sup> Ibid, Article 91.

<sup>44</sup> Elections Act, 2011.

<sup>45</sup> IEBC Act, 2011.

described above, coupled with the purposive judicial interpretation offers potentially ample environment for the electoral system.

#### **4.0 Drawbacks of the Electoral System in Kenya**

Despite the above legal and regulatory environment, the Kenyan electoral system is faced with certain challenges that hamper its efficiency.<sup>46</sup> Several factors including lack of independence of the IEBC, low voter registration, low voter turnout, electoral violence, and limited diaspora voting have continuously undermined the efficiency of the Kenyan electoral system as described in detail below.

##### **4.1 Lack of Independence of the IEBC**

In Kenya, the efficiency of the IEBC in the management of the electoral system is derailed by external influences from the State, other State organs and even the electoral candidates. For instance, in the conduct of the 2017 general elections, the IEBC was criticised for lacking independence through the electoral process, including the procurement of ballot boxes and papers, as well as BVR transmission kits. Some of the factors that hinder complete independence of the IEBC while undertaking its mandate include delayed or limited funding of the Commission. In numerous occasions, the IEBC, through its Chairperson have raised claims against the Executive for delaying allocation of funds to the Commission. On the other, the IEBC has also complained of inadequate allocation of funds as was the case during the mass voter registration process between October and November of 2021.

During the review of the 2017 general elections, the IEBC Chairperson lamented that the Commission was at the mercies of the national treasury that only remitted funds to the institution few days to the election. In fact, the Commission went further to indicate it was

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<sup>46</sup> Eric Thomas Ogwora, 'Electoral Bribery and Corruption: a Deterrent and a Game Changer towards Democratic Process and Fair Election in Kenya' (2017) 1(2) Journal of Popular Education in Africa 39.

unable to open the August 8, 2017 election servers owing to limited funds.<sup>47</sup> Studies indicate that delayed and inadequate allocation of funds to the IEBC has been used as a tool by the Executive through the national treasury to derail its independence. If the IEBC is to undertake its mandate efficiently and independently, adequate funds should be timely allocated to the Commission.

#### **4.2 Low Voter Registration**

The efficiency of the Kenyan electoral system is as well significantly hampered by lower voter registration by the IEBC. Noteworthy, the Constitution of Kenya, 2010 under Article 88 thereof tasks the IEBC with the specific mandate of continuously registering citizens as voters.<sup>48</sup> Indeed this obligation is further bolstered under the IEBC Act. In the fulfilment of the mandate of voter registration, the IEBC is required to exhort the citizens into being registered as voters.<sup>49</sup> To this extend, the IEBC is required to recruit staff to undertake the registration process across the country alongside mobilizing citizens to be registered as voters.<sup>50</sup>

However, a study by Harris, Kamindo and Windt in 2021 indicates that contrary to the expectation, voter registration is a key challenge in Kenya's electoral system.<sup>51</sup> More particularly, their study illustrate that the existing voter registration policies constrains political participation and competition. In the previous 2017 elections for instance, while the IEBC endeavoured to register an approximate of 19 million voters, much higher numbers could have been registered save for certain reasons. One of the main reasons for the above trend was budgetary constraints on the part of the IEBC. Due to the budgetary constraints, the IEBC was

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<sup>47</sup> Michael Chepkwony and Annette Kariuki, "IEBC decries lack of independence as referendum question lingers" *The Standard* (February 13<sup>th</sup> 2019).

<sup>48</sup> The Constitution of Kenya, 2010, Article 88(4)(a).

<sup>49</sup> Collins Odote and Karuti Kanyinga, 'Election technology, disputes, and political violence in Kenya' (2021) 56(3) *Journal of Asian and African Studies* 558.

<sup>50</sup> Benjamin Marx, Vincent Pons, and Tavneet Suri, 'Voter Mobilisation and Trust in Electoral Institutions: Evidence from Kenya' (2021) 131(638) *The Economic Journal* 2585.

<sup>51</sup>J. Andrew Harris, Catherine Kamindo and Peter van der Windt, 'Electoral Administration in Fledgling Democracies: Experimental Evidence from Kenya' (2021) 83(3) *The Journal of Politics* 7.

compelled to rush the duration and process of voter registration that saw many potential voters precluded from participating in the 2017 elections. Moreover, the study by Harris, Kamindo and Windt also indicate that minimal civic education in Kenya, especially in the rural parts of Kenya contributed to low voter registration in during the 2017 elections.

The preceding trend is evident in the forthcoming 2022 general elections. Once again, political analysts and commentators on the Kenyan electoral system have blamed the IEBC for dwindling voter registration in readiness for the 2022 general elections in Kenya. An article by the Standard published on October 27<sup>th</sup> 2021 indicates that voter apathy and the culture of handouts have undermined voter registration in light of forthcoming 2022 general elections.<sup>52</sup>

The mass voter registration process commenced on Monday October 4 and was set to end on Tuesday November 2.<sup>53</sup> During the ongoing mass continuous voter registration exercise towards the end of 2021, the IEBC had targeted to register a minimum of 4.5 million voters.<sup>54</sup>

However, contrary to the above expectation, one week to the closure of the registration exercise, the IEBC had only managed to register over 800, 000 voters. The above disappointing trend in voter registration has been despite concerted efforts by the political parties and their leaders opting for various tactics to woo the youth into registering as voters. On the other hand, the IEBC has also raised complaints of budgetary constraints hence the inability to extend the mass voter registration process. The IEBC had only been allocated Sh 1.2 billion contrary to the Sh 4 billion that the Commission had requested to undertake the mass registration process.<sup>55</sup>

However, a court order was issued to the IEBC directing the Commission to extend the period of the mass voter registration, which order the Commission obeyed to extend the voter

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<sup>52</sup> Samson Wire, "Apathy and culture of handouts affect voter registration" *The Standard* (October 27<sup>th</sup> 2021).

<sup>53</sup> Africanews, "Kenyan voters shun voter registration exercise ahead of 2022 polls" *Africanews* (October 26<sup>th</sup> 2021).

<sup>54</sup> Samson Wire, "Apathy and culture of handouts affect voter registration" *The Standard* (October 27<sup>th</sup> 2021).

<sup>55</sup> Bonface Otieno, "IEBC now extends mass voter registration" *Business Daily* (November 3<sup>rd</sup> 2021).

registration process into earlier days of November. Despite the extension of the deadline, voter registration still turned out to be low. The IEBC has only registered 1, 421, 710 voters against its target of between 4.5 to 6 million voters.<sup>56</sup> Essentially therefore, the above analysis indicates that indeed voter registration is a major hindrance to the attainment of an efficient electoral system in Kenya.

### **4.3 Limited Diaspora Voting in Kenya**

Closely linked to the low voter registration is the growing concern of recognition and facilitation of diaspora voting in Kenya. The basis of the grant of voting rights to Kenyan citizens living abroad is premised on the Constitution. As indicated above, Article 38 of the Constitution of Kenya recognizes the right of every person to take part in the political affairs in Kenya, including the right to vote.<sup>57</sup> Moreover, under Article 83 of the Constitution of Kenya, 2010, registration of a citizen of Kenya as a voter is not pegged on whether one is Kenyan a resident or not.<sup>58</sup> Consequently, Kenyan citizens living abroad who have attained the age of 18 years are entitled to be registered as voters and subsequently take part in elections either as candidates or voters, or both.

In 2010, voting right was formally extended to an estimate of 3 million Kenyan citizens who lived abroad.<sup>59</sup> This strategy was to ensure the implementation of every Kenyan citizen's political right as enshrined under Article 38 as read along with Article 81 of the Constitution.<sup>60</sup> However, a study by Wellman and Whitaker indicate that despite the above guarantee, only less than 3, 000 diaspora voters took part in the 2013 and 2017 presidential elections.<sup>61</sup> Some

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<sup>56</sup> Allan Mungai, "Riddle of Mt Kenya's low voter turnout" *The Standard* (November 5<sup>th</sup> 2021).

<sup>57</sup> Constitution of Kenya, 2010, Article 38.

<sup>58</sup> *Ibid*, Article 83.

<sup>59</sup> Elizabeth Iams Wellman and Beth Elise Whitaker, 'Diaspora Voting in Kenya: A Promise Denied' (2021) 120(479) *African Affairs* 199.

<sup>60</sup> *Ibid*, Article 81.

<sup>61</sup> Elizabeth Iams Wellman and Beth Elise Whitaker, 'Diaspora Voting in Kenya: A Promise Denied' (2021) 120(479) *African Affairs* 199.



of the reasons attributed to the above trend according to Wellman and Whitaker are rooted in low political willingness to facilitate diaspora voting as well as budgetary constraints on the part of the IEBC in implementing the programme. Besides, the IEBC has also raised concerns with the uncertainty in the number of diaspora voters. The totality of the above translates in impaired realization of the political rights of Kenyan citizens living abroad.

#### **4.4 Electoral Violence**

The period before, during and aftermath of the August 8, 2017 general elections was marred by heightened violations of human rights, characterised by brutal police beatings and unlawful killings.<sup>62</sup> According to the Human Rights Watch, many people were killed and several others badly injured in what has been described as brutal crackdown on protestors. Prior to the August 8, 2017, party primaries across the country were associated with varying levels of violence due to contested outcomes as majority of the losing candidates and their supporters levelled allegations of electoral malpractices such as voter buying, voter intimidation and rigging, among others.

However, the incidences of violence arose soon after the IEBC declared the presidential results.<sup>63</sup> The presidential results were contested with supporters staging mild protests especially from the Western parts of Kenya, as well as within the Nairobi region. The events that followed were the use of excessive force by the police to quell down rising political tensions. In the area around Kisumu and Siaya, the Independent Police Oversight Authority (IPOA) reported at least 12 killings by the police, which included the killing of innocent children such as the infamous killing of six-month old Samantha Pendo. Aside from the 2017 general elections, recent by elections in various regions of the country have also been

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<sup>62</sup> Judith Kimani, 'Election violence in Kenya' (2018) 7(1) The Siege Institute Journal of Applied Ethics 1.

<sup>63</sup> Semra Sevi, Antoine Yoshinaka and Andre Blais, 'Legislative party switching and the changing nature of the Canadian party system, 1867-2015' (2018) 51(3) Canadian Journal of Political Science 665.

characterised by violence and different chaos. While the levels of violence during election period have to greater extent declined compared to that witnessed during the 2007/2008 post-election violence, tension is growing in light of the forthcoming 2022 general elections. This is partly attributed to heated ethnicity and instigation of the youth by the political class that threatens the breach of peace.

#### **4.5 Expensive Cost of Elections**

The supposition by critics of democracy that elections are expensive is proving to be a reality in Kenya. Kenyan elections are termed as the most expensive elections in the world. During the 2013 general elections, the IEBC was granted Sh 36 billion to undertake the elections. By estimate, the election cost as at 2013 was at Sh 2500 per voter, wherein the number of registered voters was about 14 million. However, the expenditure by the IEBC dramatically increased during the 2017 general elections, with the National Treasury allocating Sh 49.9 billion. This was reported to be amongst the most expensive elections in the world, with some studies ranking it at second globally. The above cost of election is to be contrasted with other countries. A succinct example is the case of India. During the 2014 general elections in India, the country spent Sh 65.5 billion to undertake elections with more than 800 million voters. In the forthcoming 2022 general elections, the IEBC has declared that it will need Sh 40.9 billion to carry out the elections, a budget that is nonetheless inordinately expensive.

Further, recent studies also indicate that the cost of running for political seats in Kenya has become unnecessarily expensive. In this regard, it has become the norm in Kenya that the more a candidate spends during campaigns, the more likely that they are to win elections. For instance, to run for the seat of the MCA, it is estimated that one need to part with an average of 3.1 million, to run for the seat of a MP, a candidate requires about 18.2 million. By implication, elections in Kenya are proving to be only a preserve of the rich. Moreover, other study findings indicate that election costs are disproportionately burdensome on female

aspirant who have to spent more compared to the male political aspirants. This also implies that the elections costs have a gendered perspective.

One way or another, the cost of elections in Kenya needs to be cut. Noteworthy, certain policy and legislative measures have been adopted to address the unjustifiably higher costs of elections in Kenya. For instance, in 2011, the Political Parties Act sought to among others, provide for the funding of the political parties. Later in 2013, Parliament passed the Campaign Financing Act to regulate expenditures during the period of elections. More recently, the IEBC released 2022 election expenditure limits to be adhered to by candidates and political parties. For instance, the spending limit for a presidential candidate is placed at about Sh 4.4 billion. However, the IEBC revoked the limitation of elections expenditure following opposition from the lawmakers regarding capping of expenditures.<sup>64</sup> Therefore, the challenge of expensive elections in Kenya is expected to thrive during the 2022 general elections.

#### **4.6 Other Challenges**

On the other hand, the Kenyan electoral system is also characterized with low voter turnout that may be attributed to low civic education. Despite the IEBC spending more funds on voter education and exhorting the voters to turn out, the statistics are not at the desired level. In the 2013 general elections for instance, the voter turnout was at 85.91%. In 2017, the voter turnout dropped to about 79% with counties such as Kisumu witnessing a drop in voter turnout from 90% in 2013 to 70% in 2017 elections. Moreover, during the repeat poll in the 2017 presidential elections, voter turnout dropped to 34% owing to boycott. Further, the introduction of the ICT in voter registration and transmission of election results have also been met with certain challenges such as technology failure and susceptible to fraud. The totality of the above aspects

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<sup>64</sup> Moses Nyamori, "IEBC revokes election campaign spending limits" *The Standard* (October 11<sup>th</sup> 2021).

constitutes drawbacks to the Kenyan electoral system and hampers complete democratization of the country.

### **5.0 Comparative Study: Best Practices Kenya can Borrow from Canada, South Africa, UK, and USA to enhance the Efficiency of the Electoral System**

This section of the paper provides discussion on the lessons Kenyan can learn from Canada, South Africa, UK, and the US to enhance its electoral systems and laws. As a matter of background, the Canadian system of government adopts the Parliamentary System that is akin to that in the United Kingdom.<sup>65</sup> Moreover, Canada also uses the ‘first-past-the-post’ electoral system with the implication that the candidate with the highest number of votes wins the election to the House of Commons. In this regard parties with the highest number of seats proceeds to constitute the government as the leader becomes the Prime Minister. In Canada, every citizen who has attained the age of 18 has the right to be registered as a voter and can run for elective seat and also vote. The above right of every adult citizen to take part in the political system is founded under the Canadian Charter of Rights and Freedoms. More precisely, section 3 of the Charter reads thus;

*“Every citizen of Canada has the right to vote in an election of the members of the Houses of Commons or of a legislative assembly and to be qualified for membership therein.”<sup>66</sup>*

The implication of the recognition of the right is that it can be constitutionally claimed and enforced in Courts. More fundamentally, the electoral system in Canada is governed under the Canada Elections Act. Further elections in Canada are undertaken by the Office of the Chief Electoral Officer, commonly referred to as the Elections Canada. The mandate of the Office of

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<sup>65</sup> Semra Sevi, Antoine Yoshinaka and Andre Blais, ‘Legislative party switching and the changing nature of the Canadian party system, 1867-2015’ (2018) 51(3) Canadian Journal of Political Science 665.

<sup>66</sup> Canadian Charter of Rights and Freedoms, s3.

the Chief Electoral Officer is to provide independent administration of Canadian federal elections and referendums.

On the other hand, South Africa is used for comparative study considering the level of democratic development in the country.<sup>67</sup> The Constitution of the Republic of South Africa enshrines the right of every adult person to take part in the political affairs of the country based on universal adult suffrage. The right is to be fully enjoyed by every person on a premise of equality and non-discrimination. Moreover, elections in South Africa are managed by independent non-partisan body, the Electoral Commission of South Africa. Based on the practice of democracy and the electoral systems in Canada, South Africa, UK and the US, the paper subsequently derives key recommendations that Kenya and other countries can borrow to enhance the efficiency of the Kenyan electoral system.

The United States of America on the other hand has been described as amongst the leading proponents of democracy across the world. This is backed by the fact that the US got its independence in 1776 and has over the decades reinforced its democratic state. In the US, all candidates save for the president and vice president are directly elected through popular vote. On the other hand, election to the offices of the president and vice president are undertaken through electoral colleges in which a candidate needs a minimum of 270 electoral colleges to win presidential election. The US electoral system has over the years been termed by scholars as being efficient to a greater extent.

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<sup>67</sup> Busari Dauda Aderemi and Itumleng Meko, 'Preventing and managing electoral violence as a threat to democracy in South Africa' (2017) 29(2-3) *The Anthropologist* 192.

## 5.1 Efficient Election Dispute Resolution

The conduct of elections in most African countries, without the exception of Kenya is marred with electoral flaws and irregularities, some of which vitiates the integrity of the process.<sup>68</sup> In light of this, election disputes are always inherent, ranging from the electoral aspects of registration of political parties, registration of voters, nomination of candidates and the final voting.<sup>69</sup> This is against the backdrop that election outcomes are highly contested, considering the high interests at stake. Thus, in highly contested presidential election, disputes may extenuate into pernicious conflicts, such as the 2007 post-election violence (PEV) in Kenya.

Besides strengthening electoral management bodies (EMBs) such as the Independent Electoral and Boundaries Commission (IEBC), another indispensable imperative in guaranteeing the integrity of electoral outcomes in light of the inherent disputes is establishing efficient election dispute resolution (EDR) framework.<sup>70</sup> The African Charter on Democracy, Elections and Governance under Article 17 urges State Parties to go out and place national mechanisms for addressing election disputes.<sup>71</sup> Indeed following the 2007/2008 PEV, the Independent Review Commission (IREC) alongside the Commission of Inquiry into Post-Election Violence (CIPEV) made proposals that concise and workable EDR framework was at the very heart of addressing election disputes in Kenya<sup>72</sup>

Countries such as Canada, South Africa, UK, and the US have put in place efficient election disputes resolutions. In South Africa for instance, the Electoral Commission of South Africa

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<sup>68</sup> Henrik Angerbrandt, 'Deadly elections: post-election violence in Nigeria' (2018) 56 (1)The Journal of Modern African Studies 143.

<sup>69</sup> J. B. Ojwang, 'Election Disputes and the Judicial Process: Emerging Lessons' -Kenya Law (June 15, 2013). Available online at < <http://kenyalaw.org/kenyalawblog/election-disputes-and-the-judicial-process-emerging-lessons/>> Accessed 25/12/2021.

<sup>70</sup> O'Brien Kaaba, 'The challenges of adjudicating presidential election disputes in domestic courts in Africa' (2015) 15 African Human Rights Law Journal 329.

<sup>71</sup> See African Charter on Democracy, Election and Governance, 2007, Art. 17.

<sup>72</sup> See Charles O Oyaya and Nana K Poku, *The making of the constitution of Kenya: a century of struggle and the future of constitutionalism* (Routledge, 2018).

has put in place efficient, fair and timely framework of resolving election disputes. Moreover, the Constitutional Courts of South Africa have been determined to purposively interpret the Constitution and the electoral laws to enhance the realization of democracy. In the US, the candidates have strong faith in the court system in resolving any election disputes. This is linked to the proper training of judicial officers coupled with an outstanding culture of judicial independence over the years. For instance, during the disputed 2020 US presidential elections, the contestants resorted to the Supreme Court that effectively resolved the disputes.

The existing legal framework on EDR should be revised and amended to reflect the constitutional aspirations. Precisely, the Kenya's Elections Act No 24 of 2011, as well as the Election Petition Rules should concisely outline how courts are to exercise their jurisdiction in respect of election petitions. Such amendment should provide for how appeals are to lie to the superior courts, particularly the Supreme Court. Moreover, the Rules should address the lacuna regarding interlocutory appeals and stay of proceedings in the determination of election petitions.

## **5.2 Strengthening Independence of the IEBC**

The independence of the electoral management bodies, in the context of Kenya, is every integral in ensuring the integrity of the electoral system.<sup>73</sup> In Canada, the Office of the Chief Electoral Officer is an independent office that oversees the electoral system. The Office is free from any interference by the elite and state capture. The position is also similar in respect of the Electoral Commission of South Africa where the commissioners are not subject to any external pressure. Similarly, elections in the US are undertaken by the Federal Election Commission (FEC) that is an independent agency. Since its creation by the Congress in 1974, the Federal Election Commission enjoyed independence in undertaking its mandate. More

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<sup>73</sup> Karuti Kanyinga, and Collins Odote, 'Judicialisation of politics and Kenya's 2017 elections' (2019) 13(2) Journal of Eastern African Studies 235.

particularly, the Federal Election Commission is timely and adequately funded by the US government. Timely and adequate funding of the FEC has been pivotal in absolving the Commission from any potential interference with its independence.

In Kenya, therefore, the independence of the IEBC should be reinforced by shielding the Commission from the State, any organ of the State, and other private persons.<sup>74</sup> One of the mechanisms of strengthening the independence of the IEBC could be through ensuring adequate budgetary allocation to the IEBC. This would entail adopting policy measures to ensure that the National Treasury timely allocate adequate funds to the IEBC.

### **5.3 Enhancing Civic Education**

From the study of Canada, South Africa, and the UK civic education is as well instrumental in attaining efficient electoral system. It is the citizenry who constitutes the voters and the candidates as well. In the UK, the level of civic education is higher compared to Kenya. Significant section of the UK population, akin to Canada, is aware of their civic right and obligation to take part in the political affairs of their country, particularly the duty to vote. The above trend is informed by the high level of awareness creation that the various election management bodies play in so far as educating their citizenry of their duty to take part in election is concerned. Through civic education, the people are aware of not only how to vote, but also on how to choose the candidates to vote for.<sup>75</sup> In South Africa as well, the Electoral Commission of South Africa has continuously carried out civic education amongst its citizens. In consequence, the susceptibility of the voters to engaging in election malpractices tends to be lower. Thus, the IEBC should embrace the practice of increasing educational awareness through conducting civic education in Kenya.

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<sup>74</sup> Ibid.

<sup>75</sup> Andrew J Harris, Catherine Kamindo and Peter Van der Windt, 'Electoral administration in fledgling democracies: Experimental evidence from Kenya' (2021) 83(3) *The Journal of Politics* 2.



#### **5.4 Political Goodwill**

The implementation of the electoral laws and policies all depend on the level of political goodwill in each country. The political class should be willing to implement the codes of election conduct as laid down by the electoral management bodies. In this regard, the governments must be willing to support the initiatives of the EMBs. For instance, the governments of the UK and Canada are keen on offering support to the EMBs to ensure smooth fulfilment of their mandate in overseeing the electoral system. Similar trend of political goodwill should also be fostered in Kenya. The government of Kenya should reinforce the activities of the IEBC while implementing the various laws in place.

#### **5.5 Cutting on Election Costs**

The other best practice that Kenya can borrow from the electoral systems of Canada, South Africa, UK and the USA is cutting on the cost of elections. As indicated in the preceding section of the paper, Kenyan elections are ranked as amongst the most expensive elections globally despite having few voters compared to countries such as Canada, South Africa, and UK. In the 2021 general elections in Canada, the government spent an approximate of \$ 610 million.<sup>76</sup> While the above expenditure has been the highest cost of election in Canadian history, it is however, less compared to that of Kenya taking into account the voter ratio between the two countries. Moreover, the higher cost of Canadian 2021 election has also been blamed on COVID-19. On the other hand, in the UK, the cost of elections is much lower compared to other countries such as the US. In the UK 2017 general elections, the cost of election campaign was estimated at £40 million. Part of this is attributed to the strict expenditure on campaigns imposed in the UK. Consequently, unlike in Kenya where there is no limitation on expenditure by candidates and political parties, in the UK, there is minimal incentive by candidates and

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<sup>76</sup> Nicole Bogart, "Canada's costly election: Could \$600M have been spent elsewhere?" *CTV News* (September 23<sup>rd</sup> 2021).

political parties to raise more money for campaigns. Besides, the UK has strongly outlawed voter buying, a culture that is dominant in the Kenyan electoral system.

## **6.0 Conclusion and Recommendations**

The paper sought to analyze the drawbacks that hamper the attainment of the efficiency of the electoral system in Kenya. To fulfil the obligation of the study, the paper has provided analysis of the existing literature on the discourse, the legal environment of the Kenyan electoral system, and the comparative study of Canada, South Africa and UK. According to the study findings, the Kenyan electoral system is yet to attain the desired efficiency, integrity and legitimacy. At present, the electoral system is characterized with violence, election malpractices such as bribery, intimidation of the opponents, rigging, delayed transmission of election results as well as improper resolution of election disputes.

The challenges hampering the efficiency of the Kenyan electoral system are rooted in various factors. As indicated above, the lack of full independence of the IEBC restrains the IEBC from fully realizing its mandate, improper resolution of election disputes also fuels election violence. On the other hand, the ethnicization of the electoral system also hinders equality in the political representation process. Lastly, the paper also indicates that low political goodwill has been a major hindrance in full implementation of the electoral laws.

In light of the above findings, the study makes the following recommendations from comparative study of Canada, South Africa, UK and US. First, the independence of the IEBC should be enhanced to enable it undertake its mandate effectively. Considering the practice in the UK and US, the IEBC should be allocated adequate funds in timely fashion to avoid subjecting the Commission to the mercy of the Executive. This should be implemented by adopting a policy initiative in which the National Treasury is mandated to timely allocate funds to the IEBC as a matter of right. Political stakeholders including the candidates should also

develop a culture of adhering to the directives issued by the IEBC and restrain from interfering with the operations of the institutions.

The government of Kenya, in collaboration with the IEBC should cut the cost of elections. At present, the money allocated to the IEBC is unnecessarily high. Moreover, the costs of campaigns have sharply arisen since the 2013 general elections. One of the measures of cutting elections costs is strictly regulating the money spent by candidates and political parties during elections as the case in the UK. Again, fast-tracking all key legislative and policy instruments such as Elections Finance Act are key facets in enhancing electoral efficiency, credibility et al.

It is imperative to increase voter registration. One of the measures to increase the number of citizens that register during the continuous voter registration is through allocating more funds and timeframe to the IEBC. Moreover, the IEBC should also pro-active enhance civic education and exhort the citizens to take part in the voter registration process. Also, the voter registration exercise should be extended to the Kenyan citizens living abroad.

Akin to the practice in the US, there should be integrated proper resolution of election disputes. This should be proper, timely and efficient vetting and training of judicial officers who are to handle election petitions. Such training should be geared towards enhancing a purposive interpretation of the constitutional dictates and reinforcing strict adherence to the rule of law. This will ensure that judicial officers are equipped with the requisite.

The Judiciary should adopt a jurisprudential shift from elevating procedural technicalities over access to substantive electoral justice. In case an election petition is to be dismissed on the grounds of procedural technicalities, the same should be done cautiously and should not be exalted to defeat justice. Alternatively, there should be developed coherent and harmonised jurisprudence on striking out election petitions on procedural grounds. More civic education should be undertaken to educate the citizens on their civic rights such as their obligation to participate in the political life of their country. Political good will should also be enhanced to enable full implementation of the existing laws.

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