

**Electoral justice in Kenya under the 2010 Constitution
Implementation, enforcement, reversals and reforms**

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Electoral justice in Kenya under the 2010 Constitution Implementation, enforcement, reversals and reforms

1. Problem and background to Kenya's quest for constitutional democracy through a just electoral process and governance

My overarching argument in this chapter is that since the promulgation of the Constitution of Kenya 2010, Kenya has experienced reversals in implementation and enforcement of the Constitution generally. The process and the outcome in the 2017 General Elections provided an opportunity for Kenyans to re-ignite hope and reforms in governance and public administration.

I discuss implementation, enforcement, reversals and reforms in the quest for constitutional democracy in Kenya in the context of at least three key themes: First, presidential electoral justice, and the conduct of free, fair, accurate, verifiable, accountable and transparent general elections. Second, significance of democratic political party nomination and governance. Third, the quest for tribal equity, integrity and general constitutionality or legality in electoral administration and governance.

The Constitution of Kenya 2010 is transformative and a progressive legal instrument that if fully implemented, it can fulfil Kenya's aspirations for democratic governance. If fully implemented, Kenya can achieve its political and socio-economic aspirations. I have argued in most of my publications that the search or quest for a new constitutional dispensation in Kenya seeks to rationalize and secure equity regarding the role of the state in the economy and particularly to address the problem of primitive accumulation by state or political elite.

Moreover the quest also seeks to end or reduce authoritarianism and secure liberties through the rule of law, human rights, social justice and constitutional democracy. Briefly, the search for a new constitutional dispensation in Kenya has been the quest for economic, political and social justice, equity and egalitarianism.¹

The Constitution of Kenya 2010 was written and adopted to provide solutions to the challenges Kenyans have experienced since independence, and to address future constitutional aspirations or commitments.

¹ See Ben Sihanya (forthcoming 2017) *Constitutional Democracy in Kenya and Africa Vol. 2: Presidency, Bureaucracy and Administrative Justice in Kenya*; Revised Teaching Notes on Constitutional Law and Comparative Constitutional Law by Ben Sihanya 2004-2017, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya; Ben Sihanya (2017) "Introduction to Constitutional Law in Kenya," Class 2 Teaching Notes for LLB I Constitutional Process, University of Nairobi Law School, (2004-2017), Innovative Lawyering & Sihanya Mentoring, Nairobi & Siaya, Kenya.

Why focus on elections? First, because it is one of the three cornerstones of sovereignty and constitutional democracy. Second, because elections provide an opportunity to fill the following important offices in governance and public administration: One (1) President, One (1) deputy President, 47 County Governors, 47 Senators, 47 County Women representatives of the National Assembly, thousands of Members of County Assembly (MCA).²

Third, elections provide an opportunity to debate and decide on how Kenyans are to be governed. Fourth, free and fair elections provide a basis for good governance and constitutional democracy. The President, Governor, Senators, Members of the National Assembly (MPs), members of the county assemblies (MCAs) and all are made aware that they are chosen to lead and follow the law or else they will be recalled, voted out next time, imprisoned or disqualified from holding any public office. Certainty of assuming office and corrupted elections have created a sense of entitlement and corrupted most governance institutions. They have become non-accountable. Elections have raised anxiety and tensions as some incumbents and opponents use any means to retain or acquire power in a context where the Independent Electoral and Boundaries Commission (IEBC) is largely non-compliant, incompetent, partisan and lawless.

2. Kenya's emerging electoral jurisprudence

The emerging electoral jurisprudence in Kenya especially on presidential and gubernatorial election petitions (2013-2017) showed lack of fidelity by the Supreme Court, and some Court of Appeal as well as some High Court benches, to the progressive electoral regime under the Constitution of Kenya 2010 and the relevant statutes. Remarkably, some High Court and Court of Appeal judges exhibited remarkable judicial independence, insight and integrity in electoral matters.

Kenya's electoral code consists of the Constitution of Kenya 2010; the relevant statutes; regulations and rules; policy instruments; and operational guidelines. The following list captures the extant electoral code and proposed instruments. The instruments are in the order of their relevance with regards to the electoral process or cycle.

Acts on electoral justice

1. Political Parties Act, 2011, Cap 7B, Revised Edition 2012 [2011] (Amended 2017).
2. Political Parties (Amendment) Act, No. 2 of 2016 (Kenya Gazette Suppl. No. 112)7/7/16
3. Political Parties (Amendment) Act, No. 14 of 2016 (Kenya Gazette Suppl. No. 80) 20/5/16
4. Political Parties (Amendment) Bill No. 2 of 2016 (Kenya Gazette Suppl. No. 2) 5/12/216
5. Political Parties Act, 2017, Cap 7A Revised Edition 2010 [2007] (Repealed and replaced)
6. Independent Electoral and Boundaries Commission Act, No. 9 of 2011 (Amended 2017).
7. Elections Act, No. 24 of 2011 (Revised Edition 2015 [2012]) (Amended 2017).
8. Election Laws (Amendment) Act No. 1 of 2017 (Kenya Gazette Suppl. No. 4) 16/1/17
9. Election Laws (Amendment) Act No. 36 of 2016 (Kenya Gazette Suppl. No. 157) 6/1/17
10. Election Offences Act, No. 37 of 2016
11. Publication of Electoral Opinion Polls Act, No. 39 of 2012

² Article 136 provides for the Election of the President; Article 180 on the Election of Governors; Article 97(1)(b) and 98 (1)(a); Article 89(1) for Members of the National Assembly.

12. Election Campaign Financing Act, No. 42 of 2013 (Revised Ed. 2016 [2012] (Suspended to post 2017 General Elections).

Regulations on electoral justice

1. Elections (Technology) Regulations, 2017 (Kenya Gazette Supplement No. 61) 21/4/2017
2. Elections (Party Primaries and Party Lists) Regulations, 2017 (Kenya Gazette Supplement No. 62) 21/4/2017
3. Elections (Voter Education) Regulations, 2017 (Kenya Gazette Supplement No. 63) 21/4/2017
4. Elections (General) (Amendment) Regulations, 2017 (Kenya Gazette Supplement No. 64) 21/4/2017
5. Elections (Registration of Voters) Regulations, 2012
6. Elections (Voter Education) Regulations, 2012 (Amended 2017)
7. Elections (General) Regulations, 2012 (Amended 2017)
8. Rules of Procedure on Settlement of Disputes, 2012
9. Elections (Parliamentary and County) Petition Rules, 2013 (Revoked and replaced)
10. Elections (Parliamentary and County) Petition Rules, 2013.

Policies on electoral justice

1. IEBC's Call for Public Input on Proposed Elections ICT Regulations, October 26, 2017.

African or Transnational Instruments

1. African Charter on Democracy, Elections and Governance, 2007 (Ratified 2012)
2. Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl. 5 (XXXVI)

The following two are crucial in appreciating and implementing Kenya's electoral code:

Emerging case law or jurisprudence;

Emerging administrative and quasi-judicial decisions.³

Kenya's electoral justice has been compromised at the altar of political expediency, especially tribal MIBSA: manipulation, intimidation, bribery, stealing of votes at the stage of counting, polling and even scrutinising, as well as threatened or actual arson, assault and assassination.⁴ Presidential electoral injustices are part of tribal domination or hegemony, or what Prof ES Atieno Odhiambo has called "ethnic-based hegemonic enterprises."⁵

³ Some of the relevant, if not controversial, decisions include those regarding electoral matters by the Independent Electoral and Boundaries Commission (IEBC) under the IEBC Act, the Ethics and Anti-Corruption Commission (EACC) under the EACC Act; Public Procurement Advisory Review Board (PPARB) under the Public Procurement and Asset Disposal (PPAD) Act, 2015; and the Commission of Administration of Justice (CAJ) under the CAJ Act.

⁴ Cf Gabrielle Lynch (2015) "So, why aren't we putting our house in order way ahead of 2017 elections?" *Saturday Nation*, 2/12015, at <http://www.nation.co.ke/oped/Opinion/General-Election-2017-IEBC-Polls/-/440808/2576818/-/makhmjz/-/index.html> (accessed 13/3/2015).

⁵ See ES Atieno Odhiambo (2002) "Hegemonic enterprises and instrumentalities of survival: Ethnicity and democracy in Kenya," 61, *African Studies Review* 223- 249; E.S. Atieno Odhiambo (2004) "Hegemonic enterprises and instrumentalities of survival: Ethnicity and democracy in Kenya," in Bruce Berman, Dickson Eyoh & Will

The promulgation of the Constitution of Kenya on 27 August 2010 was a turning point for Kenya's electoral and general governance system. The Constitution embodies rules, principles and values or norms that form the basis of representation, participation and governing Kenya. It also incorporates international, regional and foreign or comparative laws which Kenya has agreed to or which are part of or "general rules of international law" or state practice (Article 2 (5) and (6)).⁶ The Constitution is the basic and supreme law and any law that is inconsistent with the Constitution is void to the extent of the inconsistency (Article 2(4)). The principle of constitutionality is embodied in the numerous provisions of the Constitution that address substantive, procedural and jurisdictional matters. Acts that are not consistent with the Constitution are therefore *ultra vires*, null and void.

The rules, principles and values regarding electoral process and justice are enacted in Chapter Seven of the Constitution.⁷ These relate to three core areas as follows: free fair, transparent, accurate and verifiable elections; fair representation; and freedom of citizens to exercise their political rights under Article 38.⁸ The rules, principles and values embodied in the Constitution are the normative standards which seek to secure constitutional democracy, the rule of law, human rights and good governance.⁹

The rules, principles and values that relate to the electoral process including alternative dispute resolution (ADR) mechanisms and adjudication. They are captured in the Preamble as well as in the following provisions, among others: Article 10 on national values and principles of governance; Article 38 on freedom of political choice; Article 47 on the right to fair administrative action;¹⁰ Article 48 on the right of access to justice; Article 50 on the right to fair hearing; Articles 73-80 of Chapter Six on leadership and integrity; and Articles 81-92 on representation of the people (Chapter Seven) are particularly important for progressive electoral jurisprudence.

The Constitution of Kenya 2010 is a transformative and progressive constitutional text and is a good basis for electoral justice.¹¹ The Constitution and the relevant electoral laws are designed, intended or supposed to ensure good governance and constitutional democracy through elections.

Kymlicka (eds) *Ethnicity & Democracy in Africa*, James Currey, Oxford, 167-182.

⁶ These include: UN Charter 1945, Universal Declaration of Human Rights (UDHR) 1948, International Covenant on Civil and Political Rights (ICCPR) 1966, International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, Constitutive Act of the African Union 2000, African Commission on Human and Peoples' Rights (ACHPR) 1981(Banjul Charter). See Dr Nana Busia (2017) "Incumbents who rig polls, cling to power face legal and economic sanctions from the African Union," *The Star*, Nairobi, Monday 17/5/2017, at 20.

⁷ But also Art. 10 (national values and principles of governance); Chapter Four (the Bill of Rights, including Art 38 on political rights); and on Chapter 6 (on leadership and integrity).

⁸ Article 38 is on freedom of political choice and participation.

⁹ Ben Sihanya (forthcoming 2017) *Constitutional Democracy in Kenya and Africa Vol. 2: Presidency, Bureaucracy and Administrative Justice in Kenya*, Revised Teaching Notes on Constitutional Law and Comparative Constitutional Law by Ben Sihanya 2004-2017, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

¹⁰ Article 47 has been elaborated in the Fair Administrative Action Act, and are the basis of judicial review and constitutional petitions. their significance in electoral process is discussed in *National Super Alliance v. Independent Electoral and Boundaries Commission*, JR No. 378 of 2017.

¹¹ Cf Yash Pal Ghai & Jill Cottrell Ghai (2011) *Kenya's Constitution: An Instrument for Change*, Katiba Institute, Nairobi.

Challenges in Kenya lie in implementation of the law. The Independent Electoral and Boundaries Commission (IEBC) and the courts (especially the Supreme Court) have not complied with the standards in ensuring that the constitutional rules, principles and values of a fair electoral process are achieved. What is Kenya's electoral code?

Fidelity to the constitutional text through practice or the observance of the rule of law is important in the quest for good governance.

Under Article 38, 81 and 86 of the Constitution of Kenya, all elections should be:

Regular..

1. by secret ballot;
2. free from violence,¹² intimidation, improper influence or corruption;
3. conducted by an independent body;
4. transparent; and
5. administered in an impartial, neutral, efficient, accurate and accountable manner.

The IEBC Act, 2011 gives effect to Article 88 of the Constitution which establishes the Independent Electoral and Boundaries Commission. IEBC, Constitutional Commissions and independent offices and the arms of government¹³ in Kenya are expected to contribute to the following three key objectives: First, to protect the sovereignty of the people. Second, to secure the observance by all state organs of democratic values and principles. Third, to promote constitutionalism.¹⁴ As I have discussed in chapter 8 of my book,¹⁵ IEBC largely failed to deliver on all three generic and the specific mandate and objectives.

3. Elections as part of sovereignty and constitutional government in Kenya

According to leading expert on African political systems, Prof Joel D. Barkan, "Elections are but one event in the long process of establishing a political culture and institutions supportive of

¹² The 2007 General Elections were marred by pre and post-election violence (PEV). Previous pre electoral and post electoral violence have been a major component of electoral injustice to retain or capture power since President Jomo Kenyatta invented and used them to ensure his presidential election in 1969. In the 2013 General Elections, the state elite affiliated to outgoing President Mwai Kibaki and presidential candidate Uhuru Kenyatta and the media introduced a peace crusade and (self) censorship that encouraged electoral irregularities and fraud.

¹³ These include ministries, departments, and agencies (MDAs). See also Ben Sihanya (forthcoming 2017) *Constitutional Democracy in Kenya and Africa, Vol 1: Tribalism, Elections, Governance, Human Rights, the Rule of Law and Due Process*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya, *ibid* Chapter 8 on "Constitutional Commissions and Independent Offices in Kenya" Experiences, Challenges and Lessons".

¹⁴ Cf Elisha Z. Ongoya and Willis Otieno (2012) *Handbook of Kenya's Electoral Laws and Systems*, Electoral Institute for Sustainable Democracy in Africa (EISA), at <http://www.ku.ac.ke/actil/wp-content/uploads/2015/07/KENYAN-ELECTION-LAWS1.pdf> (accessed 25/7/2016).

¹⁵ Ben Sihanya (forthcoming 2017) *Constitutional Democracy in Kenya and Africa, Vol: Tribalism, Elections, Governance, Human Rights, the Rule of Law and Due Process*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

democratic rule.”¹⁶ As stated earlier, elections are part of the three pronged typology on popular sovereignty under a constitutional government.¹⁷

The first component of popular sovereignty is the founding of the state or formation, constitution or construction of the polity through a constitution making process. This may be through a referendum (Article 255) or a constituent assembly.¹⁸ As already indicted the constituent power also includes constitutional amendment and review. This may be through a referendum, constituent assembly, or Parliament.

Either way, the people participate through directly casting a vote or through their representatives. Kenya went through this in the 1960-1963 Lancaster House Conference and in the 1997-2005 as well as 2008-2010 constitutional review process that culminated in the referendum on 4 August 2010.

Second popular sovereignty is exercised through the constitution of government especially through the election of the President, the Governor, and other executive officials, as well as the members of the National Assembly, Senate and County Assemblies.¹⁹

The third component of popular sovereignty is constant or external vigilance through monitoring and evaluation of governmental process. This includes recalling of the rulers or governors. These include recalling of MPs or Senators (Article 104; Part IV of the Elections Act No. 24 2011) or impeachment of Governors (section 33 County Government Act, 2012) or Members of the County Assembly (section 27 County Government Act, 2012), President and Deputy President (Articles 131-151).

Elections are best understood within the broader framework of the process of constitutional democracy the rule of law, human rights and governance even if they happen on a five year cycle.

4. Typology of elections in Kenya under the 2010 Constitution

The main types of elections under the 2010 Constitution are presidential, parliamentary and county. This replaces the old typology of presidential, parliamentary and local government elections under the 1969 Constitution repealed National Assembly and Presidential Election (NAPE) Act, Cap 7 and the repealed Local Government Act, Cap 265.²⁰

4.1 Presidential elections in Kenya

¹⁶ Joel D. Barkan (1993) “Kenya: Lessons from a flawed election,” Vol 4, No. 3, *Journal of Democracy* 85-99.

¹⁷ See Ben Sihanya (forthcoming 2017) *Constitutional Democracy in Kenya and Africa Vol: Tribalism, Elections, Governance, Human Rights, the Rule of Law and Due Process, ibid.*

¹⁸ See Ben Sihanya *Constitutional Democracy in Kenya and Africa Vol 2, op.cit.*

¹⁹ Nwabueze (1974) *Presidentialism in Commonwealth Africa, op. cit.*; *Rev Timothy Njoya & 6 Others v. Attorney General & 3 Others* (2008) 2 KLR; *Patrick Onyango Ouma & 12 Others v. Attorney-General & 2 Others* [2005] eKLR (The Referendum case).

²⁰ Under the 1969 constitutional regime, a general election entailed election of the President who appointed the Vice President, Member of Parliament and Councilors. The councilors sat in the county, city, municipal, town and other councils.

In terms of occasion, process and procedure, a presidential election may be conducted as a pure presidential election or as part of a general election (Articles 136, 138, 139, 140). A person is qualified for election as President if he or she satisfies Article 137 requirements. These include being a citizen by birth; qualifying to stand for election as a Member of Parliament (Article 99); and being nominated by a political party, or being an independent candidate.

The aspirant, candidate or would-be president must be nominated by not fewer than two thousand (2000) voters from each of a majority of the counties (that is, in at least 24 of the 47 counties).²¹ The aspirant must be nominated by a political party or may be an independent candidate. The Independent Electoral and Boundaries Commission (IEBC) issues a certificate to a person who has met the foregoing and related requirements under the Constitution, the Political Parties Act, 2011, the Elections Act, 2011 and the relevant Rules and Regulations.

In 2017, the following were cleared to vie for presidency on the platforms indicated:

- | | |
|--------------------------------|--------------------------------|
| 1. Uhuru Kenyatta (incumbent) | Jubilee Party |
| 2. Raila Odinga ²² | Orange Democratic Movement |
| 3. Cyrus Jirongo ²³ | United Democratic Party (UDP), |
| 4. Ekuru Aukot ²⁴ | Third Way Alliance |
| 5. Abduba Dida | Alliance for Real Change (ARC) |
| 6. Joseph Nyagah ²⁵ | Independent Candidate |
| 7. Michael Wainaina | Independent Candidate |
| 8. Japheth Kavin | Independent Candidate |

In 2013 the following were cleared by IEBC to run. They represent the parties indicated against their names:

- | | |
|---------------------------------|--|
| 1. Raila Odinga ²⁶ | Orange Democratic Movement (ODM) ²⁷ |
| 2. Uhuru Kenyatta ²⁸ | The National Alliance (TNA) ²⁹ |

²¹ In 2017, High Court ruled that independent candidates may be nominated by members of a political party.

²² Prime Minister, 2008-2013. ODM Party; National Supper Alliance (NASA) Coalition Presidential Candidate for 2017 General Elections. The NASA Co-Principals are Raila Odinga, Kalonzo Musyoka (running mate 2017) (Wiper Democratic Party), Moses Wetangula (Ford Kenya), Musalia Mudavadi (Amani National Congress) (ANC) and Isaac Ruto (Chama Cha Mashinani)(CCM).

²³ Former Minister for Rural Development; Former leader, Youth for KANU 92 (YK92).

²⁴ Former Chair, Committee of Experts (CoE) on constitutional review, Kenya.

²⁵ Former Minister of Cooperative Development and Marketting.

²⁶ Outgoing Prime Minister in 2013.

²⁷ ODM was part of the Coalition for Reform and Democracy (CORD) that included Kalonzo Musyoka's Wiper Democratic Party (WDP) and Moses Wetangula's Ford Kenya.

²⁸ Outgoing Deputy Prime Minister (DPM). Formerly DPM and Finance Minister.

²⁹ TNA and William Ruto's United Republican Party (URP) were the key members of the Jubilee Alliance. They concluded a merger that was characterised by manipulation and intimidation of the legal process and officials. For instance, Kenyatta was still a TNA member and was promoting another party (Jubilee Party). There were echoes of the reintroduction of a *de facto* (factually existing) and even *de jure* (legally sanctioned) single party state controlled by Kenyatta or the Kikuyu as happened under Jomo Kenyatta in 1964 and 1969 when Kenyatta I intimidated the Kenya African Democratic Union (KADU) to join his Kenya African National Union (KANU), or when he banned

- | | |
|-----------------------------------|--|
| 3. Musalia Mudavadi ³⁰ | United Democratic Forum (UDF) |
| 4. Martha Karua ³¹ | National Alliance Rainbow Coalition (NARC) |
| 5. Peter Kenneth ³² | Kenya National Congress (KNC) |
| 6. James Ole Kiyiapi | Restore and Rebuild Kenya (RBK) |

The threshold for a presidential election is outlined under Article 138 of the Constitution 2010. A candidate who receives more than half of all the votes cast in the election (50% + 1)³³ and at least twenty-five per (25) cent of the votes cast in each of more than half (or at least 24) of the 47 counties shall be declared elected as President.³⁴

To what extent should precedent from other jurisdictions be considered in making decisions on election petitions, especially presidential elections? As indicated, International or transnational and comparative law may be binding or persuasive under Articles 2(5) and (6) and the better approach is to determine whether the foreign or transnational law is a provision in *pari materia* (on the same matter), and the political economy of the decision. Generally, the Constitution of Kenya 2010 is transformative and progressive on (presidential) elections as compared or contradicted to Nigerian, Ugandan, Seychelles and other constitutions and electoral laws cited by AG Githu Muigai as *amicus curiae*. For instance, the Attorney-General Githu Muigai and the Supreme Court relied on discredited Seychelles decisions to conclude that the threshold is 50% + 1 of the “valid votes cast,” Yet Article 138(4) of the 2010 Constitution required 50% + 1 of the “votes cast.”

Contrarily, section 5(3)(f) of the 1969 Constitution provided for “valid votes cast.”³⁵ The text and intentment or spirit of the presidential vote threshold had changed.

former Vice President Jaramogi Oginga Odinga’s Kenya People’s Union (KPU), respectively.

³⁰ Outgoing Deputy Prime Minister and Minister for Local Government; former Vice President (2002); Co-Principal in National Super Alliance (NASA) 2017.

³¹ Former MP for Gichugu and Constitutional Affairs Minister.

³² Former Gatanga MP and Assistant Minister for Finance.

³³ Some pundits erroneously refer to this rule or formula as “50 + 1 votes.” Nor is it 50 + 1% or 51%.

³⁴ The Supreme Court in *Raila Odinga v. IEBC and 3 Others* thus sought to amend this clause without citing any authoritative source. The *amicus curiae* AG Githu Muigai cited a dissent from Seychelles whose constitutional and electoral system has no precedential value. Some of the (problematic) cases in *Raila* are: *Abubakar v. Yar’Adua* [2009] All FWLR (Pt. 457) 1 SC, *Akashambatwa Lewanika & Others v. Fredrick Chiluba* [1999] 1 LRC 138; *Bush v. Gore* 531 US 98 (2000) (electoral irregularities in Florida); *Buhari v. Obasanjo* (2005) CLR 7(k) (SC), *Col. Dr. Kizza Besigye v. Museveni Yoweri Kaguta & Electoral Commission*, Election Petition No. 1 of 2006; *Jugnauth v. Ringadoo and Others* [2008] UKPC 50; *M. Narayan Rao v. G. Venkata Reddy & Another*, 1977 (AIR)(SC) 208; *Morgan and Others v. Simpson and Another* [1974] 3 All ER 722; *Ojukwu v. Obasanjo* (2004) 12 NWLR (886) 169; *United States v. Michigan* 940 F.2d 143, 164. The underlying 1999 and pre-1999 Constitution of the Federal Republic of Nigeria is not as progressive as Kenya’s 2010 and Nigeria was just graduating from a military system ... Uganda had also just graduated from a military into a no-party then multi-party system.

³⁵ See *Raila Odinga & 4 Others v. IEBC & Others* Election Petition No. 5 of 2013, per, Willy M. Mutunga, Chief Justice and President of the Supreme Court; and other Justices Philip K. Tunoi; Mohammed K. Ibrahim; Jackton B. Ojwang; Smokin C. Wanjala; Njoki S. Ndungu. The Constitution of Kenya 2010 seems to have intended that every vote should count, to enhance the legitimacy of the President.

Complying with the rules and principles and values of the electoral system and voting method under Articles 10, 38, 81, 86, 232, etc of the Constitution requires demonstrated compliance with and adherence to the rules by IEBC officials.³⁶ The electoral rules and principles include free and fair elections conducted by an independent body and administered in an impartial, non-partisan, neutral, efficient, accurate and accountable manner.³⁷ Independent, accurate and accountable are key. And article 86 stipulates that during every election, IEBC shall ensure four things. First, that whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent. Second, that the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station.³⁸ Third, that the results from the polling stations are openly and accurately collated and promptly announced by the returning officer (RO).³⁹ Fourth, that appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

With regard to presidential elections, there are four additional requirements.

1. Election in every one of the 290 constituencies⁴⁰
2. The Constituency Returning Officer has duty to tally, verify, announce and declare results.
3. Presidential election results should be the first to be announced.⁴¹
4. The presidential election results as announced by the Returning Officer are final for that constituency.⁴²

³⁶ Article 81 outlines the general principles for the electoral system.

³⁷ Articles 81 and 86 have been interpreted in *Maina Kiai, Khelef Khalifa and Tirop Kitur v. IEBC and the Attorney General*, High Court Petition No. 207 of 2016 eKLR. The lawyers for the petitioners in this case were Mr Willis Otieno, Prof Ben Sihanya and Mr Ochieng' Oginga. On appeal, NASA was joined as a correspondent and represented by Mr James Orengo SC, Mr Paul Mwangi, Mr Otiende Amollo, and Dr Adams Oloo. The *amicus curiae* were Katiba Institute represented by Mr Waigwa Wanyoike and Ms Nkonge.

³⁸ *Maina Kiai* case decision discussed below.

³⁹ *Ibid.* See *NASA v. IEBC* on appointment of returning officers (ROs). The case was settled on mutual agreement between the parties.

⁴⁰ A-G Githu Muigai curiously and unsuccessfully argued that in presidential elections, Kenya is one national constituency and that the IEBC Chair is the Returning Officer.

⁴¹ *IEBC v. Maina Kiai & 5 Others*, CA No. 105 of 2017.

⁴² Remarkably, those results must be accurate and verifiable, and based on transparent, accurate, valid and legitimate processes and forms 34 A (at polling station) and forms 34 B (at constituency level). In 2017, IEBC Chair Wafula Chebukati and CEO Ezra Chiloba mechanically cited the *Maina Kiai* decision where upon we (for NASA) reminded IEBC that the release of the results at the BOMAS National Tallying Centre must comply with the foregoing. Obviously, there is need for a Chair, CEO and commissioners who appreciate electoral justice through implementation of presidential electoral law, far administrative action (administrative justice) and general constitutional democracy. Once a presidential candidate has lodged a complaint as NASA did, it must be given a fair

The failures of the disbanded Hasan-led IEBC and the ECK were mainly due to lack of independence, especially from President Uhuru Kenyatta's Jubilee Party or Mwai Kibaki's Party of National Unity (PNU) and their tribalised Governments, respectively. The lawless operatives in the Kenyatta Government have sometimes been reprimanded based on accusations of their endeavouring to compromise or influence elections. Experts and opinion makers cautioned that the Chebukati-led IEBC should not fall victim to manipulation or intimidation by Kenyatta's Jubilee. This calls for courage, firmness and absolute commitment to the rule of law and electoral justice by IEBC. This is a case to IEBC to always comply with the constitutional, statutory and regulatory rules, principals and values or norms. Chapter Six of the Constitution, other provisions of the Constitution,⁴³ and numerous laws establish the leadership and integrity standards that all IEBC officials must meet.⁴⁴ Kenyans have been demanding that electoral injustices must stop, including corruption, ethnic partisanship, incompetence,⁴⁵ The independence and integrity of the new commissioners should be beyond reproach.

4.2 Parliamentary elections in Kenya

Parliamentary elections under the 2010 Constitution involve three elections:

- (a) Election of Senators – 47 senators (county wide senators);
- (b) Election of Members of the National Assembly (290); and
- (c) Election of women representatives (47) (county wide MPs).

The above members of Parliament are elected during a general election or a by-election (Article 101). Following the 4 March 2013 General Elections, some by-elections were held or ordered by the court following a death or successful election petition. By-elections were held following a seat being declared vacant by the Speaker of the National Assembly on the appointment of two sitting senators and one MP to the Cabinet. These were Joseph Nkaissery,⁴⁶ Charles Keter⁴⁷ and

hearing; it is not enough to allow the opponent to hijack the discussion and ask that the complainant waits to file an election petition as Jubilee did through Winnie Guchu and Fred Ngatia. And IEBC complied after buying a few hours. IEBC acknowledged there were at least 11, 000 forms 34A to be availed and verified. After a few hours, they said they had final results. No feedback nor participation of NASA. Just like in 2007. See Ben Sihanya and Dancun Okello (2010) "Mediating Kenya's Post-Election Crises: The Politics and Limits of Power Sharing Agreement," in Dr Karuti Kanyinga and Duncan Okello (eds) *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections*, Institute of Development Studies (IDS), University of Nairobi, and the Society for International Development (SID) Eastern & Central Africa, Nairobi

⁴³ These include Articles 2(1), (4), (5), (6),; 22; 23; 47; 48; 232 and 258.

⁴⁴ These standards have been elaborated in legislative and emerging case law, including the Leadership and Integrity Act, 2012, Public Officer Ethics Act, 2003 and the Public Service (Values and Principles) Act, 2015, among others.

⁴⁵ This includes sharing servers with Kenyatta's Jubilee (like The National Alliance (TNA) in 2013), and procurement irregularities..

⁴⁶ The late Gen (Rtd) Joseph Nkaissery was ODM MP for Kajiado Central. He was appointed the Cabinet Secretary for Interior and Coordination of National Government in 2014. He died "on arrival at Karen Hospital" or "after a routine check up at Karen Hospita" as reported by the presidency and the Kenyan media, respectively.

Dan Kazungu, respectively ⁴⁸

4.3 County Elections in Kenya

County government elections involve the election of 47 governors and county representatives.

(a) Gubernatorial elections under Article 180.

(b) County Assembly Representative under Article 177.

These elections were closely or hotly contested in 2017 mainly because of the actual and anticipated control of political power and socio-economic resources by the Governors and MCAs. The number of candidates were 235 and over 1 450, respectively.

5. Ethics and Integrity vs the right to contest under Article 38

Article 38(3) (c) of the Constitution of Kenya 2010 states *inter alia* that every adult citizen in Kenya has a right to be a candidate for a public office without unreasonable restrictions. Further, article 50 (2) (a) states that every accused person has the right to a fair hearing which includes the right to, *inter alia*, be presumed innocent until the contrary is proven. It is against this background that Kenya still finds it challenging to implement Chapter six (6) of the Constitution and its enabling statutes such as the Leadership and Integrity Act, Public officer Ethics Act and the Ethics and Anti-Corruption Commission Act.

The run-up to the 2017 general elections presented a heated debate on integrity issues, just like it did in 2013 when Uhuru Kenyatta and William Ruto who were then indictees at the International Criminal Court (ICC) were cleared to contest. In May 2017, the National Integrity Alliance,⁴⁹ a civil society organisations (CSOs) submitted to IEBC a list of 20 individuals whom they argued had failed to meet the test set out in Chapter Six of the Constitution on leadership and integrity.⁵⁰

⁴⁷ Mr Charles Keter was the Senator for United Republic Party (Jubilee) Kericho County. He was appointed as Cabinet Secretary for Energy and Petroleum in 2015.

⁴⁸ Dan Kazungu was (ODM) Malindi MP. ODM won the by-election which witnessed mobilisation of the military to intimidate voters so as to vote for the Jubilee candidate. Kenyatta was keen on having an MP from the Coast. See Elkana Jacob (2016) "KDF deployed to Malindi polling stations," *The Star*, Nairobi, 7/3/2016 at http://www.the-star.co.ke/news/2016/03/07/video-kdf-deployed-to-malindi-polling-stations_c1308379 (Accessed 20/7/17). By-elections also included Homa Bay County (Senatorial seat won by Moses Kajwang in a by-election following the death of his brother Gerald Otieno Kajwang); Gatundu South (Moses Kuria declared the elected MP following a by-election where other candidates were removed from the race by TNA, the popular party in the region); Kajiado by-elections in 16 March 2015 following the appointment of Hon Joseph Nkaissery as Cabinet Secretary for Interior & Coordination of National Government.

⁴⁹ Entailing Transparency International, Society for International Development, Mzalendo Trust, and Inuka Trust. See Standard Team (2017) IEBC on the spot as 20 aspirants are blacklisted by civil society, *The Standard*, Nairobi, 25/5/2017, at <https://www.standardmedia.co.ke/article/2001241018/iebc-on-the-spot-as-20-aspirants-are-blacklisted-by-civil-society> (accessed 28/6/2017).

⁵⁰ The 20 were Cyprian Awiti (Homa Bay), Hassan Joho (Mombasa), Kenneth Lusaka (Bungoma), Mwangi Wa Iria (Murang'a), Alfred Mutua (Machakos), Evans Kidero (Nairobi), Okoth Obado (Migori), Anne Waiguru (Jubilee's Kirinyaga Governor nominee), Gladys Shollei (Jubilee nominee for Uasin Gishu Woman Representative), Nominated Senator Elizabeth Ongoro, Former Rongo MP Ochillo Ayacko, Nairobi Senator Mike Sonko, Laikipia North MP Mathew Lempurkel, Gatundu South MP Moses Kuria, Kapseret MP Oscar Sudi, Kilifi Governor hopeful Kazungu Kambi, Dandora MCA Stephen Kambi, Kabete MP Ferdinand Waititu, Nandi Hills MP Alfred Keter, Tiaty MP Asman Kamama

All these were cleared by IEBC. The clearance of Uhuru and Ruto in 2013 even as they faced serious criminal charges at the ICC seems to have set a bad precedent that would later cause reversals or failure in the implementation of Chapter Six.

In Uhuru Kenyatta's 2013 bid, it was not necessary that there was a conviction on a serious criminal charge. Yet Kenyatta had been indicted for crimes against humanity. Hence he should not have been approved to vie for Presidency. Some argued that there was no conviction, or that popular will should triumph. Where the integrity of an individual seeking public office is in issue, they should not be endorsed unprocedurally by the relevant institutions. Under Article 79(1) such an officer must avoid "demeaning the office the officer holds." The purpose of Chapter Six of the Constitution of Kenya 2010 as well as the Leadership and Integrity Act 2012 is to set higher standards of integrity for persons seeking to serve as State Officers.

Despite facing serious criminal charges at the ICC, Uhuru Kenyatta was easily cleared by the IEBC and other institutions to vie for presidency. The High Court in the case of *International Centre for Policy and Conflict v. Attorney General*⁵¹ challenging the eligibility of Uhuru Kenyatta and William Ruto ruled that it did not have jurisdiction to handle matters relating to the presidential election. It also found that the petitioners in the case had not exhausted other alternatives, e.g. the mandate of IEBC and other statutory bodies in dealing with the issues of eligibility and integrity before invoking the court's jurisdiction. Yet the Court was clearly wrong: the Supreme Court only has exclusive jurisdiction on "presidential election petitions;" and on matters relating to appeals from the Court of Appeal on interpretation and application of the Constitution; and matters of general public importance.⁵²

Remarkably, under the Kenyatta and his predecessors, key electoral and governance institutions routinely harassed or intimidated opposition politicians or dissenters in civil society organisations (CSOs), the Bar, and the academy. Some were locked from public office without any conviction let alone charge. Some of the institutions manipulated by Kenyatta and his predecessors in this manner include the Independent Electoral and Boundaries Commission (IEBC) (rigged elections even in the Law Society of Kenya (LSK) in 2016), Ethics and Anti-Corruption Commission (EACC) (trumped up corruption investigations), National Intelligence Service (NIS) (arbitrary surveillance), Directorate of Criminal Investigation (DCI) (arbitrary surveillance), and Kenya Revenue Authority (KRA) (spurious claims of unpaid taxes).⁵³

6. The recurrent themes on reforming and implementing a just electoral laws and system in Kenya⁵⁴

⁵¹ *International Centre for Policy and Conflict & 5 Others v. Attorney General & 5 Others* [2013] eKLR.

⁵² See Article 163 on functions and powers of the Supreme Court..

⁵³ See generally Ben Sihanya (forthcoming 2017) *Constitutional Democracy in Kenya and Africa, Vol 1: Elections, Governance, Human Rights, the Rule of Law, and Due Process in Kenya and Africa: Ben Sihanya's Essays, 1989-2016*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya, *qv*. (kindly clarify whether has been published)

There are at least seven key issues that underline the accuracy, verifiability and accountability of electoral system, method and process in Kenya.

First, there needs to be an acceptable electoral law that is enacted and implemented in time. This is related to the right of all voters to participate in the electoral process without hindrance, or any other undue influence or intimidation.

Second, the registration of voters⁵⁵ and the compilation and verification of the register of voters should meet all the constitutional and statutory standards. There have been numerous cases in courts that always seek to compel IEBC to comply with the constitutional, statutory and regulatory standards. In the case of *Gladwell Otieno v. IEBC and 2 Others*, the Petitioner, Ms Gladwell Otieno sought to compel the IEBC to open up the register of voters for public scrutiny as is required by the law.⁵⁶ The Elections Act provides that IEBC must open up the register of voters for verification by the voters for a period of thirty days. After the lapse of the thirty days of verification, the Commission shall revise the register and then publish the register online for the general public.⁵⁷

The IEBC did not stick to the timelines as prescribed by this law. Instead, the Commission directed that the register would be available upon request and at a fee of KES 20, 000.⁵⁸ This was contrary to the Elections Act as well as Access to Information Act.⁵⁹ Fourteen (14) days to the General Elections, the Commission published an incomplete National Identification Numbers.

Third, nomination processes by political parties and the nomination of candidates under IEBC should be procedural and constitutional.

Fourth, the campaign process, especially issues relating to the role of political parties in ensuring a free and fair process and the freedom to campaign for all political parties, candidates,

⁵⁴ See proposed amendments to the Constitution 2010-2017 in Sihanya (forthcoming 2017) *Constitutional Democracy in Kenya and Africa, Vol 2*, Innovative Lawyering & Sihanya Mentoring, Nairobi & Siaya, *op. cit.*.

⁵⁵ The voter registration requirements and findings must be standard, published and time-bound. See Elections (General) Regulations, 2012; and the problematic Elections (General) Regulations 2017 issued by IEBC without stakeholder and public participation on April 21, 2017.

⁵⁶ *Gladwell Otieno v. IEBC*, Petition No. 447 of 2017. See Paul O Ogemba (2017) “Activist Gladwell Otieno sues IEBC for failing to make voters’ roll public,” *Standard Digital*, Nairobi, July 19, 2017, at <https://www.standardmedia.co.ke/article/2001248240/activist-gladwell-otieno-sues-iebc-for-failing-to-make-voters-roll-public> (accessed 20/7/2017).

⁵⁷ Ss. 5 of the Election Laws (Amendment) Act, 2016.

⁵⁸ Lynet Igadwa (2017) “IEBC register Sh 20, 000 price tag questioned,” *Business Daily*, Nairobi, July 5, 2017, at <http://www.businessdailyafrica.com/news/IEBC-register-Sh20-000-price-tag-questioned/539546-4002054-fdm6p9/index.html> (Accessed 26/7/2017).

⁵⁹ Ss. 5 of the Access to Information Act states that information shall be disseminated to the public, taking into consideration the need to reach persons with disabilities, the cost, local language, the most effective method of communication in that local area, and be easily accessible and available free of charge or at a reasonable fee to cover the costs of copying and supplying them.

campaigners and observers should be guaranteed. The role of an incumbent President, Deputy President, the Executive arm of Government generally and specifically security should be checked during the general election processes to minimize interference and restrain the likely undue advantage over other candidates.

Fifth, all relevant stakeholder should play their role in securing the integrity of the ballots, electoral materials, and all electoral personnel, including poll clerks, Presiding Officers (POs), Returning Officers (ROs), Deputy Returning Officers (DROs), and agents and the accreditation and security of election observers and monitors.

Sixth, there should be a prompt, transparent, verifiable and accountable counting and tallying of votes ballots at the polling station; verifiable tallying and declaration of election results at all levels; and efficient, timely, fair and transparent disposal of pre- electoral, electoral and post-electoral disputes.⁶⁰

Seventh, there should be general accountability and openness of the electoral process to the competing parties.

We discuss these issues in the ensuing sections.

6.1 Amendments or changes to Election Laws in Kenya since 2013

There have been concerted efforts to have the above seven (7) and other parameters properly anchored in the law or implemented by relevant agencies in Kenya especially since 2013. The main actors on the reform agenda have been, Coalition for Reform and Democracy (CORD), which was succeeded by the National Supper Alliance (NASA) and some civil society organisations (CSOs). On the other hand Jubilee, IEBC and aligned politicians or civil society organisations have been keen on maintaining the *status quo* or reversing the gains. Hence the last minute amendments and intense litigation from 2016.

Since 2013, several changes to the Election Act, 2011 have been proposed or implemented. Some changes had to be effected by Parliament while others went to court. There have been problematic areas in Kenya's electoral laws especially the enabling statutes, regulations and practice hence need to improve the conduct of elections in Kenya by ensuring that the processes are properly aligned to the Constitution.

Eight key issues. First, there was the Elections (Amendment) Bill, 2015 which sought to amend Elections Act and the Political Parties Act so as to cater for obligations of the Constitution under article 81(b) on two thirds gender values, doctrine, principle, or rule.⁶¹ The Bill, inter alia, sought

⁶⁰ Cf. Muna Ndulo & Sara Lulo (2010) "Free and fair elections, violence and conflict," Vol. 51, *Harvard International Law Journal*, at http://www.harvardilj.org/articles/51_Online_Ndulo_Lulo.pdf (accessed 22/4/2013).

⁶¹ See The Institute for Social Accountability (2015) "Memorandum on the Elections Laws (Amendment) Bill, 2015," at http://www.tisa.or.ke/images/uploads/TISA_submissions- Memorandum_on_the_Election_Laws_%28Amendment%29_%28No._2%29_Bill.pdf (accessed 26/5/2017).

to compel political parties to apply the two thirds gender rule in their party nomination lists. It also sought to amend section 21(1) of the Political Parties Act to the effect that a contravention of article 81(b) of the Constitution would be a cause for deregistration of a Political Party. The Bill failed.

Second, there is the Election Laws (Amendment) Act, 2016 No. 36 of 2016. This was a result of protracted debate and clamour for the exit of Issack Hassan and other commissioners from after they had been implicated in serious electoral fraud, as well as criminal cases.⁶² The Act amended some sections of the Elections Act, Political Parties Act, Independent Electoral and Boundaries Commission Act, Supreme Court Act and Registration of Persons Act.

These amendments sought to address at least three key areas: First, the Act laid a new procedure for exit of IEBC Commissioners and the appointment of new commissioners. Second, it provided reasonable timeliness for the nomination process and resolution of election disputes. Under the Act, political parties were henceforth required to carry out their nominations at least 60 days to the elections rather than the 45 days that were allowed under the previous provision of the Elections Act. Aspirants or politicians were also compelled to join or choose parties at least 90 days to the elections.⁶³ This was to stop “party hopping” as a result of general consensus among the key political parties and formations, especially CORD/NASA and Jubilee. Third, the Act sought to change the academic or education qualifications of the candidates for the various elective positions.⁶⁴

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

Fourth, there is the Election Laws (Amendment) Act, No 1 of 2017). This legislation was unconstitutionally, illegally, irregularly, unprocedurally and controversially introduced in Parliament passed by Jubilee-affiliated MPs and Senators, with opposition legislators in Senate and National Assembly opposing it. The controversial point was the amendment to section 44 of the Elections Act 2011 through the addition of section 44A to allow IEBC to put in place a complementary mechanism for identification of voters and transmission of election results. Opposition legislators contended that the amendment did not specify instances when a

⁶² Cf Sihanya (forthcoming 2017) *Constitutional Democracy in Kenya and Africa Vol 1, op. cit*, Chapter 8 (‘Constitutional Commissions and Independent Offices in Kenya: Experiences, Challenges and Lessons’) Sihanya (--) CODEKA 1, *op. cit*

⁶³ The Act made it mandatory for parties to submit lists of their members to the IEBC at least 90 days to the date of the General Elections. While amendments may have stopped or reduced party hopping to the rival or other parties, it opened the floodgate for independent candidates. Thus, aspirants who lost or were rigged out in party nominations became independent candidates.

⁶⁴ The Bill proposes that a Member of Parliament must have a degree while a Member of the County Assembly will be required to have a post-secondary diploma for 2017 elections and a university degree for subsequent elections.

complementary system could be used. The provision was prone to abuse, for instance deliberately ignoring or subverting technology and going manual as happened in 2013 General Elections. This position was supported by the Kenya National Chamber of Commerce, the Council of Governors, Media Owners Association and other stakeholders.⁶⁵

Notably, as at July 2017, IEBC had not published regulations that would put into effect the controversial section 44A and it was not clear how IEBC was going to apply or use a complementary system. This prompted the litigation in *National Super Alliance v. IEBC*.⁶⁶

In *National Super Alliance v. Independent Electoral and Boundaries Commission*,⁶⁷ the petitioners argued that IEBC had failed to establish the Complementary to electronic voter identification (EVID) and electronic results transmission system (ERTS) as was contemplated under Sec 44A of the Election Laws (Amendment) Act, 2017. The petitioners prayers were three pronged. First, `what is the complementary mechanism provided for under s. 44A of the Elections Act.⁶⁸ The argument was that the complimentary mechanism must be electronic and not mechanical; that one technology can complement another; that is not to an alternative by complementary. And that the mechanism must be read in the context of section 39, 44 and 44A. Second, had IEBC established that mechanism sixty (60) days to the General Elections on 8/8/2017 or within a reasonable time? That regulations 69 and 83 of the Elections (General) Regulations 2012 as amended in April 2017 provided for a manual mechanism for voter identification and election results transmission. And that these read like the mainstream mechanism or if they were the complementary mechanism, then what was the mainstream mechanism for voter identification and results transmission, respectively? And had the IEBC and Parliament ensured public participation under Arts 10, 118, among others of the Constitution? Third, that the court should grant an appropriate remedy under Arts 23, 47 of the Constitution including compelling IEBC to resort to the exclusive use of electronic means of voter identification and result transmission. The respondents on the other hand argued that the application lacked merit and was frivolous as the commission was independent, free and fair and would carry out their functions in an accountable manner. IEBC failed to substantially respond to the issues raised by the Petitioners to only raising two grounds of objections and no affidavit (or evidentiary basis).

The Chair said IEBC would use the electronic voter identification devices (EVID), electronic results transmission system (ERTS) but in the court papers and submissions, IEBC, Jubilee and the A-G argued that technology was inherently unreliable. They emphasised the failure of

⁶⁵ Dennis Odunga (2017) "What controversial changes in lection law mean," *Daily Nation*, Nairobi, 15/1/2017, at <http://www.nation.co.ke/news/What-changes-in-controversial-election-law-passed-by-House-mean/1056-3518708-b7a2mo/index.html> (accessed 29/6/2017).

⁶⁶ *National Super Alliance v. Independent Electoral and Boundaries Commission*, Petition No. 328 of 2017.

⁶⁷ *National Super Alliance v. Independent Electoral and Boundaries Commission*, Petition No. 328 of 2017.

⁶⁸ The Petitioners argued that the complementary mechanism was not defined in the Elections Act and that mover and the seconder of the motion had been clear in parliamentary debates that it was not a manual system.

electronic voting in the United States and other jurisdictions. Yet the case was about EVID and ERTS, and not voting which was still manual under the law.

Seventh, IEBC published the Election Campaign Finance Regulations that were meant to put into effect the Election Campaign Finance Act of 2013. The Regulations set contribution and spending limits for political seat aspirants.⁶⁹ The implementation was suspended until after the 2017 General Elections.

In April 2017, the Government launched a Presidential Delivery Portal. This was done approximately four (4) months to elections. The launching of this portal has been accompanied by various advertisements on TV Stations as well as newspapers. Scholars and political commentators have condemned this move citing a breach of campaign rules.⁷⁰ Various calls for the IEBC to regulate the use of Government resources by Jubilee to campaign in various parts of the country have not been addressed.⁷¹ Some public officers were also accused of publicly supporting the re-election of the incumbent President.⁷²

Eighth, the role of IEBC Chairperson in the 2017 General Elections changed from high level executive decision making under the previous IEBC regulations administrative and ceremonial. This followed the declaration by the High Court and the Court of Appeal that presidential election results announced by Returning Officers at the Constituency level are final and are not subject to alteration by the IEBC Chairman.⁷³

Article 138(3)(c) of the Constitution of Kenya states that:

“in a presidential election:-

“after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.”

⁶⁹ Cf EISA Kenya (2017) “Electoral law & reform,” at <https://www.eisa.org.za/index.php/eisa-kenya-electoral-law-reform/> (accessed 28/6/2017).

⁷⁰ Luke Awich (2017) “Uhuru using public resources in Jubilee campaigns- KNCHR,” *The Star*, Nairobi, June 14, 2017 at http://www.the-star.co.ke/news/2017/06/14/uhuru-using-public-resources-in-jubilee-campaigns-knchr_c1578970 (Accessed 25/7/2017)

⁷¹ Daily Nation (2017) “Commission wants DPP to investigate five governors,” *Daily Nation*, Nairobi, 19/7/2017 at <http://mobile.nation.co.ke/news/politics/commission-wants-dpp-to-investigate-five-governors/3126390-4021382-item-1-dea49y/index.html> (accessed 25/7/2017).

⁷² David Herbling (2017) “Taxman, PS on the spot over partisan political campaign,” *Daily Nation*, Nairobi, 19/7/2017 at <http://www.nation.co.ke/business/Taxman-PS-spot-partisan-political-campaign/996-4021790-knic7x/index.html> (accessed 25/7/2017).

⁷³ *Maina Kiai and Others v. IEBC and Another* *ibid* Petition No. 207 of 2016. The Advocates in this case were Willis E.O. Otieno & Sihanya (for Petitioners), Waikwa Wanyoike & Christine Nkonge (for the amicus). The Judges at the High Court were Justice Aggrey Muchelule, Justice Weldon Korir and Justice Chacha Mwita.

A reading of Article 138(2) read together with Article 86(c) of the Constitution, the word “returning officer” is construed to mean an officer of the IEBC who is in charge of elections at the constituency level.⁷⁴ It was therefore unconstitutional for the IEBC through the Elections (General) Regulations to appoint the IEBC Chairman **as the returning officer in a presidential election**. That is why the High Court and the Court of Appeal in *Maina Kiai and Others v. IEBC and Another*⁷⁵ declared section 39 of the Elections Act and Regulations 83(4) of the Elections (General) Regulations 2012 as unconstitutional as they violate Articles 86 and 138 of the Constitution.

6.2 Registration, Register of voters: Transparency, accuracy, verifiability and accountability

Overall, the accuracy, verifiability and accountability of the voters register is key in the quest to address the above issues.

Accuracy goes to the root of the precision in capturing the voter’s data. The register’s verifiability is essential in guaranteeing the right to vote. How easy is it for a registered citizen to verify his or her details in the register?

Relevant IEBC officials who are directly accountable for the management of election affairs must also guarantee the accuracy and verifiability of the register of voters (ROV) and be accountable to the electorate. This is to ensure that qualified voters are registered. That their data are accurate. And that unqualified persons such as non citizens, foreigners or aliens, under age or dead persons are not registered. Significantly, Ahmed Issack Hassan and former IEBC Commissioners failed in to deliver in this aspect in the 2013 General Elections. Similarly, the Samuel Kivuitu led Electoral Commission of Kenya (ECK) plunged Kenya into chaos through fraudulent management, mismanagement or bungling of elections and the failure to deliver on the 15 issues highlighted above. In the 2017 electoral cycle, Kenyans remained vigilant and hopeful that IEBC would put in place mechanisms to deliver on these critical electoral process issues.⁷⁶

⁷⁴ This is because article 138 (2) provides that a presidential election is held in each constituency. It is at constituency level that votes from all polling stations are tallied. The polling stations are always manned by the presiding officers who are answerable to the returning officer.

⁷⁵ *Maina Kiai and Others v. IEBC and Another*, *ibid* (Per Muchelule, Korir & Mwita JJ). See *IEBC v. Maina Kiai & Others*, CA No. 105 of 2017 (Per Makhandia, Ouko, Kiage, M’noti & Murgor, JJ A).

⁷⁶ Cf Ben Sihanya (2017) “Conduct of IEBC Commissioner key to 2017 General Elections,” Vol 1, Issue 8, *Law Society of Kenya’s The Advocate*, , at 27; Maina Kiai (2017) “IEBC and police hold key to peaceful election” *Daily Nation*, Nairobi, 7/72017 at <http://www.nation.co.ke/oped/Opinion/maina-kiai-iebc-police-hold-crucial-key-to-peaceful-elections/440808-4005554-r5jfobz/index.html> (accessed 25/7/2017); George Kegoro (2017) “Mediation will enable IEBC protect its interests,” *Daily Nation*, Nairobi, 22/72017 at <http://www.nation.co.ke/oped/Opinion/Mediation-will-enable-IEBC-to-protect-its-interests/440808-4028006-cvjy41z/index.html> (25/7/2017).

Pursuant to the consensus reached by political parties⁷⁷ in 2016 and the subsequent amendments to the Elections Act 2011, section 8A of the Election Laws (Amendment) Act, No. 36 of 2016 mandated IEBC to procure the services of an independent professional firm to audit the register of voters (RoV). IEBC settled on KPMG. CORD filed a case contesting the award.⁷⁸ CORD advanced three key arguments. First, that at the time of awarding the tender to KPMG, IEBC had no Commissioners in office.⁷⁹ And that the audit subject of the impugned decision being a policy issue within the ambit of the Commissioners mandate and could not be conducted in the absence of Commissioners. Second, that in awarding the tender for the audit of the register of voters, IEBC proceeded without consultation and or engagement with the stakeholders including political parties including in designing the criteria and or the methodology for the audit. And third, that KPMG was incompetent as it had never audited a register of voters in Kenya or elsewhere before.⁸⁰

Nevertheless, the register of voters was audited by KPMG and the outcome was devastating. The objective of the audit was three pronged: First, to verifying the accuracy of the register. Second, to recommend mechanisms of enhancing the accuracy of the register. And third, to update the Register. The KPMG report indicated that about one million dead voters were still in the register.⁸¹ As at July 2017, a few days to elections, IEBC had not taken a step of deleting the names of dead voters from the register.⁸²

6.3 Party nominations and the implications on general elections in Kenya

The 2017 party primaries in Kenya, just like the 2013 primaries, were marred by massive irregularities and malpractices, including malfeasance, misfeasance and non-feasance. The challenges in conducting free, fair, transparent, accurate, verifiable and accountable nominations by key political parties arose partly as a result of internal party disorganisation and the respective party leader's key interests in the outcomes. It was not clear who the party members were, what the party register contained, and who qualified to run in party primaries. Some key parties did not use their registers during the nomination exercise and IEBC and the Registrar of Political Parties failed to push political parties to comply.

⁷⁷ This was through the part of issues that were discussed by a 14-member (bi-partisan) Parliamentary Committee that looked into the exit of the reform of electoral laws, including the Issack Hassan-led team. See *Report by Joint Parliament Select Panel on Electoral Reforms*, 2017.

⁷⁸ *Coalition for Reforms and Democracy (CORD) v. Independent Electoral and Boundaries Commission (IEBC) & KPMG*, JR No. 648 of 2016.

⁷⁹ The Commissioners had been removed following street demonstrations and picketing. See Nation Team (2016) "Death, violence mar protests against IEBC," *Daily Nation*, Nairobi, 7/6/2017.

⁸⁰ *Republic v. Independent Electoral & Boundaries Commission & Another Ex Parte Coalition for Reforms and Democracy*, Misc. Application No. 648 of 2016. (Chacha Mwita, J)

⁸¹ *NASA v. IEBC*.

⁸² Nzau Musau (2017) "Why dead voters are still haunting the IEBC register," *Standard Digital*, Nairobi, 25/6/2017, at <https://www.standardmedia.co.ke/article/2001244744/why-dead-voters-are-still-haunting-the-iebc-register> (accessed 27/7/2017)

The generally sham party primaries contributed to the pollution of the August 2017 General Elections, as I had predicted in a newspaper commentary before:

“You saw the party primaries through which the candidates were selected. No single party that I know of used its a lawful register to conduct them.⁸³ Some like Jubilee purported to use an IEBC register issued to them through the back door. From this alone, the election is polluted...”⁸⁴

The impact of a failed party organisation and administration led to the emergence of independent candidates in nearly all the key political seats. As at May 2017, there were about 4000 independent candidates contesting different seats.⁸⁵ This was an increase from the 350 independent candidates in 2013 General Elections.

7. The role of IEBC in electoral justice in Kenya

After the adoption or promulgation of the Constitution and the establishment of IEBC, Kenyans expected free, fair and verifiable elections under IEBC. The Interim Independent Electoral Commission (IIEC) and IEBC had presided over by-elections in different electoral units and they gave a reasonable impression that the process was under reform.⁸⁶ Some of the bye-elections between 2011 and 2013 include in Kirinyaga Central Constituency where Joseph Gitari emerged victorious after John Ngata Kariuki’s election was successfully challenged at the High Court.⁸⁷

However, subsequently, IEBC engaged in electoral and related non-feasance, malfeasance and misfeasance. IEBC flouted the procurement process in the equipment for conducting the 2013 General Elections. Similar mistakes were repeated by IEBC in procurement of ballot papers during the run-up to the 2017 general elections.⁸⁸

7.1 Role of IEBC in party nominations in Kenya

In its administrative, regulatory and quasi-judicial role, IEBC has the power to hear and determine complaints relating to nominations of political parties and independent candidates for

⁸³ Nzau Musau had stated that IEBC had given Jubilee a copy of the register of voters which it had not released to Kenyans, or to NASA. See Nzau Musau (2017) IEBC dilemma as credibility fears jolt poll preparations, *Sunday Standard*, Nairobi, 21/5/2017, at <https://www.standardmedia.co.ke/article/2001240505/iebc-dilemma-as-credibility-fears-jolt-poll-preparations> (accessed 29/5/2017).

⁸⁴ *Ibid.*

⁸⁵ IEBC (2017) “List of candidates cleared for the 2017 General Elections,” at <https://www.iebc.or.ke/uploads/resources/17umEj7cBg.pdf> (accessed 25/7/2017); Graham Kajilwa (2017) “4,000 candidates to vie as independent,” *The Standard*, Nairobi, 8/5/2017, at <https://www.standardmedia.co.ke/article/2001238950/4-000-candidates-to-vie-as-independent> (accessed 27/6/2017).

⁸⁶ IIEC and IIBC were the predecessors of the IEBC. They were part of the transitional measures following the 2007/2008 post election violence (PEV) that were intended to usher in a new constitutional dispensation. See the Elections Act, 2011 (as amended up to 2017) and the Independent Electoral and Boundaries Commission Act, 2011 (as amended).

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⁸⁸ Cf the procurement cases against IEBC by CORD/NASA in 2016 and 2017.

elections to the following six (6) public offices: President, Governor, Senator, Women's Representative, Member of the National Assembly and the Member of the County Assembly (Article 88(4)(e)).⁸⁹

In the run-up to the August 8, 2017 General elections, there are debates regarding IEBC's role and fairness. Three issues are key. First, what is impact of IEBC's role in conducting nominations by political parties especially Jubilee Party?⁹⁰ Second, what is IEBC's role in handling disputes arising from political party nominations? Third, how fair can IEBC be in handling contested nominations to run for presidential elections or where the IEBC officers have deep seated interests? What lessons did Kenyans learn from the nomination disputes regarding Kenyatta in 2013 and Kethi Kilonzo for Makeni Senate in 2013.⁹¹

In 2017 the following administrative, quasi-judicial and judicial tribunals have had to entertain various disputes regarding the party primaries: Political Parties Dispute Tribunal (PPDT), IEBC's Dispute Resolution Committee, the High Court, and Court of Appeal. A classic case of IEBC's injustice, inequity, incompetence and political partisanship was *Wavinya Ndeti v. IEBC*. Wavinya Ndeti was the Wiper Democratic Movement (WDM) candidate for Machakos Gubernatorial elections. She was opposing the incumbent Dr Alfred Mutua of Maendeleo Chap Chap (MCC), Kenyatta's point man in Ukambani or "lower Eastern" (region). The *Wavinya Ndeti* case was heard by the IEBC, PPDT, IEBC, High Court to the Court of Appeal.⁹² The Appellate Court later directed the IEBC to clear her Machakos Gubernatorial race under Wiper.

During the political parties nomination exercise in 2013, IEBC reportedly handled over 600 cases involving nomination disputes.⁹³ As indicated, IEBC glossed over presidential nomination

⁸⁹ That power is also found in Section 74 of the Elections Act and Regulation 27 of the The Elections (Party Primaries and Party Lists) Regulations, 2017.

⁹⁰ Remarkably, IEBC engaged with Jubilee Party in considering and planning for Jubilee nominations. After a lot of opposition, IEBC withdrew. Some of the arguments were that the sense of independence of IEBC would be lost if it conducted party nominations especially with respect to only one key political party when other colitions and parties were conducting them on their own. See Ben Sihanya (2017) "Conduct of IEBC Commissioners key to 2017 General Elections, Vol 1, Issue 8, *Advocate*, Magazine of the *Law Society of Kenya*, at 8; Jeremiah Kiplang'at and Francis Mureithi (2017) "Dilemma for big parties in picking candidate for the governor's post," *Saturday Standard*, Nairobi, 25/2/2017, at 4, where Ben Sihanya's views were quoted; Nzau Musau (2017) "IEBC dilemma as credibility fears jolt poll preparations," *Sunday Standard*, Nairobi, 21/5/2017, at <https://www.standardmedia.co.ke/article/2001240505/iebc-dilemma-as-credibility-fears-jolt-poll-preparations> (accessed 4/6/2017).

⁹¹ See *Diana Kethi Kilonzo & Another v. Independent Electoral & Boundaries Commission & 10 Others* Petition 359 of 2013, eKLR. Some of the IEBC officials had been involved in registering Ms Kethi Kilonzo. Yet they were now deciding whether she had been lawfully registered, contrary to Articles 47 (on fair administrative action), 48 (on access to justice) and 50 (on fair hearing) and 79 (conflict of interest).

⁹² IEBC argued that Wavinya Ndeti had not resigned from Chama cha Uzalendo (CCU) as required by the law before moving to Wper Democratic Movement (WDM). And that Wavinya Ndeti's name was not in the list submitted by WDM to IEBC on April 27, 2017.

⁹³ Independent Electoral and Boundaries Commission (2015) *Case Digest: Decisions of the IEBC Dispute Resolution Committee*, Electoral Institute for Sustainable Democracy in Africa (EISA), <https://eisa.org.za/pdf/eh2014ken.pdf> (accessed 25/4/2017).

disputes like some challenged Uhuru Kenyatta's and William Ruto's qualification to run for President and Deputy President respectively.⁹⁴ IEBC also dealt with numerous nomination disputes that relate to the National Assembly, Senate and Gubernatorial seats. In the post 2013 and pre-2017 process, IEBC was faulted for the biased approach it took in handling numerous disputes including the Kethi Kilonzo's nomination dispute for the Senate by-elections that resulted from the death of CORD Senator Mutula Kilonzo.

What is IEBC's role in the nomination of candidates for presidential, parliamentary and county elections?⁹⁵ Article 88(4)(d) provides that:

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

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

Under ss. 4 of the IEBC Act, the Commission is mandated to regulate the process by which parties nominate candidates for elections and to act as an arbiter in the electoral disputes relating to or arising from party nominations.⁹⁶

In the run-up to the 2017 General Elections, Kenyatta and Ruto's Jubilee Party (JP) made at least two major decisions regarding party nominations. First, JP decided IEBC would conduct its nominations.⁹⁷ Second, the Jubilee Party issued a smart card relatedly linked to IEBC database.⁹⁸ Some Jubilee supporters argued that the Election Law Amendment Act 2017⁹⁹ had required IEBC to conduct party nominations. They also argued that IEBC was funded by tax payers. And that IEBC would secure free and fair party nominations, as opposed to party National Election Boards (NEBs). This, according to stakeholders was likely to compromise the electoral process in favor of Jubilee.

The better view is that IEBC can only regulate but not conduct party nominations under Article 88(4)(d).

⁹⁴ See Chapter Six of the Constitution (on leadership and integrity).

⁹⁵ This is one of the typologies on elections to the six (6) offices: President and Deputy President, Senator, Member of the National Assembly, Women Representative, Governor and County Assembly Member. See Arts 97, 98, 99, 136, 137, 138, 177, 180.

⁹⁶ Independent Electoral and Boundaries Commission Act, No 9 of 2011, at 6-7.

⁹⁷ Leonard Onyango (2016) “Jubilee wants IEBC to fund its primaries,” *Daily Nation*, Nairobi, 16/11/2016, at <http://www.nation.co.ke/news/politics/Jubilee-wants-IEBC-to-fund-its-primaries/1064-3453524-w8vw9qz/index.html> (accessed 25/7/17); Emmanuel Wanjala (2017) “IEBC invites party officials for meeting over nomination,” *The Star*, Nairobi, 22/4/2017, at http://www.the-star.co.ke/news/2017/04/22/iebc-invites-party-officials-for-meeting-over-nominations_c1548020 (accessed 25/7/17)

⁹⁸ Tony Mukere (2017) “Jubilee Smart Card Technology Allowed Access to IEBC Database,” *Kenya.co.ke*, at <https://www.kenya.co.ke/news/jubilee-smart-card-technology-allowed-access-iebc-database> (accessed 11/3/2017).

⁹⁹ Cf ss. 12 of the Election Laws (Amendment) Act, 2016.

8. Reversals under Kenyatta's Jubilee Government and the issues in the 2017 elections

Under the Uhuru Kenyatta regime, the following reversals in governance, electoral equity, and the quest for constitutional governance, human rights, rule of law and justice were witnessed:

First, there was increased lawlessness, infidelity to and disrespect of the Constitution, the laws, rules, regulations and legal system as well as impunity by Government officials in most ministries, departments and agencies including constitutional commissions. The main one was tribal exclusion and the construction of a tribally insular government or what Kenyatta called *uthamaki*.¹⁰⁰

Second, the general security of individuals in Kenya was largely under threat including cattle rustling, harassment and brutality by some security agents, and Al Shabaab related terror.

Third,, systematic and pervasive corruption, looting and theft of public resources increased.¹⁰¹

Fourth, key pillars of Kenya's economy including food security and agriculture, and business were in jeopardy.¹⁰²

Fifth, Kenya's economy continued to decline. The cost of living rose for individuals and households. The cost of doing business rose for business especially through individuals, unincorporated associations, companies and corporations. Some closed down, down-sized, or retrenched employees.¹⁰³

Sixth, there was collapse in the labour sector as teachers, lecturers, university staff generally, doctors, nurses, clinical officers and other health workers frequently went on go slow or strikes to secure promised Collective Bargaining Agreements (CBAs) or to secure the implementation of signed CBAs.

As 2017 elections approached, the role of IEBC as a supposed independent arbiter came into scrutiny. IEBC's refusal and reluctance to implement some their constitutional mandates prompted the numerous court cases that had to be resorted to have compel them to comply. This is pre-election litigation. Electoral and post-electoral litigation is also expected arising mainly from the conduct of IEBC.

¹⁰⁰ Ben Sihanya (2017) *CODEKA Vol 1, op. cit.*, Chapter 1 & 12.

¹⁰¹ Kenyans in social media periodically and sarcastically listed the following corruption deals (worth billions of Kenya shillings) to be Kenyatta's "achievements"; Ministry of Health (MAfya) with at least 5 Billion; Standard Gauge Railway (SGR), National Youth Service (NYS) worth 6.1 billion, Karen land worth KES 8billion, laptops for Std 1 pupils, etc.

¹⁰² Standard Reporter (2016) "CORD dismisses jubilee promises; claims govt has mismanaged economy," *Standard Digital*, Nairobi, 9/4/2016, at <https://www.standardmedia.co.ke/article/2000197671/cord-dismisses-jubilee-promises-claims-govt-has-mismanaged-economy> (accessed 25/7/17)

¹⁰³ Some of the most....

How did the following perform in the August 8, 2017 General Elections? The voter; IEBC (especially the Chair and CEO), the 290 returning officers, the 40,000 presiding officers, election observers; the Kenyan and international media?

The voters were purposeful, law abiding and peaceful. IEBC (re) introduced the concept of computer-generated president, governors, senators, Members of the National Assembly, Women MPs and Members of the County Assembly (MCAs) through computer manipulation: a 54:44 winning formula and a consistent gap of 10-11% as results streamed through “IEBC” website. The forms 34A and 34B were essentially unavailable or fake, with the IEBC at times arguing they did not have to produce originals.¹⁰⁴

9. What next in governance and electoral justice in Kenya

As we have argued, Kenya approached the 2017 elections with serious challenges regarding governance, the rule of law, human rights, constitutional democracy and, particularly, the need for electoral justice. Electoral justice would reform the sharing and management of political power and socio-economic resources. The two main political formations were the reform oriented National Super Alliance (NASA) and the incumbent Jubilee Party which focused on entrenching the *status quo*.

10. Highlights of presidential candidate’s manifestos and the quest for justice in Kenya

They key presidential aspirants are Raila Odinga and Uhuru Kenyatta. The other six candidates were also-rans; pretenders to presidential office. What were some of the core political and socio-economic questions?

10.1 The National Super Alliance (NASA) Manifesto

NASA presented a manifesto that mainly focused on political reforms through political good governance and rule of law as the basis of socio-economic renewal. The eleven (11) key issues on NASA’s platform were:

1. **Uniting Kenyans:** NASA pledged to unite Kenyans, noting that Kenya belongs to all and that inclusivity in governance is key.
2. **Historical Injustices:** NASA promised to settle all historical injustices relating to land, IDPs and livestock.
3. **Infrastructure:** NASA promised to improve infrastructure including the construction of a dual road from Mombasa-Nairobi-Nakuru-Kericho Junction and to Kisumu-Busia-Malaba and to Eldoret.

¹⁰⁴ Section 39 (1A) (iii) and 1 (c) provide that the declaration of final results should be based on physical original forms 34A and 34B.

4. **Free Primary and Secondary Education:** NASA pledged to implement this starting from September
5. **Improving SGR to an electric train** from Mombasa-Nairobi-Naivasha-Eldoret-Kisumu-Kakamega-Malaba.
6. **Boost Farming** through subsidies for farmers and private sector engagement.
7. **Ensure increased exportation of agricultural products such as** Miraa, Tea, Coffee, Flowers, cereals.
8. **Job Creation through** empowerment in various sectors, promote investors in our country, promote private companies, promote local production
9. **Enhance security of citizens through boarder protection and devolution of security**
10. **Strengthening Devolution by devolving more funds and resources** and resources
11. **Lower prices of basic commodities and house rents**¹⁰⁵
12. **Ensure the plight of the disadvantaged groups are catered for.** This group they said would include persons with disability (PWD), women, and single mothers.

The NASA manifesto has been applauded for incorporating nationhood, rule of law, equity and equality as well as socio-economic aspects of a nation while also incorporating economic aspects of development.

10.2 Jubilee Manifesto

Jubilee focussed on econometric or brick and motor projects most of which it had not implemented since 2013. It was quite on or explained away massive failure to implement the Constitution, governance and socio-economic progress. Critics argue that such (mega) projects have been and are intended to be used as an opportunity to loot public resources through tenderpreneurship.

Jubilee made the following ten promises:

1. **Job creation:** Jubilee promised to create 1.3 million jobs every year in every county.
2. **Internship programme:** This would be government sponsored apprenticeship programme of up to 12 months for all university and TVET graduates.
3. **Inua Jamii programme:** Jubilee promised that it would double the number of vulnerable citizens supported through the cash transfer programme (Inua Jamii) from 700,000 to 1,400,000.
4. **Education:** Jubilee promised to expand the free primary school programme to include free day public secondary schools in Kenya.
5. **Housing:** Jubilee promised to facilitate mass housing production of at least 500,000 affordable homes in 5 years across the country

¹⁰⁵ As indicated in Part 4.1, the five (5) NASA principals or top leaders were Raila Odinga, Kalonzo Musyoka, Moses Wetangula, Musalia Mudavadi and Isaac Ruto.

6. **Maternity services:** Expand free maternity care to include government funded NHIF cover for every expectant mother for one year.
7. **Electricity for every citizen:** Jubilee promised it would ensure every citizen is connected to reliable and affordable electricity (on or off-grid) by 2020.
8. **Food and agriculture:** Expand food and agricultural production, double the fertiliser subsidy initiative, reducing the cost to farmers to less than Ksh1,500.
9. **Irrigation:** Complete the 57-large-scale dam construction programme, support small-holder agricultural irrigation to enhance food and agricultural production on at least 1.2 million acres.
10. **Transparency and accountability:** Make government more transparent and accountable through the digitisation of all government procurement.¹⁰⁶

Remarkably, only Raila Odinga participated in the face-to-face presidential elections debate that was held on Monday, 24/7/2017. Uhuru Kenyatta skipped it without any reasonable cause.¹⁰⁷

11. Key findings on electoral justice reforms in Kenya

The main argument in this chapter it is through electoral justice that Kenya can fulfil its aspirations for constitutional democracy, good governance, rule of law, human rights, and social justice. This argument is pegged on three main constitutional rules and principles, propositions, presumptions and presuppositions. First, election is one of the linchpins of sovereignty and constitutional democracy. Second, elections provide Kenyans with an opportunity to debate and decide how they are to be governed. Third, elections provide an opportunity for Kenyans to fill in the important offices that then make decisions on their behalf. It is through electoral justice that these aspirations and opportunities can be successfully achieved or utilised.

As far as electoral justice is concerned, this chapter makes at least four findings.

First, to achieve electoral justice, there is need for legitimate, valid, and acceptable electoral laws. For an electoral law to be acceptable, two parameters must be met. First, the enactment of an electoral law should be within a reasonable time prior to the elections.¹⁰⁸ This will help shield

¹⁰⁶ As indicated, occasional comparison on the relevant platforms were the House Majority Leader Aden Duale (Garissa town), (URP), Majority Leader Senate Kithure Kindiki (Tharaka Nithi) (he was largely absent from national campaigns)

¹⁰⁷ The debate was organised by Debate Media Ltd which is a partnership of mainstream media houses comprising television, radio, news papers and online platforms. The moderators were Linus Kaikai of NTV and Joe Ageyo of KTN News. Another presidential debate was organised earlier that evening for the other six candidates. Only three of the six attended the first session. Those who attended were Ekuro Aukot (third way alliance), Prof Michael Wainaina and Dr Japheth Kaluyi.

¹⁰⁸ There were amendments to the election laws less than two years to the General Elections. This prompted various mischievous intentions during the process. See Nancy Agutu (2016) “Wetang’ula now accuses Ethuro of rigging poll laws vote for Jubilee,” *The Star*, Nairobi, 6/1/2017, at http://www.the-star.co.ke/news/2017/01/06/wetangula-now-accuses-ethuro-of-rigging-poll-laws-vote-for-jubilee_c1483379 (accessed 27/7/2017)

against various mischievous ideologies that might be geared towards manipulating the laws to favour the interests of certain political formations. Second, the implementation and interpretation of an electoral law should be in time. This will offer an opportunity to the IEBC to prepare adequately for the elections and also to internalise the requirements of the law hence avoiding numerous pre-election and post-election litigation.¹⁰⁹ The laws should be aligned to transnational law and best practices on civil and political rights as well as electoral justice.

Second, the registration of voters, the compilation and verification of the register of voters should be streamlined and carried out within the four corners of the laws, rules and regulations that govern elections and the constitutional principles.¹¹⁰ As witnessed in the run up to the 2017 General Elections, despite the law stipulating the timelines and other statutory requirements regarding to the register of voters. IEBC generally refused, neglected or failed to adhere to the law and statutory timelines.¹¹¹

Third, the political parties campaign and nomination processes especially in relation to ensuring free and fair elections should be safeguarded by the IEBC. Electoral justice can only be achieved if the candidates, campaigners and the observers are guaranteed a freedom to exercise their political rights and obligations. This includes the protection from intimidation by the incumbent office holders and the security forces.¹¹² The incumbent President and some governors have been accused of using state resources to campaign and intimidate their opponents.¹¹³ The IEBC officials, candidates, campaigners, observers and voters must also maintain their independence and reject manipulation, intimidation and bribes.¹¹⁴

Fourth, IEBC should take every measure within the precincts of the law to ensure free, fair, transparent and prompt elections. The IEBC must always voluntarily take every step to ensure that the electoral process is transparent. This includes inviting all the stakeholders in the electoral

¹⁰⁹ Lilian Aluanga (2016) "IEBC now questions new electoral laws," *Standard Digital*, Nairobi, 30/10/2016, at <https://www.standardmedia.co.ke/article/2000221462/iebc-now-questions-new-electoral-laws> (accessed 27/7/2017)

¹¹⁰ George Kegoro (2017) "Where do matters stand regarding audit of voter register?" *Daily Nation*, Nairobi, 3/6/2017, at <http://www.nation.co.ke/oped/Opinion/audit-of-voter-register-by-iebc/440808-3954606-rdudl6z/index.html> (accessed 27/7/2017)

¹¹¹ *Gladwell Otieno v. IEBC*, JR No. 447 of 2017.

¹¹² *Apollo Mboya v. IEBC & A-G*, JR No. 625 of 2016. See Ibrahim Oruko (2017) "Civil servants still engage in politics despite warning," *Daily Nation*, Nairobi, 3/7/2017, at <http://www.nation.co.ke/news/politics/Civil-servants-defy-Ombudsman-s-warnings-on-politics/1064-3997186-format-xhtml-hrunxr/index.html> (accessed 27/7/2017)

¹¹³ David Herbling (2017) "Taxman, PS on the spot over partisan political campaign," *Business Daily*, Nairobi, 19/7/2017, at <http://www.businessdailyafrica.com/economy/Taxman-PS-spot-partisan-political-campaign/3946234-4021532-14c2xjuz/index.html> (accessed 27/7/2017)

¹¹⁴ Some voters were taken to Nakuru for Jubilee's final rally on the promise of payment, but some were reportedly abandoned. They had the right to refuse. And some observers have said they were manipulated or intimidated to endorse (presidential) elections as free and fair.

process to play a role.¹¹⁵ The work of IEBC should not be centralised under one personality or organ.¹¹⁶

12. Conclusion and recommendations on implementing, enforcing, reversals and reforming electoral justice in the Kenya electoral system

My overarching argument in this article is that since the promulgation of the Constitution in 2010, the constitutional implementation process has experienced both the positive enforcement or reform on the one hand and reversals on the other.

The setbacks and the reversals have mostly been orchestrated and sponsored by President Uhuru Kenyatta and some individuals and institutions whose aim is to maintain the *status quo* and encourage the primitive accumulation of the political power, socio-economic and state resources of Kenya.

Media should report election results from the polling stations, constituency and county levels as they are announced¹¹⁷ by the Presiding Officer (POs) and Returning Officers (ROs) for the President, Governor, Senator, Member of National Assembly, Women Representative, and Member of County Assembly (MCA). This will help ensure transparency, verifiability and accountability hence electoral justice and peace.¹¹⁸ In the 2017 General Elections, the media only streamed results from the IEBC portal and not as announced in polling and tallying centres. This defeated transparency and accountability.

Reversals in Kenya's governance and electoral process are mainly a result of the refusal by Kenyatta and his predecessors as well as individuals in authority to implement the Constitution.

The reforms and implementation process has been jealously guarded by the pro constitutional democracy individuals, groups and some politicians, some CSOs, magistrates and judges. The limited independence of judiciary has contributed to a greater extent in the realisation of electoral reforms and implementation.

Remarkably, judicial independence was grossly undermined in the last few months to elections when President Kenyatta and Co. started intimidating, ethnically profiling, and manipulating

¹¹⁵ The importance of public participation in the electoral process was a main issue in at least three of the numerous cases filed in court with the aim of ensuring that IEBC adheres to the letter and spirit of the law. These were; *CORD v. IEBC*, JR No. 637 of 2016; *NASA v. IEBC*, JR No. 378 of 2017; *Gladwell Otieno v. IEBC*, JR No. 447 of 2017.

¹¹⁶ The need to recognize and appreciate the role of other election officials was deliberated and settled upon in *Maina Kiai & Others v. IEBC*, Petition No. 168 of 2017 and in *IEBC v. Maina Kiai & 5 Others*, CA No. 105 of 2017.

¹¹⁷ Some media did this in 2002 and 2007 and helped secure accountability. They promised they would in 2017 but relied on IEBC.

¹¹⁸ Sihanya (forthcoming 2017) *Constitutional Democracy in Kenya and Africa Vol 1, op. cit*, Chapter 12 "Media, tribe and devolution under the Kenyan Constitution".

judges and the judiciary including through judge-shopping. The intense pre-election litigation that has been witnessed prior to the 2017 General Election will result in either of the following two outcomes in the post-election dispensation. First, there is likely to be a reduction in the broad typology of issues to be litigated even if the numbers are likely to increase especially because of election day and post-election manipulation of results as well as the processing of results¹¹⁹. Second, and conversely,, given the unsatisfactory nature of some of the pre-election litigation, some issues are bound to arise again in the post-election litigation.

The August 2017 General Elections provided an opportunity for Kenyans to bring in the desired change, transformation or revolution but voting out corruption, tribalism, discrimination, incompetence and lawlessness or thuggery. This would only be possible if elections were conducted by an independent IEBC presided over by law abiding Chair, Commissioners and CEO as well as Returning Officers, Presiding Officers and polling clerks, observers and the media.

That did not happen. The people must exercise their popular sovereignty under Article 1, 10, 38, 81 and 86, among others to elect or otherwise determine the composition and conduct of the President and governors.

¹¹⁹ In 2013, in the *Raila Odinga* case, the Supreme Court had to deal with a lot of issues within a short time. This is because most of the issues had not been satisfactorily litigated in the pre-election period. This left parties with no other option but to accept the outcome. Had the president and judiciary facilitated the litigation of the issues in the pre-election period, most of the issues would have been settled by the High Court and the Court of Appeal. The parties had no avenue of appealing the issues already canvassed and settled by the Supreme Court.