



NATIONAL CONFERENCE ON ACCESS TO JUSTICE

THEME:

ACCESS TO JUSTICE DURING ELECTIONEERING PERIOD IN AFRICA IN THE 21ST CENTURY

PROGRAMME AND BOOK OF ABSTRACTS

Conference Dates

14th Nov, 2022

to 19th Nov, 2022



FOLLAP
Faculty of Law Legal Aid Project



THE NATIONAL CONFERENCE ON ACCESS TO JUSTICE

THEME:
Access to Justice During
Electioneering
Period in Africa in the
21st Century

Published by Egerton University

Welcoming Message



Prof. Isaac O. Kibwage,
Professor of
Pharmaceutical
Chemistry and
Vice-Chancellor,
Egerton
University.

Egerton University proudly welcomes you to the third National Conference on access to justice. The theme of this conference; Access to justice during electioneering period in Africa in the 21st Century, touches on democracy as a core value of civilization and in particular human rights. Election is a key component of democracy. It gives people the opportunity to freely elect those who want to govern them.

The preamble to the Kenyan Constitution exalts the supremacy of the people. It states “we the people of Kenya ... “exercising our sovereign and inalienable right to determine the form of governance of our country...” This statement acknowledges that the will of the people is the source of legitimacy of sovereign governments and the preferred mode of governance. Significantly, Elections provide an environment through which people exercise this sovereign power.

In tandem with our constitutional dictates, the Faculty of Law Legal Aid Project (FOLLAP) has continued to provide free legal aid services to the community to exercise and claim their rights. Through this venture, FOLLAP undertook civic education in Nakuru County to inform citizens of their rights around the electoral process in context of access to justice among others. Many residents benefited from this exercise including some of the leaders who succeeded in getting elected.

Therefore, this conference comes at an opportune time to provide a platform through which legal scholars and consumers of legal services across the flanks of the globe can broadly dialogue on issues of access to justice and democracy as each is a function of the other, a beneficial mutuality. Without democracy there is no justice and without justice, democracy cannot prevail, a perilously dangerous state more so in a developing state like ours.

Indeed, the values of freedom of association and holding of periodic free and fair elections by universal suffrage as

witnessed across the world and recently our own elections in August 2022, are essential elements of democracy. In essence, democracy provides an environment for the protection and effective realization of human rights- the hallmark of access to justice. This occasion is significant for us gathered here today to discuss issues so critical and fundamental to our democracy.

This conference brings on board critical stakeholders in the justice sector and democracy. It serves to demonstrate the linkages between access to justice and democracy and the importance of the functionality of the two in society in the 21st Century. No doubt, access to justice is the foundation of governance systems based on human rights, democracy and the rule of law. Access to justice is central in the electoral process as the cornerstone for participation, ensuring democratic space is protected and certifying that the electoral process is authentic. This explains the key theme of the conference.

The judiciary as a key pillar of democracy pronounced itself as an independent arbiter to the electoral disputes in the just concluded elections in our motherland, which, witnessed a smooth transition and power hand over. This is a testimony that the democratic space has matured, and the rule of law observed, a key tenet of access to justice.

Key take away, from our general elections this year is that when a credible machinery is available for enforcement of the law and dispute resolution, people do not resort to violence and illegal means to address issues.

This conference provides a platform for the stakeholders to discuss access to justice during electioneering period, deliberate on strategies of ensuring access to justice during such processes to safeguard election integrity and to bolster citizens' confidence to participate.

I urge those in the justice sector and the development partners that as we look into strategies for enhancing better electoral processes in the context of access to justice, we should be alive to the intersecting needs of the citizens particularly the poor and the vulnerable members of the society to ensure fairness and justice.

An election is not an event but a continuous process. Let us learn from all its facets to promote democracy and access to justice to the citizenry by strengthening institutions tasked with its management. Even for those who participate and become unsuccessful, the notion is that they tried, and live to fight another day. Elections should not divide us but be a platform for promoting democracy and rule of law.

Today, let us have an open discussion that is geared towards strengthening

scholarship and providing guidance on how best we can improve our democracy and access to justice before, during and after elections in the interest of citizens. Through your peer learning and exchange of experiences here, I hope you will identify best practices for promoting access to justice and managing elections which are pivotal to law and policy reforms in the sector.

I am confident that this conference will come up with innovative solutions to assist us in our endeavour to provide quality justice to all especially in line with our democratic principles and values. This is what is envisioned by the Faculty of Law Legal Aid Project (FOLLAP), a society that is just and equal, even in democratic spaces. Clarion call for us is to protect our democracy and ensure access to justice for all.

My gratitude goes to the European Union and UNDP for their continued support to Egerton University Faculty of Law Legal Aid Project and making it possible to host this timely Conference. Just as I did in the last conference, I lodge another appeal to the organizers and sponsors of the conference for further support to provide similar platform for engagement not only for scholarship but strengthening access to justice through meaningful collaboration with the various stakeholders in the justice sector.

Finally, I want us to reflect on the words of Aga Khan the Fourth (IV),

“The search for justice and security, the struggle for equality of opportunity, the quest for tolerance and harmony, the pursuit of human dignity -are moral imperatives which we must work towards and think about on a daily basis”

I wish you a fruitful deliberation!!

Prof. Isaac Kibwage, PhD. HSC

Vice-Chancellor, Egerton University

Welcoming Message



Dr. Ruth Aura,
FOLLAP Team
Leader and
Dean Faculty
of Law, Egerton
University.

The Faculty of Law runs a legal aid programme dubbed Faculty of Law Legal Aid Project (FOLLAP) with the support from European Union and UNDP. Its slogan taking law to the people is aptly coined to resonate with the work it undertakes, providing legal aid services to communities in their bases within Nakuru County. This resonates well with its vision a society that is just and equal and actualizes this through its mission that of providing access to justice to the poor and the marginalized to claim and defend their rights. It works in collaboration with other stakeholders in the justice sector.

The Project has had a significant impact in the County on issues of access to justice since its inception. For example, in this reporting year, a total of 5007 people were reached directly through the various modes of engagement by the project. An estimated number of over 250,000 people have also been reached through social media platforms, the Project website, and Mainstream media: both Radio and TV on various legal issues.

This conference is another milestone for the project made possible by the financial and technical support from European Union and United Nations Development Programme. Faculty's mission is to provide quality legal education that fosters critical thinking, human rights discourse, innovative research, pursuit of justice through scholarship, advocacy and collaboration, and service to the society that contributes to national and global development. In tandem with this mission, we are happy to Co-host this conference with our sponsors to provide a platform for academicians, civil society members, the judiciary, policy makers and development partners to facilitate in-depth discussion and sharing of knowledge, practical experiences, and solutions.

This Conference builds on the past two and provides an opportunity for stakeholders to specifically share experiences and mechanisms of addressing access to justice for the poor and marginalized during the

election period in different contexts. They will discuss access to justice during electioneering period strategies of ensuring access to justice during such processes to safeguard election integrity to bolster citizens confidence to participate. The goal is to ensure fairness and justice to the citizens particularly, the poor, vulnerable and marginalized members in the society.

It will provide a platform for deliberation for academia, judiciary and other duty bearers, among them lawyers, civil society organizations and policy makers to have a conversation on how democracy looks like in Africa in the 21st Century.

The conference brings together academics, civil society, legal professionals, human rights defenders and policy makers to engage in policy and strengthening of institutions dealing with democracy and access to justice. Conference participants will:

- Critique the political parties influence on fair and free electoral process, and scrutinize the electoral management bodies in ensuring electoral justice
- Examine citizen's participation in the electoral processes, the right to vote and standards for right holders and duty bearers
- Analyze the role of the judiciary as a pillar to democracy for sustainable peace
- Discuss technology as enabler and an impediment to free and fair elections (Democracy in the digital age) and explore strategies for data protection in the electoral process.
- Interrogate the role of the media in ensuring access to justice during elections and the role of Civil Society Organizations in promoting access to justice in the democratic spaces
- Interrogate gender justice and SGBV in the context of electoral process
- Learn and share experiences from different stakeholders in the justice sector in ensuring access to justice before, during and after elections.
- Reflect on the election process and provide insights for reform to strengthen and safeguard the process.

Indeed, elections are the hallmark of democracy in our contemporary society and therefore must be guarded to ensure fairness, a key component of access to justice. This is why democracy and justice require that elections be held at fixed regular interval that allows citizens to actively participate in choosing their leaders. The Faculty of Law Legal Aid Project has been at the forefront empowering

communities within Nakuru with various legal information including the electoral process to exercise their voter rights in the electoral process besides other legal aid services offered.

Thus, this conference is a climax to the faculty's activities in the year. It provides a platform through which scholars and stakeholders in the justice sectors can have a conversation on issues of democracy and access to justice holistically. The ultimate aim is to use research through factual approach to change and improve realities in the world. We have participants not only from Kenya but other countries, a pointer to the importance of the conference theme to many. Such a conversation is necessary for our country and others in building global peace based on practices that promote democracy and access to justice in a pragmatic manner.

It is a fact that a peaceful environment is a precursor to a peaceful and secure elections, as well as meaningful national development. Therefore, a country must ensure citizens have confidence in the electoral process that promotes transparency, accountability, free and fair elections throughout the electoral process. A series of activities must be undertaken to ensure people feel safe and secure to participate in the entire process without fear of intimidation to uphold electoral integrity.

It is our sincere hope that this high-level conference will stimulate dialogues necessary for building stronger institutions for democracy and access to justice with hindsight to the poor and marginalized to meaningfully participate in the electoral process. The idea being to demonstrate that access to justice can safeguard participation, ensure democratic space is protected and that electoral processes are genuine. The conference outcomes will be useful in influencing policy for future reforms in the sector.

We extend our special appreciation to European Union and United Nations Development Programme for their continued support financial and technical in the last three years that has helped FOLLAP to realize its vision and mission. We also thank Egerton University Leadership and the Management for making it possible to host this conference.

CONFERENCE PROGRAMME

NATIONAL CONFERENCE ON ACCESS TO JUSTICE

THEME: Access to Justice During Electioneering Period

in Africa in the 21st Century

November 14th – November 19th, 2022
Lake Naivasha Simba Logde, Naivasha, Kenya

Day 1: Monday, 14th November, 2022

TIME	ACTIVITY
3.00pm - 7.00pm	Arrival and registration Facilitated by FOLLAP, Egerton University
7.00pm - 8.30pm	Dinner

Day 2: Tuesday, November 15th 2022

7.00am - 8.00am	Breakfast
08:00am - 8:30am	Arrival & Registration
08:30-9:15 am	National Anthem EA Anthem Welcome and opening Remarks <ul style="list-style-type: none">• Dean, Faculty of Law- Dr. Ruth Aura• Project Manager – UNDP Amkeni Wakenya- Mr. Jaafer Mohamed• DVC- Academic Affairs-Egerton University – Prof. Bernard O. Aduda• Vice Chancellor- Egerton University – Prof. Isaac O Kibwage PhD, HSC.

9:15am –9.45am	Documentary Beneficiary Voices
9:45am – 10.15am	Health Break
10.15am -11:00am	EGERTON LAW JOURNAL ADVISORY BOARD Prof. PLO Lumumba Prof Patricia Kameri-Mbote
11.00am- 12.45pm	KEY NOTE SESSION: <ul style="list-style-type: none"> • Independent Electoral & Boundaries Commission (IEBC) • National Legal Aid Service (NLAS) • Office of the Director of Public Prosecutions (ODPP) • United Nations Office on Drugs and Crime (UNODC) • United Nations Development Programme (UNDP) • European Union (EU) • National Assembly • Judiciary Keynote Session Moderators: Dr. Ruth Aura – Dean Faculty of Law Jaafar Mohamed / Zainab Ali -UNDP
12.45pm-1.45pm	GUEST PANEL DISCUSSION: <ul style="list-style-type: none"> • LSK Chair-Rift Valley Branch • Council of Legal Education (CLE) • Kenya Law Reform Commission (KLRC) <i>Theme: Perspectives on Access to Justice and Democracy</i> Session Moderators: Zainab Ali –UNDP, Dr. Maxwell Miyawa
	Plenary
1.45pm- 2:30pm	MEDIA BRIEFING, PHOTO SESSION & LUNCH

Session 1

2.30 pm- 3.15pm	<p>Paper presentations and Panel Discussion</p> <ol style="list-style-type: none">1. Dr. Victoria Lihiru: 30 Years of Multi-Party Democracy in Tanzania (1992 - 2022): Assessing women’s Leadership Commitments in the CCM and CHADEMA’s Constitutions in Light of International Law Principles.2. Dr Miyawa Maxwell: Extra-Constitutional Constitutional Practices In Democratic Elections In Kenya.3. Dr. Joseph Wamwara: Fifty plus one: addressing the tyranny of numbers and the marginalization of the fifty minus one of the Kenyan electorate. <p>Discussants: TBA</p>
3:15pm -5.00pm	Showcase of PLEAD Projects in The North-Rift
5.00pm- 8.00pm	HEALTH BREAK END OF DAY 2 DINNER

Day 3: Wednesday, November 16th 2022

7.00am-8.00am	Breakfast
8.00am-8.30am	Opening Remarks
Session 3	Paper presentations and Panel Discussion
8.30am-10.30am	<ol style="list-style-type: none">Dr Nicholas Orago: The judicialization of electoral politics in Kenya: what impact on judicial independence and legitimacyDr Brian Sang: The Judicial Clarification of Access to Electoral Justice by Africa's Continental and Sub-regional Courts.Dr. Annette Mbogoh and Ms. Nelius Njuguna : The Justiciability of the Right to Development and Peace within the Context of Elections: A Case Study of the Role of the Kenyan JudiciaryJoseph Macharia Kaguru & Sam Kyalo: Political Parties and the Electoral Process. <p>Discussant: TBA</p>
10.30am-11.00am	Health Break
Session 4	Paper presentations and Panel Discussion
11.00am -12.00pm	<ol style="list-style-type: none">Flora Bidali & Joyce Karanja: The Judiciary as a Pillar of DemocracyMary M. Mutugi : The Elective Omission By Undergraduate Law Programmes To Teach Election Law In KenyaAnnsalome Njehia : Elections during the Covid-19 pandemic in Africa: A comparative Study of Tanzanian and Ugandan Elections (2020-2021) <p>Discussant: TBA</p>

Session 5

12.00pm -1.00pm	Paper presentations and Panel Discussion
	<ol style="list-style-type: none"> 1. Francis Khayundi and Purity Ngari: The Role of Political Parties in Promoting Constitutional Democracy in Kenya 2. Mary Mwangi: Citizen Participation in Nomination of Candidates by Parties: Case of South Imenti Constituency 3. Moses Muchiri: A Statutory Duty of Care Theory for Electoral Bodies in Kenya <p>Discussants: TBA</p>
1.30pm - 2.15pm	LUNCH BREAK

Session 6

2.00pm - 3.00pm	Paper presentations and Panel Discussion
	<ol style="list-style-type: none"> 1. Oscah Mahoso : Examining the relationship between political will and the harmonisation of the electoral system in Africa: Prospects and Challenges 2. John Jakinda & Nascar Mutinda : The Challenge of Electoral Malpractice as an Albatross in Kenya's Quest for Democratic Electoral Good Governance 3. Ndindi Nganga: The Invisible Future Voters – Children <p>Discussants: TBA</p>
4.00pm - 5.00pm	Plenary
5.00pm-6.00pm	Health break
6.00pm-8.00pm	End of day 4
	Dinner & Networking

Day 4: Thursday, November 17th 2022

7.00am - 8.00am	Breakfast
8.00am - 8.20am	Opening Remarks

Session 7

8.30am-10.00am	Paper presentations and Panel Discussion
	<ol style="list-style-type: none">1. Prof Patricia Kameri-Mbote and Dr. Ruth Aura: The Elusive Two-Thirds gender Rule: Reflections of the 2022 General Elections.2. Dr. Paul Ogendi & Ms Judith Murungi: The Impact Of Gendered Political Violence On Women's Participation In Kenya's Electoral Process3. Dr. Mercy Deche: The Calcification of Impunity in Election Related Sexual and Gender Based Violence In Kenya <p>Discussants: TBA</p>
10.00am-10.20am	Health break

Session 8

10.20am-12.00pm	Paper presentations and Panel Discussion
	<ol style="list-style-type: none">1. Evans Ogada: the power of language in the context of adjudication: examining the Supreme Court's use of language in the consolidated presidential election petitions 2022.2. Ongowo Eliud Okumu: Examination of the Sociological foundations of Election related SGBV and its implications on Elections3. Brenda Karimi: Sexual gender based violence in the context of electoral process.4. Amos.W. Shihundu & Kivuva. S. Ndeto: Adjudication of Pre-Election Disputes in Kenya: A Glimpse into the Legal Framework, Plurality, Challenges and Expectations.

Session 9

12.00pm -1.30pm	Paper presentations and Panel Discussion
	<ol style="list-style-type: none"> 1. Dr. Ruth Aura and Ronald Kihali: Role of the Civil Society Organizations in promoting access to justice in the democratic spaces 2. Jack Nyakuti : Role of The Media in Promoting Access to Justice During Election Period 3. Kioko Kivandi , Patrick Mutahi and Shitemi Kamadi: Fake News and its implications on democratic discourse among journalists in the 2022 general election in Kenya 4. James Mutua : Role of the Media in Promoting Access to Justice During Election Period <p>Discussants: TBA</p>
1.30pm-2.00pm	LUNCH BREAK

Session 10

2.00pm- 3.00pm	Paper presentations and Panel Discussion
	<ol style="list-style-type: none"> 1. Dr. Samwel Ongwen Okuro: Comparative Review of E-Voting in India and Brazil: Key Lessons for Kenya. 2. Ian Onkundi Charles (KSL Student): Challenges Facing Women in Participation of Politics in Kenya 3. Ambrose Otachi: What election of women means for Kenya 4. Kevin Muiruri & Florida Musi: Access to Justice During the Electioneering Period in Kenya: A review of responses to SGBV Cases. 5. Ngunjiri Ndirangu: Innovative Practices in Legislative Oversight and Research in the Fight against Corruption

Session 11

3.00 pm- 4.00pm	Paper presentations and Panel Discussion
	<ol style="list-style-type: none">1. Sarah Njeru : Elections And Electoral Violence In Africa2. Musi Florida, Edna Wanjiru, Rachael Kagwa and Joseph Kimotho: Citizen Participation in the electoral process.3. Pauline Nduta (LLB Student, Egerton): Citizen participation in Electoral process in Kenya4. Mary Mwangi: The Role of Multi-sectoral Coordination and Collaboration Forums in managing Electoral Processes: A case of Meru County Multisectoral Co-ordination and Collaboration Forums.5. Mutanda Moses & Masafu Erick: Section 83 of The Elections Act; Effect Of Declaration Of Unconstitutionality <p>Discussants: TBA</p>
4.00pm - 5.00pm	Plenary
5.00pm - 6.00pm	HEALTH BREAK
6.00pm - 8.00pm	End of day 4 Dinner & Networking

Day 5: Friday, November 18th 2022

7.00am - 8.00am	Breakfast
8.00am - 8.20am	Opening Remarks

Session 12

8.30am-10.00am	Paper presentations and Panel Discussion
	<ol style="list-style-type: none">1. Stephen Mutie: Closing Online Civic Spaces in Kenya's Electoral Process? A Focus on the 2022 General Elections2. Kagama Peterson Githinji: Role of the Church in Promoting Gender Inclusivity and Justice in the Democratic Spaces3. Shem Oganga: Protecting the integrity of our Elections: A Case for the Overhaul of Kenya's Campaign Financing Regime4. Milkah Wahu & Masafu Erick: The Perils of Nomination for Marginalized and Ethnic Minorities at The County Assemblies5. Robert Mutembei: Political Parties Fund in Kenya: A Tool for Democracy or a Cash Cow? <p>Discussants: TBA</p>
10.00am -10.20am	Health break

Session 13

10.20am-12.00pm	Paper presentations and Panel Discussion
	<ol style="list-style-type: none">1. Maragia Josephine and Dr. Omondi Scholastica: Assessing the Realization of the Right to Participation in Political Life for People Living with Disabilities in Kenya.2. Muinde Cosmas Njoroge: Democracy And Electoral Rights For Person's With Disabilities In Africa: Lessons From Kenya's General Elections 20223. Alvin Kosgei & Noel Njambi: Voter Data Protection In Presidential Election Nominations: Public Interest Litigation As A Solution To Regulatory Gaps4. Ronald Kihali: Addressing the IEBC dysfunctionality: A juxtaposition of 2022 and 2017 Presidential Election Judgments. <p>Discussants: TBA</p>

Session 14

12.00pm - 1.00pm	Paper presentations and Panel Discussion
	<ol style="list-style-type: none">1. Abigael Choni & Anita Mwasi (LLB Students, Egerton University): Barriers to access to justice during electioneering period in the 21st century2. Valerie Kutima: Right To Vote: Political Participation Of Persons With Disabilities In Kenya3. Joseph Lwannia : "Big Men" and Election Disputes in Africa: Lessons from the 2017 Electoral experiences in Kenya.4. Onyango Aaron Okoth & Wahu Wangari (KSL Student): The Evanescence Of Democracy: A Litmus Test of Universal Suffrage in Kenyan Elections.5. David Mburu: Election Technology: An Assurance For Free And Fair Elections Or A Recipe For Election Malpractice? <p>Discussants: TBA</p>

1.00pm-2.00pm	LUNCH BREAK
2.00pm- 2.30pm	Plenary: Reflections from Participants
6.00pm-8.00pm	CLOSING CEREMONY
	<ul style="list-style-type: none"> • Closing remarks: Chief Guest • Highlights from the Rapporteur • Conclusion and way forward • Vote of thanks

Day 6: Saturday, November 19th 2022

7.00am - 8.00am	Breakfast
Departure	

CONFERENCE COMMITTEE

Dr. Ruth Aura	Dean, Faculty of Law Chair - Conference Committee Project Leader, FOLLAP
Robert Mutembei	Project Manager, FOLLAP
Brendah Achungo	UNDP Amkeni Wakenya
Samuel Kimani	Administrator, Faculty of Law
Kioko Kivandi	Media & Communication Advisor - FOLLAP
Peter Inziano	Technical Editor and Systems Developer
Getray Shijenje	Project Finance Officer
Valerie Kutima	Project Advocate
Kevin Muiruri	Students' Representative
Florida Musi	Legal Assistant

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30 Years of Multi-Party Democracy in Tanzania (1992 - 2022): Assessing women's Leadership Commitments in the CCM and CHADEMA's Constitutions in Light of International Law

By Victoria Lihiru (Ph.D), Lecturer of Law at the Open University of Tanzania

Tanzania re-introduced multiparty democracy in 1992 after three decades of operating under single party system. Since the 1961 independence, being a member of a political party has remained as a main route to participation in the local and national elections. Tanzania has committed to several civic and political rights related international, regional, and sub-regional conventions which require member states to, ensure key institutions, including political parties, take deliberate efforts to provide and attain equal representation of men and women in leadership positions, decision-making structures, and in candidate nominations. In 2022, three decades after the adoption of multiparty democracy, the scrutiny of the ruling party's, Chama cha Mapinduzi (CCM,) constitution, and that of the main opposition party, Chama cha Demokrasia na Maendeleo(CHADEMA), depicts serious gaps hampering effective participation of women in the political processes within and outside the parties. This article discusses such gaps, why they exist, and subsequently offers recommendations.

Key words: CCM, CHADEMA, Political parties constitutions, democracy, women in political parties, inclusive political processes, Tanzania, Elections, Multipartyism.

Extra-Constitutional Constitutional Practices in Democratic Elections in Kenya

By Dr. Miyawa Maxwel, Egerton University Faculty of Law

In this paper, I explore, by way of empirical evidence, the extra-constitutional practices (or otherwise unconstitutional conduct) by actors that have been routinized and normalized in KENYA over a long period of time as to assume constitutional validity and legitimacy. By extra-constitutional practices, I mean those conduct and omissions that would otherwise be constitutionally impermissible but for the legislative, administrative or judicial imprimatur, they are sanitized, validated and legitimized as normal and permissible therefore furnished with the requisite constitutional validity. In other words, we argue that unconstitutional constitutional electoral governance, administration and processes have gained root in the continent of Africa despite the emergence of the most liberal constitutions and progressive jurisprudence that foster liberal democratic societies. The sanctioning, legitimization and validation of constitutionally undemocratic practices through norms, customary practices, and interpretive, judicial and administrative fiat has become the order of the day in some African countries. More often than not, institutions rely on what we call expedient application of the law to arrive at the most logically and conveniently (sound), in the most logical and convenient (conception) that preserves the liberal democratic fabric, and while not strictly adhering to constitutional ethos, constitutional rectitude is attained only experientially, after a long time of trial and testing of the jurisprudence, administrative practice, policy or as the case may be. The phenomenon of “extra-constitutional constitutional” practice has not been deeply pursued in academic thinking, therefore little understood in our context. This paper makes that contribution. It explores the aspects of judicial overreach, judicial misconception of the law, administrative fiat, legislative gerrymandering, political rhetoric and discourses, and policy application that have historically legitimized, sanitized and validated the extra-constitutional conduct into permissible constitutional practices and norms, and vice-versa.

Fifty Plus One: Addressing the Tyranny of Numbers and The Marginalization of The Fifty Minus One of The Kenyan Electorate.

Dr. Joseph Wamwara (Ag. Dean, Moi University School of Law)

One of the requirements of the Kenya's 2010 Constitution prescribes that one would be declared duly elected President of the nation if they garner more than half of the votes cast in a presidential election.¹ This requirement seeks to always ensure that the presidency is held by someone who has the mandate of the majority. This requirement would seem to embody the very essence of democracy, but does it? The Constitution does not prescribe any official role to the losing candidates representing the minority (the fifty minus one). All the presidential elections results post the 2010 Constitution have been contested and close. They have also resulted in predictable outcome of perennial losers and winners. Since there is no defined role for losing candidates, those who choose to participate, do so entertaining no thought of losing and move the population towards a desperate all or nothing game that in the long run could be detrimental to the Kenyan nation.

Is it therefore time to rethink the Kenyan constitutional order to ensure that the foundational principle of democracy where, 'the majority have their way, while the minority have their say,' is realized? Is it time to rethink the presidential system? Would a parliamentary system be better and how would it fair in Kenya's ethnic society? Would a constitutional change cure the marginalization felt by the consistent fifty minus one members of the Kenyan population which almost always find themselves in the minority? To deal with national/ethnic diversities some countries have come up with measures including a rotational presidency. The Swiss Federal Council of seven Councilors which act as collective Head of state and government is of particular interest for this study. The Councilors must at any given time equitably be representative of the German, French and Italian ethnicities (language groups) members of the Swiss population. Would something comparable to the Swiss arrangement work for Kenya? This paper hopes to explore this (and any other option) and how they could work in the Kenyan situation.

May be something less radical would help cure the experience of marginalization that some members of the Kenyan population currently have. May be an electoral process that is reliable, accountable, and verifiable is what is required to resolve the issues this paper highlights. Until then though, this paper will explore

constitutional measures that could be taken to address the injustices associated with the current 'winner takes all' posture of the 2010 Constitution.

The judicialization of electoral politics in Kenya: what impact on judicial independence and legitimacy

By Dr Nicholas Orago, University of Nairobi Faculty of Law

Judicialization of politics connotes the use of law and legal institutions, especially the judiciary, to resolve political differences or manage political contestations. The Constitution of Kenya 2010 sought to address the challenges of Kenyan political and electoral contestations and their adverse political and socio-economic impacts on the development of the country by empowering the courts to be arbiters in political contestations. This was especially the case with the role and responsibility bestowed on the Supreme Court by Article 163(3)(a) of the Constitution to hear and determine disputes relating to the elections of the president arising under Article 140 of the Constitution. The thinking behind this provision and power was the realities of post electoral conflicts, such as the one subsequent to the closely contested 2007 elections, that drove Kenya to the precipice of collapse due to lack of legitimate and effective mechanisms of dispute resolution for presidential election disputes. It was thus felt by the drafters of the Constitution that the Article 163(3)(a) power would act as a safety valve for the country, to prevent recourse to violence during electoral disputes, and instead approach the Supreme Court to provide an avenue for pacific settlement of presidential electoral disputes. Since the promulgation of the Constitution, this avenue has been utilised to contest the last three presidential elections, in 2013, 2017 and in 2022, with diverse outcomes. Being an adversarial system employed to address extremely emotive leadership contests, the Supreme Court has, in undertaking this role, been placed in the eye of the storm, with its decisions on presidential petitions being hailed or condemned mainly depending on the political persuasion of the contesting collectives, and not much on the judicial rigor and fairness of the decisions.

The question that this paper seeks to explore is, what has been the impact of the assignment and execution of this role by the Supreme Court on the independence and effective functioning of the judiciary in Kenya. The hypothesis upon which this analysis will be based is that the emotive and inherently fraudulent nature of Kenya's presidential electoral contestation has deleterious effect on the independence and legitimacy of the judiciary in the eyes of citizens, and this adversely impact on the trust of citizens on the courts. This adversely affects the effectiveness of the courts in the dispensation of justice, and also leads to political witch-hunt against the judiciary, that has been experienced in the reduction of the budget of the judiciary as well as in express threats to judges individually or the judiciary collectively by political actors and their supporters. The paper argues that the perceived biasness of the Supreme Court in the determination of presidential petitions, in the eyes of the supporters of the losing candidate, erodes the legitimacy and independence of the courts, with detrimental outcomes to the fair dispensation of justice in our courts.

The Judicial Clarification of Access to Electoral Justice by Africa's Continental and Sub-regional Courts

By Dr Brian Sang, Lecturer, Faculty of Law, Egerton University

Democratic governance, with its defining attribute of periodic elections in which the voters select their representatives, is the most prevalent system of governance in Africa. This is in large part due to the constitutional reforms of the 1990s which saw the authoritarian systems maintained by post-colonial regimes replaced by liberal democratic models. Although multiparty elections have become a regular feature of civic life in many African states, they have not always lived up to the full promise of democracy. Electoral outcomes are often contested with good reason in Africa. Indeed, allegations of widespread vote buying, massive rigging and systemic voter suppression are a recurrent theme in all the recent elections in Africa. Previous decades witnessed outbreaks of election-related conflicts in response to alleged denial of electoral justice, but the tide seems to be turning toward a culture of judicial resolution of election disputes. National courts in Africa have in recent years adjudicated contested presidential elections in Kenya, Ghana, Uganda, Malawi and Zambia. While they are not universally satisfactory, these national judicial processes have promoted peace and stability.

National courts have also made creditable contributions to expanding access to electoral justice in Africa, but their efficacy is restricted. In some states, there are symbiotic relations between the national election supervision body and the ruling party thus foreclosing any credible elections. In other states, the close relations between judicial officers and the executive make it impossible for opposition candidates to get a fair and impartial determination of electoral disputes against the incumbent. There are also states where judicial officials have ruled against the incumbent office-holders in disputed presidential elections and suffered severe backlash. The ineffectiveness of national courts in rendering impartial judgments in electoral disputes has led dissatisfied parties to seek recourse before African supranational courts established by continental and sub-regional treaties. Two such continental and sub-regional courts, namely the African Court of Human and Peoples' Rights (ACtHPR) and the East African Court of Justice (EACJ), will be the main focus of my analysis.

This paper critically examines the judicial role of Africa's continental and sub-regional courts in resolving election-related disputes that are framed as alleged violations of the right to democratic participation. It argues that the election-related human rights jurisprudence of the ACtHPR and the EACJ has made a twofold

contribution to clarifying access to electoral justice in Africa: (i) elaborating the legal content of electoral rights and their implications for national election-related processes; and (ii) expanding the scope and possibility of reviewing domestic election-related laws, policies and practices that impact the right to democratic participation. To illustrate this, the paper analyzes selected judgments in which the ACtHPR and the EACJ have evaluated the compatibility of national election-related laws, policies and practices with the continental and sub-regional legal standards on political rights. After identifying the legal standards on electoral justice developed by the ACtHPR and the EACJ, the paper analyzes the ways in which those legal standards have been incorporated into the judicial reasoning and decision-making of some African national courts.

The Justiciability of the Right to Development and Peace within the Context of Elections: A Case Study of the Role of the

By Dr. Annette Mbogoh and Ms. Nelius Njuguna

The Judiciary of Kenya has progressively evolved since independence. Under the 1963

Constitution, the Judiciary was characterized by lack of independence which hindered peace and sustainable development. The general public lacked trust and confidence in the Judiciary as it was deemed to be an appendage of the Executive. This is evidenced by how Presidential

Petitions were handled before the promulgation of the 2010 Constitution. The promulgation of the 2010 Constitution ushered in the much needed judicial reforms. The Constitution of Kenya

2010 particularly emphasizes on judicial independence which can potentially and progressively transform the Judiciary into a pillar of democracy for sustainable peace and development.

Remarkably, under the dispensation of the 2010 Constitution, elections have increasingly been more peaceful. The Judiciary has set precedence through bold decisions arising from Presidential election petitions that have contributed towards sustainable peace. Notably, the Supreme Court of Kenya set history when it nullified the 2017 Presidential Elections. Recently, Kenyans remained peaceful as they awaited the decision in the 2022 presidential election petition.

While the Judiciary may inspire the peaceful resolution of electoral disputes, there is no jurisprudence on the right to development. It is important to note that peace is not just the absence of violence. Positive peace means justice and sustainable development for the people.

Despite the rich jurisprudence on first and second generation rights, third generation rights remain the least litigated, interpreted and recognized. The right to development that is closely intertwined with all other categories of rights has not been defined under the Constitution of

Kenya. The closest that the concept of development comes to being acknowledged is under

Article 10 of the Constitution wherein sustainable development is listed as a national value and principle for governance. This is in spite of there being several

international instruments that expressly recognize the right to development as an enforceable right. Further, most practitioners do not litigate on the right to development to afford the Judiciary the opportunity to advance the right. This may be attributable to some being of the view that the right to development is not justiciable while others may not even be aware of the existence of such right. To date, there is no court decision on the enforcement of the right to development especially within the context of elections. Prior to the 2022 elections, Kituo cha Sheria- Legal Advice Centre found that communities were grossly affected by the inaccessibility or unavailability of services due to early campaigns launched by the political class and by extension the civil service. The prolonged electioneering by the political class had an impact on the socio-economic development of

Kenyans. To test its justiciability, Kituo cha Sheria has anchored its argument against early campaign on the right to development of every Kenyan citizen.

As stated hereinabove, the paper will analyze the progressive evolution of an independent

Judiciary that has substantially contributed towards the promotion of peace. At the same time, the paper will delve into the de facto hierarchy of rights within the international and national legal framework. The writers will focus specifically on the place of third generation rights, more specifically the right to development, and the role of the Judiciary in advancing it. Finally, the authors will make a case for the justiciability of the right to development using the case study of

Kituo cha Sheria's pending case on early campaigns.

Political Parties and the Electoral Process

By Joseph Macharia Kaguru and Sam Kyalo

(Joseph Macharia Kaguru, LLM (UoN), LLM (Harvard), Tutorial Fellow, Strathmore Law School, Sam Kyalo, LLM (Harvard), Lecturer, Daystar University)

The struggle for expansion of political space, multipartyism and political platforms is of untold horror. As a buffer against repeated restrictions on political parties, the Constitution protects the establishment, organization, and relationship of political parties with state agencies, making political parties a crucial component of the electoral system. Despite the enhanced constitutional framework on political parties, the envisioned role remains a mirage. Using Kenya's 2022 general election season as a case study, this paper argues that political parties tend to stifle electoral justice rather than enhance electoral justice. In so arguing, the paper will a) review the aspirational constitutional role of political parties in promoting electoral justice; b) review the political and connotational factors that determine the role of political parties in promoting electoral justice and c) examine opportunities for achievement of their idealised roles.

Key words: Democracy, political parties, electoral processes

The Judiciary as a Pillar of Democracy

By Flola Bidali and Joyce Karanja

Kenya has experienced a history of electoral-related conflicts, with the 2007-2008 Post Election violence as the worst. Critics argue that most violent and divided societies cannot be re-made only through track two diplomacy. There is therefore a need to rebuild the state and its institutions. To achieve peace, the state and its institutions have to be strong to transform conflict. The loss of confidence in the Judiciary led to the 2007-2008 conflict since the aggrieved parties had no faith in the institution to resolve its conflicts. Peace is a salient factor in sustainable development and has even been given attention under the 2030 Agenda on Sustainable Development Goals. It is against this background that this study seeks to examine the effectiveness of the judiciary in protecting the gains of devolution, and as such entrenching devolution of political power, responsibilities, and resources to newly created counties as its centrepiece and most transformative aspect as per the 2010 constitution. The study will employ a doctrinal research approach to analyse court cases and publications on Devolution. It will also use a broad, purposive, and liberal interpretation of the constitution as well as seek to know the intent of the framers of devolution. This is premised on the fact that devolution was intended to address the many types of governance, economic, and development problems of the country, which arose from the long history of a highly centralized, undemocratic, and inequitable system. The main problem, however, is how the intention of devolution is subverted by different parties.

Key words: Devolution, Judiciary, Peace, Sustainable Development

The Elective Omission by Undergraduate Law Programmes to Teach Election Law in Kenya

By Mary M. Mutugi

In tandem with democratisation, authoritarianism characterised by regular elections has emerged as the normative regime type in the Kenyan political scene. Without failure, Kenya has conducted an election every five years and sometimes upon the death of a sitting member of parliament.

Election law in itself is a branch of law gaining momentum in the development of jurisprudence in Kenya. It is, however, not a standard unit in the law programmes in Kenya, and the law does not require that the law schools teach it despite its developing jurisprudence.

Election law lends itself to a pluralist approach to content from the political, social, and legal concepts, including an examination and evaluation of Constitutional law.

From the decisions of the Court, it seems to be an amalgamation of several social sciences.

Yet, it has not merited a place in the legal education providers as a stand-alone unit or an area in the law that deserves the attention of legal education providers.

This paper is an invited contribution to the examination of teaching election law in Kenya, presents election law as an area in law that is essentially, undeniably pluralist in disciplinary orientation, and, therefore offers a value proposition for legal education programmes in Kenya.

Its pluralist nature in doctrinal reasoning and empirical political science that characterizes election law is well-suited for the customary teaching of law and procedural training in law.

Electoral law merits different approaches and methodology teaching since it prescribes other prosecution and defence norms, rules, and procedures. It would form a novel area of teaching evolving jurisprudence in Kenya.

Elections during the covid-19 pandemic in Africa: A comparative Study of Tanzanian and Ugandan Elections (2020-2021)

By Annsalome Njehia (Graduate Assistant, USIU, Master of Arts in International Relations (USIU) and Dr. Francis Khayundi (Lecturer, Department of International Relations, USIU, Coordinator, Master of Arts in International Relations (MIR))

As the world reacted to a new pandemic (Covid-19) in 2020, it became essential that Election Management Bodies (EMBS) and public authorities around the world needed to make sensible and well-informed decisions regarding whether and how to hold scheduled electoral activities like voter registration, political campaigning, poll worker training and ballot casting. These decisions, according to the International Foundation for Electoral Systems were informed by the health authorities (WHO) and varied depending on the country, its public health capabilities, and the level of spread of the disease (IFES COVID-19 Briefing series, 2021).

The past two years proved challenging for elections in Africa and around the world. COVID-19 aggravated the problems faced by emerging democracies in resolving political power competition through credible and peaceful elections. The crisis of COVID-19 allowed governments to assess their democratic flexibility while allowing incumbents to maintain sovereignty. This paper focuses on elections during the COVID-19 pandemic in Africa through the case studies of the 2020 and 2021 elections held in Tanzania and Uganda respectively. The study measures the effects of running elections during a pandemic by using three variables. The COVID-19 restriction measures, government system and the Internet Shutdowns during the elections in the respective countries.

The authors use data collected from the media, journals, books, reports and data statistics from national and International electoral bodies. The information was then analyzed to identify relationships, patterns and themes emerging from the behaviour of Tanzania and Uganda during their presidential elections. The findings were also fundamental towards identifying future electoral trends of Africa.

The Role of Political Parties in Promoting Constitutional Democracy in Kenya

By Dr. Francis Khayundi and Purity Ngari

Since the reintroduction of multi-party politics in Kenya in 1992, there have been several political parties that have vied in the elections in Kenya. In chapter 7, part 3 of the

Constitution of Kenya, 2010, an important role for political parties is envisaged with these entities expected to contribute to the promotion of constitutional democracy. Thus, according to article 91 of the Constitution of Kenya political parties in Kenya are supposed to abide by the democratic principles of good governance, promote and practice democracy through regular, fair and free elections within the party; respect and promote human rights and fundamental freedoms, and gender equality and equity; promote the objects and principles of the Constitution and the rule of law; among other principles.

To further regulate the working of political parties in the country, the Political Parties Act of

2011 was passed enacted to “provide for the registration, regulation and funding of political parties, and for connected purposes.” Since, its enactment, there have been two general elections held in the country with the political parties participating in these elections expected to subscribe to the Act. The role of political parties in forming the executive and legislative arms of government means they have a role to play in promoting the rule of law and access to justice. Using the desktop methodology this paper will analyse the compliance of Kenya’s political parties with the principles of constitutional democracy.

This analysis is timely and necessary given the fact that in August 2022, Kenya had its third general election since the promulgation of the 2010 Constitution. Moreover, in the recent past, Kenya has been a case study for African states on elections and democracy.

Keys words: Elections – access to justice – rule of law – Kenya – Constitution

Citizen Participation in Nomination of Candidates by Parties: Case of South Imenti Constituency

Mary Mwangi (National Government Administrative Officer and Certified Professional Mediator)

A lot of effort has been directed towards making the election process just, free, and fair. However, most previous efforts have concentrated on the main election phase with little attention being directed towards party primary elections. Party primary elections are important part of a general election because it is at this stage that the candidate that will run on the party label is selected. Traditionally, the task of picking candidates was left to party leaders and elites with the party hierarchies. This traditional approach of nominating candidates creates immense bias against economically weak candidates, women, and youths who have little connection to party hierarchy. In recent democracies, the role of nominating candidates for parties has been expanded to ensure greater participation by the public through the holding of party primary elections. Citizen participation in the nomination of party candidates is an important issue in Kenya due to the voting patterns where the majority of voters are swayed by party waves. Consequently, the candidates who are nominated by parties with strong appeal in a particular region end up having an automatic win in the main election. In addition, credibility of party nomination process has been found to have an impact on voter turnout during the general elections. Voter turnout tend to be higher when the nomination process is perceived as credible and vice-versa. Party nominations have therefore become an important element in the consolidation of Kenya's democracy. The paper sought to examine whether the processes of nominating candidates by political parties in Kenya are inclusive and reflect the will of the people. In particular, the paper sought to determine the level of citizens' engagement in determining candidates that are given tickets to represent the party during the general election. It relies on primary data collected from registered voters in South Imenti Constituency. A sample of 50 voters was selected from the constituency using the clustered random sampling where the six wards were treated as clusters and two clusters (Nkuene and Mitunguu) were selected. Twenty five voters were randomly selected from each of the two wards and data collected from them using questionnaires. Finding of the study suggests that the voice of citizens in the nomination of candidates particularly in top positions such as presidency, gubernatorial, and Member of Parliament is low. In some parties, candidates were nominated through unclear methods such as consensus, use of delegates, and opinion polls. None of the leading parties held

primary elections to nominate their presidential candidates as it happens in the United States of America. Some parties held primary elections for the other five positions, but voter turnout during those primaries was underwhelming. Some of the reason cited by the respondents for not participating in the primary elections include lack of time-off from work, limited awareness of the time and venue for the party primaries, and lack of interest. There is also a general perception that some candidates were favoured and imposed by parties and thus the primary elections were not meaningful.

Keywords: Nomination, citizen, participation, parties, primaries, elections, Kenya

A Statutory Duty of Care Theory for Electoral Bodies in Kenya

By Moses Muchiri

Elections are important in building and solidifying democratic societies. Since Kenya's transition to multiparty politics in 1997, numerous Constitutional, legal and administrative reforms have taken place to enhance participatory politics in Kenya primarily through national competitive elections. But although amidst these reforms keen observers have questioned the legitimacy or effectiveness of democracy through the ballot in Africa, indisputably, no other means have yet been conceived that better achieves non-violent transition of power with the same consistency as competitive elections. The focus has therefore shifted towards improving electoral processes and key institutions which play a vital direct role towards a just democratic and peaceful society including the judiciary, media, civil society and independent electoral bodies. However, precisely because of the risks associated with competitive elections across many countries in Africa such as polarizing ethnic populations and violent conflicts, the need to ensure credible, fair, transparent and verifiable elections cannot be gainsaid. The Kenyan Constitution embodies the aspirations of the Kenyan people for just and democratic society. In particular, Article 81 enunciates five principles for the electoral system one of which is so fundamental that it can arguably form the basis for duty of care liability against electoral management bodies in Kenya in respect to the conduct of elections in Kenya. This paper explores the issue whether election management bodies owe a statutory duty of care in their cardinal function of administering and conducting national elections in view of the argument that the Constitutional principle of free and fair elections prescribed in Article 81(e) of the Constitution amounts to or envisages a special duty of care standard in conduct and administration of elections by electoral bodies in Kenya. Therefore, as an exception to the general rule that public bodies do not generally owe a duty of care, election management bodies in Kenya, chiefly the Independent Electoral and Boundaries Commission, has a duty of care to dispense its statutory function in fulfillment of those Constitutional electoral principles. The need to embrace this duty of care is arguably a crucial ingredient for credible, fair and independent elections not just in Kenya but in all democratic societies.

Key Words: Duty of care; statutory duty of and public authorities; electoral bodies; elections management.

Examining the relationship between political will and the harmonisation of the electoral system in Africa: Prospects and Challenges

By *Osciah Mahoso*

Since the continent of Africa experienced its third wave of democracy in the early 1990s, electoral law reform has been a significant topic in African politics. Since that time, some nations have improved voter registration laws and electoral system layout, implemented gender quotas and other affirmative action policies to encourage participation by disadvantaged groups like the disabled, the young, and ethnic minorities, created and amended legal frameworks governing party and campaign finance and overseas voting, and changed laws to make room for the use of new technologies. However, a few number of nations in Africa have updated their laws to address the electoral commissions themselves, namely its makeup, the selection of members, their duties, and their independence. This essay aims to investigate the differences between specific national election reforms and international and regional electoral reforms ratified by several African countries.

This essay emphasizes the importance of the political environment in understanding how an electoral reform project develops from conception to adoption by parliament. Reforms affect who wins and loses elections, which affects the lives and livelihoods of politicians who sit in parliament with the authority to enact new laws. This explains why some significant election reforms struggle to take place. Once in place, the framework solidifies the interests of the existing power structure, which profits from the status quo and may not be motivated to reform. A party may insist that reform is required while it is in opposition, but after it gets power, these ideals are frequently dropped. In addition, election reforms have been ignored since they are said to be engineered by outside forces, such as NGOs favourable to the former colonizers intent on overthrowing the current government.

This explains the sensitive nature of the election reforms in Africa which makes them challenging. Therefore, it is wise to implement electoral reforms from the bottom up approach in accordance with local conditions. In order for electoral reform to succeed in Africa, this article contends that political will and commitment are the most critical qualities. Following the established international and regional instruments that have been ratified, election systems in Africa must be harmonized in order for electoral changes to take effect. In order to provide potential ideas that can improve electoral reform in Africa, it is necessary to identify the opportunities

and problems facing the harmonisation of national electoral reforms in Africa as a continent given its diversity. To do this, a qualitative desk research approach will be used, in which the current literature—in the form of journals and books based on the subject—will be thoroughly exploited.

Key words: Political will, political harmonisation, electoral system, prospects and challenges.

The Challenge of Electoral Malpractice as An Albatross in Kenya's Quest for Democratic Electoral Good Governance

By John Jakinda and Nascar Mutinda (LLB, Egerton University)

Elections is one of the most essential ingredients of democracy however it's conduct has remained a challenge to democratic governance not only in Kenya but also all over the world with trends of electoral malpractice experienced largely in Africa. It has been a few decades now since many African countries adopted a multi-party democratic systems of governance, some progress has been made while challenges remain but there is evidence to show that the majority of African's population prefer the democratic system of governance. This paper reviews the features of what is and what is not democratic governance as well as election process. An attempt is also made to describe the dimensions as well as the challenges of electoral malpractice in Kenya's quest for democratic governance. Electoral malpractice in Kenya has been manifested by strategic manipulation of electoral rules, electoral institution, electoral administration, and manipulation of voters. It is due to the aforementioned practices that election offences manifest into all forms of Malpractices such as rigging, thuggery, vote buying and often violence culminates thereafter. These offences have remained an Albatross in Kenya's Electoral journey of one day achieving a good Electoral democratic governance that can be emulated not only across the continent but also the world at large. Although the Kenyan Constitution together with other laws have granted the Independent Electoral and Boundaries Commission, Director of Public Prosecution and law enforcement agencies extensive powers and authority to oversee, Investigate and prosecute all election offences in Kenya, generally the role of the court with regard to free and fair elections is to impartially and expeditiously determine electoral disputes, consequently the paper will also establish the role of the media in ensuring the voter is able to make an informed choice as a public educator in this topic. The paper adopts also a theoretical, doctrinal and conceptual method of research and utilizes Kenya's electoral laws, court decisions as well as legislations criminalizing electoral malpractices so as to arrive at a balanced and objective analysis. Electoral malpractices have not abated since the promulgation of the electoral laws and the 2010 Constitution as till to date electoral malpractices are still reported. The paper also argues triggers of electoral malpractice, violence, legitimacy crisis, corruption and other vices that cannot be unrelated with electoral fraud. Lastly It sets out strategies that would tackle challenges of electoral process and improve electoral integrity including inter alia the adoption of an efficient technology in the electoral process

that is transparent and abiding by the principles of Article 10 of the Constitution of Kenya.

Key Words: Electoral Malpractice, Electoral democratic governance, Independent Electoral and Boundaries Commission, Multi-party democracy.

The Invisible Future Voters – Children

By Ndindi Nganga

The Elusive Two-Thirds gender Rule: Reflections of the 2022 General Elections

By Prof Patricia Kameri-Mbote and Dr. Ruth Aura

The efforts to ensure gender parity in political representation in Kenya has been a struggle since independence. To mitigate the struggle, the 2010 constitution entrenched affirmative action in to ensure women form part of governance of their country in elective and appointive positions. The constitution provides that no more than two thirds of elective and appointive positions should be held by one gender. This is popularly captured as the two thirds gender rule. However, its non-implementation all on parliamentary positions remains a key struggle towards equality even with the Courts' interventions. Kenya has undergone three election cycles notably 2013, 2017 and 2022. In all the election cycles it is believed that a legal change is critical for achieving the elusive the gender rule. No legal change occurred, and women have been elected in the August houses nationally and at county level in the 2022 general elections. This study looks back to the past two elections to juxtapose the trend in 2022 with a view to ascertaining what propelled the women to be elected in the absence of a clear legal framework to bolster their increase in numbers. Democracy demands equality in representation in all facets of government and political systems. The persistent underrepresentation of women is an abuse of these democratic values. Using intersectionality and liberal feminist theories, this article is poised to interrogate the successes of elected women leaders in the just concluded elections. It will use the lessons therefrom to inform advocacy strategy to increase the number of women in elective positions, in view of the legislature's inability to implement the two thirds gender rule envisaged in the Constitution.

Key words: Two-thirds gender rule, 2022 general elections, 2010 Constitution, gender equality, intersectionality.

The Impact of Gendered Political Violence on Women's Participation in Kenya's Electoral Process

By Dr. Paul Ogendi & Ms Judith Murungi

(Dr. Paul Ogendi, Lecturer, University of Nairobi School of Law, Kisumu Campus.

Ms. Judith Murungi, Advocate)

According to the World Health Organization (WHO), political violence is characterized by both physical and psychological acts aimed at injuring or intimidating populations including: shootings or ariel bombardments, detentions; arrests, torture and home demolitions. Both men and women face gendered political violence with the main difference being that women are more susceptible to being attacked sexually while men are most likely to be physically attacked. Gendered political violence against women in particular is attributable to men's hegemonic control of the political system. Some of the gendered political violence meted out against women include: direct attacks on the campaign trail; character assassination from both party members and their opponents; and threats aimed at causing them to step down or lose.

Illustratively, Liz Njue, a Kenyan psychologist who had wanted to contest a county assembly seat had just arrived to vote in her party primary when she was attacked by her opponents who pulled her hair and tore her blouse forcing her to flee without casting her vote and subsequently lost the race. Njue was one of the many women who were physically and sexually assaulted during campaigns for presidential, legislative and local elections in August 2022 and despite reporting these cases to the police no arrests have been made. Other women contestants such as Esther Passaris also faced verbal slurs and body shaming on social media. Many other examples abound. According to the global Inter-Parliamentary Union, Kenya has the lowest rate of women in politics in East Africa with 23% of parliamentary seats, most of which are dedicated to women representatives and not mainstream Members of Parliament. The proposed study will analyze the problem of gendered political violence and its impact on women's participation in the electoral process. It will evaluate the adequacy of the law, explore the enforcement challenges, and discuss the interventions employed by various actors including the civil society to ameliorate the situation in Kenya. The study will employ mixed methods research by relying on both desktop review of available literature as well as conducting interviews from relevant stakeholders.

Key Words: gendered, political, violence, women

The Calcification of Impunity in Election Related Sexual and Gender Based Violence in Kenya

By Dr. Mercy Deche

The nature of Sexual and Gender Based Violence (SGBV) is such that it is escalated by the slightest interference with the ordinary rhythm of life such as enforcement of Covid 19 containment measures, civil and political unrest, demonstrations, humanitarian crisis and in

Kenya, the general elections. It is no wonder that SGBV has featured prominently in all electoral cycles since the 1990s. This is despite Kenya's efforts in strengthening her institutional and legislative frameworks in the post 2010 constitutional dispensation. For instance, during the 2017 general elections, the Kenya National Commission for Human

Rights (KNCHR) documented at least 201 cases of sexual violence including gang rape and other forms of sexual assault. In the 2022 elections, FIDA-Kenya deployed 100 monitors to report and monitor cases of election related SGBV (ESGBV) and by 30th June 2022, a total of 727 ESGBV cases had been reported by the Fida monitors. The actual figure is likely higher due to under-reporting and the fact that the data was from select counties identified as hot spots. Some of the recorded ERSGBV was perpetrated in broad daylight and in full view of cameras including one taking place within the precincts of a police station.

Perpetrators of ERSGBV vary from non-state actors like neighbours to state actors especially law enforcers. The victims range from political aspirants, their supporters and families, to unaligned ordinary civilians. Despite the high prevalence of ERSGBV, very few of the violations end up in the justice system. They have continuously been marginalized and minimized to a near normal and it is almost impossible to encounter anyone who knows anyone who has been convicted or even arrested for ERSGBV. In fact, impunity has been identified as a key driver to ERSGBV.

This paper traces the pattern of ERSGBV since 2007 to the 2022 general elections including the emergence of the hitherto unknown cyber facilitated ERSGBV. It also interrogates the existing socio-legal framework within which ERSGBV is responded to. This is with a view to identifying possible barriers to access to justice for victims of ERSBGV. Using the lens of various strands of feminism and the concept of patriarchy, the author presents possible reasons for the lack of delivery of prompt and expeditious justice for victims of ERSGBV and the consequences of

this status quo. The paper concludes with recommendations towards enhanced access to justice key of which include more intentional inter agency cooperation and referral mechanism between the legal, medical and security agencies.

The data in this paper is compiled from desk research, primarily through a review of statutes and reports compiled by the KNCHR and Fida- Kenya. An analysis of the facts, arguments and court's pronouncement in Petition 122 of 2013 (Covaw & 11 others v Attorney General of the Republic of Kenya & others) has also informed the paper.

The Power of Language In The Context Of Adjudication: Examining the Supreme Court's Use of Language in The Consolidated Presidential Election Petitions 2022.

By Evans O. Ogada

The Supreme Court of Kenya on 5th September 2022 rendered an abridged decision on the Consolidated Presidential election petitions, following it up later with an elaborated version after 21 days. The Supreme Court decision, as a consequence of its constitutional placing as the highest court in the land and by virtue of the fact that its decisions bind all other courts, will have effect on electoral processes and its ripple consequences will be felt in the entire justice system.

The commentary on the judgment are being made and will continue to be made. Public commentary is important as it is an important capacity of civic engagement. Public commentary is important for the reason that citizens are able to scrutinize and hold offices to account, including offices in the judiciary. It has emerged in social media commentary and public discourse that the public was not impressed by the Supreme Court in terms of the language it employed in sections of its judgment.

The Supreme Court used unprecedented terms to express its displeasure against counsel and certain witnesses. The impugned words include hot air, wild goose chase and fool's errand. The use of such terms in the context of a bitterly contested election, anger looming large in the aftermath, left casual observers worried and the Court should have used more circumspection in its use of language bearing in mind the raw emotions that characterized the 2022 Presidential elections.

Law Professor Harold Berman in a text first completed in 1964, *Law and Language: Effective Symbols of a Community*, defined language as a set of symbols for expressing thoughts, or as a mechanism for transmitting information. Language therefore has communicative and institutional importance and through words, a judge may exude self-worth and purpose. Judicial decision making is after-all a solemn enterprise, laden with history and dignifying rituals.

The uncalled for language by the Supreme Court not only detracts from the court's substantive arguments but also fundamentally and materially assails the Constitution, which demands that that court and indeed all judicial officers behave in a manner that hoists the dignity of the office above personal ego and frailties.

The office of judge under the Constitution of Kenya 2010 departs from the old judiciary which exerted its power so heartlessly. The judges of old were unbending in demeanor and some ran their courts like gulags. The judiciary under the Constitution today is expected to act in a humane, dignified and respectful manner. The importance and solemnity of the office of judge demands temperate language and the appropriate judicial temperament. Language is particularly important in any institutional setting. The analysis of language cannot be divorced from the analysis of the purpose and functions of language in human life, let alone the judicial setting. The choice of words and how these words are spoken impacts on the very image of any institution. Strong language employed to berate counsels and their pleadings can easily be construed to mean that the Court is communicating its animus with regards to the matters it is adjudicating upon. In a highly volatile election environment such as the presidential election that was, the Court bore special responsibility to not only be impartial but to be seen to be impartial.

There are certain principles that underlie the normative values that is justice, impartiality, accountability and fairness, which are always in play when judicial determinations are made. Value 2 on Impartiality of the Bangalore Principles of Judicial Conduct require that a Court conducts itself in deed and in terms of perception in an impartial manner.

The Bangalore Principles urge that, 'a judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.'

Article 5 of the Universal Charter of the Judge states that, 'the judge must perform his or her duties with restraint and attention to the dignity of the court and of all persons involved,' again emphasizing the importance of impartiality and the appearance thereof. The Latimer House Principles on Parliamentary Supremacy and Judicial Independence equally states that 'an independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice.'

In a nutshell, temperament in language and character is fundamentally important for a judicial officer. The American Bar Association defines temperament as 'having compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice.' Judicial temperament is certainly not displayed by a Court when incendiary and demeaning language is used. Judges must show respect and respect is shown when everyone is treated with dignity, by paying attention and listening carefully to submissions, by

exhibiting patience, by being polite and courteous and by the judge conveying an attitude that he/she will decide on a matter fairly and objectively, based on the evidence availed and the applicable law.

Judges awe by the weight of intellectual heft and certainly not by wielding the stick of draconian habits that may be read to compromise their impartiality. Justice Dikgang Moseneke, former deputy

Chief Justice of South Africa in his text, *All Rise: A Judicial Memoir* states that the norm demands that a judge must not appear to be nursing a fixed notion or be seen to be partial. A judge should not allow impression be formed that he or she is partial towards a cause, person or organization.

The Supreme Court in a liberal democratic setting plays several significant roles; it is the authoritative interpreter of the law, a role that Professor of Jurisprudence Koen Lenaerts states that requires the court to be in an intermediate position on the institutional map of a democracy based on the rule of law. This fundamental role of a Supreme Court truncates into legal and political dimensions, where in its legal sense, the Supreme Court is the ultimate authority on what constitutes valid law. With regards to the political dimension, depending on the intellectual and situational awareness of the Court, the Court will limit and/or expand the operating space of the political actors and their legislative tools. Socially, the Court will impact on constant changes in a society's socio-economic realities. A court hearing and decisions emanating therefrom must be alive of the solemn fact that these are a scarce public amenity with severe outcomes.

The Constitution places overreaching duties on wielders of public power including Justices of the

Supreme Court. The Supreme Court is expected to generate works imbued with textured richness and discussion about the Court's jurisprudence should centre around the qualitative aspects, the pulsating vibrancy of intellectual output and not the nature of language used.

Key words: Judgment; Words; Solemnity

Examination of the Sociological foundations of Election related SGBV and its implications on Elections

By Ongowo Eliud Okumu (Master of Arts in Sociology (Community Development and Project Management), Lecturer and Doctoral Researcher with a special interest on Social Policy and Children at Egerton University in the Department of Sociology.

Electoral-related sexual violence has been a common phenomenon during electioneering period in Kenya and Africa in general. According to Ongaro et al (2017), sexual violence has been a permanent feature of Kenyan elections since 1990s but reached a highest peak in the 2007/8 elections. The prevalence of election related sexual violence is disturbing considering the enactment of the progressive Kenyan Constitution of 2010 and other legal frameworks that prohibit SGBV in whatever nature or context. The prevalence of Election related sexual violence has been blamed on breakdown of the law. Should we really hope that the existence of the law will address election related SGBV? Do elections really lead to SGBV? Could we be seeking the causes SGBV in the wrong places? Since the Electoral-related Sexual Violence is premeditated, should we really blame election related SGBV on election? Shouldn't we then seek alternative explanations and solutions of election related SGBV from the confines of Sociology? This study sets out to examine these questions from a sociological stand point with a view to exposing the foundations of SGBV from a societal perspective. The study will use a systematic review method to examine the sociological foundations of this vice. From a Sociological stand point, we argue that election related SGBV can be prevented and addressed using socio-cultural frameworks that are domiciled in every community culture. Further, SGBV is a behavior that is learnt and can only be unlearned by invoking socio-cultural norms that protected vulnerable members of the society from such vices.

Key Words: Sexual, Gender Based Violence, Sociology, Electoral Gender Based Violence

Sexual Gender Based Violence in The Context of Electoral Process

By Kathare Karimi Brenda (Law Student, Kabarak Law School)

Scholars and philosophers alike have for years dissected what democracy is and why it's relevant and in essence elections as a fulfillment of democracy. Democracy essentially speaks to a 'government of the people, for the people and by the people. According to John Locke 'all men are, or ought to be, considered equal as political beings' and Since democracy is theoretically a government by the people, citizens in essence are the centerpiece to democracy, their votes have the power to maintain and or change leadership via elections. Apart from conferring legitimacy elections create an opportunity for vulnerable person and marginalized groups an opportunity to fully articulate their concerns or interests. But this is most likely to happen only when the elections are fair, free and credible and undertaken in countries with strong democratic institutions.

Despite the long history of democracy before the 1990s most especially in Africa it was not unheard of for presidents for life to exist. This is made possible with the emergence of 'democratic' authoritarian regimes, or authoritarian 'democracy'. This is achieved through the manipulation of the electoral process to such an extent by various means (including violence) that the election result is predictable.

The violence occurs in countries where democracy has not been entrenched, such as during the elections in Zimbabwe in 2005, or in the instance where the government has been actively factional in benefitting one ethnic group above others; namely in Kenya's 2007 election.

The history of elections in Africa has shown that the perpetration of brutal acts of sexual violence and rape being is weaponized in the context of electoral disputes. These brutal acts constitute breaches of the rights and freedoms guaranteed by the African Charter on Human and Peoples' Rights, the Maputo protocol, and the African Charter on Democracy, Elections and Governance. These include the rights to dignity, personal security, bodily integrity, personal liberty, peace and security, the right to participate in political and decision-making processes, as well as freedom from discrimination, torture, and inhumane or degrading treatment.

A comparative analysis of the violence perpetrated in Kenya during the general elections held in 2007, 2013 and 2017 suggests that Sexual Gender Based Violence constitutes one of the major components of election-related violence in Kenya.

Adjudication Of Pre-Election Disputes in Kenya: A Glimpse into The Legal Framework, Plurality, Challenges and Expectations.

By Amos.W. Shihundu & Kivuva. S. Ndeto

This paper examines the adjudication of pre-election disputes in Kenya and its impact on two correlative concepts, access to justice and public reasoning liberalism. In particular, the paper scrutinizes the efficacy of the existing substantive legal framework governing the determination of pre-election disputes. The legal framework will be dissected to establish how the law has attempted to address three pre-eminent categories: in-house political parties disputes, voter registration disputes and disputes regarding the violation of set norms governing Electoral conduct. The paper also analyses several pre-election disputes case scenarios and various reliefs that were accorded to parties. In analyzing the reliefs accorded to the parties this paper will critique on the utility of such reliefs and interlink them with the axiomatic aspect of justice as a public good. Finally, the paper will seek to discern the challenges encountered during the determination of pre-election disputes. The challenges will be categorized into two broad lanes the complex and non-complex. Transformative solutions coupled up with functional expectations will conclude in response to the complexities analyzed in the paper.

Keywords: pre-election disputes, access to justice, reliefs, transformative solutions, functional expectations.

Role of the Civil Society Organizations in promoting access to justice in the democratic spaces

By Dr. Ruth Aura and Ronald Kihali

Civil Society Organisations (CSOs) play a tremendous role in promoting access to justice and democracy in our society today. They mobilise communities for collective actions, enable civic participation and encourage inclusive development and participatory democracy. They help get people informed of their right to access justice equally. However, CSOs have not been as active as they used to be in the past. This study interrogates the evolving relationship between the state and CSOs and examines how CSO's roles have been impactful in the democratic spaces. It highlights the diminishing influence of CSOs today as compared to the past. The study attributes this to factors such as state interference and CSOs' lack of independence. There are various achievements that amplify the critical role CSOs play in our society. Nevertheless, their operations have not been without challenges. The study offers a critical examination of CSOs' involvement in democratic spaces by focusing on the watchdog role, civic education, advocacy role and the partnership role. It offers an evidence based analysis of CSOs' engagement in democratic spaces in Kenya by outlining the disposition of one democratic elected president,

CSOs' social services, their fight to defend the constitution and democratic institutions, their education to people about democratic rules and their fight against corruption. The study will demonstrate that CSOs still have a long way to go in fighting for free, fair, transparent and accountable elections.

Key words: Civil Society Organisations, access to justice, democracy, civic education, advocacy

Role Of the Media in Promoting Access to Justice During Election Period

By Jack Nyakuti (BA (Communication and Media, Laikipia University) (Editor for the Elephant Magazine)

This article examines the roles (of) and how social media can promote access to justice during election especially in this twenty first century. At this time, the social media has turned to be the most effective way to promote justice, awareness, information, education, campaign etc. then the traditional media such as newspaper, radio and television.

Incorporating evidence from reviews, personal correspondence, and diaries, this study demonstrates how social media has become a force to be reckoned. It argues for the accessible justice, economic, political and representational of all people in the society.

Fake News and its implications on democratic discourse among journalists in the 2022 general election in Kenya

By Kioko Kivandi, Patrick Mutahi and Shitemi Kamadi

One of the most debated issues of the 2022 Kenyan election was a question asked during the Nairobi County gubernatorial debate about the real name of Kenya Kwanza Alliance's (KKA) candidate Johnson Sakaja – "Is your name Sakaja?" The question, sought to clarify on the identity of Sakaja as a follow up to an issue raised by his opponent, Azimio's Polycarp Igathe. Journalistically, this was an important question considering that by the time of the debate there were integrity queries being raised about Sakaja with respect to the status of his university degree. Some of the information – that was mainly shared online – had indicated that he had another name, 'Koskei'. The question did not however elicit a substantive response from Sakaja after he downplayed it. Those who had initially argued that Koskei was also his name had done so to link him to the Kalenjin community from which the KKA presidential candidate William Ruto hails. Those pushing for the link were justifying a narrative that Ruto was a tribal king pin and most of the persons he was working with at Kenya Kwanza were from his community. This paper argues that, the question, "Is your name Sakaja?" was asked within an information ecosystem that was so saturated with fake news to the extent that it obscured real democratic discourse. It will argue that within such an ecosystem it is difficult to achieve robust democratic discussions. Specifically, the paper looks at fake news as mis-information, dis-information and mal-information asking how it impacted on democratic discourse among journalists during the 2022 general elections in Kenya. To achieve this, the paper starts with a review of a sample of social media posts that were flagged as fake news during the 2022 general election. The review is backed up by an online survey among journalists, focused group discussions and key informant interviews on the topic. Overall, the paper seeks to expand literature on research on the interplay between fake news and democracy, an interest that has been growing globally since the 2016 Presidential victory of Donald Trump in the United States of America (USA). It seeks to give a sign post of the way forward, part of which is legal and policy implications on how to mitigate abuse of the digital communications spaces as digital technology keeps improving. It will also seek to locate the space of mainstream media in the information ecosystem at the changing times in the country. It investigates gaps within the mainstream media that have made (over)reliance on social media as a source of information among Kenyans. It also goes further to unravel the opportunities that both mainstream

and social media can exploit to reverse the undesired outcomes and make media communicative spaces robust public spheres.

Key Words: Fake News, Democracy, Mainstream Media, Social Media, Public Sphere, Misinformation, Disinformation, Malinformation

Role Of the Media in Promoting Access to Justice During Election Period

By James Mutua (Journalist, EATV and Radio)

In the wake of the social media during election period whereby fake news is rampant, the mainstream media play an essential duty to provide justice in the apt functioning of a democracy. Debate of the media's roles within electoral contexts, often focuses on their watchdog duty: by unrestricted survey and discussion of the successes and failures of aspirants, governments, and electoral management bodies, the media can inform the public of how effectively they have performed and help to hold them to account. The media has enormous roles in enabling full public participation in elections:

The media educates voters on how to exercise their democratic rights;

it reports the developments of election campaigns and it provides a platform for the political parties and candidates to communicate their message to the voters by providing a platform for the public to communicate their concerns, opinions, and needs, to the parties/aspirants, the government, and to other voters, and to interact on these points; by allowing the parties and candidates to debate with each other; by reporting results and monitoring vote counting; by scrutinizing the electoral process itself, including electoral management, in order to evaluate the fairness of the process, its efficiency, and its probity; by providing information that, as far as possible, avoids inflammatory language, helping to prevent election-related violence.

The media is not the only source of information for voters, but in a world dominated by mass communications, it is increasingly the media that determine the political agenda, even in less technologically developed countries. A recent report put it this way:

The media plays a big function in keeping the citizens of a country updated of current issues and raising awareness of various events in any society.

It also has an extremely significant impact on the public's views and way of thinking. The media is the chief means through which public opinion is shaped and at times manipulated. If this is the media's role then in normal course of events, it becomes even more vital in exceptional periods, one of which is electoral junctures, when the media becomes a primary player. Elections constitute a basic challenge to the media, putting its impartiality and objectivity to the test. The task of the media, especially national media outlets, is not and should not be to

function as a mouthpiece for any government body or particular candidate. Its basic role is to enlighten and educate the public and act as a neutral, objective platform for the free debate of all points of view.

For this reason, election observers, routinely comment upon media access and coverage of elections as a criterion for judging whether elections are fair. Monitoring the media during election periods has become an increasingly common practice, using a combination of statistical analysis and the techniques of media studies and discourse analysis to measure media's role in an election. Overall, the media plays a pivotal role during the electioneering period.

Comparative Review of E-Voting in India and Brazil: Key Lessons for Kenya

Dr. Samwel Ongwen Okuro

In many developing countries particularly in Africa, electoral process and outcomes have been marked by increased violence, death and displacement of civilian populations. In Africa attempts have been made to address issues which trigger electoral violence, top on the list being electoral fraud. The introduction of electronic voting (e-voting) has been heralded as a milestone in managing electoral fraud. However, evidence continues to show that electronic voting embraced in countries such as Kenya contends with questions around system insecurity, electoral malpractices and rigging. While electronic is often seen as a tool for making the electoral process more efficient and for increasing trust in its management the challenges are considerable. If not carefully planned and designed, electronic may undermine the confidence in the whole electoral process. Using available literature, this paper seeks to initiate critical discussions about electronic voting in Kenya and to particularly isolate issues that Kenya can borrow from countries such as Brazil and India which have fully implemented e-voting in their electoral process.

Key words: Election, Electronic, Voting, Technology, Democracy

Challenges Facing Women in Participation of Politics in Kenya

Ian Onkundi Charles (LLB, Kenya School of Law Student)

For the longest time, women have faced challenges in their involvement in political activities. For instance, women face hurdles in their participation as voters, candidates, election observers, journalists, election administrators among other capacities. In Kenya, women are still largely underrepresented in politics and in decision making and this is attributable to repugnant cultural beliefs, discrimination, violence against women, male dominance in politics, lack of financial resources and lack of information. Election stakeholders such as political parties, civil society organizations, election management bodies, election observers and the media have a role to play in helping women overcome these hurdles. This paper analyzes the challenges facing women in the political arena and strategies that stakeholders can implement to ensure gender equality in the political process.

The Constitution of Kenya 2010 lays the basis for gender equality in our country through its robust Bill of Rights. Article 27 for instance provides for the right to equality and freedom from non-discrimination while Article 38 provides for political rights. The two-third gender rule is also expressly outlined under Article 27(8) which provides that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. However, despite these rights and principles being enshrined under our constitution, there is still a long way to go in ensuring gender equality in political processes.

Political parties being the basic unit of political activities have a key role in ensuring women are well represented in the political arena. They can ensure their by-laws are in line with Article 27(8) of the Constitution, they can give women platforms where they can voice their political opinions, they can support women in their political campaigns as well as ensuring they take important offices within the party so they can be on the decision making table.

Civil society organizations can engage in activities that promote gender equality in the electoral process. For instance, they can organize civic education where the public can be sensitized on the importance of having women in politics. They can also whistle blow when the rights of women are violated within the political process.

Electoral management bodies can ensure the participation of women by ensuring

their policies are integrative of women participation. For instance, they can require political parties to ensure their nomination lists abide by the two-third gender principle. They can also carry out civic education as well as ensure women are part of their staff and are actively involved in election management activities.

The media as well as election observers can ensure that they accurately report on cases of women discrimination in politics as well as ensure women actively participate as journalists and observers covering the electoral process. The media can also conduct civic education while observers can give sound recommendations based on their monitoring of the electoral process.

Violence against women is a major challenge that women face in their participation in electoral processes. It manifests through threats, intimidation, psychological abuse, as well as sexual violence. Stakeholders can work together to mitigate this challenge through identifying high risk areas and helping women in such situations. In addition this paper also discusses how men can be involved in promoting gender equality in the electoral process.

What Election of Women Means for Kenya

By Ambrose Otachi

The just concluded elections are a testament that with the right laws, policies and affirmative action, women can thrive in whatever they set out to achieve. A record-breaking 7 women were elected as governors in different counties. Others were elected as Members of Parliament,

Senators and Members of County Assemblies (MCAs). Women now have a platform to support their communities, and drive economic development at large.

Historically, women across the world have faced significant barriers hindering them from participating in the political, economic and social spaces. This is attributed to cultural barriers as well as levels of education and access to opportunities.

In taking a legal approach, we need to make a deliberate effort to review specific laws that affect the electoral process through a gender lens and create guidelines for gender-responsive implementation. It is also paramount that we strengthen the implementation of existing gender-aware or gender-sensitive laws through guidelines that recognize and address the differential gender needs of entrepreneurs. Finally, it is important to create effective collaborative engagements between public sector oversight agencies to ensure compliance in the implementation of the laws that affect women during elections.

According to UN, it would take another 40 years for women and men to be equally represented in national and political leadership at the current pace. With time to achieve SDGs quickly running out, we must urgently take action to increase women's participation in all sectors, to achieve shared prosperity as a country.

The participation of women is critical in driving growth. Any conversations around increasing our competitiveness as a country without looking at women's involvement are echoes in a hollow chamber.

Women as leaders and decision-makers at all levels are critical to advancing gender justice and gender equality—and to furthering economic, social, and political progress. As the late United

Secretary-General Kofi Annan said, "There is no tool for development more effective than the empowerment of women," let us change the narrative on women in leadership and confront socio-cultural drivers of gender inequality.

Access to Justice During the Electioneering Period in Kenya: A glance at the responses to SGBV Cases.

By Kevin Muiruri & Florida Musi (LLB, Egerton University)

More often than not, general elections in Kenya are usually characterized by much tension related to the various forms of violence experienced during the regular 5-year democratic endeavor. Concerning the forms of violence experienced, Sexual Based Gender Violence (SGBV) has always been top of the list. Kenya has progressively tried to address the emotive issue of SGBV by formulating and enacting specific laws targeting the issue.

The laws and policies in place, such as the sexual offenses act and the Protection Against Domestic Violence Act 2015, among others, help give direction about the elements related to SGBV and GBV in general; however, there are challenges to be surmounted within the implementation of the laws since gender-based violence is still experienced by many within the country. Women are the most affected persons by GBV elements. Reports indicate that five out of every 10 women aged between 15 and 49 have suffered violence compared to only 40% of men in the same age bracket.

Based on the factual representation of the status quo of SGBV in Kenya, this research critically analyzes the response to SGBV cases immediately before, during, and after the electioneering period in Kenya. Lessons from 2007, 2013, 2017, and the recently concluded 2022 general elections are highlighted. The contributing factors to SGBV, especially to the marginalized, uneducated, and poor sections of our population, are highlighted since they are the worst hit.

Considering the theoretical proposals by feminist theorists, this study aligns with the ideologies that sexual violence, especially against women in our community during our democratic powers, should not be condoned. This study is set to prove its averment that a democratic society that upholds the rule of law should ensure there is the full realization of the full enjoyment of existing rights and freedoms to its citizens regardless of Gender. In instances where the violations occur, a clear and efficient systemic structure for access to Justice should be adopted to ensure protection against the continuance of SGBV cases.

The research relies on descriptive and analytical methods of research focusing on both primary and secondary data sources. The research draws heavily from the content analysis of reports from the election of observers, the National Gender and

Equality Commission (NGEC), as well as an interviewing tool from semi-structured questionnaires targeting response from key SGBV response stakeholders such as the Police, Medical Practitioners, and the County and National Government Gender offices.

Discussions and findings from the methodological research conducted by the study will be discussed, with the legislative framework for SGBV and its nexus to access to Justice, especially within the election settings in Kenya, being addressed. The various manifestations of SGBV during elections in Kenya are addressed, and this paper's emerging trends are dissected based on the ever-growing technological advancement. Conclusions and recommendations drawn for the discourse on SGBV and access to Justice are also to be provided comprehensively to influence the academic and policy view as new elections are being prepared in the future.

Key Words: SGBV, Electioneering Period, Stakeholders, Women

Innovative Practices in Legislative Oversight and Research in the Fight against Corruption

Ngunjiri Ndirangu

The focus of this study is the innovative practices in legislative in the fight against corruption in Kenya. The overarching problem in this study is the realization that despite enacting several anti-corruption laws, the vice of corruption is still prevalent. Corruption is presumably as old as organized society, at least as old as the time when organized society first established public institutions for its preservation and development. The study has demonstrated that while the Government has pursued anti-corruption programs since the mid- 1990s, the malpractice has persisted and, in some cases, intensified, suggesting that the remedial measures have not been significantly effective. The General objective of the study is to investigate the innovative practices in legislative in the fight against corruption. It also examines the relevance of the national and county assemblies in the fight against corruption. Hence, this study has explored other anti-corruption methods and strategies outside the law to change the prevalent cultures and beliefs through public education and awareness campaigns on the dangers of corruption. A series of measures, including transparency in the funding of political parties and election campaigns, a code of conduct and close scrutiny of the sources of income and possible conflicts of interest of the legislature. The study will use longitudinal research design with the target population being legislative officers. Primary data will be collected through interview and secondary data will be collected from the national and county assemblies' library. Data collected will be analysed using SPSS for multiple regression analysis. Findings from the study will be interpreted for the extent of relationship among the variables. The study makes recommendations for more effective future legal and policy initiatives in an attempt to entrench honesty and integrity in the Kenyan public service through legislative arm of the government. The paper concludes with some solutions to the anomalies

Key Words: Corruption, legislative, oversight, fight, Innovative

Elections And Electoral Violence in Africa

By Sarah Njeru

Most countries in Africa gained their independence in the 1960s. After independence majority of African leaders adopted a single party mode of governance which was viewed as a panacea for unity while the leaders pursued national consolidation and development thus the idea of periodic election remained a mere concept in academic field. This intent was overshadowed by rise of dictators whose sole pursuit became consolidation of power and amassing of wealth. In 1990, many countries were clamoring for a multiparty democracy where ideas of polyarchy and party pluralism imbued fresh blood in the electoral process. However, these plebiscites were often marred with irregularities, lack of freedoms and civil liberties. Although most countries hold elections apart from Eritrea, the continent is still home to 10 longest serving presidents. Thus the benefit of election, which is the most visible aspect of democracy and the best way citizens express their sovereign will, is not fully realized. The envisaged sanctity of the electoral process has either been used as mechanism for legitimizing power for authoritarian governments to survive or to ensure the succession of dynasty. Nevertheless, elections in Africa have facilitated the emergence of democratic government in countries like; Ghana and South Africa. In addition, more stable countries have also emerged following autocratic regimes and constant civil wars. This paper seeks to analyze the impact of election on democratization process in Africa, while paying close attention on how the electoral violence has hampered the same. The paper also seeks to ask questions like; are elections an indicator for democracy a country? Is peaceful transition election important over transformation?

In 21st century the continent has experienced high profile electoral crises in various countries such as in Zimbabwe 2000 and 2008, Kenya 2007-2008 and cote d'ivoire 2010-2011. Collectively, these violence led to at least 4000 deaths while hundreds of thousands people were displaced. While elections are not inherently a source of violence, they can exacerbate ethnic, regional, political or religious tensions that can spill over into violence especially if they are conducted exclusively against the institutionalized legal framework. The study shows that countries with history of electoral violence are likely to experience a reoccurrence of such violence as witnessed in Kenya, Nigeria and Zimbabwe. Thus electoral violence in the continent has become a very major phenomena that seem to defy all the possible remedies which has been catalyzed by the current thirst for power by the most of African leaders, hence the electoral violence in our modern day are becoming almost inevitable in the continent, from north, west, east and central sub Saharan African regions at least majority of the countries have had a taste of the bitter pill of election violence. Most daunting, is the fact that a bigger percentage of these violence are instigated by electoral process, as electioneering period in the continent has been a matter of do or die.

Key words; Election, violence, and democracy

Citizen Participation in The Electoral Process

By Musi Florida, Edna Wanjiru, Rachael Kagwa and Joseph Kimotho

Active and meaningful participation of the citizens in public affairs is the most distinguishing feature of a democratic society. This is judged by the extent to which the government opens up to citizens' involvement in public affairs and the platform they give citizens to hold their governments accountable. Kenya's 2010 constitution is citizen centered. This means that the government is democratic because the people govern themselves and it is a republic because the legitimacy of the government powers is derived from the people themselves. We the people exercise this sovereign power directly in voting or through our democratically elected representatives, by the dint of article 1 of the constitution of Kenya 2010.

Voting is a method by which citizens of a majority age get to elect their political leaders, to govern them on their behalf for a period of time. It is important for the citizens to be involved in their national and county level governance as it helps in building the public's ability to hold their political leaders to account for the implementation of decisions and actions agreed upon. This is majorly so, when there is a higher voter turnout whenever the country is an electioneering cycle. But what happens when there is a low voter turn-out? Who is to put the political leaders to account when there is apathy and the people are no longer interested in being politically engaged? Is there recourse for the said persons? Des the law recognize the possibility that might come to be.

Low voter turn-out has always been considered to be threat to democracy and active public engagements as depicted in the constitution. The social norm perception shows that a person's behavior conforms to their beliefs about what people can actually do in that particular situation. How we respond to situations is termed as the descriptive social norm dictating our responses and reactions to situations. People should hence be persuaded to employ a high turn-out rather than a low turn-out. Democracy is the rule of the people for the people and by the people. The probability that one's vote may not be pivotal decision makers (The make or break vote) is reduced when many plan to vote. There is need to understand that every vote has a greater impact on the margin of victory as seen in the 2022 elections even if one's vote is not pivotal.

One important feature of this study is that the dependent variable is the respondent's intention to vote rather than the actual turn out. The secondary consideration is whether the turn-out is high or low. The general objectives of this

concept paper would be to understand whether the citizens are motivated enough to participate in the electoral process and if not what are the prevailing reasons and what are the measures the government and the relevant stakeholders ought to put in place to motivate the citizens engage actively and understanding the level of citizen participation in designing government policies.

Citizen participation in Electoral process in Kenya

Pauline Nduta (LLB Student, Egerton)

One of the major ways in which citizen participation or public involvement can be ascertained in a democratic setup is through voting. From a literal perspective, voting may be classified as merely casting ballots in an election. However, voting within the perspective of this piece is classified as a gesture of patriotism which demonstrates the unwritten understanding and execution of the citizens' duty and commitment to engage in governance, thus upholding the spirit and purpose of the Constitution.

The discourse within this paper aims to highlight the Kenyan public's role in the electoral process; it is imperative to underscore that there is an enormous reference to the just concluded general elections. The direction taken is entrenched in the trajectory of Kenyan politics in involving the citizens and the existing functional policies adapted to ensure maximum enjoyment of their political, social, and economic rights.

A drastic drop in voter turnout characterized the general elections held on the 9th of August 2022; this piece also discusses with an expansive outlook the 'whys' or the causative factors to the worrying numbers recorded. In addition, the dangers of nonparticipation and neutrality to democracy and governance. Methodically, relevant articles, journals, academic papers, statistics, and reports that are vast in elaborating public participation in the electoral process concerning the

recent election will be used as a secondary source for information in this paper.

The results from this theoretic analysis will, in turn, help in the comprehension of the importance of participating in elections, as it is something we cannot afford to overlook. The spirit of the discourse here highlights the importance of dissecting Kenyan and, to a greater extent, democracy in Africa with an intent to dislodge retrogressive practices that usually come alive during election periods and graft new practices that will ensure maximum enjoyment of this democratic right as prescribed by the Constitution of Kenya 2010.

The Role of Multi-sectoral Coordination and Collaboration Forums in managing Electoral Processes: A case of Meru County Multi-sectoral Co-ordination and Collaboration

By Mary Mwangi (National Government Administrative Officer and Certified Professional Mediator)

Holding regular elections is an integral part of any functioning democracy. Elections give citizens the opportunity to participate in the political process by allowing them to identify and select their political representatives. Elections make a fundamental contribution to democratic governance. Citizens must be accorded an enabling environment to elect their leaders. Despite elections providing an opportunity to nurture democracy, they present numerous challenges all over the world and Kenya is no exception. Since independence in 1963, Kenya has held regular general elections. While most of these elections have relatively been peaceful, some have been characterized by electoral violence. The 1992, 1997 and 2007 elections were marred by violence leading to deaths, displacements, destruction of property, vandalism of critical infrastructure, disruption of the economy among other vices. In 2013 and 2017 elections were generally peaceful. The electoral and security landscape of the general elections scheduled for August 2022 appeared to elicit concerns. The capacity and preparedness of both the election management body and state security mechanisms had therefore to be above reproach in managing the electoral process which consists of three phases, Pre-Electoral, Electoral and Post- Electoral. Each of these phases was marred by different activities, threats and opportunities that needed to be managed for a peaceful election. Different management practices were witnessed in the just concluded election. Among the practices included signing of code of conduct by nominated candidates, signing of peace accords in some counties, use of Alternative Justice Systems in resolving electoral related disputes as well as establishing Coordinating structures such as County and Sub County Multi - sectoral coordination and collaboration forums on Election preparedness. Executive order No. 1 of 2019 mandates the Ministry of Interior and Coordination of National Government to among other functions, Coordinate National Government functions in the Counties, provide oversight over Internal Security organs, coordinate peace-building and conflict management initiatives and facilitate registration of persons. To actualize the Executive Order, Cabinet Secretary Interior and Coordination of National Government presided over a joint meeting of senior security officers on 15th July, 2021 at Harambee House to consider peace and security for 2022 general elections. Electoral security plan and standard operating procedures (SOPS) manual was developed.

As a follow up, the Principal Secretary Ministry of Interior and Citizen Services directed all Regional and County Commissioners to establish and operationalize Multi sectoral forums in order to enhance the coordination and collaboration of different stakeholders in the Electoral process. The forums constituted state and non- state actors who had different roles to play. This paper examines the role of the multi-sectoral co-ordination and collaboration forums (MCCFs) in managing the 2022 general election processes in Kenya with a specific focus on the Meru County MCCF. The specific objectives of the paper are to establish the contribution of the MCCF towards peace-building; to determine the role of MCCF in conflict monitoring and mapping; to examine the influence of MCCF in preventing political violence against women, and to establish the contribution of MCCF towards demobilizing youths from election conflicts during the 2022 General Election in Meru County. A set of semi-structured questionnaires will be used to collect primary data to collect data from different stakeholders of the Meru County MCCF who will be selected using the stratified and random sampling methods.

Keywords: Elections, Preparedness, Multi-sectoral, Collaboration, Co-ordination, Forums.

Section 83 of the Elections Act; Effect of Declaration of Unconstitutionality

By Mutanda Moses & Masafu Erick

The electoral process remains central towards the realisation of the goal of democratic governance that is a core aspiration of the 2010 Constitution. The 2022 election cycle provides a solid basis for evaluating the soundness of our electoral system, electoral jurisprudence and procedures. The Judiciary is one of the institutions that plays a central role in the conduct of credible elections. It is tasked with adjudicating disputes that arise as part of the electoral process.

Following the nullification of the presidential election in 2017, the Election Laws (Amendment) Act 34 of 2017 was enacted by Parliament, which proposed to make the test in section 83 conjunctive, requiring proof of both non-compliance with the

Constitution or written law and the impact of irregularities on the outcome of the election before a court could nullify the result. Nevertheless, the proposed amendment to section 83 was declared unconstitutional in the case of *Katiba Institute and Africa Centre for Open Governance v Hon. Attorney General and Others*, Nairobi High Court Petition No. 548 of 2017, with the Court noting that amendments to election laws ‘must be forward looking in order to make elections more free, transparent and accountable, than to shield mistakes that vitiate an electoral process’.

Upon the said event an issue has recently presented itself as to whether the said section remained law pre the declaration of unconstitutionality or the same does not exist post the declaration of unconstitutionality. Some people argue that no legislative amendment was introduced to align section 83 with the decision of the Court, nor was an appeal preferred against the decision of the Court.

Section 83 becomes important because it helps us understand ‘standard of proof’ in EDR, which would be referring to the extent the Petitioner is to go to sufficiently persuade the election court to interfere with the election results declared in favour of the candidate who scored victory. Section 83 of the Elections Act, 2011 thus lays down the standard of proof required in election petitions in Kenya.

The amendment that were enacted in 2017, vide the Election Laws (Amendment) Act No. 34 of 2017, had the effect that the previous disjunctive ‘section 83 test’ was purported to be replaced with a conjunctive test thus requiring petitioners to prove

Act No. 34 of 2017, had the effect that the previous disjunctive 'section 83 test' was purported to be replaced with a conjunctive test thus requiring petitioners to prove both limbs, i.e., that the election was conducted in violation of the Constitution and written law and that noncompliance with the law affected the result of the elections. We have seen the just concluded Presidential Petition where Section 83 was at play, how then is Section 83 to be treated? As this has implications on access to justice where all Kenyans should be subjected to the same law.

With regard to the impugned amendment to section 83 of the Elections Act, independent of any legislative reform from Parliament and the provision having been declared unconstitutional by the Court, some persons argue that the said section is inapplicable and void. They base their argument that barring the enactment of other provisions in their place, the provisions that preceded the annulled ones cannot be said to have been automatically reinstated, as Parliament is the sole body with legislative authority. This paper respectfully disagrees with this line of thought and maintains that section 83 maintains the disjunctive test post the declaration of unconstitutionality in the Katiba Institute Case.

Closing Online Civic Spaces in Kenya's Electoral Process? A Focus on the 2022 General Elections

By Stephen Mutie* *School of Law, Arts and Social Sciences, Kenyatta University*

Despite the constitutional declaration of the equal status of both sexes in most countries, gender discrimination remains fully entrenched in the power configuration of Kenyan society, with the consequences of limiting women's participation in the political process. Indeed, the marginalization of women in the country's political equation remains the central challenge to democracy in Kenya. Yet violence against women involved in the political process has steadily risen in the last three general elections, specifically in online spaces, an civic space initially thought of as expanding civic spaces in Kenya. This violence, which signifies closing civic spaces in the online spaces, is meted out on women who run for political offices, who ironically are expected to have an amplified online presence and engage on social media. Another group of women targeted is the women who conduct elections, and thirdly is the women judges involved in settling electoral grievances. Yet, according to Articles 31 and 33 of the constitution of Kenya, read with the Kenya Computer Misuse and Cybercrimes Act Section 27, and the data protection Act is a human rights-centred policy that empowers citizens to manage their data in the hands of third parties and criminalize abuse on social media and cyberbullying. Locating my analysis within the intersectionality theory, in this paper, I argue that to mitigate gendered electoral violence in online spaces, an intersectional understanding of gender (in)justices during electoral times is needed. Although the Kenyan women made a historic breakthrough in the 9 August elections, winning 26 seats in parliament, a further step towards gender parity, this was achieved against a backdrop of severe online violence against them. The victories capped a months-long election campaign that saw female candidates subjected to a barrage of online abuse, including labels of slay queen tags, gender stereotyping, and sexual overtures. Data for this paper was mined from two Twitter hashtags, #KenyaDecides2022 and #SupremeCourtruling. An intersectional analytical framework will inform the analysis of data. The paper considers the factors against active women's political participation and sheds light on the possibility of ferrying wrong offline cultural practices into social media. The analysis (re)centres on the debates concerning the duality nature of the offline and online violence as comes out from the 2022 Kenyan political rhetoric, touching on both the electoral process and the supreme court ruling. The paper discusses three cases of online vitriol as part of its methodology seen through the use of terms opaque and hot air within the hashtags #KenyaDecides2022 and #SupremeCourtruling, whose goal, the paper argues, is to intimidate, discredit, and silence women involved in a political process. In the final analysis, this paper argues that this discussion will open up unprecedented forms of harm enabled, and often amplified, by the social media platforms, that is, Twitter explaining how new online patriarchal cultures regulate and control the world through fear and online violence meted to girls and women who venture, manage and arbitrate politics in Kenya.

Role of the Church in Promoting Gender Inclusivity and Justice in the Democratic Spaces

By Kagema Peterson Githinji

Church as a constituent of civil society organizations has made great attempts to promote the central theme of 'access to justice' within the 2010 Kenyan constitution. As such, it has worked to promote and to ensure that there are accessible, affordable, and proximate mechanisms that will promote social, political and economic justice. Crediting its role, the African church has been acting at the forefront as a canon of spiritual, moral and ethical standards to offer itself as a model to be adopted by the political class in solving the infinite questions on access to justice in democratic spaces. Taking Kenya as an example, the role of the church was greatly felt during the demand of multi-party democracy in 1991. As such, the church openly undertook its civic role contributing to the growing 'wind of change' that was blowing across the African nations. By then, the civil right campaigners who comprised religious leaders, diplomatic missions, Law Society of Kenya, journalists, NGOs, and politicians, were unhappy with the one-party system in the Kenyan democratic space. On its part, the church through religious leaders called upon the government to create an enabling environment in which the Kenyans could participate in their governance. Among the prominent church leaders were Bishop Alexander Muge, Bishop Henry Okullu, Rev. Timothy Njoya and the Episcopal Conference of Catholic Bishops. These leaders pointed out economic, political, and social ills in the society and faulted the then KANU government for distorting justice in democratic spaces. The concerted pressure hence, contributed immensely to the government's acceptance of multiparty democracy. Two lessons can be learnt from above historical democratic contribution of the church. First is that the church can help in influencing the democratic direction of a country if given a chance. And second, Church as part of civil society can independently come out to promote existence of good democratic spaces and justice by speaking out and constantly monitoring the implementation of laid down policies and laws within the state. Discussing 21st Century church as a model of gender inclusivity in democratic spaces, scholars, theologians, and researchers of religion and spirituality confirm and generally agree that women do comprise of the majority of active church members. They are also the sustaining force to both missionary and visionary objectives of almost every congregation. It is also evident that church leadership in most of the contemporary African church is also tilting towards women. Where

therefore, raises any discourse on promotion of justice in democratic spaces, the church as part of the constituent of civil society can be of great importance in disseminating information, sensitization, and working to promoting values and virtues that promotes gender equality and values in governance and leadership. With the enlightened society on the gender equality, the infinite discussion on one-third gender rule (recently attached to women) in democratic spaces will be of the past.

This paper therefore, aims at discussing the place of the 21 st century African church in ensuring gender inclusivity and justice in the democratic spaces in African.

Key words: Access to Justice, democratic spaces, gender inclusivity, church, and Africa.

Protecting The Integrity of Our Elections: A Case for The Overhaul of Kenya's Campaign Financing Regime

By Shem Oganga

Through repeated election cycles where voters have been treated to the 'generosity' of candidates for various elective seats, the electorate has been socially engineered to believe that they cannot do without the financial support of politicians. The political class has been eager to cultivate the electorate's dependency on them. So, when one knows that he or she will seek an elective seat in a certain locale, he or she begins to attend fundraisers ('Harambees' as we call them) to showcase generosity several years before the campaign period. The electorate has been made to care more about how many fundraisers the candidates have attended and less about whether these candidates have novel ideas that will solve the existing problems and help move the country forward through a realistic development agenda. For aspiring political candidates with modest resources, keeping up with their competitors who have a never-ending supply of 'generosity funds' is a futile mission. With the huge expectations from the electorate, political candidates have been forced to source funds from whichever source by hook or crook because they know that they have to dress expensively, drive in sleek fuel guzzlers and hop around in brand new choppers to impress would-be voters. They also have to maintain a steady stream of cash known as 'facilitation fees' whose key purpose is to pay individuals to attend their political rallies- they have to buy crowds and the bigger the crowd, the bigger the impression.

Unregulated campaign financing is a sowing bed for graft. Nothing is offered freely, somehow the funds spent in the campaigns will be recouped once they get into office. In any business, investments have to be returned. The more the politicians give, the more they will grab from public coffers to replenish their depleted pockets during the campaign season. For the naive aspirants that lost, it is heartache. Many run into bankruptcy, some become depressed- they had invested personal funds, borrowed from friends and family and some had taken loans. Perhaps this is why politicians do everything possible to clinch the seat inconsiderate whether it is lawful or not. This paper elucidates why the future of Kenya's democracy is hinged on a robust campaign financing regulation. It points out the loopholes in the existing campaign financing regime where the source of funds is not questioned and there is no cap on the maximum amount a candidate can spend. Further, the author will question the mechanisms for reporting on campaign spending and will also explore the reasons behind the hesitancy of the political class to enact such a regime.

Above all, the author will expound on issues that need to be addressed for the campaign financing regime to function properly. For instance; strong political institutions such as parties are based on ideologies and not personalities. Parties with steady streams of financial sources and the need for proper civic education to address increasing trends in voter apathy, despondency and the strange habit of depending on politicians for their progress.

The Perils of Nomination for Marginalized and Ethnic Minorities at The County Assemblies

By Milkah Wahu & Masafu Erick

Political parties ought to have finalised their nominations in preparation for the August General Election by 25 June 2022. The next stage of the process upon finalizing the nomination exercise was submission of those names to the Independent Electoral and Boundaries Commission (IEBC). Persons dissatisfied with the outcome of the nominations had the option of seeking redress from the political parties, the political parties' dispute tribunal and subsequently the courts.

Since the advent of devolution, 770 positions have been reserved as special seats for the nomination of Members of County Assembly (MCAs) across the 47 counties.

The slots add to the 1,450 MCAs elected directly by the people in the wards constituting single-member constituencies.

Currently, the legal regime managing the nomination of MCAs is such that anyone can be nominated in any of the 47 county assemblies provided that the sponsoring political party has indicated as such in the party list submitted to the Independent

Electoral and Boundaries Commission (IEBC). Article 177 (1) (b) of the Constitution says a county assembly shall consist of the number of special seats necessary to ensure that no more than two-thirds of the membership in the assembly is of the same gender. Article 177(1)(c) of the Constitution speaks of nomination of the marginalized persons.

Key questions remain unanswered that this paper seeks to address such as; what makes one a marginalized person? Is a Kikuyu in Mandera County a marginalized person hence making her or him suitable for nomination to the said County Assembly pursuant to Article 177(1)(c)? In the just concluded general elections we have seen persons registered as voters in constituency X being nominated in Constituency Y, we have also seen persons registered in Ward X seeking nomination in Ward X and upon failing to secure the nomination slot moving to seek nomination in Ward Z. Are these issues legally correct? Gender results are fixed for the 20 Senate list seats (18 women and two men), and for the extra- gender seats in county assemblies. The desired outcome in other cases is not guaranteed. How does the law address the issue of political parties rewarding rejected party officials and members nominations slots?

It is proposed that an amendment to the Electoral Law is needed to combat the bad practice of having political parties nominate friends, relatives, spouses, boyfriends and girlfriends to the detriment to well deserving marginalized and ethnic minorities that hail from the 47 counties.

Political Parties Fund in Kenya: A tool for democracy or a Cash cow?

By Robert Mutembei Koome

The legal framework in Kenya has embraced financing as a key pillar of democracy in a generous manner. Particularly, the Political Parties Act (the Act) establishes the Political Parties Fund to promote democratic ideals. This fund is liberally capped at 0.3% of National Revenue. The Act further specifies the manner in which the fund should be applied and sets out a robust framework for administration of the fund. Section 26 of the Act sets out lofty ideals behind the financing of political parties. Notably, the fund is expected to promote participation of women and persons with disabilities in politics and the overall effect is meant to be seen in enhanced democracy.

However, despite operationalization of the fund, some challenges meant to be addressed by the fund still persist. The two thirds gender rule encapsulated in the Constitution of Kenya 2010 is yet to be implemented despite many desperate interventions. Much attention has been paid on the need for legislation without review of application for the existing laws. Political parties continue to benefit from the political parties fund without much reflection on the fulfillment of the objectives set out in the Act. The framework for public scrutiny, sanctions and oversight is weak and often beset by policy capture by the oligarchy. Fundamentally, the current framework of funding is not linked to the reality of political life and democracy in Kenya.

Since the inception of the Political Parties Fund, the democratic gains intended in the Act are not commensurate to the millions of public funds bagged by dominant parties every year. Checks and balances remain unaddressed and scrutiny is superficial at best. It is doubtful whether the mode of application and distribution of the fund is optimal. The review mechanism should be linked to the achievement of the objectives set out in the Act. This calls for a reflection on the underpinnings of the structure and the inspirations of the fund.

This article critically reflects on the structure and objectives leading to the establishment of the Political Parties Fund. In search for an alternative model, the article explores a context specific framework that is linked to advancement of political ideologies as a catalyst for elimination of inclination to ethnic based politics. The article maintains that the Political Parties Fund is a strong tool for democracy that has been reduced to a cash cow for political expediency and the objectives set out in the Act remain on paper. In laying a theoretical framework for evaluating the current model, the article relies on economic theories to analyze the gains of the fund as applied in Kenya currently. The article concludes by establishing a different model for that should inform financing democracy in Kenya.

Key words: Political Parties Fund, Democracy, Financing Democracy, Political Parties

Assessing the Realization of the Right to Participation in Political Life for People

By Maragia Josephine and Dr Scholastica Omondi, University of Nairobi School of Law.

Purpose: This study aims at exploring the realization of the right to political participation for people living with disabilities (PLWDs) in Kenya. Historically, PLWDs have been excluded from exercising and enjoying their human rights including the right to access and participate in political life. Article 29 of the United Nations Convention on the Rights of Persons with

Disabilities (UNCRPD) guarantees an electoral process that is non-discriminatory while requiring state parties to provide disability-related accommodations for PLWDs to enable their equal right to vote. Kenya has ratified the UNCRPD and also guaranteed the right of access for PLWDs. Article 54 (2) of the Constitution mandates the state to ensure progressive implementation of the principle of access and ensure that at least 5% of members of the Public in elective and appointive bodies are for PLWDs. However, very little attention has been given to the voting rights of PLWDs.

Methodology: The study is social-legal research. It is conducted by carrying out a desk review of the literature available and making an analysis to ensure that PLWDs access and participate in political life without experiencing any form of barriers. The research is informed by the social construction theory.

Findings: The right to political participation for PLWDs is challenged for a variety of reasons. These include a lack of transport for them to access public meetings like voter education, voter registration and voting activities, discriminative laws, lack of access to information, absence of alternative and accessible modes of communication for the deaf and blind, lack of alternative and accessible voting tools and prejudices and discrimination from ill-trained election officials and the members of the Public. The inaccessible environments and prejudices exclude PLWDs from political and public life. Disabled people can participate in political life if the barriers are removed and they have access to all facilities and opportunities like the other members of society.

Value: The study provides insights into the ratification of CRPD and incorporation of disability laws into justice systems for purposes of information for stakeholders that may influence recognition and implementation of disability rights and in particular the right to participate in political life. It also provides research evidence

required for appropriate policy reengineering for the entire voting systems for PLWDs in Kenya and beyond.

Practical & Social Implications: The study concludes that there is an urgent need to create accessible environments for PLWDs to participate in political life. The study recommends continuous public sensitization and creating awareness of disability rights, development and implementation of appropriate laws by those in authority, development of integrated systems that offer essential facilities to accommodate the disabled, capacity building and professional development of election bodies and inclusion of organization for PLWDs in decision- making

Keywords: access, disability, political participation, accessibility

Democracy And Electoral Rights For Persons With Disabilities In Africa: Lessons From Kenya`S General Elections 2022

By Muinde Cosmas Njoroge (KSL (PGD), UON (LLB HONS), MTI Certified Mediator, Legislative Drafter (KSL)

Our democratic space has been widening in the modern times and participation in political space is ever increasing. Citizens have information at their fingertips to exercise their civic and sociopolitical rights to register as voters, enlist as candidates form political parties, take part and participate in town hall meetings, public participation in the policy process and even elect leaders of their choice and hold them accountable in the course of their tenure. Yet in the midst of these progresses, persons with disabilities, forming a significant portion of our population seem pushed into the periphery and reduced into unwitting observers.

In a democratic system that has gone to great heights to ensure that it's seven common pillars namely legitimacy, separation of powers, popular participation, periodic elections, checks and balances, rule of law and fundamental human rights, the rights of PWDs to participate fully in the democratic space has been rather eclipsed. This reality has lucidly been witnessed in the just concluded Kenya's general elections of 2022.

Alone in 2011 Africa held 13 general elections and in the period in between we have seen inter alia other elections in Zimbabwe 2013, Zambia`s 2016, Malawi 2019, Uganda 2021 and Kenya`s 2022 elections. In these general elections the participation and involvement of PWDs is a cause for concern. The piece studies the existing limitations both entrenched by the customs, law and political practices and how these have an effect in restricting the participation of PWDs in the democratic space.

The author`s argument is that role of PWDs role has not only been limited in the voting process but it`s seems a structural limitation ranging from the voter education, voter registration, campaign messaging, policy formulation, participation and representation in public interest litigation involving electoral proceedings in Africa and especially in Kenya.

Even with robust legislative instruments like the Convention on the Rights of Persons with Disabilities (CRPD) and affirmative action reforms which champions for representation participation and inclusion of persons with disabilities in all sectors of society, the presence of PWDs in the democratic space remains insufficient and inadequate. Several factors ranging from low political will to

ensure full participation by PWDs, poverty, existing stigma, stereotypes, limitations entrenched by our legal regimes that continue to demean PWDs are responsible contributions to these limitations. These restraints exist in the backdrop of a vast democratic system plenty with ever expanding guarantees for citizens but where the interests of the PWD class have been left unrecognized, unaddressed and underrepresented. They are available but absent, seen but not heard.

The piece identifies the existing pillars of democracy and the limitations that have pushed Persons with disabilities to be mere spectators in the democratic space and electoral system and what can be done to engage and involve PWDs and make our democracy more inclusive and comprehensive.

Keywords: PWDs, Elections, Representations, Democracy, Underrepresentation

Voter Data Protection in Presidential Election Nominations: Public Interest Litigation as A Solution to Regulatory Gaps

By Alvin Kosgei, Partner - KMK Africa Law Advocates

The Independent Electoral and Boundaries Commission (the "Commission") is required by Regulation 18 (2)(c) of the Elections (General) Regulations, 2012 to confirm that potential presidential candidates have copies of identity cards of at least 2,000 registered voters from a majority of the counties. Failure to comply with these regulations deals a fatal blow to the aspirations of any candidate to offer themselves as a contestant in the general elections. In the just concluded elections, many candidates were locked out on the basis of this regulation. In fact, Kenyans had to choose from only four candidates in what was a marked departure from recent trends. Consequently, the implementation of Regulation 18 (2) (c) led to five constitutional petitions that were determined by Justice Mrima in *Free Kenya Initiative & Others v the Independent Electoral & Boundaries Commission & Others* (2022) eKLR.

The merits of the requirement aside, there appears to be no provision in the regulations to guide the Commission and the presidential contestants on how to handle the massive amounts of sensitive and personal data collected in the process. To illustrate, the regulations together with the gazette notices that have been issued on the subject previously have not touched on the mode of collection, certification, storage, right of verification, correction, and validation by the Commission, candidates and political parties. Furthermore, despite the obvious risk arising from technological advances that have made identity theft, bank fraud and sim swaps possible, the Commission has not given guidance on the necessary policy interventions and data impact assessment studies.

On their part, the data protection laws and the constitution are explicit on the rights of data subjects. However, under the electoral laws regime, the voters who are not even aware of their rights are exposed to a myriad of risks arising from the collection of their IDs, signatures and attendant residential details. As it stands, the decision of Justice Mrima which was stayed by the court of appeal means that the status quo remains ante. This paper explores the potential role of public interest litigation in securing the rights of the voters by enforcing the law and the principles of data protection. Owing to the lacuna in the law, this paper argues that the courts can strategically be used to plug the gaping holes in the institutional and regulatory framework. Following the Supreme Court's decision in *Raila Amolo Odinga & another v Independent Electoral and Boundaries*

Commission & 2 others [2017] eKLR the law and the Commission's institutional arrangements changed for the better. In the same way, this paper identifies the gaps in the law and proposes litigation opportunities for constitutional interpretation and enforcement that can help secure the rights of the voters in the context of presidential election nominations.

Part I shall assess Regulation 18(2) (c) and other electoral laws vis a vis principles of data protection. Part II of this paper shall identify the gaps and lapses in the relevant election laws and regulations. Part III shall assess and identify the appropriate public interest litigation strategies for enforcement of the principles of data protection. Part IV shall have the conclusions and recommendations.

Addressing the IEBC dysfunctionality: A juxtaposition of 2022 and 2017 Presidential Election Judgments.

By Ronald Kihali

In the wake of the promulgation of the Constitution of Kenya 2010, parties in a presidential election have the opportunity of addressing their grievances by filing an election petition in the

Supreme Court of Kenya. One of the most prominent issues that has arisen throughout these presidential election petitions is the notion that the Independent Electoral and Boundaries

Commission (IEBC) cannot be trusted to conduct elections in a manner that is free, fair, transparent and accountable. Indeed, the Supreme Court in the 2022 Presidential Election

Petition acknowledged the dysfunctionality of the Commission as a serious problem prevalent in our democracy. This study attempts to address this dysfunctionality by juxtaposing the 2022

Presidential Election judgment with the 2017 one that nullified the elections then. The study will begin by addressing the role of the IEBC in conducting elections and what is expected of the

Supreme Court in interpreting presidential election petitions. An analysis of the two aforementioned judgments will then be postulated. The study argues that the 2022 Presidential election judgment did not interrogate the dysfunctionality of the IEBC in detail, particularly with regards to the 'walking out' of the four commissioners who declined to take ownership of the results due to their 'opaque' nature. The study advances the argument that the 2017 presidential election judgment dissected the dysfunctionality of the IEBC lock, stock, and barrel and brought to the fore profound problems within the IEBC that need to be addressed. This juxtaposition is a sine qua non for electoral reform and enrichment of dispute resolution jurisprudence.

Key Words: IEBC, IEBC dysfunctionality, Supreme Court of Kenya, Presidential elections, four commissioners, electoral reform

Barriers to access to justice during electioneering period in the 21st century

By Abigael Choni & Anita Mwasi (LLB Students)

Access to justice is a fundamental instrument of the rule of law and ultimately guarantees compliancy of democratic principle of holding a free and fair election. The judiciary has a duty to uphold the rule of law while administering justice. It also has an obligation to promote and protect human rights and guarantee access to justice to them that are deprived of their rights and those that feel aggrieved by the results. In every state, a properly structured and effective electoral justice system augments confidence in the democracy. In every fight, there must be a winner and a loser. Similarly, in an election there must be the one that gets the position in contest and the one that loses. This essay investigates the role of electoral adjudication in the democratization of Africa. An encouraging development in Africa's democratic transition is the notion that resentful parties may file electoral petitions in court rather than resort to mayhem. The harmed choose for the law as their law as and adjudicator and their hope. This procedure will make succession more institutionalized and strengthen the rule of law and constitutionalism. However, there have been concerns expressed over the resolution of these election disputes by the courts. Election disputes are not quickly settled, and the court's rulings on them are occasionally overruled by subsequent events. Additionally, there is a lack of trust in the procedure due to the impression of judicial prejudice, corruption, and strong political influence. In the same way that the judiciary is heavily burdened by the volume of election petitions, courts are overcrowded. The courts deal with post-election problems, but alternate electoral dispute resolution (AEDR), both official and informal, offers ways to settle election conflicts. However, this mostly applies to pre-election disputes. It is essential that AEDR be taken into account as a workable supplement to adjudication given the abundance of electoral petitions. Additionally, voter education should focus on citizens' realistic expectations of elections so that voting finishes and only legitimate cases are heard by judges. This study will discuss the various electoral rights and the electoral dispute resolution bodies that have been put in place to resolve electoral conflicts. It will illuminate the electoral cycle in every election period which includes the pre-electoral period, the electoral period and lastly the post-electoral period. It will emphasize the activities that are undertaken in every stage of the cycle and its challenges. In addition, it will identify other alternative means of resolving electoral disputes apart from litigation. Furthermore, this study will point out the barriers to access to justice in relation to electoral disputes and identify the solutions that can be implemented to ensure that the right is achieved.

Right To Vote: Political Participation of Persons with Disabilities in Kenya

By Valerie Kutima, Lecturer, Egerton Faculty of Law

Article 12 of the Convention on the Rights of Persons with Disabilities 1 (CRPD) provides for the equal recognition before the law. The CRPD continues to state that state parties that take appropriate measures to ensure that persons with disabilities are provided with the requisite support in exercising their legal capacity. 2 Article 29 CRPD concentrates on the aim and execution of elections that is not discriminative and requires state parties to reasonably accommodate persons with disabilities in the exercise of their right to vote.

The implementation of these articles has proved to be an intricate undertaking as the question that arises is 'how we determine the distinction between the support to make a conscious decision and the making of a decision for a person with disability?' The paper focuses on this area and tries to reconcile the two in political participation, right to vote, of persons with disabilities in Kenya.

Legal capacity is indispensable for the exercise of the right to political participation and especially the right to vote in the realization of civil and political rights. The right to vote is of unique significance to persons with disabilities when they make fundamental democratic and governance decisions. The disenfranchisement leads to the deprivation of fundamental rights to vote and right to making their own decisions.

The paper focuses on the Kenyan Context: Kenya's Obligations; Implementation of Article 12 and Domestication thereof; Substituted and Supported Decision Making Process; Theoretical Framework and finally Concludes.

“Big Men” and Election Disputes in Africa: Lessons from the 2017 Electoral experiences in Kenya

By Joseph Lwannia

The African Charter on Democracy, Elections and Governance, signed and ratified by all the fifty-five countries spells out vital elements of spearheading and upholding the tenets of democratic consolidation on the continent. However, the scarcity of viable, all-inclusive and multi-party democracies suggest that the African Union has failed to achieve most of its goals.

Today, the continent is dotted with examples of Big Men, traced back to the colonial period.

These over-bearing and all-powerful leaders continue to dominate Africa despite the flurry of democratic transitions in the 1990s. This paper contributes to the debate regarding the democratic nature of elected “Big Men” and their ability and willingness to relinquish power in a constitutional manner. While probing these brutish despots who exhibit weak, corrupt, undistinguished and divisive leadership, this paper traces the democratic trajectory that has been extremely volatile, ranging from fatal protests and military coups. This paper goes further to examine the challenges presented by the politics of brinkmanship and subversion exhibited by these budding autocrats who recklessly manipulate election results. The study provides a glimpse into the flawed conduct of elections that have stoked fears of instability and violence leading to political, economic and humanitarian quagmire. This paper, whose scope is confined to five countries – Gambia, Zimbabwe, Cote d’Ivoire, Republic of Congo and Madagascar, holds that the structure and process of election precepts and procedures remain largely perverted. The study highlights the challenges and emerging threats to the conduct of peaceful elections in these countries.

Based on the findings, the paper suggests major options for pre- and post-electoral dispute resolutions to strengthen democratic consolidation. Drawing on the lessons of the 2017 elections in Kenya, when the Supreme Court nullified the presidential election in a feat that won accolades worldwide, the paper proposes the institution of a level playing field for incumbent and opposition candidates, the broadening of civic and political space to ensure effective civic engagement and implementation of human-rights based approaches to electoral security. The study also recommends the promotion of the rule of law and accountability for electoral violations and the opening up of the information environment in a bid

to support legitimate efforts to combat disinformation and misinformation. The paper further calls for the acknowledgement of the rights and grievances of all citizens, the freedom to protest within the confines of the laws and institutions of the land, the right to participate in electoral processes by all citizens, the fight against corruption, halting the misuse of state power and the protection of the independence of the courts.

The Evanescence of Democracy: A Litmus Test of Universal Suffrage in Kenyan Elections

By Onyango Aaron Okoth Wahu Wangari*

Democracy is a polarizing word whose meaning is still contested even among its proponents. Many refer to the participatory mode of government in ancient Greek city states as the genesis of democracy. Contrary to popular belief, the type of governance highlighted as the bedrock of democracy was more exclusive as opposed to inclusive. The idea buttressing the system of governance in Greece, and later, Rome, was the premise that only qualified and enlightened citizens, as well as those with the largest stake in the economy could soundly run the government, and do so with the view of realizing positive results. These so-called democratic systems are what bore the Greek and Roman Senates, institutions upon which many of the world's self-professed democratic nation's legislatures are founded.

The Promulgation of the Constitution of Kenya 2010 has effectuated the metamorphosis of the system governance from centralized to decentralized. In Particular, it has birthed the two-round system in Presidential elections as in other self-professed democratic states. Article 138(4) states that a Presidential Candidate can only be declared as the President elect if s/he receives more than half of all votes cast and at least 25 percent of more than half of the counties. Further, Chapter 6 adjudges State Officers as the Nerve Center of the Republic and insists that their integrity should be irreproachable. However, certain arguments on the functionality of the two-round system and the ignorance of Chapter 6 in the Presidential elections have been advanced.

This study will review the manner in which elections and governance was effected in successful democracies in the past, and the the various ways Presidential Elections in Kenya were conducted before the 2010 Constitution, in a bid to establish whether the current democratic dispensation in Kenya has failed test of our nation with its largely 'politically immature' electorate.

Additionally, an analysis of the two-round system, its dysfunctionality and the 'paperization' of Chapter 6 in the conduct of the Presidential Elections in Kenya is posited. In the end, a comparison is made between the two-round system and the United States of America Delegates System and light is shed on the possibility of either designing a different Presidential Election System or the adoption of the Delegates System.

Election Technology: An Assurance for Free and Fair Elections or A Recipe for Election Malpractice?

By David Mburu

The Constitution of Kenya 2010 is considered among the category of transformative. It gives prominence to a transformation agenda that is alive to Kenya's historical context and a contributes to the agenda of democratic change. The events of the 2007-08 post-election violence accelerated the final stages of Constitution making. Elections thus marked the critical moment to constitutional making, a clear recognition of the drastic effect of a contentious, thus unpredictable political transition, and systemic or willful failure by constitutional agencies. The constitutional transformation places particular prominence in the design of the electoral system and management. There is a clear foundation on sovereignty, constitutional supremacy, the Bill of Rights, expressed values and principles.

The relationship between democracy and digital technologies is quite complex. On the one hand, digital tools have become the dominant platform of political interaction in some democracies, and they have strengthened the critical attitudes of citizens towards their governments and their widespread use facilitates the organisation of large-scale social movements and a closer interaction between citizens and political parties. On the other hand, the new digital tools may be used, and sometimes are indeed used against elections to suppress voter turnout, tamper with election results, and steal voter information; against political parties and politicians to conduct cyber espionage for the purposes of coercion and manipulation, and to publicly discredit individuals; and against both traditional and social media to spread disinformation and propaganda, and to shape the opinions of voters. The new digital realm allows for new forms of criminality and data commercialisation that seriously threaten privacy rights, and modulates social interactions by selectively and sometimes strategically feeding or hiding specific information to its users, thus fostering a partial understanding of reality and hampering freedom of expression.

Digital solutions for elections must comply with the applicable principles for democratic elections. However, the practical application of legal principles to digital technologies is not easy. The first difficulty lies in the general character of legal principles which are formulated in general and broad terms. Their application to a specific context requires interpretation which must clarify the exact meaning and practical implications that arise from the principles. The second

major difficulty lies in the technical nature of digital solutions, whose internal setup and functioning can be understood only by a handful of specialists but not by the layperson without technical help. Yet, it is the layperson (voter, election administrator, judge, observers, etc.) who must use, check and ultimately trust the digital solution and the results it yields.

This work will lay a strong foundation for Election Technology based on the values of participation and transparency. The paper appreciates the inevitable risk of technology of shifting the open and simple process with disproportionate control of a few tech elite. Elections are based on core but simple principles that can be reduced to full genuine understanding and participation by the people. The basis for democracy is established in the proposition that the political techne, the understanding of justice, mutual respect, and civic responsibility are shared equally by all.

This basic principle should be preserved in all electoral processes. For elections to have credibility, it is important that the process be understood by all. An inherent risk in any marriage of elections and technology is that control may pass from the many to the few who have the special knowledge required to understand and evaluate whether there are adequate safeguards to ensure fairness and accuracy.



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