



Strathmore University

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THE CONSTITUTIONALITY OF MANDATORY ACADEMIC QUALIFICATIONS FOR
ELECTIVE POSTS: THE CASE OF KENYA

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By

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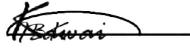
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DECLARATION

I, IAN BAHATI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

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I am immensely humbled to have been a student at the Strathmore Law School. In that breath, I am grateful to God for life and the path that has been divinely ordained in a quest to draw out a brilliant young legal mind to serve this country and beyond.

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ABSTRACT

This thesis studies the political right to stand for election also referred to as the right to candidacy in other regimes. In so doing, it evaluates the legal framework on political rights in Kenya with a bias of article 38 of the constitution and its underlying requirements set out in various other enabling legislations such as the Elections Act. The study sets out to assess the provisions of Kenya's 2010 constitution in promoting political rights. The concepts, purpose and underpinnings of article 38 (3) shall be discussed. In particular, the study shall attempt to bring out an understanding of the verbatim "*every adult citizen has the right, without **unreasonable restrictions** to be a candidate for public office and if elected, to hold public office*". In doing so, this study shall assess the various restrictions set out in the elections act but with a bias to the requirement set at section 22 of the Elections Act that any candidate need have a degree from a recognized university in order to stand for election for seats such as member of parliament, member of county assembly governor among others. An elaborate discussion of these and other legal provisions will be useful in drawing up what stands as a reasonable bar and what does not in respect of qualifying to stand for election in Kenya and in extension the constitutionality of these set indexes barring persons from fully enjoying their rights as set out in the constitution. The key issue being whether the set mandatory educational requirements are in breach of the democratic principles of equality, equity, social justice, inclusiveness, non- discrimination and participation of the people as set out at Article 10 of the constitution of Kenya by virtue of a presumed or real failure to take into account injustices and structural inequalities that have left many, especially in the rural areas, educationally disadvantaged.

LIST OF CASES

Antonina Ignatane v Latvia (884/99), CCPR/C/72/D/884/1999.

MacDonald Inc v Canada (AG), [1995] 3 S.C.R. 199

Mauritian Women v Mauritius (35/78), CCPR/C/12/D/35/1978;

Podkolzina v Latvia Application No 46726/99, 9 April 2002;

R V Oakes (1986) 26 DLR at 225

Sukhovetsky v Ukraine Application No 13716/02, 28 March 2006 United Communist

Party of Turkey v Turkey Application No 19392/92,

LEGAL INSTRUMENTS

American Convention on Human Rights, 1969

Constitution of Kenya, 2010

Elections Act no. 24 of 2011.

Independent Electoral and Boundaries Commission Act no. 9 of 2011 revised edition 2016 [2012]

International Covenant on Civil and Political Rights, 1966

Political Parties Act CAP 7b, Revised Edition 2012.

The election laws (amendment) act no. 34 of 2017

The Election Offences Act CAP 66 Revised Edition 2009 (1998)

The European Convention on Human Rights, 1950

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights (the Banjul Charter)
ACHR	American Convention on Human Rights
CoK	Constitution of Kenya
EACC	Ethics and Anti-Corruption Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
IEBC	Independent Electoral and Boundaries Commission
KACC	Kenya Anti-Corruption Commission
NGOs	Non-Governmental Organizations
ORPP	Office of the Registrar of Political Parties
UDHR	Universal Declaration of Human Rights

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CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1 BACKGROUND

In anticipation of the 2017 general election, a working group was established under the auspices of the state law office bringing together the IEBC¹, the EACC², and the ORPP³ which are the key institutions mandated to oversee leadership and integrity matters in the country. The main objectives for this working group were: to create awareness on the leadership and integrity requirements for candidates seeking election to various elective posts during the 2017 general elections; to clarify the roles and responsibilities of various actors in terms of ensuring compliance with leadership and integrity provisions under the CoK⁶, Elections Act⁴, the Leadership and Integrity Act⁵, and the Political Parties Act⁶; to promote collaboration in the enforcement of chapter six of the CoK (on leadership and integrity) and other relevant laws and last but not least, to provide an effective mechanism for ensuring issues of leadership and integrity are resolved expeditiously in order to support the electoral process.

With the IEBC acting as the forefront coordinating agency, the group opened service centres across the country to verify and clear aspirants and candidates vying for elective posts across the

¹ The IEBC is an independent regulatory agency that was founded in 2011 by the Constitution of Kenya. The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament.

² The EACC is a public body established under Section 3 (1) of the Ethics and Anti-Corruption Commission Act, 2011, to combat and prevent corruption and economic crime in Kenya through law enforcement, preventive measures, public education and promotion of standards and practices of integrity, ethics and anti-corruption. The EACC replaced the Kenya Anti-Corruption Commission (KACC).

³ The ORPP is a state office established under Article 260 of the Constitution of Kenya, 2010, and the Political Parties Act, 2011. The mandate of the office, among others is to regulate the formation, registration, and funding of political parties in accordance with the Constitution and rule of law ⁶ Constitution of Kenya, 2010.

⁴ Elections Act no. 24 of 2011.

⁵ Leadership and Integrity Act No. 19 of 2012.

⁶ Political Parties Act CAP 7b, Revised Edition 2012.

board. This was owed to what the Ministry of Education and the Commission for Higher Education had variously demonstrated; that a number of elected leaders were carrying around certificates they had not genuinely earned. As encapsulated in Chapter Six of the Leadership and Integrity Act, it is predicated that State officers should exhibit highest level of responsibility in the administration of public affairs tasking them to have conduct that is beyond reproach. Pursuant to this provision, the Elections Act had provided the president, deputy president, governors and deputy governors to be required to hold a degree from recognised institutions⁷. The team tabled proposals to have this requirement extended to other elective positions particularly those of the member of national assembly as well as a mandatory post-secondary school diploma for individuals seeking office as members of county assemblies.

These proposals were made in a move aimed at improving the quality of leadership but to a great extent the proposal is by all means good intended but as an enthusiast of politics and as such political history, I could not help but come up with notable names in world politics who in the wake of having little or no formal education heralded major achievements not to mention key solutions to critical issues that had the potential of crippling their socio-economic and political regime. The likes of Frederick Douglas who went from a slave to becoming the voice of the African-American community, with no formal education and became the most influential African American of the nineteenth century⁸. The likes of Sir Winston Leonard Spencer-Churchill who had never been to college but beat the odds becoming the Prime Minister of Great Britain and led Britain away from the brink of defeat in World War II⁹. The likes of Luiz Inácio Lula da Silva, the thirty fifth president of Brazil, who was lauded for policies and programs that accelerated national growth, kept inflation and debt in check, reduced poverty and inequality and greatly expanded the middle class. Lula managed to increase the minimum wage from R\$200 to R\$510 (100 dollars to 205 dollars) during his presidency¹⁰¹¹. Not only that but Economic growth also

⁷ See sections 22,23 and 24 of the Elections Act, No. 24 of 2011

⁸ <https://www.jmlalonde.com/famous-leaders-without-a-formal-education/> accessed 03/03/2020

⁹ <https://www.indiatoday.in/education-today/gk-current-affairs/story/leader-360003-2016-12-28> accessed 03/03/2020

¹⁰ <https://library.brown.edu/create/fivecenturiesofchange/chapters/chapter-8/luiz-ignacio-lula-da-silva/> accessed

¹¹ /03/2020

rose from 1.9% to 5.2%, and Brazil's trade surplus increased from \$13.1 billion to \$33.3 billion—all that by the leadership of a man that had little formal education¹².

1.1.1 STATEMENT OF PROBLEM

The problem herein is whether provisions that bar candidates without a post-secondary school diploma or university degree from running for elective posts are discriminatory. The key issue being whether these set mandatory educational requirements are in breach of the democratic principles of equality, equity, social justice, inclusiveness, non-discrimination and participation of the people as set out at Article 10 of the constitution of Kenya by virtue of a presumed or real failure to take into account injustices and structural inequalities that have left many in the rural areas educationally disadvantaged. A major issue is whether the provisions on academic requirements have given full effect to the rights to equality and freedom from discrimination, in particular, the obligation directed towards the state at sub article 4 on not discriminating directly or indirectly against any person on *any ground*¹³ as enumerated under Article 27 of the constitution. Most importantly is the question, whether the state has given full effect to verbatim on political rights laying emphasis on the freedom to make political choices which includes the right to be a candidate for public office and if elected to hold office as provisioned under article 38(c) of the constitution

1.1.2 OBJECTIVES OF THE STUDY

The general objective of this study is to question the constitutionality of mandatory academic requirements for elective posts in Kenya. Specifically, this study's objective is to analyse: whether political leadership is desirably a preserve of the educated or learned in our society, whether sound leadership attributes are gained only through education and lastly whether these set academic

¹² <https://www.reuters.com/article/us-latinamerica-brazil-economy-commentar-idUSKCN0YH08D> accessed 03/03/2020

¹³ Emphasis mine

standards have had the desirable impact anticipated by legislators. Another significant objective for this study is to question whether discrimination by virtue of educational background or level was anticipated in the verbatim of article 27 (4) and last but not least, this study shall take careful assessment of the term without ‘unreasonable restrictions’ (quoted herein) as drawn from article 38(3) of the constitution.

(3) Every adult citizen has the right, *without unreasonable restrictions*

(c) To be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

1.2. HYPOTHESIS

This paper aims to test out the following hypothesis:

1. Article 10 of the constitution of Kenya anticipates unlimited access to the political rights espoused under article 38 of the constitution
2. Article 73 (2) (a) of the constitution silence on the criteria to determine competence and suitability of state officers creates an inference that academic standards need be a reference point but not a mechanism bar to sieve those suitable for seeking office.
3. That subject to the inadequacy of access to education of various marginalized groups in Kenya, the requirement to have educational standards for seeking elective posts is tantamount to a breach of article 27 of the constitution of Kenya on equality and freedom from discrimination.

1.2.1 RESEARCH QUESTION

The main research question for this study is whether setting educational standards as a requirement to exercise one’s political rights as enumerated at article 38(3) is an act of discrimination contrary to set indexes at article 27(4) and article 10 of the constitution. Other research questions are aimed at drawing meaningful answers to the following fundamental questions:

1. What is the rationale behind setting mandatory academic requirements for persons seeking elective posts?

2. What is the extent to which the right espoused under Article 38 of the constitution is guaranteed?
3. Does Article 73(2) (a) of the constitution that sets competence and suitability as a guiding principle of leadership encompass academic requirements as a criterion?
4. Are these requirements just, fair and valid in an open and democratic society?

1.4 THEORETICAL FRAMEWORK

The theories of electoral governance essentially proceed from Western democracies and are premised on participatory governance and the use of law and various key institutions to enhance and facilitate inclusive participation. This study will examine Liberal Democracy as a legal theory.

Different types of democracies proceed from the conceptual framework of citizens' participation, it is the liberal democracy theory and its various underpinnings that aptly captures the objectives of this research. The relevance of liberal democracy theory is underscored by the fact that it is the most predominant practice in most established democracies. Kenneth Bollen defines liberal democracy as the extent to which political system allows political liberties and democratic rule¹⁴. Democratic rule and citizens participation in the democratic process is further amplified by Schumpeter who defined liberal democracy as an institutional arrangement for arriving at political decisions in which the individuals acquire the power to decide by means of competitive struggle for the peoples vote¹⁵. An analysis of liberal democracy theory encompasses four fundamental elements: citizen participation, democratic rule, civil rights and liberties and the rule of law¹⁶. The four elements constitute pillars upon which most constitutions are premised¹⁷.

While the foregoing represents key pillars of liberal democracy theory, it is noteworthy to mention that individual or collective theories have emerged to explain the theories further. The

¹⁴ Kenneth Bollen, *Liberal Democracy: Validity and Method Factors in Cross National Measures*, 1993, 37 American Journal of Political Science 1207, 1208.

¹⁵ Joseph Schumpeter, *Capitalism, Socialism and Democracy*, Routledge, 2003, 250.

¹⁶ Robert Fatton, *Liberal Democracy in Africa* (1990) 105, Political Science Quarterly 455, 471.

¹⁷ Majority of countries now have Chapters on the Bill of Rights and Fundamental Freedoms.

government of the people, by the people and for the people as defined by Abraham Lincoln best illustrates the concept of citizens' participation. The meaning of this definition is that the inclusion of citizens in the formation and affairs of government and the responsiveness of the government to the needs of the people are key¹⁸. The relationship between the governed and the governors is the essence of what John Locke defined as the Social Contract Theory¹⁹. Accordingly, political rights and the right to vote are now recognized across many jurisdictions as a fundamental right, which anchors and secures the enjoyment of all other rights. A critical element of the liberal democracy theory is the protection guaranteed in civil rights, fundamental freedoms and liberties. Increasingly, fundamental rights and freedoms are guaranteed in most Constitutions under the Bill of Rights Chapter, and are underpinned by the Natural Law Theory²⁰.

Although the doctrine of the Rule of Law exists both as a legal and political theory, conceptually, the rule of law represents an important ingredient in the liberal democracy theory²¹. Hillaire Barnett defines the rule of law as either a philosophy or political theory which lays down fundamental requirements of law, or as a procedural device by which those with power rule under the law²⁴. These theories coupled with the realist approach will enable this research study analyse the current law in relation to state practice. This approach will bring to light the liberal theory particularly the extent of political liberties from the perspective of ground politics. The realist approach will, furthermore, assist in revealing whether the verbatim of article 38 of the constitution of Kenya has left ambiguities by not adequately addressing in depth, the meaning of unreasonable restrictions as a bar to be a candidate for elective office. The historical approach is also of relevance to this research study since it is useful in the understanding of the history that brought about the need to have mandatory education requirements for candidates seeking elective

¹⁸ National Democratic Institute, "Increasing Citizen Participation through Advocacy Efforts: A Guidebook for Program Development", 2000, 5-8 https://www.ndi.org/files/1170_citpart_advocacy122000.pdf accessed 02 June 2015.

¹⁹ The Social contract theory, is the view that persons' moral and/or political obligations are dependent upon a contract or agreement among them to form the society in which they live

²⁰ Proponents of Natural Law Theory include scholars like Thomas Aquinas, John Austin and Thomas Finnis just to mention but a few.

²¹ Elkilt J and Reynolds A, "The Impact of Election Administration on the Legitimacy of Emerging Democracies: A New Research Agenda" (September 2000) Kellogg Institute Working Paper No. 281, 33 ²⁴ Hillarie Barnett, *Constitutional and Administrative Law* (5th edition), Routledge, 2005, 70.

positions. Through this school, focus will be placed on past state practice and the resultant customary law, before the coming into force of key modern legislations such as: the elections act, 2011; the elections offenses act, 2016; the political parties Act, 2011; the Independent Electoral and Boundaries Commission act, 2011; the elections campaign financing act, 2013 and the leadership and integrity act, 2012.

1.5 LITERATURE REVIEW

The nexus between elections and democracy has been a subject of considerable scholarly writings and analysis. While the definition of democracy in the liberal western sense lend itself to a straight forward answer, the experience with electoral governance in Africa and the self-serving definition advanced by the leadership has often brought with it more confusion than clarity²². Despite the various definitions, African scholars among them Archie Mafeje²³, Claude Ake²⁴, Ali Mazrui²⁵, Thandika Mkhandawire²⁶, opine that democracy is not merely a Western concept but must also be defined from an Afrocentric point of view, and that it is a fallacy to suggest that democracy is foreign to Africa²⁷. The central feature distinguishing democracy from authoritarian system is that democracies are responsive to the will of the people and that the people express their collective sovereignty through periodic free and fair elections²⁸.

²² Robert Fatton, ‘Liberal Democracy in Africa’ (1990) 105(3) Political Science Quarterly 455, 471.

²³ Professor Monwabisi Archbald Mafeje was born on 28 March 1936 in Engcobo in the Eastern Cape, South Africa. Notable for His most productive years during the 1980s and 1990s, publishing widely on a diverse range of topics including ‘The Ideology of Tribalism’, and also book chapters entitled *The Land Question and Agrarian Revolution in Buganda, Religion, Class, and Neo-Colonialism, State Capitalism or Revolution*

²⁴ Claude Ake was a Nigerian political scientist from Omoku, the River States, Nigeria. Ake was considered "one of Africa's foremost political philosophers." He specialised in political economy, political theory, and development studies and is well known for his research on development and democracy in Africa.

²⁵ Ali Mazrui, was a scholar and prolific author who was most notable for His books and his hundreds of scholarly articles that explored topics like African politics, international political culture, political Islam and globalization

²⁶ Thandika Mkandawire is a Swedish economist and public intellectual of Malawian descent who is a widely published scholar on the social sciences in Africa. His research focus is in development theory and economic and social policy.

²⁷ Gilbert Khadiagala, “Reflections on the Causes, Courses and Consequences of Election Violence in Africa” Khabele Matlosa, Gilbert Khadiagala and Victor Shale , *When Elephants Fight: Preventing and Resolving ElectionRelated Conflicts in Africa*, EISA, 2010, 3.

²⁸ Gilbert Khadiagala, *When Elephants Fight: Preventing and Resolving Election-Related Conflicts in Africa*

Given the foregoing, the central role that elections play in a democracy cannot be overemphasized. The starting point for unpacking the correlation between elections, democracy and constitutionalism is by reference to the now acclaimed article by Fareed Zakaria, “The Rise of Illiberal Democracy”²⁹. The illiberal democracy theory emerged partly in response to the imperfections of liberal democracy. To draw a distinction between liberal and illiberal democracy, Zakaria defined liberal democracy as a political system marked not only by free and fair elections, the rule of law, separation of powers, and the protection of basic liberties of speech, assembly, religion, and property³⁰. It follows from the definitions that, illiberal democracy denotes a governing system in which although fairly free elections take place, citizens are cut off from real power due to the lack of civil liberties. This study proceeds therefore to question the validity of the academic requirements enacted and adopted into the Kenyan electoral governance system drawing from liberal and illiberal democracy laying emphasis on its bearing on fair electoral practices.

1.6 RESEARCH DESIGN AND METHODOLOGY

The study will rely heavily on secondary data owing to the literature and publication developed on the topic. Therefore, this study shall consult empirical evidence on the disciplines of Political Science, legal theories and various jurisprudences that hold significant bearing on this case study. The study shall also endeavor to study international authorities and their position on the issue at hand such as the International Covenant on Civil and Political Rights (ICCPR) among others. This study shall also make subtle reference to the political regimes in Brazil which have apparently accommodated political leadership with little or no formal education to the apex of political class - presidential candidates.

²⁹ Fareed Zakaria, “The Rise of Illiberal Democracy” (1997) 76 Foreign Affairs 22.

³⁰ Zakaria, (1997), 22.

1.7 ASSUMPTIONS

This study proceeds on the assumption that States or other political actors generally act in a broadly rational way in making decisions. The rationality assumption means that a state seeks to deploy rules in order to achieve whatever their ends or preferences may be. The second assumption made herein is that state bodies mandated with rule making represent societal preferences and therefore are justified in setting rules they find fit for the good of its subjects and the nation as a whole. Furthermore, it is assumed that article 38 of the Constitution is indiscriminate on any grounds whatsoever, be it sex, background, political affiliation, academic qualifications or any other grounds as enumerated under article 27³¹ of the Constitution. Subsequently, it is assumed that every individual, each in his/her own right is eligible for candidature for any elective post in Kenya.

1.8 LIMITATIONS

[This study takes caution of the possibility of other externalities that may have played a significant role during the regimes of educated leaders as compared to those that had little or no formal education as depicted in this study at chapter three and four. Take for example, In the case of an incumbent president - externalities such as legislative cooperation directly influences the success of his/her agendas. It is therefore acknowledged that while it is true that some success/failure stories can be directly attributed to the leaders themselves, there is a significant amount of isolated case studies where the detriment/success of the office in question could not be directly attributed to the education levels of the person of interest. This study is careful to note that some of these reasons pose a threat to the credibility of this study. However, to mitigate this factor, the study shall put primary focus on policies and programs strengthened by a notable assessment of information expertise and political capital of the various persons of interest in this study that directly centre on the principal objectives.

³¹ See article 27 of the Constitution of Kenya, 2010. At subsection (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

1.9 CHAPTER BREAKDOWN

The objectives of this research study will be met within five chapters. Chapter 1 discusses the overall scope of the research with a succinct introduction to electoral governance. The prescribed methodology, approach, research objectives, questions, hypothesis shall be discussed in this chapter. Chapter 2 will be on the theoretical framework, which will also be made up of a theory or set of theories that mainly provide a viewpoint through which to examine the research question. Chapter three will outline the Kenyan legal framework guiding competence and suitability requirements for elective positions. This chapter will also delve into treatise and judicial interpretation of the key rights actioned for this study in the interest of drawing meaningful debate on requirements set to determine competence whilst making a case for international best practice. Chapter 4 will study the limitations to the right to candidacy in a move to determine what a reasonable restriction is. Chapter five will contain the conclusion of the thesis and offer recommendations.

CHAPTER 2

THEORETICAL FRAMEWORK

2.1 INTRODUCTION

This study focuses on two major theories: the liberal democracy theory and the social contract theory. John Rawl's Political liberalism will also be discussed herein to draw meaningful insight to the objectives of this research. These theories provide a lens through which the research questions formulated in this study are going to be assessed.

2.2 THE LIBERAL DEMOCRACY THEORY

To draw more insight to the liberal democracy theory, it shall be prudent to draw from the doctrines of liberty and liberalism. Strictly speaking, Liberalism is the doctrine that liberty is the fundamental political good³². Where liberty is non-existent, all other political goods including justice and equality are somewhat beyond reach. Montesquieu³³ posits that political liberty is that tranquility of spirit which comes from the opinion each citizen has of his security and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen. That is liberty: one citizen must not have fears of inferiority. Practically the ideal is nearly impossible due to societal inequalities as a result of access to rights such as education. However, the ideal of equity need be seemingly apparent in the treatment of citizens to have the desired effect that Montesquieu anticipated. Hence, Liberal democracy is a liberal political ideology and a form of government in which representative democracy operates under the principles of liberalism³⁴. It is nearly universally accepted that the rule of law is a core principle of liberal

³² The authoritative statement of this view is John Locke, two treatises of government 267-85, 323-53 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

³³ **Montesquieu**, was a French judge, man of letters, and philosopher. He is famous for his articulation of the theory of separation of powers, which is implemented in many constitutions throughout the world. He is also known for doing more than any other author to secure the place of the word "despotism" in the political lexicon.^[3] His anonymously published *The Spirit of the Laws* in 1748, which was received well in both Great Britain and the American colonies, influenced the Founding Fathers in drafting the United States Constitution.

³⁴ On Locke's liberalism, see Thomas L. Pangle, *The spirit of modern republicanism* (1988); and Nathan Tarcov, *Locke's Education for Liberty* (1984).

constitutionalism. In chapter 1, it was noted that an analysis of liberal democracy theory encompasses four fundamental elements: citizen participation, democratic rule, civil rights and liberties and the rule of law³⁵. The four elements constitute pillars upon which most constitutions are premised. These shall be further analyzed herein.

2.2.1 CITIZEN PARTICIPATION

The ideal of citizen participation in public affairs is hardly a new concept. The Constitution of Kenya 2010 under Article 1 states that, all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. It also states that the people may exercise their sovereign power either directly or through their democratically elected representatives. In Kenya Sovereign power of the people is exercised both at national and county level³⁶. Citizen participation requires that citizens are at the core of decision-making processes. This is an important element of democracy because ‘rule by the people’ is the underlying and founding principle of democracy. Participatory democracy, therefore, requires active and meaningful engagement of citizens in public affairs. It is a principle universally accepted as requisite for a just and open society. The Universal Declaration of Human Rights³⁷ provides that ‘everyone has the right to take part in the government of his/her country, directly or through freely chosen representatives’³⁸.

A major reason for promoting citizen participation is that it is intended to have in place sound democratic decisions which is crucial in the governing process. At a citizen participation and inclusive governance course held at The Hague Academy in 2018. A highly diverse group of participants from different countries, representing various government levels as well as NGOs drew up some seven conditions they thought would best realize successful citizen participation. They are: Empowered citizens: Citizens who have the skills, knowledge and attitudes to

³⁵ Robert Fatton, *Liberal Democracy in Africa* (1990) 105, Political Science Quarterly 455, 471.

³⁶ Article 1, Constitution of Kenya

³⁷ The Universal Declaration of Human Rights (UDHR), 1948

³⁸ Article 21, Universal Declaration of Human Rights

participate, including the ability to organize themselves ;Effectively implemented laws, regulations and policies that enable participation and social accountability; Commitment to genuine inclusive participation by the government (political leadership and civil service) and citizens; The identification, understanding and involvement of all relevant stakeholders, particularly marginalized and vulnerable groups; A well-planned process with clear objectives and sufficient allocation of resources (financial and human); A transparent government: the publication of understandable and useable information and finally, trust between government and citizens³⁹.

When the aforementioned is realized, citizen participation will prove very useful for the following reasons: To promote democratic and accountable exercise of power; to foster national unity by recognizing diversity; to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and making decisions affecting them and to recognize the rights of communities to manage their own affairs and for self-development⁴⁰.

2.2.2 DEMOCRATIC RULE

The term democracy appeared in the 5th century BC to denote the political systems then existing in Greek states, notably Athens, to mean *rule of the people*. In contrast to democracy, we have aristocracy meaning *rule of an elite*. The political system of Athens granted citizenship to free men with the exclusion of slaves and women from political participation⁴¹. Aristocracy basically meant rule of the few best. Those who were thought and found to be the morally and intellectually superior⁴². In most democratic governments throughout ancient and modern history, democratic citizenship consisted of an **elite class**⁴³, until full enfranchisement was won for all adult citizens

³⁹ <https://thehagueacademy.com/blog/2018/05/7-conditions-successful-inclusive-citizen-participation/> Retrieved May 24,2019

⁴⁰ Uraia, Kenya National Civic Education Programme: what is public participation? Pg 2-5

⁴¹ Copp, David, Jean Hampton, & John E. Roemer. (1993). *the Idea of Democracy*. Cambridge University Press.

⁴² <https://www.britannica.com/topic/aristocracy>, accessed on June 23, 2019

⁴³ Emphasis mine

through the suffrage movements of the 19th and 20th centuries⁴⁴. Kenya is a representative democracy which means citizens vote for government representatives to handle legislation and ruling the country on their behalf. In this type of democracy, open, transparent and accountable governance is key to nurturing trust between leaders and the electorate. However, when there is no accountability for policies and legislation that directly affect the citizens, *the distance between government and society widens in tandem with this failure which defeats the purpose of the founding principle of democracy, rule by the people*⁴⁵. In subsequent chapters, this study shall make an argument whether mandatory academic requirements virtually shift to a system of aristocratic rule or whether it lays claim to the tenets of a democratic rule.

2.2.3 CIVIL RIGHTS AND LIBERTIES

Civil rights arise from a primary right to be free from unequal treatment. They are premised on protected aspects such as race, gender, disability among others in varied settings such as the employment sector, the education sector and the freedom available to all to have access to public utilities. On the other hand, civil liberties concern basic rights and freedoms that are guaranteed in the bill of rights⁴⁶. Civil liberties include the right to free speech, the right to privacy, the right to vote etc. Questions about civil rights and liberties have frequently emerged. A key one to note is to what extent the government should protect individuals from infringement on their rights. This shall be discussed in subsequent chapters in the context of the protection given to the political rights as provisioned for under article 38 of the constitution.

2.2.4 THE RULE OF LAW

The rule of law is central in the proper functioning of any democratic country. In a democracy, constitutional limits on power anticipate the subjugation of state authority to the country's laws. This expectation is established through popular vote and adopted by representatives as determined in free and fair elections. The Rule of law viewed as a philosophical doctrine posits that authority

⁴⁴ Birch, Anthony H. (1993). *The Concepts and Theories of Modern Democracy*. London: Routledge

⁴⁵ Democracy and Political Participation, A review by AfriMAP, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS), University of Nairobi Karuti Kanyinga March 2014. Pg 6-7

⁴⁶ <https://civilrights.findlaw.com/civil-rights-overview/civil-rights-vs-civil-liberties.html> Retrieved January 17, 2019

to rule derives not from the power of any political authority, but from a higher power. The social contract theory infused the doctrine of the inalienability of individual human rights into the rule of law. It posits that there are rights which transcend the law of the state. That these rights cannot be overridden by the state with the important provision that the law of the state is a compliance with natural law⁴⁷. In bringing forth a prudent analogy of the rule of law, I find the following to be a more adaptable idea -that the rule of law is “a principle of governance in which all persons, institutions and entities, public and private, including the state itself are accountable to laws publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights, norms and standards⁴⁸.” Consequently, this requires measures to ensure adherence to the principles of supremacy of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. The Kenyan 2010 Constitution is richly endowed with provisions on separation of powers. It establishes the institution of the three arms of the government, provisions relating to the exercise of checks and balances, independence of the same arms of the government and with regards to the co-relation between them. Being the supreme law of the land, it binds everyone under it and all state organs and arms of the government. All other laws are therefore required to be in conformity with it, and in case any is found in violation of any provision of the Constitution, particularly, the fundamental rights, is declared void. The Constitution also incorporates the principle of equality before law and equal protection of law⁴⁹

2.2.5 CRITIQUES OF THE LIBERAL DEMOCRACY THEORY

Of the critiques of the liberal democracy theory, it is Marxism that aptly covers the objectives of this research. Marxism theory posits that the rule of the law represents the interest of the powerful within the society. Early Marxism focused on the idea of political alienation⁵⁰. *Political alienation is the idea that though people feel compelled to vote, they are restricted by their sense of*

⁴⁷ Marmor, A., 2004, “The Rule of Law and Its Limits”, *Law and Philosophy*, 23: 1–43.

⁴⁸ The definition as given by the secretary of the United Nations, **António Guterres draw from** <https://www.studentsforliberty.org> published on 2017/07/05 Retrieved July 3, 2019

⁴⁹ <https://www.studentsforliberty.org/2017/07/05/rule-law-key-freer-kenya/> Retrieved July 3, 2019

⁵⁰ Liberal Democracy, Autonomy, and Ideology Critique, David Weberman, *Social Theory and Practice* Vol. 23, No. 2 (Summer 1997), pp. 205-233

insignificance to the system. The feeling of underrepresentation or not represented at all by those running for office⁵⁴. This will be useful in bringing to light the argument for and/or against mandatory education requirements for elective posts.

2.3 SOCIAL CONTRACT THEORY

The Social contract theory, is the view that persons' moral and/or political obligations are dependent upon a contract or agreement among them to form the society in which they live.

Though there are numerous insightful scholars in this theory, this study's research shall be limited to Thomas Hobbes. Hobbes argued that political authority and obligation are based on the individual self-interests of members of society who are understood to be equal to one another. Hobbes offered this argument moving on the assumption that no single individual is invested with any essential authority to rule over the rest. Hobbes also infers from his mechanistic theory of human nature that humans are necessarily and exclusively self-interested. All men pursue only what they perceive to be in their own individually considered best interests. Hobbes argued that all men react mechanistically by being drawn to that which they desire and repelled by that to which they are averse. Hobbes believed that everything we do is motivated solely by the desire to better our own situations and satisfy as many of our own desires as possible. In addition to being exclusively self-interested, Hobbes also argues that human beings are *reasonable*⁵¹. They have in them the rational capacity to pursue their desires as efficiently and maximally as possible. According to Hobbes, the justification for political obligation is this: given that men are naturally self-interested, yet they are rational, they will choose to submit to the authority of a Sovereign in order to be able to *live in a civil society, which is conducive to their own interests**⁵².

2.4 POLITICAL LIBERALISM

John Rawls conceptualization of justice as fairness plays an important role in this study. In his observation, Rawls formulates as two principles of justice for institutions entrusted with promotion and protection of rights. These two principles offer us a glimpse of his desired politically liberal society and are relevant in the determination of the research questions. In the

⁵¹ Braybrooke, David. 1976. "The Insoluble Problem of the Social Contract." *Dialogue* Vol. XV, No. 1: 3-37.

⁵² Gauthier, David. 1988. "Hobbes's Social Contract." *Noûs* 22: 71-82. *emphasis mine

first principle, Rawls posits that each person has an equal claim to a fully adequate scheme of equal basic rights and liberties. This scheme should be compatible with the same scheme for all. Not only that but it should also avail equal political liberties which are to be guaranteed their **fair value**⁵³. In the second, he posits that social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity. Secondly, they are to be to the greatest benefit of the least advantaged members of society⁵⁴. In this sense, Rawls identifies the right to vote and to hold public office as basic liberties to which all persons have an equal right. This then introduces to the next important aspect to this study –Equality. Equality and other indexes as set out at article 10 of the constitution of Kenya will be discussed in greater context at chapters three and four.

2.5 CONCLUSION

The reconciliation of key tenets under the liberal democracy theory, the social contract theory and John Rawl’s political liberalism will help us focus on the key underpinnings as at article 38 of the constitution while integrating this right with other constitutional rights, categorically article 27 in order to make a case for equality, equity, social justice, inclusiveness, non-discrimination and participation of the people in the context of academic bars to one’s exercise of their political rights. In particular, focus will be placed on the extent of protection of political rights and the rational deliberation of externalities promoting and/or limiting those rights.

⁵³ Emphasis mine

⁵⁴ <https://www.enotes.com/topics/political-liberalism> accessed March 4, 2020

CHAPTER 3

THE RIGHT TO POLITICAL PARTICIPATION

3.1 INTRODUCTION

In the previous chapter, liberty is discussed to be the fundamental political good. As was noted from the analysis of liberal democracy, there are four fundamental elements for the advancement of this political good - citizen participation, democratic rule, civil rights and liberties and the rule of law. Citizen participation requires that citizens are at the core of decision-making processes. A major reason for promoting citizen participation is that it is intended to have in place *sound democratic decisions* which is crucial in the governing process. This study is careful to note that participation does not solely take its literal meaning but it also draws the expectation that sound governance need take into consideration the realities surrounding the direct beneficiaries of policies and regulations. This chapter offers more light to this particular aspect of liberal democracy bringing together the other three aspects in order to bring the reader to understand the justification for the current legislative framework on the right to candidacy. It is noteworthy to point out the numerous positive expectations for meaningful change in society that have been made to electoral governance generally by virtue of the 2010 constitution. However, the constitutional promise to deliver democracy cannot be realized if the values and principles of the new constitution are not translated into concrete actions. To realize these principles and anchor a democratic order, Kenya needed to nurture adherence to the rule of law, by committing to enforce all laws and embracing constitutionalism. In this regard, the government passed policies and legislation to realize these values and align other laws with the new constitution. The following Acts were enacted to govern the electoral system in Kenya :-

The Elections Act⁵⁵; The Election Laws (Amendment) Act⁵⁶, Elections Offences Act⁵⁷; The Political Parties Act⁶²; The Independent Electoral and Boundaries Commission Act⁵⁸⁵⁹. These laws were enacted in a bid to bring the new constitution to life and to provide for the vetting of persons seeking public office, through elections or appointment, to ensure they are persons of integrity as required under chapter 6 of the constitution. Such laws were meant to allow for public input in the vetting of persons seeking public office. They also set a minimum threshold of standards for elections and appointment of persons to public office by paying attention to the person's integrity, competence, and suitability. They shall be discussed in further detail herein but first, a look at the right to political participation is desirable in order to draw out objects, principles and rules that will help the reader get a clear contextual background of the tenets discussed herein.

3.2 THE RIGHT TO POLITICAL PARTICIPATION

The right to political participation appears significantly in a number of international instruments, declarations, resolutions, regional and universal treaties. It has been variously accepted to be a vital human right in most jurisdictions across the globe. In its absence, there is almost a consensus that other rights exist at peril⁶⁴. The right has been extensively used as a point of reference for different jurisdictions when boasting of their political systems or when delegitimizing other regimes that tend to narrowly adopt the scope of this right. It is in the interests of this research study that the reader understands the character of this right hereafter.

3.2.1 SOVEREIGNTY

The right to political participation hugely posits that the mass of citizens is the ultimate repository of sovereignty. This is then entrusted to an elected representative as is the case in many

⁵⁵ Elections Act no. 24 of 2011.

⁵⁶ The election laws (amendment) act no. 34 of 2017

⁵⁷ The Election Offences Act Chapter 66 Revised Edition 2009 (1998) ⁶²

Political Parties Act CAP 7b, Revised Edition 2012.

⁵⁸ Independent electoral and boundaries commission act no. 9 of 2011 revised edition 2016 [2012]

⁵⁹ Harv. Hum. Rts. Y.B. 77 (1988) Political Participation as a Human Right pg 77

democracies. Once chosen, a sovereign became the depository of the obligations relative to government and other persons. To limit the manner in which collective sovereignty was exercised in the choosing of a leader therefore was to impugn the character of the sovereignty itself⁶⁰. Article 21 of the Universal Declaration of Human Rights, for example, provides that the will of the people shall be the basis of the authority of government⁶¹. The preamble of the CoK⁶² also acknowledges the importance of the will of the people by recognizing the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law⁶³. In doing so it encourages the exercise of Kenya's sovereign right to determine the form of governance of the country. It is through this commitment that the principle of sovereignty of the people is embodied at chapter one of the constitution⁶⁴. That all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution⁶⁵ and that the people may exercise their sovereign power either directly or through their democratically elected representatives⁶⁶. The principle holds that the authority of the government is created and sustained by the consent of its people, who are the source of all political power, through their elected representatives. Voting and running for office is an exercise of Sovereign power directly as established in article 38⁶⁷.

⁶⁰ Georg Steinberger, Sovereignty, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 397, 404 (Rudolf Bernhardt ed., 1987).

⁶¹ **Article 21:** Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. Everyone has the right to equal access to public service in his country.

⁶² Constitution of Kenya, 2010

⁶³ Emphasis mine

⁶⁴ Chapter one of CoK on sovereignty of the people and supremacy of this constitution

⁶⁵ Art. 1(1) CoK

⁶⁶ Art. 1(2) CoK

⁶⁷ <http://jamhurimagazine.com/index.php/kenya-constitution/5651-understanding-kenya-constitution-article1-on-sovereign-power.html> Retrieved January 6, 2019

3.2.2 NON DISCRIMINATION

The International Covenant on Civil and Political Rights is the most widely subscribed treaty guaranteeing participatory rights⁶⁸. Article 25 is the principal provision on political rights in the Covenant and contains three principal guarantees: non-discrimination, the right to participate in public affairs and the right to free elections⁶⁹. The article provides that the rights it provides shall be enjoyed without any of the distinctions mentioned in Article 2⁷⁰ of this Covenant and without unreasonable restrictions. Article 2 forbids any restrictions that discriminate against citizens on the basis of an explicitly prohibited characteristic. The phrase *without unreasonable restrictions* implies that some restrictions on participation not based on prohibited distinctions are *reasonable* and therefore permissible. The delegates included this phrase to allow denial of suffrage to minors, convicts, the mentally ill, and those not meeting residency requirements, and to permit the existence of certain limitations on the right to hold public office, such as a requirement of professional training⁷¹. The delegates apparently did not consider such reasonable restrictions *discriminatory* but did not intend the standard of reasonableness to sanction the egregious forms of discrimination set out in Article 2. Article 14 of the European Convention forbids discrimination on any ground, and the list of prohibited distinctions is not limited by restrictive phraseology as it does not provide a remedy against all instances of inequality. The Court's test usually focuses on the reasons for differential treatment. The test asks whether: The facts found disclose a differential treatment; whether the distinction has a legitimate aim that is to check if it has no objective and reasonable justification having regard to the aim and effects

⁶⁸ <https://www.refworld.org/docid/3ae6b3aa0.html> Retrieved March 2, 2020

⁶⁹ Article 25. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country

⁷⁰ Article 2. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁷¹ See U.N. GAOR, 3d Comm., 16th Sess., 1097th mtg, at 105, U.N. Doc. A/C.3/SR.1097 (1961); U.N. GAOR 3d Comm., 16th Sess., 1096th mtg. at 179, U.N. Doc. A/C.3/SR1096 (1961) [hereinafter Third Committee, 1096th Meeting]; Summary Record of the 365th Meeting

of the measure under consideration; and there is no reasonable proportionality between the means employed and the aim sought to be realized⁷².

3.2.3 RIGHT TO TAKE PART IN PUBLIC AFFAIRS

Paragraph (a) of Article 25 guarantees the right to "take part in the conduct of public affairs directly or through freely chosen representatives". Article 13 of the African Charter guarantees participatory rights, but because the provision lacks enforceable standards its utility remains limited. Article 13 provides that every citizen shall have the right to freely participate in the government of his country, either directly or through freely chosen representatives, in accordance with the provisions of the law⁷³. The right to take part in public affairs and elections guarantees the right of citizens to stand for public office, to vote in elections and to have access to positions in public service. When considering the right to take part in public affairs and elections, often policies and programs are engineered towards: *limiting the ability of a category of individuals to stand for office or to vote in the elections*; regulating the conduct of elections and the electoral process, including funding of an expenditure by political parties and the drawing of electoral boundaries; regulating the eligibility for employment in the public service or appointment to public office among other reasons. This chapter discusses some of the policies in place in the Kenyan legislative framework that guide the right to take part in public affairs but before it delves on to that, it shall be prudent to first analyze the relationship between participatory rights and other human rights.

⁷² Geillustreerde Pers N.V. v. The Netherlands, App. No. 5178/71, 8 Eur. Comm'n H.R. Dec. & Rep. 5, 14-15 (1976);

⁷³ African Charter, supra note 6, art. 13. Lack of background materials makes investigation of rights articulated in the African Charter difficult. Transcripts of a crucial drafting meeting have yet to be released to the public, and the decisions of the African Commission on Human Rights are kept confidential to protect the safety of the petitioners. See Daniel C. Turack, The African Charter on Human and Peoples' Rights: Some Preliminary Thoughts, 17 AKRON L. REV. 361, 377 (1984). The text of the Charter alone, however, suggests that it provides guarantees substantially narrower in scope than those found in the American and European Conventions or the Political Covenant

3.3 THE RELATIONSHIP BETWEEN PARTICIPATORY RIGHTS AND OTHER HUMAN RIGHTS

It is argued that a minimum level of economic development is a prerequisite to meaningful political participation, and thus subsistence or welfare rights should be given priority⁷⁴. These arguments, however, find no support in human rights treaties, which view political participation as a keystone right. This is to mean that political participation is an essential prerequisite to the enjoyment of all other rights. The reasoning is that citizens will never attain sufficient power to advance their own welfare unless they possess a voice in the decisions of their government. In the Kenyan legislative framework, the right to participation relates directly to rights not limited to: the right to freedom of opinion and expression, the right to peaceful assembly, the right to freedom of association. Though certainly not sufficient to warrant the enjoyment of the above stated rights, participatory rights are certainly very important in the protection of these other rights. Which brings us to the framework for enforcement in Kenya.

3.4 ENFORCING THE RIGHT TO POLITICAL PARTICIPATION

There are often strong arguments where enforcement of human rights is challenged by many stakeholders for example civil society organizations, NGOs among others. These arguments are not farfetched especially in the context of participatory rights. Unlike a requirement that a government should desist from direct or indirect facilitation of particular human rights violation such as torture of political detainees, the enforcement of participatory rights often requires a state to restructure its government or constitutional system⁷⁵. In the absence of institutional enforcement, an important aspect of participatory rights is gradually obscured which adversely hinders the enjoyment of this right. Participatory rights are based on an assessment that governments themselves result from prior legally significant actions taken collectively such as elections by which citizens are able to choose their leaders. Before this study delves into the

⁷⁴ Many states expressed this view during the drafting of the Political Covenant. See Commission on Human Rights, 363d Meeting, *supra* note 62, at 11 (statement of Mr. Druto, Polish delegate) ("a citizen who had no direct say in the election of the parliament and government of his country could have no guarantee that his rights would be safeguarded"); Commission on Human Rights, 364th Meeting, *supra* note 62, at 4 (statement of Mr. Kriven, Ukrainian delegate) ("The right to participate in government was an essential prerequisite for the enjoyment of all other rights, including economic, social and cultural rights.")

⁷⁵ Henry J. Steiner, *The Youth of Rights*, 104 Harv. L. Rev. 917, 930 (1991)

current legislative framework guiding competence and suitability, guidelines set to enforce the right to political participation, it shall suffice to look at the historical approach to having representatives in the colonial government. Taking caution that this study's scope does not encompass the entire electoral regime, its focus shall be limited to the criteria used in appointing/electing members to the governing council at the time which will then act as a starting point for the substantive debate on the constitutionality of mandatory academic requirements for elective positions.

3.5 ELECTED REPRESENTATIVES: A HISTORICAL PERSPECTIVE

In the period tracing to the colonial regime, members to the legislative council, specifically Africans, were subject to appointment on the basis of *elite opinion*⁷⁶⁷⁷ and much scrutiny to members was under a weighted franchise based on education. The Legislative Council of Kenya was the legislature of Kenya at the time whose exact period of existence is correctly stated to be between the years 1907 and 1963. The Legco, as then it was called, was modelled on the Westminster parliamentary system⁸² and began as a nominated, exclusive European institution. It however later evolved into an electable legislature pursuing universal suffrage.

Following the system's end of existence, the Legco was succeeded by the National Assembly sometime in 1963⁷⁸. It majorly comprised of: the head of government being the prime minister; an executive branch adhering to the principle of cabinet collective responsibility and an independent non-partisan civil service that advised on and implemented decisions of ministers. The manner in which the system was designed and the functions it played as government of the day necessitated some form of literacy to be a viable candidate. It was therefore particularly necessary to have some form of education bearing in mind the docket and roles assumed once in government as a prerequisite to handling the political realities of the day.

⁷⁶ Emphasis mine

⁷⁷ The *Westminster system* is a parliamentary system of government developed in the United Kingdom. This term comes from the Palace of Westminster, the seat of the British Parliament.

⁷⁸ Robert M. Maxon & Thomas P. Ofcansky (2014) *Historical Dictionary of Kenya*, Rowman & Littlefield, p203

However, for colonial officials, suppressing access to education or the proper regulation of the curriculum offered a *powerful tool for social and political control*⁷⁹. As a result, educational development and policy formation were political processes with significant implications for the roles of whites and Africans in Kenya. For the larger African community education was a potential key to greater opportunity as well as a weapon against inflated European charge that they were uncivilized and therefore unprepared to participate in the political life of the colony. Therefore, it was not to come as a surprise that the first black representative to the Kenya legislative council, Eliud Mathu⁸⁰, had an oxford degree. Educational development was almost always an important perquisite for political advancement, not only in Kenya but throughout colonial Africa⁸¹.

At the time, it was more factual than not that education had political implications. Most of the African political activity was premised on matters education and literacy. Petitions and memoranda presented to the colonial office and minutes of various political meetings provide a written record of African grievances about demands for education. Concrete evidence of the connection between education and politics is given of the independent school movement that advocated for the creation of African schools free of government and mission control and was at the time vigorously supported by the KCA. The movement which was a major force in central Kenya blossomed in the early 1930s. Its efforts were not in vain as it not only promoted educational development but also sharpened the political consciousness of the Kikuyu people.

The events following World War 1 spurred a new wave in politics in Kenya. It followed that African political consciousness was propelled much more with an acute sense of grievance and the emergence of a new breed of political leaders who were by far and large mission educated men. This spawned a variety of new political associations that included the likes of the East African Association, the Young Kikuyu Association, and the Young Kavirondo Association just to mention a few. These organizations were at the forefront of the protest movement of the early

⁷⁹ Emphasis mine. *Aristocratic mode of rule

⁸⁰ Eliud Wambu Mathu (1 June 1910 - 26 May 1993) was a teacher, politician and civil servant. He was the first African member of the Legislative Council of Kenya and served from 1944 to 1957

⁸¹ Marshall Clough (April–June 1978). "Review: Understanding Kenya in the '50s: New Resources, but More Needed: Reviewed Works: Mathu of Kenya: A Political Study by Jack R. Roelker; Counter-Insurgency in Kenya 1952-60: A Study of Military Operations against Mau Mau by Anthony Clayton". *Africa Today*. **25** (2): 79–81.

1920s. They were led by at the time African elites such as the likes of Harry Thuku, James Beuttah, and Jonathan Okwiri just to mention some. Their literacy levels which in my view informed by far and large their push for reforms enabled them gain a limited role in government. Those accommodated were mostly young, educated Africans as well as older chiefs and headmen.

Governor Coryndon⁸² may have rightly stated that to encourage and develop a sense of responsibility and of duty towards the state, it was necessary that the more responsible and thoughtful of the native population be incorporated into governance. For early African politicians, education provided sufficient fulfillment for their aspirations. Education made them politically conscious. It made them challenge elements of colonial system through organisations which varied in their radicalism but agreed for the need of significant reform. Access to education opportunities enhanced dealing effectively with a rapidly changing environment⁸³.

JWK Pease, district commissioner in south Nyeri, noted of council members in his district in 1930:

I think they feel the need the sort of education that will enable them deal with new condition as of life resulting from the contact with the ideas and methods of western industrial civilization; an education which will put them on more equal terms with the more civilized communities they are now in contact with; they feel changes are occurring and they must educate their sons if they are to face and survive the changing conditions of life⁸⁴.

Literacy of political players was held in high regard in the colonial age and afforded one political affluence like nothing else. With us today is the newly promulgated constitution of 2010 - which has barely hit a decade at the time of completion of this study. With it comes numerous reforms to the general electoral governance system, some of which bear a huge semblance in respect to practice by our colonial administrators on measures for testing suitability. Subsequent sub headings shall shed more light to this phenomenon.

⁸² Sir Robert Thorne Coryndon was a British colonial administrator, a former secretary of Cecil Rhodes who became appointed as Governor of British Kenya from the year 1922 to 1925

⁸³ Bodleian Papers. "Papers of Sir Robert Thorne Coryndon (2)". Bodleian Library of Commonwealth & African Studies at Rhodes House. Retrieved 31 August 2011.

⁸⁴ Donald G. Schilling, *The International Journal of African Historical Studies* Vol. 9, No. 2 (1976), pp. 218-247. JOURNAL ARTICLE Local Native Councils and the Politics of Education in Kenya, 1925-1939

3.6 THE CURRENT LEGISLATIVE FRAMEWORK IN KENYA

3.6.1 COMPETENCE AND SUITABILITY UNDER THE CONSTITUTION OF KENYA 2010

At the onset, the preamble recognizes the aspirations of Kenyans to have government based on the essential values of human rights, *equality*⁸⁵, freedom, *democracy*, *social justice* and the rule of law. It also recognizes the power vested on Kenyans to exercise their sovereign and inalienable right to determine the form of governance of their country⁸⁶. Chapter six of the constitution of Kenya on leadership and integrity sets out a clear guide for state officers to abide by. By virtue of chapter six, any authority vested in a state officer is held in public trust and is expected to be exercised in a manner that is consistent with the purposes and objects of the constitution. It further states that any person under whose authority is vested need demonstrate respect for the people. They are obliged to act in a manner that brings honor to the nation and dignity to the office held⁸⁷. The constitution further outlines guiding principles of leadership and integrity. They include: a selection on the basis of *personal integrity, competence and suitability*, or election in free and fair elections; *objectivity and impartiality* in decision making, and in ensuring that decisions are not influenced by nepotism, favoritism or any other improper motives or corrupt practices. State officers should also be led by *selfless service* based solely on the public interest, demonstrated by *honesty* in the execution of public duties and the declaration of any personal interest that may conflict with public duties. The constitution additionally lays emphasis to the need for *accountability* to the public for decisions and actions and a further urge to uphold discipline and commitment in service to the people⁸⁸. Additionally, the constitution provides for a code of conduct for state officials. Article 75 of the constitution requires all state officer to behave in a manner that avoids any conflict between personal interests and public or official duties; compromises any public or official interest in favor of a personal interest; or demeans the office

⁸⁵ Emphasis mine

⁸⁶ Preamble of the constitution of Kenya, 2010

⁸⁷ Article 73 (1)

⁸⁸ Article 73(2)

the officer holds⁸⁹. The constitution also provides for criteria to assess qualifications and disqualifications for election as member of parliament and those of member of county assembly at Article 99(1) (b) and Article 193 (1) (b). The same are replicated in the elections act and will thus be discussed in the subsequent sub heading.

3.7 LEGISLATION ON COMPETENCE AND SUITABILITY REQUIREMENTS

3.7.1 THE ELECTIONS ACT

The elections act defines a candidate as a person contesting for an elective post⁹⁰⁹¹. The Elections act provides for among others the qualifications and disqualifications for nomination as Member of Parliament or member of county assembly. One qualifies if subsequent to provisions in the act he/she *satisfies any educational*, moral and ethical requirements prescribed by the Constitution and the Elections Act⁹⁶. In this act, a person is qualified to be nominated as a candidate for an election only if that person is qualified to be elected to that office under the Constitution and this Act and holds in the case of a Member of Parliament, a degree from a university recognized in Kenya which is the same requirement for persons seeking election as members of a county assembly⁹². The requirement for a degree is also replicated for the office of the President, Deputy President, county Governor or deputy county Governor⁹³⁹⁴. There are other important considerations taken for determining qualification and disqualification but significant to this study are whether; the candidate in question is of *sound mind*, has been adjudged *bankrupt*, is subject to a sentence of imprisonment of at least six months - as at the date of registration as a candidate, or at the date of election or is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six of the Constitution⁹⁹.

⁸⁹ Article 75 (1)

⁹⁰ Section 2

⁹¹ (1) (b) & 25(1) (b)

⁹² Elections Act section 22(1) (a), (b)

⁹³ Elections Act section 22(2)

⁹⁴ (2) & 25 (2)

3.7.2 THE LEADERSHIP AND INTEGRITY ACT

The primary purpose of this Act is to ensure that State officers respect the values, principles and requirements of the Constitution. Pursuant to the leadership and Integrity Act, a state officer is expected to respect the values, principles and the requirements of the Constitution, including : the national values and principles provided for under Article 10 of the Constitution; the rights and fundamental freedoms provided for under Chapter Four of the Constitution; the responsibilities of leadership provided for under Article 73 of the Constitution; the principles governing the conduct of State officers provided for under Article 75 of the Constitution; the educational, ethical and moral requirements in accordance with Articles 99(1)(b) and 193(1)(b) of the Constitution; in the case of County governments, the objectives of devolution provided for under Article 174 of the Constitution; and in so far as is relevant, the values and principles of Public Service as provided for under Article 232 of the Constitution⁹⁵. The leadership and Integrity Act obligates state officers to exercise their authority in the best interests of the people as any state office is held under a Public trust. The act requires state officers to take personal responsibility for the reasonably foreseeable consequences of any actions or omissions arising from the discharge of their duties of the office. In Performance of duties, a State officer shall to the best of their ability: carry out the duties of the office efficiently and honestly; carry out the duties in a transparent and accountable manner; keep accurate records and documents relating to the functions of the office and report truthfully on all matters of the organization which they represent.

*Professionalism*⁹⁶ is mandatory for A State officer as provided for by the act. A state officer shall: carry out duties of the office in a manner that maintains public confidence in the integrity of the office; treat members of the public and other public officers with courtesy and respect; not discriminate against any person, except as is expressly provided by the law; to the extent appropriate to the office, maintain high standards of performance and level of professionalism within the organization and lastly, If the State officer is a member of a professional body, observe

⁹⁵ LeadershipandIntegrityAct19of2012 SECTION 3(1) & (2)

⁹⁶ Quality of work, devotion and work ethics, comparable to a professiona. Definition available at <https://thelawdictionary.org/professionalism/> accessed July 8, 2019.

and subscribe to the ethical and professional requirements of that body in so far as the requirements do not contravene the Constitution or this Act

3.8 THE ELECTORAL BODY - IEBC

The Independent Electoral and Boundaries Commission is established by Article 88⁹⁷ of the Constitution and is subject to an enabling legislation known as the Independent Electoral and Boundaries Commission act⁹⁸. The functions of the commission are set out at section 4 of the act to include but not limited to: the continuous registration of citizens as voters; the regular revision of the voters' roll; *the regulation of the process by which parties nominate candidates for elections; the registration of candidates for election*; voter education; the facilitation of the observation; monitoring and evaluation of elections; the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election; *the development and enforcement of a code of conduct for candidates and parties contesting elections*⁹⁹. The IEBC is primarily guided by the elections act which is an act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes. From the foregoing, it is evident that the IEBC plays a key role in the drafting of standards or requirements to guide electoral practices in Kenya.

The qualifications that were tabled by the working group as noted in the background of this study at chapter one are also highlighted in legislations such as the elections act.

3.8.1 INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT

The object and purpose of this Act is among others to provide for the operations, powers, responsibilities and functions of the Commission to supervise elections and referenda at County and National government levels; to provide for the manner of the exercise of the powers, responsibilities and functions of the Commission pursuant to Article 88(5) of the Constitution and to establish mechanisms for the Commission to facilitate consultations with interested parties

⁹⁷ See article 88(1) of the CoK on the Independent Electoral and Boundaries Commission. 88(1) there is established the Independent Electoral and Boundaries Commission.

⁹⁸ Independent electoral and boundaries commission act NO. 9 OF 2011, Revised Edition 2016 [2012]

⁹⁹ Part ii – administration, Section 4 of IEBC act NO. 9 OF 2011 on the Functions of the Commission

pursuant to Article 89(7) of the Constitution. The Functions of the Commission are as provided for by Article 88(4) of the Constitution. The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament. Key among its functions and which is relevant to the objectives of this research is their duty to regulate the process by which parties nominate candidates for elections; the registration of candidates for election; to conduct voter education; to facilitate the observation; monitoring and evaluation of elections; the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election and lastly but most importantly to this research - *the development and enforcement of a code of conduct for candidates and parties contesting elections.*

3.9 THE LEGISLATIVE FRAMEWORK ON THE RIGHT TO CANDIDACY

As can be deduced at the beginning of this chapter, the right to stand for election (also the right to candidacy) is included in a number of regional and international human rights treaties. This right is often expressed alongside the closely connected right to vote. For example, Article 25 of the ICCPR¹ guarantees to ‘every citizen’ the right and opportunity ‘to vote and to be elected at genuine periodic elections’. Similarly, the ECtHR has established that the obligation to ‘hold free elections’ under Article 3 of Protocol 1 to the ECHR necessarily includes a duty to guarantee the individual rights to vote and stand for election. Additionally Article 23 of the ACHR¹ and Article 13 ACHPR¹ expressly provide for every citizen to have the right to participate freely in the government of his country. While the right to vote enjoys widespread recognition and enforcement, the same may not be said of the closely related right to stand for election. Even though the right to candidacy is recognized in numerous regional and international human rights treaties, there exist views that political candidacy should not be properly considered a fundamental right. In response to this, this chapter seeks to offer a theoretical justification of the right to stand for election by outlining the central values and interests which underlie the right. It further offers a derivative justification of the right, by examining the extent to which the right’s protection is necessary for the full realization of other human rights, including the right to vote.

3.9.1 THE RIGHT TO CANDIDACY IN REGIONAL AND INTERNATIONAL HUMAN RIGHTS LAW

There is a growing consensus on what this right has come to embody as expounded in the jurisprudence of various international courts and treaty monitoring bodies. For example, in addition to a guarantee that eligibility requirements for public office ought to be reasonable and non-discriminatory, the right also demands procedural fairness regarding determinations on eligibility¹⁰⁰. Similarly, courts and treaty monitoring bodies have held that the right also include a duty on the state to take positive measures to ensure that a real opportunity exists to exercise one's right to stand¹⁰¹. Courts therefore hold that election deposits required of candidates must be proportionate and not excessive so as to constitute an 'insurmountable administrative or financial barrier'¹⁰². In light of this, the ECtHR has acknowledged the extent to which many aspects of electoral organization can conceivably implicate the right to stand for election. It has therefore been established that the right does not include an entitlement to any specific electoral system and that a state's historical and political evolution must be taken into account when assessing the reasonableness of eligibility requirements for public office¹⁰³. The existence of such deference at the international and regional levels underscores the need for an enforceable right to candidacy on the domestic plane. But before this study gets to that, it shall be necessary to revisit an important principle necessary for the exercise of the right to stand for election; the doctrine of sovereignty of the people.

3.9.2 ARTICLE 38 OF THE CONSTITUTION OF KENYA ON POLITICAL RIGHTS

The Kenyan constitutional dispensation grants four categories of rights to participate in the electoral process. These rights include the right to be registered as a voter; the right to vote by secret ballot in any election or referendum; the right to be a candidate and if elected, right to hold

¹⁰⁰ Podkolzina v Latvia Application No 46726/99, Merits and Just Satisfaction, 9 April 2002; Antonina Ignatane v Latvia (884/99), Views, CCPR/C/72/D/884/1999.

¹⁰¹ Mauritian Women v Mauritius (35/78), Views, CCPR/C/12/D/35/1978; United Communist Party of Turkey v Turkey Application No 19392/92, Merits and Just Satisfaction, 1 January 1998, at para 33.

¹⁰² Sukhovetsky v Ukraine Application No 13716/02, Merits and Just Satisfaction, 28 March 2006, at para 73.

¹⁰³ Podkolzina, supra n 11 at para 33; Castaneda Gutman, *ibid.* at paras 165–166.

a public office; and the right to join and participate in a political party¹⁰⁴. The Constitution provides that every adult citizen has the right to be registered as a voter without unreasonable restrictions¹⁰⁵. It further provides that a person qualifies for registration as a voter at elections or referenda if the person: is an adult citizen; is of sound mind; and has not been convicted of an election offence during the preceding five years¹⁰⁶. The constitutional right to be registered as a voter is also recognized in the Elections Act which provides that ‘any citizen of Kenya who has attained the age of eighteen years as evidenced by either a national identity card or a Kenyan passport and whose name is not in the register of voters shall be registered as a voter upon application in the prescribed manner to the Commission¹¹⁹’.

In light of the foregoing, one of the most critical ways that individuals influence governmental decision-making is through voting. Voting is a formal expression of preference for a candidate for office or for a proposed resolution of an issue. Voting generally takes place in the context of a large-scale national or regional election, however, local and small-scale community elections can be just as critical to individual participation in government. The Constitution provides that every adult citizen has the right to vote by secret ballot in any election or referendum¹⁰⁷. The Elections Act accentuates this constitutional right by providing for the legal framework for exercising the right. The Act states that- an adult citizen shall exercise the right to vote specified in Article 38(3) of the Constitution in accordance with the Elections Act and where such citizen is registered in the Principal Register of Voters¹⁰⁸.

¹⁰⁴ See Article 38. (1) Every citizen is free to make political choices, which includes the right— (a) to form, or participate in forming, a political party; (b) to participate in the activities of, or recruit members for, a political party; or (c) to campaign for a political party or cause. (2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for— (a) any elective public body or office established under this Constitution; or (b) any office of any political party of which the citizen is a member. (3) Every adult citizen has the right, without unreasonable restrictions— (a) to be registered as a voter; (b) to vote by secret ballot in any election or referendum; and (c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office. (emphasis mine)

¹⁰⁵ Art.38 (3), Constitution of Kenya

¹⁰⁶ <http://kenyalaw.org/kenyalawblog/electoral-process-in-kenya/> Retrieved January 23, 2019 ¹¹⁹ S.5(3), Elections Act.

¹⁰⁷ Art.38 (3)

¹⁰⁸ Elections Act S.3

3.9.3 RIGHT TO BE A CANDIDATE AND IF ELECTED, RIGHT TO HOLD A PUBLIC OFFICE

This extract of article 38 has been occasioned its own headline as it stands as the key assessment in this study. The constitution provides that every adult citizen has the right, without *unreasonable restrictions*¹⁰⁹, to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office¹¹⁰. At the onset of this chapter, this study agrees that the phrase *without unreasonable restrictions* implies that some restrictions on participation not based on prohibited distinctions are *reasonable* and therefore permissible.

Conditions cannot curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness. In particular, such conditions must not thwart the free expression of the opinion of the people in the choice of the legislature. The free expression requirement, the ECtHR explained, "implies essentially- apart from freedom of expression, the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election¹¹¹. However, the Commission has held that states may restrict the rights to vote and to stand for election as long as the limitations are not arbitrary and do not infringe upon the free expression of opinion. From this. the principle of equality and relevant other indexes shall be discussed in greater detail at chapter four even as we draw meaningful insights on the reasonability versus unreasonability requirement.

3.9.4 CONCLUSION

This chapter has provided a lens that will serve as the starting point for chapter four. From the discussion herein, the study has been able to draw out important concepts that function prominently in the exercise of one political rights which have been discussed in correlation to the right provisioned for under article 38 of the CoK. This chapter has discussed the principles of sovereignty, non-discrimination as preludes to enjoying the right to political participation.

¹⁰⁹ Emphasis mine

¹¹⁰ Art.38 (3) c

¹¹¹ Mathieu-Mohin, 113 Eur. Ct. H.R. (ser. A) at 23.

This chapter has also analyzed the legislative framework guiding the right to participate in public affairs in Kenya with the integration of regional instruments herein. Furthermore, the concepts of equality and fairness have been introduced though not discussed in greater detail. Chapter four will attempt to discuss in greater detail how articles 10 and 27 of the constitution affect or influence the connotation at article 38 – without unreasonable restrictions in a bid to henceforth conclusively draw the conclusion to this matter and answer in entirety the research questions outlined herein.

CHAPTER 4

LIMITATIONS TO THE RIGHT TO CANDIDACY

4.1 INTRODUCTION

Chapter three introduced to us the legislative framework guiding citizens, state actors and oversight entities as pertains the right to candidacy. This chapter shall discuss in greater detail the limitations to the right to candidacy. In particular, this chapter shall attempt to draw out and discuss reasonable bars as against unreasonable bars in respect to the promotion, protection and enforcement of the political right to stand for election as enumerated in the verbatim of article 38 of the constitution. Before doing so, this chapter shall first deliberate on some key constitutional provisions that will be extremely necessary as a prelude to understand the reasonability requirement as set out.

4.2 ARTICLE 10 AND ARTICLE 27 OF THE COK

Article 10¹¹² provides for the national values and principles of governance, while article 27¹¹³ provides for equality and freedom from discrimination. Important to this study are the principles of equality, inclusiveness and non-discrimination. Non-discrimination is discussed at chapter three. Therefore, weight will be added on equality and inclusiveness. The right to directly and indirectly participate in political and public life is important in empowering individuals and groups, and is one of the core elements of human rights-based approaches aimed at eliminating

¹¹² (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them -- (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. 2) The national values and principles of governance include -- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; (c) good governance, integrity, transparency and accountability; and (d) sustainable development

¹¹³ (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms. (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

of the preferences and interests of all citizens. Equal consideration of the preferences and needs of all citizens can only be promoted and enhanced through a notable application of equal political activity among citizens.

This research study takes caution in noting down that indeed equality in all domains of social and political life is somewhat complex. It can be about many different valued goods. In today's age the most common valued goods are perhaps income, education, health just to note but a few. This can be across individuals or even groups. *When the structure of political participation is stratified in favor of the more advantaged members of society in particular the more educated, it tends to limit the scope of participation of its members in entirety.* This can then be claimed to go against the notion of equality when valued goods such as education are used to cut out those idealistically suitable to run for elected office.

It is with no doubt, that when society's participants are educated they are better placed in terms of information and are more competent in their political judgements, and more often than not will be more tolerant of alternative political positions. But at the same time, they will have needs and preferences that differ from the less advantaged members of society, who in this case are not educated. Thus, a participatory system dominated by the participants of a higher quality tends to violate the democratic ideal of equal consideration of interests. In a world where education is regularly invoked to legitimate inequality, it can appear farfetched even to raise concern about education-based discrimination as a matter of social injustice

4.3 EDUCATION BASED DISCRIMINATION

There would seem to be a preconceived notion that discrimination based on education does exist. This research study makes this observation based on the verbatim of article 27 of the constitution of Kenya that does not expressly mention it as a ground for discrimination yet the same seems to exist in practice. There is often a certain level of prejudice, false and unjust beliefs that has over time been widely harbored about the uneducated and illiterate¹¹⁸. Indeed,

¹¹⁸ Alexander, L. 1992. What makes wrongful discrimination wrong? Biases, preferences, stereotypes, and proxies, University of Pennsylvania Law Review 141, no. 1: 149–219

such manifestations of elitism and condescension occur all the way up the educational hierarchy so that persons who are deemed to have failed in the academic sphere are scorned, disregarded and excluded in as much the same way as high school dropouts and the unschooled¹¹⁹.

Looking into the Kenyan political context, we may think of the ways in which the uneducated are unjustly blamed for unfavorable political, social and economic outcomes – as, for example, in the wake impeached and former county governor of Kiambu, many Kenyans went on twitter to shame him for his gross misconduct on the basis that he lacked adequate schooling¹²⁰.

Turning to social science statistics, this study is able to draw insight quickly that indeed education, or rather the lack thereof, is today a marker of enormous social, cultural, political and economic disadvantage¹²¹. By education-based discrimination, this study means the promiscuous, and unjust denial of rights, privileges and freedoms to those lacking in education, where education may variously make reference to an individual's intellectual achievements and formal credentials.

4.3 LIMITATION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN KENYA

The idea behind limitations is that a right can be optimized as a matter of degree and not a fixated point: “a right is a ground in practical reasoning and not the conclusion of a further debate hence no reason for narrowly defining the scope of interest protected as a right¹²².”

Therefore, the optimization of a right maybe maximized or minimized subject to its value; it is value which is maximized or minimized and not the right. Moreover, for a right to be suitably a right under the scope of limitation; it has to undergo the delimitation process for its scope and content to be properly constructed. Thus creation of a limitation clause in the constitution sets

¹¹⁹ Broadfoot, P. 1996. Education, assessment and society: A sociological analysis. Buckingham: Open University Press

¹²⁰ https://twitter.com/hashtag/Waititu?src=hashtag_click

¹²¹ Clarke, Senator H. 2006. Senator Hansen Clarke to introduce legislation to end auto insurance discrimination based on education and occupation. Press release issued on April 24. www.senate.michigan.gov/dem/hansenclarke/press.htm accessed February 27, 2020

¹²² CN Webber Gregoire, The negotiable constitution: On the limitation of rights (2009)

out conditions aforementioned to which limitation is assessed¹²³. Limitation clauses limit guaranteed rights, therefore for it to be operational; the rights set forward must be ascertainable.

The bill of rights in the Kenya's 2010 constitution makes use of a single clause in explicitly identifying the limitation of rights under article 24. The limitation clause is premised on democracy in a society for the purposes of evaluating the validity of what is suitable in the public interest. The values underpinning a free and democratic society as the ultimate standard for interpreting the limitation clause ought to enhance the exercising of rights by both the individual and the society at large¹²⁴. The inquiry to the limitation clause is by its very nature a fact-specific inquiry as established by the supreme court of Canada in the case *McDonald V Canada*¹²⁵ that the validity of rights limitation ought to be established with statistical evidence and social practices i.e. commission reports; experience of other countries etc¹²⁶. Though limitation clauses provide direction on the mode of justifying rights limitation, it is important to assess the balance between the harm and the benefit of the limitation. The bill of right takes into account the protection of public interest and the rights of individuals and thus strikes a balance by making it possible for limitation under certain circumstances in order to achieve this objective – balancing of interests.

4.4 THE NATURE OF THE RIGHT GRANTED AT ARTICLE 38 OF THE COK

Rights can either be absolute, limited or qualified. Absolute rights are those rights which can be neither restricted nor restrained under any condition. Limited rights are rights that can only be restricted in specific situations set out by law most notably through legislations¹²⁷. Qualified rights

¹²³ Abiola Sarah, 'limitation clauses in national constitutions and international human rights documents: scope and judicial interpretation', Harvard University, 26th April 2010 at <https://litigation-essentials.lexisnexis.com/> (accessed 6th October 2019)

¹²⁴ R V Oakes

¹²⁵ *MacDonald Inc v Canada (AG)*, [1995] 3 S.C.R. 199

¹²⁶ CN Webber Gregoire, *The negotiable constitution: On the limitation of rights* (2009) 78-81

¹²⁷ <https://www.citizensadvice.org.uk/law-and-courts/civil-rights/human-rights/when-can-a-public-authorityinterfere-with-your-human-rights/>

are rights which may be interfered with in order to protect the rights of another or the wider public interest¹²⁸. The right to seek elective post is a political right. Political rights confer an opportunity upon people to contribute to the determination of laws and participate in government. These rights guarantee the positive liberty to contribute to the process of governing the affairs of society in which one lives. Political rights presume that the government processes should be structured so as to provide opportunities for political participation of all eligible citizens¹²⁹. The Kenyan constitutional dispensation provides for rights and fundamental freedoms that cannot be limited¹³⁰. Article 25 does not grant article 38 the status of absoluteness and by virtue of this exclusion, it leaves it to the jurisdiction of article 24 that provisions for limitation of rights. Therefore, by virtue of provisions in the constitution and its characterization, it is not subject to any debate that the right is and can be limited, as can be denoted from the wording of article 38 itself. The catch lies on assessing the importance of a certain right in the overall constitution scheme in order to justify its limitation. It is important for the laws on limitation to draw distinction between the objective and subjective contents of a right. The objective content refers to values and practices that are typical of a free, democratic and constitutional state. If this essence of the objective content of a right is negated, the objective content is lost. The subjective content of a right refers to those values and practices which particular individuals and groups enjoy. Once they are barred from enjoying such rights as a consequence of limitation, the essence of the subjective content of the right is lost¹³¹.

4.5 THE IMPORTANCE OF THE PURPOSE OF THE LIMITATION

Every measure of a limitation ought to serve a specific purpose that will appear reasonable to the citizens of a state due to compelling circumstances. I hold the firm opinion that minimum educational requirements were implemented in Kenya to raise a certain caliber of leaders. That

¹²⁸ <https://www.coe.int/en/web/echr-toolkit/definitions>

¹²⁹ <http://www.lincoln.edu/criminaljustice/hr/Civilandpolitical.html> Retrieved May 9, 2019

¹³⁰ Article 25 of CoK 2010, despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited (a) freedom from torture and cruel, inhuman or degrading treatment or punishment; (b) freedom from slavery or servitude; (c) the right to a fair trial; and (d) the right to an order of habeas corpus.

¹³¹ Gerhard Erasmus, Limitation and suspension in David Van Wyk et al, Rights and constitutionalism: The new South African constitutional legal order, (1994) 650

conduct and actions of our Kenyan leaders has awed the public is not news to the Kenyan electorate. Time and again, Kenyan leaders have been subject of public scrutiny due to behavior that show utter disregard for basic values teachable in education institutions. There has been continued concern by the electorate on the incompetence's by Kenyan leaders especially parliamentarians in addressing issues under their mandate. More often than not you find politicians bringing up or sponsoring bills that do not in any way better the welfare of the electorate but act in their self-interests. Strong proponents for the implementation of academic requirements argue that it is not good to have people who do not possess serious educational qualification at the helms of state office which by virtue of chapter six of the constitution, is held in public trust. It is variously believed that with education comes knowledge and for you to be a leader and to be able to govern well, you need to have at least, a basic educational qualification.

4.6 NATURE AND EXTENT OF THE LIMITATION

Great importance lies in assessing the manner in which limitation affects the exercise of the right to stand for election. The reason behind this is that the limitation should not be *more excessive* than what is warranted by the purpose that the limitation seeks to achieve.

Proportionality has to lie between the harm done by the limitation and the beneficial purpose that the said law is meant to achieve. If the said law fails to serve the desired purpose it may not be termed as a reasonable limitation to the right. If one is to look at the happenings in our politics today, majority of the electorate may perhaps not argue against the fact that educational requirements for those seeking elective positions in Kenya should be made compulsory.

Looking at what is obtainable in western countries for those seeking elective positions, it may or may not be correctly inferred that Kenya is quite far behind and that is why as a country we are yet to produce outstanding technocrats as presidents, governors, senators and so on. It is thus correctly or perhaps incorrectly believed that the need to have educational qualifications compulsory for those seeking elective position will gradually manifest the dividends.

4.7 LESS RESTRICTIVE MEANS TO ACHIEVE THE PURPOSE

The purpose of a limitation fails the test of proportionality if there is the presence of other means to achieve the same ends with the limitation with or without restricting the rights in a minimal manner. Therefore, the presence of a less restrictive means (but equally effective) would act as suitable alternative to achieve the same intended purpose as the prior limitation. The case **R v**

*Oakes*¹³² provides a test on the analysis of the limitation clause that allows reasonable limitations on rights and freedoms through legislation. The test of reasonableness was enumerated in a way that linked it to the identification of limitations that are justifiable in a free and democratic society as follows:

“To establish that a limit is reasonable and demonstrably in a free and democratic society, two central criteria must be satisfied; first, the objective, which the measures responsible for a limit on a right or freedom are designed to serve, must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom.”

The standard must be high in order to ensure that objectives which are trivial and discordant with the principle integral to a free and democratic society before it can be characterized as sufficiently important¹³³. What is introduced here is the first phase of the balancing of the rights interests of an individual and, on the other hand, the interests of a democratic society as represented by the state.

4.8 THE CANDIDATE POOL: UNREASONABLE RESTRICTIONS

The Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies¹³⁴. The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings¹⁴⁸. Article 12 of the CoK provides that every citizen is entitled to the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by this Constitution. Hence, the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State¹³⁵.it is

¹³² R V Oakes (1986) 26 DLR at 225

¹³³ R V Oakes (1986) 26 DLR at 225

¹³⁴ Art. 19(1) CoK ¹⁴⁸

Art. 19(2) CoK

¹³⁵ Art. 19 (3) (a), CoK

thus correctly anticipated that these rights and fundamental freedoms are subject only to the limitations contemplated in the CoK¹³⁶.

Each individual is entitled to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom¹³⁷. However, some restrictions apply. Thus, the CoK acknowledges that a right or fundamental freedom may be limited but only to the extent permitted by law and then only to the extent that the limitation is *reasonable and justifiable* in an open and democratic society based on human dignity, equality and freedom. The following factors are taken into account when determining what is and can be reasonable and justifiable: one, the nature of the right or fundamental freedom; two, the importance of the purpose of the limitation; three, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others and lastly the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose¹³⁸. The study focuses on three of the factors aforementioned as it fits relevance of this research which shall be outlined in subsequent chapters accordingly.

So what amounts to reasonable and justifiable limitations? How do we measure reasonableness in the context of an open and democratic society? This study shall begin by defining that which is unreasonable in order to find its bearing around the reasonable and justifiable.

*Unreasonable is defined as something beyond the limits of acceptability or fairness*¹³⁹. One that is not guided by or based on good sense and which is clearly inappropriate, excessive, or harmful in degree or kind lacking justification in fact or circumstance¹⁴⁰. Any conditions which apply to the exercise of the rights protected by article 38 should be based on objective and reasonable

¹³⁶ Art. 19 (3) (c) CoK

¹³⁷ Art. 20 (2) CoK

¹³⁸ Art 24, CoK on Limitation of rights and fundamental freedoms

¹³⁹ <https://www.collinsdictionary.com/dictionary/english/unreasonable> accessed January 10 , 2019

¹⁴⁰ <https://dictionary.findlaw.com/definition/unreasonable.html>

criteria. The exercise of the rights espoused under article 38 may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable.

The right to vote at elections and referenda as established by law may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. It is unreasonable to restrict the right to vote on the ground of physical disability. *All these restrictions should be context specific and should take into account societal wants and needs.* Factors such as party membership should not be a condition of eligibility to vote, nor a ground of disqualification. In the same breath, the effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements. It may be reasonable however to have limitations for example on campaign expenditure which is justified in my opinion because it is necessary to ensure that the free choice of voters is not undermined by the disproportionate expenditure on behalf of any candidate or party.

4.9 CONCLUSION

This chapter has brought into perspective provisions in the constitution in particular article 10 and 27. The discussion herein focused on equality and its key underpinnings relevant in the assessment of section 22 of the elections act. This chapter has also highlighted limitations of rights making reference to article 38 of the constitution. The next chapter shall offer conclusive findings for this study and tender recommendations in light of answering the research questions.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 SECTION 22 OF THE ELECTIONS ACT IS UNCONSTITUTIONAL

The main aim of the study was to examine the constitutionality of laws setting mandatory academic requirements for elective posts which could directly or indirectly hamper the constitutional right to candidacy as enumerated at article 38 of the CoK. Through the study, an audit of laws guiding competence and suitability for elective positions and its underlying components was done. This study was able to draw meeting points between sound election practices enhanced by state bodies and enabling legislations in the limited context of article 38 and section 22 of the Elections Act which was the core of the research hypothesis. This research study found that for governments around the world, education has been embraced as a universal approach for individuals and societies alike to get ahead, prosper and reap rich social, cultural and economic rewards¹⁴¹. This embrace of education comes with an adverse connotation. It is the observation of this research study that this embrace not only issues itself as a promise to governments themselves and their electorates but also as a license to discriminate.

Education has become the most explicit and widely used ideology worldwide to legitimate and explain away all forms of inequality. Those who do not have high levels of education tend to be locked out from fully enjoying their right to expect equality and fully rights to participate in society's, social, political and economic sphere. In a state that highly emphasizes on educational qualifications, only those who are educationally accomplished can legitimately claim such rights of participation especially if you contextualize this to fit article 38 of the Kenyan constitution¹⁴². There need be a level of emphasis on rights and equality for everyone regardless of their level of educational achievement. As a society, there needs to be a demand to end the subtle and gradual

¹⁴¹ Alexander, L. 1992. What makes wrongful discrimination wrong? Biases, preferences, stereotypes, and proxies, *University of Pennsylvania Law Review* 141, no. 1: 149–219.

¹⁴² Wolf, A. 2002. *Does education matter? Myths about education and economic growth*. London: Penguin

acceptance of differential treatment and consideration based on education, without any reflection as to whether such differentiation is just or discriminatory¹⁴³.

This form of discrimination cuts off alternative forms of social mobility in society by introducing arbitrary ceilings and barriers that are difficult, expensive and time-consuming for individuals to have to return to formal schooling in order to navigate around¹⁴⁴. This study has conclusively drawn that indeed education as a bar is discrimination and it need not be said to be in any way legitimate or innocent. It also is fundamentally unjust especially in the context of the Kenyan society where more than one in three Kenyan adults are illiterate¹⁴⁵.

I am not convinced that education guarantees quality leadership. Neither does it guarantee competency and suitability that will translate to positive change i.e. socio- economic change. I find it is imperative that bars to candidacy need not be pegged on educational requirements alone but as of other matters such as integrity and accountability which have continue to hurt our country's growth through corruption. Hence, moral and ethical standards need be strongly recommended in preference to academic requirements. It is however not completely refutable that education levels do indeed matter, this research only argues that they do not necessarily translate to suitability for holding public office. Ideally though they should help us get the most qualified and best suited candidates for the various positions in state/public office, it is imperative that other indispensable competencies be met. Elected leaders are irrefutably champions of change especially in representative democracies. It is necessary that they have an understanding, if at all the basics, of the mandate they have. To do this effectively, a form of literacy is required especially with regards to formulation of sound policies, articulation of ideologies for socio-economic growth in the context of inviting investors and so on. I believe education provides opportunities to learn, to sharpen and adopt practical skills that can be very useful in running a public office. Leadership needs a wealth of experience and assorted skills both social and economic that can only be acquired through being educated.

¹⁴³ Street, B. 1995. *Social literacies: Critical approaches to literacy in development, ethnography and education*. London: Longman

¹⁴⁴ Goldman, D. 2004. The modern-day literacy test? Felon disenfranchisement and race discrimination. *Stanford Law Review* 57, no. 2: 611–56.

¹⁴⁵ Kenya National Adult Literacy Survey report Published Jan 2007
available at <http://www.eldis.org/document/A31868>

Legislative functions cannot easily be analyzed on an abstract point, one needs an understanding of the law and the implications.

5.2 EDUCATION IS A SOUND MEASURE OF COMPETENCY BUT SHOULD NOT BE A BAR

Education is the wealth of knowledge acquired by an individual after studying particular subject matters or experiencing life lessons that provide an understanding of something¹⁴⁶. Black law dictionary defines education within the meaning of a statute relative to the powers and duties of guardians; that it comprehends not merely the instruction received at school or college, but the whole course of training, moral, intellectual, and physical. Education thus maybe particularly directed to either the mental, moral, or physical powers or faculties, but in its broadest and best sense it relates to them all¹⁴⁷. Numerous scholars agree that although there are some natural talents beneficial in leadership effectiveness, other significant aspects of knowledge, skills and abilities that make up an effective leader can be taught¹⁴⁸. It is this study's predilection that education indeed plays a significant role in shaping the future leaders at the grass root level. Effective education can and should be able to develop ethical perspectives in every aspect of a leader's decision-making process. In this regard, a need to rethink the traditional education that focuses on bottom-line curriculum to a more comprehensive view arises.

In chapter three, the study outlined the term unreasonable to be one that is not guided by or based on good sense and which is clearly inappropriate, excessive, or harmful in degree or kind lacking justification in fact or circumstance The right of persons to stand for election should not be limited unreasonably by requiring candidates to reach certain set standards that appear unreasonable from the onset. The political, economic, social and environmental challenges that face our country today necessitates decision makers to heavily rely on innovation for tackling these challenges and shaping the modern Kenyan society. The study found out that educating persons relatively impacts them with newer or improved ideas and thus a higher chance of influencing policy positively. The

¹⁴⁶ <http://www.businessdictionary.com/definition/education.html> Retrieved, February 11, 2019

¹⁴⁷ <https://thelawdictionary.org/education/> Retrieved March 2, 2019

¹⁴⁸ Doh, J.P. (2003), "Can leadership be taught? Perspectives from management educators", *Academy of Management Learning and Education*, Vol. 2 No. 1, pp. 54-67

notion that we go to school to solve our individual economic challenges is long misguided and unfounded. Institutions of learning enable us to become enhanced problem solvers in society. When learning is geared towards modern day challenges, then modern day graduates of institutions of learning at the helm of public offices tend to adopt mechanisms, both legislative and decisive, that are directly or indirectly geared towards responding to real needs in our communities. This aspect of education appreciates the value of academic work that is engaged in evidence-based solutions thus the need for leaders with a sense of understanding. Education plays a significant role in imparting ideas and making persons more knowledgeable. Education positions persons to be effective communicators, potential problem solvers and critical thinkers. Considering the role that elected leaders play as agents of change and trustees of community/societal resources, this study found it indispensable that leaders need attain some basic level of education. The study found that the standard requirement for governors and presidential candidates to have a minimum requirement of a degree to be appropriately justified based on the magnitude of office and role. For other elective posts, to have a minimum requirement of a certificate, diploma or other post-secondary school qualification is appropriate also for the nature of the offices falling below the cadre of gubernatorial seat. I find the national assembly and the IEBC to have been rational in contextualizing our state as a country when drawing the requirements befitting a democratic state that aspires substantive progression.

5.3 THE MOTIVE BEHIND SETTING ACADEMIC REQUIREMENTS IS HINDERED BY FRAUDSTERS

Well, the minimum academic standards are found to be appropriately rational and reasonable for the country's realization of the national values and principles of governance as set out at article 10 of the CoK. However, we need not deceive ourselves, a lot needs to change for us to proceed, and it is that simple. Scandals have filled media platforms of elected leaders who have degrees even going to doctorate levels but do not exhibit competencies that match the academic qualifications they claim to possess. The unfortunate factor playing out in our country's political scene is that since academic accolades became indispensable in climbing the political ladder, persons have found ways of manipulating the IEBC by either faking certificates or forging them. The political class has developed all kinds of dishonest means to obtain these certificates. The

purpose of possessing a certificate to be presented for electoral office will be defeated if such certificates are not legitimate.

5.3 RECOMMENDATIONS

The recommendations provided herein are derived from the key findings of this study. In light of the foregoing conclusions, a number of recommendations suffice in order to engineer a way forward. Accordingly, the following set of recommendations are made:

5.3.1 RECOMMENDATION TO GOVERNMENT OF KENYA

Strengthening and institutionalizing sustainable democracy in Kenya and credible elections will require concerted and collaborative efforts between state and non-state actors. The government should ensure fidelity to the constitutional implementation agenda. The government should ensure its commitment in promoting and protecting national values and principles of governance as outlined at article 10 of the CoK. It should enhance commitment in promoting chapter six of the CoK on leadership and integrity if Kenya is to realize dependable leaders at the helm of state/public office. The government of Kenya should ensure that the Kenyan citizen has convenient access to quality education that incorporates learning of the key nation building principles outlined in the constitution. The state can make this through availing funding to promote education of the masses thus eradicate illiteracy levels in the country which by far and large have had a bearing on voting behaviors by the electorate. The state can do this through state organs such as IEBC and KIE¹⁴⁹ by lobbying for the development of a curriculum guide in academic institutions.

5.3.2 RECOMMENDATIONS TO THE IEBC

It is recommended to the IEBC to set up a curriculum in conjunction with other stakeholders such as the office of the director of criminal investigations, the Ethics and Anti-Corruption Commission, the Kenya Institute of Education, the Office of the Registrar of Political Parties and Civil Society organisations and NGOs in order to develop a form of curriculum that effectively and adequately assesses the suitability and competence of candidates seeking elective positions.

¹⁴⁹ Kenya Institute of Education

This study recommends that this curriculum should be rolled out at least 12 months before the election period.

The IEBC may have to restructure its schedule of registration of candidates to align with this proposed timeline in order to have at least three to six months of background checks. This will be the first stage of sifting through the candidates for the next stage of the proposed curriculum and would be in adherence to chapter six of the constitution. The proposed curriculum should take 6 months in which candidates who met the ethical and moral requirements are then subjected to rigorous capacity and information expertise assessments. During the six months, IEBC should track a score sheet that need be published to the public at least four to six weeks before the election timeline. The curriculum should encompass conducting feasibility of the candidate's manifesto; ability to debate with a sense of clarity and knowledgeability; ability to budget appropriately and prioritize concerns that would fall under his/her mandate upon election among other values that could be merited in a score sheet. In the same breath, during the start of the curriculum, IEBC should heavily foster civic education, which is part of their mandate that enables citizens to change their voting patterns and make reference to the curriculum report at the close of the tests among other suitability and competence requirements. The IEBC should also factor in academic qualifications in their published report but solely to the effect that it should guide the citizens in making their vote but not to the extent that bars the said candidate from seeking an elective position.

5.3.4 RECOMMENDATION TO THE ELECTORATE

A study on voter behaviour in general elections in Kenya concluded that voter behaviour in Kenya is still fundamentally attached to primordial solidarities and networks such ethnic, gender, religious, geographical factors¹⁵⁰. This is partly as a result of the want of strong civic associations. Accordingly, proceeding on the assumption that the Kenyan government conducts its due diligence by conducting civic education, it is recommended that voters should take account of a

¹⁵⁰ Voter behaviour in general elections in Kenya, 1992- 2007: Implications for the development of liberal democracy by J. Otiato Wafula B.A, M.A, CPS(K), 2014

potential candidate's academic credentials and more so the merits of individual performance rather than the factors highlighted herein.

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