

**UNIVERSITY OF NAIROBI LAW SCHOOL
COLLEGE OF HUMANITIES & SOCIAL SCIENCES**

**THE ROLE OF TECHNOLOGY IN ELECTIONS IN KENYA
A CASE STUDY OF THE 2017 PRESIDENTIAL ELECTION**

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**A Research Project Paper Submitted to the University of Nairobi in Partial Fulfillment of
the Requirements for the Award of Degree in the Fulfillment of the Masters of Laws**

Supervisor

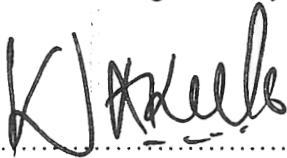
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DECLARATION

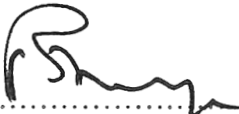
I **WILBERFORCE ODHIAMBO AKELLO**, declare that this Research is my original work and has not been submitted and it is currently not been submitted in whole or in part by any person for an award of a degree at any University.

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DEDICATION

I dedicate this thesis to my parents Mr Joseph Richard Akello and Mrs Judith Akello for mentoring me to have a greater future.

ACKNOWLEDGEMENTS

First and foremost, I am grateful to the almighty God for it is by his grace that I have been able to undertake and complete this task.

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ABBREVIATIONS AND ACRONYMS

BVR	Biometric Voter Registration
ECK	Electoral Commission of Kenya
eKLR	Electronic Kenya Law Reports
EMBs	Election Management Bodies
EP	Election Petition
ETR	Electronic Transmission of Results
EVR	Electronic Voter Registration
IEBC	Independent Electoral and Boundaries Commission
IIEC	Interim Independent Electoral Commission
JSC	Judicial Service Commission
JTI	Judiciary Training Institute
KIEMS	Kenya Integrated Electoral Management System.
KLR	Kenya Law Reports
LSK	Law Society of Kenya
NGO	Non-Governmental Organization
PEV	Post Election Violence
UDHR	Universal Declaration on Human Rights

LIST OF CONSTITUTIONS AND CONSTITUTIONAL INSTRUMENTS

Constitution of Kenya 1963

Constitution of Kenya 1969

Constitution of Kenya, 2010

Constitution of Nigeria, 1999

Constitution of South Africa, 1997

Constitution of the United States of America, 1788

LIST OF TRANSNATIONAL LEGAL INSTRUMENTS

African Charter on Democracy, Elections and Governance 2007

African Charter on Human and People's Rights 1981

Durban Declaration on the Principles of Governance, Democracy and Elections in Africa 2002

International Covenant on Civil and Political Rights 1981

Statute of the International Court of Justice 1946

Universal Declaration on Human Rights 1948

LIST OF KENYAN STATUTES AND REGULATIONS

Election Regulations, 2012

Elections (Technology) Regulations 2017

Elections Act, 2011

Elections Laws (Amendment) Act 2017

Independent Electoral and Boundaries Commission Act, 2011

Political Parties Act No. 11 of 2011

Public Procurement and Asset Disposal Act No. 33 of 2015

Public Procurement and Disposal Regulations, 2006

Supreme Court of Kenya Act No. 7 of 2011

Supreme Court Rules, 2012

LIST OF CASES

Raila Amolo Odinga & Anor v. Independent Electoral and Boundaries Commission & 2 Ors (2017) eKLR

Raila Amolo Odinga & another v. Independent Electoral and Boundaries Commission & 2 others (2013) eKLR

Independent Electoral and Boundaries Commission v. Maina Kiai & 5 others (2013) eKLR

Maina Kiai & 5 Others v. Independent Electoral and Boundaries Commission (2017) eKLR

Martha Wangari Karua & another v. Independent Electoral & Boundaries Commission & 3 others (2017) eKLR

Bush v. Gore, 531 US 98 {2000}

National Supper Alliance v. Independent Electoral and Boundaries Commission, Petition No. 328 of 2017

ABSTRACT

Free and fair elections are the cornerstone of any constitutional democracy. By and large, democracy dictates that every citizenry of a sovereign has a right to choose and replace their representatives in a credible elections. Kenya being a constitutional democracy enacted the Constitution of Kenya, 2010, which has incorporated the principles and requirements of a free and fair electoral system.

With the technological advancements, the use of technology has evolved and been adopted in the election process. In order to keep up with the times, Kenya has adopted and incorporated the use of technology in its electoral process. Article 86 of the Constitution of Kenya provides that election system shall be secure, accurate, verifiable, accountable and transparent. Accordingly and in furtherance of the foregoing principles, technology was integrated in the electoral management system to ensure free and fair elections. The Elections Act and the Information Technology Act of 2017 and Regulations made thereunder provide for the legislative framework of technology in our elections.

The question of the use of new technologies to improve the election process has recently risen in different countries around the world. Although forms of electronic voting might be useful to enhance turnout or help with the counting and tabulation process, its use raises questions of governance of the election process. An election in which technology is used requires a greater technical knowledge.

My overarching argument in this research is that technology plays an important role in ensuring free, fair, and credible elections. However, for technology to ensure free, fair and credible elections, its use, application and management must be proper. Without proper use and management, technology is nothing more than a mere tool or aesthetic.

CHAPTER 1

INTRODUCTION TO THE ROLE OF TECHNOLOGY IN ELECTIONS IN KENYA

1.1 Introduction and Background

The overarching argument in this research study is that technology plays an important role in ensuring free fair and credible presidential elections if used and managed properly. The question of the use of new technologies to improve the election process has recently risen in different countries around the world. Although forms of electronic voting might be useful to enhance turnout or help with the counting and tabulation process, its use raises questions of governance of the election process. An election in which technology is used requires a greater technical knowledge.

This study examines the role of technology in presidential elections and particularly provides a case study of 2017 Presidential Elections in Kenya. The main purpose of employing technology in presidential elections should be enhancing integrity, credibility and strengthening efficiency of human intervention. Consequently, the research discusses the background, statement of the problem, theoretical framework, conceptual framework, literature review, hypotheses, research objectives, research questions, justification, chapter breakdown and research methodology.

Kenya being a sovereign multi-party democratic state is founded on various national values and principles enshrined under the Constitution of Kenya.¹ These values include amongst others good governance, integrity, transparency, accountability and sustainable development.² These even though not exhaustive of the values, form the bed rock, the foundation upon which the notion of governance in Kenya is anchored.³

¹ Article 10 Constitution of Kenya 2010. Cf. Ben Sihanya (forthcoming 2021) “Constitutionalism, the rule of law, and human rights in Kenya’s electoral process,” in Ben Sihanya *Constitutional Democracy in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

² Ben Sihanya (2017) “Constitutional responsibilities of public officers in (un)making public policy, rules and regulations,” Vol. 9, Issue 9, *Nairobi Law Monthly*, at <http://nairobiawmonthly.com/index.php/2017/10/12/constitutional-responsibilities-of-public-officers-in-unmaking-public-policy-rules-and-regulations-in-kenya/> (accessed 23/1/2018).

³ *ibid.*

Kenya has held presidential elections after every five years since independence.⁴ From the elections in 1963 to the disputed general elections in 2007 that led to post election chaos and violence all through to 2017 elections, Kenya has had a rough terrain and stormy journey in quest for electoral reforms.⁵

It can be said that the episode of 2007 general elections enforced the need for electoral reforms in Kenya.⁶ The Court of Appeal in *Independent Electoral and Boundaries Commission v. Maina Kiai & 5 Others*⁷ while underscoring this fact addressed itself in the following terms;

“The violence that convulsed Kenya after the disputed 2007 presidential election is a scar etched in our history and engraved in our hearts and souls forever.”⁸

Following the botched elections of 2007, the Kriegler Commission⁹ was formed and tasked to carry out a study of Kenya’s electoral system and make recommendations.¹⁰ While underscoring the deficiencies such as double voter registration, ballot stuffing among other illegalities in the electoral process and noting that electoral system was entirely manual the Kriegler Commission¹¹ made three (3) key recommendations.¹²

First, that the electoral commission of Kenya (ECK) to design a single document that incorporated different descriptions of the counting and tallying procedure. Second, adoption of an improved secure integrated system to transmit election data to be used in all polling and

⁴ Ben Sihanya (2017) “Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms,” Volume 13(1) *Law Society of Kenya Journal*, 1-30.

⁵ *ibid.*

⁶ Ben Sihanya (2017) Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms,” *op. cit.*

⁷ See the Court of Appeal in *Independent Electoral and Boundaries Commission v. Maina Kiai & 5 Others* (2017) eKLR.

⁸ *ibid.*

⁹ The Kriegler Commission was appointed pursuant to the Commission of Inquiry Act Cap 102, and gazetted through Gazette Notice No. 1983 of 2008. Through the same Gazette Notice, the President appointed Judge John Kriegler (Chairman), Prof Marangu M’Matere, Francis Angila, Catherine Mumma, Lucy Kambuni and Horacio Boneo as Commissioners. Cf. Ben Sihanya (forthcoming 2021) “Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms,” in Ben Sihanya *Constitutional Democracy in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 20).

¹⁰ Collins Odote & Linda Musumba (2016) *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and Emerging Jurisprudence*, Judiciary Training Institute (JTI), Nairobi.

¹¹ Government of Kenya (2009) “The Report of the Independent Review Commission,” Government Press, Nairobi also known as the Kriegler Report

¹² *ibid.*

tallying stations. Third, more time to be allowed for verification of the provisional results before they are officially released in order to ensure they are verified.¹³

The Kriegler Commission also made a recommendation on how the use of technology can be used to improve the result tallying in presidential elections in Kenya. The Commission proposed the use of a biometric voter register, electronic voter identification and a result transmission system.¹⁴

The promulgation of the Constitution of Kenya 2010 was the climax of a long quest to transform the country's governance system.¹⁵ The quest for new constitutional order had been informed by the fact the democratic project was untenable under the old constitutional order.¹⁶

The Constitution stipulates that all sovereign power belongs to the People of Kenya and can only be exercised in accordance with the Constitution.¹⁷ The People may exercise their sovereign power either directly or through their democratically elected representatives.¹⁸ This power is exercised at two levels; the national level and the County level, thus a creation of the devolved units of governance.¹⁹

The Constitution underscores the right to vote²⁰ by the people.²¹ To operationalize this fundamental right, the Constitution of Kenya, 2010 at Chapter Seven stipulates various general principles for the electoral system with the key principle being need to comply with the freedom

¹³ Ben Sihanya (forthcoming 2021) "Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Secession Debates and Movements," *op. cit.*

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ Ben Sihanya (2017) "Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms," *op. cit.*

¹⁷ Article 1(1) Constitution of Kenya 2010. Cf. Ben Sihanya (forthcoming 2021) "Conceptualising sovereignty, Constitution, State and Government in Kenya and Africa [con and admin law questions are interlinked in text, practice, scholarship]" in Ben Sihanya *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 1).

¹⁸ Article 1 (2) Constitution of Kenya 2010. Cf. Ben Sihanya (forthcoming 2021) "Conceptualising sovereignty, Constitution, State and Government in Kenya and Africa [con and admin law questions are interlinked in text, practice, scholarship]" *op. cit.*

¹⁹ Article 1 (4) Constitution of Kenya 2010. Cf. Ben Sihanya (forthcoming 2021) "Conceptualising sovereignty, Constitution, State and Government in Kenya and Africa [con and admin law questions are interlinked in text, practice, scholarship]" *op. cit.*

²⁰ Article 38 of the Constitution provides that every citizen has the right to free, fair and regular elections based on the universal suffrage and the free expression of the will of the electors for any elective public body or office; or any office of any political party of which the citizen is a member. This right is recognized by Universal Declaration of Human Rights, 1948) as much as the Constitution of Kenya.

²¹ Ben Sihanya (2017) "Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms," *op. cit.*

of citizens to exercise their political right and the universal suffrage based on the aspiration for fair representation and equality to vote. In essence, it establishes free, fair, transparent and credible elections as the cornerstone of electoral system.²²

After the promulgation of the Constitution of Kenya 2010, numerous laws²³ were enacted accompanied with appurtenant Regulations to regulate the conduct of elections. To further the constitutional ideals, Parliament amended the Elections Act to regulate the conduct of elections²⁴ and incorporate technology into the electoral system.²⁵

First forward into the 2017 General Elections and the Supreme Court by majority decision in the *Raila Odinga case*,²⁶ 2017 annulled the Presidential elections held on 8th August, 2017 for lack of transparency and credibility in the electoral technology system.²⁷ The question then is what purpose does it serve to have technology to aid in our elections? This research intends to discuss this question and come up with a viable answer.

1.2 Problem Statement

Since independence, presidential elections have been a critical issue in Kenya. Questions of the freeness, fairness and credibility of presidential elections always arise. This has been witnessed from the elections in 1963 to the disputed general elections in 2007 that led to post election chaos and violence all through to 2017 elections.²⁸ The introduction of technology in presidential elections was a move to increase security as well as ensure free, fair and credible elections.

²² Articles 81 and 86 Constitution of Kenya 2010. Cf. Ben Sihanya (forthcoming 2021) “Constitutionalism, the rule of law, and human rights in Kenya’s electoral process,” *op. cit.*

²³ Examples include, Elections Act, 2011, Independent Electoral and Boundaries Commission Act, 2011, and the Political Parties Act, 2011

²⁴ Otieno Odek (2017) “Election Technology Law and The Concept Of —Did The Irregularity Affect the Result of The Elections?” A Paper Presented at the Electoral Disputes Resolution Training For LSK Members, at Crowne Plaza Hotel, on 10th June, 2017 at <https://www.judiciary.go.ke/wp-content/uploads/2017/12/LIST-OF-AUTHORITIES-DR.EKURU-AUKOT.pdf> (accessed 27/11/2018).

²⁵ Section 6A, 39 and 44 of the Elections Act were amended in 2016 and sections 44A amended in 2017 to expressly introduce technology in electoral management system in line with the constitutional underpinnings. Additionally, Elections (Technology) Regulations 2017 was enacted to augment the existing legislative framework providing for technology in our elections.

²⁶ *Raila Amolo Odinga & another v. Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR

²⁷ Ben Sihanya (2017) “Conduct of IEBC Commissioners key to just 2017 General Elections,” Vol. 1 Issue 8, *The Advocate*, Law Society of Kenya Magazine, at 8.

²⁸ Ben Sihanya (2017) “Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms,” *Op. Cit.*

However, the introduction of technology in presidential elections in Kenya has faced several challenges thus not been successful as was intended. Despite the enactment of laws to provide for the incorporation of technology in electoral management, Kenya is yet to achieve free, fair and credible elections.²⁹ Whereas it is common belief that technology would guarantee a free, fair and transparent elections, there is still a long way for Kenya to go.³⁰

There have been widespread claims of misuse of electoral technology to orchestrate electoral malpractices.³¹ The issue of interference of electoral technology system by hacking and fraud to manipulate the results of elections³² is now a central issue in litigation in numerous elections petitions.³³ Evidence shows that some of the claims have been vindicated by the courts of law.³⁴

This leaves the desire to examine the place and role of technology in the electoral process in Kenya. It is the aim of this paper to analyse the concerns raised and unresolved issues witnessed in the use of technology in presidential elections in Kenya and make the relevant recommendations.

1.3 Research Objectives

The study is guided by the following three objectives.

First, to critically interrogate the role of technology in elections and particularly in the 2017 General Elections. Second, to examine the impact and perils of incorporation of technology in electoral management system. And third, to suggest appropriate recommendations on legal framework on the use of technology in Kenya's electoral system that meets the constitutional requirements of a free and fair election.

1.4 Research Questions

In light of the statement of problem as illustrated above, therefore, this research paper raises and attempts answering the following questions:

²⁹ Paul Ogemba and Kamau Muthoni (2017) "Audit of IEBC Servers Reveals some Discrepancies," *The Standard* Newspaper at <http://www.standardmedia.co.ke> > (accessed 2/12/2017).

³⁰ *ibid.*

³¹ The petitioner alleged that hackers gained access to the IEBC database using credentials of the late ICT Director Chris Msando and manipulated the algorithm leading to massive irregularities. Cf. Ben Sihanya (forthcoming 2021) "Constitutionalism, the rule of law, and human rights in Kenya's electoral process," *op. cit.*

³² Ben Sihanya (2017) "Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms," *op. cit.*

³³ *ibid.*

³⁴ *ibid.*

First, what is the legal place of technology in the Kenyan Electoral process? Is it a complimentary system? Second, has the incorporation of technology in electoral management enabled realization of the right to free and fair elections? And third, what electoral reforms and legal mechanisms should be undertaken to ensure realization of free and fair elections anchored on constitutional ideals?

1.5 Hypotheses, Assumptions and Arguments

This research paper argues that there is need to reevaluate the use and implementation of technology in presidential elections in Kenya. This study proceeds on the following two interrelated assumptions or hypotheses.

First, the use and implementation of technology in presidential elections in Kenya has failed in ensuring that elections are free, fair and credible. Second, Kenya needs to adopt a clear framework on the implementation and application of technology in presidential elections.

1.6 Review of Literature,

For the purpose of this study, literature means and includes books, journal articles, book chapters and conference papers.

From the onset this research notes that the literature on this subject may be limited, especially the Kenyan perspective given the recent enactment of the Constitution of Kenya, 2010 and the electoral laws there under. Similarly, the concept of usage of technology in matter election is a fairly recent concept that develops with the advancement in technology. The law thus plays a catch up role and the literature may remain limited to that extent. The research discusses, analyses and reviews some of the literature that has been relied on in this study below.

1.6.1 Justification on the use of Technology in Presidential Elections

Justice David Maraga while writing on scrutiny of election materials in resolution of Electoral disputes notes scrutiny is very important in presidential elections because of the level of public interest they generate.³⁵ He is of the opinion that technology may be key in ensuring an authentic national voter register and electronic transmission of election results. This helps achieve certainty and reliability because the earlier the elections results are transmitted, the

³⁵ David Maraga (2016) “Scrutiny in Electoral Disputes: A Kenyan Judicial Perspective” in Collins Odote & Linda Musumba (eds) *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and Emerging Jurisprudence*, Judiciary Training Institute (JTI), Nairobi.

greater their acceptance by the public. He however notes that technology can sometimes fail even in advanced countries and as such need for striking balance in an election statute.³⁶

The International Institute for Democracy and Electoral Assistance argues that if technology is used correctly in presidential elections and properly implemented it can lead to the increased security of the ballot, speed up the processing of results and make voting easier.³⁷

Kenya can borrow a leaf from countries such as Ghana and South Africa. Ghana successfully used Electronic Voter Identification Devices (EVIDs) to enhance integrity and transparency in their 2012 presidential elections while South Africa also did the same in 2014.³⁸

1.6.2 Challenges on the use of Technology in Presidential Elections

Prof Odek in his paper³⁹ underscores that the presidential election process is susceptible to manipulation, misuse and distortion by selfish characters. He states, and rightly so, that election disputes are inherent to elections and that in any election petition, there is one critical issue that must be proved for the petition to succeed – that the alleged irregularity affected the result of the election.

He goes further to reiterate the Constitutional and other election related laws and the principles enshrined therein, especially articles 81 and 86 of the Constitution, and concludes that the two raise a two based test being the qualitative and the quantitative tests.⁴⁰

Qualitative requirements evaluate whether the election environment allowed for free and fair elections within the meaning of Article 81 (e) of the Constitution. In short this aspect questions the integrity of the system. Quantitative requirements on the other hand deal with the mathematical results of the election.⁴¹

³⁶ *ibid.*

³⁷ International IDEA (2011) “Introducing Electronic Voting: Essential Considerations,” Policy Paper <http://www.eods.eu/library/IDEA.Introducing-Electronic-Voting-Essential-Considerations.pdf> (accessed 23/2/2019).

³⁸ Ben Sihanya (2017) “Conduct of IEBC Commissioners key to just 2017 General Elections,” Vol. 1 Issue 8, *The Advocate*, Law Society of Kenya Magazine, at 8. Also see Report of the African Union Elections Observation Mission to the 7 December 2012 General Elections in the Republic of Ghana (2012) 12 (The functionality of EVIDS in Ghana was at 94%). Also see the African Union Election Observation Mission to the 7 May 2014 National and Provincial Elections in the Republic of South Africa (August 2014) 9 (The functionality of ZAP ZAP machines for voter identification was at 99%).

³⁹ Otieno Odek (2017) “Election Technology Law and The Concept Of —Did The Irregularity Affect the Result of The Elections?” *op. cit.*

⁴⁰ *ibid.*

⁴¹ *ibid.*

Prof Odek argues that in order to ensure compliance with the foregoing tests, technology ought to be employed to supplement human resource available and proceeds to analyse the election laws in Kenya as hereinafter. He notes that the use of technology is now part and parcel of Kenya's electoral system pursuant to sections 6A, 44 and 39 of the Elections Act.

He is of the opinion that Section 44 (1) of the Elections Act⁴² does not establish electronic voting (e-voting) or electronic balloting. That the Electoral Commission is only allowed to employ the use of the electronic voter identification device (EVID) and then electronically transmit the results using ETS and that all the three electronic devices must be integrated through KIEMS.⁴³ These he believes would help achieve the constitutionally expected standard of compliance as they help identify the voter, verify his credibility as to their identity and ensure efficiency and accuracy of the results transmitted.

Prof Ben Sihanya critiques the Election Laws (Amendment) Act, No 1 of 2017 which allowed the amendment of Section 44 of the Elections Act 2011 through the addition of Section 44A to allow IEBC to put place a complementary mechanism for identification of voters and transmission of election results.⁴⁴ Prof Sihanya argues that this legislation was unconstitutionally, irregularly, unprocedurally and controversially introduced in Parliament and passed by Jubilee-affiliated MPs and Senators, with opposition legislators in the Senate and National Assembly opposing it.

However, we note that despite the employment of technology as outlaid by Prof Sihanya and Prof Odek above, the constitutional threshold for a free, fair and credible elections were not met if the majority decision of the Supreme Court in *Raila Odinga* case of 2017⁴⁵ is anything to go by. This begs for more answers which this paper seeks to unravel.

Indeed, the possible fail in technology is not a long wide short to think about. The 2013 Kenyan General Elections had technology fail at the last moment. Maurer and Barrat in their book⁴⁶ states that various technological failure had been experienced for instance in the United

⁴² Section 44 (1) of Kenya's Elections Act, 2011.

⁴³ Otieno Odek (2017) "Election Technology Law and The Concept Of —Did The Irregularity Affect the Result of The Elections?" *op. cit.*

⁴⁴ Ben Sihanya (2017) "Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms," *op. cit.*

⁴⁵ *ibid.*

⁴⁶ Ardita Driza Maurer & Jordi Barrat (eds) (2015) *E-Voting Case Law: A Comparative Analysis*, Farhan, Ashgate, USA.

Kingdom and even in the United States of America⁴⁷ Maurer and Barrat go ahead and underscore the other perils of use of technology in voting including the e-voting as adopted in countries such as Germany, United Kingdom, United States of America and Estonia.⁴⁸ They note that the system may be opaque to the ordinary voter, prone to hacking and other electoral malpractices.⁴⁹ They note that even in systems where the e-voting is done such as Estonia, the same is not wholly accepted.⁵⁰

They however note that use of technology equally has its pros.⁵¹ These include the argument that e-voting would halt the decline in turnout; having to organize the vote for geographically remote populations; the mobilization of overseas voters; as a way of protecting against electoral fraud and updating the archaic, inconvenient, old-fashioned way in which voting is done in most countries, in person at a physical location marking a ballot paper.⁵²

From the above arguments by different persons it is worth noting that they all underscore the importance of elections and the integrity of the process. In doing so they espouse the idea of usage of technology in elections and the adherence of the constitutional principles set to help achieve the credibility of the whole process. It is also worth noting that technology in elections is a new concept that is yet to find its root well within our electoral system. The 2017 elections seem to have exposed this soft spot and letting everything loose. Unprecedented, the Supreme Court ruling in *Raila Odinga case, 2017*⁵³ has been branded as eye opener.

At the center of the ruling was the decision by the Supreme Court to fact find on the technology employed, the damaging outcome thereto and the unwillingness or the lack of cooperation reported on the part of the electoral body.⁵⁴

This research therefore seeks to interrogate the role and impact of the use of technology in elections in Kenya and also provide the alternatives that will be more appropriate going forward.

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ Michael Alvarez & Thad E Hall (2010) *Electronic Voting: The Perils and Promises of Digital Democracy*, Princeton University Press.

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² Ben Sihanya (2017) "Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms," *op. cit.*

⁵³ *ibid.*

⁵⁴ Paul Ogemba and Kamau Muthoni (2017) "Audit of IEBC Servers Reveals some Discrepancies," *op. cit.*

1.7 Justification

From the above discussions it is clear that the role technology has played in presidential elections in Kenya has been controversial. The introduction and implementation of technology in presidential elections was meant to ensure integrity and credibility of the presidential elections and that they were free and fair. However, this has not been the case.

As the International Institute for Democracy and Electoral Assistance argues, if the use of technology in presidential elections is properly implemented it can lead to the increased security in Kenya's presidential electoral process.⁵⁵ The employment of technology has failed in both the 2013 and 2017 elections. This can be attributed to human interference and delays thus hindering the use of technology to ensure free, fair and credible elections.

The Supreme Court of Kenya majority decision in the *Raila Odinga case* of 2017⁵⁶ found evidence of massive inexplicable illegalities and irregularities in the tabulation and transmission system.⁵⁷ The decision of the Supreme Court validated the Petitioners claims of electoral malpractices and widespread manipulation of electoral technology and in particular the Kenya Integrated Electoral Management (KIEMS).⁵⁸ Accordingly, the overriding objective of this research paper is to intensively interrogate the role, effects, impact, efficacy and scope of technology in 2017 General Elections. What are the hazards?

The justification of this research is further strengthened by the fact that there is limited literature on the research topic given the recent enactment of the Constitution of Kenya, 2010 and the electoral laws thereunder. Similarly, the integration of technology in electoral management in elections in Kenya is a fairly recent concept. This research aims to fill the gaps.

⁵⁵ International IDEA (2011) "Introducing Electronic Voting: Essential Considerations," *op. cit.* Cf. Ben Sihanya,(forthcoming 2021) "Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Secession Debates and Movements," in Ben Sihanya *Constitutional Democracy in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 21).

⁵⁶ *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR. Cf Ben Sihanya,(forthcoming 2021) "Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Secession Debates and Movements," *op. cit.*

⁵⁷ *ibid*, para 376. Cf. Paul Ogemba and Kamau Muthoni (2017) "Audit of IEBC Servers Reveals some Discrepancies," *op. cit.*

⁵⁸ Ben Sihanya (2017) "Conduct of IEBC Commissioners key to just 2017 General Elections," *op. cit.*

Accordingly, this research will assist legislators, lawyers, electoral body and political players develop an electoral method system that is consistent with the constitutional ideals. This research will suggest best electoral practices to the stakeholders in elections to ensure free and fair elections.

1.8 Conceptual and Theoretical Framework

This study draws from concepts and theories that form the basis of this study. It shall focus on two major concepts and theories. These are, first, constitutionalism and second, the rule of law. It shall rely on these concepts to justify the role of technology in presidential elections in Kenya.

Elections are very important for there to be good governance in a country or state. They help to secure the legitimacy of a government guided by constitutionalism and the rule of law. Thus constitutionalism, the rule of law, human rights and democracy play a crucial role in ensuring that presidential elections are free, fair and credible.⁵⁹

1.8.1 Conceptualizing Constitutionalism

Constitutionalism can be defined as where the rule of law applies to the citizenry of a state or country or nation with an independent judiciary which respects basic human rights and freedoms.⁶⁰ Prof Okoth-Ogendo defines constitutionalism as;

“The idea of constitutionalism must, in the very first instance imply that a society acknowledges its constitution as a living standard with which the conduct of public behaviour should conform and against which it must be evaluated. The minimum evidence of adherence to the principles of constitutionalism is therefore public respect for the constitution, in whatever form, of the society of which one is a member. Other elements must include – fidelity of life under law i.e. respect for the rule of law and – protection of human rights, including those of communities and minorities.”⁶¹

From Prof Okoth-Ogendo’s definition constitutionalism is therefore the acknowledgement and adherence of the provisions of the Constitution and the values and principles that are enshrined

⁵⁹ Ben Sihanya (forthcoming 2021) “Constitutionalism, the rule of law, and human rights in Kenya’s electoral process,” in Ben Sihanya *Constitutional Democracy in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

⁶⁰ Vicki Jackson & Mark Tushnet (2006) *Comparative Constitutional Law* Foundation Press, New York (2nd ed) at 243.

⁶¹ H.W.O. Okoth-Ogendo (1999) “The quest for constitutional government,” in Goran Hyden, Dele Olowu & H.W.O Okoth-Ogendo (1999) *African Perspectives on Governance*, Africa World Press, Trenton, pp. 35-36.

in the Constitution.⁶² Constitutionalism plays an important role in ensuring that there is accountability, fairness, equity and justice in elections.⁶³

For Kenya to ensure that technology is successfully integrated to its electoral system, it has first to ensure that the concept of constitutionalism is adhered to and respected without which the use of technology in presidential elections in Kenya and Africa will continue to fail.

1.8.2 Conceptualizing Rule of Law

The concept of rule of law and constitutionalism are linked. The concept of rule of law dictates for the legal, lawful and authoritative exercise of power in accordance with the law.⁶⁴

The Constitution of Kenya 2010 under Articles 47, 48, 81 and 87 on fair administrative action, access to justice, principles for the electoral system and electoral disputes makes provision for the rule of law.⁶⁵ The rule of law must meet substantive, procedural and jurisdictional electoral standards. Substantively the electoral rules must be fair and equitable. Second, the rule-giver must make efforts to disseminate the electoral rules, including through civic education.⁶⁶

For electoral justice and the successful implementation of technology in presidential elections to be achieved in Kenya, the rule of law must be adhered by all including citizens, public officials and institutions i.e. the IEBC.

1.9 Research Methodology

The research is based on a review of both primary and secondary literature relevant to the subject area. The most important among the primary sources is the Constitution of Kenya, 2010. Other primary sources that are deemed as relevant include among other legislations are Elections Act, 2011, the Independent Electoral and Boundaries Commission Act, the Political Parties Act, the Universal Declaration of Human Rights (UDHR, 1948) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966.

⁶² Ben Sihanya (2012) "The role of the judiciary in promoting constitutionalism under the 2010 Constitution," at <http://www.innovativelawyering.com/blogs/5-education-training-research-and-mentoring-etrm-law-programme> (accessed 4/3/2019).

⁶³ *ibid.*

⁶⁴ Ben Sihanya (2013) "Public participation and public interest lawyering under the Kenyan Constitution: Theory, process and reforms," Vol 9 (1) (2013) *Law Society of Kenya Journal* 1-32. Cf. Paul Craig (2012) *Administrative Law* 7th ed. Sweet and Maxwell, London, at 19.

⁶⁵ Ben Sihanya (forthcoming 2021) "Constitutionalism, the rule of law, and human rights in Kenya's electoral process," *op. cit.* Cf. Ben Sihanya (2013) "Public participation and public interest lawyering under the Kenyan Constitution: Theory, process and reforms," *op. cit.*

⁶⁶ *ibid.*

Secondary sources are inclusive of scholarly works in journal articles and textbooks, reports from non-governmental organizations, institutions, and task forces have come in handy in the research paper. Some of the above materials have been accessed via internet and electronic sources.

The research study undertakes a case study methodology. The study will also adopt international and comparative study approach for an insight on how other countries have tailored technology in their electoral technology system. The study will undertake a study on the electoral systems in Kenya, Nigeria, Ghana and the USA. This is because Nigeria, Ghana and the USA have used technology in their electoral process and have managed to achieve a level of success in ensuring free, fair and credible presidential elections.

The comparative approach gives a comprehensive interpretation of courts jurisprudence on the role of technology in elections and elucidates the various techniques that have been achieved within the countries legal framework in achieving a free, fair and credible electoral process. The study will involve interviews with leading electoral experts and stakeholders. In that regard, the study will apply random sampling.

1.10 Chapter Outline and Summary

This research has a total of five chapters.

Chapter 1: Introduction

This chapter addresses the research methodology on the role of technology in presidential elections in Kenya. This chapter discusses the background, statement of the problem, theoretical framework, conceptual framework, literature review, hypotheses, research objectives, research questions, justification, chapter breakdown and research methodology.

Chapter 2: Electoral Management in Kenya: The Legal and Administrative Framework

This chapter is a discussion on electoral management in Kenya with focus on the Legal and institutional framework and the inception of technology in elections in Kenya. This chapter seeks to provide an insight and critically analyze the rationale and the legal backing providing for the integration of technology in elections. It seeks to examine the constitutional and legal

underpinnings that regulate the integration of technology in elections. Further, it seeks to find out the component of electoral system as provided for in the law.

Chapter 3: The Use of Technology in the 2017 Kenyan Presidential Elections: A Case of Botched Technology?

This chapter focuses on the Kenyan presidential elections in 2017. It seeks to interrogate the role technology played in the presidential elections. It seeks to examine the claims of electoral technology malpractices and fraud. It will investigate the promises, dangers and perils of a digital democracy and further examine the gap in implementation in the laws providing for integration of technology in elections.

Chapter 4: Comparative Study on the Role of Technology in Presidential Elections in Kenya, Nigeria, Ghana and the USA

This chapter focuses on a comparative analysis on the role of technology in presidential elections in other jurisdictions specifically Nigeria, Ghana and the USA. This chapter will examine how other countries have tailored technology to help realize a free, fair and credible election. Have they set safeguards? This chapter will also provide the proposal for reforms based on the comparative analysis.

Chapter 5: Summary of Findings, Conclusion and Recommendations on the Role of Technology in Presidential Elections

This chapter gives a summary review, findings, conclusions and recommendations of the research study. It will revisit the statement of problem, research objective, research questions and hypothesis of the study and provide recommendations for reforms in the electoral management system in Kenya.

1.11 Conclusion on the Research Methodology on on the Role of Technology in Elections in Kenya

The overarching argument in this chapter is that the main purpose of employing technology in presidential elections should be enhancing integrity of the electoral process and strengthening efficiency of human intervention. It gives a detailed research methodology on the role of technology in presidential elections in Kenya.

This study focuses on three major research objectives. These are; First, to critically interrogate the role of technology in elections and particularly in the 2017 General Elections. Second, to examine the impact and perils of incorporation of technology in electoral management system. And third, to suggest appropriate recommendations on legal framework on the use of technology in Kenya's electoral system that meets the constitutional requirements of a free and fair election.

The research questions of this research study are three. First, what is the legal place of technology in the Kenyan Electoral process? Is it a complimentary system? Second, has the incorporation of technology in electoral management enabled realization of the right to free and fair elections? And third, what electoral reforms and legal mechanisms should be undertaken to ensure realization of free and fair elections anchored on constitutional ideals?

From the discussions above we can see that the use of technology has not guaranteed free, fair and credible presidential elections in Kenya. This can be mainly attributed to human interference and failure by the relevant institutions the main one being the IEBC to ensure that electoral technology is successfully tested before elections and the defects identified early on and corrected before the actual presidential elections are held.

Chapter 2 discusses and analyses the legislative and administrative framework governing electoral management in Kenya.

CHAPTER 2

THE LEGAL AND ADMINISTRATIVE FRAMEWORK OF ELECTORAL MANAGEMENT IN KENYA

2.1 Introduction to Electoral Management in Kenya

The overarching argument in this Chapter is that Kenya should review the legal and administrative framework of electoral management. In Chapter 1, the discussion focuses on the research methodology on the role of technology in presidential elections in Kenya. The Chapter also discusses the background, statement of the problem, theoretical framework, conceptual framework, literature review, hypotheses, research objectives, research questions, justification, chapter breakdown and research methodology.

This Chapter will review the history of Kenya's legal and administrative framework and the changes and review it has undergone over the years since independence. It will also discuss the impact it has had over Kenya's electoral process since independence and whether or not it has been successful.

Over the last decade, electoral democracy in Africa has been subjected to its most severe test.⁶⁷ Even though majority of the African countries are multiparty states and have had periodic general elections, most of their elections have not met the democratic test of being free, fair and transparent.⁶⁸ Majority of these elections have been punctuated with violence leading to catastrophic destruction of lives and property.⁶⁹

⁶⁷ Ben Sihanya (2017) "Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms," *op. cit.* Cf. Felix Owuor (2016) "Reforming Elections Management and Administration in Kenya: A case for Independent Electoral and Boundaries Commission," An LLM Thesis submitted to the University of Nairobi Law School.

⁶⁸ Gilbert Khadiagala (2010) "Reflections on the Causes, Courses and Consequences of Election Violence in Africa," in Khabele Matlosa, Gilbert Khadiagala and Victor Shale (eds), *When Elephants Fight: Preventing and Resolving Election-Related Conflicts in Africa*, Electoral Institute for Sustainable Democracy in Africa, South Africa.

⁶⁹ Ben Sihanya and Duncan Okello (2010) "Mediating Kenya's Post-Election Crises: The Politics and Limits of Power Sharing Agreement," in Karuti Kanvinga & Duncan Okello (eds) *Tensions and Reversals in Democratic Transitions The Kenya 2007 General Elections* (Society for International Development (SID) & University, of Nairobi, Institute of Development Studies (IDS): Nairobi. 2010), 653-709.

For example, the general elections in Kenya, Zimbabwe, Uganda, Burundi and Rwanda have been conducted in a manner that do not satisfy the legal and constitutional framework and failed to meet credibility tests as affirmed by various local and international election observers.⁷⁰

The challenges facing electoral management system management in Africa has been attributed to weak constitutional and institutional framework.⁷¹ This is has been manifestly evident in various electoral cycles in majority of African countries.⁷² Instructively, electoral democracy has been a critical issue in Africa as the same has become a new real manifestation of conflicts and disintegration of the stability of the countries.⁷³ As shall be demonstrated in this Chapter, Kenya has had a chequered electoral history punctuated with diverse electoral management models.

2.2 Election History in Kenya

Kenya has had periodic general elections since it gained independence. From the elections in 1963 to the disputed general elections in 2007 that led to post election chaos and violence all through to 2017 elections, Kenya has had a rough terrain and stormy journey in quest for electoral reforms. Indeed it is proper to say that Kenya has had a chequered elections history since gaining independence.⁷⁴ Over the years, the issue of legitimacy and the credibility of elections in Kenya has come under sharp focus and has dominated debate in every election cycle.⁷⁵

Kenya for a long time has had elections that have been marred and overshadowed by controversies.⁷⁶ Since its return to being a multi-party state in 1991, elections have not been handled in a fair and just manner leading to the post-election violence (PEV) of 2007/2008.⁷⁷

⁷⁰ *ibid.*

⁷¹ The Carter Center (2014) "Elections Obligations and Standards; A Carter Center Assessment Manual," at < <https://www.cartercenter.org/resources/pdfs/peace/democracy/cc-OES-handbook-10172014.pdf>> (accessed 18/11/2019).

⁷² Karuti Kanyinga, Duncan Okello and Akoko Akech,(2010) "Contradictions of Transition to Democracy in Fragmented Societies: The Kenya 2007 General Elections in Perspective," in Karuti Kanyinga and Duncan Okello (eds), *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections*, Society for International Development and Institute for Development Studies, Nairobi.

⁷³ *ibid.*

⁷⁴ Ben Sihanya and Duncan Okello (2010) "*Mediating Kenya's Post-Election Crises: The Politics and Limits of Power Sharing Agreement*," Op. Cit. Cf. Felix Owuor (2016) "Reforming Elections Management and Administration in Kenya: A case for Independent Electoral and Boundaries Commission," *op. cit.*

⁷⁵ *ibid.*

⁷⁶ Muema Wambua (2016) "The ethnification of electoral conflicts in Kenya: Options for positive peace," at <https://www.ajol.info/index.php/ajcr/article/download/167168/156605> (accessed 23/11/2018).

Internal wrangles and conflicts in have prevented the prevalence of peace and stability in Kenya. This has been compounded by the ethnicization of the electoral conflicts the same which is heightened during election period.⁷⁸

It has been argued that there exist tendency on the part of the state and political actors to advertently ‘ethnicize’ extra-ethnic electoral issues in a bid to sabotage free and fair elections. The ethnification of extra-ethnic conflicts has caused the country to continually drift into an electoral-conflict trap and has constrained the implementation of electoral reforms as envisaged in the Constitution of Kenya 2010.

Historically, the 1963 Constitution established the Electoral Commission of Kenya as an autonomous body mandated to administer and supervise the elections.⁷⁹ However, the Commission was not operationalised effectively as envisaged in the constitution leaving the Supervisor of Elections, a unit under the Office of the Attorney General with the powers to conduct elections.⁸⁰ In this period, the electoral body was so disused that it had been relegated to only one of its constitutional mandates: the determination of constituency boundaries.

In 1969, Parliament enacted the National Assembly and Presidential Elections Act Cap 7. This Statute consolidated the Ordinances and Regulations relating to elections. In this period, Kenya conducted frequent elections including by elections, popularly referred to as the little general elections of 1966, and General Elections in 1969, 1974, 1979, 1983 and 1988.

The General elections held in 1966 was a culmination of post-colonial events which shaped the political fate of the new nation. Following the 1963 Elections the African Peoples Party (APP) dissolved itself to join KANU. In 1964, KADU disbanded to merge with KANU effectively turning Kenya’s evolving by-party system to a one party state.⁸¹

⁷⁷ Ben Sihanya (forthcoming 2021) “Mediating Kenya’s post-election violence crises: The politics and limits of power sharing agreement,” in Ben Sihanya *Constitutional Democracy in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

⁷⁸ *ibid.*

⁷⁹ Ben Sihanya (forthcoming 2021) “The presidency and public authority in Kenya’s new constitutional order” Chapter 3 in Ben Sihanya *Constitutional Democracy in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

⁸⁰ *ibid.*

⁸¹ Christopher Mulei (1998) “Historical Perspectives of Elections in Kenya,” in Institute for Education, *The Electoral Environment in Kenya: A Research Project Report*, Institute for Education, Nairobi, 32-33.

However due to internal tensions within KANU, factions arose, some which were considered as left wing and others perceived as right wing.⁸² Consequently, during KANU's National Delegates Conference (NDC) held at Limuru in March 1966, the party abolished the position of Vice President and replaced it with eight provincial party vice presidents, a move seen as purposed at punishing Oginga Odinga and restructuring KANU leadership under a prominent presidency.⁸³

In April 1966, Oginga Odinga supported by twenty eight parliamentary colleagues announced the formation of the Kenya People's Union (KPU). KANU with an unassailable majority in Parliament pushed through a constitutional amendment, popularly referred to as the "turn-coat rule"⁸⁴ requiring that all MPs who crossed to another party following an elections must vacate their seats and a by election ensue. At the by election held in 29 constituencies KANU used all the powers and resources available to an overreaching incumbent.⁸⁵

The ruling KANU Government openly used public officials and public resources to campaign including wide media coverage by the monopoly state owned media, and promise of development to the locals.⁸⁶ This was coupled with the wide use of civil servants and provincial administrators established the post-colonial political environment. Despite the restricted political environment, KPU won a considerable number of seats.

KPU was disbanded by the government before the 1969 General Elections and many of its leaders subjected to arrests of harassment. The general elections held in 1974, 1979, 1983 and 1988 had similar features and were dominated by violence and intimidation.⁸⁷ Following disbandment of KPU, Kenya was effectively a one party state. This scenario was

⁸² *ibid.*

⁸³ Ben Sihanya (forthcoming 2021) "The presidency and public authority in Kenya's new constitutional order" *op. cit.*

⁸⁴ Crispin Odhiambo Mbai (200) "The Rise and Fall of The Autocratic State in Kenya," in Walter Oyugi, Peter Wanyande and Crispin Odhiambo-Mbai, *Politics of Transition in Kenya: From KANU to NARC*, Heinrich Böll Foundation, at 51-95.

⁸⁵ *ibid.*

⁸⁶ Ben Sihanya (forthcoming 2021) "The presidency and public authority in Kenya's new constitutional order" *op. cit.*

⁸⁷ *ibid.*

constitutionalized through the enactment of Article 2A of the Constitution which converted Kenya into a one party state.⁸⁸

The presidential elections were not competitive since the incumbent benefited from sole nomination. Parliamentary elections were held under the environment of intimidation and despondency. The election was simply a field to checkmate persons who were not thought of as sufficiently loyal to the presidency either through denial of nomination or manipulation of the election process. In 1973 a constitutional amendment lowered the age of majority from 21 to 18 years.⁸⁹ Because of lack of identity cards many young people, the incumbent could use its power to manipulate the method of identification of voters. The elections were also marked by low voter turnout because of general apathy with the system.

The incumbent could use all cards including unilaterally changing election date.⁹⁰ For instance, the 1983 elections were held one and half years before they were due, ostensibly to dislodge dissidents after the 1982 attempted coup.⁹¹

The 1988 elections, considered to be the most fraudulent in Kenya's history demonstrated the façade of Kenya's elections.⁹² First the KANU introduced an apparently unconstitutional internal party rule that candidates who garnered at least 70% votes at the primaries stood elected unopposed. The ruling party also introduced the queue voting at the primaries stage.

At the primaries largely administered by provincial administration, those whose queues looks shorter were announced outright winners. These elections which generally a sham demonstrably shattered the space for political dissent heightened agitation for re-introduction of multiparty.

Under the multi-party era, there was the ECK which had been in existence vide Article 41 of the Independence Constitution. However its powers and functions and were earnestly undertaken by the Office of the Supervisor of Elections under the Office of the Attorney General and the provincial administration.

⁸⁸ Enactment of Section 2A in 1982; See Stephen Ndegwa (1998) "The incomplete transition; The electoral and constitutional context in Kenya," Indiana University Press, Africa Today 45, 2, 193-212.

⁸⁹ Christopher Mulei (1998) "Historical Perspectives of Elections in Kenya," *op. cit.*

⁹⁰ *ibid.*

⁹¹ Ben Sihanya (forthcoming 2021) "The presidency and public authority in Kenya's new constitutional order" *op. cit.*

⁹² *ibid.*

The ECK that was constituted in 1991 recast Kenya's electoral management model to the independent after years of a largely Government driven model. The Commission consisted of 11 commissioners.⁹³

Pursuant to the provision of Article 41 of the Independence Constitution,⁹⁴ the President was constitutionally empowered to appoint the Chairperson and at least four Commissioners. The Constitution did elaborate the qualifications for the appointment of the Chairperson and Vice Chairperson had to be persons qualified for appointment as judges of the High Court or the Court of Appeal.

Upon appointment, Commissioners were subjected to an oath and thereafter to the Code of Conduct, a schedule in the National Assembly and Presidential Elections Act, Cap 7. The Constitution provided for the disqualification for the sitting MPs, holders of public office and members of the Armed Forces.⁹⁵

Following the Inter-Party Parliamentary Group (IPPG) agreement in 1997, political actors sought complete overhaul of the electoral management body (EMB) and further agreed to increase the membership of the Commission by additional 10 persons nominated by parliamentary political parties. The agreement allowed the political parties to appoint Commissioners on top up of the initial 11 appointed by the incumbent President.

As result, this process led to a scenario where Commissioners who had affiliation with the incumbent executive or appointing parties. Despite their perceived subjective in their electoral decisions, the Commissioners appointed through IPPG were lauded as competent and as had worked harmoniously with great sense of responsibility."⁹⁶

It has been argued that despite the internal weaknesses of the ECK, the presence of political parties appointees did introduce a sense of balance, acceptance and appreciation of the electoral management body particularly amongst the elite political class.⁹⁷ Of great interest is that when

⁹³ *ibid.*

⁹⁴ Constitution of Kenya (1969), as amended in 1992. Cf. Ben Sihanya (forthcoming 2021) "The presidency and public authority in Kenya's new constitutional order" *op. cit.*

⁹⁵ Article 41 Constitution of Kenya (1969), as amended in 1992. Cf. Ben Sihanya (forthcoming 2021) "The presidency and public authority in Kenya's new constitutional order" *op. cit.*

⁹⁶ Samuel Kivuitu (2001) "The Electoral Process in Kenya," Constitution of Kenya Review Commission Workshop on the Interpretation of the CKRC's Mandate, held in Mombasa, at <<http://www.commonlii.org/ke/other/KECKRC/2001/27.html>> (accessed 22/2019).

⁹⁷ Christopher Mulei (1998) "Historical Perspectives of Elections in Kenya," *op. cit.*

the vacancies fell for second renewal in 2006 and 2007, the then incumbent President opted to overlook the IPPG settlement and unilaterally appointed the Commissioners thereby causing discontent and lack of confidence in the Commission.⁹⁸

As per the IPPG agreement, the Chairman and the members were to serve a renewable term of five years. The constitution also protected Commissioners from removal; they could only be removed upon a recommendation of a special tribunal. The Commissioners salaries were determined in accordance with the Constitutional Offices Remuneration Act and paid from the Consolidated Fund. The budget of the Commission was subject to review and adoption by parliament. The Commission had powers to appoint its own staff and create regional offices.

Then fast came the 2007 General Elections.⁹⁹ Following a tense and fiercely contested poll, Kenyans went to the polls on 27th December 2007, Kenyans went to a fiercely contested poll.¹⁰⁰ The declaration of results putting Mwai Kibaki as President elect on 30th December 2017 was followed by violence and chaos that went on for over two months and took the intervention of the international community to broker peace amidst claim of election rigging and fraud.¹⁰¹ It can be said that the episode of 2007 general elections was a wakeup call to electoral reforms

The declaration of Mwai Kibaki as the President elect was subsequently followed by the swearing-in at night by the then Chief Justice Evans Gicheru.¹⁰² The declaration increased tensions and consequently catapulted the existing electoral conflict.¹⁰³

This led to the post-election violence (PEV) in 2007/2008 where many Kenyans lost their lives. In a move to restore peace, various respected African leaders were invited to help bridge the gap and find a solution for peaceful co-existence between the declared winner President Mwai Kibaki and the Opposition leader Hon Raila Odinga after successful deliberations led by Koffi Annan the grand coalition government was formed.¹⁰⁴

⁹⁸ *ibid.*

⁹⁹ Ben Sihanya (forthcoming 2021) "Mediating Kenya's post-election violence crises: The politics and limits of power sharing agreement," *op. cit.* Cf. Kanyinga Karuti (2014) "Kenya Democracy and Political Participation," Open Society Initiative of Kenya, Nairobi, at <https://www.opensocietyfoundations.org>, (accessed on 23/10/2018).

¹⁰⁰ *ibid.*

¹⁰¹ *ibid.*

¹⁰² Muema Wambua (2016) "The ethnification of electoral conflicts in Kenya: Options for positive peace," at <https://www.ajol.info/index.php/ajcr/article/download/167168/156605> (accessed on 23/10/2018).

¹⁰³ *ibid.*

¹⁰⁴ Ben Sihanya (forthcoming 2021) "Mediating Kenya's post-election violence crises: The politics and limits of power sharing agreement," *op. cit.*

Upon formation of Grand Coalition Government, a motion was initiated in Parliament to form a Special Tribunal to investigate and prepare a report on the 2007/2008 post-election violence. However, this motion was rejected on two occasions by members of the National Assembly. This was on the context of the slogan “Let’s not be vague, let’s go to Hague.”¹⁰⁵

Following the botched elections of 2007, the Kriegler Commission¹⁰⁶ was formed and tasked to carry out a study of Kenya’s electoral system and make recommendations.¹⁰⁷ The Committee chaired by Justice Johann Kriegler submitted its report, which contained the most authoritative recommendations on the legal, policy and institutional reforms of elections.¹⁰⁸

The Kriegler Commission Report found fundamental weaknesses in the Kenyan political culture, institutional breakdown electoral management framework and made strong recommendations respecting review of the legal and constitutional framework on electoral procedures, the Electoral Management Body, the composition and appointment of commissioners, the operational procedures, funding modalities, and functional efficiency amongst others.

While underscoring the deficiencies such as double voter registration, ballot stuffing among other illegalities in the electoral process and noting that electoral system was entirely manual the Kriegler Commission¹⁰⁹ made three (3) key recommendations in reforming the electoral topology in Kenya.¹¹⁰

First, it was recommended that there be integration of one document describing the counting and tallying of votes by the ECK. Second, ECK develops a tallying and data transmission system to allow for the computerized entry of data from all tallying stations to the national tallying centre.

¹⁰⁵ Kanyinga Karuti (2014) “Kenya Democracy and Political Participation,” *op. cit.*

¹⁰⁶ The Kriegler Commission was appointed pursuant to the Commission of Inquiry Act Cap 102 and gazetted through Gazette Notice No. 1983 of 2008. Through the same Gazette Notice, the President appointed Judge Johann Kriegler (Chairman), Prof. Marangu M’Matere, Francis Angila, Catherine Mumma, Lucy Kambuni and Horacio Boneo as Commissioners.

¹⁰⁷ Collins Odote & Linda Musumba (eds) (2016) *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and Emerging Jurisprudence*, International Development Law Organization and Judicial Training Institute.

¹⁰⁸ Ben Sihanya (forthcoming 2021) “Mediating Kenya’s post-election violence crises: The politics and limits of power sharing agreement,” *op. cit.*

¹⁰⁹ *ibid.*

¹¹⁰ Government of Kenya (2008) *Truth, Justice, and Reconciliations Commission: Commissions of Inquiry*, Government Press. Cf. Ben Sihanya (forthcoming 2021) “Mediating Kenya’s post-election violence crises: The politics and limits of power sharing agreement,” *op. cit.*

Third, there be enough time before the declaration of a winner in elections to allow verification of provisional results.¹¹¹

The Kriegler Commission also recommended a number of technological fixes to address some of the vulnerabilities inherent in the manual process.¹¹² These included biometric voter registration, electronic voter identification and a results transmission system.¹¹³ The Commission further recommended law reforms to ensure infusion of integrity in the election process.¹¹⁴

The Kriegler Commission further observed that staff of ECK were not well prepared to manage the 2007 elections.¹¹⁵ Despite declaring Mwai Kibaki as having won the presidential elections, the then Chairman of the ECK, Mr Samuel Kivuitu, did admit that he could not confirm the legitimate and rightful winner of the 2007 presidential elections.¹¹⁶

It has been argued that circumstances which followed the 2007 General Elections prompted a rethink of electoral management in Kenya. With very strong justification, the electoral framework attracted significant reforms in the new Constitution. The credibility questions in the 2007 General Elections tipped the balance of necessity for fundamental constitutional reform after long period of resistance and indifference.

The Kriegler Report also recommended a total overhaul of the ECK, its replacement by a lean policy commission interacting with a professional secretariat. In the interim period, through Constitutional Amendment Act No. 10 of 2008, the ECK was replaced by the Interim Independent Electoral Commission (IIEC) and Interim Independent Boundaries Review Commission (IIBRC) charged with electoral management and boundary delimitation mandates respectively.

¹¹¹ *ibid.*

¹¹² Government of Kenya (2009) “The Report of the Independent Review Commission,” Government Press, Nairobi also known as the Kriegler Report. Cf. Ben Sihanya (forthcoming 2021) “Mediating Kenya’s post-election violence crises: The politics and limits of power sharing agreement,” *op. cit.*

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ Muema Wambua (2016) “The ethnification of electoral conflicts in Kenya: Options for positive peace,” *op. cit.*

¹¹⁶ Government of Kenya (2009) “The Report of the Independent Review Commission,” Government Press, Nairobi also known as the Kriegler Report Report of the Independent Review Commission (Kriegler Report). Cf. Ben Sihanya (forthcoming 2021) “Mediating Kenya’s post-election violence crises: The politics and limits of power sharing agreement,” *op. cit.*

Following the conclusion of the Kriegler inquiry,¹¹⁷ the Interim Independent Electoral Commission (IIEC) and Interim Independent Boundaries Review Commission (IIBRC) were established. The IIEC made considerable incremental administrative and electoral reforms and generally contributed to increased confidence of Kenyans in the electoral process.

2.3 The Elections under the Constitution of Kenya 2010

The promulgation of the Constitution of Kenya 2010 was indeed the climax of a long quest for reforms to enable comprehensive transformation of the country's governance system.¹¹⁸ It has been argued that the same is offered a critical turning point for Kenya's electoral governance system and further altered the institutional and legal underpinnings of democracy and governance in the country.¹¹⁹

The quest for new constitutional order had been informed by the fact the democratic project was untenable under the old constitutional order.¹²⁰ Indeed the Constitution of Kenya 2010 is a transformative legal instrument that if fully implemented can fulfil Kenya's aspirations for democratic governance.¹²¹

The Constitution provides that all sovereign power belongs to the People of Kenya and such can only be exercised in consonance with provisions of the Constitution.¹²² This is partly based on the premise and means that citizens themselves should be the ones exercising power.¹²³ Since not all citizens can directly or actively participate in governance, they do so by means of elected representatives in Parliament, as well as direct participation through mechanisms like referenda.

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*

¹¹⁹ Ben Sihanya (2017) "Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms," *op. cit.*

¹²⁰ Elisha Ongoya & Willis Otieno (2012) "A Handbook on Kenya's Electoral Laws and System: Highlights of the Electoral Laws and System established by and under the Constitution of Kenya 2010 and Other Statutes," *Electoral Institute for Sustainable Democracy in Africa (EISA)*.

¹²¹ Ben Sihanya (2017) "Electoral justice in Kenya under the 2010 Constitution implementation, enforcement, reversals and reforms," *op. cit.*

¹²² Article 1(1) Constitution of Kenya, 2010. Cf. Ben Sihanya (forthcoming 2021) "Constitutionalism, the rule of law, and human rights in Kenya's Electoral Process," Chapter 6 in Ben Sihanya *Constitutional Democracy in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

¹²³ Benjamin Obi Nwabueze (1974) "Presidentialism in Commonwealth Africa," (New York: St. Martin's Press, 1974); Benjamin Obi Nwabueze, *Constitutionalism in the Emergent States* (London: C. Hurst & Co, 1973). Cf. *Njoya & 6 Others v. A-G & 3 Others* Miscellaneous Civil Application (No. 2) [2004] KLR.

The People may exercise their sovereign power either directly or through their democratically elected representatives.¹²⁴ This power is exercised at two levels; the national level and the County level, thus a creation of the devolved units of governance.¹²⁵

Kenya being a sovereign multi-party democratic state is founded on various national values and principles enshrined under the Constitution of Kenya.¹²⁶ The Constitution embodies rules, principles and values and norms that form the basis of representation, participation and governance in Kenya. The principle of constitutionality is therefore embodied in the numerous provisions of the Constitution.

These values include amongst others good governance, integrity, transparency, accountability and sustainable development.¹²⁷ The values form the bed rock, the foundation upon which the notion of governance in Kenya is anchored.¹²⁸ The rules, principles and values embodied in the Constitution are the normative standards which seek to secure constitutional democracy, the rule of law , human rights and good governance.¹²⁹

The Constitution of Kenya 2010 underscores the right of citizens to exercise their political rights.¹³⁰ It provides that every adult citizen has the right, without unreasonable restrictions to be registered as a voter; and to vote by secret ballot in any election or referendum.¹³¹ This right to vote in a free and fair election is so fundamental as it forms the foundation of good governance and legitimacy of any government democratically elected by the people.¹³²

¹²⁴ Article 1 (2) Constitution of Kenya, 2010. Cf. Ben Sihanya (forthcoming 2021) “Constitutionalism, the rule of law, and human rights in Kenya’s Electoral Process,” *op. cit.*

¹²⁵ Article 1 (4) Constitution of Kenya, 2010. Cf. Ben Sihanya (forthcoming 2021) “Constitutionalism, the rule of law, and human rights in Kenya’s Electoral Process,” *op. cit.*

¹²⁶ Article 10 Constitution of Kenya, 2010. Cf. Ben Sihanya (forthcoming 2021) “Constitutionalism, the rule of law, and human rights in Kenya’s Electoral Process,” *op. cit.*

¹²⁷ *ibid.*

¹²⁸ *ibid.*

¹²⁹ Ben Sihanya (2017) “Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms,” *op. cit.*

¹³⁰ Article 38 of the Constitution provides that every citizen has the right to free, fair and regular elections based on the universal suffrage and the free expression of the will of the electors for any elective public body or office; or any office of any political party of which the citizen is a member. This right is recognized by Universal Declaration of Human Rights, 1948) as much as the Constitution of Kenya.

¹³¹ Article 38(3) Constitution of Kenya.

¹³² Ben Sihanya (2017) “Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms,” *op. cit.*

To operationalize this fundamental right, Chapter Seven of the Constitution of Kenya provides various for the general principles guiding the electoral management system.¹³³ The rules, principles and values that relate to electoral process are captured under Articles 10, 38, 73, 81, and 86 as well as the preamble of the Constitution. Article 81 of the Constitution provides that all elections shall be regular; by secret ballot; be free from violence , intimidation, improper influence or corruption ; conducted by an independent body ;transparent; and administered in an impartial ,neutral , efficient, accurate and accountable manner.

The debate is whether or not the new Constitution will eventually transform the electoral sector in Kenya to a better system remains to be seen. As acknowledged by constitutionalists world over, it is one thing to have a good or flowery constitution and quite another to realize the promises that the Constitution promises its intended beneficiaries – the people.¹³⁴

Since the promulgation of the Constitution of Kenya 2010, Kenya has had two presidential elections i.e. in 2013 and 2017.¹³⁵ Both these presidential elections have been questioned for their credibility whether they were free and fair. This is because Kenya’s electoral justice has been compromised at the altar of political expediency, especially tribal MIBSA: manipulation, intimidation, bribery, stealing of votes at the stage of counting, polling and even scrutinising, as well as threatened or actual arson, assault and assassination.¹³⁶ Presidential electoral injustices are part of tribal domination or hegemony, or what Prof ES Atieno Odhiambo has called “ethnic-based hegemonic enterprises.”¹³⁷

¹³³ Articles 81 and 86 Constitution of Kenya 2010.

¹³⁴ *ibid.*

¹³⁵ Ben Sihanya (2017) “Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms,” *op. cit*

¹³⁶ Cf Gabrielle Lynch (2015) “So, why aren’t we putting our house in order way ahead of 2017 elections?” *Saturday Nation*, 2/12/2015, at <http://www.nation.co.ke/oped/Opinion/General-Election-2017-IEBC-Polls/-/440808/2576818/-/makhmjz/-/index.html> (accessed 13/3/2015).

¹³⁷ See Ben Sihanya (2017) “Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms,” *op. cit* Cf. ES Atieno Odhiambo (2002) “Hegemonic enterprises and instrumentalities of survival: Ethnicity and democracy in Kenya,” 61, *African Studies Review* 223- 249; E.S. Atieno Odhiambo (2004) “Hegemonic enterprises and instrumentalities of survival: Ethnicity and democracy in Kenya,” in Bruce Berman, Dickson Eyoh & Will Kymlicka (eds) *Ethnicity & Democracy in Africa*, James Currey, Oxford, 167-182.

2.4 The Principles for the Electoral Management System in Kenya

The Constitution of Kenya 2010 has underpinned far reaching reforms of electoral democracy. The Constitution is normative and inherently post-liberal in its architecture.¹³⁸ Article 1 of the Constitution declares that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.

It contains a progressive Bill of Rights and set outs values and principles of governance. Article 10 of the Constitution provides that all State organs and State officers, public officers shall be bound by the national values whenever they apply or interpret Constitution; and makes or implement public policy decisions.

Article 81 of the Constitution 2010 underpins the normative agenda by setting out the general principles and values that governs the electoral system and representation. The legal and legislative architecture regulating electoral management in Kenya principally the Constitution of Kenya (2010), the Independent Electoral and Boundaries Commission Act (2011), the Elections Act (2011), the Political Parties Act (2011) and the Elections Campaign Finance Act (2013).¹⁶⁴

A number of attendant regulations have be formulated to anchor the statutes. These include the Election (General) Regulations 2012, the Election (Technology) Regulations amongst others.¹³⁹

As the Supreme Law of the land, the Constitution of Kenya 2010 lays out the principal foundation of law that governs electoral process and election management system Kenya. It devotes considerable chapters on electoral framework and establishes elective offices and institutions that have a direct role in the electoral process.

The Constitution of Kenya is a transformative document that confers the sovereign power to the people of Kenya and further delegates the sovereign power to various state organs. These are Parliament (national and county level), the Executive (both the national and county executives) and Judiciary.

¹³⁸ Heidi Evelyn and Waikwa Nyoike (2015) “A new dawn postponed: The constitutional threshold for valid elections in Kenya and section 3 of the Elections Act,” International Law Development Organisation and the Judiciary Training Institute, 46.

¹³⁹ Other Regulations made pursuant to the Election Act include Elections (Registration of Voters) Regulations, 2012; Rules of Procedure on Settlement Disputes; Elections (Voter Education) Regulations, 2017; Rules of Procedure on Settlement Disputes; Elections (Party Primaries and Party Lists) Regulations, 2017; Elections (Parliamentary and County Elections) Petitions Rules, 2017; and Elections (Party Primaries and Party Lists) Regulations, 2017.

The transformative aspect of the Constitution of Kenya 2010 further underpins and constitutionalizes fundamental rights as integral component of the election process. The Bill of Rights is elevated as integral part of Kenya democratic state and forms the framework for social, economic and cultural policies.¹⁴⁰ In essence, every person has a right to enjoy the fundamental rights to the greatest extent consistent with the nature of the right or fundamental freedoms. The State and State organs have a fundamental duty to observe, protect, promote and fulfill the rights and the fundamental rights.¹⁴¹

The Constitution further provides for political rights as embolden in the Bill of Rights. Article 38 of the Constitution provides that every citizen is free to make political choices which include the right to free, free and regular elections based on universal suffrage and free expression of the electors. Every adult citizen therefore has the right without unreasonable restrictions to be a registered voter or participate in election or referendum.¹⁴² Therefore sovereignty can be exercised can be exercised directly or through freely chosen representative.¹⁴³

The foregoing provisions of the Constitution 2010 are buttressed by the provisions on national values and principles of governance.¹⁴⁴ Article 10 binds all state organs, state officers and all persons to apply the values of good governance in exercise of their functions or in the interpretation or implementation of public policy decisions.¹⁴⁵

These values include patriotism; national unity; the rule of law, democracy and public participation.¹⁴⁶ Chapter 6 of the Constitution anchors the principle of integrity of public officials in the conduct of their functions. The election officials like other public officials are enjoined to exercise their functions in a manner that is consistent with the purposes and objects of the

¹⁴⁰ Chapter 4 Constitution of Kenya, 2010. Cf. Ben Sihanya (forthcoming 2021) “Constitutional implementation in Kenya 2010-2019: Challenges and Prospects,” in Ben Sihanya *Constitutional Democracy in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

¹⁴¹ Article 21 Constitution of Kenya, 2010. Cf. Ben Sihanya (forthcoming 2021) “Constitutional implementation in Kenya 2010-2019: Challenges and Prospects,” *op. cit.*

¹⁴² Article 38 Constitution of Kenya, 2010. Cf. Ben Sihanya (forthcoming 2021) “Constitutional implementation in Kenya 2010-2019: Challenges and Prospects,” *op. cit.*

¹⁴³ Chapter 1 Constitution of Kenya, 2010. Cf. Ben Sihanya (forthcoming 2021) “Constitutional implementation in Kenya 2010-2019: Challenges and Prospects,” *op. cit.*

¹⁴⁴ Article 10 Constitution of Kenya, 2010. Cf. Ben Sihanya (forthcoming 2021) “Constitutional implementation in Kenya 2010-2019: Challenges and Prospects,” *op. cit.*

¹⁴⁵ *ibid.*

¹⁴⁶ Article 10(2) provides a comprehensive list of the national values and principles of governance. These further include integrity; transparency; accountability; sustainable development; social justice; non-discrimination; protection of the marginalized; participation of the people, sharing and devolution of power; patriotism; and equity.

Constitution which not only amplify the national values and principles of governance but in a manner promote public confidence and integrity in their offices.

In determining whether an electoral process is free, fair, transparent, verifiable and accountable the standards or parameters outlined under Articles 81(e) and 86 are instructive. Some of these issues were tested in the *Raila Odinga* Presidential Election Petition (2013).¹⁴⁷ These include the requirement that the election be: first, be by secret ballot; second, be free from violence, intimidation, improper influence or corruption; third, conducted by an independent body; fourth, be transparent; and fifth, be administered in an impartial, neutral, efficient, accurate and accountable manner.¹⁴⁸

Moreover, the Independent Electoral and Boundaries Commission (IEBC) is required to ensure that at least four standards are met. However, this has not been the case as the IEBC has failed to guarantee at least four of these standards are met both in the 2013 presidential elections and the 2017 presidential elections.¹⁴⁹ The failure by the IEBC to ensure compliance of the relevant electoral laws to ensure good governance and electoral democracy has contributed largely to Kenya's failure in ensuring the constitutional rules, principles and values of a fair presidential electoral process are achieved.¹⁵⁰

2.5 International Principles and Obligations on Elections

The Constitutional foundation for election process in Kenya must be taken in the context of provision of Article 2 (5) and 2(6) of the Constitution of Kenya 2010. The aforesaid articles of the Constitution introduce the aspect of international obligations that are materially extrapolated from various treaties and conventions and which entail a positive state duty to take the necessary steps to enable citizens to effectively exercise their political and voting rights.¹⁵¹

¹⁴⁷ *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others* Petition No.5 of 2013, In the Supreme Court of Kenya at Nairobi (2013) eKLR.

¹⁴⁸ Cf. Elisha Z. Ongoya & Willis E. Otieno (2012) *A Handbook on Kenya's Electoral Laws and System*, a study under Electoral Institute for Sustainable Democracy in Africa (EISA), also at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&ved=0CC4QFjAB&url=http%3A%2F%2Fwww.eisa.org.za%2FPDF%2Feh21.pdf&ei=BogPUpzYAeic0QWWr4DABg&usg=AFQjCNEeWEDW DzUkytMNDXRlukdDRNCRFg&bvm=bv.50768961,d.d2k> (accessed 17/8/2013).

¹⁴⁹ Ben Sihanya (forthcoming 2021) *Constitutional Law and Democracy in Kenya and Africa*, *op. cit.*

¹⁵⁰ *ibid.*

¹⁵¹ Domenico Tuccinardi (2014) "International Obligations for Elections: Guidelines for Legal Frameworks," at <https://www.idea.int/sites/default/files/publications/international-obligations-for-elections.pdf>, (accessed on 4/2/2019).

Article 2 (5) and 2(6) of the Constitution makes provision for the inclusion into the law of Kenya the general rules of international laws and further the application of treaties and conventions that has been ratified by Kenya. The Constitution of Kenya 2010 has steps to address the deficiencies in our electoral system by making way for the introduction of new electoral legislation.¹⁵²

The international election standards thus entail the principles and implementation guidelines that help improve the quality of elections across the international sphere. The treaties and conventions and particularly those made under the United Nations¹⁵³ Framework provide a set of obligations of universal relevance, as United Nations membership entails acceptance of UN Charter obligations.¹⁵⁴ All member states of the UN charter are bound to the guiding principles which include the duty to promote the fundamental rights and freedoms of citizens.¹⁵⁵

The United Nations treaties provide for the international duties and obligations relating to the conduct of elections in member states. Treaties and Conventions formalize agreements between sovereign states. On becoming a party to a treaty, states limit their sovereign rights by voluntarily accepting international obligations. As such, the transfer of public sovereign rights to the people subject to their jurisdiction. Citizenry of the member states can legally invoke the treaty against the state if their rights are violated by the state.¹⁵⁶

2.6 The Independent Electoral and Boundaries Commission (IEBC)

The Constitution of Kenya, 2010 lays the legal basis for the Independent Electoral and Boundaries Commission. Article 88 of the Constitution provides for the establishment and functions of the IEBC. It provides that the Commission shall be responsible for conducting and supervising referenda and elections to any elective body or office established the Constitution or elections as prescribed by an Act of Parliament.¹⁵⁷

¹⁵² Elisha Ongoya & Willis Otieno (2012) “A Handbook on Kenya’s Electoral Laws and System: Highlights of the Electoral Laws and System established by and under the Constitution of Kenya 2010 and Other Statutes,” *Electoral Institute for Sustainable Democracy in Africa* (EISA).

¹⁵³ The United Nations is an international organization founded in 1945. It is currently made up of 193 Member States. The mission and work of the United Nations are guided by the purposes and principles contained in its founding United Nations Charter. It is a global organization that brings together its member states to confront common challenges and manage shared responsibilities as contained in its Charter.

¹⁵⁴ Domenico Tuccinardi (2014) “International Obligations for Elections: Guidelines for Legal Frameworks,”

op. cit.

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

¹⁵⁷ Article 88(4) Constitution of Kenya 2010. Cf. Ben Sihanya (forthcoming 2021) “Constitutional implementation in Kenya 2010-2019: Challenges and Prospects,” *op. cit.*

Others functions of the IEBC include but not limited to the continuous registration of citizens as voters; the regular revision of the voters' roll; the delimitation of the constituencies and wards; voter education; settlement of electoral disputes; the development of a code of conduct for candidates and parties contesting elections; and registration of candidates for elections.¹⁵⁸ These functions are replicated in section 4 of the Independent Electoral and Boundaries Commission Act.

Article 89 of the Constitution provides for the delimitation of electoral units. It outlines the process and criteria for delimitation of boundaries of constituencies and wards. Article 89 of the Constitution provides that there shall be two hundred and ninety constituencies for the purposes of the election of the members of the National Assembly provided under article 97(1)(e).

Chapter 15 of the Constitution of Kenya provides for the Commissions and Independent Offices. This Chapter is designed to protect and promote the independence of the Commissions amongst them the Independent Electoral and Boundaries Commission. Under Article 249 of the Constitution, the Commissions are to protect the sovereignty of the people of Kenya and promote constitutionalism. The Commissions and holders of the independent offices are subject to the Constitution and the law and are not subject to direction or control by any person or authority.

The Constitution provides for the composition, appointment and terms of office of the members of a Commission.¹⁵⁹ The IEBC¹⁶⁹ Act provides for the terms and manner of appointment of the Commissioners and other members of the Commission, the establishment of the offices, financial provisions and the conduct and operations of the Commission. The Commission shall consist of a chairperson and six other members appointed in accordance with Article 250(4) of the Constitution and the provisions of this Act.¹⁶⁰

The Commissioners are appointed for a single term of six years and are not be eligible for re-appointment. The membership of the Commission serves on a full-time basis. This has inevitably brought into question whether they are policy oversight organ at the Commission or just

¹⁵⁸ *ibid.*

¹⁵⁹ Article 250 of the Constitution of Kenya 2010. Cf. Ben Sihanya (forthcoming 2021) "Constitutional implementation in Kenya 2010-2019: Challenges and Prospects," *op. cit.*

¹⁶⁰ Section 5 Independent Electoral and Boundaries Commission Act 2011. Cf. Ben Sihanya (forthcoming 2021) "Constitutional implementation in Kenya 2010-2019: Challenges and Prospects," *op. cit.*

executive. The Commission is however deemed to be properly constituted notwithstanding a vacancy in its membership.¹⁶¹

The Act provides that the Commission may create within itself such directorates, field offices, units, divisions or committees and may appoint thereto such employees as it may determine.¹⁶² Commissioners are generally organized into committees which formulate policies and strategies of the Commission on operational and technical aspects of election planning and management. Every directorate, field office, unit, division or committee created by the Commission is obligated to act in accordance with the commission mandate.¹⁶³

Section 11A of the IEBC Act provides for the relationship between the Commissioners and the Secretariat. The Secretariat performs the day-to-day administrative functions of the Commission and implements the policies and strategies formulated by the Commission while the Commissioners formulate policy and strategy of the Commission and oversight of the Secretariat.

The Secretariat of the IEBC is composed of the Chief Executive Officer and Directorates headed by Directors in the top management level. It is basically made up of professional, technical and administrative officers and support staff, as may be appointed by the Commission in the discharge of its functions and/or public officers as may be seconded to the Commission by other government or non-governmental bodies upon its request.¹⁶⁴

Each and every Directorate has electoral officers in accordance with the functions assigned to the Directorate. The structure is designed as a functional model where by Directorates and Departments complement each other to achieve common objectives but are jointly accountable under the Chief Executive Officer.¹⁶⁵

¹⁶¹ Section 11 Independent Electoral and Boundaries Commission Act, 2011. Cf. Ben Sihanya (forthcoming 2021) “Constitutional implementation in Kenya 2010-2019: Challenges and Prospects,” *op. cit.*

¹⁶² Section 12 Independent Electoral and Boundaries Commission Act, 2011. Cf. Ben Sihanya (forthcoming 2021) “Constitutional implementation in Kenya 2010-2019: Challenges and Prospects,” *op. cit.*

¹⁶³ Section 12(2) Independent Electoral and Boundaries Commission Act, 2011. Cf. Ben Sihanya (forthcoming 2021) “Constitutional implementation in Kenya 2010-2019: Challenges and Prospects,” *op. cit.*

¹⁶⁴ Section 10 Independent Electoral and Boundaries Commission Act, 2011. Cf. Ben Sihanya (forthcoming 2021) “Constitutional implementation in Kenya 2010-2019: Challenges and Prospects,” *op. cit.*

¹⁶⁵ Ben Sihanya (2017) “Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms,” *op. cit.* Felix Owuor (2016) “Reforming Elections Management and Administration in Kenya: A case for Independent Electoral and Boundaries Commission,” *op. cit.*

In respect to financial provision, section 19 of the IEBC Act provides that the administrative and other expenses of the Commission, including the salaries, allowances, gratuities and pensions of the members and employees of the Commission shall be a charge on the Consolidated Fund. Despite the enactment of the statutory provision, the election budget has been subject of partisan politics at the Parliament which has been argued to tamper with the independence of the electoral body.

The want of financial autonomy at the IEBC has been attributed to mismanagement of funds at the IEBC. Kriegler Report made findings of serious misappropriation and mismanagement of funds at the electoral body and recommended for proper and transparent election budgeting process and financial autonomy. Parliament therefore is under a duty to allocate adequate funds to enable the commission to perform its functions.¹⁶⁶

The IEBC Act provides for the funds of the Commission which comprises of monies allocated by Parliament for purposes of the Commission; any grants, gifts, donations or other endowments given to the Commission; or such funds as may vest in or accrue to the Commission in the performance of its functions under this Act or under any other written law.¹⁶⁷ Members and employees of the Commission are paid such remuneration or allowances as determined or set by the Salaries and Remuneration Commission.¹⁶⁸

Section 21 of the IEBC Act mandates the Secretary of the Commission to prepare estimates of revenue and estimates of the Commission for that year. The Cabinet Secretary responsible for finance is obliged to present the estimates approved by the Commission for consideration and approval by the National Assembly. This is aimed at insulating IEBC budget process from partisan political debate and further reinforcing its financial autonomy.

¹⁶⁶ The Kriegler Commission Report made far reaching conclusions on the management capacity of the ECK. The IEBC has also been subject to critical observations on its financial management and allegations of impropriety in procurement of electoral materials. *See* Office of the Auditor General, Special Audit Report On the Procurement of Electronic Voting Devices for the 2013 General Election by the Independent Electoral and Boundaries Commission (06 June 2014) <http://www.kenao.go.ke/index.php/reports/doc_download/148-iebc-special-audit-report-on-procurement-of-evds> (accessed 7/2/2019).

¹⁶⁷ Section 17 Independent Electoral and Boundaries Commission Act, 2011. Cf. Ben Sihanya (forthcoming 2021) “Constitutionalism, the rule of law, and human rights in Kenya’s Electoral Process,” *op. cit.*

¹⁶⁸ Section 20 Independent Electoral and Boundaries Commission Act, 2011. Cf. Ben Sihanya (forthcoming 2021) “Constitutionalism, the rule of law, and human rights in Kenya’s Electoral Process,” *op. cit.*

The Elections Act¹⁶⁹ which is the main operational legislation on the electoral process. It provides for the conduct of elections of the office of the President, the National Assembly, the Senate, county governor and county assembly; conduct of referenda; and electoral dispute resolution. It contains an elaborate procedures and processes associated with voter registration; nominations, elections, referendum, election offences and election dispute resolutions. The Election Act basically consolidates former legislative provisions on elections.

The Election Act¹⁷⁰ provides for the incorporation of technology in elections. The Commission is enjoined to establish an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. The Commission is mandated procure and put in place the technology necessary for the conduct of a general election at least one hundred and twenty days before such elections. Such technology must be tested, and deployed at least sixty days before a general election.

Despite all these provisions discussed above, the IEBC has still failed to manage to conduct free, fair and credible elections since its inception. This can be attributed mainly to poor leadership at the helm of the IEBC due to lack of independence especially from key political figures within the government.¹⁷¹ For the IEBC to be able to conduct free, fair and credible presidential elections in Kenya it must be free from any undue influence. This can only be possible if the leadership of the IEBC is courageous, firm, and has absolute commitment to the rule of law and electoral justice.¹⁷²

Despite the enactment of laws to provide for the incorporation of technology in electoral management, it has been argued that Kenya is yet to achieve free, fair and credible elections.¹⁷³

2.7 Summary of Findings and Conclusion to Electoral Management in Kenya

The overarching argument in this Chapter is that there is need to review the legal and administrative framework of electoral management in Kenya. I have reviewed the history of Kenya's legal and administrative framework and the changes and review it has undergone over

¹⁶⁹ The Elections Act 2011. Cf. Ben Sihanya (forthcoming 2021) "Constitutionalism, the rule of law, and human rights in Kenya's Electoral Process," *op. cit.*

¹⁷⁰ Section 44 Elections Act, 2011. Cf. Ben Sihanya (forthcoming 2021) "Constitutionalism, the rule of law, and human rights in Kenya's Electoral Process," *op. cit.*

¹⁷¹ Ben Sihanya (2017) "Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms," *op. cit*

¹⁷² *ibid.*

¹⁷³ Paul Ogemba & Kamau Muthoni (2017) "Audit of IEBC Servers Reveals some Discrepancies" *The Standard* Newspaper, at <http://www.standardmedia.co.ke> (accessed on 2/12/2018).

the years since independence. I have also discussed the impact it has had over Kenya's electoral process since independence and whether or not it has been successful.

From the discussions of the electoral process since Kenya attained its independence in 1963 to the 2017 presidential elections it is clear that Kenya has come a long way in terms of the legal and administrative framework of electoral management. It is undoubtedly clear that the Constitution of Kenya 2010 has provided a transformative path with regard to electoral management. The transformative nature of the Constitution has underpinned the provisions on the Bill of Rights, Representation of the people, Legislature, the Executive and Devolved Government.

As Prof Ben Sihanya¹⁷⁴ provides, the Constitution of Kenya 2010 was written and adopted to provide solutions to the challenges Kenyans have experienced since independence, and to address future constitutional aspirations or commitments. The promulgation of the Constitution of Kenya 2010 has led to the adoption of various relevant statutes, regulations, rules, and policies that govern elections.

These include the IEBC Act No. 9 of 2011, Elections Act, No. 24 of 2011 (Revised Edition 2015 [2012]) (Amended 2017), Election Laws (Amendment) Act No. 1 of 2017 (Kenya Gazette Suppl. No. 4) , Election Laws (Amendment) Act No. 36 of 2016 (Kenya Gazette Suppl. No. 157), Election Offences Act, No. 37 of 2016, Publication of Electoral Opinion Polls Act, No. 39 of 2012 amongst others.

It is also clear that the IEBC plays a very major and critical primary role in ensuring that presidential elections in Kenya are free, fair and credible. However, the IEBC has failed to ensure these due to various reasons the key among them being poor leadership at the helm of the IEBC due to lack of independence especially from key political figures within the government.

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

¹⁷⁴ Ben Sihanya (2017) "Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms," *op. cit*

process to play a role.¹⁷⁵ The work of IEBC should not be centralised under one personality or organ.¹⁷⁶

The next Chapter shall focus on the role of technology in elections. It debate whether technology ensures free and fair elections or whether it undermines the whole electoral process. The main case study shall be the 2017 Kenyan general elections.

¹⁷⁵ The importance of public participation in the electoral process was a main issue in at least three of the numerous cases filed in court with the aim of ensuring that IEBC adheres to the letter and spirit of the law. These were; *CORD v. IEBC*, JR No. 637 of 2016; *NASA v. IEBC*, JR No. 378 of 2017; *Gladwell Otieno v. IEBC*, JR No. 447 of 2017. Cf. Ben Sihanya (2017) “Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms,” *op. cit*

¹⁷⁶ The need to recognize and appreciate the role of other election officials was deliberated and settled upon in *Maina Kiai & Others v. IEBC*, Petition No. 168 of 2017 and in *IEBC v. Maina Kiai & 5 Others*, CA No. 105 of 2017. Cf. Ben Sihanya (2017) “Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms,” *op. cit*

CHAPTER 3

THE USE OF TECHNOLOGY IN THE 2017 KENYAN PRESIDENTIAL ELECTIONS: A CASE OF BOTCHED TECHNOLOGY?

3.1 Introduction to an Analysis of the 2017 Presidential Elections in Kenya

The overarching argument in this Chapter is that technology plays an important role in ensuring free fair and credible presidential elections if used and managed properly. Chapter 2 discusses the legal and administrative framework of electoral management in Kenya.

This Chapter 3 interrogates the effect of technology in the 2017 presidential elections. It seeks to examine the claims of electoral technology malpractices and fraud. It will investigate the promises, dangers and perils of a digital democracy and further examine the gap in implementation in the laws providing for integration of technology in elections.

This project paper interrogates the effect of voting technology in promoting credibility, transparency and integrity of the electoral process. It analyses how the role the IEBC played in implementing the relevant provisions of the Constitution of Kenya 2010 and the various election laws including the Election Act 2011 and the various amendments made to the Act on the use of technology in presidential elections in Kenya.

Although this research chapter seeks to examine the role of technology in presidential elections in Kenya, its proceeds in the trajectory of understanding that the incorporation of technology in the electoral management system is not the only process and activity that would improve electoral integrity and guarantee free and fair elections.

There are other functions and processes that encompasses institutional and legal reforms which strengthens the electoral management system as shall be discussed in the following chapter. The role of technology as an integral role in the electoral processes which includes but not limited to voter registration and identification, boundaries delimitation, and results management system shall be interrogated in this chapter.

3.2 The Incorporation of Technology in Kenya's Presidential Elections

Kenya introduced use of electoral technology in its presidential elections after the promulgation of the Constitution of Kenya 2010.¹⁷⁷ This has been done with a view of supplementing the human element in the electoral system. The adoption of technology seeks to supplement the manual aspect that has characterized the electoral process and operations.¹⁷⁸

As earlier discussed in Chapters 1 and 2, the incorporation of electoral technology was influenced by the recommendations made by the Kriegler Commission after the PEV that ensued after the 2007-2008 Kenyan presidential elections.¹⁷⁹

Subsequent to the recommendations by the Kriegler Commission, electoral reforms became necessary in order to provide a framework on the use of technology. Parliament through legal¹⁸⁰ and institutional framework sought to entrench technology in the electoral management system.¹⁸¹

In 2010, the Interim Independent Electoral and Boundaries Commission (IIEBC) which had been formed to oversee the referendum oversaw the pilot test of by registering voters using technology in eighteen constituencies around the country.¹⁸² This was principally aimed at examining the

¹⁷⁷ Ben Sihanya (2017) "Conduct of IEBC Commissioners key to just 2017 General Elections," Vol. 1 Issue 8, The Advocate, Law Society of Kenya Magazine, at 8. Cf. The Independent Electoral and Boundaries Commission, The Evaluation Report for the August 8 2017 General Election and the Fresh Presidential Election held on 26th October 2017, 137.

¹⁷⁸ Chapter 7 of the Constitution provides the legal framework governing the elections in Kenya. Articles 81 and 86 of the Constitution of Kenya 2010 establishes the principle of free and fair elections as the cornerstone of the electoral system in Kenya. Cf. Ben Sihanya *Constitutional Democracy in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

¹⁷⁹ Sihanya, Ben (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.* Cf. Government of Kenya (2008) "The Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007," *op. cit.* Cf. Ben Sihanya *Constitutional Democracy in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

¹⁸⁰ Elections Act No. 24 of 2011. Cf. Ben Sihanya *Constitutional Democracy in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

¹⁸¹ Otieno Odek (2017) "Election Technology and the Concept of "Did the Irregularity Affect the Result of the Elections?" <<https://www.judiciary.go.ke/wp-content/uploads/2017/12/LIST-OF-AUTHORITIES-DR.EKURU-AUKOT.pdf>> (accessed 6/2/2019).

¹⁸² Ben Sihanya (forthcoming 2021) "Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements," in Ben Sihanya *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 21). Cf. The Independent Electoral and Boundaries Commission (2017) "The Evaluation Report for the August 8 2017 General Election and the Fresh Presidential Election held on 26th October 2017," at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjgG2mbHiAhUFzIUKHdQCAi00FjAAegQIABAC&url=https%3A%2F%2Fwww.cartercenter.org%2Fresources%2Fp>

efficacy and accuracy of the technology in voter registration *vis-a-vis* the existing manual registration. Technology was also deployed in the transmission of results. The results show that the same was efficient and accurate if used correctly and would be fundamental in reduction of anomalies such as multiple registration of voters.¹⁸³

The Elections Act No. 24 of 2011 was enacted by Parliament providing the statutory framework governing elections and in this instance the incorporation of technology in the electoral management system.¹⁸⁴ The Election (General) Regulations 2012 were subsequently enacted by the IEBC to provide for the procedural mechanism governing elections as provided by the Constitution¹⁸⁵ which underpins the principle of transparent, credible, free, and fair elections. In other words, the technology adopted by the electoral body had to be simple, accurate, verifiable, secure, accountable and transparent.

Section 44 of the Election Act 2011 then conferred powers on the IEBC to adopt technology that it would deem fit to apply in the electoral management system.¹⁸⁶ The Act did not specify which technology the IEBC would adopt during elections leaving that discretion for IEBC with the assistance of technological experts to choose whichever proper for a particular election.

Put differently, the Elections Act did not provide clear legal route to be applied in the adoption of technology in elections. The Elections Act 2011 did not prepare for the event the electoral technology failed and thus failed to prepare a backup in the event this failure occurred.

The IEBC on its part delayed publishing the regulations effecting Section 44A leading to the uncertainty of how the application of a complimentary system was to be actualized. This led to

[dfs%2Fnews%2Fpeace_publications%2Felection_reports%2Fkenya-2017-final-election-report.pdf&usg=AOvVaw0SoXJwR9Z3m18MCbun5HhR](#) (accessed 6/2/2019) .

¹⁸³ *ibid.*

¹⁸⁴ Elections Act No. 24 of 2011. Cf. Ben Sihanya (forthcoming 2021) “Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” in Ben Sihanya *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 21).

¹⁸⁵ Chapter 7 Constitution of Kenya 2010. Cf. Ben Sihanya (forthcoming 2021) “Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” in Ben Sihanya *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 21).

¹⁸⁶ Section 13(3) Election Act 2011. Cf. Ben Sihanya (forthcoming 2021) “Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms,” in Ben Sihanya *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 20).

NASA¹⁸⁷ going to court on grounds that IEBC was unable to make the necessary preparations to establish the complimentary to electronic results transmission (ERTS) and the electronic voter identification (EVID) system. NASA sought three prayers. The first prayer was IEBC provide a clear clarification on whether section 44A of the Elections Act 2011 provided for a electronic or mechanical complimentary system.¹⁸⁸

Second, they sought clarification whether the IEBC established the complimentary mechanism sixty days to the election date which was August 8, 2017. Third, that IEBC be compelled to use electronic voter identification and result transmission exclusively as per provisions of Articles 23 and 47 of the Constitution of Kenya 2010. IEBC, being the respondent in the case, raised the argument that NASA's application did not have any merit failing to answer any of the issues raised by NASA substantially.¹⁸⁹

The Election (General) Regulations 2012 were intended to lay out a detailed procedure of incorporating technology in the elections and address the legal gaps that the Election Act had failed to address.¹⁹⁰ The Election (General) Regulations 2012 thus envisaged biometric registration, electronic voting¹⁹¹ and electronic transmission of results.¹⁹²

The IEBC adopted the Biometric Voter Registration System (BVRs), Electronic Voter Identification System (EVID) and the Results Transmission System (RTS) in the 2013 general elections principally as a stand-alone system. The IEBC further introduced the Political Party Nomination System (PPNS) which was applied in the political party nominations.

¹⁸⁷ *National Supper Alliance v. Independent Electoral and Boundaries Commission*, Petition No. 328 of 2017.

¹⁸⁸ Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," in Ben Sihanya *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 20).

¹⁸⁹ *ibid.*

¹⁹⁰ *John Harrison Kinyanjui v The Independent Electoral and Boundaries Commission & 4 Others*, Constitutional Petition No. 555 of 2012 In the High Court of Kenya at Nairobi Constitutional and Judicial Review Division (2013) eKLR.

¹⁹¹ Section 60 Elections (General) Regulations 2012. Cf. Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," in Ben Sihanya *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 20).

¹⁹² Section 82 Elections (General) Regulations 2012. Cf. Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," in Ben Sihanya *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 20).

It is noteworthy that at this point before the 2013 general elections, the wave of becoming technological was on the rise and the public had the confidence that technology in the elections would guarantee free and fair elections and further avert violence if the same was well employed in the electoral management system.¹⁹³ Public expectations were substantially hinged on substantial reform to the result management framework of the electoral system.

The IEBC adopted the Biometric Registration (BVR) System in the 2013 elections which basically consist of a computer finger prints scanners and cameras. The BVR machine is used to capture the bio-data of a voter and particularly the finger prints to ensure authenticity of a voter and increase transparency in elections.¹⁹⁴ The biometric information of voters was stored in an electronic register supplemented by the principal register.¹⁹⁵ Further, the electoral body was required to ensure that an electronic register is placed on its website for access and verification by voters as the same would enhance public trust and confidence in the electoral system.¹⁹⁶

Despite the deployment of BVR in elections, it faced numerous challenges. Pronounced concerns were raised regarding its procurement and acquisition leading to legal contentions as it was in the case of *Okiya Omtatah Okoiti v. Attorney General and Another*.¹⁹⁷ The Applicant sought an injunction to have the IEBC barred from acquiring BVR kits from Safran Morpho on account of allegations of corruption levelled against the said Safran Morpho.¹⁹⁸

There were concerns over its integrity of the register principally predicated on the allegations that the biometric information had been interfered with.¹⁹⁹ The late registration of voters occasioned by late procurement of BVR kits had major impact on the registration of voters.

¹⁹³ Ben Sihanya (forthcoming 2021) “Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms,” *op. cit.* Cf. Vellah Kidogo (2018) “*The Adoption of Technology in the Kenyan Electoral Process: Lessons from the 2013 and 2017 Presidential Elections*,” at https://www.academia.edu/37884440/Kenya_The_Adoption_of_Technology_in_the_Kenyan_Electoral_Process.docx (accessed 25/4/2019)

¹⁹⁴ Ben Sihanya (forthcoming 2021) “Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” *op. cit.* Cf. Ole Holtved (2011) “Biometrics in Elections, Georgia: De-duplication or Voter Register and Verification of Voter Identity Using Biometrics,” at https://www.ifes.org/sites/default/files/biometrics_in_elections_2011_0.pdf (accessed 25/4/2019).

¹⁹⁵ Sections 3 and 4 Elections Act 2011. Cf. Ben Sihanya (forthcoming 2021) “Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms,” *op. cit.*

¹⁹⁶ *Ibid.*, s 33.

¹⁹⁷ Petition 311 of 2012, In the High Court at Nairobi 2012 eKLR.

¹⁹⁸ *ibid.*

¹⁹⁹ The Carter Centre (2013) “Observing Kenya’s March 2013 National Elections,” at (https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-final-101613.pdf) (accessed 26/4/2019).

Consequently, the processes such as inspection and publication of registers were delayed thereby breeding mistrust, suspicion, contempt and dearth of public confidence in the electoral technology.²⁰⁰

The IEBC also deployed the Electronic Voter Identification System (EVID) in the 2013 presidential elections which basically consist of an electronic poll book which verifies and confers voters electronically as registered by the BVR.²⁰¹ The EVID had its own challenges too. First, it was viewed with lots of mistrust on account that it contained information registered by BVR which the public had believed to be corrupted. Secondly, the EVID machines failed in most polling stations despite heavy investment by IEBC in them.²⁰²

The circumstances leading to the acquisition of the machines were controversial and heavily disputed.²⁰³ The International Foundation of Electoral System (IFES) had raised concerns over the capacity of Face Technologies to supply the EVID kits, and contended that to allow them to proceed with the same would negate the public interest.²⁰⁴ However, the IEBC went ahead to acquire and use the kits the kits.²⁰⁵

The challenges encompassing EVID kits were further amplified by the fact that a number of polling stations had no electricity. Laptops, cameras and phones ran out of power charge. There were in adequate preparations on the same and as such the IEBC had to revert to manual system of identification of voters.²⁰⁶ It suffices to say therefore that the failure by the EVID during 2013 elections vitiated the adoption of technology. This was amplified by the pronounced concerns that the system had been hacked and corrupted thereby devoid of integrity and reliability.²⁰⁷

The IEBC further deployed the Results Transmission System (RTS) in the 2013 general and presidential elections. Basically, the RTS was purposed to transmit results from the polling

²⁰⁰ *ibid.*

²⁰¹ Ben Sihanya (forthcoming 2021) “Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” *op. cit.*

²⁰² *ibid.*

²⁰³ Ben Sihanya (forthcoming 2021) “Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms,” *op. cit.*

²⁰⁴ *ibid.* Cf. Joel Barkan, (2013) “Kenya’s 2013 Elections: Technology is not Democracy,” (2013) 24(3) *Journal of Democracy* 156.

²⁰⁵ *ibid.*

²⁰⁶ Ben Sihanya (2017) “Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms,” *op. cit.*

²⁰⁷ *ibid.*

stations to the tallying centres once the electoral results had been counted and tabulated. This was aimed at preventing electoral malpractices such as doctoring of results and ballot stuffing that had characterized previous elections like the disputed 2007 elections.

Unfortunately, the RTS also failed on the election day of 2013.²⁰⁸ It failed to transmit results to the various tallying centres and particularly the presidential results to the national tallying centre. This was coupled by the lack of clarity in so far as the tabulation of hard copies of the results are concerned. This led to manifest anxiety and tension in the country.²⁰⁹

The IEBC servers were also reported to have broken down.²¹⁰ Some election officials did not have pins to enable them access the system majorly due to unpreparedness for the task. The results could not be uploaded. Blame game flew here and there as mistrust and tension built up. The IEBC while faced with the RTS failure quagmire reverted to the manual system. The election staff opted for the use of excel spreadsheets in place of the database systems.²¹¹

This led to numerous errors and rectifications and some circumstances occasioning the printing of parallel polling forms for the same electoral area. It should be noteworthy that whereas the results transmitted electronically were to be deemed provisional, the essence of technology in elections was to ensure transparency in the electoral management system. This objective was never achieved as well.²¹²

Pursuant to article 138(10) of the Constitution of Kenya 2010, a cut off period of seven days is provided for the declaration of presidential elections results. The Elections (General) Regulations 2012 laid down the procedure for counting, tallying, transmission and publication of results including those of presidential results. The results were to be counted and declared at each

²⁰⁸ Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.* Cf. KNCHR (2013) "Elections: Safeguarding Rights, An Account of Hotspots, Elections 2013," *op. cit.*

²⁰⁹ Ben Sihanya (forthcoming 2021) "Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements," *op. cit.* Cf. Karen E Ferree, Clark C Gibson and James D. Long (2014) "Voting Behavior and Electoral Irregularities in Kenya's 2013 Election," 8(1) *Journal of Eastern African Studies* 153; Nic Cheeseman, Gabrielle Lynch and Justin Willis (2014) "Democracy and Its Discontents: Understanding Kenya's 2013 Elections," 8(1) *Journal of Eastern African Studies*.

²¹⁰ Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.*

²¹¹ *ibid.*

²¹² Ben Sihanya (forthcoming 2021) "Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements," *op. cit.*

polling station and sequential tallying at the constituency levels, county level and at the national level.²¹³

Most election staff and particularly the Constituency Returning Officers did not comply with this regulation. They instead rushed to tender physical results of presidential elections to the national tallying centre.²¹⁴

The issues of want of integrity in the electoral technology and failure thereof in 2013 have been vindicated. The issues have been litigated in various judicial forums. The African Centre for Open Governance (AFRICOG) in the case of *African Centre for Open Governance (AFRICOG) V Ahmed Issack Hassan & Another*²¹⁵ argued that the manual reversal subsequent to the failure of RTS was undermining the credibility and transparency of the electoral process and sought to have the High Court halt the manual tallying and tabulation of results.²¹⁶

Raila Odinga, who was one of the presidential candidate approached Supreme Court in the case of *Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 Others*.²¹⁷ The Petitioner's argued that the election was not free and fair and contented that the failure of technology during the presidential election process amongst other grounds had rendered the election null and void. The main argument was based on the failure of technology during the election process. The Supreme Court however dismissed the Petition on the account that the adoption of technology in electoral process did not replace the manual system but complemented it.²¹⁸

The decision of the Supreme Court was that the adoption of technology was to increase efficiency in the electoral system but could not guarantee an accountability and credibility of the elections.²¹⁹ They further opined that the adoption of technology was principally unconnected to

²¹³ Independent Electoral and Boundaries Commission Post Election Evaluation Report on the 4th March 2013 General Elections (October 2013).

²¹⁴ *ibid.*

²¹⁵ Petition No. 152 of 2013, In the High Court of Kenya at Nairobi (2013) EKLR. Cf. Ben Sihanya (forthcoming 2021) "Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements," *op. cit.*

²¹⁶ *ibid.*

²¹⁷ Petition No.5 of 2013, In the Supreme Court of Kenya at Nairobi (2013) eKLR. Cf. Ben Sihanya (forthcoming 2021) "Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements," *op. cit.*

²¹⁸ Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.*

²¹⁹ *ibid.*

the official results and as such an election could not be annulled on the ground of failed technological devices.²²⁰

As indicated hereinabove, the issue of failure and lack of integrity in the technology adopted by the IEBC in 2013 general elections came to fore in various election petitions. For example, in the case of *Thomas Musau v. IEBC & another*,²²¹ the election petition against election of the Matungulu Constituency National Assembly Member was allowed on the grounds that there were widespread election malpractices including but not limited to the lack of integrity in the tabulation process of results.²²²

In an interview with Peter,²²³ who is an election expert, observed the use of technology in 2017 elections as follows;

“There was massive failure of technology employed in the 2013 elections. This had been coupled by the allegations that all range of technology had been corrupted thereby leading to pronounced suspicion, mistrust and loss of public interest. Everything was done openly and transparently. It did cast doubt on its reliability and integrity.”²²⁴

3.3 The Road to Kenya’s 2017 Presidential Elections: Did we Learn Lessons on Technology?

After the challenges and critiques on the failure of the use of technology in the 2013 presidential elections, the citizenry still had hopes that technology would be made effective in the 2017 presidential elections so as to guarantee the credibility of the electoral management system.²²⁵

Following the 2013 presidential elections, there were questions raised on the procurement of the technology by the IEBC. Instructively, the National Assembly asked the Auditor General to conduct an audit on the electronic devices employed by the IEBC.²²⁶ The Special Investigation Report on the Procurement of Electronic Voting Devices for 2013 General Elections observed

²²⁰ Petition No.5 of 2013, In the Supreme Court of Kenya at Nairobi (2013) eKLR.

²²¹ HC EP No. 2 of 2013.

²²² Ben Sihanya (forthcoming 2021) “Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms,” *op. cit.*

²²³ Interview with Peter on 16th March 2019.

²²⁴ Peter Interview excerpts as held on on 8th March 2019.

²²⁵ Government of Kenya (2014) “Special Audit on Procurement of Electronic Voting Devices for 2013 General Elections by the Independent Electoral and Boundaries Commission,” Government Press, Nairobi

²²⁶ *ibid.* Cf. Ben Sihanya (forthcoming 2021) “Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” *op. cit.*

vide a report that the procurement of the electronic devices by IEBC was not only laden with corruption but also had been grossly inflated and the single sourcing of the same from the Canadian Government and the Morpho Canada was not transparent.²²⁷

The electoral events of the 2013 elections generally undermined public trust and confidence leading to call for reconstruction and reforms of IEBC.²²⁸ Many political actors sought for the resignation of the IEBC Commissioners to allow for commencement of electoral reforms.²²⁹ One of the key areas that necessitated reforms were the use and adoption of technology in elections and particularly how the same were to be applied in the 2017 elections in light of the general public mistrust on the same. Instructively, much emphasis was put on the management of technology in the electoral system to ensure accountability and credibility principally drawing from the harsh lessons of 2013.²³⁰

Following calls for electoral reforms, a Joint Parliamentary Select Committee was formed to look into issues concerning the 2013 elections.²³¹ The Committee²³² in a bi-partisan process recommended legal and institutional reform to ensure that the mishaps of 2013 did not reoccur and that electoral technology was correctly used in the forthcoming elections.²³³

Following the Committee's recommendations on the use of technology, the Election Act was amended requiring the IEBC to establish an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.²³⁴ This was designed to integrate all the processes under the Kenya Integrated Election Management System (KIEMS).²³⁵ The IEBC was further tasked with the responsibility of

²²⁷ Government of Kenya (2014) "Special Audit on Procurement of Electronic Voting Devices for 2013 General Elections by the Independent Electoral and Boundaries Commission," *op. cit.*

²²⁸ Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.*

²²⁹ *ibid.*

²³⁰ The Independent Electoral and Boundaries Commission, The Evaluation Report for the August 8 2017 General Election and the Fresh Presidential Election held on 26th October 2017, page 137.

²³¹ *ibid.*

²³² Ben Sihanya (forthcoming 2021) "President and Prime Minister in Kenya and Africa," *op. cit.* Cf. The Report of the Joint Parliamentary Select Committee on the Matters Relating to the IEBC, 2017.

²³³ *ibid.*

²³⁴ Ben Sihanya (forthcoming 2021) "Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements," *op. cit.* Cf. International Foundation for Electoral Systems, '2017 General Elections: Frequently asked Questions' (July 20, 2017).

²³⁵ National Crime Research Centre (2017) "Elections Without Disruption: Picking-Out Disruptive Events of 2017 General Elections in Kenya," at. <<http://crimeresearch.go.ke/wp-content/uploads/2018/05/Rapid-Assesment-Report-on-the-August-2017-General-Elections-in-Kenya.pdf>> accessed 10 November 2018 (accessed 1/5/2019).

developing a policy that allowed the effective use of technology to improve the presidential electoral system in Kenya by providing transparent, accountable, accurate, simple and secure elections.²³⁶

The Election Act further mandated the IEBC would procure and put in place the necessary technology for conducting general elections at least eight months before.²³⁷ The technology adopted would be restricted to voter registration, identification and result transmission. This did not include electronic voting. The IEBC was required to test, verify and deploy such technologies at least 60 days before the presidential elections could be conducted to enhance its reliability.²³⁸

The IEBC was mandated to establish a technical committee on technology with the mandate to integrate electoral technology in presidential elections in Kenya. The IEBC was further required to formulate the regulations that would govern the use of information technology in the elections, which were formulated in 2017 as the Elections (Technology) Regulations, 2017.²³⁹

Parliament later introduced further amendments to the Election Act through the Elections Laws Amendment Act 1 of 2017.²⁴⁰ The first amendment was related to the procurement of technology system and required the IEBC to establish the use of electoral technology required to conduct the general elections at least 120 days before the said elections unlike the previous law which had stipulated eight months. This was basically to instill transparency and confidence in the procurement of technology and cure the mistrust that had characterized the 2013 general elections.²⁴¹

Secondly, the 2017 amendment did amend Section 6A of the Elections Act 2011 by reducing the days required for verification of voters biometric information from ninety days to sixty days before the presidential and general elections. This was to enable the IEBC comply with the strict

²³⁶ Ben Sihanya (forthcoming 2021) “Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” *op. cit.*

²³⁷ Ben Sihanya (forthcoming 2021) “Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms,” *op. cit.*

²³⁸ *ibid.*

²³⁹ Section 44The Elections Act 2011.

²⁴⁰ Ben Sihanya (forthcoming 2021) “Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” *op. cit.*

²⁴¹ *ibid.*

timelines and ensure that the register of voters were credible.²⁴² A petitioner in the case of *Kenneth Otieno v. Attorney General & Another*,²⁴³ sought to have High Court declare section 6A of the Elections Act unconstitutional as the strict deadlines would impede the credibility of the elections. The Court however disagreed with him and opined that indeed section 6A of the Elections was constitutional and it was incumbent on the IEBC to ensure that it had met its deadlines.²⁴⁴

The 2017 amendments further amended section 8A of the Election Act and recommended the audit of voter's register to ensure its integrity and credibility. Whereas the application of BVR may ensure that a registered voter does not register twice, there are some instances where the use of BVR may not cure such irregularities. An audit of the voters register is therefore necessary in light of the pronounced concerns following the 2013 general elections. For instance, in Venezuela, it was reported that than one million voters had been registered twice through the BVR. The audit therefore helps therefore cure such electoral fraud and malpractices.

Consequently, the KPMG was appointed by the IEBC to carry out an audit of the voters roll in line to Section 8A of the Elections Act.²⁴⁵ However, the appointment of KPMG and the audit itself were faced with controversy. There were claims of lack of transparency, a number of audit irregularities including the deceased appearing on the voter registrar were unearthed.²⁴⁶ There were also unexplained transfers, duplicate registrations, invalid IDs and passport numbers, missing data amongst other inadequacies were brought to fore.²⁴⁷ These prominent issues concerns as to the validity of the voters' registrar were never remedied thereby creating further uncertainty ahead of the 2017 elections.²⁴⁸

²⁴² *ibid.*

²⁴³ Petition 127 of 2017, In the High Court of Kenya at Nairobi.

²⁴⁴ Ben Sihanya (forthcoming 2021) "Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements," *op. cit.*

²⁴⁵ KPMG (2017) "Independent Audit of the Register of Voters," <<https://home.kpmg.com/content/dam/kpmg/ke/pdf/rc/ita/iebc-stakeholder-presentation-13-april-17.pdf> > (accessed 8/5/2019).

²⁴⁶ Patrick Vidija (2017) "Over One Million Dead Voters Could be in IEBC Register, KPMG Says in Audit Report," at <https://www.the-star.co.ke/news/2017/06/09/over-one-million-dead-voters-could-be-in-iebc-register-kpmg-says-in_c1577635> (accessed 8/5/2019)..

²⁴⁷ AFRICOG (2017) "Ready or Not? The Register of Voters: Where we are One Week Ahead of Election Day," at <https://africog.org/wp-content/uploads/2017/08/Ready-Or-Not3_Registration-of-Voters_Final1.pdf> (accessed 8/5/2019).

²⁴⁸ *ibid.*

The Elections (Amendment) Act 2017 further conferred powers on the IEBC discretion to adopt a complimentary mechanism to help identify voters and transmit results more effectively.²⁴⁹ Basically section 44A of the Elections Act 2011 sought to remedy challenges that the IEBC had faced during the 2013 elections.

It had been contented that in the event of technological failure, a reversal to manual backup would occur and help facilitate the identification of voters whose biometrics could not be identified by the EVID.²⁵⁰ That notwithstanding, Section 44A of the Election Act did not define what complementary mechanism IEBC was to put in place and whether same implied the old manual system as it was argued that technology may fail in circumstances.²⁵¹

It was envisaged that the complementary mechanism in addition to the electronic system would be defined by the Regulations.²⁵² This created doubt as to the reliability and probity of the presidential elections exercise. The passing of the impugned amendments were disputed by the opposition members of parliament.

Unsatisfied with these amendments, the opposition coalition NASA proceeded to court in the matter *NASA v. IEBC & 2 Others*.²⁵³ They contended that due to time restrictions, the electoral body was unable to set up a complementary mechanism. They argued that in all circumstances, the elections of 2017 be deemed electronic and sought that IEBC do set up an electronic back up instead of manual back up. The High Court dismissed the petition.

On appeal, the Court of Appeal in disagreeing with NASA opined that the meaning of complementary mechanism envisaged was that system that would ensure that no eligible voter who is registered was left out of the voting because the voter's biometrics could not be identified

²⁴⁹ Section 44A stipulates that notwithstanding the provisions of section 39 and section 44 of the Act, the Commission shall put in place a complementary mechanisms for identification of voters and transmission of elections results that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution.

²⁵⁰ This would also apply in case of failure of the electronic results transmission system. Cf. Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.*

²⁵¹ Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.* Cf. Nic Cheeseman, Gabrielle Lynch and Justin Willis (2018) "Digital Dilemmas: The Unintended Consequences of Election Technology," 25 (8) *Journal Democratization* 1397.

²⁵² Section 109 Elections Act 2011.

²⁵³ *National Super Alliance (NASA) Kenya v. Independent Electoral and Boundaries Commission & 2 Others* Civil Appeal No. 258 of 2017, In the Court of Appeal at Nairobi (2017) eKLR.

or the results could not be transmitted because of an electronic failures of a system as enshrined in Article 38(2) and (3) of the Constitution.²⁵⁴

The Court in the case of *Independent Electoral & Boundaries Commission v. Maina Kiai & 5 Others*,²⁵⁵ opined on the primacy, finality and fundamental importance on the results declared at the polling station. It posited that the electronic transmission of the already tabulated results from the polling stations, contained in the prescribed forms, is a critical way of safeguarding the accuracy of the outcome of elections.

From the interpretation of court, the import of Section 44A of the Election Act therefore conferred discretion on the IEBC the statutory discretion to use a complementary mechanism where there is failure of technology or the same deployed was unable to meet the constitutional threshold. This discretion was viewed with suspicion as an attempt to rig through the electronic technology by members of the opposition.

Regulation 87(2)(c) was introduced to have results transmitted electronically deemed as only provisional, raising further concern in the election technology as this brought to fore as to whether the transmitted results had legal status.²⁵⁶ Regulation 87(2) (c) provides that the returning officer shall after the tallying of the votes at the constituency level announce the results, issue certificates to the person elected and electronically transmit the provisional results to the IEBC.

To further quell emerging concerns on the complimentary system, IEBC through Legal Notice No. 72 of 2017, and by dint of Regulation 69²⁵⁷ and 83 of the Elections (General) Regulations introduced the procedure to be followed in case there was failure of the technology on voter verification and transmission of results. Regulation 69 provided that incase a voter could not be identified by biometrics.

3.4 Electoral Technology in Kenya

The Election Act as amended in 2016 and 2017²⁵⁸ established election technology in the following folds namely the Biometric Voter Registration (BVR); the Electronic Voter

²⁵⁴ *ibid* Para 23.

²⁵⁵ Civil Appeal No. 105 of 2017, In the Court of Appeal at Nairobi (2017) eKLR.

²⁵⁶ As contended by the IEBC in the Presidential Petition No. 1 of 2017, para 61.

²⁵⁷ *ibid*.

²⁵⁸ Sections 6 (A) 3 (b), 39, 44 and 44 A of the Elections Act.

Identification (EVI); the Electronic Transmission of Results (ETR); the Kenya Integrated Elections Management System (KIEMS) and the On-line publication of the Register of Voters; and the Publishing polling result forms of presidential elections on an online public portal maintained by the Commission.

The IEBC contracted KPMG to provide the services of an independent professional firm to audit the electoral register of voters (ROV). This was after a consensus reached by political parties²⁵⁹ in 2016 and the subsequent amendments to the Elections Act 2011, section 8A of the Election Laws (Amendment) Act, No. 36 of 2016. However, the Coalition for Reforms and Democracy (CORD) contested this decision by the IEBC advancing three key arguments.²⁶⁰

First, that at the time of awarding the tender to KPMG, IEBC had no Commissioners in office.²⁶¹ And that the audit subject of the impugned decision being a policy issue within the ambit of the Commissioners mandate and could not be conducted in the absence of Commissioners. Second, that in awarding the tender for the audit of the register of voters, IEBC proceeded without consultation and or engagement with the stakeholders including political parties including in designing the criteria and or the methodology for the audit. And third, that KPMG was incompetent as it had never audited a register of voters in Kenya or elsewhere before.²⁶²

Nevertheless, the register of voters was audited by KPMG. The objective of the audit was three pronged: First, to verifying the accuracy of the register. Second, to recommend mechanisms of enhancing the accuracy of the register. And third, to update the Register. The KPMG report indicated that about one million dead voters were still in the register.²⁶³ As at July 2017, a few

²⁵⁹ This was through the part of issues that were discussed by a 14-member (bi-partisan) Parliamentary Committee that looked into the exit of the reform of electoral laws, including the Isaac Hassan-led team. See *Report by Joint Parliament Select Panel on Electoral Reforms*, 2017.

²⁶⁰ Ben Sihanya (forthcoming 2021) “Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” *op. cit.*

²⁶¹ The Commissioners had been removed following street demonstrations and picketing. See Nation Team (2016) “Death, violence mar protests against IEBC,” *Daily Nation*, Nairobi, 7/62017. Cf. Ben Sihanya (forthcoming 2021) “Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” *op. cit.*

²⁶² *Republic v. Independent Electoral & Boundaries Commission & Another Ex Parte Coalition for Reforms and Democracy*, Misc. Application No. 648 of 2016 (Chacha Mwita, J).

²⁶³ *NASA v. IEBC*. Cf. Ben Sihanya (forthcoming 2021) “Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” *op. cit.*

days to elections, IEBC had not taken a step of deleting the names of dead voters from the register.²⁶⁴

3.5 Elections (Technology) Regulations 2017

Due to the relevance of technology in the Kenyan electoral process, regulations governing the adoption and application of technology were long overdue. Subsequently in 2017, the IEBC formulated the Elections (Technology) Regulations 2017 and the same were thereafter adopted by parliament. Section 2 of the Elections (Technology) Regulations, 2017, defined an election technology as “a system that includes a biometric voter registration system, a biometric voter identification system, a system that enables the nomination and registration of candidates and electronic results transmission system.”²⁶⁵

This definition also embodied the Kenya Integrated Elections Management System (KIEMS). The Regulations were enacted to govern the security, data availability, accuracy, integrity and accountability of the elections.

Regulations 21, 22 and 23 mandated the IEBC to publish vide a public notice polling stations lacking network coverage within 45 days to the election. This information was published one day before the elections contrary to the 45 day requirement throwing further doubt on the IEBC. According to the publication, over 11, 155 polling stations lacked 4G/3G network coverage.²⁶⁶ As a result, the Presiding officers had been instructed to move to a better signal and use satellite phones to transmit data to the tallying centres. This brewed discontent and mistrust amongst political stakeholders.²⁶⁷

Despite the key legal amendments, the period prior to the 2017 general elections was characterized by a number of events that were similar to what happened prior to the 2013 general

²⁶⁴ Nzau Musau (2017) “Why dead voters are still haunting the IEBC register,” *Standard Digital*, Nairobi, 25/6/2017, at <https://www.standardmedia.co.ke/article/2001244744/why-dead-voters-are-still-haunting-the-iebc-register> (accessed 27/7/2017)

²⁶⁵ Section 2 of the Elections (Technology) Regulations, 2017.

²⁶⁶ Odipo Riaga (2017) “Something is Not Adding up with the IEBC List Of Polling Stations that Lack 4G/3G Networks,” at <http://chetenet.com/2017/08/06/iebc-list-of-polling-stations-that-lack-4g3g-networks/> (accessed 13/4/2019).

²⁶⁷ The Independent Electoral and Boundaries Commission, *The Evaluation Report for the August 8 2017 General Election and the Fresh Presidential Election held on 26th October 2017*, page 145.

elections that undermined technology. This raised concerns over the integrity of the use of technology in the presidential elections by the IEBC.²⁶⁸

3.6 2017 Presidential Elections in Kenya

The 2017 Kenyan presidential election was a much anticipated elections. The elections can be classified as one of the unique elections that stood out in the History of Kenyan presidential elections.²⁶⁹ This is due to at least three definitive issues.

As demonstrated in the preceding paragraphs, there have been public unrest and discontent following the 2013 general elections.²⁷⁰ This was partly attributed to the various scandals accompanied by the misappropriation of public funds as well as industrial unrests.²⁷¹ After the 2013 presidential elections, the opposition and a vast majority of its supporters still held the view that the Uhuru Kenyatta led coalition had in fact rigged them out.²⁷² The opposition had therefore opted to keep the day's government in check.²⁷³

During this period, there were also calls for referendum²⁷⁴ which were thwarted by IEBC.²⁷⁵ IEBC cited two reasons for refusing to grant the opposition's request for a referendum. First, the Commission claimed that the signatures submitted were forged. This was despite the absence of

²⁶⁸ See Ben Sihanya (forthcoming 2021) "Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements," *op. cit.*

²⁶⁹ *ibid.*

²⁷⁰ Dennis Onyango & Stanley Ongwae (2014) "President Uhuru Kenyatta tells CORD to stop blame games," *The Standard* Newspaper, (June 8, 2014) at <https://www.standardmedia.co.ke/article/2000123956/president-uhuru-kenyatta-tells-cord-to-stop-blame-games> (accessed 21/2/2019). Cf. Geoffrey Mosoku (2014) "We won't keep quiet, CORD tells Deputy President Ruto over urge to wait till 2017," *The Standard* Newspaper, July 21, 2014, at <https://www.standardmedia.co.ke/article/2000128932/we-won-t-keep-quiet-cord-tells-deputy-president-ruto-over-urge-to-wait-till-2017?pageNo=2> (accessed 21/2/2019).

²⁷¹ Dorothy Otieno (2017) "11 mega scandals that hit the Jubilee Government," *Daily Nation* Newspaper, February 6, 2017, at <https://www.nation.co.ke/newsplex/jubilee-scandals/2718262-3802442-m5abehz/index.html> (accessed 21/2/2019).

²⁷² Duncan Okubasu (2017) "Lessons for Sub-Saharan Africa from Kenya on Electoral Reforms: The Role and Limitations of the Law," 16(2), *Election Law Journal: Rules, Politics, and Policy*, 306-315.

²⁷³ William Mwangi (2015) "Raila promises to keep state in check in 2016, cites Eurobond, insecurity," *The Star*, Newspaper, (December 31, 2015), at https://www.the-star.co.ke/news/2015/12/31/raila-promises-to-keep-state-in-check-in-2016-cites-eurobond_c1268262 (accessed 22/2/2019).

²⁷⁴ Felix Olick (2015) "Okoa Kenya referendum journey kicks off," *The Star* Newspaper, (November 9, 2015), at https://www.the-star.co.ke/news/2015/11/09/okoa-kenya-referendum-journey-kicks-off_c1238873 (accessed 22/2/2019).

²⁷⁵ Issac Ongiri (2016) "Opposition leaders accuse IEBC of sabotaging Okoa Kenya referendum," *The Star* Newspaper, (March 15, 2016), at <https://www.nation.co.ke/news/politics/IEBC-Okoa-kenya-raila-odinga-/1064-3117952-e5ksy/index.html> (accessed 22/2/2019).

specimen signatures to compare against. The second reason was that there was no explicit referendum law in place. These actions by the IEBC led to the second issue.²⁷⁶

Second, as has been shown above, the period leading to the elections was preceded by various demos and calls for electoral reform, legal amendments, and institutional restructuring as well constitutional litigations.²⁷⁷ This was dominated by persistent calls for electoral reforms and removal of IEBC Commissioners.²⁷⁸ A bipartisan parliamentary bipartisan committee was formed and came up with a raft of recommendations in a bid to reform the electoral process.²⁷⁹

Third, constitutional litigation, unlike the previous elections, the constitutionality of various electoral laws as well as actions of the various office holders were tested.²⁸⁰ The following key issues were litigated in court, among others. First, the declaration of presidential election results at the constituency level. This matter was litigated at both the High Court²⁸¹ and in the Court of

²⁷⁶ Eric Shimoli (2016) "CORD's Okoa Kenya drive signatures rejected," *Daily Nation* Newspaper, (March 23, 2016), at <https://www.nation.co.ke/1148-3132244-14mti8t/index.html> (accessed 22/2/2019).

²⁷⁷ Ben Sihanya (2017) "Electoral Justice in Kenya under the 2010 Constitution implementation, enforcement, reversals and reforms," Vol 13 Issue 1, *Law Society of Kenya Journal* 1-30.

²⁷⁸ Abdullahi Boru Halakhe & Abdirahim Abubakar Mohamed (2018) "Making Sense of Kenya's Contested 2017 Election," *Social Sciences Research Network*.

²⁷⁹ Ben Sihanya (2017) "Electoral Justice in Kenya under the 2010 Constitution implementation, enforcement, reversals and reforms," Vol 13 Issue 1, *Law Society of Kenya Journal* 1-30. Cf. Abdullahi Boru Halakhe & Abdirahim Abubakar Mohamed (2018) "Making Sense of Kenya's Contested 2017 Election," *Social Sciences Research Network*. The Parliamentary committee members agreed on an audit of the voters register by an international audit firm. And second, the committee suggested a constitution of a nine member panel to recruit new members of the Independent Electoral and Boundaries Commission (IEBC). This paved way for law reform on electoral technology and the reconstitution of the IEBC which took place barely a year to the elections. There were a host of legislative amendments such as the Elections Laws (Amendment) Act 2016, the Election Offences Act 2016 and key subsidiary legislation such as the Elections Technology (Regulations) 2017 that entrenched an array of electoral reforms in law on 4th October 2016.

²⁸⁰ There were at least 19 cases filed prior to the 2017 elections. they included *Coalition for Reforms and Democracy v. IEBC & KPMG*, JR case no 648 of 2016; *CORD v. IEBC & Others*, JR case no 637 of 2016; *ODM v. IEBC*, JR case no 625 of 2016; *Apollo Mboya v. IEBC & AG*, Petition No 162 of 2017; *Maina Kiai & others v. IEBC*, Petition No 168 of 2017; *NASA v. IEBC*, JR case no 378 of 2017; *NASA v. IEBC*, JR case no 238 of 2017; *Bado Mapandano Trust v. IEBC & AG*, Petition No 16 of 2017; *Gladwell Otieno v. IEBC*, JR Case No 447 of 2017; *NASA v. IEBC*, Petition No 328 of 2017; *Japhet Muroko v. IEBC & KPMG*, JR case no 153 of 2017; *Maina Kiai & others v. , JR case No 657 of 2016*; *CORD v. , JR case no 647 of 2016*; *IEBC v. NASA*, Civil Appeal no 224 of 2017; *IEBC v. Maina Kiai & others*, Civil Appeal no 105 of 2017; *AlGhurair Printing & Publishing v. CORD*, Civil Appeal no 63 of 2017; *Cecil James Oyugi v. IEBC & Another*, Petition no 241 of 2017; *CORD v. Speaker National Assembly & Others*, JR Case no 657 of 2016, *CORD v. IG of Police & others*, JR no 240 of 2016.

²⁸¹ *Maina Kiai, Khelef Khalifa and Tirop Kitur v. IEBC and the Attorney General*, Petition No. 207 of 2016.

Appeal.²⁸² Second, was a case challenging the award of ballot paper printing tender by the IEBC to Al Ghurair Printing and Publishing Llc.²⁸³

These cases were also heard at the Court of Appeal.²⁸⁴ Third, there was an application by the National Super Alliance (NASA) seeking declarations that voter identification and result transmission on August 8, 2017 be done purely electronically.²⁸⁵ And fourth, there was the case which challenged the validity of the gazettelement of two presidential candidates for the purposes of fresh elections as ordered by the Supreme Court in Presidential Petition No. 1 of 2017.²⁸⁶

The last definitive issue in the 2017 presidential elections is the nullification of the August 2017 presidential election results giving way to the subsequent October 2017 elections. Remarkably, 2013 marked the 1st General Election that saw the electoral management body embrace electoral technology. The above three definite issues made the August 2017 elections not only unique but also hotly contested.

In the 2017 presidential election, IEBC in compliance with the law embraced the Kenya Integrated Electoral Management System (KIEMS) that notably sought to integrate the Biometric Voter Registration (BVR), Electronic Voter Identification Devices (EVID), Results Transmission System (RTS) and Candidate Registration Systems that had initially been used during the 2013 presidential elections but had not worked properly.

In what was seen as a move to destabilize IEBC's use of technology,²⁸⁷ Mr Chris Musando, IEBC's ICT Manager was brutally murdered and the body dumped in a forest within Kiambu County.²⁸⁸ The brutal murder of the IEBC information technology manager who had played a key role in the electronic management of elections, created a lot of political uncertainty on the

²⁸² *Independent Electoral & Boundaries Commission v. Maina Kiai, Khelef Khalifa, Tirop Kitur, Attorney-General, Katiba Institute & Coalition for Reforms & Democracy*, Court of Appeal (CA) No. 105 of 2017.

²⁸³ *R. v. Independent Electoral & Boundaries Commission & 6 Others, ex parte National Super Alliance*, Judicial Review Application 378 of 2017.

²⁸⁴ *Independent Electoral & Boundaries Commission v. National Supper Alliance & 6 Others*, Court of Appeal (CA) 224 of 2017.

²⁸⁵ *National Supper Alliance v. Independent Electoral & Boundaries Commission*, Petition No. 328 of 2017.

²⁸⁶ *Dr Ekuru Aukot v. Independent Electoral & Boundaries Commission & 3 Others*, Petition No. 471 of 2017.

²⁸⁷ Nancy Agutu (2017) "NASA hacking claims serious, should be probed – EU observers," *The Star* Newspaper, (August 10, 2017), at https://www.the-star.co.ke/news/2017/08/10/nasa-hacking-claims-serious-should-be-probed-eu-election-observers_c1614033 (accessed 22/2/2019).

²⁸⁸ Kurgat Marindanyi (2017) "Chris Musando tortured before murder: Cousin asks tough questions," *The Star*, Newspaper, (July 31, 2017), at https://www.the-star.co.ke/news/2017/07/31/chris-musando-tortured-before-murder-cousin-asks-tough-questions_c1607857 (22/2/2019).

use of technology.²⁸⁹ His death raised suspicions and uncertainty on the outcome of elections and the reliability of the technology noting that it just occurred a few days to the general elections.

Although IEBC had deployed the electronic device, there were failures in a number of polling stations. During the transmission of the presidential results to the national tallying centre, the results transmission system failed again.²⁹⁰ Although IEBC had promised Kenyans before the elections that the system was secure and reliable, they had to revert to manual. IEBC later indicated that the transmission by the KIEMs kit was not accurate in terms of absolute numbers and therefore reverting back to Form 34Bs.²⁹¹ This raised the question on integrity and legitimacy of the election results as it undermined proper tallying and verification.

3.6.1 Presidential Petition of 2017 on the Lack of Integrity in Electoral Technology

Upon conclusion of the August 2017 election, the Opposition filed a presidential petition at the Supreme Court.²⁹² NASA contended that the electoral technology adopted in the 2017 elections was not secure, susceptible to hacking and enabled election fraud and malpractice.²⁹³ They further argued that the electoral technology was designed in a manner that it could not function properly.²⁹⁴ It was further argued the law requires that the Presiding officer after the manual filing in the Form 34A, would key the results in the KIEMS kit, take an image of the Form 34A and transmit the same electronically to the constituency and national tallying centers however the same had not been complied with.²⁹⁵

During the hearing and determination of the petition, NASA sought to have an access to the KIEMS hardware and software used in the conduct of the Presidential Election and particularly

²⁸⁹ Dominique van Heerden and Lauren Said-Moorhouse (2018 "Kenyan Election Official was Strangled, Authorities Confirm," at < <https://edition.cnn.com/2017/08/03/africa/kenya-election-official-chris-msando/index.html> > (accessed 20/5/2019).

²⁹⁰ KTN News (2017) "Transmission by KIEMS kits will not accurate: IEBC admits to having error in transmission," https://www.youtube.com/watch?v=PLYUkkaYp_s (accessed 23/4/2019).

²⁹¹ *ibid.*

²⁹² *Raila Odinga & Another v. IEBC & 3 Others*, Petition No. 1 of 2017.

²⁹³ *ibid.*

²⁹⁴ *Raila Amolo Odinga & another v. Independent Electoral and Boundaries Commission & 2 others* Presidential Petition No. 1 of 2017, [2017] eKLR para 72.

²⁹⁵ See Ben Sihanya (forthcoming 2021) "Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements," *op. cit.*

the electronic devices and servers used in the transmission of election results. This request was granted limiting the access to read only.²⁹⁶

The decision to allow NASA access IEBC servers, confirmed the fears that indeed something mischievous was happening with the technology adopted. The IEBC reactionary measures to the pronounced allegations of technological fraud in itself undermined public confidence in the system. They instead printed the server logs and served upon NASA contrary to the directions issued by court. Consequently under the direction of the Registrar of the Supreme Court, ICT experts appointed by the court and agents of the political parties, managed to access the IEBC servers.²⁹⁷

A scrutiny report was prepared which unearthed a number of illegalities and irregularities. Election results had varied in more than 11, 000 polling stations. There were wide scale variations in a huge number of forms 34s and KIEMS. These results variations coupled with delay and failure thereof in the transmission of election results had watered down the justification of employing technology.²⁹⁸ The report vindicated the assertions that the use of technology did not guarantee the integrity, legitimacy and credibility of the elections. The Supreme Court by a majority decision annulled the election on account that the IEBC had not conducted the elections within the dictates of the Constitution and ordered IEBC to conduct a repeat presidential elections within 60 days as provided in article 140 (3) of the Constitution of Kenya.²⁹⁹

Following the annulment of the elections, IEBC started to put in a house in order in readiness for the repeat presidential election. NASA and the civil society pointed out a number of irreducible minimums on electoral reforms principally focusing on the electoral technology. They demanded

²⁹⁶ *Raila Odinga & Another v. IEBC & 3 Others*, Petition No. 1 of 2017.

²⁹⁷ See Ben Sihanya (forthcoming 2021) "Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements," *op. cit.*

²⁹⁸ See Ben Sihanya (forthcoming 2021) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 2: Presidency, Bureaucracy and Administrative Justice in Kenya*; Revised Teaching Notes on Constitutional Law and Comparative Constitutional Law by Ben Sihanya 2004-2017, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya; Ben Sihanya (2019) "Introduction to Constitutional Law in Kenya," Class 2 Teaching Notes for LLB I Constitutional Process, University of Nairobi Law School, (2004-2019), Innovative Lawyering & Sihanya Mentoring, Nairobi & Siaya, Kenya

²⁹⁹ *ibid.*

an audit of the electoral technology before use in the repeat election.³⁰⁰ They also sought that the physical location of the servers and ensure that all systems hosting data are in the country and in conformity with various ICT related legislations such as ‘Data Sovereignty Act.

However, IEBC failed to meet the demands that NASA wanted to be addressed before leading to withdrawal by the NASA presidential candidate from participating in the repeat elections that was scheduled on 26th October 2018.³⁰¹

3.6.2 Technology in the Repeat Presidential Elections held on 26th August 2018

Following the annulment of the presidential elections by the Supreme Court, the ruling Jubilee party became jittery. As a reactionary measure, Baringo North Member of Parliament introduced the Elections Laws (Amendment) Bill 2017 seeking to amend the IEBC Act No. 9 of 2011, the Elections Act 2016 and the Elections Offences Act 2016 which sought to change the managerial architecture of the IEBC.

The Bill also sought to amend the Election Act and have the use of both technology and the manual systems in transmission of election results. The Bill also sought to restrict the role of Judges in determining the outcome of an election. These amendments were introduced within 21 days to the October elections thereby creating suspicion and deepening mistrust and political uncertainty in the country.³⁰²

IEBC proceeded with the repeat presidential elections despite the notice of withdrawal by the NASA candidate. The boycotted repeat elections were won by the incumbent President. NASA Coalition indicated that they did not recognize the results of the boycotted repeat elections and indicated they would swear their candidate as the “People’s President.” It is clear that the events that unfolded prior and the 2017 general elections were principally hinged on the use of

³⁰⁰ See Ben Sihanya (forthcoming 2021) “Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” *op. cit.*

³⁰¹ *ibid.*

³⁰² Abdi Latif Dahir (2017) “Kenya has Passed a Controversial Election Bill which is Deepening its Political Uncertainty,” at <https://qz.com/africa/1099687/elections-kenya-2017-raila-odinga-kenya-has-passed-a-bill-to-amend-election-laws/> (accessed 18/2.2019).

technology. The integrity and reliability of electoral technology are serious concerns in the electoral management that must be addressed to increase public trust and electoral legitimacy.³⁰³

3.7 An Assessment of the Technology Adopted by IEBC in 2017 Presidential Elections

During the 2017 general elections, the electronic devices in a number of polling stations failed to work. Numerous irregularities and illegalities in the election technology were unearthed and brought to fore during the presidential petition at the Supreme Court.³⁰⁴ Although IEBC had indicated on a couple of times prior to the 2017 general elections that the electronic system were secure and reliable, that came to be wrong. This raised the question on integrity and legitimacy of the electoral technology.

On the global area, critics of election technology have contended that influential actors seek to fetishize technology and promote the digital fallacy that technology can improve electoral democracy³⁰⁵ Over the years there have been widespread fears that electoral technology is not safe and susceptible to hacking and manipulation .³⁰⁶ For instance, during the USA elections held on 7th November 2016, there were allegations that the election electronic devices and servers had been manipulated by the Russians despite USA being considered the pioneer in ICT.³⁰⁷ Many countries and states such as Ireland have withheld the adoption of technology due to imminent threats of manipulation and breach of data security.³⁰⁸

Whereas technology reduces human error, the threats that come with can never be underrated. The events prior and aftermath of 2017 presidential elections vindicate the assertions they need to relook and examine the legal and institutional work governing the adoption and use of technology in elections.³⁰⁹ Although it is expected that the use of technology enhance public

³⁰³ Ben Sihanya (forthcoming 2021) “Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” *op. cit.*

³⁰⁴ *Raila Amolo Odinga & another v. Independent Electoral and Boundaries Commission & 2 others* Presidential Petition No. 1 of 2017, [2017] eKLR.

³⁰⁵ Alan Gelb and Anna Diofasi (2016) Biometric Elections in Poor Countries: Wasteful or a Worthwhile Investment?” Centre for Global Development.

³⁰⁶ Paul Sambo and Patricial Alexander (2018) “A Scheme of Analysis for eVoting as a Technological Innovation This System,” 84(2) *The Electronic Journal of Information Systems in Developing Countries* 1.

³⁰⁷ *ibid.*

³⁰⁸ European Union Election Observation Mission (2017) “Republic of Kenya General Elections 2017,” at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625178/EPRS_BRI\(2018\)625178_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625178/EPRS_BRI(2018)625178_EN.pdf) (accessed 11/5/2019).

³⁰⁹ Rehema Baguma and Emmanuel Eilu (2015) “Using Mobile Phones in Elections in Developing Countries: Opportunities and Challenges,” in A Gamatie (ed), *Computer in Research and Development in Africa*, Springer Publishers, 251-265.

confidence in the electoral system, its failure and manipulation thereof has invoked suspicions and creates mistrust.³¹⁰ Technology if not used properly can neither solve any election problem nor avert any risk.³¹¹ There is therefore need to reform the management of the electoral body and particularly on legal and institutional framework governing the adoption and use of technology in elections.

3.8 Summary of Findings and Conclusion on Analysis of the 2017 Presidential Elections in Kenya

This chapter set out to interrogate the role of technology in the 2017 presidential elections. The chapter has undertaken to review the process and areas of technology integration into the 2017 elections as well as its impacts in the 2017 elections. The chapter has also highlighted a brief history of the previous elections held prior to the introduction and integration of technology into the Kenyan electoral system. The chapter highlights at least two key findings.

First, that the challenges to the August 8, 2017 elections arose when IEBC failed to follow the constitution and the legal rules and processes on managing and transmitting presidential results through deliberate sabotage and manipulation of the whole Kenya Integrated Management System (KIEMS) and process. As it emerged in the presidential election petition filed by Raila Amollo Odinga and Stephen Kalonzo Musyoka of the National Super Alliance (NASA), IEBC servers and the IEBC Chairman's password had been illegally accessed by "strangers" who manipulated the system leading to the announcement of Kenyatta as President.³¹²

Second, that it is now a settled principle that an election is a process, not just an event or outcome. Thus in an election, preparation, campaigns, voting, counting, tallying, transmission, display or announcement and declaration can be more important than the identity of the winner, and is part of the outcome or "result." Compliance with the rules, principles and values of the electoral system and voting method under Articles 10, 38, 81, 86, 232,³¹³ etc of the Constitution require that IEBC officials demonstrate compliance with and adherence to the Constitution statutes regulations and rules.

³¹⁰ Paul Sambo and Patricia Alexander (2018) "A Scheme of Analysis for eVoting as a Technological Innovation System," *op. cit.*

³¹¹ See the ratio decidendi in *Bush v. Gore*, 531 US 98 (2000).

³¹² See Supreme Court Judgment in Petition No 1 of 2017, *op. cit.* Cf. Ben Sihanya (forthcoming 2021) "Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements," *Op. Cit.*

³¹³ Art 232 deals with values and principles of public service. See also Public Service (Values and Principles Act) 2011.

Chapter 4 will focus on a comparative study and analysis on the role of technology in presidential elections in other jurisdictions specifically Nigeria, Ghana, and the USA.

CHAPTER 4

COMPARATIVE STUDY ON THE ROLE OF TECHNOLOGY IN PRESIDENTIAL ELECTIONS IN KENYA, NIGERIA, GHANA AND THE USA

4.1 Introduction

The overarching argument in this Chapter 4 is that technology when used correctly plays an important role in presidential elections not only in Kenya and Africa but also internationally. Chapter 3 focused on the use of technology in the 2017 Kenyan presidential election.³¹⁴ This Chapter will focus on use of technology in presidential elections in Nigeria, Ghana, and the USA.

This Chapter seeks to examine how these countries have tailored technology to help realize free, fair and credible presidential elections. Have they set safeguards? What can Kenya learn from these states? Which reforms should be adopted in the Kenyan electoral management system?

For a long time elections in Kenya and other African States have become a hotly contested issue.³¹⁵ There have been persistent difficulties in the conduct of transparent, free, fair and credible presidential elections as most have been marred by gross electoral irregularities, electoral fraud, violence and inconclusive ballots.³¹⁶

The introduction of technology into the electoral process to facilitate free and fair elections has generated mixed feelings and reactions from voters, election candidates, election experts amongst others, all over the world.³¹⁷ The use of technology in presidential elections is currently

³¹⁴ See Chapter 3.

³¹⁵ Ben Sihanya (forthcoming 2021) “Presidential and Premier Election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” in Ben Sihanya *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 21).

³¹⁶ Victor Chidubem (2018) “ICT and elections in Nigeria: Rural dynamics of biometric voting technology adoption,” *Africa Spectrum*, 53, 3, at 89-113. Cf. Ben Sihanya (forthcoming 2021) “Presidential election and transition in 2017 and beyond electoral Protests, Revolutions, and Secession Debates and Movements,” *Op. Cit.*

³¹⁷ Peter Wolf & Nicholas Matatu (2017) “New technologies play an integral role in organizing elections,” International Institute for Democracy and Electoral Assistance (IDEA), at <https://www.idea.int/news-media/multimedia-reports/new-technologies-play-integral-role-organizing-elections> (accessed 26/6/2019).

widespread in Africa with countries such as Ghana, Nigeria, Kenya, Mali, just to name a few, with its use varying in terms of success.³¹⁸

This Chapter will focus on and discuss the use of technology in presidential elections in Nigeria, Ghana, and the USA and what lessons Kenya can take from these countries.

4.2 Presidential Elections in Nigeria

Nigeria has had tumultuous past. The elections conducted in the past have been termed as shambolic and fail to meet integrity test. Nigeria has been under military administration more than democratically elected leaders.³¹⁹ The military leaders have had tight grip on the country leadership and institutions for over 29 years as compared to 20 years of democracy. Consequently, the questions about the integrity and the credibility of elections in post-independence have been rife. Nigeria can be traced as far back in the 1960s elections. There have been serious allegations of massive rigging and manipulation of election results.³²⁰

Since 1966, Nigeria has experienced numerous coups. These coups have further weakened the democratic process and vitiated the ability of the citizenry to make their choices in free and fair elections.³²¹ Even before the country made a decisive break from military politics in 1999, the presidential elections in Nigeria have been described as a sham and one that is far from being free and fair.³²²

Since 1999, Nigeria has held five (5) presidential elections after a period of four years. These have been in 1999, 2003, 2007, 2011, and 2015. There has been general perception that the

³¹⁸ Victor Chidubem (2018) "ICT and elections in Nigeria: Rural dynamics of biometric voting technology adoption," *op. cit.*

³¹⁹ Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," in Ben Sihanya *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 20). Ini Dele Adedegi (2019) "Nigeria has a history of dodgy elections: will it be different this time?" AllAfrica Website at <https://allafrica.com/stories/201902120003.html> (accessed 14/5/ 2019).

³²⁰ Ben Nwabueze (2005) "Nature and forms of rigging in elections," at http://unpub.wpb.tam.us.siteprotect.com/var/m_f/fa/fa2/22697/235422-nature_and_forms_of.pdf (accessed 26/6/2019). Cf. Ben Sihanya (forthcoming 2021) *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

³²¹ Nwokeke P. Osinakachukwu & Jayum A Jawan (2011) "The electoral process and democratic consolidation in Nigeria," *Journal of Politics*, Vol. 4, No. 2 at 128-137. Cf Ben Sihanya (forthcoming 2021) "President and Prime Minister in Kenya and Africa," in Ben Sihanya *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 7).

³²² *ibid.*

presidential elections of 1999, 2003 and 2007 were flawed.³²³ However, the introduction and the use of technology in the 2011 and 2015 presidential elections led to more credible and competitive elections.³²⁴

4.2.1 Legislative and Administrative Framework on Presidential Elections in Nigeria

Presidential elections in Nigeria are governed by the Constitution of the Federal Republic of Nigeria 1999 (as amended) and the Electoral Act 2010 (as amended) together with the Regulations made there under.³²⁵ The preamble of the Elections Act of Nigeria Act provides that it is act of Parliament to repeal the Electoral Act No. 2, 2006 and Independent National Electoral Commission Act, Cap. 15 of the Laws of laws of the Federation of Nigeria and to regulate the conduct of federal, state and area council elections; and for related matters.³²⁶

Section 153 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides for the establishment of the Independent National Electoral Commission (INEC) herein referred to as “the Commission.” It confers powers on the Commission to conduct elections and referenda in addition to functions provided therein.³²⁷

Section 2 of the Elections Act of Nigeria provides that the Commission shall have power to conduct voter and civic education; and promote knowledge of sound democratic election processes. This is in additions to the functions conferred by it by the Constitution.³²⁸ These provisions lay a basis for the establishment and authority of the administrative body (INEC) which regulates how presidential elections are conducted in Nigeria.

In 2015, Ms Zakari was appointed by President Muhhamadu Buhari in 2015 as the very first female Chair of INEC.³²⁹ This was seen as a very bold move considering the reputation and ethnic considerations. Under Ms Zakari, the INEC managed to promote free, fair and credible elections compared to previous presidential elections.

³²³ Lai Olurode (2017) “Technology and election conundrum: A case study of Nigeria,” *Sociology and Anthropology* 5(10), at 799-811.

³²⁴ *ibid.*

³²⁵ The Constitution of the Federal Republic of Nigeria 1999. Cf. The Nigerian Electoral Act 2010. Cf. Ben Sihanya (forthcoming 2021) “President and Prime Minister in Kenya and Africa,” *op. cit.*

³²⁶ *ibid.*

³²⁷ Article 153 The Constitution of the Federal Republic of Nigeria 1999(as amended). Cf “Ben Sihanya (forthcoming 2021) “President and Prime Minister in Kenya and Africa,” *op. cit.*

³²⁸ Section 2 Elections Act 2010. Cf Ben Sihanya (forthcoming 2019) “President and Prime Minister in Kenya and Africa,” *op. cit.*

³²⁹ Idayat Hassan and Shamsudeen Yusuf (2015) “Case study: Nigeria,” at <https://www.eisa.org.za/pdf/nigcasestudy.pdf> (accessed 21/11/2019).

4.2.2 Role of Technology in Presidential Elections in Nigeria

It is important to note that the use of technology in Nigeria's 2015 presidential elections did not stop the usual problems encountered in elections in Nigeria. However, the use of technology did help curb the high levels of rigging and election malpractice that is usually associated with presidential elections. The use of permanent voter cards (PVC) and smart card readers (SCR) helped reduce the tampering and hacking of the Nigerian electoral system.³³⁰

INEC produced approximately 68 833 467 permanent voter cards (PVCs) for voters in its biometric register for the 2015 Nigerian elections.³³¹ The PVCs were designed in such a manner that they had a lifespan of 10 years. The cards had security features that were to help prevent them from being counterfeited and ensure proper authentication and verification of a voter before they were allowed to vote.³³²

Smart card readers (SCRs) were also introduced by the INEC during the 2015 Nigerian presidential elections through electronic voter authentication. The cards used highly secured cryptographic technology usually used in devices that perform secure transactions.³³³

The use of permanent voter cards (PVCs), and smart card readers (SCRs) was in line with the provisions of section 52 of Nigeria's Electoral Act 2010 which makes provision for electronic voting in Nigeria's presidential elections.³³⁴

While the use of technology in the presidential elections in Nigeria were largely satisfactory, there were complaints of electoral malpractices and inconsistencies in two states i.e. Rivers State and Akwa Ibom State.³³⁵ It was reported that in both states, the PVCs and SCRs were sidelined due to claims that they were seriously compromised.³³⁶

³³⁰ Osita Agbu (2016) "Election rigging and the use of technology: The smart card reader as the joker in Nigeria's 2015 Presidential Elections," Vol. 15, No. 2 Journal of African Elections, at 90-110.

³³¹ *ibid.*

³³² Chikodiri Nwangwu (2015) "Biometric voting technology and the 2015 General Election in Nigeria," paper presented at the "The two-day national conference on the 2015 General Election in Nigeria: the real issues," 27 – 28 July, 2015. Cf. Ben Sihanya (forthcoming 2021) "Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements," *op. cit.*

³³³ *ibid.*

³³⁴ Chikodiri Nwangwu, Vincent Chidi Onah and Out Akanu Out (2018) "Elixir of electoral fraud: The impact of digital technology on the 2015 General Elections in Nigeria," *Cogent Social Sciences*, Vol 4. issue 1., at <https://www.tandfonline.com/doi/full/10.1080/23311886.2018.1549007> (accessed 21/11/2019).

³³⁵ Osita Agbu (2016) "Election rigging and the use of technology: The smart card reader as the joker in Nigeria's 2015 Presidential Elections," *op. cit.* Ben Sihanya (forthcoming 2021) "Presidential and Premier election,

The Independent National Electoral Commission (INEC) took several steps and measures before the presidential elections so as to ensure free, fair, and credible elections. Some of the measures had been previously introduced in the 2011 Nigerian presidential elections. INEC took seven key measures.³³⁷

First, it established a new biometric register of the Nigerian voters. Second, it re-modified its open ballot system.³³⁸ Third, INEC improved the standards in the production of sensitive electoral materials including the serial numbering and color coding of the ballot papers and result sheets. Fourth, INEC improved its voter education and citizen management by ensuring that it conducted civic education to as many voters as possible.³³⁹

Fifth, INEC revised its framework for the collation and returning of vote results. Sixth, INEC introduced more open and transparent procedures, modalities and processes on the Election Day such as posting results at polling stations and collation centres.³⁴⁰ And seventh, INEC created an inter-agency consultative committee on election security (ICCES) to ensure coordinated engagement of all security agencies during the election period.³⁴¹

These measures helped the INEC to conduct fairly free and credible presidential elections in Nigeria. In the next subtitle I discuss the use of technology in presidential elections in Ghana.

4.3 Presidential Elections in Ghana

Like Nigeria, Ghana has also experienced a tumultuous past when it comes to presidential elections. The country has had four military takeovers in 1957, 1960, 1969 and 1979. However, Ghana has made a steady recovery since 1992 when it enacted its Constitution and later the

Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” *op. cit.*

³³⁶ *ibid.*

³³⁷ Opeyemi Aluko (2016) “Nigeria’s 2015 Elections: Permanent Voter’s Cards, Smart Card Readers and Security Challenges,” Vol. 5 No. 2, *Journal of African Elections*, at 50-67. Cf. Ben Sihanya (2017) “Conduct of IEBC Commissioners key to just 2017 General Elections,” Vol. 1 Issue 8, *The Advocate*, Law Society of Kenya Magazine, at 8.

³³⁸ *ibid.*

³³⁹ Osita Agbu (2016) “Election rigging and the use of technology: The smart card reader as the joker in Nigeria’s 2015 Presidential Elections,” *op. cit.* Cf Ben Sihanya (2017) “Conduct of IEBC Commissioners key to just 2017 General Elections,” Vol. 1 Issue 8, *The Advocate*, Law Society of Kenya Magazine, at 8.

³⁴⁰ *ibid.*

³⁴¹ Chikodiri Nwangwu (2015) “Biometric voting technology and the 2015 General Election in Nigeria,” *op. cit.* Cf. Ben Sihanya (2017) “Conduct of IEBC Commissioners key to just 2017 General Elections,” *op. cit.*

Constitution of the Republic of Ghana (Amendment) Act 1996. Ghana has since then held five presidential elections since 1992 with the latest being in 2016.³⁴²

4.3.1 Legislative and Administrative Framework of Presidential Elections in Ghana

Presidential elections in Ghana are governed by the Constitution of Ghana which provides for a President,³⁴³ Parliament,³⁴⁴ a State Council,³⁴⁵ and a Judiciary.³⁴⁶ Article 43(1) of the Constitution of Ghana establishes the Electoral Commission of Ghana responsible for the management of elections in Ghana.³⁴⁷ The Commission comprises of a chairman, two deputy chairmen, and four other members.³⁴⁸

4.3.2 Role of Technology in Presidential Elections in Ghana

Ghana adopted the use of technology in its presidential elections for the first time in 2012. The Electoral Commission of Ghana in 2011 announced that the 2012 elections would rely on biometric voter registration and voting.³⁴⁹ Ghana has since then relied on biometric verification devices (BVDs) for voter registration, verification and also transmission of results from polling stations to the Electoral Commission of Ghana.³⁵⁰

Unlike the IEBC in Kenya, the Electoral Commission of Ghana ensured that its BVDs were tested in time so as to avoid any inconveniences on the Election Day such as failure of BVR kits during its 2012 and 2016 presidential elections.³⁵¹

³⁴² Ben Sihanya (forthcoming 2021) “President and Prime Minister in Kenya and Africa,” *op. cit.*

³⁴³ Chapter 8 Constitution of Ghana 1996. Cf. Ben Sihanya (forthcoming 2019) “President and Prime Minister in Kenya and Africa,” *op. cit.*

³⁴⁴ Chapter 10 Constitution of Ghana 1996. Cf. Ben Sihanya (forthcoming 2021) “President and Prime Minister in Kenya and Africa,” *op. cit.*

³⁴⁵ Chapter 9 Constitution of Ghana 1996. Cf. Ben Sihanya (forthcoming 2021) “President and Prime Minister in Kenya and Africa,” *op. cit.*

³⁴⁶ Chapter 11 Constitution of Ghana 1996. Cf. Ben Sihanya (forthcoming 2021) “President and Prime Minister in Kenya and Africa,” *op. cit.*

³⁴⁷ Article 43(1) Constitution of Ghana 1996. Cf. Ben Sihanya (forthcoming 2021) “President and Prime Minister in Kenya and Africa,” *op. cit.*

³⁴⁸ *ibid.*

³⁴⁹ Charlotte Osei (2016) “Ghana’s 2016 election: Processes and priorities of the Electoral Commission,” Africa Programme Transcript, at <https://www.chathamhouse.org/sites/default/files/events/ghana-2016-elections-transcript.pdf> (accessed 26/9/2019).

³⁵⁰ *ibid.*

³⁵¹ Ben Sihanya (2017) “Conduct of IEBC Commissioners key to just 2017 General Elections,” Vol. 1 Issue 8, *The Advocate*, Law Society of Kenya Magazine, at 8. Cf. Technology Salon (2017) “How technology impacted Ghana’s elections,” at <http://technologysalon.org/technology-impacted-ghanas-elections/> (accessed 27/6/2019).

However, the use of technology in the presidential elections in Ghana was not without its share of controversy. In 2012, the New Patriotic Party (NPP), led by its leader and presidential candidate, Nana Akuffo Addo, challenged the use of technology in the presidential elections in the Ghanaian Supreme Court citing irregularities including over voting and cases of voting without biometric verification. The Supreme Court ruled that National Democratic Congress's presidential candidate John Mahama had fairly won the presidential elections.³⁵²

In order to provide for free, fair and credible elections, the Electoral Commission of Ghana took at least six (6) steps to ensure the successful use of technology in its 2016 presidential elections.³⁵³ First, establishment of strong and independent institutions following recommendations to institute fundamental reforms following Ghana's 2012 presidential elections.³⁵⁴

Second, the Commission invested in additional electoral equipment, polling stations, and enhanced training of election officials. Third, the Commission opened the entire results collation process in a move to manage the high levels of mistrust. Fourth, planning in advance. The Electoral Commission of Ghana ensured that all materials and equipment to be used for the 2016 presidential election was ready even before the day of the elections.³⁵⁵

Fifth, the Commission revamped its communication strategy by setting up a social media hub to monitor election stories and also setting up a digital election hub to counter bias and false reports and stories. Sixth, live transmission of the election results and immediate response to emerging concerns.

The Commission ensured that there was live coverage of the presidential elections and the results collation at its headquarters enhanced transparency and credibility of the results.³⁵⁶

³⁵² Joana Mantey (2013) "Ghana court rejects challenge to President's election," Voice of Africa, at <https://www.voanews.com/africa/ghana-court-rejects-challenge-presidents-election> (accessed 21/11/2019).

³⁵³ Maendeleo Policy Reform (2016) "Deepening democracy: Election Management and Stability in Africa's divided societies," Report of the 6th Edition of the Maendeleo Policy Forum held in Nairobi, Kenya on the 14th of December 2016. Cf. Ben Sihanya (forthcoming 2021) "President and Prime Minister in Kenya and Africa," *op. cit.*

³⁵⁴ *ibid.*

³⁵⁵ Charlotte Osei (2016) "Ghana's 2016 election: Processes and priorities of the Electoral Commission," *op. cit.* Ben Sihanya (forthcoming 2021) "President and Prime Minister in Kenya and Africa," *op. cit.*

³⁵⁶ *ibid.*

The Commission was chaired by Ms Charlotte Osei.³⁵⁷ After the first round voting, Nana Akuffo Addo, the New Patriotic Party (NPP), leader and presidential candidate was declared the winner defeating the then sitting president and National Democratic Congress's presidential candidate John Mahama.

In the next subtitle the discussion will focus on the use of technology in presidential elections in the United States of America (USA).

4.4 Presidential Elections in the USA

Elections in the United States are generally conducted by the state governments and the local government. The Federal Elections Commissions regulate elections financing and enforce limits on campaign financing of various candidates participating in the election.³⁵⁸ Presidential elections in the USA are done by way of electoral voting. This is where registered voters in all the States cast votes for electors who are members of the Electoral College who then in turn vote for the President.³⁵⁹

The use of technology in the US presidential elections has been incorporated since the 1060s. In the 1964 elections, the USA was one of the countries that incorporated technology into their electoral system. This involved the use of optical scanners in their voting systems which allowed the computers to count a voter's mark on a ballot. The USA has also incorporated voting machines to collect and tabulate votes.³⁶⁰

The use of technology in presidential elections in the USA is provided for under section 301A of the Help America Vote Act (HAVA) 2002.³⁶¹ The Act provides for the technical requirements for voting machines in presidential elections.³⁶² HAVA was introduced after the controversial elections in 2000 in which George Bush vying on the Republican ticket defeated Al Gore, the

³⁵⁷ Sarah Brierley and George Oforu (2016) "9 things you should know about Ghana's election," *The Washington Post*, at <https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/07/nine-things-you-should-know-about-ghanas-election/> (accessed 21/11/2019).

³⁵⁸ White House Website, at <https://www.whitehouse.gov/about-the-white-house/elections-voting/> accessed on 14th April 2019

³⁵⁹ Alexander Belenky (2018) *Understanding the Fundamentals of the US Presidential Election System*, Springer Heidelberg Publishers, New York.

³⁶⁰ *ibid.*

³⁶¹ section 301A of the Help America Vote Act (HAVA) 2002. Cf. Ben Goldsmith and Holly Ruthrauff "Building the system for e-voting or e-counting," National Democratic Institute at <https://www.ndi.org/sites/default/files/2.2.pdf> (accessed 21/11/2019).

³⁶² Ben Goldsmith and Holly Ruthrauff "Building the system for e-voting or e-counting," National Democratic Institute at <https://www.ndi.org/sites/default/files/2.2.pdf> (accessed 21/11/2019).

Democratic candidate. This election exposed a divide in voting technology especially in Florida where the punch card voting machines were largely ineffective.³⁶³

While the use of technology in the US has been fairly successful since the 2000 presidential elections, new problems have cropped up. There have been various concerns on the use of technology in the USA the most prominent one being cyber attacks. This was one of the major concerns during and even after the US 2016 presidential elections.³⁶⁴

The US proceeded to form the Committee on the Future of Voting: Accessible Reliable, Verifiable Technology to help combat these technological challenges in elections and provide viable solutions. The Committee came up with the following three (3) recommendations on voting technology.³⁶⁵

First, all States to put in place policies providing for the regular maintenance and replacement of election technology systems. Second, the Committee proposed the use of human readable paper ballots to be used in elections and proposed for removal of voting machines uncap able of independent audit capacity. Third, that the devices and software used in the preparation of ballot papers be different from the devices and software used to count votes.³⁶⁶

Critics of incorporation of electronic technology such as democratic legislators who prefer the paper ballot voting system, have argued that in absence of voter-verifiable paper audit trails in the systems, there is a room for electoral manipulation and rigging.³⁶⁷ Verification and audit of voting, counting and tabulation are therefore necessary because of issues such as malfunctions or compromise by third parties. It has been argued that the accuracy of the systems maybe unreliable. This calls for public scrutiny on the technology so adopted. In essence, all these revolve around an efficient and effective electoral body.³⁶⁸

³⁶³ Paul Schwartz (2000) "Voting technology and democracy," <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2525&context=facpubs> (accessed 21/11/2019).

³⁶⁴ Mitchell Brown, Kathleen Hale and Bridgett King (eds) (2019) *The Future of Election Administration: Cases and Conversations*, Palgrave Macmillan Publishers, Auburn, AL.

³⁶⁵ National Academies of Sciences, Engineering and Medicine (2018) *Securing the Vote: Protecting American Democracy*, The National Academies Press, Washington.

³⁶⁶ *ibid.*

³⁶⁷ Mark Niese (2019) "Law makers, tech experts at odds over Georgia's voting machines," *The Atlanta Journal* at <https://www.govtech.com/security/Lawmakers-Tech-Experts-at-Odds-Over-Georgias-Voting-Machines.html> (accessed 21/11/2019).

³⁶⁸ Roy Saltman (1988) "Accuracy, integrity, and security in computerized vote-tallying," *Communications of the ACM* 31 (10): 1184–1191.

4.5 Summary of Findings and Conclusion on the Comparative Study on Use of Technology in Presidential elections in Kenya, Nigeria, Ghana and USA

The Chapter has examined the different models of electoral management in the selected countries and particularly the adoption and use of electoral technology within the electoral processes. It has discussed how Nigeria, Ghana and USA have been able to successfully use technology to ensure free, fair and credible presidential elections in their respective jurisdictions.³⁶⁹

From the discussions above, it is clear that there is urgent need for key reforms in the use of technology in presidential elections by IEBC in Kenya. Without key reforms in the electoral process, the constitutional requirement of free, fair, transparent and credible elections will remain a mirage.

The IEBC should borrow a leaf from the Independent National Electoral Commission (INEC) of Nigeria and the Electoral Commission of Ghana when incorporating technology in presidential elections to ensure that they are free, fair and credible. First, IEBC should ensure that the biometric register (BVR kit) is up to date in advance before presidential elections. This ensures that all the relevant data is captured and there are no irregularities during the Election Day.

Second, the IEBC should improve its standards in production of sensitive electoral materials. This can be done by way of using different software in the preparation of ballot papers and result sheets. This reduces the chances of hacking and cyber attacks. Early preparation averts any last minute delays and failures.

It is clear that in addition to weak legal and institutional systems, the adoption and use of electoral technology in Kenya has not properly facilitated electoral processes as had been intended. In deed from the theories discussed in Chapter 1, the literature review, the interrogation of the legal and institutional capacity of the IEBC to conduct a free , fair and credible presidential elections all to the examination of the role of electoral technology validate the justification for electoral reforms. What can Kenya learn from the above countries to enable her strengthen its electoral management?

³⁶⁹ See discussions above.

Chapter 5 discusses summary of findings and conclusion on the use of technology in presidential elections. It proposes minimum reforms that are absolutely critical for strengthening the integrity of the electoral process. It is noteworthy that proposed reforms were made following the review of data collected and analysis of the literature.

CHAPTER 5

SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS ON THE ROLE OF TECHNOLOGY IN PRESIDENTIAL ELECTIONS IN KENYA

5.1 Summary of Findings on the Role of Technology in Presidential Elections in Kenya

The overarching argument in this research study is that technology plays an important role in ensuring free fair and credible presidential elections. However, this is subject to proper use and management by the IEBC.

The study has been guided by three objectives. First, to critically interrogate the role of technology in elections and particularly in the 2017 General Elections. Second, to examine the impact and perils of incorporation of technology in electoral management system. And third, to suggest appropriate recommendations on legal framework on the use of technology in Kenya's electoral system that meets the constitutional requirements of a free and fair election.³⁷⁰

This study has raised and attempted to answer the following three questions:³⁷¹ First, what is the legal place of technology in the Kenyan electoral process? Is it a complimentary system? Second, has the incorporation of technology in electoral management enabled realization of the right to free and fair elections? And third, what electoral reforms and legal mechanisms should be undertaken to ensure realization of free and fair elections anchored on constitutional ideals?

As discussed in Chapter 1.5, this study argues that there is need to reevaluate the use and implementation of technology in presidential elections in Kenya. This study proceeds on the following two interrelated assumptions or hypotheses.

First, the use and implementation of technology in presidential elections in Kenya has failed in ensuring that elections are free, fair and credible. Second, Kenya needs to adopt a clear framework on the implementation and application of technology in presidential elections.

³⁷⁰ See Chapter 1.3 of this Research Study. Cf. Ben Sihanya (forthcoming 2021) "Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements," *op. cit.*

³⁷¹ See Chapter 1.4 of this Research Study. Cf. Ben Sihanya (forthcoming 2021) "Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements," *op. cit.*

Chapter 2 of this study discussed electoral management in Kenya with focus on the Legal and institutional framework and the inception of technology in elections in Kenya. This chapter sought to provide an insight and critically analyze the rationale and the legal backing providing for the integration of technology in elections. It also examined the constitutional and legal underpinnings that regulate the integration of technology in elections.

Chapter 3 focused on the Kenyan presidential elections in 2017. It interrogated the role technology played in the presidential elections. It examined the claims of electoral technology malpractices and fraud. It investigated the promises, dangers and perils of a digital democracy and further examined the gap in implementation in the laws providing for integration of technology in elections.³⁷²

Despite the deployment of technology in the 2017 presidential elections, Kenya faced numerous challenges. Pronounced concerns were raised regarding the procurement and acquisition leading to legal contentions as it was in the case of *Okiya Omtatah Okioti v Attorney General and Another*.³⁷³ The Applicant sought an injunction to have the IEBC barred from acquiring biometric voter registration (BVR) kits from Safran Morpho on account of allegations of corruption levelled against the said Safran Morpho.³⁷⁴

There were concerns over its integrity of the register principally predicated on the allegations that the biometric information had been interfered with.³⁷⁵ The late registration of voters occasioned by late procurement of biometric voter registration (BVR) kits had major impact on the registration of voters. Consequently, the processes such as inspection and publication of registers were delayed thereby breeding mistrust, suspicion, contempt and dearth of public confidence in the electoral technology.³⁷⁶

³⁷² Ben Sihanya (forthcoming 2021) “Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms,” in Ben Sihanya *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 20).

³⁷³ Petition 311 of 2012, In the High Court at Nairobi 2012 eKLR.

³⁷⁴ *ibid.*

³⁷⁵ Ben Sihanya (forthcoming 2021) “Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms,” *op. cit.* Cf. The Carter Centre (2013) “Observing Kenya’s March 2013 National Elections,” at https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-final-101613.pdf (accessed 26/4/2019).

³⁷⁶ *ibid.*

The IEBC also deployed the Electronic Voter Identification System (EVID) in the 2013 presidential elections which basically consist of an electronic poll book which verifies and confers voters electronically as registered by the BVR. The EVID had its own challenges too. First, it was viewed with lots of mistrust on account that it contained information registered by BVR which the public had believed to be corrupted. Secondly, the EVID machines failed in most polling stations despite heavy investment by IEBC in them.

The circumstances leading to the acquisition of the machines were controversial and heavily disputed and lack of early preparedness by the IEBC was vivid. The International Foundation of Electoral System (IFES) had raised concerns over the capacity of Face Technologies to supply the EVID kits, and contended that to allow them to proceed with the same would negate the public interest.³⁷⁷ Unfortunately the IEBC ignore the concerns raised over the reliability and integrity of the kits³⁷⁸

The chapter highlights at least two key findings. First, that the challenges to the August 8, 2017 elections arose when IEBC failed to follow the Constitution and the legal rules and processes on managing and transmitting presidential results through deliberate sabotage and manipulation of the whole Kenya Integrated Management System (KIEMS) and process. As it emerged in the presidential election petition filed by Raila Amollo Odinga and Stephen Kalonzo Musyoka of the National Super Alliance (NASA), IEBC servers and the IEBC Chairman's password had been illegally accessed by "strangers" who manipulated the system leading to the announcement of Kenyatta as President.³⁷⁹

Second, that it is now a settled principle that an election is a process, not just an event or outcome. Thus in an election, preparation, campaigns, voting, counting, tallying, transmission, display or announcement and declaration can be more important than the identity of the winner, and is part of the outcome or "result." Compliance with the rules, principles and values of the electoral system and voting method under Articles 10, 38, 81, 86, 232,³⁸⁰ etc of the Constitution

³⁷⁷ Joel Barkan, (2013) "Kenya's 2013 Elections: Technology is not Democracy," (2013) 24(3) *Journal of Democracy* 156.

³⁷⁸ *ibid.* Cf. Ben Sihanya (forthcoming 2021) "Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements," *op. cit.*

³⁷⁹ See Supreme Court Judgment in Petition No 1 of 2017, *op. cit.*

³⁸⁰ Articles 10, 75, 129 and 232 deal with values and principles of public service. See also Public Service (Values and Principles Act) 2011. Cf. Ben Sihanya (forthcoming 2021) "Presidential and Premier election,

require that IEBC officials demonstrate compliance with and adherence to the Constitution statutes regulations and rules.

Chapter 4 focused on the comparative analysis on the role of technology in presidential elections in other jurisdictions specifically Nigeria, Ghana and the USA. It examined how other countries have tailored technology to help realize a free, fair and credible election. This chapter how Nigeria, Ghana and USA have been able to successfully use technology to ensure free, fair and credible presidential elections in their respective jurisdictions. However, the use of technology in these countries has not been without some challenges and critiques.

The use of technology into the electoral process to facilitate free and fair elections has generated both interest and concern among voters, as well as election experts and practitioners, all over the world.³⁸¹

The use of technology in presidential elections is currently widespread in Africa with countries such as Ghana, Nigeria, Kenya, Mali, Cameroon, Sierra Leone, Mozambique, Zambia, Malawi, Rwanda, Senegal, and Mauritania using it with varying degrees of success.³⁸² Nigeria and Ghana have found are two example of countries in Africa that have managed to use technology successfully to conduct presidential elections considering the tumultuous past that both these countries have had with presidential elections.

In Nigeria, the Independent National Electoral Commission (INEC) took several steps and measures before the presidential elections so as to ensure free, fair, and credible elections. Some of the measures had been previously introduced in the 2011 Nigerian presidential elections. INEC took seven key measures.³⁸³

Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” *op. cit.* see also Ben Sihanya (forthcoming 2021) “Constitutional values, principles, policies, and politics: Agency and structure in Kenya and Africa,” in Ben Sihanya *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 3).

³⁸¹ Ben Sihanya (forthcoming 2021) “Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms,” *op. cit.* Cf. Peter Wolf & Nicholas Matatu (2017) “New technologies play an integral role in organizing elections,” International Institute for Democracy and Electoral Assistance (IDEA), at <https://www.idea.int/news-media/multimedia-reports/new-technologies-play-integral-role-organizing-elections> (accessed 26/6/2019).

³⁸² Victor Chidubem (2018) “ICT and elections in Nigeria: Rural dynamics of biometric voting technology adoption,” *op. cit.*

³⁸³ Opeyemi Aluko (2016) “Nigeria’s 2015 Elections: Permanent Voter’s Cards, Smart Card Readers and

First, it established a new biometric register of the Nigerian voters. Second, it re-modified its open ballot system.³⁸⁴ Third, INEC improved the standards in the production of sensitive electoral materials including the serial numbering and color coding of the ballot papers and result sheets. Fourth, INEC improved its voter education and citizen management by ensuring that it conducted civic education to as many voters as possible.³⁸⁵

Fifth, INEC revised its framework for the collation and returning of vote results. Sixth, INEC introduced more open and transparent procedures, modalities and processes on the Election Day such as posting results at polling stations and collation centres.³⁸⁶ And seventh, INEC created an inter-agency consultative committee on election security (ICCES) to ensure coordinated engagement of all security agencies during the election period.³⁸⁷

In Ghana, the Electoral Commission of Ghana took at least six (6) steps to ensure the successful use of technology in its 2016 presidential elections.³⁸⁸ First, establishment of strong and independent institutions following recommendations to institute fundamental reforms following Ghana's 2012 presidential elections.³⁸⁹

Second, the Commission invested in additional electoral equipment, polling stations, and enhanced training of election officials. Third, the Commission opened the entire results collation process in a move to manage the high levels of mistrust. Fourth, planning in advance. The Electoral Commission of Ghana ensured that all materials and equipment to be used for the 2016 presidential election was ready even before the day of the elections.³⁹⁰

Fifth, the Commission revamped its communication strategy by setting up a social media hub to monitor election stories and also setting up a digital election hub to counter bias and false

Security Challenges," Vol. 5 No. 2, Journal of African Elections, at 50-67.

³⁸⁴ *ibid.*

³⁸⁵ Osita Agbu (2016) "Election rigging and the use of technology: The smart card reader as the joker in Nigeria's 2015 Presidential Elections," *op. cit.*

³⁸⁶ *ibid.*

³⁸⁷ Chikodiri Nwangwu (2015) "Biometric voting technology and the 2015 General Election in Nigeria," *op. cit.*

³⁸⁸ Maendeleo Policy Reform (2016) "Deepening democracy: Election Management and Stability in Africa's divided societies," Report of the 6th Edition of the Maendeleo Policy Forum held in Nairobi, Kenya on the 14th of December 2016.

³⁸⁹ *ibid.*

³⁹⁰ Charlotte Osei (2016) "Ghana's 2016 election: Processes and priorities of the Electoral Commission," *op. cit.*

reports and stories. Sixth, live transmission of the election results and immediate response to emerging concerns. The Commission ensured that there was live coverage of the presidential elections and the results collation at its headquarters enhanced transparency and credibility of the results.³⁹¹

The IEBC should borrow a leaf from the Independent National Electoral Commission (INEC) of Nigeria and the Electoral Commission of Ghana when incorporating technology in presidential elections to ensure that they are free, fair and credible.

5.2 Recommendations on the use of Technology in Presidential Elections in Kenya

From the discussions above, it is clear that there is urgent need for key reforms in the use of technology in presidential elections by IEBC in Kenya.³⁹² Without key reforms in the electoral process, the constitutional requirement of free, fair, transparent and credible elections will remain a mirage.³⁹³ This study proposes minimum reforms that are absolutely critical for strengthening the integrity of the electoral process. It is noteworthy that proposed reforms were made following the review of data collected and analysis of the literature.³⁹⁴

It is clear that in addition to weak legal and institutional systems, the adoption and use of electoral technology in Kenya has not properly facilitated electoral processes as had been intended. In deed from the theories discussed in Chapter one, the literature review, the interrogation of the legal and institutional capacity of the IEBC to conduct a free, fair and credible presidential elections all to the examination of the role of electoral technology validate the justification for electoral reforms. What can Kenya learn from the above countries to enable her strengthen its electoral management?

5.2.1 Review of the Legal and Institutional Structure of IEBC

The promulgation of the Constitution of Kenya 2010 was the climax of a long quest to transform the country's governance system.³⁹⁵ The quest for new constitutional order had been informed by the fact the democratic project was untenable under the old constitutional order.³⁹⁶

³⁹¹ *ibid.*

³⁹² Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.*

³⁹³ *ibid.*

³⁹⁴ See Chapters 1-4.

³⁹⁵ Ben Sihanya (2017) "Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms," *op. cit.*

Kenya being a sovereign multi-party democratic state is founded on various national values and principles enshrined under the Constitution of Kenya.³⁹⁷ The Constitution of Kenya 2010 provides for the administration of elections in Kenya. It underpins the normative architecture of elections management and administration in Kenya. The Constitution of Kenya in essence affirms the sovereignty of the people of Kenya and comprehensively lays out progressive Bill of Rights that underpins fundamental rights and freedoms.

Chapter Seven of the Constitution of Kenya stipulates various general principles for the electoral system with the key principle being need to comply with the freedom of citizens to exercise their political right and the universal suffrage based on the aspiration for fair representation and equality to vote. In essence, it establishes free, fair, transparent and credible elections as the cornerstone of electoral system.³⁹⁸

Article 88 of the Constitution of Kenya establishes the Independent Electoral and Boundaries Commission and sets out the broad functions intended to comprehensively secure its functional independence. Article 89 on the other hand focuses on the process of Boundaries Delimitation, insulates the process from political considerations and establishes a framework for judicial review.³⁹⁹

There is need to review the institutional and legal structure of IEBC to enable its deliver on its mandate. There is confusion as to the functions of the Commissioners as opposed to those of

³⁹⁶ See Ben Sihanya (forthcoming 2021) “Conceptualising sovereignty, Constitution, State and Government in Kenya and Africa [con and admin law questions are interlinked in text, practice, scholarship]” in Ben Sihanya *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 1).

³⁹⁷ Article 10 Constitution of Kenya 2010. Cf. Ben Sihanya (forthcoming 2021) “Conceptualising sovereignty, Constitution, State and Government in Kenya and Africa [con and admin law questions are interlinked in text, practice, scholarship]” *op. cit.* See also Ben Sihanya (forthcoming 2021) “Administrative Bureaucracy, Cabinet, Cabinet Secretary, Chief Administrative Secretary, Permanent Secretary, HOPs (HOCs) and County Administration in Kenya and Africa,” in Ben Sihanya *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 12).

³⁹⁸ Articles 81 and 86 Constitution of Kenya 2010. Cf. Ben Sihanya (forthcoming 2021) “Conceptualising sovereignty, Constitution, State and Government in Kenya and Africa [con and admin law questions are interlinked in text, practice, scholarship]” *op. cit.* See also Ben Sihanya (forthcoming 2021) “Administrative Bureaucracy, Cabinet, Cabinet Secretary, Chief Administrative Secretary, Permanent Secretary, HOPs (HOCs) and County Administration in Kenya and Africa,” *op. cit.*

³⁹⁹ Ben Sihanya (forthcoming 2021) “Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” *op. cit.* See also Ben Sihanya (forthcoming 2021) “Administrative Bureaucracy, Cabinet, Cabinet Secretary, Chief Administrative Secretary, Permanent Secretary, HOPs (HOCs) and County Administration in Kenya and Africa,” *op. cit.*

the Secretariat headed the Chief Executive Officer. This has led to sectional wars. The key legislations that requires a review are the Elections Act, 2011; the Independent Electoral and Boundaries Commission Act 2011; the Political Parties Act, 2012; and the Electoral Campaign Financing Act 2013.

In deed IEBC has weak internal governance structures. Behind a public image of unity, IEBC's unity of purpose is under threat in diverse ways resulting from broader board and management separation issues. It is still not clear what the dividing lines are between the policy and administrative domains; there are no institutionalized guidelines for how to manage this separation; and there is no common understanding of the core processes of delivering an election.⁴⁰⁰

The IEBC has inadequate enforcement of electoral laws. Continuing weakness in enforcing electoral law has raised doubts on the IEBC's capacity to deal with law-breaking by political parties and their members. Enforcement of nomination procedures is also somewhat hampered by IEBC's Nominations Disputes Committee's overlapping mandates with the political parties dispute tribunal (PPDT) and the courts.⁴⁰¹ IEBC's handling of the nomination of special seat representatives has exposed it to unfavourable court action and further dented its image.

Its investigation and prosecution output compared to all the allegations of malfeasance, is not apparent and the country's response to electoral malfeasance is not strong enough to send a clearly deterrent message to would-be election offenders about the cost of committing electoral crimes.⁴⁰²

Electoral transparency has been one of the weakest aspects of Kenya's electoral process. IEBC has to date failed to be wholly transparent and accountable with regard to the election results of the 2013 and 2017 presidential elections, in violation of the law and at great cost to its public image.⁴⁰³ The time to negotiate changes to the constitutional and legal framework is

⁴⁰⁰ *ibid.*

⁴⁰¹ Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.* See also Ben Sihanya (forthcoming 2021) "Constitutional Commissions and Independent Offices in Kenya: Experiences, Challenges and Opportunities," in Ben Sihanya *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Chapter 13).

⁴⁰² *ibid.*

⁴⁰³ Ben Sihanya (forthcoming 2021) "Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,"

now, rather than later. The electoral management body (EMB) should lead stakeholder discussions on critical constitutional and legal reforms necessary for the further improvement of Kenya's elections.⁴⁰⁴

A system-wide organizational assessment of IEBC's institutional structures and ability to discharge its mandate is a crucial first step, and should inform the critical capacity investments that are required to make the EMB more effective.⁴⁰⁵ IEBC needs to train its staff to act impartially at all times; comprehensively and competently deal with electoral crime; review its procurement and hiring systems to ensure that it deals sufficiently with these integrity issues. IEBC needs to strengthen its internal audit function and institutionalize election audits and evaluations in order to learn from all its electoral exercises, especially major ones like the forthcoming general elections.⁴⁰⁶

It therefore behooves on all the stakeholders in the electoral process to re-think the continuing shortcomings of the electoral process and its management with a view to making whatever further changes are necessary to entrench electoral democracy in the country.

5.2.2 Reliable Electoral Technology

The Election Act as amended in 2016 and 2017⁴⁰⁷ established election technology in the following folds namely the Biometric Voter Registration (BVR); the Electronic Voter Identification (EVI); the Electronic Transmission of Results (ETR); the Kenya Integrated Elections Management System (KIEMS) and the On-line publication of the Register of Voters; and the Publishing polling result forms of presidential elections on an online public portal maintained by the Commission.⁴⁰⁸

For the purposes of 2017 General Election, IEBC deployed Electronic Voter Identification (EVI) being part of the integrated system KIEMS as the electronic means of identifying the voter. The EVI system was meant to eliminate impersonation and to ensure that only those

op. cit. See also Ben Sihanya (forthcoming 2021) "Constitutional Commissions and Independent Offices in Kenya: Experiences, Challenges and Opportunities," *op. cit.*

⁴⁰⁴ *ibid.*

⁴⁰⁵ Ben Sihanya (forthcoming 2021) *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya (Vols. 1 and 2).

⁴⁰⁶ *ibid.*

⁴⁰⁷ Sections 6 (A) 3 (b); 39; 44 and 44 A of the Elections Act.

⁴⁰⁸ Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.*

who registered to vote were allowed to vote while keeping track of the number of voters identified to ensure integrity.⁴⁰⁹

The Results Transmission System (RTS) is designed to transmit results electronically both text and image from counting to tallying centres.⁴¹⁰ At the end of voting and when votes had been counted and tallied, the Presiding Officers entered the data on the signed results sheet (Form 34A), into the KIEMS and took an image of the signed form, and thereafter transmitted the data to the election results centres at the Constituency, County and National level.⁴¹¹

During the 2017 general elections, the electronic devices in a number of polling stations failed to work. Lots of irregularities and illegalities in the election technology were unearthed and brought to fore during the presidential petition at the Supreme Court.⁴¹² Although IEBC had indicated on a couple of times prior to the 2017 general elections that the electronic system were secure and reliable, that came to be wrong. This raised the question on integrity and legitimacy of the electoral technology.

On the global area, critics of election technology have contended that influential actors seek to fetishize technology and promote the digital fallacy that technology can improve electoral democracy⁴¹³ Over the years there have been widespread fears that electoral technology is not safe and susceptible to hacking and manipulation.⁴¹⁴ For instance, during the USA elections held on 7th November 2016, there were allegations that the election electronic devices and servers had been manipulated by the Russians despite USA being considered the pioneer in ICT.⁴¹⁵

⁴⁰⁹ KNCHR (2013) “2013 Elections: Safeguarding Rights, An Account of Hotspots, Elections,” *op.cit.*

⁴¹⁰ *ibid.*

⁴¹¹ The Independent Electoral and Boundaries Commission, The Evaluation Report for the August 8 2017 General Election and the Fresh Presidential Election held on 26th October 2017, page 137. See also Ben Sihanya (forthcoming 2021) “Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” *op. cit.*

⁴¹² *Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission & 2 Others* Presidential Petition No. 1 of 2017, [2017] eKLR. Cf. Ben Sihanya (forthcoming 2021) “Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements,” *op. cit.*

⁴¹³ Alan Gelb and Anna Diofasi (2016) “Biometric Elections in Poor Countries: Wasteful or a Worthwhile Investment?” Centre for Global Development.

⁴¹⁴ Paul Sambo and Patricial Alexander (2018) “A Scheme of Analysis for eVoting as a Technological Innovation System,” 84(2) *The Electronic Journal of Information Systems in Developing Countries* 1.

⁴¹⁵ *ibid.*

Instructively, although IEBC has tried to enhance the use of technology in electoral process aimed at eliminating human error, improving efficiency, increasing verifiability, the issue of the integrity of the electoral technology has come under sharp focus. The issue of reliability of the technology has been questioned. The operation and functioning of the technology and system servers have been done by third party companies which raises doubts on the integrity of the system.

Without audit and checks on the electoral technology system, there is danger of system manipulation and electoral theft. The Technology Regulations 2017 does not provide for provisions on the operation of the electoral system. This creates room for electoral manipulation and rigging.

During the research interviews, Peter pointed out that the success in integration of electoral technology hinges on a clear policy and strategy that recognizes the key objectives to enhance integrity.⁴¹⁶ The Technology Regulations 2017 is not comprehensive enough to cover these gaps. The primary purpose of the use electoral technology is to facilitate electoral processes and enhance to enhance its efficiency and integrity. It is therefore necessary that integrity and efficiency of the system reinforces one another as opposed to being exclusive objectives.⁴¹⁷

IEBC does not have clear policy and strategy to address the critical issues surrounding the use of electoral technology.⁴¹⁸ This undermines the integration of technology in electoral process and make the application of the system vulnerable to abuse by rogue IEBC staff. The existence of wide informational asymmetry breeds discretion on issues concerning the integration of technology in electoral process. This causes suspicion and loss of trust by the public. The IEBC should therefore develop a strategy to evaluate the successes, risks and challenges of such incorporation of technology.⁴¹⁹

The failure of EVID machines during elections in 2017, the failure of the Result Transmission System (RTS) , the contentious procurement of the electoral technology, the lack of clear

⁴¹⁶ Interview with Peter on 16th March 2019, the Election Expert.

⁴¹⁷ See Ben Sihanya (forthcoming 2021) *Constitutional Democracy Regulatory and Administrative Law in Kenya and Africa, op. cit.*

⁴¹⁸ See Independent Electoral and Boundaries Commission Post Election Evaluation Report on the 4 March 2013 General Election (October 2014), 118.

⁴¹⁹ Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.*

policy on integration of technology, the late delivery, curtailed testing, training and deployment of equipment have all vitiated the successes of technology.⁴²⁰

It is therefore suffices that IEBC should go back to the drawing board and evaluate the technology it intends to apply in the electoral process. It is therefore clear some of the challenges facing the integration of electoral technology were foreseeable and could have been eliminated through setting clear policy, better planning, training and deliberate execution.⁴²¹

There is need for comprehensive legislative reform on integration of technology. The Elections Act and The Technology Regulations of 2017 is unclear, shallow and ambiguous with regard to integration of technology. It fails to comprehensively provide for the control and operations of the electoral technology. It does not specify clearly the boundaries of service provides involvement during electoral process. This leaves room for manipulation of the electoral systems.⁴²²

IEBC should build a transparent and accountable results management system: A critical confidence building measure that IEBC can put in place before the next general elections is to establish transparency requirements throughout the entire results audit trail and make the information publicly available through the use of technology.⁴²³

At the very least, a spread sheet of the results of the presidential election (which is usually the most problematic) should be availed in a timely manner following the declaration of the winner. Polling station level data should be available electronically in easily accessible formats rather than the present portable document format (PDF) data dumps on the electoral management body's (EMB) website which do not download efficiently or at all.⁴²⁴

5.2.3 Transparency and Integrity in Voter Registration

The Constitution of Kenya 2010 engenders adequate clarity in relation to the right to vote; qualifications for registration as a voter; and the mandate of IEBC with respect to voter

⁴²⁰ *ibid.*

⁴²¹ Ben Sihanya (forthcoming 2021) "Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements," *op. cit.* See also Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.*

⁴²² *ibid.*

⁴²³ Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.*

⁴²⁴ *ibid.*

registration.

The Constitution of Kenya 2010 underpins the right to vote as a fundamental right.⁴²⁵ It provides that every adult citizen has the right, without unreasonable restrictions to be registered as a voter; to vote by secret ballot in any election or referendum; and 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.⁴²⁶ This right to vote is forms the foundation of good governance, legality, legitimacy and acceptability of a government by the people.⁴²⁷

The research recommends a shift to a new voter registration system that is more aligned to other citizen registration databases. This means rendering the current register supplementary. The IEBC needs to redesign the biometric voter registration (BVR) system based on greater controls and inbuilt parameters of exceptions to forestall reliance on multiple reference materials. This research therefore proposes that the voter registration be linked to the data base for the national Identity and the Integrated Population Registration Systems so as to enhance accuracy and integrity.⁴²⁸

It is also evident that the voter register is based on polling station as the smallest unit in accordance with section 3 of the Elections Act. However, in practice, IEBC uses registration centres and subsequently divides the centre registers into streams. This practice poses two challenges. First, in centres where there are multiple streams, there is no polling station register as such but rather a polling centre register.⁴²⁹

As such during elections, there is not only multiple material in respect to each polling centre, but there is also comparable names across polling stations. Secondly during reconciliation of ballots, materials and results, it is difficult to determine absolutely the number of registered persons in each station without reference to the entire polling centre. A related challenge is

⁴²⁵ Article 38 of the Constitution provides that every citizen has the right to free, fair and regular elections based on the universal suffrage and the free expression of the will of the electors for any elective public body or office; or any office of any political party of which the citizen is a member. This right is recognized by Universal Declaration of Human Rights, 1948) as much as the Constitution of Kenya.

⁴²⁶ Article 38(3) Constitution of Kenya 2010.

⁴²⁷ Ben Sihanya (2017) "Electoral Justice in Kenya under the 2010 Constitution Implementation, Enforcement, Reversals and Reforms," *op. cit.*

⁴²⁸ Report of the Independent Review Commission on the General Elections held in Kenya on the 27 December 2007 (17 September 2008) 79.

⁴²⁹ Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.*

that during polling there are inordinately long queues creating problems in managing polling process, delays and causing unnecessary anxiety. The convenient opportunity of curing these challenges is during the occasion of fresh registrations when the operational infrastructure is redesigned.⁴³⁰

Technology in voter registration should address the objectives of the integrity of the voters register. This objective has two aims-on the one hand, comprehensiveness or completeness of eligible franchise, and accuracy and verifiability on the other hand. The required integrity and completeness are achieved through, simplicity, complete enfranchisement, and verifiability.⁴³¹

These elements were compromised in the 2013 General Elections since the published BVR voters register was subject to additional reference materials which were not published and therefore not verifiable. In respect to franchise, enhanced inclusion of women, youth and regional registration drives should be enhanced. This should be supported through an arrangement that interfaces the regime of registration of persons with voter registration.⁴³² The choice of technology for BVR should be amenable to changes and in-built security features. The licence arrangements for the software chosen should not make the IEBC hostage to a supplier thus increasing operational costs and risking integrity of the process.

IEBC has for the past maintained the legacy of determining registration centres at during voter registration periods while gazetting polling stations closer to election periods.⁴³³ This inevitably leads to some misalignment of polling stations and registration centres. Thus, during elections, there are always complaints of voters unable to find their stations or allegations of arbitrary creation of new polling stations.⁴³⁴ This creates a lot of inconvenience to registered voters and vitiates electoral democracy.

⁴³⁰ *ibid.*

⁴³¹ See generally Vladimir Pran and Patrick Merloe, *Monitoring Electronic Technologies in Electoral Processes: An NDI Guide for Political Parties and Civic Organizations* (National Democracy Institute 2007); See also Rafael López-Pintor and Maria Gratschew, „Registration and Inclusive Democracy: Analysing Practices Worldwide“ 5-9 < <http://www.idea.int/publications/vt/upload/Voter%20registration.pdf>> (accessed 20 May 2019).

⁴³² Current practice in South Africa, and Ghana among other countries in Africa.

⁴³³ AfriCOG (2013) “Election day and its aftermath,” AfriCOG/KPTJ Election Series.

⁴³⁴ *ibid.*

IEBC's faulty procurement process for the biometric voter registration (BVR) system and electronic voter identification devices (EVIDs), and the ensuing controversy, dented its image with respect to the integrity of its systems and officers and delayed voter registration.

IEBC should resume the continuous registration of voters and clean up all the issues that arose from the last registration. It is not only a substantial trust builder, but will go a long way in cleaning up a register that will have begun to slide into obsolescence, as all registers at some point do, and to generally learn from the operational failures evident in the past elections.

5.2.4 Efficient Dispute Resolution System

The major problem with Electoral Dispute Resolution in Kenya (EDR) in the run up to 2013 was the overlap of jurisdiction between the Political Parties Dispute Tribunal, the High Court's unlimited jurisdiction on all matters including Constitutional interpretation and the protection of fundamental rights. A cardinal principle of EDR is the speedy and expeditious resolution of disputes.⁴³⁵

Given the foregoing principle, a fundamental question is whether the jurisdiction vested in the IEBC to determine disputes arising from party nominations is misplaced.

Considering the fact that IEBC is also mandated to conduct six elections simultaneously and the recently enacted Election Campaign Finance Act, 2013, it is clear that IEBC is overstretched and therefore amendments to the Election Laws to cure the concurrent jurisdiction is necessary. To strengthen EDR in Kenya, Article 88 (4) of the Constitution and Sections 74 of the Elections Act, and Section 40 of the Political Parties Act, 2011 needs to be streamlined.⁴³⁶

The Political Parties Dispute Tribunal should be empowered to deal with the larger chunk of party nomination disputes, while IEBC can retain the jurisdiction to determine disputes arising after the clearance by the Returning Officers. This approach is consistent with the preamble of the Elections Act 2011 that defines nominations to mean clearance by the Returning Officers (RO).⁴³⁷

⁴³⁵ International Foundations for Electoral System "Principles of Electoral Disputes Resolution," 3

at <<http://www.ifes.org/issues/election-dispute-resolution-and-complaints-adjudication>> (accessed 7/5/2019).

⁴³⁶ Ben Sihanya (forthcoming 2021) "Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms," *op. cit.*

⁴³⁷ *ibid.*

Principally, IEBC has broad powers to detect and adjudicate electoral disputes. Since the IEBC is not the only actor in the electoral justice chain other agencies, such as the police service, the Director of Public Prosecutions (DPP) and the judiciary, are also part of this chain. The limits between the IEBC's jurisdiction and powers, and those of the court and other agencies, are nevertheless not clearly delineated.⁴³⁸

Though the IEBC is also part of the justice chain, in the sense that it has the first responsibility of reaching a fair decision on the implementation of electoral law, and has some adjudicative power with respect to pre-election disputes, it requires the judiciary to conclusively determine issues over which its decisions have been disputed or to require the enforcement of some aspect of electoral law or procedure. This is especially so in the context of election offences and post-election disputes.⁴³⁹

5.3 Conclusion to the Role of Technology in Presidential Elections in Kenya

This study on the role of technology in presidential elections was inspired by the failings of the use of technology in Kenya's 2013 and 2017 presidential elections. The failure by the IEBC to conduct free, fair and credible elections while incorporating led to various critique to the use of technology in Kenyan presidential elections. From the discussions in Chapter 4, it has been proven that when technology is effectively incorporated it can lead to free, fair and credible elections as has been the case in Nigeria, Ghana, and the USA. The IEBC therefore needs borrow a leaf from these countries that have successfully used technology to ensure free, fair and credible presidential elections in their respective jurisdictions.

⁴³⁸ Ben Sihanya (forthcoming 2021) "Presidential and Premier election, Succession and Transition in 2017 and Beyond: Electoral Justice, Popular Sovereignty, Protests, Revolutions, and Succession Debates and Movements," *op. cit.*

⁴³⁹ *ibid.*

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