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INSTITUTIONALISING TECHNOLOGY FOR ACCOUNTABILITY IN ELECTIONS
MANAGEMENT IN KENYA

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Democratisation in Africa

by

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DEDICATION

This work in text and spirit, is foremost dedicated to my lovely mother, Elizabeth (Queen) Kerubo, to whom I look for requisite inspiration. *Naye bweka Mama!* It further goes to the people of the Republic of Kenya, who crave electoral justice as a fruit of the independence struggle.

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TABLE OF CONTENTS

PLAGIARISM DECLARATION.....	I
DEDICATION.....	II
ACKNOWLEDGEMENTS.....	III
ABSTRACT.....	VII
LIST OF ABBREVIATIONS AND ACRONYMS.....	VIII
CHAPTER ONE.....	1
INTRODUCTION.....	1
1.1 BACKGROUND.....	1
1.2 PROBLEM STATEMENT.....	7
1.3 RESEARCH OBJECTIVES.....	9
1.4 RESEARCH QUESTIONS.....	9
1.5 LITERATURE REVIEW.....	10
1.5.1 Conceptualising electoral accountability.....	10
1.5.2 Conceptualising institutionalisation of technology.....	12
1.5.3 The IEBC as an Elections Management Body.....	13
1.5.4 Institutional electoral accountability of the IEBC.....	15
1.5.5 Electoral technology and techno-democracy.....	16
1.5.6 The gains of electoral technology in fostering accountability.....	18
1.6 RESEARCH METHODOLOGY.....	19
1.7 STRUCTURE OF THE STUDY.....	19
1.8 SCOPE AND LIMITATIONS OF THE STUDY.....	19
CHAPTER TWO.....	20
ENTRENCHING ELECTORAL TECHNOLOGY: THE ROLE OF EFFECTIVE FRAMEWORKS.....	20



2.1	INTRODUCTION.....	20
2.2	NATIONAL LEGAL FRAMEWORKS.....	21
	a) The Constitution of Kenya 2010.....	21
	b) The Independent Electoral and Boundaries Commission Act 2011.....	24
	c) The Elections Act 2011.....	25
	d) Elections (Technology) Regulations 2017.....	27
	e) Data protection laws.....	28
2.3	REGIONAL LEGAL FRAMEWORKS.....	30
	a) The African Charter on Human and Peoples’ Rights.....	30
	b) The African Charter on Democracy, Elections and Governance 2007.....	31
2.4	GLOBAL LEGAL FRAMEWORKS.....	33
	a) The International Covenant on Civil and Political Rights.....	33
	b) The Universal Declaration of Human Rights (UDHR).....	35
2.5	INSTITUTIONAL FRAMEWORK.....	36
	2.5.1 The Independent Electoral and Boundaries Commission.....	37
	2.5.2 Election courts.....	38
2.6	CONCLUSION.....	40
	CHAPTER 3.....	41
	LITIGATING ELECTORAL TECHNOLOGY AND LESSONS FROM JURISPRUDENCE IN KENYA.....	41
	3.1 INTRODUCTION.....	41
	3.2 TRACING THE LITIGATION HISTORY OF ELECTORAL TECHNOLOGY IN KENYA.....	42
	3.2.1 The original ‘false start’.....	42
	3.2.2 Judicial interpretation of principles of the electoral system.....	44
	3.2.3 End-to-end electoral processes.....	45



3.3	JURISPRUDENCE ON ELECTORAL TECHNOLOGY IN KENYA SINCE 2013.....	46
3.3.1	The <i>Maina Kiai</i> effect.....	46
3.3.2	Electoral technology in <i>Raila Odinga 2013</i>	47
3.3.3	Electoral technology in <i>Raila Odinga 2017</i>	48
3.3.4	Electoral Technology in <i>Raila Odinga 2022</i>	50
3.4	CONCLUSION.....	52
CHAPTER 4.....		54
CONCLUSION AND RECOMMENDATIONS.....		54
4.1	INTRODUCTION.....	54
4.2	KEY FINDINGS.....	54
4.2.1	The link between electoral technology and electoral principles.....	54
4.2.2	Institutional technology policies, practices and accountability.....	55
4.2.3	Adjudication of electoral technology.....	56
4.2.4	Practices and strategies for accountability through electoral technology.....	57
4.3	KEY RECOMMENDATIONS.....	57
4.3.1	Institutional reforms.....	57
4.3.2	Implementation of court recommendations.....	58
4.3.3	Review of legal frameworks.....	59
4.3.4	Electoral technology and data protection.....	59
4.4	CONCLUSION.....	59
BIBLIOGRAPHY.....		61

ABSTRACT

This study examines the role of electoral technology in developing an accountable election management system by the Independent Electoral and Boundaries Commission (IEBC) in Kenya, between 2010 and 2023. Although there has been progress, the IEBC faces electoral implementation challenges. The level of electoral accountability is low, illustrative of an institutional culture gap and ineffective enforcement mechanisms. The IEBC lacks a well-articulated policy on electoral technology, including low public participation. Nonetheless, the uptake of electoral technology continues to pick momentum, in each electoral cycle.

The study argues that the IEBC should establish consistent and long-term institutional policies and standards for electoral technology. These standards should facilitate predictable practices, to achieve an accountable electoral process, with a self-sustaining institutional culture which outlives the electoral body and inspires stability and public confidence. The study further argues that the trust deficit in the electoral system can be bridged by electoral technology systems, more accountable than manual processes because the human element is mitigated or reduced.

The study illustrates that despite the recurring pitfalls such as a low understanding of electoral technology, there is progress, although the policy, legislative, and institutional frameworks demonstrate missed opportunities in easing democratic consolidation. Trends from 2013 to 2022 demonstrate that the manner of implementation of electoral technology threatens the very democracy it is meant to safeguard. This is due to a lack of proper planning, consistent procurement practices, training of stakeholders and inconsistent electoral technology practices.

The study contributes to the literature on electoral technology by exploring the centrality of accountability in the electoral process, which is an area hardly explored. It provides recommendations taking into account jurisprudence, existing legal frameworks, and emerging technologies. Chapter one introduces the study, while Chapter two explores the legal and institutional frameworks. Chapter three is a review of jurisprudence, while Chapter four provides key findings, recommendations and conclusions.

Keywords: IEBC, servers, electoral technology, institutionalisation, accountability, elections management.

LIST OF ABBREVIATIONS AND ACRONYMS

ACDEG	-	African Charter on Democracy, Elections and Governance
ACE Project	-	Administration and Cost of Elections Project
ACHPR	-	African Charter on Human and Peoples' Rights
ACmHPRs	-	African Commission on Human and Peoples' Rights
ACtHPRs	-	African Court on Human and Peoples' Rights
AfriCOG	-	Africa Centre for Open Governance
BVR	-	Biometric Voter Registration
DPA	-	Data Protection Act 2019
ECK	-	Electoral Commission of Kenya
ELGIA	-	Electoral Law and Governance Institute Africa
EMB	-	Electoral Management Body
EMBs	-	Electoral Management Bodies
EVI	-	Electronic Voter Identification
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
IEBC	-	Independent Electoral and Boundaries Commission
International IDEA	-	International Institute for Democracy and Electoral Assistance
KIEMS	-	Kenya Integrated Elections Management System
ODPC	-	Office of the Data Protection Commissioner
RTS	-	Results Transmission System
UDHR	-	Universal Declaration of Human Rights
UN	-	United Nations
UNDP	-	United Nations Development Programme

CHAPTER ONE

INTRODUCTION

Inherent in the use of digital technologies in election management in Africa are several antinomic and paradoxical manifestations. First is what may be described as a paradox of trust.¹

1.1 Background

Technology is increasingly becoming a factor contributing to the quality of election management processes and practices in Africa. In Kenya, the International Commission of Jurists states that ‘weaknesses in technology integration have been directly linked to institutional dysfunction and unaccountable decision making.’² Definitively, the institutional performance of electoral bodies determines the transition from symbolic elections to democratic governance based on free, fair and accountable electoral processes.³ This transformation seeks the elusive promise of substantive democracy which started in the 1990s. Voting trends thus indicate that democratic legitimacy depends on among other factors, the successful implementation of electoral technology.⁴ This is especially true in the digital age, where technology is a driving force in the democratisation agenda.⁵

However, as Fombad states, in the era of democratisation and constitutionalism, accountability has been one of the ‘missing blocks.’⁶ Accountability means the diverse institutional checks and balances for the control of government action in a democracy.⁷ Further, election management entails the professional and impartial conduct of elections by a designated body with a structure and mandate. Accountability in elections management thus encompasses

¹ OO Ibeanu ‘Digital technologies and election management in Africa’ (2022) 47 *Africa Development / Afrique et Développement* 15 at 21 <https://www.jstor.org/stable/48682664?seq=5> (accessed 3 August 2023).

² M Owuor ‘Election technology and electoral justice in Kenya’ 8 <https://icj-kenya.org/wp-content/uploads/2023/01/ELECTION-TECHNOLOGY-AND-ELECTORAL-JUSTICE-IN-KENYA-Final-1.pdf> (accessed 24 August 2023).

³ L Thuo ‘Deepening and sustaining electoral democracy in Kenya: Lessons from Ghana’ in M Addaney & MG Nyarko (eds) *Ghana @ 60: Governance and human rights in twenty-first century Africa* (2017) 195.

⁴ Ibeanu (n 1) 16.

⁵ As above.

⁶ CM Fombad ‘The constitution as a source of accountability: The role of constitutionalism’ (2010) 2 *Speculum Juris* 41 at 64 https://repository.up.ac.za/bitstream/handle/2263/17022/Fombad_Constitution%282010%29.pdf?sequence=1&isAllowed=y (accessed 15 July 2023).

⁷ R Mulgan ‘Accountability: An ever-expanding concept?’ (2000) 78 *Public Administration* 555 at 556 https://crawford.anu.edu.au/pdf/staff/richard_mulgan/MulganR_02.pdf (accessed 15 July 2023).

responsiveness,⁸ and the ability of the electorate to seek answers from constitutionally established public institutions and officials.⁹ In the context of this study, the responsible institution is the IEBC. Therefore, the centrality of accountable election management bodies (EMBs) to democracy cannot be gainsaid.¹⁰

The aftermath of the 2007 general elections necessitated legal and institutional reforms as exemplified by the Constitution of Kenya 2010 (the Constitution).¹¹ The Constitution sought to transform democracy and governance by streamlining the electoral system to respond to concerns on the conduct of elections, expressed through the 2010 constitutional referendum.¹² Significantly, therefore, the post-2007 period crystallised the reform agenda, accelerating the momentum of institutional reforms.¹³

Moreover, the management of all elections in Kenya after 1992 has been contested, except in 2002.¹⁴ As Long notes, institutional failures of the Electoral Commission of Kenya (ECK) in 2007, fundamentally interfered with the accountability mechanism that elections are designed to promote.¹⁵ Cases of electoral manipulation led to contested results¹⁶ and the 2007 presidential elections were deemed fraudulent.¹⁷ The ECK was later disbanded paving the way for the establishment of the IEBC under the 2010 Constitution,¹⁸ and conferred special governance mandates.¹⁹ It is a custodian of democracy,²⁰ with a corresponding constitutional obligation to

⁸ R Mulgan (n 7) 557.

⁹ As above.

¹⁰ As above.

¹¹ The Constitution of Kenya 2010

<http://www.kenyalaw.org:8181/exist/rest//db/kenyalex/Kenya/The%20Constitution%20of%20Kenya/docs/ConstitutionofKenyaof2010.pdf> (accessed 28 June 2023).

¹² M Nderitu and others *History of constitution making in Kenya* (2012) 61.

¹³ *Raila Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others* (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) (2022) KESC 54 (KLR) <http://kenyalaw.org/caselaw/cases/view/241353/> para 1 (accessed 26 May 2023).

¹⁴ *Raila Odinga* 2022 (n 13).

¹⁵ JD Long 'Electoral fraud and the erosion of democratic gains in Kenya' (2010) 9&10 http://www.sscnet.ucla.edu/polisci/wgape/papers/18_Long.pdf (accessed 28 June 2023).

¹⁶ As above.

¹⁷ As above.

¹⁸ The Constitution of Kenya 2010 art 59.

¹⁹ *Re the Matter of the Interim Independent Electoral Commission* [2011] eKLR <http://kenyalaw.org/caselaw/cases/view/77634/> para 59 (accessed 29 June 2023).

²⁰ As above.

enforce the rule of law, integrity, transparency, and public participation.²¹ These democratic principles are reiterated as national values and principles of governance,²² binding on all persons and state organs.²³ The IEBC is therefore bound to be accountable,²⁴ in general elections and referenda.²⁵

Concisely, the 2009 report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 (Kriegler report) recommended the use of technology in tallying, recording, transcribing, transmitting, and announcing election results.²⁶ Incidentally, the IEBC determines voting methods, required to be simple, accurate, verifiable, secure, accountable, and transparent.²⁷ It has the power to establish appropriate structures and mechanisms to eliminate electoral malpractices.²⁸ The Constitution thus addresses the parameters of election management.²⁹ This is to facilitate accountability as a way of strengthening democracy and participation of the people.

Accountability requires independent watchdog institutions,³⁰ to monitor and report on the implementation of laws and the discharge of mandates by public officials. As a result, in 2013, 2017, and 2022, the gradual integration of technology into the management of elections has been a transformative factor. The Elections Act 2011,³¹ introduced a hybrid electoral system by introducing the use of technology to complement the then existing purely manual electoral system. The Kenya Integrated Elections Management System (KIEMS) was put in place as a core

²¹ As above.

²² The Constitution of Kenya 2010 art 10.

²³ The Constitution (n 10) art 10(2) (c).

²⁴ As above art 88.

²⁵ As above art 88(4).

²⁶ ACE project 'Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007' 9 <https://aceproject.org/regions-en/countries-and-territories/KE/reports/independent-review-commission-on-the-general> (accessed 25 May 2023).

²⁷ The Constitution (n 10) art 86(a).

²⁸ As above art 86.

²⁹ As above.

³⁰ MA Simiyu 'Freedom of expression and African elections: Mitigating the insidious effect of emerging approaches to addressing the false news threat' (2022) 22 *African Human Rights Law Journal* 85.

³¹ Elections Act 2011 sec 44 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2024%20of%202011> (accessed 28 June 2023).

function. The KIEMS covered Biometric Voter Registration (BVR), Electronic Voter Identification (EVI), and the Results Transmission System (RTS).³²

Unfortunately, the transformation has not been optimal, with the 2013, 2017, and 2022 elections as benchmarks. For instance, access to electoral information has not been streamlined using technology to reassure the electorate of participatory governance.³³ The use of technology invites a higher sense of responsibility for proactive transparency. This is to achieve accountability by providing the electorate with the right information, as a principle of good democratic governance.³⁴

As of 2022, Ngila reports that there is limited public confidence in electoral technology with concerns on the levels of transparency, there is limited public participation, unsatisfactory audit procedures, and the technology is not well understood by both election officials and the public.³⁵ Technology is thus seen as a 'vulnerability to a free and fair election.'³⁶ Despite the IEBC maintaining a public portal for results transmission, manual tallying at the national tallying centre has been the norm, because of the public perception that full automation and digitisation is a recipe for rigging.³⁷

The challenges notwithstanding, technology has been instrumental in facilitating voter registration and verification, as witnessed in the elections when the electronic system was first introduced. Eventually, it is anticipated that solutions such as blockchain technology could create fool-proof voting systems with several personal computers working together thus eliminating the single point of failure occasioned by centralised servers.³⁸ Indeed Kenya has continued to scale up

³² Elections Act (n 30) & R Mosero 'In Kenya's 2022 elections, technology and data protection must go hand-in-hand' 3 https://carnegieendowment.org/files/202208-Mosero_KenyaElection_v1.pdf (accessed 6 September 2023).

³³ HK Prempeh 'Africa's constitutionalism revival: False start or new dawn?' 5(3) *International Journal of Constitutional Law* 469 (2007).

³⁴ I Mergel 'Study on The Impact of Digital Transformation on Democracy and Good Governance' 12 <https://rm.coe.int/study-on-the-impact-of-digital-transformation-on-democracy-and-good-go/1680a3b9f9> (accessed 10 October 2023).

³⁵ F Ngila 'Kenyans still don't trust technology to run general elections' *Quartz* 15 August 2022 <https://qz.com/this-is-why-kenyans-still-cannot-trust-technology-to-run-1849411684> (accessed 17 July 2023).

³⁶ As above.

³⁷ As above.

³⁸ J Ndungu 'An e-voting system based on blockchain technology: A case study of Kenya elections' Masters' thesis, University of Nairobi, 2013 1 <http://erepository.uonbi.ac.ke/bitstream/handle/11295/153038/Joseph%20Ndungu.pdf?sequence=1> (accessed 6 September 2023).

the use of electoral technology. According to Freedom House, the 2022 elections saw an improvement in freedom rankings for Kenya due to the outcome of the elections, which were predominantly technology-led.³⁹

However, to put the integration of electoral technology in perspective, Omwoha argues that the use of technology in the 2013 elections ‘flopped’ as the secure results transmission servers were unable to handle the amount of data uploaded to the system.⁴⁰ The breakdown of technology led to an erroneous results transmission system.⁴¹ It led to delays in the declaration of results thus raising the concern of whether technology could end up subverting the same democracy it is meant to promote.⁴² The technical challenges and breakdown of technology experienced were termed by the opposition politicians as a plot to defraud them of their votes.⁴³ The IEBC could not demonstrate institutional accountability, as the electronic equipment in particular polling stations failed, the data system overloaded and the servers were not fit for purpose.⁴⁴

Similarly, in 2017 the election was nullified for among other reasons, lack of transparency in the use of electoral technology, famously ‘the servers.’⁴⁵ The technology systems used by the IEBC were reported as complex, and their inner workings were very difficult to observe, even for computer security experts.⁴⁶

Omwoha posits that the link between technology and democracy was still a matter of contention unless election policies were revised and implemented.⁴⁷ The author further argues that Kenyans attempted to hold the IEBC accountable for conducting defective elections in 2017

³⁹ Freedom House ‘New report: Freedom in Africa improved slightly in 2022 but challenges persist’ 9 March 2023 <https://freedomhouse.org/article/new-report-freedom-africa-improved-slightly-2022-challenges-persist> (accessed 6 September 2023).

⁴⁰ J Omwoha ‘Open the Servers: The implications of electoral technology for Kenya’s democratisation process’ (2022) 47(2) *Africa Development* 149.

⁴¹ M Andago ‘The technological face of Kenyan elections: A critical analysis of the 2013 polls’ http://www.kenyalaw.org/LVI2014/docs/Technological_Face_of_Kenyan_Elections.pdf (accessed 30 June 2023).

⁴² G Warner ‘How Kenya’s high-tech voting nearly lost the election’ *NPR* 9 March 2013 <https://www.npr.org/sections/alltechconsidered/2013/03/09/173905754/how-kenyas-high-tech-voting-nearly-lost-the-election> (accessed 16 June 2023).

⁴³ As above.

⁴⁴ Omwoha (n 40) 147.

⁴⁵ As above.

⁴⁶ The Carter Center ‘Kenya 2017 general and presidential elections final report’ 9 https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-2017-final-election-report.pdf (accessed 29 June 2023).

⁴⁷ Omwoha (n 40) 157.

through calls for access to the election servers. The author further questions whether the low levels of public confidence in the IEBC result from the flawed implementation of technology.⁴⁸

Furthermore, Cheeseman and others note that in 2017, a nationally representative survey conducted in Kenya found that 58 per cent of respondents agreed that the use of digital technologies results in free and fair elections.⁴⁹ However, the authors further argue that despite the widespread use of technology in the 2017 elections, the Supreme Court still nullified the results for among other matters, that the use of technology led to irregularities.⁵⁰ The authors further argue that the use of technology may lead to improved quality of particular aspects of the elections but may not necessarily guarantee a credible election.⁵¹ Technology alone cannot fix weak electoral commissions because the implementation depends on strong administrative structures.⁵² This is what this study refers to as institutionalising technology by the IEBC.

The IEBC in 2022,⁵³ faced challenges with KIEMS implementation, which tainted the transparency of the electoral process and shook public confidence in electoral technology.⁵⁴ The election results were transmitted using the KIEMS,⁵⁵ under Section 44 of the Elections Act 2011.⁵⁶ Despite the electronic transmission, the elections demonstrated that accountability requires a comprehensive approach to the use of technology in results transmission, including transparency in tallying and display of the data received electronically in real time.⁵⁷

The IEBC recommended that all election technologies should be implemented two years before the general election.⁵⁸ For accountability, only the IEBC staff should have access to the

⁴⁸ Omwoha (n 40) 158.

⁴⁹ N Cheeseman, G Lynch & J Willist 'Digital dilemmas: the unintended consequences of election technology' (2018) 25 *Democratization* 1402 <https://www.tandfonline.com/doi/epdf/10.1080/13510347.2018.1470165?needAccess=true&role=button> (accessed 29 June 2023).

⁵⁰ As above.

⁵¹ Cheeseman and others (n 49) 1406.

⁵² As above.

⁵³ Independent Electoral and Boundaries Commission 'Post-election evaluation report for the 9 August 2022 general election' 67 <https://www.iebc.or.ke/uploads/resources/pabjKTV6Xa.pdf> (accessed 26 May 2023).

⁵⁴ Final report of the European Union Election Observation Mission at 15 https://www.eeas.europa.eu/sites/default/files/documents/EU_EOM_Kenya_2022_EN.pdf (accessed 28 June 2023).

⁵⁵ IEBC (n 53) 90.

⁵⁶ Elections (Technology) Regulations 2017 reg 2.

⁵⁷ As above.

⁵⁸ IEBC (n 53) 91.

servers supporting the transmission and storage of result forms.⁵⁹ This is to 'avoid suspicion from stakeholders.'⁶⁰ However, the 2022 electoral cycle illustrates that the IEBC is yet to inspire public confidence.⁶¹

1.2 Problem statement

The IEBC has not been successful in demonstrating substantive accountability in elections management post-2010, as the electoral process continues to be challenged.⁶² This is partly attributable to the general failures in the implementation of electoral technology and manual tabulation and collation of results in areas with no internet or device penetration, which makes the process susceptible to manipulation leading to violence as observed in 2007.⁶³ To remedy this anomaly caused by manual systems, the Kriegler report recommended the use of technology to enhance accountability and transparency.⁶⁴

However, electoral technology is still open to abuse, including potential infiltration and hacking to manipulate and pre-determine election results as alleged in 2013, 2017 and 2022.⁶⁵ Technology thus presents weak points and threatens accountability because such manipulation can lead to subversion of democracy since technology is not an end in itself, but a tool to facilitate elections management.⁶⁶

Institutional mechanisms such as tabulation logs in servers can therefore enhance accountability in elections management. However, as the United Nations Development Programme (UNDP) notes, high-technology equipment is desirable only when it can be easily

⁵⁹ IEBC (n 53) 28.

⁶⁰ As above.

⁶¹ *Raila Odinga 2022* (n 13) para 1.

⁶² Cheeseman and others (n 49) 1402.

⁶³ United Nations 'UN human rights team issues report on post-election violence in Kenya' <https://www.ohchr.org/en/press-releases/2009/10/un-human-rights-team-issues-report-post-election-violence-kenya> (accessed 15 August 2023).

⁶⁴ Kriegler report (n 26) 9 & 140.

⁶⁵ O Otieno 'Odinga back to rallies in quest for poll justice, role recruiting IEBC chiefs' *The East African* 28 January 2023 <https://www.theeastafrican.co.ke/tea/news/east-africa/odinga-back-to-rallies-in-quest-for-poll-justice-4101848> (accessed 11 August 2023).

⁶⁶ Administration and Cost of Elections (ACE) Project 'Elections and technology' <https://aceproject.org/ace-en/topics/et/onePage> para 9 (accessed 15 August 2023).

maintained, otherwise its use can distract EMBs from their fundamental functions.⁶⁷ This is the case in Kenya as there is limited understanding of the role of technology by electoral officials and the public,⁶⁸ due to lack of a sustainable institutional culture. Furthermore, its failed implementation has contributed to the classification of Kenya's democracy as a 'flawed transition.'⁶⁹

In 2023, the outgoing IEBC chairperson argued that the 'last mile test' which is a timely publication of results, is the magic bullet.⁷⁰ However, this standard has not been applied before, illustrating a lack of institutional consistency. The IEBC's strategic plan should thus comprise a plan on the use of technology with a significant degree of institutional permanence.⁷¹ This is because permanence connotes the central role of technology, being part of the technical and managerial strategies of EMBs. It appreciates that technology opens new frontiers for uncertainty and fraud with a 'black box' approach where the internal workings are not known.⁷²

In 2013, the Supreme Court noted that electronic technology has not provided perfect solutions and it has been inherently undependable.⁷³ Similarly, in the 2017 elections, the use of technology did not result in an accountable electoral process.⁷⁴ In 2022 the use of technology by the IEBC was challenged,⁷⁵ the court noting that its failure is an expected reality.⁷⁶ The court

⁶⁷ R Lopez-Pintor 'Electoral Management Bodies as Institutions of Governance' 125 <https://www.eods.eu/library/UNDP.Electoral%20Management%20Bodies%20as%20Institutions%20of%20Governance.pdf> (accessed 18 July 2023).

⁶⁸ C Passanti & M Pommerolle 'The (un)making of electoral transparency through technology: The 2017 Kenyan presidential election controversy' (2022) 52 *Social studies of science* 928 at 942 <https://journals.sagepub.com/doi/pdf/10.1177/03063127221124007> (accessed 6 September 2023).

⁶⁹ Lopez-Pintor (n 67) 18.

⁷⁰ W Chebukati 'Role of technology in improving the integrity of the electoral process in Kenya' 2 <https://acrobat.adobe.com/id/urn:aaid:sc:EU:485faa8b-0acc-4a12-869e-93a1b62c1a18> (accessed 25 August 2023).

⁷¹ Lopez-Pintor (n 66) 129.

⁷² Africa Centre for Open Governance & Kenyans for Peace with Truth and Justice 'Disobeying court orders: The scrutiny of Kenya's electoral technology' iii https://africog.org/wp-content/uploads/2022/12/ICT_Experts_Report_For_Kenya_Presidential_Election_Petition_2022.pdf (accessed 18 July 2023).

⁷³ *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 others* (2013) eKLR para 237 <http://kenyalaw.org/caselaw/cases/view/87380/> (accessed 30 June 2023).

⁷⁴ *Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR Petition No 1 of 2017 para 405 <http://kenyalaw.org/caselaw/cases/view/140716/> (accessed 26 May 2023).

⁷⁵ *Raila Odinga* 2022 (n 13) above.

⁷⁶ *Raila Odinga* 2022 (n 13) para

ordered access to electoral servers among other reasons, to seek accountability in the transmission and tallying of results.⁷⁷

However, compliance with the orders was a challenge, which illustrates that electoral technology has concentrated power in technocrats and technology companies making the process more technocratic than democratic,⁷⁸ hence this study explores the influence of technology on the accountability of the electoral system in Kenya.

1.3 Research objectives

Firstly, the study assesses the status of the implementation of election technology from 2013 to date, in line with the constitutional principle of accountability and existing legislation. It explores the manner of integration of technology in the electoral system by the IEBC. Secondly, the study reviews electoral technology policies, practices and judicial interpretation of electoral disputes involving electoral technology to determine the standard set for effective integration. Thirdly, the study provides recommendations for the integration of technology to result in an accountable electoral system.

1.4 Research questions

The main research question of this study is: To what extent has the integration of technology into the electoral process enhanced electoral accountability in Kenya? The study further explores the following sub-questions:

- a) To what extent does the integration of electoral technology *vide* Section 44 A of the Elections Act 2011 engender the electoral principles under Article 86 (a) of the Constitution of Kenya 2010?
- b) What institutional policies and practices have the IEBC implemented on electoral technology to promote accountability in elections management in Kenya?

⁷⁷ The East African 'Kenya poll petition: Smartmatic declines to open IEBC servers to Raila Odinga' <https://www.zawya.com/en/economy/africa/kenya-poll-petition-smartmatic-declines-to-open-iebc-servers-to-raila-odinga-p2tu34rm> (accessed 4 August 2023).

⁷⁸ Ibeanu (n 1) 23.

- c) How have courts approached the adjudication of election petitions touching on the integration of electoral technology in Kenya?
- d) What practices and strategies can IEBC adopt in the implementation of electoral technology to promote accountability in elections management in Kenya?

1.5 Literature review

This part of the study reviews the existing literature in the following thematic areas.

1.5.1 Conceptualising electoral accountability

According to Uhr, people require public officials to answer, explain and accept sanctions in a democracy as a way of controlling their actions.⁷⁹ Uhr explains ‘control’ as requiring public agencies and officials to comply with the will of the people and clarifies that accountability and control are linked. For the IEBC to be accountable to the people, the use of technology has to be consistent with the existing legislation.⁸⁰ The manner of recording or alteration of digital data should be compliant with the Election (Technology) Regulations 2017, with a clear log of the officials performing functions, and a specific indication of the action performed on the data.⁸¹ However, Uhr does not further explore the role of technology in fostering accountability, which this study seeks to build up on.

To build on accountability, Okello argues that independent EMBs are required to be accountable to the people and the government.⁸² In the author’s view, EMBs are state institutions with the responsibility to perform public functions.⁸³ Accountability is achieved through the establishment of mechanisms for reporting, including the submission of annual reports to Parliament.⁸⁴ The author argues that the process of submitting reports to enable scrutiny is

⁷⁹ J Uhr ‘Redesigning accountability’ (1993) 65 *Australian Quarterly* 6.

⁸⁰ As above.

⁸¹ As above.

⁸² EO Okello ‘Guaranteeing the independence of election management bodies in Africa: A study of the electoral commissions of Kenya and South Africa’ LLM thesis, University of Pretoria, 2006 17-18 (https://repository.up.ac.za/bitstream/handle/2263/1227/okello_eo_1.pdf?sequence=1&isAllowed=y accessed 4 August 2023).

⁸³ As above.

⁸⁴ As above.

important as it ensures the EMBs perform their functions effectively thus fostering public confidence.⁸⁵

Okello further argues that EMBs should be accountable to the electorate by providing access to the information contained in reports and other mechanisms. The author specifically identifies the dissemination of newsletters, pamphlets, or booklets on the activities of EMBs as a way to enhance understanding of their activities.⁸⁶ The author further proposes that the accountability of EMBs can be achieved through the assessment of their performance by the public.⁸⁷

In line with this, Mutunga argues that through the Constitution, Kenyans sought the reconstitution or reconfiguration of the state from the vertical, imperial, authoritative, and non-accountable past regimes to a state that is accountable and responsive to the vision of the Constitution.⁸⁸ The author underscores the need for accountability as an indicator of constitutionalism, against which all organs of government should be measured.

In addition, the Africa Centre for Open Governance highlights that under the Constitution, the IEBC is required to allow public scrutiny of its processes to ensure accountability.⁸⁹ It further notes that election stakeholders can proactively monitor the work of the IEBC. It particularly states in 2013 the IEBC illustrated gaps in transparency and accountability as it could not determine the voters' register used for elections.⁹⁰

As part of its accountability obligations, the IEBC has to demonstrate that technology is not standing in the way of the public understanding the electoral process. Article 88(4)(1)(g) of the Constitution mandates the IEBC to conduct voter education, including demonstrating to the public the workings of the electoral technology used in the electoral process.

⁸⁵ Okello (n 82) 18.

⁸⁶ As above.

⁸⁷ As above.

⁸⁸ W Mutunga 'The 2010 constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions' 1 <http://www.saflii.org/za/journals/SPECJU/2015/6.pdf> (accessed 29 June 2023).

⁸⁹ Africa Centre for Open Governance 'Rethinking electoral management in Kenya: An emerging agenda for the 2017 Elections' 10 <https://africog.org/wp-content/uploads/2017/05/Rethinking-Electoral-Management-Updated.pdf> (accessed 29 June 2023).

⁹⁰ Africa Centre for Open Governance (n 89) 16.

The study thus adopts the elements of accountability discussed and notes that electoral technology plays a critical role in asserting accountability, because voter registration, verification and transmission of results are all technology-reliant processes. This is despite the challenges in the implementation of the various elements.

1.5.2 Conceptualising institutionalisation of technology

Salvati defines the term institutionalisation as ‘the creation of stable patterns of action and behaviour, based on routinised formal and informal rules.’⁹¹ It is therefore the process through which organisations define operational parameters to guide the performance of roles. Furthermore, according to Russell, the process of institutionalisation entails creating an organisational culture with formalised routines for the implementation of decisions.⁹² Contextually, the institutionalisation of technology requires compliance with electoral laws and regulations by establishing systems by the IEBC to guide the implementation of electoral technology and to give effect to the principles of electoral democracy.

To this end, Nantulya argues that the need to ‘technocratise’ the IEBC arose from concerns about the manipulation of the electronic transmission of results.⁹³ The use of technology at the institutional level thus requires the IEBC to apply consistent and established policies, patterns and behaviour to produce a uniform result in addressing the recurrent, structured problem of lack of trust in the electoral system and the lack of accountability in the implementation of technology.⁹⁴

The rationale for the institutionalisation of technology further rests with Likoti’s argument that elections constitute a holistic process of democratic transition as opposed to isolated events, and through elections, good governance is pursued as a democratic ideal.⁹⁵ This conceptualisation

⁹¹ E Salvati ‘The role of networks in local governance’ <https://www.igi-global.com/chapter/the-role-of-networks-in-local-governance/263548> (accessed 7 September 2023).

⁹² RD Russel ‘How organisational culture can help to institutionalise the spirit of innovation in entrepreneurial ventures’ 7 <https://www.emerald.com/insight/content/doi/10.1108/09534818910005773/full/pdf?title=how-organisational-culture-can-help-to-institutionalise-the-spirit-of-innovation-in-entrepreneurial-ventures> (accessed 3 August 2023).

⁹³ P Nantulya ‘Seven takeaways from Kenya’s consequential election’ <https://africacenter.org/spotlight/seven-takeaways-from-kenyas-consequential-election/> (accessed 17 June 2023).

⁹⁴ As above.

⁹⁵ JF Likoti ‘Electoral Management Bodies as institutions of good governance: Focus on Lesotho Independent Electoral Commission’ (2009) 13 (1) *Review of South African Studies* 123- at

of institutionalisation of technology best fits the context of this study as the history of electoral reforms in Kenya shows a pattern of lack of an institutional character where technology is used as a tool for accountable elections management. The authors discussed have not touched on the realities of implementation of institutionalisation through predictable practices, which this study pursues.

1.5.3 The IEBC as an Elections Management Body

According to the International Institute for Democracy and Electoral Assistance (International IDEA), the typology of EMBs classifies them into an independent model where elections are managed by an EMB institutionally independent and autonomous from the executive.⁹⁶ This is the model adopted by Kenya and it is different from the governmental model where the executive, through a ministry, manages elections. It further differs from the mixed model where elections are managed largely by the executive with limited oversight by an EMB.⁹⁷ This creates a further distinction between structural or formal independence and normative or actual independence. Formal independence denotes structural detachment from the executive while actual independence means the ability of the EMB to resist external interference.⁹⁸

Loeber highlights that when technology is introduced in the electoral system, it affects the actual independence of an EMB, due to the technical knowledge requirements.⁹⁹ The main contention is that where the EMB lacks the technical knowledge required, the need to engage private companies arises. In the case of Kenya, international vendor companies are engaged to provide technical capacity. The author argues that private companies could have vested interests in the outcome of the election, raising the issue of impartiality. Therefore, formal independence

¹²⁶<https://repository.tml.nul.ls/bitstream/handle/20.500.14155/284/rev13n109p6.pdf?sequence=1&isAllowed=y> (accessed 7 September 2023).

⁹⁶ A Wall 'Electoral management design' *The International IDEA Handbook* (2014) 21 <https://www.idea.int/sites/default/files/publications/electoral-management-design-2014.pdf> (accessed 7 September 2023).

⁹⁷ As above 151.

⁹⁸ As above.

⁹⁹ L Loeber 'Use of technology in the election process: Who governs?' (2020) 19 *Election Law Journal* 150-152 <https://www.liebertpub.com/doi/pdf/10.1089/elj.2019.0559> (accessed 16 August 2023).

without actual independence in the use of electoral technology leads to less independent EMBs than what the legal framework presupposes.¹⁰⁰

Furthermore, Fombad succinctly argues that elections are central to the model of liberal democratic politics in Africa and presupposes the establishment of institutional structures to guarantee a free and fair contest. In his view, the electoral institutions necessary to guarantee free and fair elections include an independent election management body. The author adds that institutions shape the choices available to political actors and that the type of EMB chosen must be recognised as one of the most important institutional structures for shaping the nature and extent of political competition because it is likely to influence the outcome of elections.¹⁰¹

In Kenya, the legal framework prescribes the type of EMB and in light of this, the Constitution designates the IEBC as the sole corporate body responsible for the independent management of elections.¹⁰² It has the mandate of ensuring continuous voter registration¹⁰³ and conducting regular general elections and by-elections.¹⁰⁴

However, Passanti and Pommerolle note that there is a lack of trust in the IEBC, and the opposition consistently questions its legitimacy and efficiency.¹⁰⁵ To be effective the IEBC should communicate, create awareness, and elaborate on the use of technology.¹⁰⁶ This is to ensure that its election management practices are understood by the people and that the use of technology is explained to the public.¹⁰⁷

This study underscores the need to roll out awareness programmes before the campaign periods for objective civic engagement on the integration of technology in the electoral process. The study complements the authors' views by demonstrating that the IEBC is under an obligation

¹⁰⁰ As above.

¹⁰¹ CM Fombad 'Election management bodies in Africa: Cameroon's 'national elections observatory' in perspective' (2003) 3 *African Human Rights Law Journal* 26 https://www.ahrlj.up.ac.za/images/ahrlj/2003/ahrlj_vol3_no1_2003_charles_manga_fombad.pdf (accessed 23 May 2023).

¹⁰² The Constitution of Kenya 2010 art 253.

¹⁰³ The Constitution of Kenya 2010 art 82(1)(c).

¹⁰⁴ The Constitution of Kenya 2010 art 82(1)(d).

¹⁰⁵ Passanti & Pommerolle (n 68) 13.

¹⁰⁶ As above 5.

¹⁰⁷ As above.

to deliver on its constitutional mandate which constitutes inspiring public trust and confidence by implementing the principle of accountability.¹⁰⁸

1.5.4 Institutional electoral accountability of the IEBC

The Constitution sought to entrench electoral accountability.¹⁰⁹ Ochieng writes that high levels of impunity and the general governance culture require independent bodies, in an attempt to ‘dismantle and democratise’ Kenya.¹¹⁰ The author reckons that the institutional design of an independent commission is the determinant factor for its ability to establish its force for accountability.¹¹¹ He argues that due to government excesses through amendments of the constitution, the existing governance institutions were weakened and the government was not subjected to accountability structures, against the tenets of constitutionalism.¹¹²

This means that the IEBC as an independent commission is required to demonstrate that through its institutional design, it can cushion Kenyans against autocratic rule, and it cannot be subject to control from any quarters whatsoever. Its institutional accountability mechanisms should be beyond reproach and it should inspire public confidence. This should reflect the history of constitution-making, to move the country away from the dark past where accountability was a façade, to a future where accountability is part of the core government processes and decisions.

Electoral accountability in this sense requires deliberate attempts to restructure the institutional design of the IEBC, to achieve an environment that empowers the electorate to participate in the electoral process, and to change the narrative that technology is deployed and used to subvert the will of the people. The author’s views thus inspire the study in evaluating the current institutional structure of the IEBC, and its independence to determine the extent of institutional accountability in the management of elections.

¹⁰⁸ The Constitution of Kenya 2010 art 10.

¹⁰⁹ The 2005 Bomas of Kenya Draft Report on Constitutional Review 27 <http://kenyalaw.org/kl/fileadmin/CommissionReports/The-Final-Report-of-the-Constitution-of-Kenya-Review-Commission-2005.pdf> (accessed 5 October 2023).

¹¹⁰ WK Ochieng, ‘The independence, accountability, and effectiveness of constitutional commissions and independent offices in Kenya’ (2019) 4 *Kabarak Journal of Law and Ethics* 135-164 <https://journals.kabarak.ac.ke/index.php/kjle/article/view/178/176> (accessed 23 May 2023).

¹¹¹ As above.

¹¹² Ochieng (n 110) 136.

1.5.5 Electoral technology and techno-democracy

Odek notes that in *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others (Maina Kiai)*,¹¹³ the Court held that the transmission of results electronically safeguards the accuracy and integrity of election results.¹¹⁴ The author states that technology is a complementary mechanism under Section 44A of the Elections Act 2011, which buttresses the point that technology and manual processes form Kenya's voting system.¹¹⁵ The author's view addresses the importance of electoral technology in fostering accountability.

Similarly, Wachira is of the view that the successful use of technology by the IEBC is critical in avoiding discrepancies as determined by the Supreme Court.¹¹⁶ He reiterates that electronically transmitted results from polling stations are final results, just like manual results.¹¹⁷ Electoral technology is therefore critical in enhancing democracy in the digital age. The perspective of the author is in line with the study's objective of evaluating IEBC's integration of technology as a core component in the management of elections.

Furthermore, Barkan states that the reason why the IEBC sought to use the latest technology was to avoid a repeat of the events of 2007, where there was a lack of an accurate, up-to-date, and secure register and failure to ensure accurate results transmission from polling stations.¹¹⁸ The need to ensure information concerning the tallies was available in real-time was considered as creating transparency and through this, the IEBC would maintain its legitimacy.

According to Noor, the process of regaining public trust and confidence in the IEBC is not easy because the electorate in many Sub-Saharan African countries has no trust in their

¹¹³ *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* Civil Appeal No 105 of 2017 70 & 71 <http://kenyalaw.org/caselaw/cases/view/137601/> (accessed 6 September 2023).

¹¹⁴ O Odek 'Election technology law and the concept of 'did the irregularity affect the result of the elections?' 8 https://www.innovativelawyring.com/attachments/UNDP_1%20ELECTORAL_DISPUTE_RESOLUTION_CONCEPT_OF_IRREGULARITIES_AFFECT_THE_RESULT.pdf (accessed 30 June 2023).

¹¹⁵ As above 10.

¹¹⁶ BW Wachira 'Nullification of presidential elections in Kenya: Addressing the lacuna in the Elections Act 24 of 2011' LLM thesis, University of Pretoria, 2021 37 https://repository.up.ac.za/bitstream/handle/2263/82866/Wachira_Nullification_2021.pdf?sequence=1&isAllowed=y (accessed 26 May 2023).

¹¹⁷ *Maina Kiai* (n 113) 33.

¹¹⁸ JD Barkan 'Kenya's 2013 elections: Technology is not democracy' (2013) 24 *Journal of Democracy* at 157-158 <https://muse.jhu.edu/pub/1/article/512744/pdf> (accessed 27 June 2023).

governments and government institutions.¹¹⁹ The author notes that there is a need to ensure that technological flaws are eliminated to foster transparency and openness. The author is of the view that this will further entrench a predictable process. Concerning access to information, the author adds that the IEBC should supply information to the public regarding every stage of the electoral process. This will ensure that there is no suspicion.¹²⁰

Adams and Asante proffer that the use of diverse forms of computer technology is a desirable factor in the management of national elections. They note that the use of technology leads to a transformation of democracy as we understand it, into a form of computerised democracy. This is where the process of conducting elections is based on information technology. The use of technology aims to ensure that challenges that come with the exercise of democratic rights are resolved. The challenges include voting fraud, rigging, and impersonation.¹²¹

Parvu notes that technology and its use for purposes of elections have the positive effects of ensuring transparency and public participation. Furthermore, the author argues that technology portends inherent risks caused by low levels of understanding of the technical processes involved. This opens up the electoral process to challenges of accountability and may lead to other challenges including disinformation.¹²² The use of technology to enhance efficiency and transparency to guarantee verifiable elections is also highlighted as important in promoting democracy.¹²³

The author acknowledges electoral technology alone cannot address serious gaps in the electoral system, such as the institutional and legal framework. There is a need for independence and a strengthened capacity on the part of the electoral bodies.¹²⁴ Effective implementation of

¹¹⁹ AH Noor 'Determinants of citizens' trust levels in EMB: a study of the independent electoral and boundaries commission (IEBC)' LLM thesis, Strathmore University, 2020 51 <https://su-plus.strathmore.edu/server/api/core/bitstreams/9c2c2ce0-b581-468f-9011-24ab36d0053e/content> (accessed 29 June 2023).

¹²⁰ As above.

¹²¹ S Adams & W Asante 'Biometric election technology, voter experience and turnout in Ghana' (2019) 18 *Journal of African Elections* 45 at 48 <https://www.eisa.org/wp-content/uploads/2023/05/2019-journal-of-african-elections-v18n1-biometric-election-technology-voter-experience-turnout-ghana-eisa.pdf> (accessed 2 July 2023).

¹²² S Parvu 'Technology in elections - best practices in using digital tools and platforms in the community of democracies' 8 <https://community-democracies.org/app/uploads/2022/09/Report-Technology-in-Elections.pdf> (accessed 1 July 2023).

¹²³ As above 9.

¹²⁴ As above 10.

technology can guarantee accountability through systems that allow electoral officials to perform their duties effectively.

The choice of electoral technology should meet the principles of electoral democracy under the Constitution for an effective electoral system. Part of the strategies for achieving seamless implementation is the need to ensure public participation in the processes and provide a breakdown of the operations of the complex electoral technology for the electorate to identify with its internal workings.

1.5.6 The gains of electoral technology in fostering accountability

Credible elections are a cornerstone to the exercise of the right to vote.¹²⁵ Simiyu underscores that the essence of voting under national constitutions, regional laws,¹²⁶ and international law,¹²⁷ is that the individual electors' voting decisions should count and that the overall election shall reflect the people's will.¹²⁸ The author notes that technology has transformed the process of election results transmission through the use of mobile networks and internet connectivity.¹²⁹ Furthermore, the choice of electoral technology should be made after careful consideration of suitability by EMBs.¹³⁰ The integration of technology, therefore, contributes to ensuring that the registration of voters, the verification, and the transmission of results are accurate. In this way, the election declaration of results can be easily verified, which is a cornerstone of accountability.

The author's perspectives are important to this study as they specifically review the history of the use of technology and evaluate its impact on the 2013 elections. There is a need for an explanation as to why despite using technology in all elections post-2010, implementation challenges continue to riddle the IEBC. The author's views are relevant to this study which explores the lack of consistent and predictable standards of integration of technology. Technology

¹²⁵ The Constitution of Kenya 2010 art 38.

¹²⁶ African Charter on Human and Peoples' Rights (ACHPR) art 13.

¹²⁷ International Covenant on Civil and Political Rights art 25; the Universal Declaration of Human Rights art 21.

¹²⁸ MA Simiyu 'Kenyan supreme court approach to handling election-related digital threats: Lessons from the 2013 and 2017 Kenyan elections' in C Mbazira *Budding democracy or judicialization: Lessons from Africa's emerging electoral jurisprudence* (2021) 130 <https://electionjudgments.org/api/files/1622816572862hgdsok0u73w.pdf> (accessed 27 May 2023).

¹²⁹ As above 135.

¹³⁰ Simiyu (n 128) 136.

used should not only be well understood by the IEBC, but also by the people, thus the need to ensure public participation and civic education on technological aspects of the electoral process.

1.6 Research Methodology

This study explores the research questions posed by relying on desktop research targeting both primary and secondary sources. The primary sources consulted include national constitutions, legislation providing for applicable normative standards and guidance on elections, conventions, and relevant case law. Additionally, the study explores secondary sources including books, journal articles, dissertations, and official election observer reports. To test the levels of implementation of electoral technology, the study reviews existing frameworks and examines their interpretation by various courts. This approach ultimately does an appraisal of the available material to identify practices and strategies to aid the effective implementation of electoral technology by the IEBC.

1.7 Structure of the study

Chapter one comprises the background, problem statement, research objectives, research questions, applied methodology, study limitations, literature review and structure. Chapter two is a review of the legal and institutional framework for the integration of electoral technology by the IEBC. Chapter three reviews selected cases on litigating and adjudicating electoral technology in Kenya. Chapter four provides the concluding themes including the observations, key research findings, conclusion and recommendations.

1.8 Scope and limitations of the study

The study is limited to the extent to which the IEBC has demonstrated the utility of electoral technology post-2010. As a challenge, the official reports relied upon are not exhaustive, and do not effectively highlight the prevailing situation. Further, due to time constraints, the study primarily relies on secondary data obtained through desktop library research.

ENTRENCHING ELECTORAL TECHNOLOGY: THE ROLE OF EFFECTIVE FRAMEWORKS

2.1 Introduction

The use of electoral technology is governed by laws and regulations implemented by institutions such as the IEBC. In Chapter one, this study highlighted that the Constitution reconfigured the legal framework governing the electoral system, to implement among other principles, accountability.¹³¹ It was expected that the reconfiguration would face challenges in implementation. According to Held, the challenge of democracy is the implementation of procedures that would allow the people's will to be reflected.¹³² In this Chapter, the study reviews the existing legal and institutional frameworks governing the integration of technology into elections management.

The Chapter explores the applicable laws nationally, regionally and internationally. These frameworks are essential building blocks of election management and the foundation of public confidence in the electoral process.¹³³ The main idea is that without full implementation of technology integration as required under the laws, the IEBC will not achieve an accountable electoral system, thus a regression of the efforts made in deepening democracy in Kenya.

The implementation of technology in voter registration, verification and the electronic transmission of results from polling stations to the national tallying centre should thus comply with the standards set under the laws discussed.¹³⁴ Despite clear stipulations in the law of the manner of technology integration, challenges in implementation continue to persist. The struggle for electoral reforms started in the 1990s, and continues now in 2023, in the form of public demonstrations (*'maandamano'*).¹³⁵ Particularly, the opposition has in the first half year of 2023

¹³¹ The Constitution of Kenya 2010 arts 10 & 86.

¹³² D Held *Models of democracy* (2006) 233.

¹³³ M Trebilcock & P Chitalkar, 'From nominal to substantive democracy: The role and design of Election Management Bodies' 2009 *The Law and Development Review* 2 191-224.

¹³⁴ The Constitution (n 10) arts 38, 81 & 86.

¹³⁵ M Gaitho 'Raising the stakes' *Nation* 27 March 2023 <https://nation.africa/kenya/news/politics/raising-the-stakes-4174272> (accessed 11 August 2023).

decried flawed elections, by leading public protests seeking among others, an independent audit of the 2022 elections.¹³⁶

As stated in chapter one of this study, among other recommendations to resolve the challenge of flawed elections, the Kriegler Commission proposed the integration of technology to improve transparency and efficiency. In the words of the Supreme Court in 2017, let the Kriegler report speak for itself:¹³⁷

The system of tallying, recording, transcribing, transmitting and announcing results was conceptually defective and poorly executed. The ECK had long since been aware of the need to revise the system fundamentally by introducing readily available information and communications technology. Its failure to do so was grossly remiss and contributed to the climate of tension, suspicion and rumour in which the violence erupted.

The Constitution therefore sought to inculcate a value system into the electoral process, hence establishing conceptually strong institutions to implement the national values and principles of good governance, which also double up as principles of the electoral system.¹³⁸ The legal framework is discussed below.

2.2 National legal frameworks

The management of elections and the use of electoral technology is regulated by laws at the national level as follows.

a) The Constitution of Kenya 2010

Touted as a transformative charter,¹³⁹ the Constitution of Kenya 2010 is supreme.¹⁴⁰ It contains provisions critical to democracy and governance. The Constitution seeks to 'institute social change and reform, through values such as social justice, equality, devolution, human rights, rule

¹³⁶ As above.

¹³⁷ The Kriegler report (n 26) 9.

¹³⁸ The Constitution of Kenya 2010 art 10.

¹³⁹ E Kibet & C Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *African Human Rights Law Journal* 340 at 352 <http://www.scielo.org.za/pdf/ahrlj/v17n2/02.pdf> (accessed 19 August 2023).

¹⁴⁰ The Constitution of Kenya 2010 art 1.

of law, freedom and democracy.¹⁴¹ The Constitution restates the sovereignty of the people as the basis upon which the conduct of genuine elections leads to the formation of a legitimate government, based on the will of the people.¹⁴²

Additionally, Article 38(2) of the Constitution provides for the right to free and fair elections based on universal suffrage. This guarantee applies to every Kenyan. The right is limited under Article 24 of the Constitution, subject to legality, necessity and proportionality. This means that any such limitation on the right to vote must comply with these conditions. For instance, Article 38 can be limited by the requirement that it is exercised by citizens, registered as voters and above 18 years.¹⁴³ The use of electoral technology should thus not hinder the exercise of the right to vote unless the three-part limitation test under the Constitution is met.

Further, the Constitution provides that every adult citizen has the right, without unreasonable restrictions, to vote by secret ballot in any election or referendum.¹⁴⁴ This applies to any form of electoral process, whether manually or electronically. About the KIEMS technology used by the IEBC, where electronic verification of a voter is not possible due to factors such as disability or lack of biometric data, mechanisms under the Elections Act 2011 and the Elections (Technology) Regulations 2017 apply, allowing for manual verification.¹⁴⁵ This is to ensure the exercise of the right to vote under Article 38 of the Constitution to its full extent.

Furthermore, Article 81 of the Constitution sets the qualitative standards for the conduct of elections. It imposes an obligation on the IEBC to implement an irregularity-free electoral process. Transparency and accountability are absolute prerequisites in elections management. Additionally, Article 86 of the Constitution provides indicators for quantitative standards, requiring an electoral process which is simple, transparent and verifiable. Electronic transmission of results should thus be done openly, accurately and promptly. The provisions are a cushion

¹⁴¹ As above.

¹⁴² The Constitution of Kenya 2010 arts 1 & 2.

¹⁴³ The Constitution of Kenya 2010 art 38.

¹⁴⁴ As above art 38 (3) (b).

¹⁴⁵ The Elections Act 2011 sec 83

http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ElectionsAct_No24of_2011_New.pdf (accessed 10 October 2023).

against unnecessary informational asymmetry.¹⁴⁶ Technology is the yardstick for the implementation of these standards. The desired approach under the Constitution thus seeks to promote efficiency without sacrificing transparency, and technology is the bridge to achieving both standards.

Accordingly, Article 86 of the Constitution imposes a mandatory obligation on the IEBC to ensure that at every election, the voting method shall be simple, accurate, verifiable, secure, accountable and transparent.¹⁴⁷ This is the standard against which the use of technology should be institutionalised. However, the procurement of electoral technology, its audit before and after elections, and the right to access information under Article 35 of the Constitution remain contested.

As the study highlights, the architecture of the electoral system in Kenya is derived from the Constitution.¹⁴⁸ The instructive principles require the IEBC to implement an electoral process which guarantees and promotes the freedom to exercise political rights enshrined under Article 38 of the Constitution, by the citizens. The electoral system further seeks to implement the principle of universal suffrage based on the aspiration for fair representation and equality of vote.

The United Nations (UN) General Comment 25 clarifies on equality of the vote, that is the principle of one person, one vote meaning that the vote of one elector should be equal to the vote of another.¹⁴⁹ The use of technology in the electoral process should thus seek to foster equality of the vote, and not to disenfranchise particular persons.

The Constitution further guarantees free and fair elections by secret ballot, free from violence, intimidation, improper influence or corruption.¹⁵⁰ The independence of the IEBC is an absolute prerequisite and the electoral process shall be transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.¹⁵¹ Staff and officers of the IEBC are

¹⁴⁶ Owuor (n 2) 13.

¹⁴⁷ The Constitution of Kenya 2010.

¹⁴⁸ As above art 81.

¹⁴⁹ United Nations Committee on Human Rights General Comment 25 'The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service' para 21 <https://www.osce.org/files/f/documents/4/a/19154.pdf> (accessed 15 August 2023).

¹⁵⁰ The Constitution of Kenya 2010 arts 11 & 38 (2).

¹⁵¹ The Elections Act 2011 sec 44(3).

thus required to conduct elections in compliance with the governing electoral laws,¹⁵² in a manner that promotes integrity.¹⁵³ The implementation of electoral technology frameworks by the IEBC should thus comply with these electoral principles. Compliance should start from procurement to implementation of election technology.

Accordingly, electronic voter registration, verification and results transmission should conform with the principles of the electoral system. Additionally, the IEBC is under an obligation to ensure the safety and security of the electoral technology used.¹⁵⁴ This includes backup systems to cushion against cyber-attacks which threaten the integrity of the electoral process.¹⁵⁵ Securing the integrity of the vote is thus expressed through the implementation of all the other principles of the electoral system.

b) The Independent Electoral and Boundaries Commission Act 2011

This is the parent Act governing the operations of the IEBC and it gives effect to Article 88 of the Constitution which provides for its establishment and functions. The IEBC Act comprises the main objects of the Act, including its institutional structure, roles and responsibilities.¹⁵⁶ The IEBC, despite being a creature of the Constitution with formal independence, draws on provisions of the Act to assert its statutory underpinning.

The IEBC Act provides for the appointment of officials of the IEBC, the establishment of the offices, financial provisions and the conduct of commissioners and officials.¹⁵⁷ In terms of security of tenure, the commissioners of the IEBC work full-time and perform their duties through different committees. In the 2022 elections, the commissioners were allocated different committees

¹⁵² As above.

¹⁵³ National Democratic Institute 'Accountability' <https://www.ndi.org/e-voting-guide/accountability> (accessed 16 August 2023).

¹⁵⁴ MA Simiyu 'Digital solutions for African elections in the time of COVID-19' *AfricLaw* 22 April 2020 <https://africlaw.com/2020/04/22/digital-solutions-for-african-elections-in-the-time-of-covid-19/> (accessed 15 August 2023).

¹⁵⁵ As above.

¹⁵⁶ The Independent Electoral and Boundaries Commission Act 2011 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/IndependentElectoralandBoundariesCommissionNo9of2011.pdf> (accessed 17 August 2023).

¹⁵⁷ The IEBC Act sec 5.

with different roles, including one responsible for the implementation of electoral technology.¹⁵⁸ The implementation of technology in line with the Elections Act 2011 and the Elections (Technology) Regulations therefore finds bearing under the IEBC Act, in terms of the responsible commissioners.

Section 4 (m) of the IEBC Act 2011 empowers the IEBC to perform its functions using appropriate technology and approaches. The IEBC should therefore implement this provision by making a clear plan on what constitutes appropriate technology to be used in the discharge of its functions.

The finances to roll out technology policies are anchored under Section 17 of the IEBC Act 2011. It provides for funds of the Commission which include; monies allocated by Parliament for purposes of the Commission, any grants, gifts, donations or other endowments given to the Commission.¹⁵⁹ With this provision on funding and the role played by Parliament, the financial independence of the IEBC is directly affected, as Parliament has the discretion on the amount of funding allocated to the IEBC, thus any delays in allocation and disbursement or budget cuts are likely to interfere with the operations of the IEBC.

c) The Elections Act 2011

The legislation provides for the conduct of elections. It refers to 'technology' six times, demonstrating that it is a desired tool in election management. Section 44 specifically addresses the use of technology. It establishes an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.¹⁶⁰ It further mandates the IEBC to develop a policy on the 'progressive use of technology' in elections management.¹⁶¹ The IEBC in the use of technology is required to comply with the

¹⁵⁸ Report of the Commonwealth Observer Group 'Kenya General Election 9 August 2022' 17 [https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/s3fs-public/2023-08/Kenya%20COG%20Report%20Final%20\(2\).pdf?VersionId=yj2INsQTT0LrdfixdctCsAgJw4yt3cpg](https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/s3fs-public/2023-08/Kenya%20COG%20Report%20Final%20(2).pdf?VersionId=yj2INsQTT0LrdfixdctCsAgJw4yt3cpg) (accessed 8 September 2023).

¹⁵⁹ Independent Electoral and Boundaries Commission Act 2011 secs 17 & 26.

¹⁶⁰ Elections Act 2011 sec 44(1) <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2024%20of%202011> (accessed 18 August 2023).

¹⁶¹ As above sec 44(2).

requirement that such technology shall be simple, accurate, verifiable, secure, accountable and transparent.¹⁶²

Additionally, the IEBC is required to be open and transparent in the procurement of electoral technology, which should be done at least one hundred and twenty days before the elections.¹⁶³ After such procurement, the IEBC is under a statutory obligation to test, verify and deploy the electoral technology at least sixty days before a general election.¹⁶⁴ These provisions inspire confidence in the use of technology in the management of elections. The institutional mechanisms for implementation of this law are thus required to consider both qualitative and quantitative aspects of elections management. The statutory timelines have to be interpreted in a purposive manner, as they are deliberately provided to aid in planning. Nothing therefore hinders the IEBC from planning ahead of time, to achieve optimal use of technology.

Additionally, having appreciated the practical challenges related to the use of technology, and in response to the *Maina Kiai* decision,¹⁶⁵ Section 44A provides for a complementary mechanism for the identification of voters and transmission of election results.¹⁶⁶ In *Maina Kiai*, the complementary mechanism was tested, with the relevant issue before the Court of Appeal being; the finality of results recorded at polling stations.¹⁶⁷ The Court held that the declaration form containing results at the polling station level is a primary document and all other forms after it are only tallies of the original and final results recorded at the polling station.¹⁶⁸ The case thus put to rest the issue of tallying results, with the consequence that results in declaration forms submitted from the polling station level conveyed the final results. The transmission of results is thus required to comply with this position.

In *National Super Alliance (NASA) v Independent Electoral and Boundaries Commission & 2 others*,¹⁶⁹ the obligation of the IEBC to put in place an appropriate mechanism to complement the

¹⁶² As above sec 44(3).

¹⁶³ As above sec 44(4) (a)

¹⁶⁴ As above sec 44(4) (b).

¹⁶⁵ *Maina Kiai* (n 113) 33.

¹⁶⁶ The Elections Act 2011 sec 44A.

¹⁶⁷ *Maina Kiai* (n 113) 33.

¹⁶⁸ As above.

¹⁶⁹ *National Super Alliance (NASA) v Independent Electoral and Boundaries Commission & 2 others* Petition 328 of 2017 <http://kenyalaw.org/caselaw/cases/view/138217> (accessed 10 October 2023).

one set out in Section 44 of the Elections Act 2011 was restated. The process shall therefore be simple, accurate, verifiable, secure, accountable and transparent.¹⁷⁰ This provision empowers the IEBC to be innovative and adapt to a hybrid electoral system, using appropriate technology alongside manual processes. The provisions of the legislation thus guarantee an effective electoral process if the aspects of technology are implemented consistently through transparent institutional practices.

Transparency in this context includes providing information contained in the servers. For instance, in 2017 the Supreme Court stated that concerns about compromise of the security of the servers must be addressed by the IEBC, which is required to put in place adequate security measures.¹⁷¹ The Elections Act 2011 thus firmly establishes a strong foundation for the implementation of electoral technology in Kenya.

d) Elections (Technology) Regulations 2017

The Elections (Technology) Regulations 2017 were developed under Section 44 (5) and Section 109 of the Elections Act, 2011. This is to guide the IEBC in the use and regulation of electoral technology. Under the Regulations, election technology is defined 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 an electronic results transmission system.¹⁷² The regulations cover the acquisition, storage and deployment requirements relating to the use of technology in the management of elections.¹⁷³

Under the Regulations, electoral technology is required to comply with transparency and public participation standards.¹⁷⁴ Issues related to planning, procurement and use of technology are also covered.¹⁷⁵ Furthermore, the regulations specifically guide the procurement, feasibility studies, pilot projects, specifications, and vendor evaluations.¹⁷⁶ It is expected that the use of

¹⁷⁰ The Elections Act 2011.

¹⁷¹ *Raila Odinga 2017* (n 74) para 277.

¹⁷² Elections (Technology) Regulations 2017 <https://www.iebc.or.ke/uploads/resources/8IJsH5aTCd.pdf> reg 2 (accessed 17 August 2023).

¹⁷³ Elections (Technology) Regulations 2017 reg 3.

¹⁷⁴ Elections (Technology) Regulations 2017 reg 9.

¹⁷⁵ Elections (Technology) Regulations 2017 reg 5.

¹⁷⁶ Elections (Technology) Regulations 2017 reg 4.

technology shall take into account security for all systems and all data.¹⁷⁷ The electoral technology should be auditable, and capable of independent verification of the output of the process and provide information on the internal workings of the technology.¹⁷⁸

However, the implementation of the regulations remains an issue which requires concerted efforts of the IEBC and its officials. The standards set are high, but the delivery has faced challenges as can be observed from all the post-2010 elections. For instance, under Part V, the IEBC is required to put in place mechanisms to ensure data availability, accuracy, integrity, and confidentiality.¹⁷⁹ However, implementation of this provision has been a difficult task as in 2017, orders to access important electoral data could not be complied with by the IEBC, against the principle of data availability.

Additionally, retention of data should comply with the standard of three years after the results of the elections, and such data is to be retained whether in electronic form or not, in safe custody.¹⁸⁰ If implemented, therefore, the Regulations provide a good basis for effective electoral technology practices in Kenya.

e) Data protection laws

The processing of electoral data such as the electorate's name and identity information is directly regulated under the Data Protection Act 2019 (DPA).¹⁸¹ The use of the KIEMS is data-driven, thus the DPA imposes an obligation on the IEBC and other key election stakeholders such as political parties and the regulator to protect personal data.¹⁸² Personal data is defined as information relating to an identifiable natural person, such as identity and biometric data.¹⁸³

Electoral technology vendors, whether local or foreign, such as Smartmatic should thus comply with this law in the processing of data, and the IEBC should oversee the protection of data

¹⁷⁷ Elections (Technology) Regulations 2017 reg 14.

¹⁷⁸ Elections (Technology) Regulations 2017 reg 11.

¹⁷⁹ Elections (Technology) Regulations 2017 reg 14.

¹⁸⁰ As above reg 17.

¹⁸¹ The Data Protection Act 2019

http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2019/TheDataProtectionAct_No24of2019.pdf (accessed 8 September 2023).

¹⁸² As above sec 25.

¹⁸³ As above sec 2.

contained in the KIEMS.¹⁸⁴ Among the important principles of data protection under the DPA is that of accountability, in the sense that data processing must have a lawful basis, be necessary and for a legitimate purpose.¹⁸⁵

To give effect to the DPA, the Data Protection (General) Regulations 2021 were developed. They regulate the processing of personal data and give direction on the manner of processing. To deal with the challenge of the availability of data, the Regulations require that data processing be done through a local data centre or servers located in Kenya.

Consequently, where a foreign service provider is contracted, a local copy of the data is required to be maintained within Kenya. Furthermore, the use of data by political parties and the IEBC should comply with requirements for the express consent of registered voters. However, this was not fully complied with in the 2022 elections because as confirmed by the Data Protection Commissioner (ODPC), there was an uproar on social media following allegations of registration of some persons by political party members without their consent.¹⁸⁶

Therefore, the principles of data protection require implementation by the IEBC and relevant stakeholders. To this end, the Data Protection (Registration of Data Processors and Data Controllers) Regulations 2021 and the Data Protection (Enforcement) Regulations 2021 were adopted. The former set regulates the registration of authorised data handlers by the data commissioner, while the latter guides the data commissioner on the implementation of the DPA.¹⁸⁷

The study further notes that the regional framework African Union Convention on Cyber Security and Personal Data Protection,¹⁸⁸ is yet to be ratified by Kenya,¹⁸⁹ which if done, will create obligations to protect electoral data. The legal framework discussed above is up-to-date and

¹⁸⁴ The Commonwealth (n 158) 15.

¹⁸⁵ The DPA (n 181) sec 25.

¹⁸⁶ Office of the Data Protection Commissioner Statement on Alleged use of Personal Data in Registration to Political Parties without Consent 25 June 2021) X https://twitter.com/ODPC_KE/status/1408353948239597570 (accessed 10 October 2023).

¹⁸⁷ Mosero (n 31).

¹⁸⁸ African Union Convention on Cyber Security and Personal Data Protection https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf (accessed 9 September 2023).

¹⁸⁹ African Union Status List https://au.int/sites/default/files/treaties/29560-sl-AFRICAN_UNION_CONVENTION_ON_CYBER_SECURITY_AND_PERSONAL_DATA_PROTECTION.pdf (accessed 9 September 2023).

robust. In fact, from time to time, amendments are inevitable to suit the prevailing circumstances. However, without implementation, the frameworks will not be effective, thus not worth the paper they are written on.

Below is a discussion of the institutions responsible for implementing the legal framework.

2.3 Regional legal frameworks

EMBs in Africa use various forms of technology in managing different aspects of their elections.¹⁹⁰ The drive towards this trend is the theory that democracy requires consolidation through elections hence democracy and democratisation.¹⁹¹ The following is an analysis of the relevant regional instruments.

a) The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (ACHPR) entered into force in 1986 and it aims to promote and protect human and peoples' rights and freedoms. It is a human rights instrument but with inadequate provision for civil and political rights. Article 13 of the ACHPR codifies the right to political participation directly or through elected representatives.¹⁹² This is the basis upon which countries in Africa hold elections to enable their citizens to participate in their governance. However, according to Heyns,¹⁹³ when compared to international instruments, Article 13 is incomplete and is inhibited by the operation of clawback clauses.¹⁹⁴

The right to participate in government is enshrined superficially and its full scope is not defined. Additionally, Article 13 is couched in terms which do not provide for regular and genuine elections. The implementation of the provision is thus not an easy task, considering the

¹⁹⁰ R Osei-Afful 'Solutions or problems? The increasing role of technology in African elections' *Wilson Centre* 11 December 2017 <https://www.wilsoncenter.org/blog-post/solutions-or-problems-the-increasing-role-of-technology-in-african-elections> (accessed 19 August 2023).

¹⁹¹ J Ewald *Challenges for the democratisation process: Moving towards consolidation 50 years after independence?* 25 <https://books.google.co.za/books?id=f2ZIRMNai4gC&lpg=PP1&ots=oxdhpOwPn6&dq=the%20theory%20that%20democracy%20requires%20consolidation%20through%20elections%20hence%20democracy%20and%20democratisation&lr&pg=PA23#v=onepage&q&f=false> (accessed 8 September 2023).

¹⁹² The African Charter on Human and Peoples' Rights art 13 https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf (accessed 10 October 2023).

¹⁹³ C Heyns 'The African Regional Human Rights System: The African Charter' (2003-2004) 108 *Dickinson Law Review* 679 & 687.

¹⁹⁴ As above.

character of African leaders who have not shown commitment to the ideals of democratic elections.

In interpreting Article 13, Mbondenyi is of the view that it is not desirable to restrict the scope of Article 13 within the narrow parameters of participation in politics.¹⁹⁵ Therefore, the right is a bridge between the rule of law, democracy and human rights, and extends to the realisation of all other rights.¹⁹⁶ The African Commission on Human and Peoples' Rights (ACmHPR) on its part was emphatic that measures which have the effect of excluding people from the exercise of democratic rights are discriminatory, and they amount to a violation of Article 13.¹⁹⁷ This kind of approach in interpretation provides a much-needed lifeline in asserting regional coverage concerning the exercise of democratic rights.

b) The African Charter on Democracy, Elections and Governance 2007

The African Charter on Democracy, Elections and Governance (ACDEG) places an obligation on ratifying states like Kenya, to 'establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.'¹⁹⁸ The objective of establishing independent EMBs is to be derived from its preamble, which is to 'promote and strengthen good governance through the institutionalisation of transparency, accountability and participatory democracy.'¹⁹⁹ Furthermore, Article 2 of ACDEG obligates states to promote among others, citizen participation, transparency, and accountability in the management of public affairs.

Article 17 of the ACDEG requires Kenya to reaffirm its commitment to conducting regular transparent, free, and fair elections.²⁰⁰ The commitment is reinforced by the non-binding and pragmatic African Union Declaration on the Principles Governing Democratic Elections in

¹⁹⁵ MK Mbondenyi 'The right to participate in the government of one's country: An analysis of article 13 of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 political crisis' (2009) 9 *African Human Rights Law Journal* 186.

¹⁹⁶ As above.

¹⁹⁷ *Legal Resources Foundation v Zambia* (2001) *Human Rights Library* 84 (ACHPR 2001) <http://hrlibrary.umn.edu/africa/comcases/Comm211-98.pdf> (accessed 10 October 2023); *Modise v Botswana* (2000) *Human Rights Library* 30 (ACHPR 2000) <http://hrlibrary.umn.edu/africa/comcases/97-93c.html> (accessed 10 October 2023).

¹⁹⁸ ACDEG art 17.

¹⁹⁹ ACDEG preamble.

²⁰⁰ As above art 17.

Africa.²⁰¹ Furthermore, Article 27 of the ACDEG provides that ‘to advance political, economic and social governance, State Parties shall commit themselves to development and utilisation of information and communication technologies.’²⁰²

In line with these provisions of the ACDEG, the African Commission on Human and Peoples’ Rights developed persuasive Guidelines on Access to Information and Elections in Africa.²⁰³ This is to guide states to particularly refrain from the now common practice of internet shutdowns during elections, among other provisions. Technology can be used to implement the guideline requiring stakeholders to ‘create, keep, organise, maintain and manage information about the electoral process in machine-readable formats and in a manner that facilitates the right of access to information.’²⁰⁴

In practice, the implementation of electoral technology is dependent on substantial access to the internet. Furthermore, access to information and freedom of expression are important rights whose enforcement relies on the availability of the internet.²⁰⁵ Exceptional circumstances warranting internet shutdowns during elections must therefore be authorised by law, serve a legitimate aim, and be necessary and proportional in a democratic society.²⁰⁶ The analysis above thus shows that both the global and regional legal frameworks support the integration of technology into the electoral process to secure accountable elections.²⁰⁷

²⁰¹ African Union Declaration on the Principles Governing Democratic Elections in Africa (2002) https://archives.au.int/bitstream/handle/123456789/572/AHG%20Decl%201%20%28XXXVIII%29%20_E.pdf?sequence=1&isAllowed=y (accessed 11 October 2023).

²⁰² ACDEG art 27.

²⁰³ African Commission on Human and Peoples’ Rights ‘Guidelines on Access to Information during Elections’ Guideline 26 https://www.africanplatform.org/fileadmin/user_upload/Guidelines_on_Access_to_Information_and_Elections_in_Africa.pdf (accessed 8 September 2023).

²⁰⁴ As above Guideline 4.

²⁰⁵ As above.

²⁰⁶ As above 27.

²⁰⁷ International IDEA ‘Electoral law reform in Africa: Insights into the role of EMBs and approaches to engagement’ <https://www.idea.int/sites/default/files/publications/electoral-law-reform-in-africa.pdf> (accessed 19 August 2023).

2.4 Global legal frameworks

International law is directly applicable in Kenya, as it in substance forms part of the laws of Kenya.²⁰⁸ This is despite the different judicial interpretations of the monism and dualism approaches to the hierarchy of application of international law norms and standards. The Constitution affirms that ratified treaties are directly incorporated into the laws of Kenya, thus asserting the primacy of international human rights law.²⁰⁹

Therefore, international norms and standards of democracy contained in treaties ratified by Kenya are directly applicable. This is despite the acknowledgement that there is no global consensus on acceptable standards for elections management.²¹⁰ The analysis of applicable global legal frameworks is discussed below.

a) The International Covenant on Civil and Political Rights

Article 25 of the International Covenant on Civil and Political Rights (ICCPR),²¹¹ codifies the right to vote as a fundamental human right. The ICCPR applies to Kenya having ratified it in 1972,²¹² and it establishes the obligation to hold genuine elections.²¹³ Genuine in this context as elaborated under the UN General Comment 25 denotes periodic elections which must be held at intervals which are not unduly long.²¹⁴ Such elections must also ensure that the authority of government continues to be based on the free expression of the will of electors.²¹⁵

²⁰⁸ The Constitution of Kenya 2010 arts 2(5) & 2(6).

²⁰⁹ *David Ndungo Maina v Zipporah Wambui Mathara Bankruptcy Cause 19 of 2010*, http://kenyalaw.org/Downloads_FreeCases/77605.pdf (accessed 8 September 2023) & N W Orago 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: a comparative perspective' (2013) 13(2) *African Human Rights Law Journal* 419-420 <https://journals.co.za/doi/epdf/10.10520/EJC148407> (accessed 5 October 2023).

²¹⁰ A David-Roberts & DJ Carroll 'Using international law to assess elections' (2010) 17 *Democratization* 416 <https://www.tandfonline.com/doi/full/10.1080/13510341003700253> (accessed 16 August 2023).

²¹¹ International Covenant on Civil and Political Rights <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/ccpr.pdf> (accessed 8 October 2023).

²¹² United Nations Treaty Body Database 'Ratification status for Kenya' https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN (accessed 8 September 2023).

²¹³ International Covenant on Civil and Political Rights art 25.

²¹⁴ United Nations 'CCPR General Comment 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service' para 9 <https://www.refworld.org/docid/453883fc22.html> (accessed 8 September 2023).

²¹⁵ As above.

Therefore, genuine elections should be competitive and offer the electorate a real choice. Furthermore, tallying of votes should be done accurately and the state should guarantee access to information, freedom of expression, association, assembly, and movement.²¹⁶ The right to vote, therefore, is the hallmark of democratic governments which respect and promote the will of the people. The electoral system adopted by any country shall therefore facilitate genuine elections. Elections are free and fair, thus genuine, where the electoral process is free from intimidation, bribery, violence, and coercion, and results are announced in good time.²¹⁷

It follows that electoral technology can be harnessed to achieve the ideals of a genuine election. This position is reflected by the Resolution on Strengthening the role of the UN in enhancing periodic and genuine elections and the promotion of democratisation.²¹⁸ The UN Resolution 68/164 specifically recognises that ‘appropriate, sustainable and cost-effective electoral technology, supports the electoral processes of developing countries.’²¹⁹ The use of electoral technology is thus assessed in line with interpretations that best empower people to exercise their fundamental right to vote.

Furthermore, the UN considers the right to vote as necessary for compliance with international norms and standards on political participation. This is because even though the right to vote is not absolute, its limitation must comply with standards of reasonableness, such as the minimum age limit for voting.²²⁰ It follows that forms of technology which limit the exercise of the right to vote without meeting the standards set for such restrictions or limitations are not consistent with international law. For instance, the uniform use of technology without consideration of factors such as internet and device penetration in various parts of the country is a possible factor that may inhibit the exercise of the right to vote. The obligation to enforce the right to vote requires the IEBC to ensure that every citizen entitled to exercise this right does so

²¹⁶ Democracy Reporting International ‘Strengthening international law to support democratic governance and genuine elections’ 7 <https://www.eods.eu/library/strengthening-international-law-to-support-democratic-governance-elections.pdf> (accessed 8 September 2023).

²¹⁷ *Rtd Col Dr Kiza Besigye v Yoweri Kaguta Museveni and Electoral Commission* Presidential Petition 1 of 2001 <https://ulii.org/akn/ug/judgment/ugsc/2007/24/eng@2007-01-30> (accessed 8 September 2023).

²¹⁸ United Nations Resolution 68/164 ‘Strengthening the role of the United Nations in enhancing periodic and genuine elections and the promotion of democratization’ para 7 <https://www.refworld.org/pdfid/53a7fe6f4.pdf> (accessed 16 August 2023).

²¹⁹ As above.

²²⁰ Human Rights Committee, General Comment 25 (1996) para 10.

without regard to any considerations such as gender,²²¹ hence an all-inclusive electoral system based on a set of principles.

Further, the exercise of the right to vote is tied to the ability of the IEBC to deliver genuine elections which require full compliance with international obligations relating to the conduct of elections. These obligations guarantee the electorate the benefit of free expression of their will hence a legitimate process.²²² Where technology inhibits the conduct of elections that meet the test of credibility, then the whole electoral process violates the right to vote.

The right to vote was interpreted in *Richter v Minister for Home Affairs & others Richter*.²²³ The Court was of the view that the right to vote is symbolic of citizenship and has constitutional importance.²²⁴ It reiterated that the right to vote and its exercise is an important element of democracy.²²⁵ The court was further categorical that when interpreting the right to vote, it is critical to be mindful of its symbolic value. It carries a deep democratic value that lies in a citizenry conscious of its civil responsibilities and willing to take the trouble of exercising the right.²²⁶ This interpretation confirms that in integrating technology into the electoral system, the objective of promoting the right to vote should not be watered down as it is a right that touches on the core of democracy.

b) The Universal Declaration of Human Rights (UDHR)

In an electoral system, a popular mandate is conferred on the government through elections, where votes are transformed into elective positions. The non-binding but instrumental UDHR contains specific guiding provisions which have gained recognition under customary

²²¹ The Constitution of Kenya 2010 art 38.

²²² International IDEA 'International obligations for elections: Guidelines for legal frameworks' <https://www.idea.int/sites/default/files/publications/international-obligations-for-elections.pdf> 37 (accessed 18 August 2023).

²²³ *Richter v Minister for Home Affairs & others* CCT 09/09 (2009) ZACC 3 2009 (3) Sa 615 (CC) <http://www.saflii.org/za/cases/ZACC/2009/3.html> (accessed 8 September 2023).

²²⁴ As above 615.

²²⁵ As above.

²²⁶ As above.

international law. One such provision is enshrined under Article 21 of the UDHR,²²⁷ which provides that the legitimate authority of government is derived from the will of the people.

Therefore, periodic and genuine elections are at the heart of the implementation of the popular will of the people. The use of electoral technology thus should be done in a manner which does not compromise this standard. Electoral technology should amplify the democratic advantage of giving the electorate a real choice. It should further facilitate compliance with legal frameworks on the implementation of the principles of electoral democracy including accountability.²²⁸

In line with the implementation of the popular will of the people, Yard indicates that in the management of elections, effective management entails timely distribution of ballot material, and this includes electoral technology, appropriately trained electoral officials, consistent application of laws and regulations, civic education and transparency.²²⁹ These factors constitute the mechanisms for the implementation of the will of the people through legitimate electoral processes.

The IEBC should implement electoral technology in compliance with the popular will of the people. This is by prioritising accountable processes. According to the Electoral Law and Governance Institute of Africa (ELGIA), the use of electoral technology in Kenya from the 2013 elections, has demonstrated that the process is not fully transparent and accountable.²³⁰

2.5 Institutional framework

The institutional framework for elections management in Kenya was reconfigured under the Constitution by establishing a formally independent EMB. Furthermore, the operations of the IEBC are governed by enabling legislation as discussed below.

²²⁷ The Universal Declaration of Human Rights art 21.

²²⁸ As above.

²²⁹ M Yard 'Direct democracy - progress and pitfalls' 35 <https://www.ifes.org/publications/direct-democracy-progress-and-pitfalls-election-technology> (accessed 18 August 2023).

²³⁰ Electoral Law and Governance Institute 'The decline and fall of electoral integrity: How and why elections seem to frustrate the popular will in Kenya' <https://www.elgia.org/media/attachments/2022/12/15/elgia--fcd-research-project-on-decline-of-electoral-integrity-in-kenya.pdf> (accessed 18 August 2023).

2.5.1 The Independent Electoral and Boundaries Commission

As discussed in the previous chapter, the IEBC is established under Article 88(1) of the Constitution.²³¹ The IEBC is charged with the mandate of elections management, including conducting voter registration, civic education, and actual collation and transmission of election results. The provision further provides for the composition of the IEBC.²³² The IEBC Act 2011 is the implementing legislation which governs the implementation of the functions of the IEBC. Under Section 3,²³³ the IEBC Act 2011 provides for the functions of the IEBC while Section 26 provides for its independence.²³⁴

Importantly, the Constitution guarantees the independence of the IEBC under Article 248(1)(c) and Article 249 (2)(a), which provide that such commissions are only subject to the Constitution and the law.²³⁵ The IEBC is therefore not subject to direction or control by any person or authority. The IEBC is thus regarded as the ‘people’s watchdog.’²³⁶ In *the Matter of the Interim Independent Electoral Commission*,²³⁷ the Court restated the independence of the IEBC, by holding that the real purpose of the independence clause about commissions and independent offices was to provide a safeguard against undue interference by other persons or other institutions of government.

Furthermore, the question of the independence of the IEBC was litigated in *Dr Kenneth Otieno v Attorney General & another*.²³⁸ The petitioner challenged the Elections (Amendment) Act, 2016 specifically Section 44(8) which permitted the establishment of a technical committee to oversee the adoption and implementation of technology.²³⁹

²³¹ The Constitution of Kenya 2010 art 88.

²³² As above.

²³³ The IEBC Act (n 192).

²³⁴ As above.

²³⁵ The Constitution of Kenya 2010 arts 248 & 249.

²³⁶ *Re The matter of the Interim Independent Electoral Commission* const application 2 of 2011 (2011) eKLR <http://kenyalaw.org/caselaw/cases/view/77634/> (accessed 9 September 2023).

²³⁷ *In the Matter of Interim Independent Electoral Commission* Supreme Court constitutional application 2 of 2011 (2011) eKLR <http://kenyalaw.org/caselaw/cases/view/77634/> (accessed 9 September 2023).

²³⁸ *Kenneth Otieno v Attorney General & another* [2017] eKLR Petition 127 of 2017 <http://kenyalaw.org/caselaw/cases/view/137864/> (accessed 9 September 2023).

²³⁹ As above.

The Court declared section 44(8) of the Elections Act, 2011 unconstitutional for being in contravention of Articles 88 and 249(2) of the Constitution.²⁴⁰ The Court held that the use of general words such as ‘relevant agencies, institutions or stakeholders’ leaves room for the inclusion of governmental and political or other partisan influences, expressly excluded by Article 88(2) of the Constitution from running the affairs of IEBC.²⁴¹ However, Parliament is the oversight mechanism for the IEBC, and it receives and considers budgetary proposals by the IEBC, and determines the status of funding.²⁴² The implementing legislation provides that the funds of the Commission shall consist of monies allocated by Parliament for purposes of the Commission.

The use of the term allocate denotes the strong discretion retained by Parliament. This has an impact on the operations of the IEBC, including staffing arrangements, the number of professionals engaged and the quality of officers contracted to assist with the implementation of electoral technology.²⁴³ Further challenges include delayed appointments to the IEBC, and lack of objectivity because the processes are partisan due to the role played by Parliament.²⁴⁴

2.5.2 Election courts

The Constitution establishes an independent judiciary under Chapter 10, to which the sovereign power derived from the people is delegated.²⁴⁵ Under Article 162, the Constitution establishes a system of courts competent to hear and determine disputes relating to elections.²⁴⁶ Further, Article 163(3) (a) establishes the original jurisdiction of the Supreme Court to hear and determine disputes relating to the elections to the office of the President.²⁴⁷

The Judiciary is thus an institution to which stakeholders in elections turn, for purposes of interpretation of the legal framework discussed above. This is the framework for the resolution of pre-election and post-election disputes, filed either through complaints to specialised tribunals or election petitions, including those involving the use of electoral technology. The Constitution

²⁴⁰ As above.

²⁴¹ As above.

²⁴² IEBC Act 2011 sec 17.

²⁴³ Okello (n 82) 18.

²⁴⁴ As above.

²⁴⁵ The Constitution of Kenya 2010 art 3.

²⁴⁶ As above art 162.

²⁴⁷ As above art 163.

under Article 165 empowers the High Court to hear and determine disputes relating to the validity of election of a member of Parliament,²⁴⁸ or a declaration of a vacancy in that office. The dispute is to be heard and determined within six months of lodging the petition.²⁴⁹ Therefore, all disputes relating to the use of technology in the conduct of elections of members of Parliament shall be heard and determined by the High Court.

Furthermore, under Article 140 of the Constitution, any person is allowed to approach the Supreme Court by filing a petition to challenge the election of the President-elect. This should be done within seven days of the declaration of the results of the presidential election.²⁵⁰ The Supreme Court shall within 14 days after the filing of a petition hear and determine the petition and its decision shall be final.²⁵¹

Electoral technology has been litigated at the Supreme Court since 2013 in Kenya.²⁵² The International Foundation for Electoral Systems (IFES) proposes that there is a need for EMBs to provide awareness, specifically to judges and stakeholders on the electoral technology used even before elections.²⁵³ This is to enable effective assessment of the verifiability, accuracy, and authenticity of a particular technology.²⁵⁴ According to IFES, collaboration between EMBs and courts should start before elections without necessarily compromising the independence of either institution.²⁵⁵

In 2017, the Supreme Court granted an order for scrutiny of the electoral servers.²⁵⁶ However, the challenge is that the Deputy Registrar of the Court who supervised its execution was not well equipped to effectively handle the process because there was no pre-election training on electoral technology, specifically the RTS. In 2022, the judiciary and the IEBC conducted pre-

²⁴⁸ As above art 105(1).

²⁴⁹ The Constitution of Kenya 2010 art 105(2).

²⁵⁰ As above art 140.

²⁵¹ The Constitution of Kenya 2010 art 140.

²⁵² *Raila Odinga 2013* (n73); *Raila Odinga 2017* (n 74) & *Raila Odinga 2022* (n 13).

²⁵³ International Foundation for Electoral Systems 'Lessons on the Use of Technology in Elections Election Case Law Analysis Series' 9
https://www.ifes.org/sites/default/files/2022-12/Lessons%20on%20the%20Use%20of%20Technology%20in%20Elections%20and%20the%20Impact%20on%20EDR_Final_0.pdf (accessed 8 September 2023).

²⁵⁴ As above 9.

²⁵⁵ International Foundation for Electoral Systems (n 253).

²⁵⁶ As above.

election training where judicial officers were familiarised with the electoral technology implemented by the IEBC.²⁵⁷

2.6 Conclusion

This chapter has reviewed the legal and institutional framework governing elections management in Kenya. The study finds that the frameworks are comprehensive and respond to the historical challenge of election mismanagement. However, implementation requires consistent institutional practices. The study identifies the need for transparent procurement processes and trained technical staff knowledgeable in electoral technology.

Furthermore, its implementation requires transparent practices and processes for the audit of results transmission servers. This is to establish predictable mechanisms to hold private vendors accountable and restore public trust in the process. For efficiency, legal practitioners such as lawyers, judicial officers and judges need to understand the application of electoral technology, so that they can effectively analyse the implementation by the IEBC.²⁵⁸

The gaps identified include the lack of an international charter expressly codifying the use of technology in elections management. At the regional level, the ACDEG contains implicit provisions. The extra-legal problem of fidelity to the law continues to exist, as it is difficult to legislate loyalty to the law. There exists an opportunity for the IEBC to implement existing frameworks by ensuring institutional practices comply with the laws. The next chapter investigates the interpretation of electoral technology disputes to determine the judicial approach of courts and the issues under scrutiny.

²⁵⁷ International Foundation for Electoral Systems (n 253) 12.

²⁵⁸ As above 9.

CHAPTER 3

LITIGATING ELECTORAL TECHNOLOGY AND LESSONS FROM JURISPRUDENCE IN KENYA

3.1 Introduction

The Constitution provides a framework for the resolution of electoral disputes in Kenya.²⁵⁹ The process of electoral dispute resolution has therefore undergone a complete transformation post-2010, with the enactment of a progressive legal framework.²⁶⁰ Elections management is closely linked to electoral violence in Kenya, necessitating clear dispute resolution mechanisms through courts, as umpires of last recourse.²⁶¹ In Chapter two, the study reviewed the relevant legal framework and identified that its implementation requires the intervention of courts.

In this chapter, the study explores the interpretation of the laws and questions on the integration of electoral technology in the management of elections in Kenya. The study reviews jurisprudence as developed by various superior courts, including the Supreme Court, the only forum with original jurisdiction to hear and determine disputes relating to presidential elections.²⁶² Particularly, the study explores the threshold set for implementation of laws on technology by the IEBC and its effect on the qualitative element of democracy.

In litigating electoral technology in Kenya since 2013, the consistent factor has been the manner of implementation of electoral technology. In the 2017 elections, among other allegations, the petitioners challenged the use of electoral technology and claimed that it contributed to a lack of accountability and transparency.²⁶³ Additionally, in the 2017 and 2022 election petitions, the petitioners sought orders of access to the technology systems referred to as ‘servers,’ which the Court granted in both instances.²⁶⁴

²⁵⁹ The Constitution of Kenya 2010 art 162.

²⁶⁰ As above.

²⁶¹ United Nations (n 63).

²⁶² The Constitution of Kenya 2010 art 163(3) (a).

²⁶³ O Kaaba ‘Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others Presidential Petition No. 1 of 2017’ (2018) 1(2) *South Africa Institute for Policy and Research Case Review* 15 <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1012&context=scr> (accessed 8 September 2023).

²⁶⁴ Omwoha (n 40) 150.

3.2 Tracing the litigation history of electoral technology in Kenya

The following is an analysis of cases on the use of technology in the electoral system in Kenya since 2010.

3.2.1 The original ‘false start’

The Kriegler report expressly recommended that technology would be the desired bridge to trust and accountability in the electoral system.²⁶⁵ Additionally, the history of elections management in Kenya demonstrated that manipulation of the electoral system is rife, if the existing EMB is fundamentally weak, with neither formal nor substantive institutional independence.²⁶⁶ Therefore, it was predictable that technology would insulate electoral processes against manipulation and fraud thus instilling public trust and accountability by entrenching transparency.²⁶⁷

Furthermore, it was projected that electoral technology would be the arteries and veins embedded into the electoral system to circulate transparency and effectively reduce political tensions to avoid post-election violence.²⁶⁸ Therefore, the interpretation of the laws backing electoral technology should be done with this background in mind, and to say the least, a purposive approach to the interpretation of electoral technology frameworks.

However, in *Raila Odinga 2013*, the Court was of the view that because the technology deployed by the IEBC failed to achieve ‘a level of reliability, it cannot yet be considered a permanent or irreversible foundation for the conduct of the electoral process.’²⁶⁹ The Court in correctly diagnosing part of the problems facing the IEBC was emphatic that ‘the failure mainly arose from the misunderstandings and squabbles among IEBC members during the procurement process.’²⁷⁰

²⁶⁵ Kriegler report (n 26) 9&14.

²⁶⁶ International IDEA (n 96) 147.

²⁶⁷ Kriegler report (n 26) 9.

²⁶⁸ As above.

²⁶⁹ *Raila Odinga 2013* (n 73) para 237.

²⁷⁰ As above para 234.

The IEBC failed to assess the integrity of the technologies in good time,²⁷¹ which was an indictment on the institutionalisation of electoral technology by the IEBC. Instead of setting a high standard for the implementation of electoral technology, the Court stated thus:²⁷²

We take judicial notice that, as with all technologies, so it is with electoral technology: it is rarely perfect, and those employing it must remain open to the coming of new and improved technologies. But as regards the integrity of the election itself, what lawful course could IEBC have taken after the transmission technology failed? There was no option, in our opinion, but to revert to the manual electoral system, as was done.

This approach to the interpretation of electoral technology legislation and standards has received scholarly attention, and Harrington and Manji argue that:²⁷³

The decision failed to engage in any significant way with the findings and recommendations of the Kriegler report on these questions. The latter had found that the use of 'Black Books' in the 2007 election, similar to the 'Green Books' relied on in 2013, had opened the way to considerable electoral malpractice.

The Court thus committed what this study describes as the 'original sin' by downplaying the role of technology in the electoral process. The Court had the chance to elevate the strict implementation of electoral technology and require accountability by the IEBC, but unfortunately, it effortlessly failed to do so.²⁷⁴ Instead, the interpretation of the issue of deployment and failure of electoral technology by the Court was inconsistent with the transformative nature of the Constitution.

The study observes that there was a missed opportunity to elevate the status of electoral technology and to build on the recommendations of the Kriegler report by requiring strict implementation of technology.²⁷⁵ The Court rightly identified the institutional weaknesses the

²⁷¹ As above.

²⁷² As above para 233 & 235.

²⁷³ J Harrington & A Manji 'Restoring Leviathan? The Kenyan Supreme Court, constitutional transformation, and the presidential election of 2013' 182 <https://www.tandfonline.com/doi/epdf/10.1080/17531055.2015.1029296?needAccess=true&role=button> (accessed 8 September 2023).

²⁷⁴ As above 175.

²⁷⁵ Kriegler report (n 26) 9.

IEBC faced, including the lack of a consistent electoral technology procurement policy and squabbles within the IEBC which led to the failed trial to implement technology in elections management.²⁷⁶ Failure to institutionalise technology in 2013 by the IEBC was thus a glaring misstep which created a ripple effect to date as the Court failed to arrest it.

The Court analysed cases and reviewed the history of elections management in Kenya, and concluded that electronic technology had failed to proffer ‘perfect solutions.’ It stated that the electronic technology was as noted in the study’s literature review, ‘inherently undependable.’²⁷⁷ At the same time, the Court stated that the manual system itself had a major weakness.²⁷⁸ However, it failed to restate that the reason for the integration of technology was to break away from the manual electoral system which was perennially compromised since independence.

Electoral technology and its application were thus rendered a false start by the Court, despite identifying the lack of an institutional culture of implementation. Subsequently, in sharp contrast, the 2017 Court could not accept the explanation provided by the IEBC on the failure of technology in the transmission of the presidential election results.²⁷⁹ It stated that the failure of electronic transmission of results violates the law.²⁸⁰ The decision has been lauded by Kaaba as consistent with the values of democracy and constitutionalism.²⁸¹ It is therefore important to explore whether there is a value system within which the electoral system should be implemented as highlighted below.

3.2.2 Judicial interpretation of principles of the electoral system

In *Gatirau Peter Munya v Dickson Mwenda Githinji and 2 others*,²⁸² the election petition involved allegations of electoral malpractices among others, the discrepancy in the results announced, and

²⁷⁶ *Raila Odinga* 2013 (n 73) para 234.

²⁷⁷ *Raila Odinga* 2013 (n 73) para 237

²⁷⁸ *Raila Odinga* 2013 (n 73) para 236

²⁷⁹ *Raila Odinga* 2017 (n 74) para 270.

²⁸⁰ As above.

²⁸¹ Kaaba (n 263) 15.

²⁸² *Gatirau Peter Munya v Dickson Mwenda Githinji and 2 others* (2014) eKLR <http://kenyalaw.org/caselaw/cases/view/96314/> (accessed 8 September 2023).

contraventions of the regulations governing elections.²⁸³ The petitioner alleged that the election was conducted in a manner that violated Article 81(e) of the Constitution, which is the principle of the electoral system. The Court stated that an election should be conducted substantially by the principles of the Constitution.²⁸⁴

Furthermore, the Court held that the voting process is required to comply with the principles set out under Article 86 of the Constitution.²⁸⁵ It reiterated that where there is evidence that the magnitude of alleged irregularities affected the election result, the election shall be invalidated. Therefore, where the use of electoral technology results in an election process so devoid of merits, and so distorted as not to reflect the will of the people, its outcome should be disturbed. This is because it is a violation of laws, and the courts are required to nullify such an election.²⁸⁶ However, it is not easy to define an effective electoral process, thus courts have attempted to provide perspectives as discussed below.

3.2.3 End-to-end electoral processes

The electoral process consists of several but intricately related elements, such as voter registration, education, voting, declaration of results and announcement of victors. As such, the use of electoral technology should be viewed as influencing these processes altogether. In *Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 others*,²⁸⁷ the Court stated that elections constitute an elaborate process which begins with the registration of voters, the nomination of candidates, voting or counting and tallying of votes and finally declaration of the winner by gazettelement.²⁸⁸

On the issue of the validity of the results declared, the Court stated that it was bound to examine the entire process up to the declaration of results.²⁸⁹ The reasoning was that the quality of elections being free and fair is expressed not only on the voting day but throughout the election

²⁸³ As above para 5.

²⁸⁴ As above para 77.

²⁸⁵ The Constitution of Kenya 2010 art 86.

²⁸⁶ As above.

²⁸⁷ *Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 Others* Election petition 12 of 2013 (2013) eKLR <http://kenyalaw.org/caselaw/cases/view/90666/> (accessed 9 September 2023).

²⁸⁸ As above para 2.11.

²⁸⁹ As above para 2.12.

process.²⁹⁰ Therefore, it was of the view that failure to comply with the law regulating these processes would affect the validity of the election of the Member of Parliament.²⁹¹

The decision established that the electoral process as a whole is as important as the result of the elections. It follows that the use of technology at any stage of the elections should be considered as a part of the process, hence measures should be taken to ensure effective implementation of the forms of technology used. The study notes that the process starts at the local level, where polling stations are stationed, hence it is important to review the impact of *Maina Kiai* on the implementation of electoral technology, specifically the transmission of electoral results. The case is discussed below.

3.3 Jurisprudence on electoral technology in Kenya since 2013

The legal and institutional reforms gained momentum in the subsequent pre-election period, and eventually tested in various courts as illustrated below.

3.3.1 The *Maina Kiai* effect

Electronic transmission of results tabulated at polling stations was canvassed in the *Maina Kiai* case.²⁹² The petitioner sought among others, a declaration that sections 39(2) and (3) of the Elections Act, 2011 contravened Articles 86 and 138 (2) of the Constitution.²⁹³ The main concern was that only returning officers had the exclusive mandate to announce and declare the final results of a presidential election at the constituency level.²⁹⁴ The petitioner sought the declaration that the IEBC had no authority to interfere with the results as announced and declared at the polling station level.²⁹⁵

In deciding, the Court of Appeal stamped the position that electronic transmission of results tabulated by returning officers at polling stations serves to safeguard the accuracy of results.²⁹⁶ Therefore, the court held that the IEBC has no authority to vary or claim to verify the

²⁹⁰ *Kabage* (n 287)

²⁹¹ *Kabage* (n 287).

²⁹² *Maina Kiai* (n 113) 33.

²⁹³ As above

²⁹⁴ *Maina Kiai* (n 113) 5.

²⁹⁵ As above.

²⁹⁶ As above.

results as announced and declared at the polling station level.²⁹⁷ The collegiate role of the IEBC to tally and verify the results was further highlighted, thus settling the issue of whether the chairperson could solely undertake such critical roles.²⁹⁸ This confirms the need for institutional mechanisms for the use of electoral technology for the transmission of polling station-level electoral results.

Therefore, upon electronic transmission of the results directly from the polling station, the IEBC is required to tally and verify the results,²⁹⁹ but not to alter or purport to do so. In the 2022 elections, the IEBC commissioners took turns announcing the tallies as received electronically from the various constituencies through the Results Transmission System. The decision elevates the role of electoral technology and sets a good precedent for accountability as the IEBC cannot alter the results transmitted electronically without lawful justification.

3.3.2 Electoral technology in *Raila Odinga 2013*

In the 2013 elections, the petitioners approached the Supreme Court contesting among others, the manner of implementation of electoral technology, which was used for the first time.³⁰⁰ The lead petition alleged that the electoral process was so fundamentally flawed that it violated the legality of the results declared.³⁰¹ The role of the BVR system was highlighted, and its role in voter registration, where biometric data such as fingerprint and bio-data were used for verification of voters.³⁰²

The IEBC used electoral technology in the management of elections in 2013. The different elements of technology worked separately as the system was not integrated.³⁰³ The procurement was done by different vendors. Safran Morpho was engaged to provide the BVR while Face

²⁹⁷ *Maina Kiai* (n 113) 33.

²⁹⁸ As above 38.

²⁹⁹ *Maina Kiai* (n 113) 33.

³⁰⁰ *Raila Odinga 2013* (n 73) para 4.

³⁰¹ As above para 15.

³⁰² *Raila Odinga 2013* (n 73) para 42.

³⁰³ *Passanti* (n 68) 8.

Technology provided the EVI.³⁰⁴ Together with development partners such as Google and IFES, the IEBC developed the RTS and the website interface to access results.³⁰⁵

It is important to note that despite the use of electoral technology in 2013, there was no framework in terms of regulations such as the Elections (Technology) Regulations 2017, to guide the implementation of electoral technology. The process relied on vendors and technicians, leaving the question of transparency and accountability to the jury, which is still out there.³⁰⁶ The human element was such a weak link that allegations of manipulation of electoral technology were manifest. The IEBC also lacked the required technical expertise.³⁰⁷

In determining the petition, the Supreme Court acknowledged that the technology failed to work seamlessly, and it did not provide the desired results.³⁰⁸ The IEBC could not provide proof of verifiable results from the computer servers at the national tallying centre, thus serving as a blow to the element of accountability in elections management. Electronic tallying and transmission of results was thus suspended by the IEBC and the election results forms were thus delivered physically to the national tallying centre.³⁰⁹ As highlighted above, the study identifies a missed opportunity by the Supreme Court to nurture the institutionalisation of technology, by allowing the IEBC to get away with the identified and acknowledged failures in the implementation of technology and the impact of the failures on achieving accountable elections.

3.3.3 Electoral technology in *Raila Odinga 2017*

In 2017, the petitioners approached the Supreme Court challenging the election of the president. The petition challenged the conduct of the electoral process and questioned whether it was done by the principles of electoral democracy and the impact of irregularities and illegalities on the integrity of the election.³¹⁰ The petitioners challenged the manner of implementation of technology

³⁰⁴ As above.

³⁰⁵ As above.

³⁰⁶ As above 11.

³⁰⁷ As above.

³⁰⁸ *Raila Odinga 2013* (n 74) paras 231 - 237.

³⁰⁹ C Odote and K Kanyinga 'Election technology, disputes, and political violence in Kenya' 56(3) *Journal of Asian and African Studies* 558 at 563 <https://journals.sagepub.com/doi/pdf/10.1177/0021909620933991> 563 (accessed 9 September 2023).

³¹⁰ *Raila Odinga 2013* (n 74).

in the transmission of the election results.³¹¹ The procurement of electoral technology was challenged for failure to comply with the timelines set under the Elections Act 2011.³¹²

On electronic transmission of results, the petitioners alleged that the IEBC contravened *Maina Kiai* because of the declaration of final results without receipt of results from more than 10,000 polling stations.³¹³ Upon application by the petitioners, the Court granted an interim order permitting access to all the scanned and transmitted copies of the polling station results.³¹⁴ In the course of the hearing of the petition and as held by the Court, the IEBC failed to comply fully with the order.³¹⁵

On access to the ‘hallowed’ servers, the Court granted an access order, which the IEBC failed to comply with, by arguing that compliance with the orders of the Court and granting full access to the petitioners would bear a blow on the security of the servers.³¹⁶ The Court noted that considering the financial investment the country had made in electoral technology, the IEBC was under an obligation to prioritise the security of the servers.³¹⁷

The manner of implementation of technology thus largely informed the decision of the Court in nullifying the presidential elections. The Court paid fidelity to the Constitution, and as Simiyu states, the Court faithfully used the Constitution as its lighthouse.³¹⁸ The election thus failed to muster the constitutional test because the irregularities and illegalities were substantial, affecting the integrity of the election. The court did not excuse the failures of the IEBC in deploying technology successfully.

Kaaba argues that the decision was important to Africa’s electoral jurisprudence because it correctly applied the substantial effect rule. After all, the irregularities and illegalities were

³¹¹ As above.

³¹² *Raila Odinga 2017* (n 74) para 25.

³¹³ *Raila Odinga 2017* (n 75) paras 24, 27 & 28.

³¹⁴ *Raila Odinga 2017* (n 75) para 267.

³¹⁵ As above.

³¹⁶ *Raila Odinga 2017* (n 75) para 277.

³¹⁷ As above.

³¹⁸ Simiyu (n 128) 145.

significant and in need of redress.³¹⁹ This is so especially because the quality of elections is to be determined by taking into account not only numbers but also the entire process. To this end, the Supreme Court in granting access orders to the servers, specifically appointed independent technology experts led by its deputy registrar. The decision has been heralded as a progressive commitment to constitutionalism and the rule of law.³²⁰

3.3.4 Electoral Technology in *Raila Odinga 2022*

Electoral technology took centre stage in the management of the 2022 elections.³²¹ It was applied in the process of recruitment of election officials, in voter registration, verification, results transmission and other processes such as registration of elections observers and in providing voter education.³²² It emerged more profoundly than in previous elections that electronic transmission of results forms from polling stations would be accompanied by hard copy forms to the national tallying centre.³²³ This elevates the role of electoral technology while preserving accountability in the management of elections. Despite this progress, the results of the presidential election were challenged, with the implementation of electoral technology being a key question for determination.

From the onset, the Supreme Court stated that a lack of trust in the electoral system led to the introduction of election technology in Kenya.³²⁴ The Court highlighted that the IEBC is under an obligation to adopt an integrated electronic electoral system enabling biometric voter registration, electronic voter identification and electronic transmission of results.³²⁵ The petitioners specifically challenged how technology was deployed and utilised.³²⁶ They alleged that the implementation of technology in the management of elections did not meet the standards

³¹⁹ O Kaaba 'Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and others presidential petition 1 of 2017' 15 <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1012&context=scr> (accessed 8 September 2023).

³²⁰ As above.

³²¹ The Carter Center Election Expert Mission 'Preliminary report of presidential election Kenya' 1 https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya/2022/kenya-preliminary-report-2022.pdf (accessed 9 September 2023).

³²² As above 5.

³²³ As above 8.

³²⁴ *Raila Odinga 2022* (n 13) para 10.

³²⁵ As above.

³²⁶ *Raila Odinga 2022* (n 13) para 11.

requiring the electoral system to be simple, accurate, verifiable, secure, accountable and transparent.³²⁷

In determining whether the electoral technology was compliant with the principles of electoral democracy, the Court adopted the intermediate standard of proof, which seeks to strike a middle ground between the criminal law threshold of beyond reasonable doubt and the civil law balance of probability.³²⁸ The petitioners thus had to shoulder a high standard of proof to demonstrate that the manner of deployment of technology did not meet the requirements in law.

Furthermore, the Court noted that the IEBC in using an integrated system in the 2022 elections displayed gradual but sustained advancement in election technology.³²⁹ However, unlike *Raila Odinga 2017*, the Court watered down the gains made in 2017, where the Court firmly spoke against excuses for failure to implement electoral technology as required by law.³³⁰ The Court started by creating a soft landing for the IEBC by stating that ‘technology, like all human inventions, no matter how advanced, is bound to fail at one point or another, leading to a bad user experience.’³³¹ The Court referred to ‘practical realities’ which are likely to lead to imperfections in the process and stated that such imperfections are inevitable.³³²

The Court went ahead to state as follows:³³³

Whereas, it is not in dispute that the KIEMS kits failed in 235 polling stations in Kibwezi West Constituency and parts of Kakamega County, 86,889 voters were granted the right to vote manually and the requisite Forms 32A duly filled. As such, the failure of the KIEMS kits in the identified polling stations cannot be taken as a yardstick of the performance of KIEMS kits in the whole country. In any case, all affected voters who could have complained were not disenfranchised as they were able to exercise their democratic right to vote manually.

The Court acknowledges the hybrid nature of the electoral system in Kenya, allowing both manual and electronic forms of election management. However, it does not at this point restate

³²⁷ As above.

³²⁸ *Raila Odinga 2022* (n 13) para 34.

³²⁹ *Raila Odinga 2022* (n 13) para 44.

³³⁰ *Raila Odinga 2017* (n 74) para 45.

³³¹ *Raila Odinga 2022* (n 13) para 45.

³³² As above.

³³³ *Raila Odinga 2022* (n 13) para 47.

the spirit of the Kriegler report in recommending progressive integration of technology. The Court confirms the admission of the chairperson of the IEBC that it 'does not have and was not expected to have the capacity to set up and design the technology of that magnitude by itself; that it relied on suitably qualified bidders to design and provide the technology that would deliver the support required.'³³⁴

The study notes that the IEBC's admission came 12 years after it was constitutionally established after it had conducted elections in 2013, and twice in 2017. The continued engagement of international vendors proved to be a point of concern in the 2022 elections, even though the petitioners could not successfully convince the Court that the electronic system was accessed by unauthorised persons and results interfered with.³³⁵ In the end, the petitioners did not succeed in persuading the Court that the technology deployed by IEBC did not meet the standard of Article 86(a) of the Constitution,³³⁶ perhaps due to the stringent intermediate standard of proof, which requires evidence below the threshold of beyond reasonable doubt, but slightly above a balance of probabilities.

In subsequent paragraphs of the decision, the Court provides recommendations to the IEBC to strengthen its capacity at the institutional level.³³⁷ Noteworthy is the fact that the IEBC has not considered the implications of the lack of a clear policy on electoral technology, hence a failure to institutionalise practices that can translate to electoral accountability. That said, the study notes that because the law permits international procurement of electoral technology, measures to ensure accountability of private vendors need to be put in place, including bridging the information asymmetry caused by the technical nature of the tools procured. This cannot be implemented unless the dysfunctionality noted by the Court is addressed.³³⁸

3.4 Conclusion

Chapter three of this study has reviewed the history of litigation on electoral technology and the approaches taken by courts after the Constitution. The manner of implementation of electoral

³³⁴ As above para 49.

³³⁵ As above para 53.

³³⁶ As above para 56.

³³⁷ As above paras 309 (a) (b) & (c).

³³⁸ As above.

technology is a uniform concern that is likely to recur even into the future as Kenya considers emerging technologies, such as blockchain systems. The courts and stakeholders should therefore be prepared to litigate and adjudicate on complex issues, which require specialised training.

The Carter Center elections observation mission on its part recommends that, in subsequent elections, the IEBC should consider implementing measures to mitigate and counter risks such as IEBC employees or contractors misusing access rights to IEBC databases to access or modify privileged information or prevent the system from working properly.³³⁹ Additionally, the IEBC should consider using open-source software to enhance transparency in results transmission and digital signature schemes and other cryptographic methods for the authenticity of log files, software, results forms, and other IEBC documents.³⁴⁰

This chapter observes that there is an opportunity for courts to shape electoral technology jurisprudence more boldly than before, towards an approach which will cement the role of electoral technology in advancing democratic ideals such as accountability. This approach shall foster discourse aimed at a fully technology-driven electoral system. The challenges anticipated such as the digital divide, internet and device penetration can also be addressed. The study maintains that eventually, e-voting is an inevitable reality. In anticipation, the courts should consider judicial interpretation which best promotes accountability.

Chapter 4 below contains the conclusion and recommendations of this study, based on the analysis done in Chapters 1, 2 and 3 of the study. It highlights the findings from each of the Chapters and provides a basis for recommendations. The Chapter concisely collates the responses to the research questions posed in Chapter one of the study.

³³⁹ The Carter Center (n 321) 9.

³⁴⁰ As above.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

4.1 Introduction

In this Chapter, the study provides a summary of the findings in light of the research questions explored. It further summarises the recommendations and concludes, based on the research findings. The central theme is that the effective use of electoral technology by the IEBC contributes to accountability in election management. Efficiency in election management requires consistent, auditable and transparent institutional structures as demonstrated below.

4.2 Key findings

This study set out to answer the main research question by exploring the frameworks for the integration of technology into the electoral process to enhance electoral accountability in Kenya. The analysis found that there have been positive steps in developing frameworks, although implementation remains low, calling for improvements in the existing implementation strategies. Based on the research objectives, the analysis of literature, legal instruments and jurisprudence in Chapters one, two and three made the following further findings:

4.2.1 The link between electoral technology and electoral principles

Chapter one of the study established that indeed the Constitution entrenches a value system in the electoral process. This is formally enshrined as principles of electoral democracy, under Article 86 of the Constitution. Additionally, the principle of accountability prominently features among the national values and principles of governance under Article 10. Furthermore, these principles form part of the substantive framework for the establishment of an effective electoral system by the IEBC.

The Chapter further established that the IEBC has the constitutional obligation to implement the principle of electoral accountability, including the use of technology as an enabler. The procurement and implementation of electoral technology is thus regulated by the Election (Technology) Regulations 2017. Considering the history of electoral malpractices, technology is considered a bridge to accountability and transparency as principles of electoral democracy.

In Chapter two, the study highlighted that the IEBC is obliged to implement the principles of electoral democracy as benchmarks for the fulfilment of political rights under Article 38 of the Constitution. Furthermore, the principle of universal suffrage calls for the use of electoral technology in a manner which enhances voter turn-out. This in turn secures the equality of the vote as technology holds the potential to create uniform voting conditions for all voters from all regions.

The study thus found that post-2010, the principles of electoral democracy, including accountability form the substantive building blocks of the electoral system to be adopted by the IEBC in any election. These principles are to be applied directly in the integration of electoral technology, to secure an accountable electoral process.

4.2.2 Institutional technology policies, practices and accountability

In Chapter one, the study underscored that since 2013, the need for policies on an integrated electoral management system has been apparent. This has recurred throughout subsequent electoral cycles as the electoral practices of the IEBC have been inconsistent. In 2013, the electoral technology relied upon was procured in a rush, and unevenly implemented, with particular regions not benefitting from the gains of electoral technology.

The study thus identified a gap in the implementation of consistent policies and practices, because in 2017, the technology adopted although slightly enhanced, could not demonstrate high levels of accountability leading to the nullification of the election results as a result of a high-tech electoral process, but fundamentally flawed as confirmed by the Supreme Court.

Additionally, the legal framework as analysed in Chapter two identified that the lack of full implementation of the existing laws and effective policies on electoral technology is fanned by resource constraints by the IEBC, leading to outsourced personnel, limited training of officials and ineffective audit mechanisms to achieve electoral accountability. The Chapter further highlighted the need for electoral practices by the IEBC to conform to the general principles for the electoral system under Article 81 and standards guiding the IEBC on voting under Article 86 of the Constitution.

Chapter three analysed the jurisprudence on electoral technology and established that courts have consistently interpreted questions in electoral technology disputes taking into account the practices of the IEBC and its officials. In 2013, the practices and policies were found to be far from effective, and there was express recognition of the need to continue to work towards better electoral technology practices, such as electronic results transmission, registration, verification and identification of voters.

Additionally, the need to demonstrate the actual operations of the technology systems such as the transmission portal was highlighted. This is to foster transparency and accountability. The Supreme Court in 2022 identified the need for the IEBC to implement legal, policy and institutional reforms to address the glaring shortcomings within IEBC. The express acknowledgement of institutional dysfunctionality within the IEBC is a symptom of a lack of long-term institutional policies and practices to implement accountability. It poses a challenge for the implementation of electoral technology thus a need for reforms.

4.2.3 Adjudication of electoral technology

Chapter 3 of the study traced the litigation history of electoral technology disputes since 2010. It highlighted that in 2013, the Supreme Court set a low threshold for the implementation of electoral technology, but acknowledged that there was a need for progressive reforms to build on the momentum of the imperfect electoral technology systems procured for voter registration, identification and verification. For instance, on voter registration, identification and verification, the Supreme Court took issue with the manual system for presenting fundamental gaps.

Furthermore, the failure of the result transmission system necessitated the need for better strategies than those adopted in 2013, from the choice of electoral technology to procurement and implementation. The acknowledgement that electoral technology is rarely perfect by the Supreme Court in 2013 set a pace for reforms. In 2017, the Supreme Court identified flawed electoral technology practices as one of the risks and barriers to accountable election results.

The nullification of the presidential election results was thus informed by among other reasons, the non-compliant use of electoral technology. In 2022, the manner of implementation of

electoral technology was litigated, with the court noting the complementary nature of both the manual and technology aspects of the electoral system.

4.2.4 Practices and strategies for accountability through electoral technology

Chapter one of the study established the need for consistent practices in the implementation of electoral technology, specifically in civic education, voter registration, verification, identification and results transmission. This requires a high level of independence and adequate financial allocation to the IEBC. The barriers such as financial constraints and lack of political will to entrench the principles of electoral democracy were identified. The study further singled out the lack of a formal and comprehensive policy on the integration of electoral technology as a gap.

4.3 Key recommendations

This study has explored the recommendations in the Kriegler report which contained the consequential proposal for integration of electoral technology. However, the implementation requires institutionalised structures, hence the following recommendations:

4.3.1 Institutional reforms

The IEBC should conduct a review of the progress made in the integration of technology since 2013. This will inform the areas of reform in detail. Furthermore, the study proposes that as part of the institutional reform process, there is a need to prepare and fully implement technology deployment plans under Regulation 5 of the Elections (Technology) Regulations 2017. This should be long-term, to fully institutionalise electoral technology. This will sustain the transition to a predominantly digitally enabled electoral system. The public resources spent so far signal the possibility of e-voting, considering the government's digital masterplan, and the status of Kenya as the Silicon Savannah of Africa.

Particular reforms in line with one of the recommendations by the Supreme Court in 2022 include; the entrenchment of the information, communication and technology function of the IEBC. This can be done by amending the current institutional structure of the IEBC to establish a mandate for the review of electoral technology. This should include an innovation hub for testing concepts for emerging electoral technologies. It will create a culture of homegrown electoral

technology solutions and engage local innovators and developers. This institutional shift will address the public trust deficit associated with the outsourcing of experts and international procurement of electoral technology.

Furthermore, the institutional reforms should take into account a review of jurisprudence since 2010 on technology aspects, to ensure conclusive solutions to the challenges in the implementation of both legislation and regulations powering the integration of electoral technology. An audit of case law is a data-centric approach, which can inform high-level decision-making by the IEBC in developing a technology implementation matrix.

The IEBC should further restructure its operations to incorporate a robust training mechanism, such as a training centre, where stakeholders such as judges, advocates and information communications and technology practitioners can be trained on electoral technology. This will in turn improve the quality of decision-making and create public awareness of the internal workings of the electoral technology. The commissioners of the IEBC and election officials should undergo comprehensive training, specifically on the electoral technology implemented and not just general training.

4.3.2 Implementation of court recommendations

The process of litigating electoral technology since 2013 has resulted in recommendations for reforms to be adopted by the IEBC. However, from the 2017 electoral cycle to the 2022 elections, it is apparent that the IEBC has faced challenges in implementing these recommendations. In 2022, the Supreme Court recommended that to avoid suspicion from stakeholders, access to the electoral servers should be restricted to IEBC staff during the election period. This is an important recommendation that requires full implementation, considering the impression created in the 2022 elections that foreign nationals accessed the servers despite not being officials of the IEBC.

Furthermore, the recommendation for maintenance of electoral servers separate from the IEBC's institutional servers should be fully implemented for long-term facilitation of access, supervision and auditing, without inhibitions such as contractual obligations with foreign electoral technology vendors. Additionally, it would facilitate compliance with court orders on access to the electoral servers for forensic imaging.

4.3.3 Review of legal frameworks

To anticipate the impact of emerging technologies on the electoral system, there is a need for the IEBC to audit and propose amendments to the Election (Technology) Regulations 2017, to incorporate potential aspects of technology, such as artificial intelligence as there is no current regulation. These would have an impact on the workforce, skill and preparedness of the IEBC. Therefore, the IEBC should be represented in the discourse leading to such legislation. Furthermore, there is a need to institutionalise technology by incorporating Standard Operating Procedures (SOPs). The SOPs would incorporate emerging trends, such as integrating the role of the judiciary, to foster compliance with court orders on access to the electoral servers.

Additionally, the review should take into account the need to incorporate a comprehensive electoral technology implementation policy. The policy should comprise accountability-enhancing practices, such as proactive disclosure of electoral information in readable formats, through digital devices and platforms. The policy should undergo robust public participation to incorporate the views of technology experts, practitioners and the electorate.

4.3.4 Electoral technology and data protection

The 2022 elections were the first under the 2019 data protection regime in Kenya. The study established that there were challenges in complying with the principles of data protection, especially on the part of political parties. The processing of personal data by the IEBC should therefore comply with the Data Protection Act 2019. The IEBC should further improve its data protection policies, and cybersecurity strategies and importantly, implement practices in line with the obligation to respect and promote the right to privacy of the electorate. The public registers maintained by the IEBC contain personal data, and the IEBC is thus considered a data processor and data controller.

4.4 Conclusion

This study identified gaps in the implementation of electoral technology to achieve an accountable electoral process in Kenya. Chapter one highlighted the electoral cycles starting post-2007, 2013, 2017 and 2022. It further analysed the problem, the study's research objectives, and four research

questions, and analysed existing literature. It further highlighted the research methodology, structure, scope and limitations of the study.

In Chapter two the study established that sufficient laws on electoral technology exist in the text, with a challenge in implementation. Furthermore, in Chapter three decided cases established that electoral technology is a litigation channel, with the courts prioritising the central role of the electorate. Chapter four has collated the findings from each of the Chapters and provided recommendations and a conclusion.

The study has demonstrated that accountability in elections management is a possibility under the existing legal frameworks, with deliberate efforts to establish an institutional culture on the integration of electoral technology. The enforcement of the principles of electoral democracy provides an avenue for sustaining a technology-driven electoral system, yet simple, accurate, verifiable, secure, accountable and transparent. To pen off, the study concludes that technology cannot cure flawed electoral processes, as this usurps the will of the people, and perpetuates democratic regression. It takes the will of the IEBC and its leadership to continuously innovate towards a responsive electoral technology plan, that is not as complex as to obscure accountability. In the words of Steve Jobs:³⁴¹

Technology is nothing. What's important is that you have a faith in people, that they're basically good and smart, and if you give them tools, they'll do wonderful things with them.

[Word Count: 20,000]

³⁴¹ J Goodell 'Steve Jobs in 1994: The Rolling Stone Interview' *Rolling Stone* 17 January 2011 <https://www.rollingstone.com/culture/culture-news/steve-jobs-in-1994-the-rolling-stone-interview-231132/> (accessed 15 October 2023).

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