

**ELECTORAL REFORMS AND DEMOCRATIC CONSOLIDATION IN  
KENYA, 1997 – 2017.**

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**MA THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS FOR THE DEGREE OF MASTER OF ARTS IN  
POLITICAL SCIENCE AND PUBLIC ADMINISTRATION,  
UNIVERSITY OF NAIROBI**

**2020**

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# DECLARATION

## DECLARATION

This thesis is my original work and has not been presented for any other academic award at any other institution of learning.

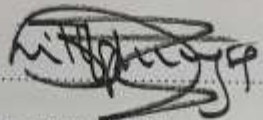
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This thesis has been submitted for examination with our approval as the university supervisors.

Sign  .....

Date 14/8/2020

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Date 17/8/2020

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## ACKNOWLEDGEMENTS

Writing a thesis is a humbling process. While that has been clear from day one, typing these acknowledgments brings home how much I have benefitted from the guidance and support of numerous individuals. Without their influence I would not have embarked on this project, let alone completed it. It has been an honour to work with and learn from each of them.

I pass my special thanks to my supervisors Professor Fred Jonyo, head of the Department of Political Science and Public Administration, University of Nairobi, and Dr. Solomon Owuoché, for your insightful and timely comments throughout the period of writing this thesis. To you both, I owe a special debt.

Further, I pass my deep gratitude to the other lecturers in the Department; Prof. Phillip Nyinguro', Dr. Henry Amadi, Dr. Mumma-Martinon, L. Maumo and the entire Departmental fraternity. I owe you all a great debt of gratitude.

I am further indebted to my good friend Deo Gumba of ISS who took time out of his busy schedule to go through the manuscript and share his useful comments. Also, special appreciation goes to my other special friends, who have all been a source of constant, good-humoured encouragement in the course of writing my thesis.

In addition, I do not want to omit expressing the debt I owe my MA seminar colleagues. It would be invidious of me to single any out but I would like to express my great appreciation to Michal Thon and Oburu. You guys made our class debates fun.

## **DEDICATION**

This thesis is dedicated to my parents, Mr. Stephen and Consolata Ajwang, who have been constant source of love, concern, support and strength all my life.

## TABLE OF CONTENTS

DECLARATION.....	ii
ACKNOWLEDGEMENTS .....	iii
DEDICATION.....	iv
LIST OF TABLES .....	vii
LIST OF FIGURES .....	viii
ACRONYMS AND ABBREVIATIONS .....	ix
ABSTRACT.....	xi
CHAPTER ONE .....	1
1.1 Background to the Study .....	1
1.2 Statement of the Research Problem .....	3
1.3 Objectives of the Study .....	5
1.3.1 Main Objective .....	5
1.3.2 Specific Objectives .....	5
1.4 Research Questions .....	5
1.4.1 Main Question .....	5
1.5 Justification of the Study .....	6
1.5.1 Policy Justification .....	6
1.5.2 Academic Justification .....	6
1.6 Scope and Limitations of the Study.....	7
1.7 Definition and Operationalization of Key Terms.....	7
1.7.1 Democratic Consolidation .....	7
1.7.2 Electoral Reforms .....	8
1.8 Literature Review .....	8
1.9 Conceptual Framework .....	23
1.10 Research Methodology .....	27
1.10.1 Introduction .....	27
1.10.2 Research Design .....	27
1.10.3 Method of Data Collection .....	27
1.10.4 Target Population .....	28
1.10.5 Sampling Procedure .....	28
1.10.6 Sampling Size .....	28
1.10.7 Data Analysis .....	29
CHAPTER TWO .....	30
DEMOCRATIC CONSOLIDATION: MINIMALIST VERSUS MAXIMALIST.....	30
2.1 Introduction .....	30
2.2 Minimalist and Maximalist Concepts of Democratic Consolidation .....	31
2.3 Key Principles of Democracy .....	32
2.4 Classification of Regimes .....	40
2.5 Conclusion .....	43
CHAPTER THREE .....	44
HISTORICAL REVIEW OF ELECTORAL REFORM PROCESS IN KENYA .....	44
3.1 Introduction.....	44
3.2 Electoral Reforms in Kenya Between 1963 and 1991 .....	44
3.3 Electoral Reforms During the Multi-Party Era, Post 1991 .....	47
3.4 Electoral Reforms after the Disputed 2007 Elections .....	52
3.5 Conclusion .....	54
CHAPTER FOUR .....	55
ELECTORAL REFORMS AND DEMOCRATIC CONSOLIDATION IN KENYA .....	55
4.1 Introduction .....	55
4.2 Election Laws and Democratic Consolidation in Kenya. ....	55

<b>4.3 Electoral Technology and Democratic Consolidation in Kenya</b> .....	62
<b>4.4 Political Party Institutionalization and Democratic Consolidation in Kenya</b> .....	69
<b>4.5 Conclusion</b> .....	72
<b>4.6 Challenges Confronting Electoral Reform Process in Kenya</b> .....	73
<b>4.6.1 Political Culture</b> .....	73
<b>4.6.2 Weak Institutions.</b> .....	75
<b>4.6.3 Financial Challenges</b> .....	76
<b>4.6.4 Slack in Global Democratic Support</b> .....	79
<b>4.6.5 Correcting Electoral Reform Challenges for Successful Democratic Consolidation in Kenya</b> .....	80
<b>4.7 Conclusion</b> .....	81
<b>CHAPTER FIVE</b> .....	82
<b>SUMMARY, CONCLUSION AND RECOMMENDATION</b> .....	82
<b>5.1 Introduction</b> .....	82
<b>5.2 Summary and Conclusion</b> .....	82
<b>6.2.1 Electoral Reforms and Democratic</b> .....	82
<b>5.2.1 Impact of the Electoral Reforms on Democratic Consolidation in Kenya</b> .....	83
<b>5.3 Conclusion</b> .....	86
<b>5.4 Recommendations</b> .....	86
<b>BIBLIOGRAPHY</b> .....	88
<b>APPENDIX I: IN-DEPTH INTERVIEW SCHEDULE</b> .....	97

## LIST OF TABLES

Table 1: Interviews Conducted .....	28
Table 2: Technology Opinions in a Free and Fair Elections .....	64
Table 3: Presidential Elections in Kenya .....	67
Table 4: Parliamentary Elections in Kenya .....	68

## **LIST OF FIGURES**

Figure 1: Conceptual Framework. ....	26
Figure 2: Technology Opinions in Free and Fair Elections.....	65



## ACRONYMS AND ABBREVIATIONS

4 Cs	Citizens Coalition for Constitutional Change.
ACE	Administration and Cost of Elections.
BVR	Biometric Voter Registration.
CHRAJ	Commission on Human Rights and Administrative Justice
CIPEV	Commission of Inquiry into Post-Election Violence.
CIS	Commonwealth of Independent States.
CNC	Coalition of National Convention.
CORD	Coalition for Reforms and Democracy.
CRS	Candidates Registration System
CSOs	Civil Society Organizations.
CPC	Communist Party of China.
DPK	Democratic Party of Kenya.
EC	Electoral Commission.
ECK	Electoral Commission of Kenya.
EMB	Electoral Management Body.
EVID	Electronic Voter Identification System.
EVM	Electronic Voting Machine.
FEC	Federal Elections Commission.
FORD	Forum for the Restoration of Democracy.
FORD – Asili	Forum for the Restoration of Democracy – Asili
FORD – Kenya	Forum for the Restoration of Democracy – Kenya.
FPTP	First Past The Post.
GERDDES-Afrique	Groupe d’Etude et de Recherche sur la Democratie et le Developpement Economique et Sociale en Afrique.
IEBC	Independent Electoral and Boundaries Commission.
IIDEA	International Institute for Democracy and Electoral Assistance.
IPPG	Inter-Party Parliamentary Group.
IPU	Inter-Parliamentary Union.
IREC	Independent Review Commission.
IREC	Independent Review Commission.
KADU	Kenya African Democratic Union.
KADU	Kenya African Democratic Union.

KANU	Kenya African National Union.
KHRC	Kenya Human Rights Commission.
KPU	Kenya People’s Union.
MPs	Member of Parliament.
NARC	National Rainbow Coalition.
NCA	National Convention Assembly.
NCKK	National Council of Churches of Kenya.
NCEC	National Convention Executive Council.
NDI	National Democracy Institute.
NDP	National Democratic Party.
NGOs	Non-Governmental Organizations.
ODM	Orange Democratic Movement.
PNU	Party of National Unity.
PR	Proportional Representation.
RTS	Results Transmission and Presentation.
UMNO	United Malays National Organisation
UN	United Nations.

## ABSTRACT

The study examines how electoral reforms have impacted democratic consolidation in Kenya, from 1997 to 2017. It is guided by the following specific objectives: To examine how electoral laws carried out in Kenya from 1997 to 2017 have enhanced democratic consolidation in Kenya; to determine how the institutionalization of political parties enhanced democratic consolidation in Kenya from 1997 to 2017; and, to examine how the integration of electoral technology within Kenya's electoral architecture enhanced democratic consolidation from 1997 to 2017. The motivation to focus on the above topic is informed by the fact that elections are important ingredient in facilitating democratic transition and deepening democracy in any society. The reforms on the other hand is intended to address the challenges that might arise out of the elections. Thus, the complementarity in the role of the two in any democracy cannot be over-emphasized. Minimalist and maximalist approaches formed the conceptual framework for the study. In democratic theory, countries move from being minimal to become maximal democracies. Further, the study was carried out through a case study approach using semi-structured interviews with key stakeholders/actors involved, or impacted directly or indirectly in the electoral processes. The findings of the study show that the adoption of electoral reforms has to a large extent facilitated the process of democratic consolidation in Kenya. These reforms have in their wake deepened trust and confidence while motivating participation by Kenyan voters. They have also ensured relative political stability and elicited more pressing demands for further reforms in the electoral process. Against this backdrop, the study concludes that electoral reforms are an indispensable requirement for Kenya's aspiration to transition into a stable and progressive democracy. Drawing from Kenya's past experiences in electoral reform, the study suggests three recommendations: Policy makers should take cognizant of political-will as it sets the right environment for reform; and ensure that fundamental principles such as independence, transparency, inclusiveness are upheld; and then, there is need for more research on how electoral systems impacts on the democratic consolidation process in Kenya.

# CHAPTER ONE

## 1.1 Background to the Study

Democratic consolidation is a complex, open-ended and long-term process (Whitehead, 2002). This characterization has in turn led political scientists to offer various, though not contradictory understanding of what democratic consolidation is (Schmitter and Karl, 1993). The definitions offered range from minimalist prerequisite of free and competitive elections (Schumpeter, 1943) to definitions emphasizing a much more extended, participatory type of politics (Dahl, 1971; Diamond and Morlino, 2005).

Current democratisation theory draws a close link on how domestic and international factors explain the process of democratic consolidation. One of the domestic variables is elections. Effective election management has been argued as a precondition for successful democratization (Goodwin-Gill, 1994; Mozaffer and Schedler, 2002). Indeed, Goodwin-Gill (1994) postulated that impartial and independent electoral management are essential in the transition to and consolidation of representative democracy. However, for the Electoral Management Body (EMB) to achieve impartiality, it has to be seen to be autonomous of government control (Mozaffar, 2002). Otherwise a prejudiced electoral architecture erodes public trust and subsequently faith on the whole concept of democracy. Proper electoral management thus constitutes an essential component of Diamond and Morlino's eight dimensions of a consolidated democracy. These dimensions include; rule of law, electoral accountability, inter-institutional accountability, participation, competition, freedom, equality and responsiveness (Diamond and Morlino, 2005). These dimensions constitute the end result most of the transitional democracies aspire to achieve.

In Africa however, independent institutions of governance are prone to elite capture and political interference and as a consequence, they lack autonomy to discharge their mandate effectively. For instance, in the case of Kenya, Kriegler et al (2008) attributed the outbreak of violence ensuing from the 2007/2008 elections in Kenya to the absence of electoral integrity by the incompetent Electoral Commission of Kenya (ECK). Hornsby (2012) in similar vein attributed the cases of election fraud that characterised Kenya's 1992 and 1997 general elections to interference in the ECK by the political class. Despite minimum reforms that resulted in the repeal of the Section 2 (a) of the Constitution that resulted in the reintroduction of multi-party democracy, the electoral body, Hornsby notes, remained an appendage of the ruling party, Kenya African National Union (KANU).

The aforementioned situation thus, informs the need for countries to strive to put in place an electoral process that is perceived by voters, candidates and the even the civil society as fair. Otherwise an electoral process that is perceived as advancing specific outcomes becomes illegitimate (Przeworski, 1991). As observed by Norris in her 2012 article titled *Are There Global Norms and Universal Standards for Electoral Integrity and Malpractice?*, to ensure legitimacy, an electoral process should thus be regulated by constitutional rules and other universally acclaimed standard norms and procedures to quote from Pippa Norris (2012).

One of the main institutions that has been a target for reform since the 1990s is the entity with the primary responsibility of electoral management. This is predicated on the basis that electoral systems are the most specific “manipulable instrument of politics” (Sartori, 1968). It is on this basis that the donor community singled out the ECK and other electoral related institutions for significant reforms in the case of Kenya. In an attempt therefore to understand the role electoral reforms has played in Kenya’s democratic consolidation, the study used the Inter-Parliamentary Union (IPU) index of measuring free and fair elections enumerated by Goodwin-Gill in 1994. This index is significant since by indicating the quality of elections, it aids EMBs and other key institutions involved in the reform process in identifying some of the grey areas that warrant improvement. Further, the index outlines the conditions countries have to meet in order to be classified as either minimal or maximal democracies. Thus far, the index has gained acceptance and its parameters are regularly used by the African Union (AU), European Union (EU) and Commonwealth to assist and observe electoral processes.

The index captures the following markers: Electoral law and system; constituency delimitation; election management; the right to vote; voter registration; civic education and voter information; candidates, political parties and political organization, including funding; electoral campaigns, including protection and respect for fundamental human rights, political meetings, media access and coverage; balloting, monitoring and results; as well as complaints and dispute resolution (Goodwin-Gill, 1994).

The first index, electoral law and system refers to rules, procedures and principles used in a country to carry out elections. The second index is constituency delimitation. This index refers to the demarcation of a country into several voting districts or constituencies. Thirdly, proper election management as an index is essential, especially in its role of enhancing neutrality or impartiality in the electoral process. In addition, it also encompasses creation of an Independent electoral body that is non-partisan, thereby creating an atmosphere of peace, credibility and

self-respect (Gyekye-Jandoh, 2013). The right to vote is the fourth index given credence by the 1948 Universal Declaration of Human Rights. The declaration established the will of the people as the basis of government authority and legitimacy.

Then, the fifth index is voter registration and verification, which Smith (1960) defines as the lists of all those who are eligible to vote in an election, is another important element in ensuring fairness of the electoral outcome. The sixth index is voter/civic education. Civic/voter education is important for ensuring voters are civically responsible. The seventh marker is regulation and monitoring of the activities of political parties and candidates. The eighth index is balloting and monitoring of elections. These processes are necessary for enhancing transparency of the electoral processes. The right to vote is the ninth marker. This index basically calls for extension of suffrage to all eligible voters that are citizens of a particular state. The final marker is complaint and dispute resolution. Democratic systems should create sufficient institutional framework to deal with dispute resolution.

Out of the ten indices above, the study was limited to the examination of mainly three indices. These have been the greatest source of contention in elections held within the period covered by the study. Most of these issues have either been raised by political parties, CSOs, voters, donor community, and domestic and international election observers. In addition, the study also considered the 2008 report of the Kriegler-led Commission that cited shortcomings in the three issues that contributed to the outbreak of post-election violence in 2008. The Kriegler report stated that these shortcomings were grey areas that warranted immediate attention to make Kenya's elections free and fair. The three areas of reform discussed in the study include; electoral laws, use of technology in elections and political party institutionalization.

## **1.2 Statement of the Research Problem**

Elections is an important mark for measuring democratic transition (Huntington, 1991). Arising from this, different studies focussing on the impact of elections in both established and transitional democracies have been carried out. For instance, Alvarez et al., (2008, 2012) focused on US presidential elections; Booth and Seligson (1995) focused on Central America; Lindberg (2006) conducted a comparative analysis of elections in Africa, same as Van de Walle (2002).

In the case of Africa, scholarly studies have pointed to a considerable variation in relative success of elections. The cases of Ghana and South Africa have reinforced the notion that

repeated elections gives way to democratic consolidation (Lindberg, 2006; Levitsky and Lucan, 2002; Reilly, 2010). In others, it has represented a break with the past (civil strife) as represented with the cases of Mozambique and Namibia. But in other countries like Angola, elections have occasioned return to violent conflict (Reilly, 2010).

The mixed impact of elections in sub-Saharan Africa has therefore in effect led many countries to engage in a spate of reforms to their electoral architecture in a bid to bolster the quality of the electoral process. This move especially intervenes against the argument that electoral reforms represent the most suitable and effective way of changing the nature of a particular democracy (Lijphart, 1995). Despite the reform endeavours, however, many sub-Saharan countries such as Cameroon, Zambia, and Rwanda remain stalled in the transition phase despite implementing a host of reforms to their electoral architecture.

In Kenya, since the restoration of multi-partism in 1992, a total of six general elections (1992, 1997, 2002, 2007, 2013 and 2017) have been held, each preceded by concerns raised about failed electoral processes and procedures. For instance, in the elections of 1992 and 1997, the ECK was blamed for having aided the ruling party, Kenya African National Union (KANU), in rigging elections (Branch 2011; Hornsby 2012). Similarly, in the bungled 2007 general election, which left in its wake more than 1200 people dead and over 600,000 others displaced, the ECK's inadequate administrative and institutional capacity were cited as the main shortcomings (Kriegler et al, 2008). These challenges to Kenya's electoral architecture have provided a basis for continuous conduct of electoral reforms.

As a consequence, Kenya has conducted electoral reforms with the overarching aim of improving the quality of elections. The reforms have ranged from policy, legal and to institutional changes. However, despite, these reforms there still exist a lot of institutional, procedural and even technical weaknesses in the Kenyan electoral processes as evidenced by the post-poll violence that followed the 2007 elections and even the court case filed by the leading opposition party following the 2013 presidential elections.

Thus, after many decades of electoral reforms, is Kenya's democracy consolidated? The study thus examined the impact of electoral reforms on democracy consolidation in Kenya during the period stretching from 1997 to 2017. The study addressed the following questions: How has the electoral laws, political party institutionalization, and integration of technology as part of Kenya's electoral architecture influenced democratic consolidation in Kenya from 1997 to

2017? The study chose the year 1997 as the entry point as it coincided with the watershed moment in Kenya's democratic journey, the signing of an agreement brokered by an Inter-Party Parliamentary Group (IPPG). The IPPG agreement outlined broad areas that were to be reviewed after the 1997 general elections. The period thus presented a window of opportunity for the country to implement the new "peace building" strategies of institutionalization (Paris, 2004). These strategies according to Maupeu (2014), were meant to exacerbate the process of democratic consolidation in Kenya.

### **1.3 Objectives of the Study**

#### **1.3.1 Main Objective**

The study examines how the electoral reforms of 1997 to 2017 enhanced democratic consolidation in Kenya.

#### **1.3.2 Specific Objectives**

1. To examine how electoral laws carried out in Kenya from 1997 to 2017 have enhanced democratic consolidation in Kenya.
2. To determine how the institutionalization of political parties enhanced democratic consolidation in Kenya from 1997 to 2017?
3. To examine how the integration of electoral technology within Kenya's electoral architecture enhanced democratic consolidation from 1997 to 2017.

### **1.4 Research Questions**

#### **1.4.1 Main Question**

How did the electoral reforms carried out from 1997 to 2017 enhance democratic consolidation in Kenya?

#### **1.4.2 Specific Questions**

1. How did the electoral laws, enacted in Kenya from 1997 to 2017, enhance democratic consolidation?
2. How did the institutionalization of political parties, carried out in Kenya from 1997 to 2017, enhance democratic consolidation?
3. How did the integration of electoral technology within Kenya's electoral architecture enhance democratic consolidation during the period from 1997 to 2017?



## **1.5 Justification of the Study**

### **1.5.1 Policy Justification**

Election is a recurring event in both fledgling (new) and established democracies, there is thus need to ensure that effective institutions are in place to deliver quality and legitimate electoral outcomes. But, the concern over institutional capacity of EMBs, court systems among other key electoral institutions is not as grave in established democracies as it is the case in fledgling democracies. This is because as Mozaffar and Schedler (2002) have argued, elections in established democracies tend to be routine events that produce results falling within narrow and acceptable margins of error and as such not a “very big” issue of concern for scrutiny.

The above scenario has in retrospect lent emphasis on why the quality of the electoral process in emerging democracies should be enhanced to avoid adverse negative consequences as outbreak of political violence as was the case after the 2007 elections in Kenya. The outbreak of the violence after the elections demonstrated that elections in fragile democracies is a high stakes game and therefore any error leads to adverse consequences. Against this backdrop, the study intends to make a contribution by bringing to the attention of stakeholders (both governmental and non-governmental) why reform is needed to secure peaceful electoral processes and so electoral management bodies and related institutions can adapt and respond to new realities. Also, by exploring the success of electoral reform in new democracies like East Timor, and African bright spots, such as Ghana and South Africa, the study offers valuable insights on how the electoral reform process in Kenya can be attuned to suit its myriad political needs.

### **1.5.2 Academic Justification**

Electoral reforms constitutes an important component of democratic consolidation. This requirement thus necessitates continuous research on the subject of electoral reforms to improve the quality of electoral processes, and thus in the process boasting the prospects of democratic consolidation. Academic literature on democratization process in Kenya have largely focused on single *explanan* variables and includes: civil society and democratization (Murung’ a and Nasongo, 2007); political parties and democratization (Jonyo, 2013); and, role of the church in the democratic struggle (Gacaga, 2007; Owuoch, 2010).

The study plugs the paucity in literature by employing a heterogeneous intervention which combines several variables to explain the process of democratic consolidation. In particular,

the study combined the variables of technology, political parties and electoral laws to explain how they facilitate or militate against the process of democratic consolidation in Kenya. Testing of several variables in the study is key in offering a holistic picture on the democratic consolidation in Kenya, hitherto a non-linear process.

In addition, a detailed examination of the electoral discourse in Kenya is useful in unearthing pitfalls in the implementation of electoral reforms in emerging democracies and their possible remedies. In so doing, scholars as well as students of Comparative Electoral Systems are able to glean some comparative insights from the Kenyan case, especially in their endeavours to explain the success or failures of electoral reforms in other emerging (transitional) democracies.

## **1.6 Scope and Limitations of the Study**

The study examined the effects electoral reform have had on the quality of democracy in Kenya between 1997 and 2017. It covers three main aspects of electoral reforms and their impact on democratic process in Kenya. These include electoral laws, electoral technology, electoral laws and political party institutionalization. The study chose the three areas at the expense of the other areas since they constitute the main areas that have been under review in the recent past in an effort to improve the quality of elections. Additionally, the three areas, perhaps more than any other aspects constitutes the necessary conditions that have to be met to guarantee a successful electoral process. The electoral reform discussed, cover all aspects: legal, institutional and policy.

During the study it became challenging to reach some key individuals who have played a key role in the democratization process in Kenya for first-hand interviews. But, this challenge was overcome by relying on the available secondary sources of data (materials).

## **1.7 Definition and Operationalization of Key Terms**

### **1.7.1 Democratic Consolidation**

According to Schedler, the term democratic consolidation was originally meant to describe the challenge of making new democracies secure, of extending their life expectancy beyond the short term, of making them immune against the threat of authoritarian regression, of building dykes against eventual “reverse waves” (Schedler, 1998). However, over time, Schedler notes the concept has evolved to include such divergent attributes as popular legitimation, civilian

rule over the military, diffusion of democratic attributes/values, the elimination of authoritarian enclaves, party building, the organization of functional interests, the stabilization of electoral rules, the routinization of politics, the decentralization of state power, the introduction of mechanisms of direct democracy, judicial reform, poverty alleviation, and economic stabilization (Schedler, 1998). The definition by Schedler is more expanded compared to the minimalist criterion of democratic consolidation; one man, one vote, secrecy of the ballot, free competition postulated by Oyugi (1997). The study thus adopted Schedler's characterization of the concept as the working definition.

### **1.7.2 Electoral Reforms**

To operationalize this term, this concept was first broken down into two separate terms; election and then reform. Election refers to the process by which office holders are formally chosen. Reforms on the other hand can be taken to refer to improvement by either substitution or alteration. When the two words are put together we get electoral reform which is a broad term that covers, among other things, improving the responsiveness of electoral processes to public preferences and expectations, to borrow from the International Institute for Democracy and Electoral Assistance (IIDEA) 2006 publication. Sartori defines electoral reform as a process of inducing specific political outcomes by means of political institutions (Sartori, 1968). The study focused on how the three areas: electoral laws (implying laws, regulations, procedures that guide electoral processes in Kenya); electoral technology (including technology on voter registration/identification, candidate registration and results transmission and presentation): institutionalization of political parties (laws, regulations and procedures that guide operations of political parties in Kenya) have impacted democratic consolidation in Kenya.

### **1.8 Literature Review**

This section reviews selected scholarly works on electoral reforms and democracy in Kenya and by extension other emerging democracies. A review of electoral reform discourse in advanced democracies is also included. This is critically and thematically done.

#### **Drivers of Electoral Reform**

The drivers of electoral reform differ from one country to another. In some countries, this initiative is usually started by the regime in power whilst in others this process is driven by the EMB itself. In the case of Sweden, for instance, reforms to electoral management was

suggested by the electoral body. Whilst in the cases of New Zealand and United Kingdom respectively, reforms to the management of elections were initiated by the government (IIDEA, 2006). In other instances, elite consensus has been attributed to generate impetus for electoral reforms for their own gain or for general interest. Renwick (2009) has advanced the argument that elites may sometimes band together and impose electoral reforms to suit their future political needs. He offers the examples of (Italy 1953, 2005 and France 1951, 1984 and 1986) as casing illustrations of the elite majoritarian imposition of their wishes as reforms (Renwick, 2009).

Similarly, electoral reforms may also be as a result of pressure from civil society groups. This is what Renwick (2009) labels as elite-mass interaction. The masses in this case wins the battle to change the electoral rules against the wishes of the elites. Like in the cases of Georgia and Liberia, it is civil society that exerted a lot of pressure on the government to reform the electoral process (IDEA, 2006). According to IIDEA, civil society groups may target reform on areas as electoral participation and representation, delimitation of electoral boundaries, voter registration and even monitoring and regulation of political party activities. Further, other areas in which civil society groups may put pressure are in the use of technology in the whole electoral process from voter registration, to the voting process and even vote counting methods. In addition, they may also involve reducing social policies such as reducing gender imbalance in representation, improving electoral access by marginalised sectors of society as well as improving the representativeness within EMB staff (IIDEA, 2006).

In addition, demand for political legitimacy from citizens in Pippa Norris (2009) words may also play a role in adoption, amendment and maintenance of electoral rules. Norris argues that when citizens are satisfied with the performance of a regime, then there is little pressure to alter the status quo (change the rules of the game). But it is the converse when there is popular dissatisfaction with the regime among the public. Norris makes the argument that the latter situation intensifies the salience of electoral reform(s) on the policy agenda.

### **Inter-Parliamentary Union Index of Free and Fair Elections**

The IPU index of measuring free and fair elections was enumerated by Goodwin-Gill in 1994. This index is significant since by indicating the quality of elections, it aids EMBs and other key institutions involved in the reform process by identifying grey areas that warrant improvement. This index captures the following makers: electoral law and system; constituency delimitation; election management; the right to vote; voter registration; civic

education and voter information; candidates, political parties and political organization, including funding; electoral campaigns, including protection and respect for fundamental human rights, political meetings, media access and coverage; balloting, monitoring and results; and complaints and dispute resolution (Goodwin-Gill, 1994).

The first index, electoral law and system refers to rules, procedures and principles used in a state to carry out elections. This system is country-specific and is subject to political, historical, cultural and religious factors (Goodwin-Gill, 1994). The second index is constituency delimitation. This index refers to the demarcation of a country into several voting districts or constituencies. It is meant to enhance the principle of political equality in representation. Thirdly, proper election management as an index is essential especially in its role of enhancing neutrality or impartiality of the electoral process. In addition, it also encompasses the creation of an Independent electoral body that is non-partisan and thereby creating an atmosphere of peace, credibility and self-respect (Gyekye-Jandoh, 2013). Further, election management also encompasses upholding the secrecy of the ballot, one man one vote, periodic elections, and competitive elections. The right to vote is the fourth index that is given credence by the 1948 Universal Declaration of Human Rights. The declaration established the will of the people as the basis of government authority.

Then, the fifth index is voter registration and verification, which Smith (1960) defines as the lists of all eligible voters in an election is another important element in ensuring fairness of the electoral outcome. The sixth index is vote/civic education. According to Nyamu (2003), voter education helps with “opening the eyes of voters”. Civic education has been associated with creating an environment that promotes democratic values (NDI, 1993). Civic education, basically should be a continuous exercise even when elections have not been called. The seventh marker is regulation and monitoring activities of the political parties and candidates. This step is necessary to ensure that a level playing field is created for both contestants and parties participating in the elections (Oyugi, 2003).

The eighth index is balloting and monitoring of elections. According to Goodwin-Gill (1994), balloting is closely connected to monitoring and it involves allowing the presence of party agents and other domestic and foreign monitors to participate in election observation. The right to vote is the ninth marker. This index basically calls for extension of suffrage to all eligible voters that are citizens of a particular state. The final marker is complaint and dispute resolution. Democratic systems should create sufficient institutional framework to deal with

dispute resolution. Democracies should create public engagement devices like advisory boards, deliberative forums, public hearings to resolve issues that may arise as a result of “democracy deficits” (Gastil and Levine, 2005).

### **Electoral Laws and Democratic Consolidation**

IIDEA (2006) identifies new methods of electoral district boundary delimitation, vote and vote counting as one of the areas EMBs in developing world have targeted for reform in the past decade. It argues that EMBs fulfil this role by providing expert opinion on issues concerning boundary delimitation and upholding impartiality, equity and integrity when it comes to exercising its mandate in boundary delimitation (IIDEA, 2006). However, this process sometimes produces latent outcomes. Wong (2018), for instance, in his examination of the constituency delimitation in Malaysia found that the process had been successfully manipulated to give the incumbent party, United Malays National Organisation (UMNO) of the former Prime Minister Najib Razak, advantage over opposition parties. Wong goes ahead to mention that gerrymandering and malapportionment in the previous cycle of delimitation exercises in 2003 - 2005 had secured Prime Minister Najib Razak a comfortable 60% parliamentary majority in 2013 despite garnering only 47% of popular votes (Wong, 2018). Wong’s analysis of Malaysia is both timely and relevant on the outcome electoral reforms can produce. It however, goes beyond the scope of the study.

Further, reforms should also be targeted to make boundary delimitation process more transparent and objective have focussed on divorcing the legislature from the boundary delimitation process. According to IIDEA (2006) this step enhances the independence of the electoral/ boundaries body, especially in its quest to carry out open hearings and independent review of proposed boundaries. Jeffrey Green (2011), for instance, argues that the primary role of the people in contemporary democracy is to be “spectators” of their leaders and as such, “institutions are needed to ensure that leaders are not in control of their publicity.” Institutions therefore in this sense shapes the context within which politics is practised as it establishes stable and predictable structures for interaction between persons, either as groups or individuals (North, 1990). However, insulating the process of boundary delimitation from the control of the political executive or even the legislature is normally a challenge since the boundary delimitation exercise is itself a very political affair. Like in the case of Malaysia, the Electoral Commission (EC) is only mandated to recommend new constituency electoral boundaries and

then forward the list to the Prime Minister who can then amend it accordingly in parliament through a simple majority vote. The above analysis is useful though it does not address the concerns of the study. The study sought to ascertain the extent to which reform of electoral laws, institutionalization of political parties and use of technology have insulated Kenya's EMB from interference by other institutions or arms of government.

Beitz (1989) focus on how reform of the system of representation affects political equality. He argues that the system of one person, one vote, one value does not necessarily translate into political equality. He gives the example of a candidate from the majority group within a constituency may get elected but end up being marginalised once he or she enters the legislature. This phenomena has been described by David Lublin as the "paradox of representation". The implication of this phenomenon is that we may achieve political equality in reference to the legislation (enacting a law on representation) created as opposed to voting or the likelihood of electing a candidate Rehfeld and Schwartzber (2005). In scenarios as the one recounted above, alternative voting system (such as proportional representation) is preferred to ensure that even minority interests are represented. As a remedy, Thomas Pogge (2002) recommended that such voting districts adopt a system called "self-constituting constituencies", where individuals are allowed to count their votes as they wish. Pogge (2002), however, goes ahead to point out that autonomy at the level of the districts may leave them more autonomous since they will attract like-minded voters, each of whom wants to be represented by their party identity. Pogge argues further that this kind of situation generate the "paradox of representation" already described earlier. And, it is against this backdrop that he goes ahead to prescribe sacrifice of autonomy in favour of better policy outcomes (Pogge, 2002). Beitz's and Pogge's contributions provides a critical understanding on electoral systems and representation which goes beyond the scope of the study. However, it addresses a fundamental issue that has to be tackled to render political competition and even representation fairer.

In addition to the aforementioned points, the electoral reform discourse has advanced to include developing institutional procedures of dealing with electoral offences. Rehfeld and Schwartzberg (2002), for instance, cites the standard practice in Ancient Athens where magistrates and other public officials retiring from office were subjected to scrutiny on management of public finances and other forms of abuse of office. This system of public scrutiny was called "euthynai" and it was implemented in two phases. The first phase focused on financial improprieties, whilst the second phase involved ordinary Athenian citizens

presenting written accusations of malfeasance. If any allegation was justified, the offender would be subjected to public or private prosecution (Ibid.). The challenge to Rehfeld and Schwartzber notion of a system of “euthynai” lies in weak nature of African states. Taylor, for instance, opines that many African states are not institutionally functional (Taylor, 2005). He goes ahead to pejoratively note that the acronym NARC, also stand for ‘Nothing Actually Really Changes’. Ogendo (2003) also reinforced this viewpoint in his argument that African states lack the culture of institutionalism despite possessing necessary institutions of governance.

Southal has blamed the First Past The Post (FPTP) electoral system for stoking ethnic polarization or what he calls “ethnic politicization” and as well perpetuating the political culture of “big men” that was blamed for patronage politics that characterised the Moi regime (Southal, 2009). It is against this backdrop that Southal suggested that in order for Kenya to improve on constituency representation, the FPTP system should be enhanced by equitably delimiting constituencies. Southal’s analysis of the FPTP electoral system is useful addition to literature on the area of electoral systems, however, his analysis goes beyond the scope of the study. The discourse on electoral system reform has actually been addressed as a future research agenda by the study.

Hardin (2001) delves into how reforms to the electoral process in Thailand strengthened the legal framework to secure fair elections and effective parliamentary representation. He states that Thailand’s new constitution of 1997 laid out new rules and a framework for various fundamental changes in the Thai political and administrative system. It indeed heralded a new dawn in Thai politics (Hardin, 2001). This was for a number of reasons. First, it incorporated views from the public. Then, there was significant public consultation in the constitution-making process compared to previous constitutions. Also, it conceived of measures to tackle endemic corruption that until the 1990s was very prevalent in the Thai political system. More importantly however, the new constitutional dispensation put in place an electoral commission with enhanced powers. That of exercising oversight over the entire electoral process as well as prosecution of electoral abuses. Thai’s case has certain mirror similarities with Kenya, especially because it is a country still undergoing democratic transition. And, then also because most of its reform priorities mirror those of Kenya. However, the points of difference is that the three issues addressed in the study are different from what Hardin focused on in the Thai case. And, this is significant since different reform priorities produce different results.



In addition, other literature have focused on political consensus and legitimacy of electoral outcome. For instance, Carter Centre 1992 observation report on Guyanese election notes that the opposition only accepted the results after the Electoral Commission (EC) Chairman was replaced by an individual they viewed as impartial. The Guyanese EC was instituted in 1992 to give the electoral process more credibility. In the case of Guyana, the move to appoint a new Chairman came as a result of consensus between the incumbent regime, led by President Desmond Hoyte and the opposition leader. This confidence in the EC, the Carter Centre report notes, resulted into both camps accepting the poll outcome despite instances of irregularities and other electoral challenges reported. The analysis by the Carter Centre of the Guyanese case casts a dark shadow on the challenge of achieving political consensus, an outcome that has been hard to come by in Kenya's political context. However, this analysis is useful to the extent that it demonstrates that elite consensus is necessary to institute minimum reforms aimed at improving the legitimacy of political processes.

Mueller (2011) has argued in favour of respect for domestic institutions of transparency and accountability like the electoral body to assure public trust. She has made an argument that in countries like Kenya, whereas checks and balances exist on paper, politicians, civil servants and other key political players hardly respect them. The result is loss of public trust in public institutions. She has further argued that this state of affairs has led to increased tendency for elections and other contests to be resolved in the streets rather than around tables or in courts as is the norm in liberal democracies (Ibid.). As such electoral reform is significant to incentivise the system to enable political actors to act within available legal and institutional frameworks. Electoral reform thus helps to avert political violence. Mueller's arguments are very rich in that she emphasizes on institutional independence as a bargain for preventing descent into chaos and disorder. This study examined the extent to which Kenya has enhanced its laws to engineer institutions that inspire trust and confidence, particularly in the management of the electoral process. However, Mueller's account does not include instances where the courts (Supreme Court) in both Kenya (2017) and Sierra Leone (2018) nullified the presidential elections, thereby necessitating repeat elections to be conducted in both cases. Both cases demonstrated that institutional maturity is slowly, or even incrementally beginning to take root across the developing world, sub-Africa in this case. Further, Ghana's Supreme Court has been credited for fostering a democratic political culture over the years, especially between 1992 and the present. Courts are important in a political system because of their mandate to enforce compliance or obedience of the rule of law. Obedience in the words of American

political theorist John Rawls (1996) is supposed to promote public interest since the courts are considered as the citadel of public reason. In the case of Ghana, Luna argues that despite its chequered history, post-1992 Ghanaian courts demonstrated greater independence signalling that they were not suffering from influence from external forces (Luna, 2015).

Monitoring and regulation of political party activities is another aspect of electoral reform that has a direct implication on the quality of democracy. Most legal reforms targeted in this area aim at levelling the playing field for political participation by both the incumbent and opposition parties respectively (IIDEA, 2006). Some of the reforms encompassed here include administration of state funding of political parties and candidates' election campaigns and qualifications for registration of parties and candidates to contest elections. Other reforms in this area cover on improving oversight of campaign contributions and expenditure, enhancement of internal democracy within political parties and as well as ensuring that advertising space is distributed more equitably among competing political parties (IIDEA, 2006). Key reforms on levelling the playing field can however, suffer major setbacks in political environments where CSOs and opposition parties do not speak from a united front. A case in point is before the 1997 elections in Kenya where lack of consensus among civil society organizations and opposition parties on key issues delayed the implementation of the Inter-Parties Parliamentary Group (IPPG) Accord resulting in the adoption of minimal reforms that in affect handed the incumbent regime victory (Oyugi, 2003).

Further, electoral reforms aimed at improving accessor equity of women and other marginalised groups in society have gone a long way to ensure that electoral bodies are more inclusive. EMBs can promote equitable access by promoting gender balance in their own staffing system and also by using internal professional development programmes to ensure that women advance into management positions within EMBs (IIDEA, 2006). Indeed, a lot of literature on the electoral process reveal that women are the biggest victims of election-related violence compared to men. Mitullah attributes the violence (both physical and psychological) women candidates suffer during elections to their underrepresentation in electoral bodies (Mitullah, 2007). Improving women's participation in EMBs goes a long way to ensuring that international standards and best practices on electoral management are upheld. However, the notion of gender equality in representation is of normative value in democracy debates and differ from empirical concept which looks at democracy from an institutional perspective. Thus, the complexity or even the heterogeneity of the concept of democracy led Tremblay (2007) to warn that to arrive at a better understanding of women (women leaders) presence in

parliament, then it is poignant that refrain should be exercised from uniformly applying the indicators (democracy indicators) to all countries, that obviously experience different circumstances. Further, the question of gender equality (electoral parity) was not under focus in the study and as such this thesis did not lay special emphasis on the subject.

Conduct of civic education is another significant way EMBs can ensure a democratic vote. The National Democratic Institute 1993 report on Senegalese elections, for instance, pointed out that voter education creates an environment in which the values of democracy are understood and acted upon by the population (NDI, 1993). The report went further to highlight that such kind of environments do not occur naturally and as such the government must play a role in ensuring that a non-partisan civic education programme is carried out among the adult population to impart democratic values among them. The report also emphasized the role of political parties and other non-governmental organizations (NGOs) in supplementing government efforts towards it (NDI, 1993). The Electoral Commission of Kenya (ECK) also identified greater stakeholder participation in the voter education programme before the 2002 elections as a way of ensuring peaceful, free and fair elections (Nyamu, 2003).

Nyamu (2003) in contrast argues that voter education initiatives may be suppressed by undemocratic regimes that associate such democratic programmes with “opening the eyes of voters” to the truth relating to injustices a particular regime might have committed. Goodwin-Gill (2006) contends with this viewpoint in his contrast of the 1991 elections in Zambia and 1992 elections in Ghana. Goodwin-Gill cites the Commonwealth Observer Group report that chided the relevant agencies in Zambia for failing to carry out proper civic education whilst in similar vein hailing the Electoral Commission in Ghana for carrying out civic education that both preached tolerance and at the same time promoting democratic ideals (Goodwin-Gill, 2006). The 1991 Commonwealth Observer Group report had observed that civic education in Ghana had left Ghanaian voters more informed about the date of the poll, hours of voting and as well the procedures to be followed at polling stations. In the case of Kenya, Stephen Brown attributed the defeat of the incumbent Kenya African National Union (KANU) in 2002 by the opposition National Alliance Rainbow Coalition (NARC) to three factors among them a more informed public that could not easily be duped into foul play (Brown, 2004). Brown observed further that the 2002 elections marked the culmination of ten years of effective civic education.

Other scholars posit that both training and appointment of electoral staff also constitute crucial aspects of electoral reforms. Nyamu (2003), for instance, attributed the low incidences of

complaint reporting against ECK officials to proper training. He further argues that higher qualifications among Returning Officers and their Deputies, for instance, made them the most suitable people to implement a new proposal by the ECK to count votes at the polling stations within a registration centre (Ibid.).

Absence or poor staff training may also on the other hand provide fertile ground for electoral malpractice. Kriegler et al (2008), for instance, attributed the ECK's failure to deliver free and fair elections in 2007 to incompetent staff. Incompetency should however, not only be seen from the perspective of electoral bodies, failure by the government, especially, to provide financial support to EMBs also contributes to poor quality of elections.

Distribution of media space either equally or equitably by the Electoral Management Body (EMB) enhances free expression of opinion in the choice of a new government (Leys, 1999). Indeed, Graber has further argued that media plays a central role in politics of a state by shaping perceptions that form the reality on which people base their political choices (Graber, 2001). Large private ownership of the media in Kenya has however, rendered it susceptible to manipulation (by media owners) to support politically desirable views. Makokha (2007) for example attributes the biased coverage of the 2005 referendum in Kenya in favour of the "Yes" vote to elite consensus (many political leaders in the Yes camp had stakes in the media). The media in 2005 was largely dominated by Royal Media Services, which is owned by Samuel K. Macharia who right from the beginning sided with the "Yes" camp.

### **Political Parties, Civil Society and Democratic Consolidation**

Civil society involvement in election monitoring and observation helps in enhancing the credibility of the electoral (democratic) process. Gyimah-Boadi (2004) has noted that the role of civil society in Africa today should be appreciated in the context of their transformation from being anti-state establishments to agents abetting the process of democratic transition. Gyimah-Boadi identified Groupe d'Etude et de Recherche sur la Democratie et le Developpement Economique et Sociale en Afrique (GERDDES-Afrique) as one of the pioneering civil society organizations to monitor elections in Africa. GERDDES-Afrique observed the 1995 elections in Benin and has since participated in election observation in other francophone African countries. In Kenya, an alliance of the Catholic Justice and Peace Commission, the National Council of Churches of Kenya and the Institute of Education and Democracy monitored the 1997 elections (Gyimah-Boadi (2004). Similarly, this trend also replicated in the cases of Ghana, Zambia, and Nigeria among many other African countries. To

add to the aforementioned, Maria Nzomo's (2003) assertion of the importance of CSOs in bringing back political pluralism in the 1990s and subsequently acting as a medium of constitutional change, makes them indispensable levers of democratic change.

Conversely, whereas Civil Society Organizations (CSOs) have been hailed for promoting the cause of democracy in Africa, they face a myriad of challenges, like lack of an independent revenue base and even co-optation of their members by incumbent regimes. Brown (2004) has argued that the civil society in Kenya has been weakened by most of the respected activists joining the government. This situation has made it quite difficult for the current members of civil society to criticise their former colleagues, recounts Brown (2004).

Commenting on political parties and democratisation in Africa, Randall and Svåsand (2002) argue that political parties have been important vehicles, especially in their role in facilitating democratic consolidation in Africa. However, they continue to encounter certain shortcomings in fulfilling the aforementioned function. These shortcomings include the imbalance of party systems and 'weakness' of parties, especially opposition parties. These are further buttressed by underlying factors such as the weakness of civil society, economic context, pervasiveness of ethnicity as a basis for political mobilization, personalism (patron-clientelism) and strong presidencies. Randall and Svåsand conclude that political parties in Africa have generally fallen short in facilitating the democratization process. Indeed, they note that political parties in Africa have themselves been the obstacle, or the main problem towards this end (Randall and Svåsand, 2002). Randall and Svåsand's work is a useful addition to the literature on political parties and their role in the democratization process. However, it should be noted that the performance of political parties differ from one political system to the other. The performance of political parties in liberal societies, for instance, markedly differ with the situation in illiberal societies, where associational life is considered rudimentary in nature to borrow from Ake (2000). The study focus on the effects (positive or negative impacts) of institutionalization of political parties and democratization in Kenya.

Santiso and Loada (2003) examined the impact of the parliamentary elections held in 2002 on democratic transition in Burkina Faso. They argue that these parliamentary elections constituted a ray of hope in Burkina Faso, which is rare in Africa, as it resulted into the loss of majority by the incumbent party. Further, they argue that a strong opposition (in terms of number of legislators in parliament) is necessary for exercising vertical accountability on the regime thereby strengthening the power of the legislature in promoting democracy

consolidation. The Burkina Faso case thus represents what reform of the electoral system (proportional representation) can do to a semi-authoritarian democracy. Santiso's and Loada's study however, goes beyond the focus of the study, which concerns with electoral reforms (defined in terms of election laws, political party institutionalization and election technology) and not reform of the electoral system.

Bratton and van de Walle (1992) concerns with the linkage between popular protests and political reform in Africa. They argue that protests are a sporadic feature of African politics, which the recent events of the 1990s, collapse of the Berlin wall-and along with it Leninist one-party rule and the bipolar world order inspired. They argue that in and around 1990, the citizens' protests in sixteen sub-Saharan African countries to express discontent with economic hardship, political repression and to demand for civic reforms yielded positive outcomes. The protests in response delivered, between November 1989 and May 1991, at least twenty-one governments adopting significant reform measures to permit greater political pluralism and competition (Bratton and van de Walle, 1992). The democratic dividends from the protest delivered what Richard Sklar (1987) had earlier predicted would ensue in Africa, citizens choosing democracy in the place of developmental dictatorship. Bratton and van de Walle's works is very useful especially in the way they correlate popular protests and democratic transition in Africa. However, the study concerns with other drivers for democratic consolidation, other than popular protests. In addition, the study is case-specific, it is restricted to the analysis of Kenya. In addition, contentious politics (where popular protests fall under) do not necessarily deliver the anticipated political change. Brancati, for instance, in his analysis of the correlation between popular protests and democratic change found that pro-democracy protests (agitations) are not pointedly connected with regime transitions – either towards or away from democracy, but are significantly linked with smaller increases (changes) in democracy (Brancati, 2014).

Arthur (2010) writes on the contribution of the media, civil society and state institutions in the democratic consolidation process in Ghana. He notes that since the watershed 1992 elections, Ghana has made significant efforts to institute a democratic process and culture. And, that this has improved during each and every of the subsequent five elections that have been staged so far in Ghana. The independence and administrative capacity of Ghana's Electoral Commission (EC) has improved with each election, while levels of public interest in national elections remain high (Gyimah-Boadi, 2009). Further, the country's core democratic institutions – the Courts, Commission on Human Rights and Administrative Justice (CHRAJ) and legislature

continue to mature and solidify, and media (press) freedoms and respect for human and political rights have expanded from one election to the next. All these factors, Arthur contends have been instrumental in facilitating the process of democratic consolidation in Ghana as much there have been obstacles militating against the aforementioned factors playing a critical role in Ghana's democratic consolidation. However, the argument that civil society, or the media as positive agents for democratic change has been challenged by some scholars. The Media, despite being praised by Montesquieu and even Jefferson for their important watchdog role (fourth estate) over the government and non-government agencies/agents, has in recent times been on the receiving end for biased reporting/coverage of news stories. This latter factor has partly been blamed on media ownership patterns. A survey commissioned by the World Bank in 2001 found that media is disproportionately owned by private families or the state. This ownership pattern according to Djankov et al., (2001) is likely to predispose the aforementioned actors to extract private benefits of control of the media. Further, it is not a given that civil society activities always leads to democratization as Walzer (1997) noted.

Kasfir (1998) focuses on the civil society, the state and democracy in Africa. He argues that the new civil society is important in promoting good governance and holding the state accountable. Civil society organizations face challenges of collective action and finance to facilitate their operations. Thus, this warrants a need for building strong civil society institutions that are democratically-oriented to help with forcing the state to conduct essential reforms necessary for promoting good governance. Strong civil society associations are thus seen as harbingers for good governance and democracy consolidation. Kasfir's study is very relevant in the way it analyses role of civil society organizations in Africa, however, the study does not focus on civil society organizations as drivers of democratic change. Additionally, other scholars have argued that the role of civil society organizations on the democratization process is predicated partly on the nature of the society. Walzer, for instance, notes that only a democratic state can create a democratic civil society, and only a democratic civil society on the other hand can sustain a democratic state (Walzer, 1997). This thus means that it is not obvious that a vibrant civil society sector automatically leads to democratization.

### **Electoral Technology and Democratic Consolidation**

Another scholar who has contributed to the discourse on electoral reforms is Nyamu (2003) who argued that securing the elections also form part of the greater efforts aimed at ensuring that the elections are free and fair. He cogently argues that the police play an important role in mitigating against the occurrence of electoral related violence. Securing the electoral process

thus becomes an essential component of the electoral reforms. Nyamu further writing on the preparations of the Electoral Commission of Kenya (ECK) for the 2002 elections, observed that the Electoral Commission of Kenya (ECK) had made significant strides towards building bridges with the police in an attempt to organise violence-free elections (Ibid.).

In retrospect, Nyamu actually ignores a fundamental point with regard to the nature of African body politics where the security agencies has often been used by the incumbent regimes to commit electoral fraud. As such, there always exist a tense relationship between the opposition leaders and their supporters with the police. In the Moi administration, for instance, the Provincial Administration was used to harass and intimidate the opposition and other members of the civil society who dared oppose the regime. Candidates were often denied permits to hold public rallies in the name of threatening peace of the country (Oyugi, 1992; Berman et al, 2009). Moi style use of brute force again replayed after the 2007/2008 polls as the “illegitimately elected” Kibaki administration also employed the use of police to rout the opposition supporters who were protesting the “stolen” victory of Raila Odinga. Berman et al (2009) actually notes that the police intervened after the outbreak of violence in 2007/2008 with a shoot to kill policy especially in opposition strongholds.

Another important facet in ensuring fairness in elections is the credibility of the voter registration process. This is because voter registration determines the ability of eligible voters to participate in the elections (IIDEA, 2006). The internal integrity of voter registration also needs to be very high as it is often done outside direct scrutiny of observers. In political systems characterised by rigid voter registration procedures, the result is usually low voter turnout (Friedman, 2004). As a result of this shortcoming, IIDEA has thus proposed reforms touching on improving the efficiency as well as integrity of voter registration process to ensure that electoral outcomes reflect the popular will (IIDEA, 2006). The study examines the impact voter registration process has had on the democratization transition in Kenya. This background literature on voter registration is thus very relevant.

Also, many EMBs have implemented systems to improve the inclusivity, fairness, transparency and even accuracy of the voter registration process. The electoral bodies have realised the aforementioned by constantly updating the voter registration rolls, carrying out special registration of transient voters and as well as instituting measures to safeguard against unlawful rejection of registration or removal from the electoral register (IIDEA, 2006). Many EMBs and other agencies/bodies responsible for maintaining data from which electoral registers are



derived are currently digitising their records to not only reduce the time it takes to identify eligible individuals to vote but also to speed up the time it takes to process individual data (Ibid). IIDEA (2006) however, cautions EMBs especially in emerging democracies to ensure that the technology that is being embraced not only win the public trust but that it is also sustainable. The 2013 elections in Kenya, for instance, marked a watershed moment for the EMB as the Electronic Voting Machine system (EVM) replaced the manual voting system that had all along been blamed for the “mess” that had come to characterise the Kenyan elections. In this sense the EMB in one part boosted public trust in its processes and on the other increased its efficiency.

Paradoxically, whilst technology has enhanced citizen participation in the elections through a phenomena known as “e-democracy”, it has also been blamed as a source of electoral fraud. It is for this reason that Ulrich Beck (1992) argues that electronic voting constitutes what is referred to as “risk society”. In a risk society the world is the colossal laboratory which lacks the control advantage usually enjoyed by the scientists working in modern scientific laboratories (Alvarez and Hall, 2007). This therefore means that while technology on one hand enhances spaces for the realisation of universal suffrage, it can on the other hand be manipulated, or abused thus in the process contributing to the erosion of faith in a democracy.

In conclusion thus, this section has demonstrated that electoral reforms has been an on-going endeavour in both advanced and new (emerging) democracies. In the case of advanced democracies, the process has resulted into more consolidation of democracy with the actors generally accepting the outcomes of the process. This is despite the fact that across a variety of settings in advanced democracies, supporters of the winning candidate often display higher support of the political process compared to the supporters of the losing candidate (Nadeau and Blais, 1993).

Much of the discourse on electoral reforms in advanced democracies is not dedicated to addressing the existential problems of administrative incompetence, or lack of trust and legitimacy in EMBs, rather on opening new spaces of participation for all groups in the society.

In the case of the emerging democracies, the study underscores the fact that a sizeable number of countries have remarkably improved the quality of their elections since the onset of the Third Wave of democratization, partly as a result of engineering of new or reform of the existing institutional architecture. Institutional reforms builds from Lijphart’s (1991) assertion that “different institutional forms, rules and practices can have major consequences both for the

degree of democracy in a democratic system and for the operation of the system.” However, this improvement has not uniform across all the countries, with democracy becoming rooted in a few of the cases and others experiencing a relapse back to authoritarianism. It is poignant to mention that there are countries that have made significant strides towards democratic consolidation such as the cases of Ghana and Botswana.

In addition, while a lot of studies focussing on democratization in Africa have emphasized on variables like the role of the civil society, external actors (donor community and major world powers), end of cold war among many other factors, little attention has been paid on the role of electoral reforms towards the same. Particularly, whilst a lot of literature has focussed on institutional reform to enhance the democratic space in Africa, the cannon of literature on institution of the Electoral Management Body (EMB) is limited, particularly in reference to the Kenyan case.

## **1.9 Conceptual Framework**

The study adopted the minimalist and maximalist approaches of the broader democratic theory to explain the relationship that exist between electoral reforms and democratic consolidation. The minimalist, or the procedural view of democratic consolidation associated with Joseph Schumpeter (1947) and later expanded by O’Donnell and Schmitter (1986) encompass the following attributes; secret balloting, universal adult suffrage, regular elections, partisan competition, associational recognition and access, and executive accountability. This view represents a limited or a narrow view of democratic consolidation compared to the expanded, or the maximal view of the concept. Yet, at the same time, the minimalist view enjoys considerable scholarly consensus over maximalist view on what its attributes are.

Maximalist view of democratic consolidation on the other hand represents an ideal, comprehensive vision of what democratic consolidation is. This view is mainly attributed to the works of Dahl (1971) and later Diamond et al., (1995). This perspective goes beyond the democratic institution of the ballot box to quote from Riker (1986). According to Dahl, maximalist view of democracy is distinguished by eight conditions; periodic free and fair elections, civic participation, political deliberation, freedom of expression, right of access to government information, freedom to form or join autonomous groups or associations and voters choosing the kind of institutions they prefer (Dahl, 1971; 1989). Since Dahl’s postulation, the literature on maximalist view of democracy has burgeoned to encompass other features not

previously included like social and economic rights citizens are entitled to in a state. Also included here is absence of the military from all forms of political activities, different levels of accountability and even media freedom (Diamond, 2003).

The above view has the implication that democratic consolidation is a developmental phenomenon, which involves countries basically transitioning from being minimal democracies to become maximal democracies. The process is however fraught with a series of starts, stops, surges and retreats. The process of democratic consolidation has been presented by scholars to unfold in waves. Huntington (1991; 1997) talked about three historical waves, with the first wave being launched in the first half of the nineteenth century with the granting of the right to vote to the adult males in the United States. This wave peaked in the 1920s, but also saw a retreat by some of the newly installed democracies in Europe. Then, the second wave was launched after World War II and lasted up to the early 1970s. The second half of the 1970s witnessed the launch of the Third Wave of democracy, which expanded the democratic reach to countries in Latin America, former Communist Eastern European countries and Africa.

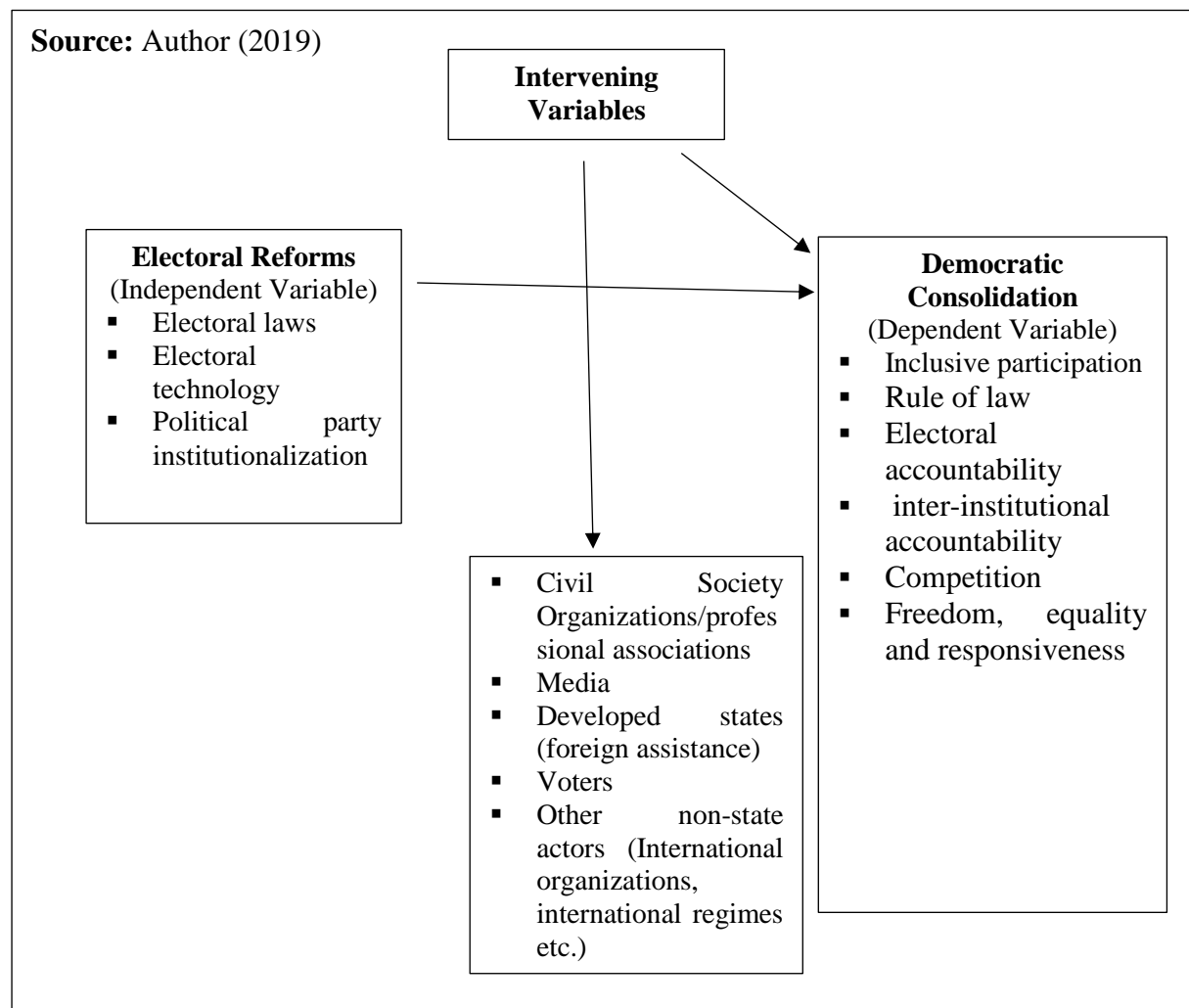
Since the launch of the Third Wave of democratization which peaked in the early 1990s, many African countries, Kenya included have either embraced, or are in the process of consolidating democratic governance. This endeavour has been made possible thanks partly to the electoral reforms instituted by different countries to exacerbate the process of democratic consolidation. Most of the reforms implemented constitutes the minimal conditions for consolidating a democracy. They are thus a significant precursor to launch the third wave countries into progressive democracies. One of the areas targeted for reform is the institution of political parties. Huntington (1991) observed that party competition has become an important route to power in many less developed countries especially since the advent of third wave of democratization. This is contrasted with weak institutionalization of political parties, which in essence hampers electoral accountability. Further, electoral technologies have been argued to play an integral role in elections around the world. Particularly, IIDEA (2017) report notes that the adoption of electoral technology around the world has rendered elections more efficient and more cost effective, and further strengthened stakeholder trust in each stage of the electoral cycle. The increased uptake of electoral technology by countries is happening even as the use of electoral technology appears to cause consternation from politicians and citizens even from developed world such as the United States.

In addition, according to Valenzuela (1990) the minimal conditions/procedures of democratic consolidation presuppose, despite their minimality, the development of a complex institutionalization, the skeletal outlines of which are generally formally established and written in the constitution and other relevant electoral laws. Valenzuela notes further that this democratic institutional edifice permits, or even fosters the development of organizations, such as interest groups, political parties which articulate and channel societal political demands (Valenzuela, 1990).

From the foregoing, it can be concluded that consolidating a democracy takes time and proceed in steps. The electoral reforms plays an important role in hastening the consolidation process. In this regards thus, the electoral reforms, which are minimal procedures are necessary for the process of democratic consolidation to take place. Further, the minimal conditions/procedures acts as a precursor to the maximal conditions for consolidating a democracy.

In the figure 1 below, electoral reforms is hypothesized to influence the democratic consolidation process in Kenya. Electoral reforms is operationalized as (electoral laws, integration of technology in the electoral processes and political party institutionalization). Democratic consolidation is taken to mean inclusive participation, enhanced political accountability/openness and enhanced civil and political liberties. The study postulates that the independent variables directly influences the dependent variables. But this relationship may be modified by other variables such as civil society organizations, media, developed states and non-state actors (international organizations/regimes).

**Figure 1: Conceptual Framework.**



## **1.10 Research Methodology**

### **1.10.1 Introduction**

This section deals with the description of the systematic procedure that entailed the generation and analysing of data for solving research problem of the study. This section covers the following; research design, method of data collection, sampling procedure and finally the method of data analysis.

### **1.10.2 Research Design**

The study adopted a case study research design in the data gathering process that examines the study problem through a case studies causal relational context. In particular, this study explored a single case over a period of time covering from 1997 to 2017, principally giving the study a longitudinal touch. This allowed for detailed, in-depth data collection through triangulation involving multiple sources of information (such as interviews, documents and reports review). It also gave a greater understanding to the phenomena being studied in qualitative paradigms that involved interpretations, descriptive inferences and not numbers.

### **1.10.3 Method of Data Collection**

The study relied on both primary and secondary data sources. The secondary data sources included relevant books, journal articles, Domestic and Foreign Observer Mission reports, and ECK/ IEBC election reports. Besides library research, the study also conducted face to face interviews with key informants (current and former electoral officials), experts from academia, civil society groups, leaders of political parties and voters. In overall, the study employed qualitative approach to obtain in-depth information on the role of electoral reforms have played in the democratic consolidation process in Kenya.

For primary data, interview method was used. The interviews were conducted with the aid of a flexible semi-structured interview guide. Like with most unstructured interviews, the researcher had some sense of themes he intended to explore and that was made easier with an interview guide. The scripting of the interview guide was meant to provide the researcher a broad outline of the issues to be addressed. Interview questions were attuned to address specific issues. Respondents were interviewed for an average of 35 minutes, with the researcher posing follow-up questions as they arose from the discussion. This technique allowed the study to gather quality data with regard to the topic. An audio recorder was used to ensure all information from the interviews is captured.

#### **1.10.4 Target Population**

The study was conducted and targeted individuals with expert knowledge on electoral processes and stakeholder participation in the electoral processes. This target population was chosen because the study seeks to establish the nature and dynamics of electoral processes in line with the objectives of the study. It is therefore considered appropriate that the target population was relevant.

#### **1.10.5 Sampling Procedure**

The study employed purposive sampling, which is a non-probabilistic sampling method. To compliment this technique the researcher opted to adopt purposive sampling and snowball sampling to select the sample. Organizations and the categories of respondent to be included in the sample with respect to clearly identifiable characteristics in the study population (political knowledge especially on electoral reforms) were then identified. The study interviewed officials from IEBC since it is the body that deals with the day to day management of the electoral processes or activities in Kenya including overseeing elections at all levels to implementing reform of the electoral processes. The civil society groups are also important as “watchdog” players in the electoral process. They not only put pressure on the electoral body to carry out reforms aimed at ensuring that elections are free and fair, but also partake in the activities of the electoral agency through collaborating with IEBC to carry out civic education.

The study also interviewed the party officials because of the “gatekeeping” role political parties’ play in a democracy. Political parties not only nominate candidates for political positions, but that they also play an important role in policy formation and issue structuring (Gunther and Diamond, 2001). In addition, the study also chose to interview respondents from academia (two in number) to obtain in-depth information on the electoral reform discourse in Kenya.

#### **1.10.6 Sampling Size**

The study interviewed a total of 25 respondents broken down into the following six categories. That is; 5 officials from the electoral body (IEBC) and 2 from Registrar of Political Parties, 6 individuals from the Civil Society Organizations, 9 representatives of Political Parties and 3 individuals from the Academia (experts). The above five categories were selected based on the presumption that the individuals would be a huge source of in-depth information on the subject of electoral system and processes in Kenya. The researcher selected the sample using a non-probability design. Furthermore, the data was collected to a saturation point or a stage where

no new information was coming from the respondents. This was critical because of the heterogeneity that increases the extent of variation or uncertainty of the sample with respect to their characteristics. As a result, the selection of a larger sample size of 25 respondents raised the accuracy of the estimate of the true population mean.

**Table 1: Interviews Conducted**

S/no	Stakeholders	No. of Interviews Conducted
1.	Independent Electoral and Boundaries Commission (IEBC)	5
2.	Office of the Registrar of Political Parties (ORPP)	2
3	Representatives of Political Parties	9
4.	Civil society organizations (CSOs)	6
5.	Academia	3
	<b>Total Respondents</b>	25

**Source:** Author (2019).

### 1.10.7 Data Analysis

The study largely made use of qualitative data analysis techniques to analyse the collected data. For qualitative data the information went through the process of content analysis, where you identify the main themes that emerge from the description given by respondents answer to questions (Mugenda and Mugenda, 2003). The verbatim response of the main themes were examined and integrated within the text of the thesis either to support or contradict the main argument. The information was further coded in relation to established themes that was later subjected to a count in order to ascertain the frequently of the situation. In addition, Statistical Methods was used when the researcher quantified the responses to express them as frequencies using descriptive or inferential statistics.



## **CHAPTER TWO**

### **DEMOCRATIC CONSOLIDATION: MINIMALIST VERSUS MAXIMALIST**

#### **2.1 Introduction**

Democracy remains a contested concept in the discipline of political science (Gallie, 1956; Bratton and Mattes, 2003). Indeed, philosophers, scholars have debated over the definition of the concept of democracy for millenniums without arriving to any consensus. However, one of the most ubiquitous definition of the concept is attributed to Schumpeter (1947) who defined democracy as a system for arriving at political verdicts in which individuals acquire the power to decide by means of a competitive struggle for the people's vote.

As a key subject matter of political science, democracy has been presented to travel in waves (Huntington, 1991; Diamond, 1996). Huntington (1991; 1997) talked about three historical waves, with the first wave being launched in the first half of the nineteenth century with the granting of the right to vote to the males in the United States. This wave peaked in the 1920s, but also saw a retreat by some of the newly installed democracies in Europe. Then, the second wave was launched after World War II and lasted up to the early 1970s. The second half of the 1970s witnessed the launch of the Third Wave of democracy, which expanded the democratic reach to countries in Latin America, former Communist Eastern European countries and Africa.

Since the launch of the Third Wave of democratization which peaked in the early 1990s, most of the countries around the world have either democratized or in the process of transitioning to democracy. Today, almost all African countries, Kenya included display different variants of democracy. This empirical diffusion of democracies during the second half of the 20<sup>th</sup> century and the start of the 21<sup>st</sup> century points to two things. First, it can be argued that, in principle, democracy represents the dominant form of government and governance around the world. And, on the other hand, now it is more necessary to seek possibilities for differentiating between different qualities of democracy, for the purpose of mutually learning from democracies, innovating democracies and deepening democracy further (Campbell, 2008). This endeavour has gained a lot of traction by scholars and students of democratic politics, especially since the end of the cold war when regimes could be broadly classified into two simple dichotomies; democratic versus authoritarian.

The aforementioned concerns, thus motivates the need to classify democracies especially if we are to improve the performance and legitimacy of the democratic institutions and processes. This endeavour is realised in the study first, through identification and subsequent discussion of the key principles of democracy. Then, the chapter discusses different strands of democracy based on how they rank on the key democratic attributes (principles). This is done to help classify democracy on the two main continuums, minimal and maximal democracies respectively. This latter activity is important as it builds the debate the thesis intends to make that minimal democracy serves as a precursor to the more comprehensive, maximal democracy. Then, a conclusion caps the chapter.

## **2.2 Minimalist and Maximalist Concepts of Democratic Consolidation**

The minimalist, or the procedural view of democratic consolidation according to O'Donnell and Schmitter (1986) encompass the following attributes; secret balloting, universal adult suffrage, regular elections, partisan competition, associational recognition and access, and executive accountability. This view represents a limited or a narrow view of democratic consolidation compared to the expanded, or the maximal view of the concept. Yet, at the same time, the minimalist view enjoys considerable scholarly consensus over maximalist view on what its attributes are.

Maximalist view of democratic consolidation on the other hand represents an ideal, comprehensive vision of what democratic consolidation is. This view is mainly attributed to the works of Dahl (1971) and later Diamond et al., (1995). This perspective goes beyond the democratic institution of the ballot box to quote from Riker (1986). According to Dahl, maximalist view of democracy is distinguished by eight conditions; periodic free and fair elections, civic participation, political deliberation, freedom of expression, right of access to government information, freedom to form or join autonomous groups or associations and voters choosing the kind of institutions they prefer (Dahl, 1971; 1989).

Dahl and a coterie of other political scientists have focussed their work on discussing the necessary and sufficient conditions for maximising democracy. They argue that whilst the ultimate end is establishing an ideal maximal democracy, what is possible in reality is establishing a liberal democratic order (Dahl, 1971; Schedler, 1998; Diamond, 2003). Liberal democracy thus according to Dahl, though limited represents the highest form of democracy that has been attained to date. It thus, constitutes the aspirational democratic model that states hoping to become democratic strives to transition into.

## **2.3 Key Principles of Democracy**

There is abundant literature relating to democratic theory, with countless definitions of what democracy should be and what democracy actually is. All of them are contested and differ according to the preferences of their authors (Schumpeter, 1962; Bobbio, 1987). Thus, measurement of democracy is dependent on the definition of democracy, which of course is a function of the fundamental principles of democracy (Collier and Levitsky, 1997). This section will identify some of the key fundamental principles of democracy and illustrate how they can be applied to classify democracies in either of the two continuums; minimal or maximal democracies respectively.

The three democratic principles discussed in this section are equality, liberty and control. These principles can be argued to have defined both the history and development of the modern day states as we know them. This therefore means that the development of democracy as a core governance concept is very much intertwined with the history of development of the modern states. The thesis thus makes the argument that democracy can be measured and defined by the aforementioned principles.

### **Equality**

Equality, particularly understood as political equality is a fundamental democratic principle and its pursuit is necessary for the survival of a democracy. Before the formation of political communities as we know it today, equality existed in the state of nature (a state of anarchy and disorder). Rousseau and other Contractarian theorists (John Locke and Hobbes) argued that the state of nature is one of freedom and equality. Individuals, according to them are equal to the extent that all are endowed with the faculty of reason. But inequality only arise when others optimize on their capacities better than others. Hobbes further builds this argument by starting that individuals in the pursuit of self-preservation comes together to sign an agreement that overrides all selfish/individual desires. This renders all equal before the law. This is where the idea of state comes in to guarantee the pursuit and enjoyment of this principle by all citizens without discrimination. The state is thus an ideation that embodies the concept of equality.

Political equality in contemporary times connotes different things. It implies that all citizens are treated as equals before the law and in the political process. This implies that all citizens have the same rights and equal legal chances to influence important political decisions such as electoral outcomes. Dahl (1976) argues that under the aforementioned context, citizens' preferences have the same weight in political decisions. Every citizens' voice matters in

political decisions. Dahl (2000) identifies two main reasons why equality should be considered a fundamental principle of democracy. First, democracy must attain the requirements of morality, acceptability and prudence. The moral imperativeness of democracy implies that all citizens in a polity/state are of equal value, and all should be allowed to pursue their well-being and interests without any discrimination (Dahl, 2000). Further, since democracy is seen as a system of *organized uncertainty* (Przeworski, 1986), sheer prudence demands that there should be equal concern for every citizen's rights and interests. Both majority and minority interests should be guaranteed by the political system (state). This logic makes it possible for the majority to have their way, and minority to have their say in the political contests.

Then, the second reason equality is considered a fundamental principle of democracy rests on the idea of the civic ability of citizens to govern themselves. Dahl posits that the complete and final authority over the control of the state (government) lies with the sovereign (citizens) (Dahl, 2000). Illegitimate governments that rely on the use of force/coercion to ensure their stay in power cannot thus be considered as representing the popular interest. It is on the same logic that military and militaristic regimes have been criticized not to represent the popular feeling. Take the case of the recent popular uprisings in Sudan in July 2019 against what was taken as an illegal takeover by the military after the resignation from power in April 2019 by the long-time dictator Omar al-Bashir. The people responded by staging many days of street protests, and in the end the people power triumphed with the Military Council agreeing to share power with the representatives of the civilian protestors.

In addition, equality also means that all citizens must be treated equally by the state, and all should be guaranteed equal rights to participate in politics and their preferences respected. This latter fact is an expansive notion (maximal) of the concept of democracy that when acquiesced by majority of the players in the political system as the way to organize political competition, promotes the spirit of positive-sum games (political players respect the outcomes of political processes as all are winners of the process). This principle ensures respect for voters' choices at the ballot, and not subversion of the same. This practice is the norm in liberal democracies, unlike the case in majority of the semi-democracies, or even in pseudo-democracies. In most of the transitional democracies, elections normally form a key theatre where the right to vote and right to be voted is regularly subverted. Take the example of Cameroon where the long-surviving autocratic regime of Paul Biya maintains stronghold on power through a clientelist system of distribution of state largesse (employment, development and allocation of political party funds – presidential campaign fund allocation based on loyalty to Paul Biya). This in a

way limit the number of alternatives (choices) available for selection at the ballot, and this can at times lock-out parts of the society who are considered rebels – as is the case with Anglophone region of Cameroon.

As illustrated above, equality (conceptualized as political equality) is a fundamental principle of democracy, but that its enjoyment is predicated on the guarantee of other complementary principles. This thus leads to a discussion on the principle of liberty.

## **Liberty**

Another fundamental principle of democracy is liberty, referred to as freedom in the contemporary usage. Liberty remains one of the most contested concepts in political science to explain perhaps because it is a conflation of a variant of diverse ideals. Several competing versions of this concept exist and each conception reflects a specific historical epoch. The usage of the concept of political liberty dates back to the Ancient Greek treatment of the concepts; freedom and liberty. Political theorists however, point to the French Revolution of 1898 as having etched a central place for this concept in democracy debates. This is because the French Revolution both reinforced the need to respect individual rights and also highlighted the role of the state in safeguarding these rights.

Today, the concept of liberty alongside the concept of equality (also a core issue of the French revolution) have gained greater prominence in academic research, especially democracy debates with scholars as well as students of political science conducting their research on different aspects of the concept.

Isaiah Berlin in his famous lecture titled, “*Two Concepts of Liberty*” delivered in 1958 at the University of Oxford differentiated between two typologies of liberty; positive liberty (freedom) and negative liberty. According to him, negative liberty implied being able to act unobstructed by others, especially by the state. Negative liberty means individuals are free from legal constraints on their rights (such as freedom of speech, expression and even privacy). Berlin argued further that coercion implied deliberate interference of other human beings within the area in which they could otherwise act. Negative freedom untamed can be dangerous (see Mill’s harm principle – which states that power can only be exercised legitimately on a member of the political community against his will to prevent harm to others). Positive liberty on the other hand has to do with being the master of your actions. Positive liberty addresses the question of who or what is in control of an individual’s actions. Berlin expressed distaste for communism as it encouraged over-regulation of individual’s lifestyle. The more a person is in

control of what he does (what liberalism stand for), the greater the freedom he or she exacts. Your actions as an individual thus expresses your true self.

Using the example of elections, which is an important mark of democratic transition/consolidation, citizens have a right to both vote and be voted for. But the application of this right differs from one political system to the other. With the exception of liberal democracies, most countries in the world limit, or control the extents of citizens' involvement in politics. This view fits with the description of scholars who argue, for instance, that elections is too narrow a yardstick for measuring the quality of a democracy. Thus, conducting elections is not an end in itself, the conditions under which elections are held matter. Indeed, according to Collier and Levitsky (1992), elections needs periodic elaboration to distinguish cases (elections) that do not meet the threshold of being classified as free, fair and competitive. This process is called "précising". Otherwise, holding elections under insufficient conditions fits into the description of what Terry Lynn Karl has termed as the "fallacy of electoralism" (Karl, 1980).

Karl elaborated further on the above view in an article authored together with Philippe Schmitter, in which they argued that during elections, the electorates have very limited options, in that they choose from a list (alternatives) presented by various political parties in contestation (Schmitter and Karl, 1991). Other scholars have noted that the democratization paradigm recognises that transitions does not automatically lead to consolidation. And, that elections alone is insufficient to anchor democratic governance (Carothers, 2002; Zakaria, 2003). Zakaria (1997) goes ahead to argue that while it is possible to impose elections on a state, it is more difficult to push for constitutional liberalism on a society. Thus, it is constitutional liberalism that represents an expanded (maximal) vision of democracy. This puzzle leads to the question, how do you expand democracy, particularly electoral democracy from its mere procedural definition?

Diamond responds to the above puzzle by arguing that in addition to electoral democracy, there should be absence of reserved domains of power for the military and other political actors not directly or indirectly elected through the ballot (Diamond, 2003). That means that the *volonté generale* (the will of the people) safeguarded via the ballot is considered the main sovereign entity. Jean-Jacques Rousseau, the Swiss-French philosopher considered the general will germane in his discussions of the social contract (the covenant signed between the rulers and ruled). The general will, which lies with the sovereign is the source of legitimacy for the state

and the government. Rousseau contended that if laws are a product of the general will, aimed at the common good of all, then the laws must be in accordance with the public interest and therefore in the interest of each, and each is obliged by the law yet free because they are its author (Rousseau and May, 2002).

Other scholars have focused their writings on the contest between free market principles versus command economy. Prominent among them is Fredrick Hayek, who had profound influence on Thatcher's rise to power as well as her economic policies. In his *Constitution of Liberty* published in 1960, Hayek cogently argued in favour of free market principles by observing that market outcomes are not intentional. And that individuals engage in exchanges to satisfy their needs and that the unequal benefits and burdens that results from these interactions is not a direct action by some identifiable agents (Hayek, 1960). It is based on this premise that Hayek proposed to the conservative administration of Thatcher to "roll back the state" and let the free market principles prevail instead.

Hayek's view has however, come under challenge from scholars like Raymond Plant (1991) who argues that market outcomes are in fact foreseeable and that property rights are distributed unequally. Plant (1991) argues that proponents of free market principles favour free market over state control on grounds that the foreseeable outcomes of the market will be preferable over state provision. They advocate for privatization of health care provision in order to increase the number of private hospitals. The second argument Plant (1991) puts forth is that the nature of property rights is that it is distributed unequally. Therefore individuals who enter the market with least will end up with least and vice versa. This kind of situation thus hampers progress which is impossible without freedom. For the individuals to realise progress, then the state has an obligation to create opportunities for citizens to improve their well-being.

Further, rules prevents governments in free societies (liberal democracies) from coercing individuals. This is unlike the situation in most of the less-free states (predominantly developing states – most of which exhibit illiberal tendencies) where the individual leader's whims have more influence in decision-making over the institutions. Institutions in such kind of contexts (illiberal societies) are considered subservient to the power and influence yielded by the leaders.

In addition, Diamond's extended version of liberal democracy, also encompasses provisions for political and civic pluralism as well as individual and group rights. In political systems with enshrined true rule of law as Western democracies, all citizens irrespective of any

classifications (race, class, and income) are entitled to equal political and legal rights. Abbe Sieyès (a political theorist during the French revolution) however, focused his writings on the exceptions to the aforementioned view. In his celebrated 1789 pamphlet “What is the Third Estate?” which became the manifesto of the revolution, he elaborated on the need to have the three orders (clergy, aristocracy and the third estate) that existed in France at the time to have equal stake in the management of the affairs of the country. The third estate was the underprivileged order in France and thus needed liberation. For Sieyès thus, equality of the three orders in France was pegged on equal stake in the exercise of civic liberty by the three orders. Thus, in order for the third estate to exercise their political rights they equally had to be granted an opportunity to choose their deputies (representatives) same as the other orders. According to Sieyès thus, it is liberty that insures equality. Siéyes arguments can easily be contrasted to what Alexis de Tocqueville (1835) observed with democracy in America, where the individuals possessed equal rights as a matter of divine providence and this led to equal say in political matters. Everyone participated in choosing the deputies and all were free to contest leadership positions.

Sieyès’s view much in similar vein with some of his successors underscored the struggle that citizens of different countries undergo in their efforts to cement in place a system that works for all the citizens. In concluding, Sieyès, observed that liberty in France meant equality of the three orders. And, this is indeed the form and spirit of liberal democracy which stresses equality of all citizens.

Mill also intervened on the debate on political and civic liberties. He wrote on the limits that power can be exercised legitimately by the society over an individual under conditions of popular consent (liberal democracy). To Mill, traditional liberty meant the establishment of constitutional checks on the authority of the magistrates (rulers). In his “Considerations on Representative Government” published in 1861 (republished in 2015), Mill posits that popular governments does not need checks as the governors are responsible to the people. However, he cautions that the “will of the people” is that of the majority or those who succeed in making themselves majority and as a result safeguards are needed to protect against tyranny of the majority (Mill, 1861). There should be a form of control to ensure that the majority do not “hijack” the government. The majority may assume the power of the government as their own thus trampling on the rights of the minority. This latter fact is normally the situation in most of the hybrid or semi-authoritarian regimes such as Kenya.



Mill's popular government here represents liberal democracies, where institutions are constructed in such a way that they promote enjoyment of civic and political liberties by the citizenry. Indeed in liberal democracies such as the United States, or even the United Kingdom, the president, or the prime minister is only considered the first among equals. Further, Mill also talked about the harm principle which basically sanctions the government to intervene in instances individual rights are infringed upon.

Mill (2015) then goes on to list three activities that individuals should not be restricted from pursuing by the state or any other unlicensed agencies. First, is freedom of inner consciousness (thought, expression, opinion, conscience). Then, second, is liberty of tastes and pursuits and then finally liberty of association. No society in which all these liberties on the whole are not respected is free irrespective of the type of government (respected by government and popular opinion). Freedom of thought and expression are important for ascertaining the truth and knowledge on which ultimate wellbeing of humans depend. To Mill thus, liberty is doing what one desires (positive conception of liberty). Each individual first become valuable to themselves before to others and thus government. Men should be left on their own as long as they do not harm others. The above conception of individual freedoms by Mill fits within the traditions of the maximalist conception of democracy. In most of the electoral democracies such as those of the sub-Saharan Africa, there is widespread abuse of individual freedoms through the use of coercive state institutions such as the police, army or the courts. This is so, as some of these regimes lack popular legitimacy.

From the above discussion, it is clear to state that individual/group freedoms can be conceptualised in terms of entitlements or rights. Rights as Professor Sandel (2005) puts it, gives freedom a moralistic or judgemental sense. Sandel further suggests that in deciding what rights individuals should possess requires one to consider the purpose and moral worth of the social practices that give rise to such questions about rights (Sandel, 2005). The amount of rights an individual is entitled to enjoy to a greater extent is determined by the nature of the state, which can be either democratic or authoritarian.

## **Control**

Control is essential for democracy and its institutional organization. The ruled ought to conduct oversight on their rulers (representatives) to secure freedom and equality, which basically protects them from more negative tendencies such as tyranny/despotism. The existing institutions should serve interests of all the members of a state/territory. Further, the executive's

control over policies should be subject to both democratic and institutional checks and balances. It is under the above conditions that democracy can be said to be functional. Thus, to ensure the core democratic principles of equality and freedom are realised, then some form of control is necessary. Control also helps to avoid the predominance of equality over freedom or vice versa through control over those who govern, especially on their limits to exercise control over their subject. Ideally, democracy operates on the logic that when one principle displaces the other, then it smothers the fundamental idea that predicate the establishment of a democracy, or democratic government.

Diamond explains that control can be ensured through vertical and horizontal accountability. Vertical accountability is achieved during elections (when the ruled choose the rulers). Then, horizontal accountability is achieved through various officeholders exercising oversight over other officeholders, or offices. This latter type of accountability rings back to the fore the centrality of the concept of principle of separation of powers which was first advanced by the French philosopher, Charles-Louis de Secondat, Baron de Montesquieu. In his seminal 1748 publication *De l'esprit des lois* (Spirit of the Laws), he articulated that political liberty is the tranquillity of the mind arising from the opinion each person has of his own safety (Montesquieu, 1748). Through this notion, Montesquieu intended to advance the argument that there was a need to constitute the three arms of the government in such a way that despotism is kept in check. According to Montesquieu thus, it is therefore imperative that the three arms of government (political executive, legislature, and the judiciary) work in complementarity. This is the situation in established democracies, particularly the United States, Western Europe and now large swaths of former communist Eastern Europe. In the United States, the Congress and the Courts have intervened in several instances to prevent overreaches by the political executive. Indeed, there are instances when the sitting president has been forced to vacate office as a result of breaching his constitutional mandate. A casing point is President Richard Nixon, who was forced to vacate office due his involvement in the Watergate scandal in 1974.

Benjamin Constant (1819) building on the ideas of Montesquieu contended that the unchecked power of any governmental entity poses a threat to the private individuals and even the greater society. According to him thus, there was thus a need for institutional safeguards to rein-in on the excesses of the political executive. He says that even the laws, a representation of the will of the people must be circumscribed within certain limits. This argument points to the limits of law in as far as they enhance the enjoyment of political and civic rights by the citizens.

Constant goes ahead to allude that individuals almost always sovereign in public affairs, was a slave in all his private relations (Constant, 1819). He even mentions that it is fallacious to pretend to submit the government to the general will for it is they who determine the content of the will. French reformers serving the despotic regime of Bonaparte in several occasions opportunistically misinterpreted Rousseau's works to legitimise their actions (particularly the constitutional changes of 1791 and 1795 reflected this).

## **2.4 Classification of Regimes**

So, what defines a functional democracy? Democracy is defined by a combination of several attributes. These attributes apply differently from one country (political system) to another. Some countries rank high in most of the democracy indices (such countries are classified as liberal democracies), and others record mixed results in the democracy indices, thus labelled as hybrid regimes, electoral democracies, or transitional democracies (mostly states from developing areas of the world). Then, on the polar opposite of democracy are authoritarian regimes – which are states that display despotic or tyrannical tendencies. This section discusses the attributes that define the different regime types identified above with the aim of fleshing out the side of the continuum they fall under; minimal or maximal definitions respectively.

### **Liberal Democracy**

This refers to category of countries that have met the widely accepted conditions for identifying a country as democratic. Dahl calls such countries as polyarchies, but they are more commonly referred to as liberal democracies in mainstream scholarship. The countries on other end of the scale are labelled as non-democratic, or authoritarian countries. Liberal democracies are regarded by political scientists as largely fitting within the maximalist notion of looking at democracies (Dahl, 2000; Diamond, 2003).

Diamond (2003) has elaborated eleven conditions that a country must meet in order to be classified as a liberal democracy. These conditions largely attune to the already discussed principles of democracy. A country can thus be labelled liberal (free) when it scores high on a combination of most of the conditions outlined below.

First, under liberal democracy, constitutional power/mandate lies with the elected officials and not what Diamond (2003) refers to as the unaccountable actors, not given direct mandate by the electorates such as the military, police among other actors. Second, and closely linked to the first is that there is competition for political power. All interested parties (who have met

the requirements) are allowed to participate in electoral contests unhindered. And, leaders respect the principle that political competition should be free and fair as there must be a winner and a loser at the same time. Further, this spirit is realised through political parties respecting the democratic institutions, especially those mandated with managing electoral processes.

Third, there is an established system of horizontal accountability to check on the political executive (the system of checks and balances is functional). This is achieved through clear separation of powers between different organs/agencies of government. The President in such countries is considered the first among the equals, but not as above the law. This is unlike the case in most of the transitional democracies where the President assumes an invincible cult-like personality, and regularly flaunts the constitution.

Then, participation in the political processes should not be constrained by factors such as ethnic, cultural affiliations, religion among other factors. Minority groups too should not be subjugated (prejudiced) by ethnic majority groups as that would pass as tyranny of the majority. Then, the civil society sphere to borrow from Georg Hegel should be liberalised to allow for broader pursuit of freedoms by its members. No member of the civil society (citizen) should be prohibited from speaking their language or practising their culture.

In addition, Diamond also talks about having a free media. The state should allow the media (both government and independent media) to operate freely without censorship. Incumbent regimes that treat truths it doesn't like as "fake news" are thus hurting the credibility of the media, which is indeed the lifeblood of democracy. Like the media, individuals too should have substantial freedom of belief, publication, assembly, speech and even petition. Further, all citizens should be treated as equals, in as much as individuals differ in terms of capabilities. In liberal democracies also, there exists free and independent judiciaries that make binding decisions (decisions to be respected by all the institutions/individuals inhabiting a particular political system. The courts also safeguards both independent and group liberties. In informally arranged polyarchies, citizens in some instances are not allowed fair access to a just process in the courts. Take the case of Turkey, where the courts are heavily stacked with judges loyal to the current President Recep Tayyip Erdoğan, outcome of cases is heavily politicized.

To add to the aforementioned, liberal political systems have an established system of rule of law that shields the citizens from being unfairly detained without trial, tortured, exiled by force or even harassment by both the state and non-state actors. Political contests in such kind of systems take ideological rather than personal differences.

To cap his eleven conditions, Diamond talks about the importance of having a supreme constitution. He invokes Juan Linz (1997) who singled out lack of a constitutional spirit as one of the single biggest threats constraining the growth of democracy in most of the illiberal states.

### **Transitional democracies**

The minimalist conception of democracy looks at democracy from a far less comprehensive vision compared to the maximalist view. Minimalists appreciate that the regime types under this category meets some of the essential but not all tenets of liberal democracy. They thus located on the grey zone between democracy and autocracy.

Elections is seen as the main indicator of democracy levels for this category of countries. This has resulted into these regimes sometimes being brandished as electoral democracies. Meaning that elections is the yardstick used to measure the levels of democracy. Yet, as it has been discussed above, elections is too narrow a yardstick to tell the levels of democracy. Holding elections alone is not adequate to label a country as democratic. The conditions under which elections are held also matter. Otherwise, holding elections under insufficient conditions fits into the description of what Terry Lynn Karl has termed as the “fallacy of electoralism” (Karl, 1980).

Indeed, in most of the transitional democracies, it is not strange to find observers (both domestic and international) complaining about the quality of elections, especially raising questions on legal, administrative and procedural anomalies emanating from the process. Pastor (1999) has pointed out the cases of Haiti and Cameroon, where partisan appointment of the key electoral officers resulted into lack of a level playing field, and as a result the opposition boycotted the ensuing elections over a series of years in the 1990s. The argument of the opposition in both cases was that the appointment impugned the legitimacy of the electoral process, and thus by extension the final results.

Further, these regimes appreciate that guarantee of freedoms such as assembly, press, association are necessary to encourage healthy political competition, but in reality devote little time on them. Indeed, in most parts of sub-Saharan Africa, regimes regularly suppress the enjoyment of most of these freedoms outlined above. The administration of Yoweri Museveni in Uganda, for instance, has over the years been known to regularly muzzle the media by intimidating, arresting journalists and even closing down news organizations that criticise him. Such kind of acts goes against the very foundations modern states are built on. For Aristotle notes in *Politics* that liberty is the basis of a democratic state.

Further, in some transitional democracies, the ruling party tolerates the existence/operation of other alternative political parties. The alternative parties might however, not necessarily possess equal chances of winning political power as was the case in most of Maghreb African countries such as Egypt. Sartori has labelled such regimes as pseudo-democracies. In such countries, the ruling party makes use of patronage, coercion, media control to deny legal parties a fair chance to compete in elections (Sartori, 1976). Such kind of practices constitutes an abrogation of some of the political rights individuals and groups are entitled to in a political system. This renders such kind of regimes to be qualified as democracies but only in the minimalist sense.

## **2.5 Conclusion**

In conclusion, this chapter has succeeded in demonstrating that whilst democracy is not the most perfect form of governance, its imperatives; allows for widespread enjoyment of civic and political liberties, offers opportunities for selecting alternative governments and policies, offer opportunities for disadvantaged groups to organize and mobilize politically makes it best positioned to reduce/solve social injustices in the long run (Diamond, 2003). Following the democratic path by the less democratic (electoral democracies) offers them a vital avenue to also reduce/solve most of the ills that bedevil them. It is on this note that electoral democracies such as Kenya should persist on the continuous path of reform (electoral reform) to launch them as progressive, stable democracies.

Further, democracy should be seen as a developmental phenomenon and not an end in itself. Even countries long considered citadels of democratic governance, continuous renewal or reform is necessary to improve democratic institutions in order to render political contestation more open and fairer, to enhance participation of various groups/actors in the political processes, to better protect civil liberties, to hold elected officials accountable among many other positive dividends. This is because, some autocratic regimes too are both as administratively and economically efficient as liberal democracies (Schmitter and Karl, 1991).

However, democratic change should not be taken as a unidirectional phenomenon. In the case of electoral democracies, for instance, democratic change is necessary to render political processes fairer, more inclusive, accountable and participatory. But, these changes might also take a reverse wave. Electoral democracies have the potential to be more illiberal, less democratic, corrupt and even unresponsive as it has been demonstrated in many sub-Saharan African states and other parts of the developing world.

## **CHAPTER THREE**

### **HISTORICAL REVIEW OF ELECTORAL REFORM PROCESS IN KENYA**

#### **3.1 Introduction**

This chapter traces the advent of electoral reforms and its role in enhancing the quality of elections in Kenya through the years. The chapter recapitulates on the historic dynamics in an attempt to explain the entry point for electoral reforms as a viable alternative for improving the quality of elections, thus deepening democracy in Kenya. The section is disaggregated into three main periods: from 1963 to 1991; 1991 to 2007; and post 2007. In each trajectory, the reforms are discussed to show the democratic journey Kenya has travelled.

#### **3.2 Electoral Reforms in Kenya Between 1963 and 1991**

The clamour for constitutional change, either to render politics fairer in Kenya or preserve the status quo started in earnest immediately after independence. Kenya attained independence from the British in 1963 with two main political parties, Kenya African National Union (KANU) and Kenya African Democratic Union (KADU). But, even before independence the two parties held long competing ideologies, a factor that presaged a future fraught with difficulties and likely to be violent (Furedi, 1989). KADU pushed for a Majimbo system, which was intended to decentralise more powers to the Regional Assemblies, whilst KANU stood for a strong central government. After independence, in which KANU had a majority over KADU, Kenyatta was installed as the Prime Minister and soon moved to consolidate his power within KANU and over the state. Members of the opposition KADU, through use of both offers to join KANU and intimidation, crossed the aisle resulting into the dissolution of KADU on the eve of first independence anniversary (Throup, 1993).

The consequences of these event were that, first it made Kenya a *de facto* single party state. This was effected through constitutional changes that resulted in the creation of a centralized system of government, the abolition of regionalism and establishment of de facto one-party state. It also laid the foundation in terms of content and process, of the constitutional changes that were to follow. Indeed between 1963 and 1990, more than twenty-four constitutional amendments were effected in Kenya. This wave of constitutional reforms was an ad hoc and reactive process, largely aimed at dealing with political exigencies of the moment. The events in Kenya at this time reflected what was happening elsewhere around Africa.

And, second, the KANU/KADU merger strengthened the position of Kenyatta (a moderate), within KANU especially over the radicals led by Oginga Odinga and former Mau Mau activist, Bildad Kaggia. The radicals were pushing for more nationalization of public corporations, seizing of white settler lands among other demands. The climax of this ideological struggle played out during the infamous Limuru conference in which KANU led by Tom Mboya, Odinga's Luo rival conducted rigged party elections that all but extinguished any chances of the Odinga-led camp remaining within KANU. Odinga and his allies then proceeded to form the Kenya People's Union (KPU). The formation of KPU sparked panic within KANU prompting Kenyatta to respond with what would turn to be the fifth constitutional amendment. The amendment obligated members of the National Assembly who changed parties to seek fresh mandate from their constituents. This move, prevented many members of the radical wing of KANU not to resign. And, in the resultant "little general elections" of 1966, Throup contends that the new KPU members were reduced to a rump of nine (Throup, 1993).

It is important to underscore that after the dissolution of KADU, there existed two parties in Kenya, KANU and KPU qualifying Kenya to claim stake as a "multi-party" democracy. However, the events of between 1966 and 1969 significantly altered Kenya's political landscape. During much of this period. KPU officials and candidates suffered a lot of harassment and intimidation in the hands of the state and its apparatus. Mueller (1984) has noted that this period was characterised by strict control of the political system by the ruling party. A new law was passed in 1968 that required all candidates for local and national office had to be supported by a political party with registered branches and sub-branches in the locality. This, together with other technicalities in law resulted into the opposition party either not fielding a candidate, or their candidate getting disqualified.

The opposition candidates also suffered in the hands of the provincial administration who regularly revoked the permits to hold political rallies. In addition, KANU young wingers also often harassed the KPU candidates and disrupted their meeting, asserts Throup. In the end, by 1970, there was no opposition party in Kenya to challenge the KANU administration. This allowed the ruling party monopoly of the Kenyan politics for the subsequent 22 years that followed. Later, in 1982 when Oginga, teaming up with a Gusii politician, George Anyona attempted to register Kenya Socialist Party (KSP), the provision on *de facto* single party state was instituted and Kenya became a *de jure* one party state.



However, close examination of the 1969 and 1974 elections reveal a different picture. Kenyatta's KANU demonstrated semblance of internal openness with all candidates asked to seek the nomination of the party in order to participate in the polls. Several cabinet members and MPs alike lost their seats, contrary to their expectation that the removal of KPU from the scene had in effect handed them direct ticket to parliament, or in some places created "safe" constituencies. Furthermore, there was also low voter turnout in both the 1969 and 1974 general elections. Only 1.7 million of the nearly 3.7 million registered voters, roughly 46.7 percent bothered to vote in 1969, compared with 83.6 percent of the 1.4 million registered voters in 1961 and 71.6 percent of the 2.6 million in the 1963 (Hornsby and Throup, 1992).

After Kenyatta's death, President Daniel Moi took over in 1979 and installed an authoritarian regime that for the next close to three decades would curtail critical electoral reform to help deepen democracy in Kenya. Moi, to assert his authority and insulate himself from criticism from his fellow Kalenjin bailiwicks J. M. Seroney and Taita Towett. Towett had been part of "The Change Constitution Movement, allegedly to block Moi from ascending to power and Seroney who had deep contempt for a less bright "country cousin" from Baringo, a backward place compared to Nandi and Kericho (Throup, 1992). Moi, employed the aid of provincial administration to ensure that both Towett and Seroney were rigged out. The provincial administration working in collaboration with the police staged a joint operation that ultimately saw Moi's critics defeated by his henchmen, among the losers, Towett and Seroney. The provincial administration served as the polling officials on that occasion, a role that gave them a *carte blanche* to declare results acceptable to the incumbent KANU regime. Elite troops from the General Service Unit (GSU) were instructed to dragoon voters to the polling stations and ensure they vote the right way.

Whilst Kenyatta used provincial administration to intimidate and harass (denial/revocation of campaign license, detention without trial of KPU activists) the KPU candidates during the 1969 general elections, it is Moi who actually commenced widespread use of provincial administration to either support loyal candidates or to ensure defeat of recalcitrant ones. The administration of Moi also witnessed the widespread use of the provincial administration to especially the district commissioners as electoral officials. The district commissioners were often deployed as returning officers and the local chiefs were used to campaign for the preferred candidates. Hornsby and Throup (1992) posited that the chiefs often used the tactic of summoning the local villagers to *barazas* whenever hostile candidates called their meetings.

Moi followed the use of provincial administration with a series of other measures to ensure his preferred list of candidates goes through. In 1988 elections, the state forced the use of queue voting system, or what Throup labelled as “African democracy” which had been earlier used in the 1985 KANU elections. The process, considered by many observers as dubious resulted into loss of trust in the electoral outcomes by the citizens and loss of legitimacy in the electoral process. These efforts by the incumbent administration to influence electoral outcomes coupled with the administrative incompetence of the electoral agency, to a large extent compromised the final outcome of the elections.

With the end of the cold war in 1989, a lot of changes ensued both domestically and internationally. At the systemic level, the United States triumphed in the war, whilst Soviet Union suffered disintegration of its empire to form the Commonwealth of Independent States (CIS). In Africa, the Third Wave of Democratization of the 1990s, which ushered in transition from one-party systems or military regimes to multi-party systems was still continuing. In Kenya, following a sustained international pressure especially from the, Paris group of donors and other bilateral donors, the government of President Moi succumbed to pressure, and through a special KANU delegates conference, Moi informed the delegates that they did not have any other choice but, to repeal the Section 2 (a) of the constitution. This action was implemented on the 10<sup>th</sup> of December 1991 (Weekly Review, 1992).

In this kind of environment, when KANU pursued a mixture of both constitutional and extra-constitutional ways to tip advantage in favour of their candidates over other political players in the political process, the electoral process could hardly pass out as free, fair and credible. Actually, there was a very thin line between the electoral agency and the government. The government often used the state apparatus to manipulate the electoral processes. In overall, one can say that the electoral reforms that were carried out during this period were conducted by the ruling party, KANU, and were aimed mainly at guaranteeing survival of the regime and not really aimed at effecting certain meaningful reforms, to help deepen Kenya’s democracy.

### **3.3 Electoral Reforms During the Multi-Party Era, Post 1991**

The reintroduction of political pluralism in Kenya led to liberalization of the Kenyan political space. This era witnessed the crystallization of the constitutional change movement in the country, which began with the repeal of the Section 2 (a) of the constitution that re-ushered in the era of multi-party politics, or multi-party democracy. The opening of the political space

saw the formation of several political parties to challenge the “dominant” KANU. Mwai Kibaki formed the Democratic Party of Kenya, and the other major party to have been formed then was FORD. FORD later split into two; FORD-Kenya, led by Oginga Odinga and FORD-Asili led by Kenneth Matiba. The three new parties competed against Moi in the December 1992 elections that unlike the previous elections witnessed new tactics of “rigging” the vote.

KANU however, Throup (1992) avers “fixed” the vote six months prior to the actual date of the vote, during the registration exercise. The ruling party ferried the party supporters from their rural strongholds to the marginal areas such as Nairobi and Mombasa in order to gain a numerical advantage in the National Assembly. This strategy registered mixed outcomes as it succeeded in some places and failed in few other places. The 1992 general elections thus unlike the 1988 and other previous elections, did not witness systematic attempts especially through the constitutional mechanism to influence the outcome of the vote. The big win by KANU was attributed mainly to fragmentation within the political opposition.

The defeat of the political opposition in the 1992 polls however, served as a catalyst to press for more changes to the constitution to make politics fairer (Herbeson, 1999). During much of the ensuing period, different groups pushed for broader socio-economic and political reforms. Even before the 1992 elections were staged, significant efforts aimed at bringing together the civil society organizations (CSOs), opposition political parties and religious organizations were made. The National Council of Churches of Kenya (NCCK) organised a symposia to facilitate the same. The symposia brought together the aforementioned groups (Mutunga, 1999; Nasong’o 2007). It is noteworthy that despite the fact that these symposia did not deliver much in terms of uniting the different groups, they were significant because they led to the formation of the Coalition of National Convention (CNC) which was instrumental in terms of charting forward the future of Kenya after the repeal of Section 2 (a).

However, the CNC did not last long, first, because its radical agenda (pushed for total overhaul of the constitution) failed to attract the support of the church and two, because of the divisions between the pro-reform movements and the political parties (Mutunga, 1999). The Coalition much as it did not last long had a legacy since its reform agenda was adopted by the various successor groupings. The main successor groupings were the; the Catholic Church’s Kenya Episcopal Conference that in March 1994 issued a clarion call for a review of the constitution that reflected the new realities of multi-party politics, and the Kenya Human Rights Commission (KHRC) that proposed a New Model Constitution. KHRC stole the limelight as

its model excited a wave of public interest. The New proposed Model brought together many human rights NGOs and other actors involved in the constitution-making process. This broadening happened through the constitutional caucus of 9<sup>th</sup> December at Ufungamano House. During the caucus, many leaders including the religious ones, pushed a review of the constitution. Bishop Njue, who was then the Deputy Chair of the Episcopal Conference of the Catholic Bishops stroke a cord with many ordinary Kenyans when he stated that constitution-making was a God given right of all Kenyans (Mutunga, 1999).

The pressure by the pro-democracy groups crystallized into an announcement by President Moi on the New Year's Eve of 1995 on the need for a new constitution. He announced that Kenya needed a new constitution, and that his government would invite foreign experts to collect the views of Kenyans, write a draft constitution and then present it to parliament for debate (Mutua, 2008). This announcement was greeted with much scepticism much as it provided a window opening for the nascent pro-democracy groups to push for the inclusion of their demands in the proposed constitutional review. However, Moi renegaded on his promise, consequently resulting into a militant escalation in the push for constitutional change by the pro-democracy activists.

At the start of 1997, the individuals/groups that were championing for constitutional reform, under the label of "The Model Constitution", but had now reconstituted under the banner, Citizen Coalition for Constitution Change (4Cs) started strategizing on how to push KANU to agree to constitutional changes that would guarantee a credible process during the elections that were slated for later that year. In April 1997, the 4C convened what came to be known as the National Convention Assembly (NCA) at Limuru and invited the participation of various diverse groupings. The Limuru meeting resulted into the formation of National Convention Executive Council (NCEC), as the implementation of the NCA (Mutua, 2008).

In the subsequent months, following mass mobilisation of the citizens by this movement, many citizens joined the "NO Reforms No Elections" call. The protests escalated as the general elections approached, as both the leaders of the movement and the citizens teamed up to battle the police and *Jeshi la Mzee*, a private militia which was linked to the KANU top leadership (Mutunga, 1999). In the end, Moi had to cede ground especially as the unrests threatened to paralyse the December elections that were fast nearing.

However, in a strategic move to out-fox the NCEC, Moi invited the religious groups and opposition leaders for dialogue in what came to be known as the Inter-Parliamentary Party Group (IPPG). IPPG agreed on minimum reforms, with comprehensive reforms to follow after elections. The two main successes of the IPPG were, removal of the Chief's Act and the Public Order Act, both of which had been exploited by KANU to emasculate the opposition (Southall, 1998). The post 1997 elections promises were captured in the 1997 Constitution of Kenya Review Act. The IPPG deal whilst was successful in forestalling blockage of the 1997 elections, it failed to deliver the much needed electoral reforms that many opposition political actors hoped would result into levelling the political playing field. For instance, Moi continued to get more media coverage, KANU retained access to state resources, and the opposition only got minority slots in the Electoral Commission.

Mutua (2008) argued that the “bonfire for reforms” stoked in the populace by the NCEC, resulted into the marginalization of the opposition politicians and thus, the move to side-line the NCEC by KANU once again put the opposition political parties and the religious groups back in charge of the reform movement. One of the leading figures of the IPPG agreement, Murungi, noted that in IPPG, the MPs saw an opportunity for ensuring that the NCEC did not remain the “solo voice” in the pro-democracy efforts (Murungi, 2000).

The IPPG agreement thus can be said to have been an opportunity wasted much as it produced minimal reforms that allowed the 1997 elections to proceed ahead. Mutua (2008) saw the side-lining of the NCEC as an attempt by the donor community, with the affirmation of the clergy and politicians to arrest the tide of reforms in Kenya. In the end, KANU and Moi largely came out of the IPPG agreement unscathed.

In addition, the IPPG events reveals a consistent trend among the transitional democracies, that of allowing “window openings” to slip. Brown (2001), has pointed out IPPG as a classic example of how donors sometimes act to scuttle progressive transformation.

After an agreement on how to proceed with the implementation of the IPPG reforms after the 1997 elections failed to be reached, a coalition of diverse groups, interest which came to be known as the Ufungamano Initiative arose. The Ufungamano Initiative (loosely translated as citizen assembly) came up to challenge the domination of the reform process by the politicians, whom people came to distrust because of their role in the now unsuccessful IPPG reform endeavour. Particularly, the merger between KANU and NDP reminisced the politics of

betrayal that had characterised the now botched IPPG reform agenda. The Ufungamano Initiative thus was a broad-based effort by the various pro-reform groups to wrestle away the control of the reform agenda from the “self-interested” politicians.

However, in the end, as Mutua (2008) has aptly noted, since the British founded Kenya, it has not been a vineyard of revolutionary or progressive ideologies, rather only gradualist ideas have morphed into real political success. So, the Ufungamano Initiative suffered similar fate as the IPPG reform endeavour. A new constitutional draft presented for a referendum voting in 2005 was shot down by the citizens, after rigorous campaigns by a coalition bringing together the Ufungamano activists and those who felt left out by the Kibaki administration.

It is actually important to underscore that the peaceful political transition that occasioned the 2002 general elections was largely as a result of the intervention of external factors. Barkan (2004) recounts that in the lead up to this election, President Bush, Vice-President Dick Cheney and Secretary of State, Colin Powell had met Moi on four separate occasions and encouraged him to retire and hold election. At the domestic sphere, it has to be appreciated that significant reforms were also enacted to guarantee a credible vote come 27<sup>th</sup> December 2002, the scheduled date for the general elections. The Electoral Commission was reconstituted to also include individuals proposed by the opposition parties, this instilled a level of legitimacy in the electoral process and as a result, several Observer Missions (domestic and international) participated in the process. Barkan (2004) reports a figure of over 28, 000 observers. A confluence of all these factors lent a lot of credibility to the conduct of the elections, and the elections were judged to have been free and fair. There was also the avoidance of violence, which had become a common occurrence in the Kenyan elections. It is important to remember that Moi had in the previous elections used violence to successfully manipulate the outcomes.

The failure of the Ufungamano Initiative to deliver an acceptable draft constitution highlighted the shortcoming of the social movements and their ability to effect positive change, in this case electoral reforms. Social movements, like political parties are largely driven by the interest of the elites, who are the leaders and their ability to achieve consensus. Mosca and Michels in their “Iron Law of Oligarchy” thesis of 1915, argued that oligarchic tendencies is almost an inevitable occurrence in any society, however, democratic a society could be at the start. This renders the practice of true democracy almost impractical. Michels (1915; 1966) observed this phenomenon during his time serving as a young activist in the Socialist Party in Germany.

### **3.4 Electoral Reforms after the Disputed 2007 Elections**

The period after the 2007/ 2008 general elections has produced the most far-reaching electoral reforms to date in Kenya. This election was preceded by the failed 2005 referendum on the proposed draft constitution. Politicians, especially those in the opposition used the referendum to mobilise their ethnic bases against the incumbent NARC regime. This flared up ethnic rivalry, a development that would ultimately culminate into the 2007/ 2008 post-election violence. The failure of the NARC government to deliver a new constitution, and address long-standing issues of land reforms, unemployment, poverty, reform the institutions, found a lot of reverberation during the campaigns, especially among the opposition politicians. The opposition politicians, most notably Raila Odinga, William Ruto and Musalia Mudavadi used the failure of the Kibaki regime to tackle the aforementioned issues to organise and build a broad-based coalition that would later challenge the incumbent regime of Mwai Kibaki at the 2007 general elections.

But even before the 2007 general elections were held, the irregular appointment of the Electoral Commissioners, cast a shadow of doubt on the impartiality of the electoral agency, the Electoral Commission of Kenya (ECK) and its ability to preside over a free, fair and transparent elections. The opposition, Orange Democratic Movement (ODM) after being bolstered by their strong showing in the referendum in which they beat NARC by 58 to 42 percent (Gibson and Long, 2009), made a case that only rigging could prevent them from ascending to State House.

The aforementioned point thus, was tested on the general election day in 2007 where, whilst voting, counting and announcement especially for parliamentary elections, were said to have passed smoothly, the counting for presidential vote was contested. There was near unanimous agreement among both the domestic and international observers that vote counting was flawed (Gibson and Long, 2009).

Consequently, the ECK's inability to uphold confidence in the vote produced widespread protest and violence. During December 2007 to February 2008, Kenya experienced unprecedented levels of post-election aggression in its modern history. There were battles between government officers and ODM supporters, and between various ethnic communities,

particularly over longstanding land disputes<sup>1</sup>. In the end, violence left more than 1500 dead and more than 600, 000 people displaced (Kriegler, 2008)<sup>2</sup>.

However, the events of the 2007 general elections provided an *abertura* (window of opportunity), to effect new changes to Kenya's legal and institutional architecture. This window opening came with the signing of a peace agreement between the Party of National Unity (PNU) and Orange Democratic Movement (ODM), following a 41 day mediation period guided by The Panel of Eminent African Personalities, Chaired by the former UN Secretary-General, H.E Kofi Annan. The agreement led to the signing of *Agreement on the Principles of Partnership of the Coalition Government*, which provided that no party could govern without the other and the National Accord and Reconciliation Act of 2008<sup>3</sup>.

Mediation agreement in effect resulted into the formation of two main commissions; the Independent Review Committee (IREC) and the Commission of Inquiry on Post-Election Violence (CIPEV). The latter Commission was headed by Justice Philip Waki, investigated the facts and surrounding circumstances related to the violence that followed the elections and made recommendations to prevent any recurrence of the same in future. More relevant to this thesis, is the IREC, which investigated all aspects of the 2007 presidential elections and made findings and recommendations to improve the electoral process. Kriegler Commission reported institutional breakdown in EMBs, and fundamental weakness in the political culture. Against this backdrop, IREC thus recommended fundamental review of the legal framework on electoral procedures, EMB, appointment of the commissioners, functional efficiency among many other recommendations (Kriegler, 2008). The IREC recommendations, taken together with the provisions of Agenda 4, especially on constitutional review, can be said to have provided the ground for the new electoral reforms in Kenya. The 2013 general elections, and

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<sup>1</sup> For reports on the violence, see Human Rights Watch (2008) and International Crisis Group (2008); on violence and the land question, see Anderson and Lochery (2008).

<sup>2</sup> Omaga (2008). The exact numbers of those killed in the violence are in dispute. The figures range from 621 according to the police to 1020 according to medical officials. Human rights organisations allege that an even greater number died.

<sup>3</sup> National Accord and Reconciliation Act No. 4 of 2008. Provided for the position of the Prime Minister of the Government of Kenya, with authority to coordinate and supervise the executions of the functions and affairs of the government.



now the most recent 2017 general elections were staged against the backdrop of a new EMB, a new Supreme Court, and new constitutional architecture among other recent innovations.

### **3.5 Conclusion**

In conclusion thus, this chapter identified three contrasting periods in Kenya's electoral reform journey: the period stretching from 1963 to 1991; 1991 to 2007; and the post 2007 period. The 1963 to 1991 period mainly witnessed the entrenchment of one-party system through constitutional engineering. This move frustrated the electoral reform process, and thus very little strides was made towards reforming Kenya's politics. Then the repeal of Section 2A in 1991 reintroduced multi-party politics in Kenya. Thus, the period from 1991 to 2007 saw the era of minimum electoral reform that at least minimally levelled the political playing field. In the post -2007 general elections, Kenya has witnessed tremendous transformation in various spheres, ranging from institutional building, to political reforms, to economic transformation. However, the question of whether these improvements have generally resulted into a more stability and deepened democracy, remains to be seen. For instance, the much heralded digitisation of the Kenya's electoral architecture, has brought new threats than opportunity to Kenya's democratic consolidation process, as can be attested by the deliberations in the 2013 Supreme Court case, Raila Odinga versus IEBC and 3 others, and the 2017 Supreme Court nullification of presidential election results.

## **CHAPTER FOUR**

### **ELECTORAL REFORMS AND DEMOCRATIC CONSOLIDATION IN KENYA**

#### **4.1 Introduction**

The core subjects of this chapter are the contents related to the key aspects of Kenya's electoral reforms that occurred between the periods 1997 up to 2017. This will entail the analysis of the impacts of all these new electoral mechanisms and arrangements on the process of democratic consolidation. The primary and secondary data that guides the analysis in this study, especially on key electoral reforms emanates from respondents views and perceptions drawn from the political parties, CSOs, voters, IEBC, ORPP, and scholars (experts). For secondary sources, commission of inquiry reports such as the Kriegler report (2008), reports from domestic and international observers, books, journal articles among others provided epitome for analysis. This chapter thus specifically analyses the impact of the new electoral laws, electoral technology and political party institutionalization on democracy in Kenya.

Part I outlines the introduction. Part II, examines the electoral laws instituted and their impacts on the democracy transition in Kenya. Then Part III evaluates the role of technology in enhancing efficiency and effectiveness in voter registration and results management. Then, part IV deals with ramifications of political party institutionalization on democracy in Kenya. Part V looks at the challenges and remedies to the Kenya's democratic consolidation process. Then, the conclusion section caps the chapter.

#### **4.2 Election Laws and Democratic Consolidation in Kenya.**

Laws are important as they act as a buffer against the fallibility of human beings. Indeed, James Madison, while writing in the Federalist Paper no. 51 in 1788, observed that if men were angels, no Government would be necessary (Federalist, no. 51). It is in this regard that Kenya has over the years reviewed its laws to render its politics free, fair and competitive.

The journey of electoral reforms goes hand in hand with that of constitutional and politics of regime change in Kenya. Accordingly, the period stretching all the way from the independence constitution of 1963 to the promulgation of the new 2010 constitution defines the context in which electoral reforms have taken place. The introduction of multi-party politics after the amendment of section 2A in 1992 was a constitutional move that allowed for the entry of competitive politics in the country. It transformed the state from a single party to a multi-party

democracy, and this marked an important electoral reform aimed at transforming the nature of Kenya's politics.

Since 1997, there has been tremendous transformation in the outlook of the institutions of governance in Kenya, partly as a result of the progressive laws that have been instituted. The rules governing electoral process have marked a new context, new environment, new opportunities and new constraint for political mobilization, political participation, as well as political competition. However, as will be demonstrated in this section shortly, the improved intentions on paper didn't always translate into improved implementation in practice, or in improvements in the quality of the elections, thus quality of democracy. In the period, covered by this thesis, two phases of election law reform can be identified; between 1997 to 2007 and post -2007. This segmentation is owed to the following factors; nature, scope and impact of the laws on democracy in Kenya.

In both the 1997 and 2002 general elections, the constitutional reforms that preceded the elections did not excite most of the actors. A section of Opposition leaders criticized the reforms for not being far reaching enough to facilitate a credible vote. This cynicism was informed partly by the dismal performance of the Electoral Commission in 1992, and the government's ability to use provincial administration to make results go their way as it had done in the previous elections such as that of 1988 where the provincial administration was used to execute the much maligned *mlolongo* voting (queue voting).

The 1997 general elections was conducted against the backdrop of a "piece-meal" reform package, the IPPG minimum reform package. The IPPG reforms did not entail comprehensive review of the constitution that members of the NCEC had demanded. This is because the agreement was achieved late, thereby preventing passage of sweeping changes to the constitution. Key, among the reforms were; increase in the number of the Electoral Commissioners to 20 to accommodate greater Opposition party representation, and increased media access to the opposition (Steeves, 1999). These reforms, to quote from IEBC legal officer, "helped to level the playing field, thereby helping the electoral reform agenda stay on course." However, the extents to which the playing field was levelled remained a vexing question to answer.

The dissatisfaction with the electoral reforms played out in the 1997 elections, where in the presidential race, President Moi's margin of victory over his nearest rival, Mwai Kibaki of the

Democratic Party, was less than 10 per cent, with the latter having obtained majority votes in two provinces. In Central Province, Mwai Kibaki obtained almost 90% of the 49% votes cast compared to Daniel Arap Moi's 5.6 %, while in Nairobi he obtained slightly over 43 per cent of the votes compared to Daniel Arap Moi's 20 %. After the announcement of the results, Mwai Kibaki lodged a petition at the High Court challenging the election results, citing massive irregularities in the electoral process. But like in 1992 elections, nothing much had changed with the independence of the courts, and so Kibaki would not succeed through the court route. Also, at the same time, KANU formed parliamentary alliances with most of the other opposition parties, including FORD Kenya, the National Development Party (NDP) and the Kenya Social Congress. This was critical in subduing any effective opposition DP would engage in in parliament.

The study notes that in both 1997 and 2002, the absence of a clear legal and constitutional framework rendered doubtful much of succession planning. Both Moi and Kibaki administrations exploited such constitutional shortfalls to shift the tide in their favour. Both Moi and Kibaki regimes used a combination of manipulation and coercion to control aspects of the electoral process that includes election timetables, campaign period timing and even setting the pace and direction of the process<sup>4</sup>. This had the net effect of opposition parties threatening election boycott, and calling their supporters to go to the streets, thereby raising the political temperatures, an event that amplifies the chances of occurrence of electoral conflict, given the fragile nature of Kenya's political system. Supporters of opposition politicians go to the streets to protest perceived pre-planned election rigging by incumbent administrations.

The combination of both legal loopholes and lack of constitutionalism can thus be said to have greatly hampered free, fair electoral contests in both 1997 and 2002. Nasongo (1994) argued that for any election to be said to have passed the reality test, then issues revolving around the legal framework, nature and structure of political organizations, structure of election management, and nature and structure of the electorate must first be addressed, otherwise trying to sidestep any of these issues would be a red herring!

Further, challenges from the above period highlight that the interplay between the use of state machinery and elite power to manipulate the electoral processes during electioneering periods

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<sup>4</sup> Singo et al., (2009). Have argued that various Kenyan presidents have used the secret weapon to prorogue and dissolve Parliament to a monumental personal gain.

remains protracted. In line with this, Oyugi's (1997) argument on minimalist criteria (one man, one vote, secrecy of the ballot, free competition) or attributes for open competition in a political process suffice. The study period suggests that there existed a variation in space and time of critical democratic ingredients that satisfies election process to be free and fair.

Nonetheless, numerous efforts made by the opposition and the government between 1997 to 2002 towards enhancing and promoting the minimal criteria for democracy faced restrictions from the incumbent regime. For example, efforts by the regime to disenfranchise over two million potential voter by denying them national identity cards in opposition areas was one area of concern in the lead up to the 2002 general elections. This thus meant that calls for the restoration of multi-partyism were not accompanied by relevant changes in electoral law(s) that would help render elections freer.

Similarly, the study also established that despite the existence of the Electoral Code of Conduct, in both 1997, 2002 and even 2007 elections, the ECK either lacked competent leadership to ensure compliance with these laws, or selectively applied them, or altogether neglected applying the laws. This view was echoed by an anonymous ODM official who was interviewed as part of the study. He stated as follows;

“ECK demonstrated a lot of incompetence in the way it both run the elections and applied electoral laws. ECK for most part, was an extension of the executive wing of government, and most of its actions reflected the whims of the administration. Against such a background, it was difficult for the ECK to ensure transparency in the electoral processes.”<sup>5</sup>

In addition, Singo et al., (2009) have reinforced this view in their study of electoral processes in Kenya. Their study found that the ECK mostly used its legal powers to ensure compliance with the Electoral Code of Conduct, against such background electoral malpractices such as violence, bribery flourished unabated. Also, one of the IEBC Managers from the Legal department interviewed for the study, admitted that for the most part, the ECK demonstrated inability to apply existing laws to reign in on non-compliant candidates, party officials among other groups. This administrative incapacity of the ECK was one area also highlighted in the Kriegler report (2008) for reform so that electoral procedures and even operational procedures are properly guided by a documented regulatory framework.

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<sup>5</sup> Oral Interview of an ODM Official (Interviewee No. 1) at ODM Hq. in Nairobi, March 2018.

In the post -2007 elections era, the study notes that a lot of changes have been effected in the Kenya's legal, constitutional, policy and institutional architecture. These changes promises a bright future for Kenya's democratic consolidation. Some of the significant laws instituted include: the Constitution of Kenya of 2010; the Independent Electoral and Boundaries Commission (IEBC) Act; the Elections Act, 2011; the Political Parties Act. These new laws revolutionized Kenya's political landscape especially with regard to the process and conduct of elections.

These far-reaching changes in the constitution with regard to the conduct of elections were as a result of recommendations of the Kriegler Commission Report of 2009. The report unearthed fundamental weaknesses in Kenya's political culture, institutional breakdown, and thus made strong recommendations with regard to the review of the legal and constitutional framework on electoral procedures, the Electoral Management Body, the composition and appointment of commissioners, the operational procedures, funding modalities amongst others<sup>6</sup>.

The Kriegler Commission Report grounded some of its recommendations from the Annan-led mediation team which had emphasized the need for a new constitution to implement reforms that would help address the relapse of future political violence. As a result a peaceful referendum was held on August 2010, and a new constitution that provided a platform for restructuring state power structure was passed. The, adoption of the 2010 constitution marked a significant achievement in the country's history of political and constitution-making. However, the principal test ahead lied in its implementation as the new constitution was not an end in itself but a means to realizing electoral democracy in Kenya.

Particularly, the challenge to implementing the new constitution was that the political culture in the post-2010 period was yet to change. The culture of bad governance and failure to embed accountability and the rule of law in society was highly entrenched. Secondly, there existed the forces against change, especially by those actors who perceived implementing the Constitution as a zero-sum gain. This explains the virulent opposition to the new constitution by sections of the clergy and powerful politicians, like William Ruto, then the Member of Parliament of Eldoret North. Opposition to the new constitution during the referendum, especially by most politicians was largely informed by self-interest rather than for ideological reasons. This latter

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<sup>6</sup> Kriegler Commission report (2009). The report noted that Kenya needed to fundamentally clean its institutions and processes to improve the credibility of the electoral process.

observation partly explains why, out of the 24 mandatory Bills that needed to be passed within the first one year after the coming into force of the new constitution, 15 Bills were passed by parliament within a week. This rush and quick passing of these Bills raised concern about their quality and whether they would effectively aid in operationalizing the new constitution.

The study notes that the recent era (post 2010 period - 2017), occasioned by the enactment of new laws and clear procedures have empowered the electoral body, IEBC, to be more independent, though the body still ranks low in terms of institutional independence. The Interim Independent Electoral Commission (IIEC) successfully staged the 2010 constitutional referendum thereby boosting public confidence in the electoral body's ability to successfully conduct the 2013 elections. The analysis of the 2013 pre-election period, for instance, suggested numerous efforts to deal with election irregularities which had been put in place by the electoral management body. To quote an official of the ODM party, "*Unlike in the previous elections, the newly established IEBC had for example outlined modalities and mechanisms for dealing with the electoral related dispute.*"<sup>7</sup>

Successes scored by the IIEC in the 2010 referendum was attributed to both competent leadership and incremental changes that the Commission made towards the period of holding the referendum. However, as was the case with ECK that conducted the 2005 referendum successfully, but later failed to deliver a legitimate process in 2007, IEBC (successor to IIEC) was criticized in many quarters for having staged a shambolic vote, particularly at the presidential level. The Opposition alleged monumental malpractices, a view that was reinforced by massive technology failures at both stages of voter verification and results transmission. For instance, according to an ODM (sentiments confirmed by an Official of the Wiper-Party) official,

"The failure of Biometric Voter Registration (BVR) kit raised many concerns over their credibility to ensure free and fair elections. This consequently eroded public trust in the final tally delivered by the IEBC."<sup>8</sup>

To make their case, the opposition Coalition for Reform and Democracy (CORD) filed a case against the IEBC, Odinga Vs IEBC and three others. The case was heard by a bench of 6 Supreme Court Justices, given that one Justice was serving suspension. After few days of

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<sup>7</sup> Oral Interview of an ODM Official (Interviewee No. 1) at ODM Hq. in Nairobi, 18 March 2018.

<sup>8</sup> Oral Interview of an ODM Official (Interviewee No. 2) at ODM Hq. in Nairobi, 6 April 2018.

deliberations, the court up-held the victory of Uhuru Kenyatta. This decision has been seen by many as sacrificing justice at the altar of stability<sup>9</sup>.

For the Supreme Court, another of the new institutions created under the new constitution, the ruling threatened its infallibility. The ruling contributed to eroding trust in the institution, and thus consequently informing a negative view of the Court by a section of the populace. An official of Transparency International-Kenya reinforced this view when he noted that, “*Kenya’s institutions have a similar attribute...that they exist to serve interests of the political class, and not the common wananchi (ordinary citizens).*”<sup>10</sup> This view has also been echoed by Wolfrom (2015) who contended that it was a big shame for the courts to fail to prosecute massive electoral malpractices such as vote rigging, intimidation of voter, multiple registration among other electoral offences. The 2013 elections in her view once again demonstrated that institutional reforms are necessary, but not a sufficient condition for legitimising the electoral process. She notes further that political will is much more important for Kenya to realise its democratic aspirations (Wolfrom, 2015).

To add to the aforementioned, as confidence building measure, the Political Parties Act, 2011 created the office of Political Parties Liaison Committees (PPLC), which occurs both at national and county levels respectively. According to IIDEA (2012), “the organisation of elections necessarily requires the EMB to be in contact with political parties through their organisational structure, their candidates, agents, and other party volunteers.”

The PPLC has served as a platform for fostering constructive dialogue between the registrar, IEBC and political parties. According to an official of the Office of the Registrar of Political Parties (ORPP):

“PPLC has been a useful platform that has promoted consensus building between the ORPP, IEBC and political parties. The frequent meetings with stakeholders, particularly IEBC has resulted into subsidence of suspicion in the activities of the IEBC. However, challenges still abound as large parties tend to follow their own channels, disregarding the role of PPLC.”<sup>11</sup>

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<sup>9</sup> Cheeseman, N., Lynch, G., & Willis, J. (2014). The authors argue that the ruling risk what they call “negative peace” raising stakes for feelings of marginalization and exclusion by some communities. This have the potential consequence of stirring instability in the country.

<sup>10</sup> Oral Interview of Interviewee No. 4 at TI-Kenya Hq. in Nairobi 15 April 2018.

<sup>11</sup> Oral Interview of Interviewee No. 5 at ORPP Hq. in Westlands May 2018.



PPLC, undeniably an innovative mechanism, allowed political parties in Kenya to come together to discuss election preparations with the IEBC, but it played and still plays a purely advisory role. This is classical case of elites building consensus on rules of the electoral game. Donors and international community members also attended meetings organized by PPLC.

In addition, the study found that despite the passage of the Campaign Finance Act (which act spells out the amount of money to be spent by a candidate during elections) into law in 2014, the IEBC is toothless in implementing it. An IEBC official confirmed that as a consequence of the failure to operationalize this Act “the Commission lacked the capability to bring to book any offenders against this Act.” Most politicians try to act above the law, a practice that really undermines the IEBC’s mandate. Vote buying and intimidation still remains pervasive in the Kenyan political landscape partly due to lack of regulation of campaign money.

In conclusion thus, this section demonstrates that legal, policy and institutional reforms have only contributed to partial reform of the electoral process in Kenya, which is insufficient for positive-sum political competition and even the significance of an individual vote. However, the much done so far in terms of the electoral laws enacted and implemented is a step in the right direction. But as they say, there is still room for improvement, especially in the journey towards consolidating Kenya’s nascent democracy.

### **4.3 Electoral Technology and Democratic Consolidation in Kenya**

A significant development in the electoral process is the integration of technology in both voter registration and verification as well as results transmission management. Kenya has since adopted both and it was expected that it would render the systems simple, accurate verifiable, transparent and even accountable.

In the course of Kenya’s history, voter registration has been a source of huge contestation, though remains one of the core functions of the IEBC and its predecessor body ECK. The voter registration exercise for a long time remained costly in terms of both time and resources (IIDEA, 2006). This is especially so given that voter registration is generally a low benefit exercise, only necessitated by the civic virtue considerations. Despite its relatively low value, Almond and Verba (1963) considered voting in elections as a primary civic virtue that can be used to distinguish democracies. Thus, in the context of Kenya, voter registration, a first step towards participating in the elections has often been manipulated by different regimes to gain an upper hand in the electoral contests.

Before 2010, Moi's regime had used the voter registration process to lock out potential voters from opposition strongholds. For instance, according to Brown (2001), in both 1992 and 1997, between 0.5 million to 3 million potential voters were not issued with national identification cards. This prevented them from exercising their civic duty of voting, thus denying opposition parties a much-needed voting base to overcome KANU. Buying of identification cards is another strategy that KANU used in 1997, and has continued to be used up to now especially by politicians, shrewd at by-passing the Electoral Code of Conduct. It is also, important to point out that such practices however, unethical they appear are not only restricted to Kenya. Alvarez and Hall (2010) have argued that such practices also characterised voting in the early years of American history. Voters received gratuity from candidates to vote in a specific way, this resulted into the loss of secrecy. Sometimes, voters could also be coerced through threat of use of physical violence or force on them.

The situation however, changed in 2010 with the integration of technology as part of Kenya's electoral architecture. Integration of technology in voter registration and verification and results management has been noted as a significant step towards eliminating errors in the register and boosting confidence among all stakeholders about IEBC activities. For instance, the biometric registration of voters prior to the 2013 general elections was meant to eliminate chances of double or multiple registration, which for a long time characterised the ECK. According to an IEBC official from the Directorate of Voter Education, "*manual registration had both its strengths and weaknesses, it was relatively cheap to carry out on one hand, and, on the other hand susceptible to manipulation.*"<sup>12</sup> This latter argument informed the Commission's decision to digitize the register and the whole process of voter registration." Technology here represented a trade-off with the much criticised manual system that was severely blamed for contributing to the 2007 electoral process failure. The bar chart below shows perceptions of respondents to various aspects of electoral technology adopted after 2010.

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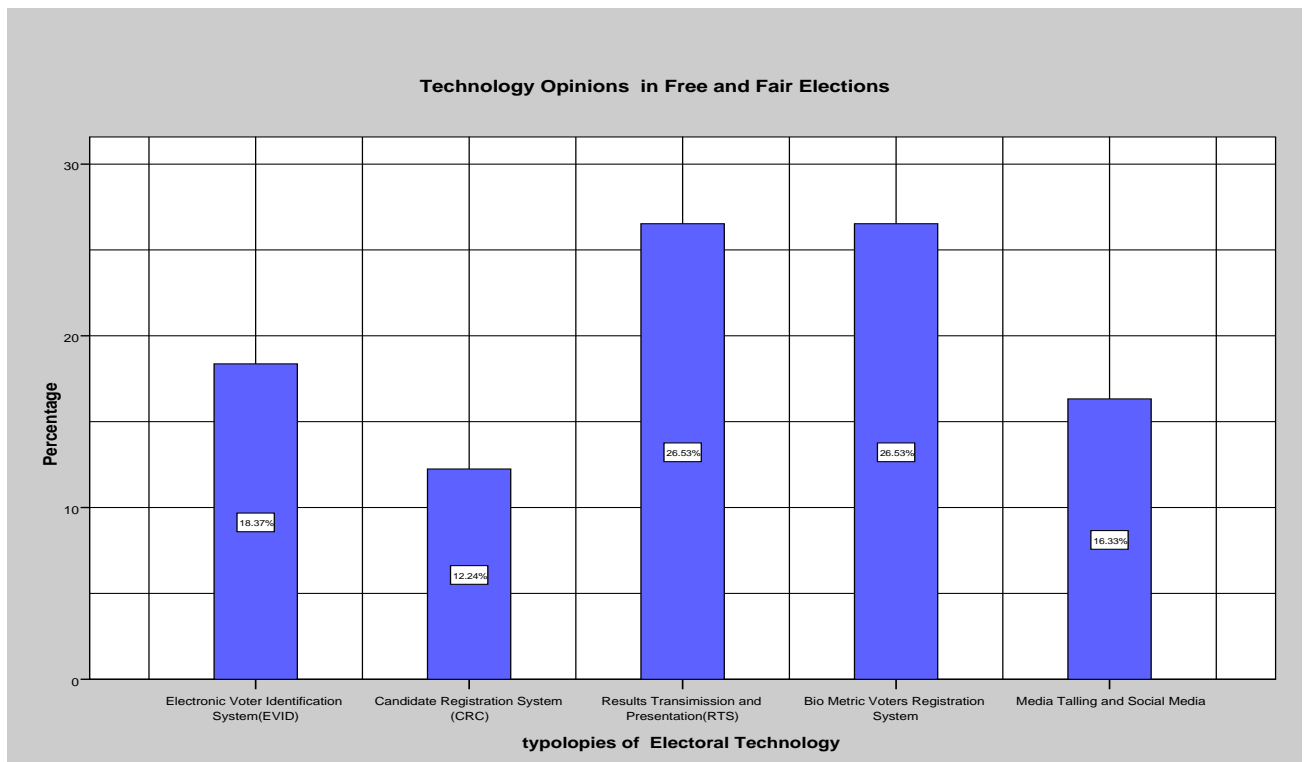
<sup>12</sup> Oral Interview of Interviewee No. 6 at IEBC Hq. in Nairobi, 6 April 2018.

**Table 2: Technology Opinions in a Free and Fair Elections**

		<b>Tech</b>			
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Electronic Voter Identification System(EVID)	9	18.4	18.4	18.4
	Candidate Registration System(CRC)	6	12.2	12.2	30.6
	Results Transimission and Presentation(RTS)	13	26.5	26.5	57.1
	Bio Metric Voters Registration System	13	26.5	26.5	83.7
	Media Talling and Social Media	8	16.3	16.3	100.0
	Total	49	100.0	100.0	

**Source:** Author (2019).

**Figure 2: Technology Opinions in Free and Fair Elections**



**Source:** Author (2019).

The bar chart above depicts respondents' opinions on the application of electoral technology in the wake of post 2010 election environment in Kenya. In line with new provisions stipulated by the electoral law anchored in the Political Parties Act of 2011, a number of key technological features were noted to have directly impacted the people's opinion towards electoral fairness through enhanced transparency and accountability. Accordingly, 26% of respondents felt that the establishment of Biometric Voter Registration system (BVR) and the operationalization of the Results Transmission and Presentation system (RTP) recorded high confidence due to what many termed as electoral security or vote security. This perception can be tied to resultant credibility of electoral data that became less vulnerable to manipulation and compromise as compared to the hitherto use of manual voters register.

The operationalization of the Electronic Voter Identification System (EVID) attained 18% opinion rate among respondents who argued that it was a game changer, especially in cleaning and verifying voters' identification unlike the manual register. At the very least the IEBC's autonomy and the granting of access to media tallying during the voting day recorded a 16 % opinion rate. This allowed for live media transmission of electoral results, a process that boosted public confidence and reduced suspicion incidents that were associated with results

delay, especially in the period before 2010. In the same thread, availability and easy access to information via the use of various smart electronic gadgets by both party agents and voters at the polling stations reinforced the verification process of the electoral outcome especially during the voting day. This went a long way in boosting public confidence in the closing stages of the elections. Further, the Candidates Registration System (CRS) allowed for a seamless (one-stop system of registration) process of tracking candidates registration. This latter attribute of electoral technology simplified the registration of multiple candidates for different elective positions.

However, some of the above positive perceptions were challenged during the 2013 elections with the failure of technology in both voter identification and results transmission that imperilled credibility in the vote. The events surrounding the 2013 and 2017 general elections respectively underscored both the perils and promises of digital democracy. Electronic voting falls under the rubric of Ulrich Beck's *risk society*. Where the world is a laboratory for conducting experiments, but without the benefit of control, an option available to scientists conducting experiments in scientific laboratories (Beck, 1992). During the 2013 general elections, Cheeseman et al., (2014) notes that the process fell apart as soon as it began. The Electronic Voter Identification (EVID) kit deployed to electronically identify voters failed either to identify or work in many polling stations across the country, 55.1 percent of polling stations<sup>13</sup>. The massive failures of voter identification kits was later compounded by failure of the mobile results transmission system. The mobile results transmission system was just intended to be provisional, its failure though imperilled the confidence of the opposition coalition CORD that also contested the elections.

Further, anomalies in the voters register during the March 2013 general elections also raised eyebrows on whether the adopted technology would really boost the transparency and credibility of the vote. The provisional register as at December 18, 2012 contained 14,337,399 voters, while the principal register as of February 18, 2013 had 14,352,545 voters. Further, the political parties register on March 2013 had 14,336,842 voters, while the results register on March 9, 2013 had 14,352,536 voters. These anomalies, though not very huge can sow loss of public confidence in a country like Kenya where elections are viewed as a zero-sum game.

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<sup>13</sup> Election Observer Group (ELOG), election observation report published in 2013.

The failure of technology in the 2013 and 2017 general elections were reminiscent of the 2007 events where the ECK Chairperson could not implicitly name the clear victor of the presidential contest. In 2007, the Kibaki administration and the ECK had declined an offer from the International Foundation for Election Systems (IFES) to install a computer program that would have enabled election officials submit constituency level results electronically to the tallying centre in Nairobi. The idea of going electronic was aimed at promoting transparency, by forestalling any manipulation of election results. By declining the offer, the electoral agency confounded many as it provided a basis for suspicion by stakeholders in that particular election.

The study also noted an incremental rise in the percentage of voter turn-out since the re-introduction of multiparty politics in 1992. This rise in the percentage of voter participation against the number of registered voters is consistent with Robert Erikson’s (1981) argument that turnouts are extremely high among registered voters, and that this also applies to unlikely registrants when they do register. However, this argument mainly applies when all factors are held constant. High voter registration do not automatically translate into high voter turnout. The tables below shows voter turn-out figures for both presidential and parliamentary elections since 1992 up to 2017.

**Table 3: Presidential Elections in Kenya**

Year	Voter Turnout	Total vote	Registration	VAP Turnout	Voting age population	Population	Invalid votes
2017	79.49 %	15,590,236	19,611,423	61.44 %	25,374,082	47,615,739	2.62 %
2013	85.69 %	12,330,028	14,388,781	55.60 %	22,177,678	43,013,341	0.88 %
2007	69.09 %	9,877,028	14,296,180	54.49 %	18,126,573	36,913,721	0.90 %
2002	57.18 %	5,975,910	10,451,150	38.51 %	15,517,826	31,138,735	1.90 %
1997	83.86 %	4,273,595	5,095,850	33.74 %	12,664,960	28,784,000	0.70 %
1992	66.81 %	5,248,596	7,855,880	46.41 %	11,308,000	25,700,000	

**Source:** Institute for Democracy and Electoral Assistance (IIDEA, 2017)

**Table 4: Parliamentary Elections in Kenya**

Year	Voter Turnout	Total vote	Registration	VAP Turnout	Voting age population	Population	Invalid votes
2017	77.37 %	15,164,826	19,601,502	59.77 %	25,374,082	47,615,739	1.95 %
2013	85.75 %	12,194,562	14,388,781	54.99 %	22,177,678	43,013,341	0.88 %
2007	69.09 %	9,877,028	14,296,180	54.49 %	18,126,573	36,913,721	1.10 %
2002	57.18 %	5,976,205	10,451,150	38.51 %	15,517,826	31,138,735	1.70 %
1997	65.45 %	5,910,580	9,030,092	46.67 %	12,664,960	28,784,000	1.60 %
1992	58.84 %	4,622,764	7,855,880	40.88 %	11,308,000	25,700,000	

**Source:** Institute for Democracy and Electoral Assistance (IIDEA, 2017).

The above tables, for both presidential and parliamentary elections respectively show that an increase in the number of registered voters during the period covered by the study was partly as a result of electoral reforms, and partly as a result of ethnic alliances, ethnic groups wanted to ensure their respective candidate carry the day. These reasons are in sharp contrast to prevailing reasons in other democracies, especially advanced democracies where education levels and social-economic status determine voter turn-out.

The post 2010 period, in particular, was characterised by integration of technology into the electoral architecture (Biometric Voter Registration System, BVR and Electronic Voter Identification System, EVID). This is credited with improving the accuracy of the voters register as well as boosting the confidence of electorates in the significance of their vote. The above table shows that there was significant increase in the number of voters in the 2013 elections for both presidential (16%) as well as parliamentary (16%) polls, compared to the previous election in 2007. The 2013 picture contrasts with the situation in 2017 elections, where the voters' numbers dipped partly because of the weak confidence in the Biometric Voter Registration technology as well as the Results Transmission and Presentation System (RTS) the IEBC had put in place.

In conclusion thus, whilst integration of technology in Kenya's electoral architecture is highly commendable, a lot of safety nets still need to be put in place to insulate the electoral process from manipulation. That said, it is now easier to tell the total number of voters in the roll with technology in place. Further, technology has produced more openness and accountability in results transmission and management and also eliminated unnecessary costs. The 2017 Supreme Court voiding of the Presidential elections results was, for instance, premised around

anomalies generated by the use of technology. This would go undetected, difficult to prove through the manual system.

#### **4.4 Political Party Institutionalization and Democratic Consolidation in Kenya**

Political parties have been defined in different ways by different scholars. Joseph Schumpeter (1950) noted that a party is a group whose members propose to act in concert in the competitive struggle for power. Schumpeter's notion borrows from an earlier definition postulated by Edmund Burke in 1770, who noted that a political party is a body of men united upon some particular principle.

But as a working definition, political parties can be conceptualized as formal organizations formed with the intention of acquiring or maintaining political power. Political parties are considered as cornerstones of any functional democratic order. This is because they provide an avenue for political mobilization, political participation, political competition, intended to consolidate or deepen a democracy. Other functions of political parties include; political socialization, representation function, promotion of socio-economic development, and policy-making function.

Diamond (1994) has argued that while there are many requisites for democratic consolidation, civil society and institutionalized parties are necessary for a healthy democracy. Kenya has in the recent had relatively strong opposition parties, whose main challenges have been insufficient funding, personalization of party leadership and fragmentation, a trend that replicates across many African states. Elections offer political parties a chance to realize their political aspirations, much as electoral processes cannot proceed on without them.

Before the repeal of Section 2(A) in 1991 that ushered in the multi-party era, Kenya had long been under a single-party dictatorship. Widner (1993) writes that unlike Jomo Kenyatta, who had used mainly the provincial administration to maintain firm-hold on power, Moi made Kenya a single party-state (KANU and the state became one side of the same coin), stretching from 1982 to early 1990s to eliminate any potential challenge during elections, especially presidential. Moi established this system through proscribing/limiting activities of ethnic welfare societies, and establishment of internal disciplinary committee within KANU. The events before 1991 thus, made Kenya's politics opaque, personality driven and not based on predictable institutional standards and procedures, which is normally the case under multi-party systems. After 1991, new political parties were formed, but their effectiveness was hampered



by continued intimidation by Moi regime, as well as other internal party challenges as personalization of party leadership.

In the post 2010 period, a lot of steps have been taken to streamline, strengthen and harmonize political party operations. The need for this became particularly more pressing after the bungled elections of 2007. Jonyo (2013) contends that the challenges of personalization of leadership, lack of fair recruitment and democratic internal nomination necessitated the need for injecting some order to the management of political parties in Kenya.

Some of the above concerns have been addressed through operationalization of the Political Parties Act of 2011. The Act entails progressive provisions pertinent to the organization and management of political parties. For instance, registration of political parties is the mandate of the Registrar of Political Parties (ORPP). Also, the Registrar is responsible for arbitration of disputes between members of a political party. Further, the Act establishes the Political Parties Disputes Tribunal, which is charged with determining with finality inter-party and intra-party disputes, such as disputes arising between coalition partners, and appeals from decisions rendered by the Registrar of political parties.

The Act also proscribes party formation (political banding) based on ethnicity, age, tribal, racial, gender, linguistic, regional, corporatist, professional or religious basis or one which seeks to engage in propaganda based on any other matters that may rivet the nation into factions. This provision is very progressive in building a cohesive society through promotion of formation of political parties that have national appeal.

Further, the Act restricts membership to just a single party at any given time. Political parties must thus establish structures for recruiting members and even for expelling those found contravening the norms or rules of the party they are subscribed. But, expulsion should only be done after a member is accorded a fair hearing. Also, there is provision on deregistration of a political party when it contravenes the Act.

To buttress the role of Political Parties Act in regulating activities of political parties in Kenya, is the Election Act no 24 of 2011. This Act has provisions that lays out stringent rules to allow for fair, free, accountable and transparent party nominations. Further, the Act introduced a clause which provided that one had to hold membership of a political party at least for three months in advance in order to qualify for nomination on that party's ticket as a candidate for

elections. This provision was however, flouted by most parties during the candidates nomination exercise (Jonjo, 2013).

Then, there is the Political Parties Liaison Committee at the National and County Level established through the Political Parties Act, 2011 Sec (38). The key function of the Political Parties Liaison Committee is to provide a platform for dialogue between the Registrar, Electoral Commission and political parties. The formation of PPLC followed one of the recommendations made by the Report of the Independent Review Commission (Kriegler report, 2009).

Similarly, prior to the 1997 vote, the IPPG, a body that was akin to the current PPLC acted as a platform for negotiations between the ruling party KANU and the opposition parties. The minimum reforms were thus a by-product of these negotiations. Some of the key agreements from the minimum reforms included the number of the ECK Commissioners was increased to 20 to accommodate the opposition proposals, opposition got more media access, the Chiefs Act was repealed among other agreements. The 1997 pre-election reforms laid ground for the clamour for more reforms, as it witnessed the birthing of the NCEC which would prove instrumental in pushing for more level ground field in the subsequent election that followed, in 2002. The party unity (Narc coalition) achieved in 2002 provided a watershed moment for the country as it marked the first time a presidential candidate for the ruling party, KANU was defeated in a general election.

There have also been measures to enhance intra-party democracy. Political parties now institute measures to promote internal democracy in its operations. In Kenya, there have been steps towards realisation of the same. For instance, during the run-up to the 2007 general elections, the main political parties, ODM, PNU and ODM-Kenya, constituted elections boards to oversee parliamentary and civic nominations. The eligibility criteria set out to candidates varied from one party to another, especially in terms of nomination fees. However, the process with all its shortcomings, was hailed as a progress in the right direction with regard to improving openness and transparency in political party activities. The 2007 open party nomination exercises contrasted with the previous electioneering periods when party tickets were handed to individuals deemed as loyal, or favoured by the party leaders. Further, party primaries were also known to be marred by chaos occasioned by rigging in the previous elections before 2007.

Political parties in Kenya today encourage participation of members in their activities both at the grassroots level and national level respectively. Political Parties Act (Section 17(a)) stipulates this as a right of the member, and it is intended to influence the composition of leaders and policies of government.

However, despite the tremendous progress being made to enhance intra-party democracy in Kenya, the principle of must-win syndrome (a zero-sum game) embraced by a lot of candidates during electioneering periods remains a big challenge that has to be overcome in order to improve openness during party nomination exercises.

Introduction of independent candidates is another important milestone towards institutionalization of political party activities in Kenya. The 2010 Constitution of Kenya introduced an important innovation, that of introducing the possibility of candidates standing for elections on a “no party ticket”. This constitutional innovation has made it now possible for candidates who feel aggrieved from party primaries, or who are non-aligned (to certain ideologies, or other considerations) to contest elections as independents.

In all, the various constitutional innovations to promote the effectiveness of political parties in anchoring Kenya’s nascent democracy is laudable. Particularly, after 2010, there have been very progressive efforts towards the aforementioned end, with the net result being robust political party system. However, this contrasts with most periods before 1997 when party activities, thus influence in the political system was curtailed. The findings further reveal that since democratic consolidation is a developmental process, there is still leg-room in the efforts to enhance the influence of political parties in the process.

#### **4.5 Conclusion**

In conclusion, this section has advanced three main arguments. First, a lot of legal reforms have been implemented to produce a level playing field in Kenya’s politics. Also, there have been institutional reforms as well as policy reforms aimed at realising the same goal. The reforms in question are; reform of the electoral laws, integration of technology and political party institutionalization.

Taken together, the implemented legal, policy and institutional reforms have contributed to the partial reform of the electoral process in Kenya, which is necessary for positive-sum political competition and even the significance of an individual’s vote. The reforms in their wake have

to a larger extent contributed to the democratic consolidation in Kenya in the period covered by the study. This thus should add more impetus to the reform drive so that the pace of reform is sustained. The reform endeavours should not be allowed to pass as a veritable Petri-dish that stimulates the growth and multiplication of dangerous bacteria.

However, the realisation of the above reforms, which are necessary to facilitate the process of democratic consolidation in Kenya have been hampered by a multiplicity of factors. The section below details a discussion on some of these factors, and their possible remedies.

## **4.6 Challenges Confronting Electoral Reform Process in Kenya**

### **4.6.1 Political Culture**

Kenya's historical tale of institutional struggle is a manifestation of a fundamental flaw in the nation's fabric, the political culture. After every cycle of calamitous electoral contest, Kenyan politicians make big promises never to let electoral contest degenerate into full-blown violence. But they rarely follow their promises. This is a pointer to a flaw in Kenya's democratic culture.

Douglas North, a Nobel laureate in economics sciences once posited that when taking a consulting overseas, he would first spend the first six months in a country to absorb its belief systems and its organization and institutional framework before offering his advice. This assertion basically underscores the centrality of societal values and beliefs in the construction of institutions. Institutions are a mirror reflection of the values of a society. Wolfrom (2015) in analysing the ruling of the Supreme Court in the Odinga versus IEBC and three others, noted that without political will, institutional reform is an insufficient condition for guaranteeing legitimate electoral process. Institutions are created to generate order and reduce uncertainty (North, 1991), but this is dependent on the culture of the beneficiaries those institutions are supposed to serve. Rules and their imperfect enforcement is not sufficient for harmony and stability in the society, rather you need to complement them with norms of behaviour. North (1991) indeed observed that majority of the Latin American countries modelled their constitutions after that of the United States constitution. But that was not enough to assure order and predictability of the political processes.

Almond and Verba (1963) in their seminal work, the *Civic Culture*, defined political culture as attitudes toward the political system and its various parts, and attitudes toward the role of the self in the system. They distinguished three typologies of political culture; parochial, subject

and participant. Parochial political culture implies general unawareness about the conduct of government business and public policy. Subject political culture alludes to the fact that the individual is a tool of mobilization of government policies. Participant political culture implies cognitive orientation towards both the inputs and outputs aspects of the system. Majority of the third world economies espouse parochial political culture, where citizens are largely unaware of what is going with regard to statecraft.

Almond and Verba underscored the role played by a participant political culture (allegiant political culture) in stabilising democracy. Thus a stable political system (democratic political system) is conceivable when the political culture is congruent with the political system. A similar view was also propagated by Verba and Pye (1965). Civic culture is thus a cultural map against which the support for democracy is to be built around. A society's civic culture is important determines the kind of institutions set up in place.

The development of political culture is a role of agencies such as the school, family, work place, peer pressure, media and the state. Education exerts the greatest influence, a grey area in Kenya. A large portion of the voters are illiterate and inhabit the rural areas. These group of voters respond more to the ethnic appeal than any other factors. Even though, it is important to note that, ethnic appeal is widespread across all population strata in Kenya as other places in Africa.

Ethnic factionalism continues to rivet Kenya, despite the enormous gains made in the economic and political sectors. Most of the politics oscillate around ethnicity. Policy discussions hardly dominate as the prevailing discourse during campaigns. Ideas are usually linked to those who have said them. This a pointer on the way ethos of informality drives state-society interactions in Kenya. Chabal and Daloz (1999, pp. 15) captured the following in their works *Africa Works: Disorder as a Political Instrument*:

“Hence, the notion that [African] politicians, bureaucrats or military chiefs should be the servants of the state does not make sense. Their political obligations are, first and foremost, to their kith and kin, their clients, their communities, their regions, or even to their religion. All such patrons seek ideally to constitute themselves as ‘Big Men’, controlling as many networks as they can... We are thus led to conclude that, in most African countries, the state is no more than a décor,

a pseudo-Western façade masking the realities of deeply personalized political realities”<sup>14</sup>

The study notes that every country has latent democratic currents. Kenya, because it is a relatively nascent democracy, the process of consolidating or moving towards common shared democratic values still remains elusive. Mature democracies display what Inglehart labels as *self-expressive* values. These includes tolerance, trust, support for equality and a desire to participate in public life (Diamond, 2008). These *self-expressive* values forms the cog upon which society organises its practice of politics among many other issues.

In summary, political culture is an important determinant of the nature of politics in any society. In Kenya, the political culture is not allegiant or even assertive, but parochial. This a problem in most of transitional democracies where democratic gains have in most cases been followed by a period of back-tracking (reversal of democratic gains). For Kenya, how democratic transition is managed in the next few years will shape a lot how citizens and other stakeholders view the political system.

#### **4.6.2 Weak Institutions.**

The success of electoral processes does not stop with the development of legal or institutional arsenals, but the wide-acceptance of the institutions by actors within the political system. Douglas C. North underscored this point by observing that institutions comprise both sets of formal rules, such as institutions, and informal norms of behaviour. Institutions pattern interaction between actors within any political setting. However, limited legitimacy of African institutions has been a contributing factor on their overall performance. Pierre Englebert (2000) has traced this problem to colonial legacy. He argues that the process of colonialism created states that are exogenous to their societies, and thus African states were born lacking legitimacy. As a result, these states are not embedded in the historical context of power dynamics.

Mueller (2011) has provided a detailed analysis on how Kenya came to near full blown implosion in 2007. She argues that the false optimism of analysts that the 2007 polls was going to usher in a democratic transition was borne out of over-focus on formal institutions

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<sup>14</sup> Chabal, P., and Daloz, J. P. (1999). *Africa works: Disorder as Political Instrument*. London: International African Institute.

such as the ECK, the judiciary, among others, at the expense of variables that incentivize the behaviour of actors during political processes.

The history of Kenya is fraught between those pro-reforms and those for status quo; those pro-strengthening institutions, and those in favour of mutilating them to remain in control. Moi, for better part of his rule practised patron-client politics, a practice he carried forward from Kenyatta, who was classified as a *Prince* by Rosberg and Jackson in their influential 1982 works, *Personal Rule in Black Africa: prince, autocrat, prophet and tyrant*. Moi, saw alternative centres of authority as weakening his hold on power, that saw him merge KANU (the ruling party) and the state into one political outfit. This trend continued till 1992, when diversity in the political space was restored. But, even after that KANU continued to dominate Kenyan politics until 2002, when for the first time ever, the ruling party was out of power. During KANU's reign in Kenya, violence almost became entrenched as part of life, Moi often used tribal clashes to rig the vote. Such events saw the slow, but steady erosion of the powers of legitimate institutions such as the ECK, the judiciary, among others. In a nutshell entrenching a powerful executive has the effect of weakening the institutions.

In addition, there generally lacks a culture of constitutionalism across many sub-Saharan African states. The argument is that states can have good laws or institutions, but such laws risk being useless, unless there is an allegiant culture among the populace that promotes respect for the rule of law and that is not antithetical to it. In the context of sub-Saharan Africa, the informal nature of politics has partly contributed to the weakening of bureaucracies/institutions of governance. It is against the above backdrop that Chabal and Daloz regard African political actors as exhibiting weak commitment to bureaucratic norms because these are constantly undercut by the need to service social networks (Chabal and Daloz, 1999). The above “*constitutionalism crisis*” is further fuelled by the culture of corruption prevalent in many developing states. With regard to Kenya, Hope notes that corruption, in the form of petty bribes has penetrated daily lives of the general population (Hope, 2012). This culture can be said to brew dishonesty and wilful subversion of laid down rules and procedures that is common in Kenya.

#### **4. 6.3 Financial Challenges**

Granting financial autonomy to the electoral body was one of the recommendations of the Kriegler Commission report. Kriegler et al., (2008) found that ECK lacked its own budget and

as a result depended continually on Parliament/Treasury to review its budget requests. This often subjected the Commission to external control over its activities. This is because, since politicians are rational actors, they at all times aim at utility maximisation. In this case, the utility or payoff is tilting the political balance and playing field to a politician's favour. Because of this, many policy makers have recommended that the budget of the Commission be placed under the consolidated funds.

In Ghana, this has been the practice. The Ghanaian constitution passed in 1992 guaranteed financial autonomy of the Electoral Commission (EC), its expenditure regarding salaries, allowances, pensions and other emoluments of members of the Commission are charged on the Consolidated Fund. This move has allowed the EC to make its own budget and defend it before a special Parliamentary Committee.

The IEBC like its predecessor, the ECK, still suffers from lack of financial independence. The Commission's budget proposals are subject to approval by both the Treasury and Parliament. According to one official of the Commission:

“IEBC basically depends on the government for most of its funding. This renders the Commission mainly independent on paper as its flow of activities is dependent on both the amount of money government allocates and the time it is allocated. Planning of activities by the Commission is thus, to a greater extent, interfered with by [through] such practices.”<sup>15</sup>

Also, the involvement of parliament in debates to determine the IEBC *budget* offers politicians an avenue to promote partisan interests. This is very typical of African legislatures where “pork barrel politics”<sup>16</sup> still exists despite massive democratic gains on the continent since the restoration of multiparty politics. Whereas legislatures are primary institutions for promoting both vertical and horizontal accountability by rulers to the ruled, in Africa this is quite the opposite. Legislatures insulate the political executive from accountability by the ruled. Many legislatures in Africa still serve the interest of the ruling elite, signifying a continuation of neo-patrimonial politics that dominated much of Africa in the 1970s, 80s and early 90s.

In addition, limiting the Commission's budget by other arms of government has significantly weakened its ability to augment staff whenever it faces a shortfall. As a result, IEBC face the challenge of under-staffing, something that has been pointed out as a cause for poor

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<sup>15</sup> Oral Interview with an IEBC Official (Interviewee No. 7) at IEBC Hq., Nairobi 15 June 2018.

<sup>16</sup> Barkan et al., (1979). “Pork-barrel” politics implied legislators taking to their constituents' pork (development) from the centre, in exchange for their support (votes).



management of elections by the Commission. It has continued to rely on casuals, or non-permanent staff to help it run elections. This complicates election preparations as the training levels expected might sometimes not be realised, thus insufficient capacity to conduct credible polls. This is very much evident in the 2013 general elections, where technology was involved, and insufficient trainings on information and communication technology (ICT) for staff did not help matters. There were also cases of incorrect filling of statutory forms by electoral officials. This occurred in all the elections covered by the study.

Additionally, the ECK engaged in a rushed process during voter registration in 1997, 2002 and 2007. This produced a register fraught with errors such as aliens, multiple registrations among other errors. The delay in budget disbursements often results in missed opportunities that often facilitate credible electoral processes. Like in this case, the integrity of the voters roll in most instances was disputed by opposition parties, who perceived it to be full of irregularities.

However, it should be noted, that due to insufficient state funding the electoral body has continually sought donor support to enable it execute some of its activities like voter education, voter registration among other activities. In the lead up to 2013, International Foundation for Electoral Systems (IFES) in 2017 sponsored most of the voter education activities by the IEBC. The same happened in 2002 and 2007 elections. Despite assistance from donor organizations, the electoral agency has been unable to secure funds to conduct civic education, which is important for inculcating a democratic culture<sup>17</sup>. In addition:

“IFES provided support and capacity building to the newly-created IEBC in the areas of voter registration, results transmission, oversight of political parties, civic education, and dispute resolution to facilitate the IEBC’s role in conducting transparent, credible and violence-free elections.”<sup>18</sup>

In addition, despite assertions that the Commission lacks financial autonomy, it also needs to come clean and publish its financial reports on how tax payers’ money is being spent. Kriegler’s report noted a lot of anomalies in the way funds allocated to IEBC is spent. IEBC like any other constitutional body is accountable to the public as it exists to serve public interest. Public institutions operate under the principle of public transparency (publicness).

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<sup>17</sup> Aristotle wrote in his *Politics* (c 340 BC), "If liberty and equality, as is thought by some, are chiefly to be found in democracy, they will be attained when all persons alike share in the government to the utmost.

<sup>18</sup> Oral Interview with a IFES Official (Interviewee No. 8) in Upper, Nairobi June 2018

#### **4.6.4 Slack in Global Democratic Support**

Politics follows geopolitics, so asserts Kagan (2015). Kagan uses the example of the Athenian democracy to demonstrate his case. He notes that the rise of the Athenian democracy in the 5<sup>th</sup> BC paved way for the proliferation of democratic rule in most of the Ancient-Greek city-states. The same is true of Sparta, whose influence was seen in the spread of oligarchic type of government around Greece. This trend has been carried on to the present moment, with the West championing the adoption of the liberal democracy model by societies in transition, less democratic or even non-democratic. The Western led efforts has resulted in the spread of democracy in most of the developing parts of the world.

In Kenya, democratization efforts occasioned by the third wave of democratization that began in the 1990s ushered in a new era of multi-party politics beginning with the 1992 multi-party general elections. This continued, and in 1997, following sustained domestic pressure by CSOs, the church and opposition parties, and bolstered by pressure from the West, the IPPG agreement was signed, and this set the stage for the 1997 December elections. In 2002, the Western-led efforts again prevailed with the US President George Bush talking Moi out of contesting, thereby paving way for peaceful transition of power. The Western led efforts were on show again in 2007 when it pushed for a Grand Coalition government between President Kibaki and Premier Odinga.

However, after President Barrack Obama ascended to power in 2009, democracy entered a phase of retrenchment (Kagan, 2015). The same trend has been replicated in Europe with many states adopting an inward approach, abandoning their moral obligation to champion democracy around the world. Huntington (1991) noted that the “pervasiveness of democratic norms rested in large part on the commitment to those norms of the most powerful country in the world.” This is because, democracy did not just appear from nowhere, but originated from somewhere.

Larry Diamond (2016) bemoaned this retreat by Western countries as constituting a threat to democracy with likely implication of emboldening “authoritarian democracy.” Countries such as Uganda, Burundi, Congo Brazzaville, Rwanda falls under this classification. In these countries, the leaders have consistently changed or flouted the constitution to remain in power, and use elections a rituals for legitimising their stay in power. This acts entrench electoral autocracy and denies the citizens a chance to freely exercise their political rights.

Thus, the global democratic recession carries negative consequences for democratic transition in Kenya. Kenya is still a nascent democracy that requires support from more established democracies to effectively transition from the bracket of competitive-authoritarian states to a stable democracy.

#### **4.6.5 Correcting Electoral Reform Challenges for Successful Democratic Consolidation in Kenya**

Attempts have been made to address the challenges highlighted above that militate against electoral reforms in Kenya. First is through control of corruption and other forms of financial mismanagement. At the heart of problems with democracy in Kenya is vote-buying and electoral fraud. The impression of politicians loaded with cash in the rural areas during election periods have been forever imprinted in the minds of many Kenyans. The poor and uneducated rural voters were seen as susceptible to bribery by unethical candidates, thus being blamed for sending corrupt politicians, who wanted to reclaim the cost of electioneering, to the National Assembly. These situation has fostered belief that the rural voters helped to perpetuate a system of patronage and corruption. In addition, there is also the question of mismanagement of public funds by the electoral agency. Kriegler report (2008) noted a lot of anomalies in the way public funds were used by the ECK. The same charges has been raised against IEBC by the Auditor General's report (2017). The report noted a lot of anomalies in the use of public funds by IEBC.

To counter the above challenges, certain measures have been instituted to deal with the aforementioned challenge. In 2013, parliament enacted the Election Campaign Finance Act 2013 aimed at regulating the flow of money during campaigns to create a level playing ground for political competitors. This law is progressive in nature, though implementation has remained a challenge. For instance, in the lead up to the 2017 general elections, this Act was suspended, paving way for ridiculous spending on campaigns by various candidates. This should thus serve as a wake-up call to African governments to develop effective anti-corruption strategies so that they can increase resources available for investment on economic and social development, among other spheres of life.

On institutional reform, several progressive institutions have either been set-up or reformed in Kenya. Institutions are essential for rendering the practice of politics more stable and predictable. Over the past two decades, steady progress has been made in reforming judicial institutions, electoral agency, police, and political executive among other institutions. The establishment of the Supreme Court through the Supreme Court Act of 2011 injected more

confidence among Kenyans. Political candidates especially presidential candidates have been offered an avenue to seek redress (as was the case in both 2013 and 2017) whenever they feel that results declared by the IEBC do not reflect the majority will. The lower courts have also been actively involved in hearing election petitions and rendering judgements. The Political Parties Act of 2011 has also played a key role in streamlining and harmonizing operations of political parties in Kenya. The police have become part and parcel of the electoral process through ensuring that voting takes place in a secure and peaceful environment.

However, a lot still needs to be done to improve the political culture. Politicians, who are the main movers of political processes are rational actors, motivated by their selfish interests, this is thus what motivates their choices actions. Kenya's political culture is not yet allegiant (meaning focus on both goals and the process), it is parochial (only focus on the end product). This thus means that outcomes of political processes are to a greater extent dependent on elite consensus. David Truman (1959) buttressed this notion when he argued that the continuing existence of the democratic process depends on the "consensus of elites" as a necessary basis upon which established elites can repulse attempts of demagogues to subvert the system. Kenya's political elites should thus strive to ensure that they are carriers of general will in as much as they engage in pursuit of their national interests.

#### **4.7 Conclusion**

In summary, it is notable that successive years of electoral reform endeavour have produced positive dividends on the Kenya's democratic experiment. Kenya has for many years been characterised as a stable, progressive country within the East and Horn of Africa region, where many states are otherwise experiencing economic and political turmoil. However, challenges of finance, political culture and weakening global democratic support threatens to undo the democratic dividends achieved so far. Correcting these factors should thus come in handy in the efforts towards consolidating Kenya's democracy.

## **CHAPTER FIVE**

### **SUMMARY, CONCLUSION AND RECOMMENDATION**

#### **5.1 Introduction**

This chapter summarises the findings of the study by responding to three key issues (tasks). The first task is to recapitulate the research objectives, evaluate the extent to which each objective has been met. Then, conclusions on the research findings are submitted. Recommendations are made on some of the grey areas that require overhaul to enable Kenya surge “smoothly” towards becoming a stable and progressive democracy.

#### **5.2 Summary and Conclusion**

##### **6.2.1 Electoral Reforms and Democratic Consolidation in Kenya**

The study established that elections is an important ingredient in facilitating democratic consolidation, or deepening in any society. Through electoral reforms, the challenges of democratic practices as evident from the history of electoral process tend to suggest that reforms and electoral justice are one side of the same coin. The study identified key electoral reforms that have been pertinent in helping Kenya enhance the capacity of its electoral and related institutions, and thus by extension the quality of its democracy.

In whole, reforms identified by the study from the period covered by the study produced varying degrees of outcomes. These reforms include electoral laws, integration of electoral technology and political party institutionalization. The study established that electoral laws have been instrumental in anchoring key electoral and institutions in Kenya by grating them more independence (autonomy) in their operations. Also connected to this, was the question of constitutionalism that to a greater extent dictated the rules of electoral process by defining the nature of engagement as stipulated. Before 2007, the inadequacy and lack of electoral reforms had made the constitutionality of democratic processes vulnerable to manipulation by political elites, and this affected the attainment of critical (gold) standards for holding free and fair elections. The 2010 Constitution altered the reform landscape with several new laws being enacted to improve the quality of elections. Some of them included; the new Constitution 2010, Political Parties Act of 2011, IEBC Act of 2011 among other laws.

The integration of new technology (electoral technology) in both voter registration, verification and results management as well as in candidate registration at the beginning of 2013 heralded

a watershed moment in terms of launching Kenya as one of the leading African countries in embracing digitization of its electoral architecture. The introduction and subsequent integration of new electoral technology into Kenya's electoral process were in tandem with recommendations of the Kriegler Commission in 2009 that called for putting in place a system of results management that is simple, verifiable, accountable and transparent. The technology adopted have in their wake been a source of electoral confidence building opportunity as well as a peril on the future of Kenya's nascent democracy.

In addition, political party institutionalization was another key reform component that has to a large extent been hailed for streamlining, strengthening and harmonizing the operations of political parties in Kenya. The Political Parties Act of 2011 specifically provided for mechanisms of ensuring intra-party democracy as well as mechanisms for dealing with disputes, both within a party, between different parties, or between a political party and the IEBC. Further, the ORPP and the PPLC have been other key institutions responsible for streamlining political party operations in Kenya. This is of course in addition to the PPDT, key body in arbitrating intra and inter party conflicts. Beyond anchoring the legal framework, the space of political parties has been broadened, and this has implications on Kenya's democracy. The broadening of the space has in retrospect promoted inclusion of both majority and minority voices in the political processes.

### **5.2.1 Impact of the Electoral Reforms on Democratic Consolidation in Kenya**

Electoral reforms in Kenya have brought a lot of tidings, or what political scientists call democratic dividends. First, reforms of the electoral technology have enhanced efficiency in results management. Relaying of results all the way from the polling stations located across the country to the national tallying centre was possible in both 2013 and 2017 despite some hitches. This is in sharp contrast to the era before 2013, where the manual system often produced contested results such as the disputed 2007 presidential elections. Further, the adoption of electoral technology has rendered voter identification at the polling stations simple, verifiable, accountable and transparent. This has in turn reduced waiting time during voting as well facilitated easy and safe storage of voters' data.

Despite its benefits, technology has come with certain drawbacks. In the 2013 general elections, there was widespread failure in results transmission using mobile phone technology. This significantly eroded stakeholder (political actors, voters) confidence in the electoral process. The EVID machines also failed to properly identify the voters, this resulted into the

use of a manual voter register by the Commission. Similarly, the 2017 presidential elections also had a lot of questions marks being asked of the credibility of the technology deployed. The technology failed at the point of results transmission and management, an event that precipitated a court action that led to the voiding of the presidential elections by the Supreme Court.

Thus, despite the introduction of electoral technology to reduce rancour among key political actors, thereby imbuing legitimacy and credibility to the electoral process, it has also brought with it challenges. The challenges should be a learning opportunity, especially in the quest to consolidate Kenya's nascent democracy.

Significant also is the involvement of political parties in all the aspects of the electoral process. There have been a lot of reforms aimed at enhancing the influence of political parties on Kenya's democratic consolidation. Through PPLC, political parties now have a platform to hold dialogue with the IEBC and the ORPP. The PPLC platform is now being used by parties to address all pressing issues with the electoral agency. This is significant as small political parties now almost have an "equal" voice when it comes to shaping the electoral process and getting their issues addressed. Other aspects of political party operations such as party financing (political party fund) and compliance to codes of operation have also been ensured under the new electoral laws.

The mechanisms for intra-party democracy have been useful in promoting broad-based participation of different actors in political party activities. Political parties have to an extent been dissociated from the "*big man syndrome*", though it must be admitted that ethnic patrons still hold a significant sway in the party operations. In addition, the PPDT has instrumental in resolving intra-party and inter-party disputes. Members of political parties who feel victimised in their parties can seek redress from this body.

In addition, the passage of novel electoral laws have anchored most of the political process within the law (legal framework is clear). There now exist several different procedures for carrying out different aspects of elections. Chief among the institutions is the Constitution which basically gives rise to all other laws and regulations. The new Constitution 2010 establishes the IEBC (through the IEBC Act of 2011). There also exist the Political Parties Act of 2011, the Elections Act of 2011 among many other rules and regulations. The overall

purpose of these rules is to make the game fairer, by levelling the political playing field and making the processes transparent and accountable.

In most of the pre-2010 new Constitutional era, electoral contests were staged against the backdrop of minimum reform packages that were considered to be largely insufficient conditions for free, fair and competitive contest. The limitations in the conditions is argued to have created grounds for clamour for more reforms that characterized the immediate periods that followed. The new laws instituted thus after the catastrophic 2007 general elections is a testament the relative success of the reform endeavours.

### **6.2.3 Barriers to Electoral Reforms in Kenya.**

The study identified some of the key barriers to the implementation of electoral reforms. First, is financial challenge(s). In a developing country such as Kenya, the incidence of delays in the release of public funds presents adverse impacts on the efficiency of public institutions including the electoral agency. Over the years, the electoral agency has had cause to complain about government delays in releasing funds for the conduct of elections. The challenge of delayed, inadequate funding has in some cases, led to postponement of electoral activities, thus interfering with the calendar/planning of activities. In all, the failure to provide financial funding by the state was a critical political tool aimed at incapacitating the EMB from delivering free and fair elections.

Then there is the question of political culture that is highly intertwined with regime interests and identity question. Kenya's historical tale of institutional struggle is a manifestation of a fundamental flaw in the nation's fabric and political culture. After every calamitous election, Kenyan politicians make big promises. They say: we will reform. We will not be defeated. Never again will this be allowed to occur. But they rarely follow through their promises. This is part of a political culture problem. There is generally an absence of a democratic political culture to help institutions flourish and grown mature.

Weak institutions is another challenge. It is mainly as a result of disregard for the laws/institutions by the political elites. The elites see themselves as above the law. As a result of this, political regimes in Kenya have for a long time systematically worked to weaken the power of institutions through passing amendments to the constitution, or through creating alternative centres of power. A case in point is what Moi did with KANU. To respond to the



above challenges, attempts have been made at different levels; from legal, to institutional reforms, to building more political consensus and even control corruption.

### **5.3 Conclusion**

From the findings of the study, it can be concluded that in general electoral reforms, that is; electoral laws, integration of electoral technology and institutionalization of political parties have to a large extent facilitated the process of democratic consolidation in Kenya within the period covered by the study. There is now evidence that reforms have improved trust, confidence and participation of Kenyan voters in the electoral process. Further, reform dividends produced in their wake even greater demands for more reforms. As such electoral reforms is an important contributory factor to the consolidation of democracy in Kenya.

### **5.4 Recommendations**

From the research findings, the study suggests the following general guidelines to be followed when conducting electoral reforms in Kenya. These guidelines thus form policy recommendations that can be used to improve the quality of elections in Kenya and elsewhere. They include the following:

#### **a) Policy Recommendation**

- I. It is necessary for stakeholders involved in the electoral reform process to take cognizant of the centrality of political will to ensure the success of electoral reforms efforts. Political will is key not only in mobilising broad-based support from the key actors to fast-track critical reforms in the country, but also in injecting inter-agency harmony, necessary in promoting commitment to electoral reforms.
- II. Further, strengthening fundamental principles such as independence, transparency, inclusiveness while conducting electoral reforms are key to anchoring Kenya's fragile democracy. Respect for the rule of law and constitutionalism are key attributes that provide minimal standards for independence and transparency, especially in any functional democratic society. Similarly, democratic societies are distinguished by their ability to give all stakeholders a "voice" in the political process. There should be no bias based on race, colour or social status as was the case in England and even America during the formative years of their birth. Political contest takes place in an arena termed by Linz and Stepan as the political society. This is a legitimate arena and core institutions such as political parties, electoral rules, political leadership, inter-party alliances, and legislatures are involved (Linz and Stepan 1996). More still needs to be

done to give all stakeholders, including minority tribes and even diaspora voters an equal voice in the political processes.

**b) Academic Recommendation**

- I. There is a need to bridge the paucity in literature on the variable of electoral systems and its effects on the democratic consolidation process in the context of sub-Saharan Africa. Whilst literature on the relationship between electoral systems and governance in the context of developed countries is rich, in the developing countries those efforts to understand the impact of different electoral systems are still nascent. Among other things, the literature suggests that electoral systems can have an impact on the degree of coherence, or fragmentation of the party system and broader government effectiveness, as well as on public policy outcomes and the behaviour and incentives of political actors and resulting accountability linkages.

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# APPENDIX I: IN-DEPTH INTERVIEW SCHEDULE

## UNIVERSITY OF NAIROBI

### DEPARTMENT OF POLITICAL SCIENCE & PUBLIC ADMINISTRATION

*Research Topic: ELECTORAL REFORMS AND DEMOCRATIZATION IN KENYA, 1997 – 2017.*

#### Introduction

The study is meant to mobilize empirical evidence for a study focusing on the role of electoral reforms in the democratization process in Kenya, 1997 to 2017. The study is part of the thesis paper to be submitted for a successful completion of a master's degree at the University of Nairobi, Kenya.

Your participation in the study is completely voluntary. There are no foreseeable risks associated with this project. And that you have the right to either answer in part or all the questions asked, as well as the right to desist from answering any question.

Your personal information and survey responses are strictly confidential and will be used solely for academic research purposes. Your identity will not be published with written responses without written consent. Data from this research will only be reported in the aggregate, unless otherwise specified. Many thanks for your assistance.

1. Gender \_\_\_\_\_ Age \_\_\_\_\_ Education \_\_\_\_\_
2. In your view, what is the purpose of an election?
3. What do you understand by the concept of electoral reforms?
4. Do you think Kenya needs electoral reforms?
5. Who should guide the electoral reform agenda?
6. Do you think the current model of electoral system is suitable for Kenya's Democratic aspirations?
7. Mention some of the key electoral reform initiatives undertaken in Kenya between 1997 and 2017?
8. What do you think needs to be reformed in the electoral management process and how should the electoral system look like?
9. Who do you think is most responsible for electoral reforms?
10. What are the possible challenges to electoral reforms?
11. How can we ensure effective electoral reforms in Kenya?
12. Does the IEBC have a post-2013 strategic plan? If yes, elaborate further.
13. In your own view, what are the other reform initiatives the IEBC/other agencies should carry out to enhance the legitimacy and quality of the electoral process?