Adjudicating Presidential Election Disputes in Africa: The Emerging Challenge of Election Technology

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Abstract

Challenging the results of presidential elections in courts in many African countries is largely a phenomenon that accompanied the fall of dictatorships and one-party regimes across Africa in the late 1980s and early 1990s. The reintroduction of multiparty democracy entailed that elections would be genuinely contested between several candidates, with the possibility that opposition leaders could wrestle power from the incumbent leaders. Many constitutions or electoral laws adopted following this wind of change provide for the possibility of aggrieved individuals and/or entities to seek legal redress in courts of law or other quasi-judicial bodies, usually on specified grounds. This phenomenon is now compounded by the increased use of Information Communication Technology (ICT) in the electoral process. In the last ten years, almost all presidential election disputes in Africa have revolved around failure or alleged tampering with the ICT facilities in the electoral process. It would, therefore, seem that ICTs, although helpful in increasing efficiency in the electoral process, provide possible new and cleaner ways of stealing elections. This new development presents new challenges to courts as ICTs are often adopted by Electoral Management Bodies (EMBs) without appropriate changes to the electoral laws to enhance transparency and accountability. This article analyses how the courts are facing the challenge of increased use of technology in elections and explores the way forward in terms of progressive interpretation and proactive adjudication of election matters.

Keywords: Africa; electoral disputes; information and communication technology; presidential elections; democracy; national courts.

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Introduction

Challenging the results of presidential elections in courts in many African countries is largely a phenomenon that accompanied the fall of dictatorships and one-party regimes across Africa in the late 1980s and early 1990s. The reintroduction of multiparty democracy entailed that elections were going to be genuinely contested between several candidates, with the possibility that opposition leaders could wrestle power from the incumbent leaders. Many constitutions or electoral laws adopted following this wind of change provide for the possibility of aggrieved individuals and/or entities to seek legal redress in courts of law or other quasi-judicial bodies, usually on specified grounds. This process has now come to characterise the resolution of electoral disputes in Africa. Although the mechanism is widely used in Africa, only the Kenyan Supreme Court in 2017 and the Malawian Constitutional Court in 2020 have overturned a presidential election result. It is contended that by confirming questionable election results, courts have in effect, been giving a veneer of legitimacy to fraudulent electoral victories.

This phenomenon is now compounded by the increased use of Information Communication Technology (ICT) in the electoral process. In the last ten years, almost all presidential election disputes in Africa have revolved around failure or alleged tampering with the ICT facilities in the electoral process. It would, therefore, seem that ICTs, although helpful in increasing efficiency in the electoral process, provide new and cleaner ways of stealing elections. This new development presents new challenges to courts as often ICTs are adopted by Election Management Bodies (EMBs) without appropriate changes to the electoral laws to enhance transparency and accountability.

This article analyses how the courts are facing the challenge of the increased use of technology in elections. It starts with an overview discussion of the use of technology in African elections. This is followed by a discussion of how the courts have adjudicated allegations of the manipulation of technology in presidential election disputes in Africa. It concludes with exploring the way forward in terms of progressive interpretation and proactive adjudication of election matters. It is important to emphasise that although the article focuses on selected countries, the increasing similarity of problems emanating with electoral disputes ensure that the recommendations made here can also apply to other African Union (AU) member states.

The Use of Technology in African Elections: A Critical Overview

We now live in a digital age, where computers have in replaced human beings in performing several tasks in many areas. It is hard to imagine a sector of modern human activity which has not been computerised to some degree. Many routine tasks such as paying for goods and services, packaging goods, and looking for directions are automated. The consequence of this has generally been efficiency and precision in the provision of services. As a result, the use of computers has become part of the global

human culture and popular consciousness.[1] In this popular consciousness and culture, computers have acquired an undisputed sense of infallibility about their accuracy and precision.[2] Even in the context of politics, there was optimism that technology would contribute significantly to better governance and human rights through increased transparency and efficiency.[3]

In the same manner, technology is permeating other sectors of human life, and it is increasingly being used in managing elections in Africa. Today across the African continent, computers are performing work that was previously done by humans in the electoral process.[4] Over the last two decades, many African countries have computerised one or more areas of the electoral process. It is estimated that about half of the national level elections involve the use of digital equipment in some parts of the electoral process.[5] This could be through the establishment of a biometric voter register, automated voter identification or verification process, and the computerised tabulation, transmission of votes and dissemination of results.[6] For example, Zambia introduced the biometric voter register in 2006;[7] Ghana introduced a biometric register and biometric verification of voters for the first time in the 2012 elections;[8] Nigeria used Smart Card reading devices to authenticate voters in the 2015 and 2019 elections;[9] Uganda introduced the biometric verification of voters and electronic transmission of results in the 2016 election;[10] Namibia introduced electronic voting machines in 2014;[11] and Kenya, in 2013 and 2017, computerised most of their electoral process through the deployment of the Kenya Integrated Electoral Management System (KIEMS), which computerised the voter registration, voter identification and the transmission and tabulation of election results.[12]

Apart from the desire to promote efficiency in the electoral process, the increased computerisation of the electoral process is usually encouraged as a panacea to election

1 Roberto Verzola, 'Automating Elections: Electronic Voting Machines Have Made Mistakes Too' Halal Working Paper No 4 1.

2 ibid 1.

3 Elrini Kikarea and Maayan Menashe, 'The Global Governance of Cyberspace: Reimagining Private Actors' Accountability' (2019) 8 Cambridge International Law Journal 153.

4 International IDEA, *Certificate of ICTS in Elections* (International IDEA 2015) 1.

5 Nic Cheeseman, Gabrielle Lynch and Justin Willis, 'Digital Dilemmas: The Unintended Consequences of Election Technology' (2018) 25 Democratisation 1397.

6 Katherine Ellena and Goran Petrov, *Cybersecurity in Elections: Developing A Holistic Exposure and Adaptation Training (HEAT) Process for Election Management Bodies* (IFES 2018) 19.

7 Through the enactment of the Electoral Act 2006.

8 *Nana Addo Dankwa Akufo-Addo and Others v John Dramani Mahama and Others* Presidential Election Petition Writ No.J/6/2013.

9 *Atiku Abubakar and Another v Independent National Electoral Commission (INEC) and Others* LER (2019) CA/PEPC/002/2019.

10 *Amama Mbabazi v Yoweri Kaguta Museveni and Others* Presidential Election Petition No.01 of 2016.

11 Section 97 Electoral Act No. 5 of 2014.

12 *Raila Amolo Odinga and Others* Presidential Election Petition No.1 of 2017.

fraud or rigging.[13] For example, following the 2007 violence occasioned by discredited elections in Kenya, a commission of inquiry (popularly known as the Kriegler Commission) was appointed to review the crisis. To enhance transparency and to eliminate the possibility of human interference and error in the electoral process, the Commission recommended in part that the Electoral Commission should

> start having developed an integrated and secure tallying and data transmission system, which will allow computerized data entry and tallying at constituencies, secure simultaneous transmission (of individual polling station level data too) to the national tallying centre, and the integration of this results-handling system in a progressive election result announcement system.[14]

Similar faith in electoral technology is visible in case law. For example, the Kenyan Court of Appeal, in relation to the transmission of election results, had this to say:

> The electronic transmission of results was intended to cure the mischief that all returning officers from each of the 290 constituencies and 47 county returning officers troop to Nairobi by whatever means of transport, carrying in hard copy the presidential results which they had announced at their respective constituency tallying centers. The other fear was that some returning officers would tamper with the announced results.[15]

In this sense, technology is seen as a cure for many contemporary electoral problems. Cheeseman, Lynch and Willis have argued that there are at least three reasons for adopting electoral technology.[16] These are to enhance election management efficiency, to reduce the scope for electoral manipulation, and to improve transparency and clarity regarding management of election results.[17]

In countries where elections are routinely disputed and genuine questions exist about the fairness of elections, increased computerisation of the electoral process is more likely to mask than resolve electoral problems. Where elections are liable to manipulation, where an unequal or lopsided playing field characterises the electoral process, the use of technology is more likely to be deployed to further those vices rather than enhancing the quality of the electoral process.[18] Odote and Kanyinga, in recently published research, have warned that electoral problems in Africa require political solutions rather than technological interventions.[19] They assert that technology is a tool

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13 'Elections and Democracy Under Fire' 57(9) Africa Confidential (29 April 2016) 1.

14 *Kriegler and Waki Reports Summarised Version, Revised Edition* (Primark Ventures 2009) 36 <https://www.kas.de/c/document_library/get_file?uuid=d8aa1729-8a9e-7226-acee-8193fd67a21a&groupId=252038> accessed 26 October 2021.

15 *Independent Electoral and Boundaries Commission v Maina Kaai and 5 Others* Civil Appeal No. 105 of 2017.

16 Cheeseman and others (n 5) 1397.

17 ibid.

18 Ellena and Petrov (n 6) 19.

19 Collins Odote and Karuti Kanyinga, 'Election Technology, Disputes and Political Violence in Kenya' (2020) Journal of Asian and African Studies 1–14.

and like any political tool, it tends to reinforce the structural positions of those in power. It does not by itself provide a level playing field.[20]

This is very important considering that elections in many African countries are still characterised by low levels of integrity and other corrupt activities. This often manifests through payment of electoral officials to stuff ballot boxes or manipulate results;[21] vote-buying; registration (and eventual 'voting') of unqualified or deceased voters; and misuse of public resources, usually to the benefit of the incumbent party or candidate and invariably to the detriment of the opposition.[22]

A 2016 Afrobarometer survey of thirty-five African countries found that seven in ten Africans say that voters are bribed at least 'sometime' and forty-three per cent said this happened 'often' or 'always.'[23] The survey found perceptions of bribing voters to be more pervasive in Mali (78%), Gambia (71%) and Senegal (68%) than in other African countries surveyed.[24] A 2015 global survey of electoral integrity featuring 139 countries found that sub-Saharan African countries displayed the worst record of electoral integrity.[25] The majority of the countries surveyed in Africa were seen as having 'low' levels of electoral integrity. Notably, Ethiopia ranked last at number 139; Equatorial Guinea ranked 138, Burundi 137, Djibouti 136 and the Republic of Congo ranked 133.[26] A survey in Uganda in 2010 established that fifty-six per cent of the respondents thought that candidates buy votes during elections 'often' or 'always' while seventy-six per cent responded that if they were offered money in exchange for their vote they would defect to the party offering them money.[27]

Despite all the stated faith in technology, election technology can be vulnerable from many angles and at every stage of the electoral process. Shackelford and others discuss the five stages of the electoral process at which electoral technology could be vulnerable to hacking or manipulation.[28] First, technology can be used, predominantly through the manipulation of social media, to control the information received by voters in the lead

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20 ibid 3. The danger lies in the fact that unlike manual observable systems, depending on the technology used, technology could provide a clean way of stealing an election. As discussed in this article, the 2017 Kenyan case is a clear example of this, as there were no observable anomalies on polling day. The anomalies were in the computer server.

21 ND Danjibo and Abubaka Dladeji, 'Vote Buying in Nigeria: An Assessment of the 2007 General Elections' (2007) 2 Journal of African Elections Special Issue Nigeria 2007 Elections 186.

22 ibid.

23 Afrobarometer, 'Election Quality, Public Trust are Central Issues for Africa's Upcoming Contests' (Afrobarometer Policy Paper No. 35 September 2016) 20.

24 ibid.

25 Pippa Norris and others, 'The Year in Elections 2015: Expert Survey on Perceptions of Electoral Integrity' (2016) 10.

26 ibid.

27 Jeffrey Conroy-Krutz and Carolyn Logan, 'Museveni and the 2011 Uganda Elections: Did Money Matter?' (2012) The Journal of Modern African Studies 635.

28 Scott Shackelford and others, 'Making Democracy Hard to Hack: Should Elections be Classified as Critical Infrastructure?' (2017) 8 Michigan Journal of Law Reform 8.

up to the elections.[29] Second, the voter register can be hacked to delete, add or alter its contents.[30] Third, where countries have adopted electronic voting, the voting machines can be tampered with so that the choice of the voters is not reflected in the outcome.[31] Fourth, the machines used to tabulate results could be manipulated whereby the input would not reflect the outcome.[32] And finally, electoral technology can be vulnerable at the stage of disseminating results to the public in such a manner that the results fed into the machines and those announced would be at variance.[33]

Similarly, Carrier has highlighted three inherent weaknesses of election technology.[34] The first is reduced transparency, which entails that, unlike a paper-based electoral system that leaves a clear and visible trail, the operations of electronic machines is hidden from the sight of the public and not easily discernible without expert knowledge.[35] The second weakness is the risk of an increased magnitude of errors and fraud. This is as a result of the nature of computer software used in elections, which often lacks upper limits on fraud and error.[36] Anything can go wrong inadvertently or by human tampering. Finally, Carrier considers the lack of security controls as the third inherent weakness of electoral technology.[37] By this, he means where electoral technology does not use encryption or other adequate control mechanisms, it becomes easy to change voter registers, vote totals and the like.[38]

In the African context, election technology, judging from presidential election disputes (to be discussed in more detail in the next section) seem to be vulnerable at three levels. The first is the stage of controlling the information the voters receive. For example, there have been revelations that Cambridge Analytica, a social media company, was involved in the 2015 Nigerian and 2013 Kenyan elections, whereby, through the manipulation of information and leaking of confidential data, public views are carefully influenced and tilted against one candidate in favour of another.[39] Part of the problem

29 ibid 9.
30 ibid 9.
31 ibid 9.
32 ibid 9.
33 ibid 9.
34 Michael Carrier, 'Vote Counting, Technology and Unintended Consequences,' (2005) 79 St John's LR 646.
35 ibid 646.
36 ibid 646.
37 ibid 646.
38 ibid 646.
39 Christopher Wylie, 'How I Helped Hacked Democracy' <https://nymag.com/intelligencer/2019/10/book-excerpt-mindf-ck-by-christopher-wylie.html> accessed 13 July 2021; Nanjala Nyabola, 'The Spectre of Cambridge Analytica Still Haunts African Elections' (15 February 2019) <https://www.aljazeera.com/opinions/2019/2/15/the-spectre-of-cambridge-analytica-still-haunts-african-elections> accessed 13 July 2021; and Anna Cardovillis and Bukola Adebayo, 'Cambridge Analytica: Nigeria, Kenya Opposition to Probe Firm's Alleged Role in Their Elections' (4 April 2018) <https://edition.cnn.com/2018/04/03/africa/nigeria-kenya-cambridge-analytica-elections-intl/index.html> accessed 13 July 2021.

here is that social media companies harvest information across the globe and use it to influence political processes in a manner that may not have been contemplated or agreed to by the sources of information. This gives such companies 'a position of invisible power compared to those who do not.'[40] Although this does not directly relate to the technology used in the electoral process, it may have a direct impact on electoral outcomes, which may not reflect the free will of the people.

The second one has to do with the voter register and, concomitantly, how the voters are identified, verified, or authenticated on election day. Problems and allegations of manipulating the technology around this issue have been the subject of litigation in many presidential election disputes. For example, the 2013 and 2018 Zimbabwean presidential election petitions raised questions about the integrity of the biometric voter register.[41] The 2012 Ghanaian presidential election dispute revolved mainly around the failed biometric identification system,[42] while the 2019 Nigerian presidential election revolved around the failed Smart Card reading machines for voter verification.[43] Researchers who reviewed the use of the biometric voter verification equipment in Ghana during the 2012 election came to the conclusion that in polling stations that had election observers, biometric verification machines were about fifty per cent less likely to break down as compared to polling stations that did not have observers.[44] They concluded that the machines' malfunction was a result of human manipulation to facilitate election fraud and over-voting.[45]

Biometric technology has inherent limitations also, in the sense that multiple registrations (and consequently multiple voting) can only be eliminated if the register is audited and cleaned to remove multiple entries of voters. If this is not done, the technology is of no use, as it may be used to mask electoral malpractices and give a veneer of credibility to an otherwise flawed election. This was the case in the 2008 Somaliland elections, where there was evidence of widespread and 'flagrant biometric multiple registration.'[46] Similarly, an audit of the register ahead of the 2011 Democratic Republic of Congo (DRC) elections found that there were more than 700,000 double registrations, but electoral officials refused to clean the register, arguing that 'it was too late to clean up the roll.'[47] In the 2015 Nigerian election, which led to a peaceful transfer

40 Elrini Kikarea and Maayan Menashe, 'The Global Governance of Cyberspace: Reimagining Private Actors' Accountability' (2019) 8 Cambridge Intl LJ 157.

41 *Morgan Tsvangirai v Robert Gabriel Mugabe and Others* Case No. CCZ71/13 (see specifically the claims in the petition and not the judgment); *Nelson Chamisa v Emmerson Dambudzo Mnangagwa and Others* CCZ 42/18 (August 2018).

42 *Nana Addo Dankwa Akufo-Addo and Others v John Dramani Mahama and Others* Presidential Election Petition Writ No.J/6/2013.

43 Abubakar (n 9).

44 Samuel Adams and William Asante, 'Biometric Election Technology, Voter Experience and Turnout in Ghana' (2019) 18 Journal of African Elections 49.

45 ibid 49.

46 Cheeseman and others (n 5) 1403.

47 ibid 1403.

of power, about ninety-one per cent of biometric machines failed to correctly identify the identity of voters in the presidential election.[48] Although the election was considered credible by many observers, it should be noted that this was not due to the effectiveness of election technology but to the credible leadership of the EMB.

The third one is about the transmission and tabulation of election results. Here the tabulation or transmission of results can be tampered with in such a manner that the end results do not reflect results fed into the system. A well-known example from outside Africa relates to the 2013 elections in Azerbaijan. On the pretext of improving efficiency and transparency in the electoral process, the government introduced an iPhone app aimed at allowing citizens to have instantaneous access to the tallying of ballots and the announcement of results.[49] Those who tried the app were shocked to see the results of the election, a day before the actual elections and before a single vote had been cast.[50] Within Africa, perhaps the best-known example was the attempt to manipulate the results of the first democratic election in South Africa in 1994.[51] Here the election results were tampered with by the illegal installation of a computer programme on the Independent Electoral Commission's (IEC) main computer, which caused results to be altered to the disadvantage of the African National Congress (ANC).[52]

The alleged manipulation of the tabulation and transmission of election results has been the subject of intense presidential election disputes in several African countries such as DRC,[53] Kenya, [54] Zambia,[55] and Zimbabwe.[56] Even where technology has not yet been manipulated, it is usually just a matter of time. Following detailed research on tools used by authoritarian regimes to rig elections, Cheeseman and Klaas remarked that 'for those countries that have digitised their elections and are doing nothing to protect their systems, it is a matter of when, not if, an election will be compromised.'[57] Closely related to the issue of transmission of results is the use of electronic voting machines. For example, Botswana introduced electronic voting in 2016[58] but abandoned it in 2018 following strong reservations from the opposition parties and civil society stakeholders,

48 ibid.
49 Nic Cheeseman and Brian Klaas, *How to Rig an Election* (Yale University Press 2019) 1.
50 ibid.
51 Shackelford (n 28) 19.
52 ibid.
53 Case No RCE 001/PR.CR decided on 19 January 2019 (Unreported).
54 *Raila Odinga v Independent Electoral and Boundaries Commission and Others* Petition No. 3, 4 and 5 of 2013 (4 March 2013); *Raila Amolo Odinga v Independent Electoral and Boundaries Commission and Others* Presidential Election Petition No.1 of 2017.
55 *Hakainde Hichilema and Another v Edgar Lungu and Others* 2016/CC/0031 Ruling No. 33 of 2016.
56 *Tsvangirai* (n 41); *Chamisa* (n 41).
57 Cheeseman and Klaas (n 49) xxv.
58 Electoral Reform Act 2016.

as it was seen as lacking safeguards and being simply introduced to help the ruling party rig elections.[59]

Considering all these vulnerabilities, it can be concluded that the deployment of technology in the electoral system actually provides a tool to African rulers to retain power, with minimal effort and in a manner difficult to detect. Prior to 1990, many African presidents came into office through military struggle or coup d'états. During this period, there were 82 successful coups, 109 attempted coups that failed and 145 coup plots that were foiled before being put into effect.[60] However, since 1990, elections have become the standard norm and ritual through which presidents assume office. The decline in military coups is in part attributable to the fact that electoral technology now allows for a much easier way to retain or 'grab' power. Collier, for example, has argued that by manipulating the electoral process, instead of resorting to military interventions to retain or win power, African presidents 'have discovered a whole armoury of technology that enables them to retain power despite the need to hold elections.'[61]

The Emerging Challenge of Election Technology during the Adjudication of Presidential Election Disputes in Africa

Challenging the results of presidential elections in courts in many African countries is largely a phenomenon that accompanied the fall of dictatorships and one-party regimes across Africa in the late 1980s and early 1990s. The reintroduction of multiparty democracy entailed that elections were going to be genuinely contested between several candidates, with the possibility that opposition leaders could wrestle power from the incumbent leaders. Many constitutions or electoral laws adopted following this wind of change provide for the possibility of aggrieved individuals and/or entities to seek legal redress in courts of law or other quasi-judicial bodies, usually on specified grounds. This process has now come to characterise the resolution of electoral disputes in Africa. Although the mechanism is widely used, so far in Africa, only the Kenyan Supreme Court (in 2017) and Malawian Constitutional Court (in 2020) have overturned presidential election results.[62] By confirming questionable election results, courts have in effect, been giving a veneer of legitimacy to fraudulent electoral victories.[63]

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59 'Election Fraud in Botswana: A Threat to Peace, Justice and Democracy' <https://www.mmegi.bw/index.php?aid=84177&dir=2020/january/27> accessed 13 July 2021.

60 Paul Collier, *Wars, Guns, and Votes: Democracy in Dangerous Places* (Harper Collins Publishers 2009) 8.

61 ibid 6.

62 For a detailed discussion of this case, see O'Brien Kaaba, 'Raila Amolo Odinga and Another v The Independent Electoral and Boundaries Commission and Others Presidential Election Petition No. 1 of 2017' (2018) 1 SAIPAR Case Review 8–16.

63 For a detailed discussion of how courts in Africa have adjudicated disputed presidential election disputes in Africa, see O'Brien Kaaba, 'The Challenges of Adjudicating Presidential Election Disputes in Domestic Courts in Africa' (2015) 15 AHRLJ 329–354; and O'Brien Kaaba, 'The Challenges of

This section discusses how African courts are adjudicating disputed presidential election disputes, where allegations of impropriety relate to manipulation or improper use of technology in the electoral process. The section is in two parts. The first part discusses experiences in the context where technology has been adopted, but without an adequate legal framework governing its use, while the second part looks at the trend whereby the courts simply refuse to upset the status quo.

Inadequate Legal Framework

Although many African countries have adopted the use of various forms of technologies at various stages of the electoral process, some countries do not have specific legal frameworks guiding the adoption of technology and how it should be utilised. Where this happens, it leaves a lot of discretion in the hands of election officials, which could entail deploying the technology arbitrarily. This may have the consequence of diminishing transparency and accountability in the electoral process. How should courts approach presidential election disputes alleging that such technology was deployed for improper purposes but without enabling legislation?

There are at least two relevant case examples here. The first relates to the petition arising from the 2016 Ugandan elections.[64] The petitioners, in this case, raised two issues regarding election technology. The first was to do with the use of biometric verification of voters, a practice not specifically provided for in the law. The petitioners argued that because of the use of defective biometric verification machines, the Commission failed to identify voters by their voters' cards as required by law. This lapse, it was argued, had a dual effect; that is, it denied legitimate voters an opportunity to vote as they were not identified but allowed those not registered to vote as long as they were identified biometrically.[65]

The Commission agreed with petitioners that the biometric identification machines malfunctioned on election day but that there was a hardcover register of voters at each polling station as a backup. The Commission had averred that the biometric verification technology was adopted to overcome the problems of fraud and multiple voting.[66]

In resolving this first allegation, the Supreme Court held that the use of biometric verification of voters by the Commission was within its general powers, although not specifically provided for under the law. It pointed to section 12(1)(f) of the Electoral Commission Act, which empowers the Commission to 'have the power to take steps to ensure that there are secure conditions necessary for the conduct of any election in accordance with this Act.'

Adjudicating Presidential Election Disputes in Africa: Exploring the Viability of Establishing an African Supranational Elections Tribunal' (LLD thesis, University of South Africa 2015).

64 *Amama Mbabazi v Yoweri Kaguta Museveni and Others* Presidential Election Petition No.01 of 2016.

65 ibid 59.

66 ibid 63.

The provision, as can be seen, does not specifically address the issue of deployment of technology in elections. Allowing the Commission to introduce technology under such a broad provision simply clothes the Commission with unchecked power in the deployment of technology, limiting any effective means of checking both the appropriateness of the technology used and its actual deployment. This can be contrasted, for example, with Kenya, which in 2016 passed a comprehensive amendment to the electoral laws in order to establish clear parameters for the use of technology in the electoral process. The Election Laws Act was amended in order to introduce the Kenya Integrated Electoral Management System (KIEMS). This was intended to be used in the biometric voter registration and, on polling day, for voter identification as well as the transmission of election results from polling stations simultaneously to the Constituency Tallying Center and the National Tallying Center.[67]

The second issue the case raised is about the electronic transmission of election results. The petitioners argued that they suffered prejudice by the Commission transmitting election results from district tally centres to the national tally centre using an electronic system that was not safe and had no basis in the law. The Commission confirmed electronically transmitting the results, and that there was no specific provision in the law empowering it to do so. The court held that this was not unlawful, as, in the absence of any specific law on electronic transmission of election results, the action by the Commission did not amount to non-compliance with the law. The court reasoned further that since section 23 of the Interpretation and General Provisions Act states that where a law empowers a person or an entity to perform a task, that includes all the necessary power to accomplish the task.[68]

According to the court, therefore, both the use of the biometric verification and the electronic transmission of results did not breach any law. Ironically, however, the same court recommended that parliament should pass a specific law to guide the use of technology in the electoral process.[69] This demonstrates that the legal framework is inadequate.

The second case example is the 2019 Nigerian presidential election petition.[70] The dispute here related to the use of smart card readers to identify voters. It was alleged by the petitioners that not only did the Commission deploy the smart card readers, but also used the smart card reading machines to transmit results to the server at the national tallying centre, both practices lacking any clear legal basis in the electoral laws. The Court of Appeal agreed that there was no law allowing the use of smart cards to identify voters as section 49 of the Electoral Act 2010 specifically required voters to present themselves physically and present their voters cards. However, it took the view that since the smart card was simply being used to verify voters in order to prevent multiple

67 See the Election Laws (Amendment) Act 2016.
68 ibid 145.
69 ibid 315.
70 *Abubakar* (n 9).

voting and did not displace the physical verification of voters, it had no adverse effect.[71] The court equally dismissed the claim of electronic transmission of election results on the basis that there was no evidence that it had been deployed or had any adverse effect on the results. The approach taken by the court entails there are no consequences when the technology that was adopted to improve the electoral system is deployed for wrong ends. With the increased use of technology in elections in Africa, such cases are likely to increase.

Refusing to Upset the Status Quo

This sub-section discusses case examples that presented somewhat compelling evidence of tampering with the electoral technology deployed but the courts seemed so desirous to uphold the status quo. These are the presidential election petitions arising from the Kenyan 2013 election, the 2012 Ghanaian election, the 2016 Zambian election and Namibia in 2020.

The Kenyan petition of 2013 mainly related to the failed electronic transmission of election results.[72] In the Kenyan context, electronic transmission of results was a legal requirement, which set appropriate safeguards. Rule 82(1) of the Elections (General) Rules 2012 provided:

> The presiding officer shall, before ferrying the actual results of the elections to the returning officer at the tallying venue, submit to the returning officer the results in electronic form in such manner as the Commission may direct.

The petitioners contended that the electronic transmission for election results failed and when this happened, the Commission resorted to manual handling of results, leaving the results susceptible to manipulation and corruption.[73] The petitioners argued further that the electronic transmission of election results was a mandatory requirement.

The court, surprisingly, without any cogent explanation from the Commission over the failure of the technology, took judicial notice of the failure of technology. This was on the account that technology is never perfect and that once the technology failed, there was no other mechanism of processing results but to resort to the manual processing of results.[74] Considering that this was at the heart of the dispute, it was improper for the court to take judicial notice of a disputed issue, which needed to be proved or disproved through evidence. The court needed to satisfy itself that the reasons for the failure of technology were not for improper ends.

The 2012 Ghanaian presidential election petition raised similar issues as the Kenyan one, although in the case of Ghana, this was mainly about the biometric verification of

71 ibid.
72 *Raila Odinga* (n 54).
73 ibid 42.
74 ibid 54 and 96.

voters, which was a mandatory requirement.[75] The relevant rule stated that 'the voter shall go through a biometric verification process.'[76] Petitioners alleged that the failure of the biometric machines was a deliberate attempt to manipulate the system to allow unqualified persons to vote, leading to over-voting. The majority of the court, however, held that this failure did not substantially affect the results of the elections overall. To upset the results, the petitioners needed to demonstrate how the non-compliance with the law impacted on the electoral outcome. By taking this approach, the court allowed itself to ignore the mandatory requirement of the law for biometric verification of voters.

The 2016 Zambian presidential election dispute in part revolved around the allegation that the server at the national tally centre receiving results transmitted electronically from the constituencies was hacked, and the results altered in favour of the incumbent.[77] The case, however, unfolded in a dramatic manner which shows the lengths a court can go to in order to avoid confronting the possibility of upsetting the status quo. After giving contradictory orders about when the trial should commence, the Constitutional Court dismissed the petition after two weeks on the pretext that it was constitutionally bound to determine a presidential election dispute within that time frame. Once the dispute went beyond that period, the court had no jurisdiction to hear the matter.[78] This case is an extreme scenario of a court unwilling to hear the merits of a case and in this context, it meant that the evidence of how the election technology was manipulated, could not be produced before the court.

Perhaps the case which epitomises the emerging challenge of election technology in the adjudication of presidential election disputes is the judgment of the Namibian Supreme Court in February 2020.[79] Namibia held its presidential elections in 2019. In 2014, the Namibian legislature enacted the Electoral Act No. 5 of 2014, which, inter alia, introduced electronic voting through the deployment of Electronic Voting Machines (EVM). Because of the inherent vulnerability of EVMs to manipulation, the law provided specifically that the technology to be used will have a paper trail. The import of this was to secure the integrity of the electoral system. Section 97(3) of the Act, which is the relevant provision, made the deployment of EVMs conditional on the simultaneous use of a verifiable paper trail, while section 97(4) is categorical that where there is a discrepancy, the paper trail results would prevail.

To operationalise the Act, a relevant minister had to indicate when it shall commence by way of Government Notice. In October 2014, the Minister of Urban and Rural Development issued a Government Notice, triggering the Act into effect. In issuing the

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75 *Nana Addo Dankwa Akufo-Addo and Others v John Dramani Mahama and Others* Presidential Election Petition Writ No.J/6/2013.

76 ibid 88.

77 *Hakainde Hichilema and Another V Edgar Lungu and Others* 2016/CC/0031 Ruling No.33 of 2016.

78 ibid.

79 *Panduleni Filemon Bango Itula and Others v Minister of Urban and Rural Development and Others* Case No. A 1/2019 (February 2020).

Government Notice, the minister, however, decided that while the rest of the Act shall come into effect, meaning that sections 97(3) and (4), which provide for the use of a verifiable paper trail, would not come into effect. The 2019 elections were held using electronic voting machines but without a verifiable paper trail.[80] As a result, the inbuilt mechanism for ensuring the integrity of electronic voting was excluded.

Following the declaration of results, losing opposition leaders petitioned the Supreme Court, seeking to annul the election. The applicants argued that the selective implementation of the Electoral Act was unconstitutional as it violated constitutional principles such as the separation of powers. The court held that the selective implementation of the Act was a violation of constitutional principles. It reasoned further that section 97 was a composite provision whose subsections could not be compartmentalised. Through this action, the court held that the 'minister effectively deleted (for the time being) the safeguards enacted by Parliament and thus usurped its role and breached the separation of powers provided for in the Constitution.'[81]

Having reached this conclusion, it would have naturally followed that the election was held under circumstances that violated the constitution and electoral laws and, in a manner, that the will of the people could not be verifiable. The court, however, took the view that the violations did not affect the results, stating as follows: 'The applicants have not shown that the absence of a verifiable paper trail has adversely affected their fundamental right to vote particularly with reference to irregular use of EVMs or their unreliability.'[82] It goes without saying that the judgment is contradictory in that on the one hand, the court found that the selective implementation of the Act was unconstitutional and removed any verifiable means of knowing the accuracy of the election results, while on the other hand the court strangely held that the effect on results was not proved.

It should, however, be emphasised that there are many other reasons why a court may not tamper with the status quo in election petition matters. In his analysis of the adjudication of presidential elections in African courts, Kaaba identified five patterns in this respect. The first is the overwhelming trend to rule in favour of the incumbent, the candidate sponsored by the incumbent party or the presumptive winner of the election.[83] Such default position is one that places a premium on sustaining the political climate rather than addressing unfairness and imbalance. Second is the dismissal of petitions on the grounds of curable technicalities without considering the merits of the case.[84] Third is the misuse of the 'substantial effect rule', where courts wrongly classify major irregularities as minor infractions that are incapable of significantly affecting the

80 ibid.
81 ibid 35.
82 ibid 39.
83 Kaaba AHRLJ (n 63) 335–337.
84 ibid 338–343.

election results.[85] This, however, is not to argue that every infraction of the law or mistake should lead to the nullification of results. Fourth is the delayed determination of election disputes.[86] Lastly is the way in which some courts refrain from making any meaningful decision.[87] In addition to these points is the extent to which the executive interfere in judicial independence by appointing 'friendly' judges and/or members of the Judicial Service Commissions, political backlash against the judiciary for ruling in favour of the opposition, and making laws that curtail the powers of the judiciary.[88] Although beyond the scope of this article, addressing these problems will entail the reconsideration of the rules of evidence, the adversary nature of trials, and the test for nullification or upholding of elections.

These cases discussed here suggest there is a need for courts to develop new standards for adjudicating elections.

The Imperative of a Progressive and Proactive Judiciary: Lessons from Kenya and Malawi

Reforming the law to provide for clear standards for the use of technology could allow for certainty and, therefore, potentially aid the courts in making assessments where there are allegations of improper use of technology. Law reform, however, is often at the discretion of ruling regimes. Where changes may work against them, reforms are unlikely to be embarked upon or if done, less likely to be implemented effectively. The courts, however, can do something without waiting for politicians to act. The suggestions here are, therefore, confined to what judges could accomplish even in the absence of extensive law reform.

The courts can use the inherent discretion of their office to develop the law incrementally, through progressive interpretation and proactive adjudication. As guardians of constitutionalism and the rule of law, judges have a responsibility to ensure that they articulate the law in a manner that promotes these values and not defeating them. The decisions of the Kenyan Supreme Court in 2017 and Malawian Constitutional Court in 2020 are illustrative of this approach. The Republic of Kenya held its second general elections under the 2010 Constitution on 8 August 2017. The Independent Electoral and Boundaries Commission (IEBC) on 11 August 2017 declared the incumbent, Uhuru Kenyatta, as an outright winner, having garnered 8,203,290 votes, beating his closest rival, Raila Odinga, who secured 6,762,224 votes. Dissatisfied with

85 ibid 343–349.

86 ibid 349–351.

87 ibid 352–354.

88 See eg Rachel Ellett, 'Judicial Independence Under the APRM: From Rhetoric to Reality' South African Institute of International Affairs Occasional Paper 212 (2015) 1–35. <https://www.files.ethz.ch/isn/189964/saia_sop_212_ellett_20150402.pdf> accessed 13 July 2021.

the results, Odinga and his running mate, Stephen Kalonzo Musyoka filed a petition challenging the election of Kenyatta in the Kenyan Supreme Court.[89]

The Kenyan decision demonstrates that it is not only what happens on polling day that matters, but the entire process. Elections, as the court correctly observed, 'are not events but processes.'[90] Prior to the election, the Elections Act was amended in order to introduce the KIEMS. This was intended to be used in the biometric voter registration and, on polling day, for voter identification as well as the transmission of election results from polling stations simultaneously to the Constituency Tallying Center and the National Tallying Center. The transmission of results required the use of standard forms (Forms 34A and 34B). In many instances, the transmission of results was not done as required by the law. No plausible explanation was given by the IEBC for this. The petitioners alleged that the system was hacked and results tampered with in favour of the incumbent. The court appointed its own IT experts to assess the IEBC servers and report their findings to the court. IEBC, in violation of the court order, declined to give access to the court-appointed IT experts to critical areas of the server.

The court held that the failures by IEBC were a clear violation of the Constitution and the Elections Act and caused serious doubt as to whether the election results could be said to be a free expression of the will of the people. The court declined to take what has been the easy way out by many courts, as urged by the defendants, that even if all the anomalies were taken into account, in terms of numbers, the gap between the declared winner and the runner up was big and could not be bridged. It held that elections are not just about numbers but that the quality of the entire process matters in order to gauge whether the result reflects the will of the people.[91]

More importantly, the Supreme Court took a proactive approach to allow court appointed technology experts to investigate the allegations and have access to the Commission's servers and report the findings to the Court. Specifically, the experts were to determine whether the system for transmission of results was hacked. IEBC, however, 'contumaciously disobeyed the order' leading the court to draw an adverse inference against IEBC and accepted the petitioners' claim that 'either IEBC's IT system was infiltrated and compromised and the data therein interfered with or IEBC's officials themselves interfered with the data […].'[92]

The Kenyan Supreme Court decision is also important in that it demonstrates that election cheating using technology may not be easy to detect as it is not visible to election observers. In the case of Kenya, all the major international election observers certified the election as having been credible or largely reflecting the will of the people,

89 *Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others* Presidential Petition No. 1 of 2017.

90 ibid para 224.

91 ibid.

92 ibid para 280.

this conclusion entirely based on what was observable on poll day, without accounting for the transmission of results. The Court had this to say:

> In passing only, we must also state that whereas the role of observers and their interim reports were heavily relied upon by the respondents as evidence that the electoral process was free and fair, the evidence before us points to the fact that hardly any of the observers interrogated the process beyond counting and tallying at the polling stations. The interim reports cannot therefore be used to authenticate the transmission and eventual declaration of results.[93]

The judgment, however, demonstrates an unalloyed and unwavering commitment to constitutionalism and the rule of law. It is only through such principled adjudication that African courts can contribute towards putting African countries on the path of development anchored on respect for human rights, accountability and the rule of law, and the emergence of genuine democracy anchored on the will of the people.

Similarly, the Malawi Constitutional Court took a proactive approach in February 2020 when it annulled the presidential elections held in 2019.[94] The court built on the 2017 Kenyan judgment (which it referred to several times). One of the main allegations was that the election officers unlawfully tampered with election results by substantially altering figures. The court found that the election results forms which were used to tabulate national figures were pervasively altered unlawfully. Based on adduced evidence, the court came to the conclusion that twenty-four per cent of the result sheets had results altered using correction fluid (popularly known as Tippex), six per cent of forms were manually amended, four per cent of the forms lacked signatures of the election officials and six per cent of the forms inexplicably lacked the signatures of political party agents.[95] Having established this (among other reasons), the court came to the conclusion that the Electoral Commission failed to preside a free and fair election as the electoral process was compromised and was conducted in a manner that violated electoral laws and the Constitution. The court nullified the election and ordered a new election to be held within 150 days.[96]

Of great relevance to this article, the court also confronted the issue of technology in the electoral process. Although there was no evidence that there was manipulation of results in the electronic transmission and tabulation of results, the court took seriously the defects that were proved. The court heard and accepted evidence that the computerised Electronic Results Management System (eRMS) was compromised due to the use of default accounts with multiple passwords on the server, a situation known by several people within the Electoral Commission. According to the court, 'this opened

93 ibid para 302.

94 *Saulosi Chilima and Lazarus Chakwera v Arthur Mutharika and Others* Constitutional Reference No. 1 of 2019 (February 2020).

95 ibid para 402.

96 ibid para 414.

the eRMS to risk of internal abuse without accountability.'[97] More elaborately, the court recorded its disapproval in the following terms:

> Consequently, we find that the default user accounts presented a risk to the integrity of the eRMS. This detracted from the quality and reliability of the eRMS and qualified as a cause for questioning the final national election result which result was electronically collated and tallied by the system.[98]

As in the case of the Kenyan Supreme Court, the Malawian Constitutional Court was not happy to simply explain away the discrepancies as simple inconsequential errors. The court showed remarkable concern for the integrity of the entire electoral process and the need to safeguard the integrity of electoral technology.

Conclusion

Adjudication of disputed elections in Africa is problematic. The courts have, with the exception of the Kenyan Supreme Court in 2017 and the Malawian Constitutional Court in 2020, merely confirmed the status quo. The use of technology in elections has made elections more vulnerable to manipulation. However, the courts have failed to develop jurisprudence that takes into account this new development. The implication of this is that technology will continue to be used to manipulate elections with the full imprimatur of domestic courts in Africa. This article engaged in a discussion of how election technology has been manipulated in a number of African elections. In addition, it considered the way in which many African courts have refused to meaningfully assess the defects of election technology proactively during the adjudication of presidential election disputes. Two deficiencies were identified in this respect. One is the absence of, or in most cases, an inadequate legal framework that specifies the way in which EMBs should use election technology. The second is where the judiciary has chosen to maintain the status quo, preferring 'not to rock the boat'. The article argued that for this to change, courts should adopt a proactive approach and develop the law, as done by the Kenyan Supreme Court in 2017 and the Malawian Constitutional Court in 2020. The ultimate aim is that such proactive disposition will ensure that technology does not undermine the will of the people in the electoral process.

97 ibid para 358.
98 ibid para 358.

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