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**UNIVERSITY**

**RIGHT TO RECALL: ASSESSING WHETHER CONDUCTING A  
UNIFIED RECALL ELECTION WOULD BE A SOLUTION TO THE  
HIGH COST OF ELECTION IN KENYA**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,  
Strathmore University Law School

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[DECEMBER 2023]

Word count: 13190

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## ACKNOWLEDGEMENTS

Above all, I thank the Almighty God for good health through-out this period. Second, I thank my supervisor — Mr. Chacha Odera, and Ms. Anne Kadima for their guidance, support, advice, and clarification during the writing of this project. To them, I am forever indebted.

Third, to thank my parents for their unwavering support and encouragement through-out the writing process and my years of school so far. Also, my grandmother for her prayers and the time-to-time phone calls to find out how I was progressing with this study project.

Fourth, to Mr. Jeffah Ombati, I thank you for taking time off your busy schedule to discuss some challenging bits in this study, and for proofreading this work to ensure it had no typos and errors. Additionally, to my friends and everyone who has been of help in one way or another, I thank you and I do not take your help and support for granted.

DECLARATION

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

Signed: H. Ogeri

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

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Date: 19<sup>th</sup> December 2023

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## ABSTRACT

*The right to recall is anchored in the Constitution of Kenya, 2010. Inasmuch as this provision has not been exercised by the electorate, it is bound to be used in the future. The right to Recall enables the electorate to impeach or rather oust their elected representatives from office prior to the expiry of their tenure. This tool enhances accountability on the part of the elected representative and enables the electorate to engage their representatives. Recall also ensures that democracy is upheld as the electorate is afforded the opportunity to kick start the recall process as they are the ones who are at the centre of this process. In Kenya, the recall election is held in a two-tier system where the recall vote— where the electorate is asked whether to recall their representative first— and where a majority vote yes, then a by-election will be held on a later date where the electorate will be afforded the opportunity to elect a replacement to fill in the void occasioned in the event the recall vote was successful.*

*This study seeks to assess whether it would be possible for Kenya to conduct a unified recall election— the recall vote and the replacement vote— in one election rather than splitting the two votes so as to minimise the cost of conducting elections in Kenya. In doing so, this study will look into the legal framework that underpins the right to recall in Kenya, assess what makes the Kenyan election costly, and finally, compare how the State of California conducts its unified recall election. In its conclusion, this study finds that it might be challenging for Kenya to conduct the unified recall election as a solution to the high cost of conducting elections in Kenya. This study recommends that a system of volunteerism be adopted by the IEBC to help in conducting elections and educating the general public on electoral matters, the procurement of ballot papers be done within Kenya where printing firms in Kenya are awarded contracts to print the ballot papers and that an audit be done to the digital technologies used in election to determine their suitability to be used in between the 5-year period to conduct recall election or any other elections that may occur.*

## LIST OF ABBREVIATIONS

Kshs.	Kenya Shillings.
Cok	Constitution of Kenya, 2010.
EA	Elections Act (Act No. 24 of 2011).
CGA	County Governments Act (Act No. 17 of 2012).
MP	Member of Parliament.
MCA	Member of County Assembly.
IEBC	Independent Electoral and Boundaries Commission.
Commission	Also, refers to the Independent Electoral and Boundaries Commission.
CBA	Cost Benefit Analysis.
BVR	Biometric Voter Registration System.
EVID	Electronic Voter Identification Kits.
RTS	Results Transmission System.
KIEMS Kits	Kenya Integrated Elections Management System.
CEO	Chief Executive Officer.
G2G	Government-to-Government.
ICT	Information Communications Technology.
US\$	United States Dollar.
NEC	National Electoral Commission.
CoR	Constitution of Rwanda.
RWf	Rwandan Franc.

## LIST OF CASES

Katiba Institute & Another v Attorney General & Another (2017) eKLR.

African Centre for Open Governance (AFRICOG) v Ahmed Issack Hassan & Another (2013) eKLR.

Thomas Musau & 2 Others v IEBC & 2 Others (2013) eKLR.

Orrin Heatlie v Alex Padilla (2020), Superior Court of California.

John Lokitare Lodinyo v Mark Lemunokol & 2 Others (2013) eKLR.

Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others (Election Petition 1 of 2017) [2017] KESC 32 (KLR) (Election Petition) (1 September 2017) (Determination).

## LIST OF STATUTES

The Constitution of Kenya, 2010.

Elections Act (Act No. 24 of 2011).

County Governments Act (Act No. 17 of 2012).

Leadership and Integrity Act (Act No. 19 of 2012).

Elections Code (California).

Universal Declaration of Rights (1948).

The Elections (Parliamentary and County Elections) Petitions Rules (2017).

The Constitution of Rwanda.

No. 001 of 2019 Organic Law Governing Elections of 29/07/2019 (Rwanda).

## CHAPTER 1: INTRODUCTION

### I. BACKGROUND

Recall is the removal of a public official from office by popular vote<sup>1</sup> before the end of their tenure. Advocates argue that recall is a century-old tool for direct democracy<sup>2</sup> with roots tracing back to ancient Greece.<sup>3</sup> This right has been said to reinforce the people's sovereignty over their elected leaders.<sup>4</sup> The recall process also promotes democracy because the electorates initiate the process, promoting their role in the democratic process.<sup>5</sup> Recall also allows the elected leaders to be accountable to the electorate.<sup>6</sup>

In Kenya, the Constitution provides for the right to recall under Article 104 which provides the electorate with a window period to exercise the right to recall their elected representatives before the end of their term in the relevant House of Parliament.<sup>7</sup> Pursuant to this article, Parliament was tasked to legislate laws that provide for the grounds and procedure for recall.<sup>8</sup> Two statutes were enacted— the Elections Act (EA)<sup>9</sup> and the County Governments Act (CGA)<sup>10</sup>— which outline the grounds and procedures for recalling a member of parliament (MP) and a member of the county assembly (MCA) respectively.

The grounds for recalling an MP are that after due process of the law— (s)he has violated the provisions of Chapter Six on leadership and integrity, mismanaged public resources, and is convicted of an election-related offence.<sup>11</sup> On the other hand, the grounds for recalling an MCA are— grave contravention of the Constitution or any other law, incompetence, grave misconduct, and being found guilty of a crime punishable by at least six months in prison.<sup>12</sup>

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<sup>1</sup> Black's Law Dictionary, 9<sup>th</sup> ed.

<sup>2</sup> Carrillo D, Spivak J, Kaliss N and Madnick J, 'California's recall is not overpowered' 62 *Santa Clara Law Review* 3, 2022, 481.

<sup>3</sup> Spivak J, 'What is the history of recall elections?' *History News Network*, 2023, <https://historynewsnetwork.org/article/1660> on 17 February 2023.

<sup>4</sup> Kiwinda M and Ambani J, *The New Constitutional Law of Kenya: Principles, Government and Human Rights*, Law Africa Nairobi, 2012, 119.

<sup>5</sup> Griffith G and Roth L, 'Recall Elections' 3 *New South Wales Parliamentary Library Research Service* 2, 2010, 8.

<sup>6</sup> Bhanu V, 'Right to recall legislatures: The Chhattisgarh experiment' 43 *Economic and Political Weekly* 40, 2008, 15.

<sup>7</sup> Article 104(1), Constitution of Kenya (2010).

<sup>8</sup> Article 104(2), Constitution of Kenya (2010).

<sup>9</sup> Sections 45-48, Elections Act (Act No. 24 of 2011).

<sup>10</sup> Sections 27-29, County Governments Act (Act No.17 of 2012).

<sup>11</sup> Section 45(2), Elections Act (Act No. 24 of 2011).

<sup>12</sup> Section 27(2), County Governments Act (Act No. 17 of 2012).

A recall petition may be filed only once against the MP and MCA during the member's term in parliament or county assembly.<sup>13</sup> The EA further stipulates that a person who has unsuccessfully contested an election is ineligible to commence a petition to recall, either directly or indirectly.<sup>14</sup> A recall of an MP may be initiated only if a High Court judgment or finding confirms the specified grounds therein.<sup>15</sup> The Acts provide that the recall can be initiated by submitting a petition to the Independent Electoral and Boundaries Commission (IEBC) and the petitioner who is a voter in the constituency or county affected, signs the petition.<sup>16</sup> Furthermore, both Acts stipulate that a recall cannot commence until 2 years after the MP's and MCA's election and no later than 1 year before the next general election.<sup>17</sup>

Upon IEBC being contented that the petition meets the statutory threshold and basis, it is required to send a recall notice to the speaker of the relevant House of Parliament or county assembly. The Commission then formulates the recall question to be decided at the election. The question should be phrased in such a way that the answer "yes" or "no" is required, and a symbol should be assigned to each answer to the recall question. The Commission must conduct a by-election in the affected constituency, county, or ward if an MP or MCA is removed as a result of a recall election.<sup>18</sup>

The provisions of the EA and the CGA relating to recall were challenged in the High Court in the case of *Katiba Institute & another v Attorney General & another*.<sup>19</sup> The petitioners claimed that the grounds for recall in the statutes were purposeless because they did not provide a workable and efficient process, thus, making it difficult for citizens to exercise their right to recall.<sup>20</sup> The court in its judgment held that certain provisions in both the EA and the CGA fall below the constitutional imperative enshrined in Article 104 of the Constitution, and thus are unconstitutional.<sup>21</sup>

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<sup>13</sup> Section 45(5), Elections Act (Act No. 24 of 2011) and Section 27(5), County Governments Act (Act No. 17 of 2012).

<sup>14</sup> Section 45(3), Elections Act (No. 24 of 2011).

<sup>15</sup> Sections 45(6), Elections Act (No. 24 of 2011).

<sup>16</sup> Section 46, Elections Act (Act No. 24 of 2011).

<sup>17</sup> Section 45(4), Elections Act (Act No. 24 of 2011) and Section 27(4), County Governments Act (Act No. 17 of 2012).

<sup>18</sup> Sections 47, Elections Act (Act No. 24 of 2011) and Section 29, County Governments Act (Act No. 17 of 2012).

<sup>19</sup> Constitutional Petition 209 of 2016.

<sup>20</sup> *Katiba Institute & Another v Attorney General & Another* (2017) eKLR.

<sup>21</sup> *Katiba Institute & Another v Attorney General & Another* (2017) eKLR. Para 127(a). *Sections 45(2)(3) and (6), 46(1)(b)(ii) and (c), and 48 of the Elections Act, as well as sections 27(2)(3) and (6) and 28(1)(b)(ii) and (c) of the County Governments Act.*

Furthermore, some of the two Acts' provisions were declared unconstitutional because they were discriminatory.<sup>22</sup> It was envisioned that recall of the elected representatives would promote the electorates' participation in the political process, encourage a more vigilant electorate and provide an incentive for them to monitor the MP's performance, and make the MP accountable to the electorate and encourage him or her to perform well.<sup>23</sup>

There has been no successful recall petition or election in Kenya. However, there was an attempt to recall Kiambu's woman representative; Gathoni wa Muchomba, in 2017.<sup>24</sup> The law provides for a two-tier process for a recall election being— i) the question put forth to the electorate to vote on whether a certain MP or MCA should be recalled; and ii) where the answer yes has the majority votes in the recall election, then a by-election is conducted where the electorate choose who should be elected as their MP or MCA.

The two-tier system of recall is expensive and may pose a challenge considering that the treasury does not also allocate the IEBC with the 'required' funding. For instance, in the 2012/2013 budget allocation for the general election, the treasury allocated IEBC Kshs. 17.5 billion<sup>25</sup> instead of the Kshs. 41.4 billion that the Commission had requested.<sup>26</sup> As a result, the Commission amassed a massive pending bill.

It has been noted recently that Kenya is among the countries that hold costly elections in the world <sup>27</sup>. The IEBC in the 2022 general elections put the cost of the elections at Kshs. 44.6 billion which translates to a cost per registered voter being Kshs. 2,000.<sup>28</sup> From the budget statement for the financial year 2022/2023, the treasury had allocated the IEBC Kshs. 44.6 billion.<sup>29</sup> Considering that this was the amount needed by the IEBC to conduct the election, this budget allocation does not take into consideration the occurrence of a recall election which would require funds to carry out which in my opinion may be expensive if all factors are kept

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<sup>22</sup> Katiba Institute & Another v Attorney General & Another (2017) eKLR. Para 127(b). *Sections 45(1)(b)(ii) and 45(6) of the Elections Act, as well as sections 27(6) and 28(1)(b)(ii) of the County Government Act.*

<sup>23</sup> The Final Report of the Constitution of Kenya Review Commission (2005), 176-177.

<sup>24</sup> Githae W, 'Plan to recall woman rep in pay row may hit legal snag' Daily Nation, 26 August 2017 <https://nation.africa/kenya/news/politics/plan-to-recall-woman-rep-in-pay-row-may-hit-legal-snog--443268> on 1 February 2023.

<sup>25</sup> Ministry of finance, Budget Statement FY 2012/2013, 14 June 2012.

<sup>26</sup> Onyango L, 'Factors influencing effective planning for general elections: A case of independent electoral and boundaries commission Kenya' Published LLM Thesis, University of Nairobi, Nairobi, 2015, 6.

<sup>27</sup> Walsh D, 'Kenya elections: A fiercely fought election in Kenya, an African Power House' The New York Times, 9 August 2022 <https://www.nytimes.com/live/2022/08/09/world/kenya-elections> 18 April 2024.

<sup>28</sup> Musau D, 'Kenya's august elections among the world's most expensive' Citizen Digital, 26 July 2022 <https://www.citizen.digital/news/kenyas-august-elections-among-the-worlds-most-expensive-n302874> on 19 February 2023.

<sup>29</sup> Ministry of Finance, Budget Statement FY 2022/2023, 7 April 2022, 72.

constant. This is to say that it shall cost every voter Kshs. 2,000 for each part of the two-tier recall election process.<sup>30</sup>

## II. STATEMENT OF PROBLEM

Kenya's election has been said to be expensive.<sup>31</sup> The high cost of conducting elections in Kenya poses a significant challenge to the electoral process. The current practice of holding the recall vote and by-elections separately, exacerbates the problem, putting a significant financial strain on both the IEBC and voters. With each registered voter in Kenya paying around Kshs. 2,000/= per election, the cost per voter is relatively high compared to countries like Rwanda<sup>32</sup>, emphasising the need for a more cost-effective approach to electoral management. Also, it is important to state that in the Building Bridges Initiative, IEBC noted that the funds allocated to it in the budget statement of 2021/2022 would not be used to conduct the referendum as the Treasury Cabinet Secretary had not taken into account the costs of a referendum when he allocated resources to IEBC.<sup>33</sup> This study will therefore assess whether conducting a unified recall election can be a solution to the high cost of election in Kenya.

## III. RESEARCH OBJECTIVES

1. To examine what makes the Kenyan election expensive
2. The legal framework that underpins the right to recall in Kenya.
3. To examine whether the unified model of recall election can be applicable in the Kenyan context as a way to reduce the cost of election.

## IV. RESEARCH QUESTIONS

1. What makes the Kenyan election expensive?
2. What is the legal framework that underpins the right to recall in Kenya?

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<sup>30</sup> Mutinda L, '2022, Kenya's second most expensive election' Debunk Media, 6 August 2022 <https://debunk.media/2022-kenyas-second-most-expensive-election/> on 18 April 2024.

<sup>31</sup> Mutai E, 'The hidden costs that make Kenya polls money guzzlers' Business Daily, 22 August 2022 <https://www.businessdailyafrica.com/bd/data-hub/the-hidden-costs-that-make-kenya-polls-money-guzzlers-3922944> on 18 April 2024.

<sup>32</sup> Musau D, 'Kenya's August elections among the world's most expensive' Citizen Digital, 26 July 2022 <https://www.citizen.digital/news/kenyas-august-elections-among-the-worlds-most-expensive-n302874> on 18 April 2024.

<sup>33</sup> Mireri J, 'Referendum not factored in money allocated To IEBC, agency boss says' The Standard, 2022, <https://www.standardmedia.co.ke/national/article/2001415401/referendum-not-factored-in-money-allocated-to-iebc-agency-boss-says> on 2 March 2023.

3. Can the unified model of conducting a recall election be applicable in the Kenyan context to reduce the cost of election?

## V. HYPOTHESIS

With the high cost of conducting elections, it is this study's hypothesis that the solution to this problem may be cured by conducting the recall vote concurrently with the by-election. This will minimize the cost of conducting two separate elections to achieve one goal. By combining the recall vote and the by-election, the electoral process can be streamlined, resulting in significant cost savings. Thus, this study will move to assess whether conducting a unified recall election would be appropriate in the Kenyan context as a solution to the high cost of election.

## VI. JUSTIFICATION OF THE STUDY

The high cost of elections in Kenya as noted, will in the event of a recall election, be experienced. This study will be beneficial in that it will evaluate whether it is possible for Kenya to hold a unified recall as a solution to the issue of high election costs in Kenya rather than a separate recall election. This study will provide useful information to law-makers when faced with the task of amending laws. Also, researchers interested in this matter will benefit from this study.

## VII. THEORETICAL FRAMEWORK; COST-BENEFIT ANALYSIS AND LEGAL RIGHTS THEORIES

### a. Cost-Benefit Analysis

The cost-benefit analysis theory (CBA) has been described to be the analysis of a decision in terms of its implications, or costs and benefits<sup>34</sup> where the costs and benefits are asserted and evaluated in monetary terms to the greatest extent possible.<sup>35</sup> This theory seeks to help politicians make project and policy decisions.<sup>36</sup> CBA provides a systematic and objective

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<sup>34</sup> Dreze J and Stern N, 'The theory of cost-based analysis' in Auerbach A and Feldstein M (ed) *Handbook of Public Economics*, London School of Economics, London, 1987, 911.

<sup>35</sup> Boadway R, 'Principles of cost-benefit analysis' 2 *Public Policy Review* 1, 2006, 5.

<sup>36</sup> Mouter N, 'The politics of cost-benefit analysis' Oxford Research, 2019, 1. [https://www.researchgate.net/publication/338150125\\_The\\_Politics\\_of\\_Cost-Benefit\\_Analysis](https://www.researchgate.net/publication/338150125_The_Politics_of_Cost-Benefit_Analysis) on 6 March 2023.

framework for decision-making, which can assist politicians in making more informed and evidence-based decisions.<sup>37</sup> Therefore, politicians can make decisions that are in the best interests of the public by taking into account all relevant costs and benefits. CBA assists politicians in identifying and evaluating the potential costs and benefits of a plan by recognizing and evaluating the costs and benefits. This includes both direct costs like financial costs and indirect costs like environmental costs, as well as direct benefits like increased revenue and indirect benefits like improved public health.<sup>38</sup>

CBA has been criticized in that there is no agreement on how or whether to quantify the numerous costs or more importantly, the benefits a regulation would bring.<sup>39</sup> Another criticism is that there is no agreement on how the future generation would perceive some of the policies we have currently.<sup>40</sup> CBA has been seen not to be suitable in its evaluation of ethical and political matters where it has been proposed that before a decision is made to finality, then CBA ought to be supplemented with other information.<sup>41</sup> Similarly, politicians and bureaucrats have had a fair share of criticisms from economists for not paying attention to the results of CBA in decision-making.<sup>42</sup>

Sunstein observes that CBA is best placed to promote economic efficiency.<sup>43</sup> CBA has been praised for promoting the depth of political discussions and the foundation of political resolutions is improved.<sup>44</sup> Here, politicians have found out the need to argue more precisely on why they vouch for a project notwithstanding it having a negative CBA, or why they do not want a project despite a positive CBA. Dutch politicians argue that without a CBA, the necessity of a government project is frequently advanced in a broad sense.<sup>45</sup> In a Cost-Benefit Analysis, when the costs of a proposed plan outweigh the benefits, it indicates that the proposal is going to have a negative net impact on society. In such cases, policymakers must decide whether the proposal should be modified or scrapped entirely. When the benefits of the

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<sup>37</sup> Makowsky D and Wagner E, 'From scholarly idea to budgetary institution' 20 *Constitutional Political Economy* 1, 2009, 64.

<sup>38</sup> Thomas V and Chindarkar N, 'The picture from cost-benefit analysis' in Thomas V and Chindarkar N (ed) *Economic evaluation of sustainable development*, Springer Nature Singapore, Singapore, 2019, 65.

<sup>39</sup> McGarity T, 'A cost-benefit state' 50 *Administrative Law Review* 1, 1998, 23.

<sup>40</sup> Sen A, 'Approaches to the choice of discount rates for social benefit-cost analysis' in Robert C (ed) *Discounting for time and risk in energy policy*, Resources for the Future, Washington DC, 1982, 332.

<sup>41</sup> Nyborg K and Spangen I, 'Cost-benefit analysis and the democratic ideal' Statistics Norway Research Department, Discussion Paper No. 24, 1997, 3. <https://www.econstor.eu/bitstream/10419/192189/1/dp205.pdf> on 6 March 2023.

<sup>42</sup> Nyborg K and Spangen I, 'Cost-benefit analysis and the democratic ideal' 3.

<sup>43</sup> Sunstein C, 'Cognition and cost-benefit analysis' 29 *Journal of Legal Studies* 54, 2000, 1062.

<sup>44</sup> Mouter N, 'Attitudes of Dutch politicians towards cost-benefit analysis' 54 *Transport Policy* 1, 2017, 4.

<sup>45</sup> Mouter N, 'Attitudes of Dutch politicians towards cost-benefit analysis' 6.

proposed policy, project, or program outweigh the costs, it shows that the proposal is likely to have a positive net impact on society. In such cases, policymakers must decide whether to implement the proposal and how to do so in the most effective and efficient manner.

Therefore, in having a CBA that analyses the costs and benefits of holding a unified recall election as a means to reducing the cost of election takes precedence over the right of an elected member to challenge the recall. This theory will help this study assess the costs that might be incurred in conducting a unified recall election rather than a separate one vis-à-vis the benefits that the same may have and thus, this will be instrumental in the conclusion and recommendations that will be arrived at.

#### b. Legal Rights Theory

The legal rights theory is often associated with the philosophical works of figures such as John Locke<sup>46</sup> and Immanuel Kant<sup>47</sup>, who underscore the inherent and fundamental rights individuals possess by virtue of their humanity. These rights, whether expressed in constitutional provisions, statutes, or international conventions, form the basis of a rights-based approach to justice.<sup>48</sup>

Within this framework, the legal system is viewed as a tool for protecting and enforcing these rights. Individuals who believe their rights have been breached are justified in seeking a remedy from the court, as this aligns with the legal recognition of these essential rights. The rule of law, a fundamental principle in many legal systems, emphasizes that everyone, including those in positions of authority, is bound by and accountable to the law.<sup>49</sup>

Furthermore, taking legal action not only allows individuals to assert their rights, but also plays an important role in preventing impunity and holding wrongdoers accountable.<sup>50</sup> Legal systems provide distinct remedies for violations of rights, such as compensatory measures, court orders, or specific actions, reinforcing the principle that individuals should not be denied their rights without repercussions for those who are at fault.<sup>51</sup>

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<sup>46</sup> Locke J, *Two treatises of government*, McMaster University Press, London, 1823, 30.

<sup>47</sup> Kant I, *Groundwork for Metaphysics and Morals*, Cambridge University Press, Cambridge, 1998.

<sup>48</sup> Article 8, Universal Declaration of Human Rights, 10 December 1948.

<sup>49</sup> Dicey A, *Introduction to the study of the law of the constitution*, Liberty Classics, Sumerian, 1982, 261.

<sup>50</sup> Waldron J, 'The rule of law and the importance of procedure' Public Law and Legal Research Paper Series, Working Paper No. 10-73, 2010, 11.

<sup>51</sup> Posner R, *The Problems of Jurisprudence*, Harvard University Press, Cambridge, 1990, 321.

The legal rights theory, which is based on principles of impartiality and equity, emphasizes the idea that individuals deserve fair treatment and that the legal system should protect their rights equally.<sup>52</sup> As a result, approaching the court serves as a method not only of pursuing individual justice but also of confronting systemic injustices and contributing to the overarching goal of social justice.<sup>53</sup>

In conclusion, the legal rights theory provides a compelling reason for individuals whose rights have been violated to seek redress in court. This approach ensures that the legal system serves as a guardian of fundamental rights, allowing individuals to seek justice, accountability, and equal treatment under the law.

### VIII. LITERATURE REVIEW

In Kenya, even though there is academic work on the right to recall, the same does not delve much into the question being studied herein this paper. Brian Ochola in his dissertation, notes that if the law remains as it is; the two-tier recall process, the expenses associated with conducting a recall election will be expensive.<sup>54</sup> Morris Kiwinda and John Ambani note that the right as currently enacted is rife with restrictions which was not the case as it was believed that the electorate would have sufficient power to recall a non-performing representative.<sup>55</sup> They go on to add that the electorate does not have a free hand in recalling an MP who they believe is unfit for leadership which is contrary to the expectations the electorate had earlier on.<sup>56</sup> Further, these sentiments are affirmed by Jessica Musila and Gitungo Wamwere.<sup>57</sup>

Joshua Nyawa equates the right to recall to a seedling and that it is entirely dependent on the farmer, and only the farmer can decide whether to allow it to flourish or die. The seedling was provided by the drafters of the constitution, which was unfortunately left in the hands of selfish MPs.<sup>58</sup> On the clause on the time that a recall can be initiated, Elisha Ongoya and Willis Otieno

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<sup>52</sup> Rawls J, *A theory of justice*, Harvard University Press, Cambridge, 1971, 51.

<sup>53</sup> Sen A, *The idea of justice*, Harvard University Press, Cambridge, 2009, 56.

<sup>54</sup> Ochola B, 'Right to recall: Assessing the constitutional right to recall and its viability in Kenya' Published LLB Dissertation, University of Nairobi, Nairobi, 2018, 42.

<sup>55</sup> Kiwinda M and Ambani J, *The new constitutional law of Kenya: Principles, government and human rights*, 118.

<sup>56</sup> Kiwinda M and Ambani J, *The new constitutional law of Kenya: Principles, government and human rights*, 118.

<sup>57</sup> Musila J and Gitungo W, 'The vulnerable guardian angel: Kenya's parliament in the post-2010 Constitution' in Ghai Y, Kinama E and Cottrell J (ed) *Ten years on: Assessing the achievements of the Constitution of Kenya 2010*, Katiba Institute, Nairobi, 2021, 27.

<sup>58</sup> Nyawa J, 'The right to recall in Kenya is maribound' SSR, 2015, 1 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3081445](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3081445) on 5 March 2023.

note that it is somehow problematic in that inasmuch as the rationale of the timelines is acknowledged, it gives the impression that an MP or MCA who is cognizant of the improbability of their re-election in the next election, can engage in actions that calls for them to be recalled without fear of repercussions during the last twelve months before the next election.<sup>59</sup> The time-frame to initiate a recall is too short because the electorate has only a one or two-year period where they may recall their representatives.<sup>60</sup>

a. On the one-tier/unified recall election

In the United States of America, six states that have allowed recall to be exercised in their jurisdictions, conduct the one-tier recall election where both the recall question and, if successful, the replacement of the official is determined jointly.<sup>61</sup> Recall in the other twelve states addresses the two-tier process where the electorate is first to decide on the recall question and if the majority vote to recall the official, he or she is replaced by a by-election or by the appointment of another person for the remainder of the term.<sup>62</sup> California is a good example of a state that conducts a unified recall election where both 2003 and 2021 recall elections; Governor Gary Davis and Governor Gavin Newsom respectively, being significant in this aspect.

This brings out the unusual nature of the Californian recall law where it is required that both elections will take place on the same day and the same ballot.<sup>63</sup> The recall election featured two separate questions that addressed the same issue. Voters could choose to vote only on the first question, only on the second question, or both.<sup>64</sup> The first issue was whether Davis should be recalled. Governor Davis required a majority of those voting on the recall to vote "no," in which case the votes cast on the second question; who would succeed him, would be

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<sup>59</sup> Ongoya E and Otieno W, *Handbook on Kenya's electoral laws and system: Highlights of the electoral laws and systems established by and under the constitution of 2010 and other statutes*, Electoral Institute for Sustainable Democracy in Africa, Nairobi 2012, 86.

<sup>60</sup> Ongoya E, 'The legal framework on resolution of election disputes in Kenya' in Musila G (ed) *Handbook on election disputes in Kenya: Context, legal framework, institutions and jurisprudence*, Law Society of Kenya, 2013, 124.

<sup>61</sup> Twomey A, 'The recall of members of parliament and citizens' initiated elections' 34 *The University of New South Wales Law Journal* 1, 2011, 47.

<sup>62</sup> Twomey A, 'The recall of members of parliament and citizens' initiated elections' 47.

<sup>63</sup> Karlamangla S, 'Why Newsome is telling California voters to leave half the ballot blank' *The New York Times*, 9 September 2021 <https://www.nytimes.com/2021/09/03/us/newsom-california-recall-ballot.html> on 19 February 2023.

<sup>64</sup> Stone W and Datta M, 'Rationalizing the California recall' 37 *Political Science and Politics* 1, 2004, 19.

meaningless.<sup>65</sup> Whether they voted for or against the recall, voters were limited to only vote for one replacement candidate.<sup>66</sup>

In California, a recall petition is commenced by submitting a petition to the Secretary of State, which outlines the grounds for recalling the State officer.<sup>67</sup> A petition for the recall of state-wide officials requires signatures from registered voters amounting to 12% of the previous vote for that office.<sup>68</sup>

For Senators, Assembly members, Board of Equalization members, as well as judges in appellate and trial courts, the prescribed number of signatures for a recall petition is 20% of the most recent vote for the respective office.<sup>69</sup> The proponents for the recall are required to collect the signatures for 160 days before being submitted to the elections official.<sup>70</sup> Where the signature requirement has been attained, the Governor must schedule an election to decide whether to recall an official and, if applicable, to choose a replacement. This election must occur within a time frame extending from 60 days to 80 days from the date when enough signatures are officially verified and certified.<sup>71</sup>

As for the nomination of candidates<sup>72</sup>, Californian provides that nomination papers and the candidate's formal declaration for state offices must be submitted no earlier than the issuance of the election order and no later than 59 days before the election date.

It has been stated that the recall question and the replacement candidates' elections are held on the same ballot so that money is saved for future elections.<sup>73</sup> Ellis supports this notion that the cost of running only one vote rather than two is beneficial.<sup>74</sup> He also states that holding the elections separately raises the monetary and administrative strain of the recall process and causes a period of uncertainty between the incumbent's recall and the election of a successor.<sup>75</sup>

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<sup>65</sup> Stone W and Datta M, 'Rationalizing the California recall', 19.

<sup>66</sup> Stone W and Datta M, 'Rationalizing the California recall', 19.

<sup>67</sup> California Secretary of State, *Procedures for recalling state and local officials*, 10 January 2023, 3.

<sup>68</sup> National Conference of State Legislatures, *Recall of state officials*, 15 September 2021 <https://www.ncsl.org/elections-and-campaigns/recall-of-state-officials> on 11 September 2023.

<sup>69</sup> National Conference of State Legislatures, *Recall of state officials*.

<sup>70</sup> California Secretary of State, *Procedures for recalling state and local officials*, 12.

<sup>71</sup> California Secretary of State, *Procedures for recalling state and local officials*, 14.

<sup>72</sup> California Secretary of State, *Procedures for recalling state and local officials*, 28.

<sup>73</sup> Lawrence D, 'California's crazy recall' Westmont Magazine, 2003 <https://www.westmont.edu/californias-crazy-recall> on 19 February 2023.

<sup>74</sup> Ellis A, 'The use and design of recall votes' International IDEA, Working Paper Number 4, 2005, 8.

<sup>75</sup> Ellis A, 'The use and design of recall votes' 8.

Jurisdictions that conduct the recall election separately have been seen to increase costs associated with holding the recall election.<sup>76</sup>

This issue will be expounded on in chapter 4 of this study.

#### b. On the cost of elections

Elections serve an important function in a democracy where the electorate elects their preferred leaders into public office. As Molomo puts it, elections can thus be said to be a stamp of authenticity.<sup>77</sup> It has been reported that Kenya's 2022 general election was among the most expensive elections held in the world.<sup>78</sup> Almost half of the African states— Kenya included— have adopted digital technologies such as bio-metric voter registration and electronic transmission of results in their elections.<sup>79</sup> Electoral technology has been adopted in three exercises. These are— voter registration, voter verification and results transmission.<sup>80</sup>

Mistrust not only in the election management bodies but also in the political players has also been said to be an issue that makes elections expensive.<sup>81</sup> The former IEBC commissioner Abdi Guliye noted that there was mistrust in the Commission and that it could not deliver a credible and transparent election. He further stated that the mistrust has led the Commission to use expensive electronic gadgets.<sup>82</sup> The mistrust that the electorate has in some election management bodies has seen these bodies contracts foreign firms to print ballots papers with advanced security features<sup>83</sup>, akin to those found on currencies, and arrange for the transportation of party and civil society representatives to oversee the printing process. In some

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<sup>76</sup> Carrillo D, Spivak J, Kaliss N and Madnick J, 'California's recall is not overpowered' 62 *Santa Clara Law Review* 3, 2022, 535.

<sup>77</sup> Molomo G, 'Democracy and Botswana's electoral system' 5 *Journal of African Elections* 2, 2006, 23.

<sup>78</sup> Musau D, 'Kenya's August elections among the world's most expensive'.

<sup>79</sup> Cheeseman N, Lynch G and Willis J, 'Digital dilemmas: The unintended consequences of election technology' 25 *Democratisation* 8, 2018, 1.

<sup>80</sup> Mosero R, 'In Kenya's 2022 elections, technology and data protection must go hand-in-hand' Carnegie Endowment for International Peace, 8 August 2022 <https://carnegieendowment.org/2022/08/08/in-kenya-s-2022-elections-technology-and-data-protection-must-go-hand-in-hand-pub-87647> on 6 August 2022.

<sup>81</sup> Otieno R, 'Why our polls cost an arm and a leg' *The Standard*, 18 April 2021 <https://www.standardmedia.co.ke/counties/article/2001387247/why-our-polls-cost-an-arm-and-a-leg> on 18 April 2024.

<sup>82</sup> Chepkwony M, 'Voters do not trust us, says IEBC commissioner' *The Standard Newspaper*, 6 April 2019 <https://www.standardmedia.co.ke/politics/article/2001299334/voters-do-not-trust-us-says-iebc-commissioner> on 6 September 2023.

<sup>83</sup> Odhiambo M, 'Security features in 2022 ballot papers revealed' *The Star Newspaper*, 15 July 2021 <https://www.the-star.co.ke/news/2021-07-15-security-features-in-2022-ballot-papers-revealed/> on 6 September 2023.

instances, expensive electronic voting machines have been acquired to reduce the potential for fraudulent activities.<sup>84</sup>

Van der Straaten<sup>85</sup> posits that using digital technologies in elections, may not necessarily improve the integrity of elections or foster confidence in the electoral process. The 2017 presidential election is a good example where the Supreme Court of Kenya nullified<sup>86</sup> the presidential elections noting that the election had been manipulated electronically.<sup>87</sup> George Okong'o and Nicholas Matatu<sup>88</sup> contend that in 2017, the technology employed by the Commission did not yield the intended outcome of guaranteeing reliable election results and fostering a widespread agreement that the results represented the people's desire.

Kendra Collins<sup>89</sup> notes that electoral problems are not always solved by technical solutions which are sometimes costly and unsuitable high-tech options. Rather, it is more effective to address the issue by conducting elections in a manner that builds trust and confidence among candidates and voters, ensuring that the outcome genuinely represent the people's desire, even in the presence of potential imperfections or disputes.<sup>90</sup>

Therefore, this study will look to build on the presumption noted in this preliminary review that the procurement of digital tech and mistrust of the voters in election management bodies, are some of the factors that cause the election to be quite expensive. This will be tackled in more detail in Chapter 2 which will be centred on what makes the Kenyan election expensive.

## IX. CONTRIBUTION

This study will make a contribution to the discussion on the right to recall and more so to whether conducting a unified recall election is better in addressing the high cost of election

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<sup>84</sup> Sawyer K, 'Can't buy me trust: Why are Africa's elections so costly yet contested' African Arguments, 20 October 2022 <https://africanarguments.org/2022/10/cant-buy-me-trust-why-are-africa-elections-so-costly-yet-contested/> on 6 September 2023.

<sup>85</sup> Van der Straaten J, 'Of democracy and Elections—in reverse. On the exorbitant (increase in the) cost of elections in Africa' 3<sup>rd</sup> Colloquium of the Bhalisa identity expert group, Cambridge, 20 March 2019, 13.

<sup>86</sup> Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 Others (Election Petition 1 of 2017) [2017] KESC 32 (KLR) (Election Petition) (1 September 2017) (Determination).

<sup>87</sup> Freytas- Tamura K, 'Kenya's supreme court nullifies presidential election' The New York Times, 1 September 2017 <https://www.nytimes.com/2017/09/01/world/africa/kenya-election-kenyatta-odinga.html> on 6 September 2023.

<sup>88</sup> Okong'o G and Matatu N, 'Kenya: The potential and limitations of electoral technology' International Institute for Democracy and Electoral Assistance, 27 September 2017 <https://www.idea.int/news-media/news/kenya-potential-and-limitations-electoral-technology> on 6 September 2023.

<sup>89</sup> Collins K, 'Elections and stability in West Africa: The way forward' International Peace Institute, 26 September 2011 [https://www.files.ethz.ch/isn/143915/ipi\\_e\\_pub\\_elections\\_in\\_west\\_africa.pdf](https://www.files.ethz.ch/isn/143915/ipi_e_pub_elections_in_west_africa.pdf) on 6 September 2023.

<sup>90</sup> Collins K, 'Elections and stability in West Africa: The way forward'.

compared to the separate model envisioned in both the EA and CGA. There is an existence of studies on the right to recall in Kenya but these studies have not gone into considering Kenya adopting the unified model of recall elections to minimize the cost of conducting elections. Inasmuch as Ochola's dissertation touches on what this study is about, he does not go into a detailed discussion on the same. This study is going to contribute to the discussion on recall in this dimension and complement the existing work.

## X. METHODOLOGY

This study will employ a qualitative research approach where both primary and secondary sources will serve as the primary sources of data. The primary sources will include legislations like the EA and CGA, case laws among other primary sources. The secondary sources will include journal articles, books, chapters in books, reports and other internet resources. A deductive method will be used in arriving at my conclusion where I will try to prove my hypothesis through the findings of the research questions.

The first research question is on the expensive nature of Kenya's election. Here, the study will employ a critical analysis approach to the costly Kenyan elections where secondary sources will be used. Secondary sources such as reports, journal articles, budgetary statements, etc. will be key in this part.

The second research question entails the legal framework that underpins the right to recall in Kenya, this study will use the critical analysis method where the primary sources; the EA and CGA, will be important to give details on what the law says about recall in Kenya. Here, I will not only look at what the law says but also the problem that the law presents as it is. Also cases that have been determined by Kenyan Courts on the right to recall will be instrumental in this part of the study as they will give a clear and conscious path that the Court has used to interpret certain provisions that have been presented for determination by the Court.

The third research question deals with whether the unified model of conducting a recall election may be possible in the Kenyan context. A comparative analysis approach will be employed here, where, the United States will be assessed; more so in particular, the state of California which has a unified recall election model. Here, both primary and secondary sources will be used in this regard.

## XI. CHAPTER BREAKDOWN

This study shall comprise 5 chapters. The first chapter of this study will include the research questions that the study seeks to answer, the theoretical framework that underpins its study, and the justification of the study. Also, the background and literature review and methodology of the study are contained here. Thus, this chapter will set the basis of the study and the next chapters.

Chapter two will deal with the issue of why the Kenyan election is costly where this study will go into assessing the cost of Kenya's election and also what makes the election expensive. Chapter three entails the legal framework that underpins the right to recall in Kenya. This chapter will go into detail on what the law in Kenya entails on the right to recall and will thus seek to bring out the problem from the existing law as it is.

Chapter four will examine the possibility of Kenya conducting a unified recall election. Here, this study will look at how California conducts its recall election and whether the same can be borrowed and applied in Kenya. Additionally, this study will also look at Rwanda as a comparative study and assess what makes their elections cheaper and cost-effective. The last chapter will be chapter five where this chapter will deal with the conclusions and recommendations of the study.

## CHAPTER 2: WHAT MAKES THE KENYAN ELECTIONS COSTLY

### I. Introduction

The conduct of elections is an important tenet of a democratic state. Many states have adopted Constitutions that have enshrined the holding of regular, free and fair elections— Kenya<sup>91</sup> included. In this aspect of democracies holding regular, free and fair elections, the electorate is afforded the opportunity to vote out incompetent leaders. Elections in Africa— particularly in Kenya— are highly competitive<sup>92</sup> and are seen as a matter of life and death in some situations.

With historical experiences where there have been claims of rigging, the Kenyan electoral body moved from manual voter registration or identification during elections, to the use of technologies to curb the rigging and also to promote free and fair elections. The EA<sup>93</sup> has gone ahead to create a consolidated electronic electoral system that encompasses biometric voter registration, electronic voter verification and the electronic transmission of election results.

The CoK<sup>94</sup> provides that the IEBC is responsible for ensuring that, regardless of the voting method used, the system remains simple, accurate, verifiable, secure, accountable, and transparent. This chapter will look at what necessitated the adoption of the utilization of digital technologies, the procurement of these technologies, other factors that make Kenyan elections costly— use of additional security features on ballot boxes and the high number of polling stations, and whether these technologies have improved the public trust in the Commission. Also, in looking at the procurement of the said technologies, this chapter will look at whether the procurement procedures have been followed.

### II. Why did Kenya adopt the use of digital technology in its elections?

Kenya was left in a devastating state after the 2007 general elections which saw the loss of lives and people displaced due to the violence that ensued shortly after the presidential elections results were announced and the Late President Mwai Kibaki was sworn into office at night.<sup>95</sup> This led to the eruption of violence in many parts of the country.

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<sup>91</sup> Article 38 (2), Constitution of Kenya (2010).

<sup>92</sup> Oduor A, 'Digital giants must pay more heed to Africa' Center for International Governance Innovation, 20 February 2022 <https://www.cigionline.org/articles/digital-giants-must-pay-more-heed-to-africa/> on 25 October 2023.

<sup>93</sup> Section 44, Elections Act (Act No. 24 of 2011).

<sup>94</sup> Article 86 (a), Constitution of Kenya (2010).

<sup>95</sup> Mutuku R, 'Modernizing the Kenyan electoral system through polkadot blockchain network' *6 East African Journal of Information Technology 1*, 2023, 79.

After the 2007 post-election violence arising from the outcome of the presidential election, a Commission of inquiry, chaired by Justice Kriegler was instituted and following its recommendation, the electoral commission was reconstituted and renamed the IEBC, which implemented the recommendations of the Kriegler Commission and more specifically, a number of new technologies to promote peaceful elections.<sup>96</sup> The Kriegler report was instrumental in recommending the adoption of digital technologies. The report noted that the extent of electoral misconduct was so pervasive across all political parties that it was impossible to reach any definitive conclusion about the outcome of the 2007 presidential election.<sup>97</sup>

The report recommended the adoption of the use of biometric registration to verify voters at polling stations, as well as the development of a consolidated and secure system for tallying and transmitting data to prevent vote manipulation or counting irregularities.<sup>98</sup> The electorate had lost confidence in the defunct Electoral Commission of Kenya (ECK)<sup>99</sup> and therefore, digital technologies were adopted as a way to curb electoral malpractice, enhance the trust of the electorate during an election, and improve accountability and transparency during the election period.<sup>100</sup>

### III. The procurement of digital technologies in Kenya's election

In the 2013 general elections, the IEBC acquired the digital technologies— Biometric Voter Registration system (BVR), Electronic Voter Identification (EVID), and the electronic Results Transmission System (RTS)<sup>101</sup>— which were to help the Commission conduct credible, free, fair and transparent elections throughout the country.

Significant delays in various critical processes, such as the acquisition, examination, and testing of technological systems, occurred in the time leading up to and during the general elections.

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<sup>96</sup> International Foundation for Electoral System, 'In Kenya, using technology for safer elections' *IFES*, 22 June 2012 <https://www.ifes.org/news/kenya-using-technology-safer-elections> on 25 October 2023.

<sup>97</sup> Kenya National Archives, Report of the Independent Review Commission on the General Elections held in Kenya on 27<sup>th</sup> December, 2007, 17 September 2008, 103.

<sup>98</sup> Kenya National Archives, Report of the Independent Review Commission on the General Elections held in Kenya on 27<sup>th</sup> December, 2007, 17 September 2008, 103.

<sup>99</sup> Schulz-Herzenberg C, Alongo P and Gatimu S, 'The 2013 general elections in Kenya: The integrity of the electoral process' Institute for Security Studies, Policy Brief No. 74, 2015, 2.

<sup>100</sup> Mosero R, 'In Kenya's 2022 elections, technology and data protection must go hand-in-hand.'

<sup>101</sup> Chugh A and Krueger K, 'The role of technology in the outcome of the Kenyan general election' Ace the Electoral Knowledge Network <https://aceproject.org/today/feature-articles/the-role-of-technology-in-the-outcome-of-the> on 27 October 2023.

The BVR kits were procured late through a Government-to-Government (G2G) procurement agreement after the initial procurement process by the IEBC was rife with many challenges.<sup>102</sup>

The Auditor General conducted an audit on the procurement of these technologies that were to be used in the election and the special audit report found that the prices were hiked and the single sourcing to award the tender to the Canadian Government and Morpho Canada lacked transparency.<sup>103</sup> The National Assembly's Public Accounts Committee's report found that the acquisition of the BVR kits through the G2G agreement saw the country borrow Kshs. 6.48 billion in principal, Kshs. 1.59 billion in interest, Kshs. 988 million in loan insurance, and Kshs. 2.49 billion in brokerage fees.<sup>104</sup>

As for the EVIDs kits, the mismanagement of the procurement continued. The contract for the procurement tender was later changed by more than 10%, in violation of procurement laws. The report found that the then Chief Executive Officer (CEO) of the IEBC— Mr. Ezra Chiloba— proceeded to make payments amounting to Kshs. 258 million without a genuine contract.<sup>105</sup> Additionally, on the RTS, mobile phones were obtained without following proper procedures via a quotation method. This purchase cost Kshs. 17 million, and WAN purchased directly from Safaricom PLC for Kshs. 6 million with an additional payment to Airtel for services not provided worth Kshs. 480,516.<sup>106</sup>

As for the 2017 General Elections, the IEBC procured the Kenya Integrated Elections Management System (KIEMS) kits which were procured late and thus the system was not inspected by the Kenya Bureau of Standard (KEBS).<sup>107</sup> It has been noted that some Commissioners in the Commission displayed a conflict of interest in the procurement of the

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<sup>102</sup> Onyango L, 'Factors influencing effective planning for general elections: A case of independent electoral and boundaries commission Kenya', 6.

<sup>103</sup> The Office of the Auditor General, *Special Audit on procurement of electronic voting devices for 2013 general elections by the Independent Electoral and Boundaries Commission*, 6 June 2014, 85.

<sup>104</sup> National Assembly, *Report of the public Accounts Committee on the special audit report of June 2014; over the procurement of electronic voting devices for the 2013 General Election by the independent electoral and boundaries commission*, 23 March 2016, 11.

<sup>105</sup> National Assembly, *Report of the public Accounts Committee on the special audit report of June 2014; over the procurement of electronic voting devices for the 2013 General Election by the independent electoral and boundaries commission*, 23 March 2016, 11.

<sup>106</sup> National Assembly, *Report of the public Accounts Committee on the special audit report of June 2014; over the procurement of electronic voting devices for the 2013 General Election by the independent electoral and boundaries commission*, 23 March 2016, 11.

<sup>107</sup> Monyango F, 'Quick thoughts on biometrics, general elections and security in Kenya' *Strathmore University Centre for Intellectual Property and Information Technology Law*, 3 August 2017, <https://cipit.strathmore.edu/quick-thoughts-on-biometrics-general-elections-and-security-in-kenya/> on 30 October 2023.

KIEMS kits by voting in favour of suppliers they personally preferred.<sup>108</sup> Additionally, the CEO of the Commission was found culpable of exposing the Commission to significant risks by failing to require performance bonds prior to contract signing. Even though these solutions were not used during the 2017 General Elections, the CEO authorized a contract for the maintenance of the BVR IBM Server infrastructure and security monitoring solutions for KIEMS kits through direct procurement, totalling Kshs. 452 million.<sup>109</sup>

The IEBC was unable to explain the unaccounted Kshs. 9.5 billion, which is related to contracts granted for the procurement of goods and services for both the general election in August 2017 and the subsequent repeat election in October 2017.<sup>110</sup> Some contracted goods were paid for but never delivered, while others were delivered but never used.

Jennifer Nou<sup>111</sup> suggests that procurement contracts, despite their importance as an accountability tool, are frequently underestimated. Therefore, it is right to say that the shoddy manner in which some of the technologies to be used for the election were procured, makes the taxpayer spend more money in paying for the loans taken and may compromise the electorate's integrity in the Commission.

#### IV. Other factors that contribute to costly elections in Kenya

##### a. Use of additional security features on the ballot papers

Chepkwony<sup>112</sup> notes there is mistrust in the Commission that it could not deliver a credible and transparent election. He continues further to state that the mistrust has led the Commission to use expensive electronic gadgets. Due to the mistrust in the Commission, the Commission has hired foreign companies to print ballot papers with high-level security features like those found on currency notes.<sup>113</sup> The Commission has also organised the transportation of representatives from various parties and civil society organizations to oversee the printing process.

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<sup>108</sup> National Assembly, *Report on the examination of the report of the auditor-general on the financial statements for the independent electoral and boundaries commission for the year ended 30 June 2017*, 27 February 2019, 10.

<sup>109</sup> National Assembly, *Report on the examination of the report of the auditor-general on the financial statements for the independent electoral and boundaries commission for the year ended 30 June 2017*, 27 February 2019, 10.

<sup>110</sup> Maina W, 'The decline and fall of the electoral integrity: Explaining how and why elections seem to frustrate the proper will in Kenya' *Electoral Law and Governance Institute for Kenya*, 2020, 32.

<sup>111</sup> Nou J, 'Privatizing democracy: Promoting election integrity through procurement contracts' *118 Yale Law Journal* 744, 2009, 770.

<sup>112</sup> Chepkwony M, 'Voters do not trust us, says IEBC commissioner' *The Standard Newspaper*, 6 April 2019 <https://www.standardmedia.co.ke/politics/article/2001299334/voters-do-not-trust-us-says-iebc-commissioner> on 6 September 2023

<sup>113</sup> Odhiambo M, 'Security features in 2022 ballot papers revealed' *The Star Newspaper*, 15 July 2021,

In 2017, a delegation from Kenya visited the Al Ghurair firm which had been awarded the tender to print the ballot papers. This visit was to bolster confidence and transparency following the controversies that had been raised by the selection process of Al Ghurair by the opposition.<sup>114</sup> It is noted that in the 2022 general elections, the ballot papers had 8 distinct security features to curb the mistrust that the public has in the Commission.<sup>115</sup> This mistrust has made it hard for the ballot papers to be printed locally and thus ultimately the cost of printing these ballot papers is high.

#### b. High number of polling stations

The IEBC in an open letter to Kenyans, notes that the large number of polling stations which has been occasioned by the capping of the maximum number of voters in a particular polling station makes the Kenyan election costly.<sup>116</sup> For the 2022 general election, there was an increase in the number of registered polling stations from 40, 883 polling stations in 2017 to 46,232 polling stations in 2022.<sup>117</sup> This indicates that there is a 13.08% increase in the number of polling stations.

The EA<sup>118</sup> has set the maximum number of voters in a polling station which is set at 700 to provide for the efficient and effective conduct of the election. The increase in the number of new registered voters in 2022, saw the number of polling stations increase to guarantee that the Commission adheres to the statutory requirement of 700 voters per polling station. It is this study's position that with the increased number of polling stations, there comes an increased cost of ensuring that the election technologies are adequate to cover all the polling stations, the security personnel per polling station is adequate to guarantee that the process is free from violence and that the staff to administer the elections at each polling station is adequate.

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6 September 2023.

<sup>114</sup> Mosoku G, 'Dubai firm completes printing of presidential ballot papers' The Standard Newspaper, 8 April 2017 [https://www.standardmedia.co.ke/article/2001249451/dubai-firm-completes-printing-of-presidential-ballot-papers#google\\_vignette](https://www.standardmedia.co.ke/article/2001249451/dubai-firm-completes-printing-of-presidential-ballot-papers#google_vignette) on 8 December 2017.

<sup>115</sup> Menyua W, 'First batch of presidential ballots to arrive this week' Daily Nation Newspaper, 24 July 2022 <https://nation.africa/kenya/news/politics/security-features-on-presidential-ballot-papers-3890084> on 8 December 2023.

<sup>116</sup> Independent Electoral and Boundaries Commission, 'An open letter to the people of Kenya' Amazon, 2 <https://s3-eu-west-1.amazonaws.com/s3.sourceafrica.net/documents/120833/IEBC.pdf> on 6 December 2023.

<sup>117</sup> Maringa G, 'Election 2022 to feature highest number of registered voters, polling stations in Kenya's history' The Standard Newspaper, 25 June 2022, <https://www.standardmedia.co.ke/national/article/2001448421/election-2022-to-feature-highest-number-of-registered-voters-polling-stations-in-kenyas-history> on 6 December 2023.

<sup>118</sup> Section 38A, Elections Act (Act No. 24 of 2011).

## V. Has the use of digital technologies improved the confidence the electorate has in the Commission?

Since 2013, when Kenya first introduced the use of digital technologies in the conduct of its elections, there have been different challenges that the Commission has faced and thus, confidence and trust in the Commission has dwindled over time. Gregory Warner notes that during the election day in 2013, the laptops and mobile phones that were to be used for the RTS experienced battery power depletion and some of the polling stations located in rural Kenya had no power outlets to charge the devices.<sup>119</sup>

Vellah Kigwiru<sup>120</sup> posits that a number of election officials forgot their personal identification numbers (PINs), resulting in the inability to transmit the election results. Due to the failure of the RTS system, the IEBC reverted to using the manual system. With the said challenges that the IEBC faced on election day, litigation ensued where in *African Centre for Open Governance (AFRICOG) v Ahmed Issack Hassan & Another*<sup>121</sup>, the petitioners approached the Court to seek an injunction restraining the IEBC from manual tallying due to the RTS failure as this reduces the openness and credibility of the election process. The High Court dismissed the case as it found that it had no jurisdiction over the matter as it dealt with how the presidential election was being handled.

The High Court in *Thomas Musau & 2 others v IEBC & 2 others*<sup>122</sup> nullified the election for the Matungulu constituency seat because the election was rife with irregularities in the process of tabulation of results therefore, there was a lack of credibility. The failure of the technologies employed in the election did little to enhance confidence in the electorate that the Commission would deliver a credible election and thus, the electorate and the public trust were undermined.<sup>123</sup>

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<sup>119</sup> Warner G, 'How Kenya's high-tech voting nearly lost the election, NPR Organisation, 9 March 2013 <https://www.npr.org/sections/alltechconsidered/2013/03/09/173905754/how-kenyas-high-tech-voting-nearly-lost-the-election> on 27 October 2023.

<sup>120</sup> Kigwiru V, 'The adoption of technology in Kenyan electoral process: Lessons from the 2013 and 2017 presidential elections' [https://www.researchgate.net/profile/Vellah-Kigwiru/publication/341234333\\_The\\_Adoption\\_of\\_Technology\\_in\\_the\\_Kenyan\\_Electoral\\_Process\\_Lessons\\_from\\_the\\_2013\\_and\\_2017\\_Presidential\\_Election/links/5eb5348392851cd50da14c92/The-Adoption-of-Technology-in-the-Kenyan-Electoral-Process-Lessons-from-the-2013-and-2017-Presidential-Election.pdf](https://www.researchgate.net/profile/Vellah-Kigwiru/publication/341234333_The_Adoption_of_Technology_in_the_Kenyan_Electoral_Process_Lessons_from_the_2013_and_2017_Presidential_Election/links/5eb5348392851cd50da14c92/The-Adoption-of-Technology-in-the-Kenyan-Electoral-Process-Lessons-from-the-2013-and-2017-Presidential-Election.pdf) on 27 October 2023.

<sup>121</sup> Petition No. 152 of 2013 eKLR.

<sup>122</sup> Election petition case 2 of 2013 eKLR.

<sup>123</sup> Odhiambo W, 'The role of technology in elections in Kenya: A case of the 2017 Presidential election' Published, University of Nairobi, Nairobi, 2017, 48.

In 2017, the gruesome murder of IEBC's ICT manager— Mr. Chris Musando— created significant uncertainty about the credibility of the election, owing to his pivotal role in the electronic management of the electoral process.<sup>124</sup> In a rather similar circumstance as in 2013, the KIEMS kit failed in various polling stations and IEBC confirmed that the figures being fed into the KIEMS kit lacked precision in terms of absolute values, prompting a return to Form 34Bs.<sup>125</sup>

## VI. Conclusion

The adoption and use of technology enhance the effectiveness and trustworthiness of the electoral process<sup>126</sup>, which consequently promotes public trust in the electoral system.<sup>127</sup> Inasmuch as the technologies were meant to bring election reforms so as to improve administrative efficiency, reduce long-term costs, and increase transparency in the electoral process<sup>128</sup>, this has not been the case as has been discussed in this chapter.

It is the premise of this study that the bungling up of procurement procedures leads to a costly election because there are additional costs that are incurred when the prices are inflated or when the Commission pays for goods and services that have not been delivered or will be used in the election.

Also, the manner in which the election is being conducted using these technologies creates mistrust in the Commission and thus the IEBC will look to always procure and add additional safety features that make the election costly in a view that the election will be credible, transparent, free and fair. Additionally, the EA provides for the use of technologies.

The factors given in this chapter are all geared towards the election process and in the event of a recall election, these factors are to be pivotal in the administration and conduct of the recall election. Thus, these factors will affect or influence the cost of conducting a recall election.

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<sup>124</sup> Van Heerden D and Said-Moorhouse, 'Kenyan election official was strangled, authorities confirm' CNN, 3 August 2017 <https://edition.cnn.com/2017/08/03/africa/kenya-election-official-chris-msando/index.html> on 31 October 2023.

<sup>125</sup> Kigwiru V, 'The adoption of technology in Kenyan electoral process: Lessons from the 2013 and 2017 presidential elections.'

<sup>126</sup> *John Lokitare Lodinyo v Mark Lemunokol & 2 others (2013) eKLR.*

<sup>127</sup> Cheeseman N, Lynch G and Willis J, 'Digital dilemmas: The unintended consequences of election technology' 25 *Democratization* 8, 2018, 1402.

<sup>128</sup> Omwoha J, "'Open the servers'": The implication of electoral technology for Kenya's democratization process' 47 *African Development* 2, 2022, 147.

## CHAPTER 3: LEGAL FRAMEWORK UNDERPINNING THE RIGHT TO RECALL

### I. Introduction

The right to recall is a unique feature of the 2010 Constitution that has been discussed extensively. Ghai and Cottrell<sup>129</sup> point out that during the drafting of the Constitution at Bomas of Kenya, politicians initially rejected the idea of recall, but the Committee of Experts later revived it. Thus, this chapter of the study will seek to look at the laws that enshrine this right and those that govern it. Additionally, this chapter seeks to look at how positively or negatively any Court judgments before the Kenyan Courts have influenced this right. Also, this chapter seeks to identify the key problem that this study is concerned about.

Some laws that this chapter will be looking at are the Constitution of Kenya (CoK), the Elections Act (EA), the County Governments Act (CGA), and the Leadership and Integrity Act.

### II. The Constitution of Kenya

The CoK enshrines the right to recall<sup>130</sup> in article 104 which provides that the electorate in electing their MPs and Senators, are afforded the right to recall their representative before the term of the respective house of parliament lapses. This provision does not only apply to the MPs and Senators but also to the MCAs as provided in the CGA.<sup>131</sup> The same article goes on to provide that parliament will pass laws that lay out the grounds and procedure that a representative may be recalled on.<sup>132</sup>

The CoK provides that all the sovereign power vests in the people and the people may exercise their sovereignty either directly or indirectly through their representatives elected democratically. This article is crucial as the right to recall is exercised directly by the people when they are recalling their representatives to whom they have delegated their power in either the parliament or the county assemblies.<sup>133</sup>

The CoK also prescribes circumstances upon which a seat of Parliament shall fall vacant. Article 101 provides that when a seat either in the National Assembly or the Senate becomes

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<sup>129</sup> Ghai Y and Cottrell J, *Kenya's Constitution: An instrument for change*, 2 ed, Katiba Institute, Nairobi, 2021, 131.

<sup>130</sup> Article 104, Constitution of Kenya (2010).

<sup>131</sup> Section 29, County Governments Act (Act No. 17 Of 2012).

<sup>132</sup> Article 104 (2), Constitution of Kenya (2010).

<sup>133</sup> Article 1, Constitution of Kenya (2010).

vacant, the Speaker of each House must formally notify the IEBC and the political party under whose banner the member was elected or nominated within 21 days of the vacancy. Also, in the event of a vacancy in the National Assembly or the Senate, and the Speaker has notified the IEBC in writing within 21 days of the event of the vacancy, a by-election must be held within 90 days of the vacancy.<sup>134</sup>

Article 38 provides for political rights granted to the citizens of Kenya. The political rights that are important here in this regard are— the right to campaign for a political party or cause, the right to free, fair, impartial, and regular elections basis, and the right to vote in a secret ballot in any election or referendum.<sup>135</sup> Further, CoK stipulates that every individual has the right to fair and efficient administrative actions that are lawful, reasonable, and carried out in a fair and equitable manner.<sup>136</sup> Also, everyone has the right to have legal disputes resolved in a fair and public hearing before a court or an independent and impartial tribunal<sup>137</sup> and initiate legal action on the grounds that a right or fundamental freedom has been violated or is in danger of being violated.<sup>138</sup>

Chapter 6 of the CoK on leadership and integrity<sup>139</sup> states that state officers are assigned the responsibility to uphold the public trust which responsibility is to be used in a way that aligns with the objectives of the Constitution; shows respect for the people; brings honour to the nation and dignity to the office; and fosters public confidence in the integrity of the office. Additionally, CoK in the interpretation article gives the meaning of a state office and a state office.<sup>140</sup> A state office listed includes *inter alia*, an office of an MCA, governor or deputy governor of a county, or other member of the executive committee of a county government.

### III. The Elections Act of 2011

This Act was enacted in 2011 to give effect to Article 104 (2) of the Constitution of Kenya. This Act *inter alia* deals with the grounds and procedure for a recall for both members of the two Houses (Senate and National Assembly).

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<sup>134</sup> Article 101, Constitution of Kenya (2010).

<sup>135</sup> Article 38 (3), Constitution of Kenya (2010).

<sup>136</sup> Article 47, Constitution of Kenya (2010).

<sup>137</sup> Article 50, Constitution of Kenya (2010).

<sup>138</sup> Article 22, Constitution of Kenya (2010).

<sup>139</sup> Chapter 6, Constitution of Kenya (2010).

<sup>140</sup> Article 260, Constitution of Kenya (2010).

#### a. Grounds for Recall under the EA

The EA under section 45 (2) provides that an MP may be recalled where after the determination of the lawful due process is found to have— mismanaged public resources, contravened the provisions of Chapter 6 of the Constitution, and has been convicted of an offence under the EA.<sup>141</sup>

#### b. Procedure for Recall under the EA

Under the EA, a recall can only commence after a High Court judgment confirms the grounds for recall. Recall shall not be commenced 24-months after an election and not within 12 months of the next general election. A recall petition can only be presented once during a member's term, and unsuccessful election candidates are barred from initiating a recall.<sup>142</sup>

The petition must be submitted to the Commission in writing, signed by an eligible voter in the respective constituency or county, and the petitioner must have been registered to vote in the previous election. It must also be accompanied by a High Court order confirming the specified grounds.<sup>143</sup>

The petition should outline the grounds for recall, have a list of such number of names of voters in the constituency or county consisting of at least 30% of registered voters, and be accompanied by the prescribed fee for an election petition.<sup>144</sup> The list should include names, addresses, voter card numbers, national identity card or passport numbers, and signatures of supporters from at least 15% of the county's or constituency's wards<sup>145</sup>, representing diverse demographics.<sup>146</sup>

The petitioner must collect and submit the petition to the IEBC within 30 days of filing<sup>147</sup>, and it must be verified within 30 days of submission.<sup>148</sup> If the IEBC confirms that the requirements have been satisfied, they will notify the Speaker of the relevant House of Parliament within 15

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<sup>141</sup> Section 45 (2), Elections Act (Act No. 24 of 2011).

<sup>142</sup> Section 45 (6), Elections Act (Act No. 24 of 2011).

<sup>143</sup> Section 46 (1), Elections Act (Act No. 24 of 2011).

<sup>144</sup> Section 46 (2), Elections Act (Act No. 24 of 2011).

<sup>145</sup> Section 46 (3), Elections Act (Act No. 24 of 2011).

<sup>146</sup> Section 46 (4), Elections Act (Act No. 24 of 2011).

<sup>147</sup> Section 46 (5), Elections Act (Act No. 24 of 2011).

<sup>148</sup> Section 46 (6), Elections Act (Act No. 24 of 2011).

days.<sup>149</sup> A recall election is then held within 90 days of the recall question being published<sup>150</sup>, allowing voters to vote "yes" or "no" on the member's recall.<sup>151</sup>

Each recall response option is given a symbol, and the voting is done by secret ballot. The outcome of the recall election is determined by a simple majority of voters. If an MP is recalled, the IEBC holds a by-election in the affected constituency or county, and the recalled MP is permitted to vie in the by-election.<sup>152</sup> If at least 50% of registered voters participate and agree, the recall election is valid.<sup>153</sup>

#### IV. The County Governments Act of 2012

This Act was also enacted by Parliament to give effect to Article 104. CGA deals with the recall of MCAs who are legislators in the 47 county assemblies of Kenya.

##### a. The grounds for Recall under the CGA

The MCA can be recalled for gross breach of the CoK or any other law, incompetence, gross misconduct, or has been found guilty of an offence punishable by at least 6 months in prison.<sup>154</sup>

##### b. The procedure for Recall under the CGA

The process of recall here can only begin 24 months after a member's election and not within 12 months of the next general election.<sup>155</sup> Furthermore, a recall petition can only be filed once during a member's term.<sup>156</sup>

To initiate a recall, an eligible voter in the respective ward must submit a written petition with the IEBC. The petition must state the grounds for recall and include a list of voters in the Ward who account for at least 30% of registered voters. It must include names, addresses, voter card numbers, national identity card or passport numbers, and the signatures of petition supporters,

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<sup>149</sup> Section 46 (7), Elections Act (Act No. 24 of 2011).

<sup>150</sup> Section 46 (8), Elections Act (Act No. 24 of 2011).

<sup>151</sup> Section 47 (2), Elections Act (Act No. 24 of 2011).

<sup>152</sup> Section 47, Elections Act (Act No. 24 of 2011).

<sup>153</sup> Section 48, Elections Act (Act No. 24 of 2011).

<sup>154</sup> Section 27 (2), County Governments Act (Act No. 17 of 2012).

<sup>155</sup> Section 27 (4), County Governments Act (Act No. 17 of 2012).

<sup>156</sup> Section 27 (5), County Governments Act (Act No. 17 of 2012).

as well as the required election petition fee. The supporters should be representative of the ward's diversity.

The petitioner shall collect and submit the petition to IEBC within 30 days and verifies it within 30 days. If the IEBC determines that the petition meets the requirements, it will notify the Speaker of the county assembly within 15 days. A recall election is then held in the ward within 90 days of the recall question being published<sup>157</sup>, allowing voters to vote "yes" or "no" on the member's recall.

Each response option is given a symbol, and the voting is done by secret ballot. The outcome of the recall election is determined by a simple majority of those who vote. If an MCA is recalled, the IEBC holds a by-election in the affected ward, in which the recalled MCA may vie.<sup>158</sup>

#### V. Challenging Recall elections

The EA provides in Part VII<sup>159</sup> election dispute resolution. This part mandates the Commission to take on the responsibility of resolving electoral disputes, including issues emerging from nominations excluding election petitions and disputes that arise after the declaration of election results. The Commission shall determine these disputes within 10 days of them being lodged. If the dispute concerns a potential nomination or election, it must be resolved before the nomination or election date, depending on the circumstances.<sup>160</sup>

A petition on the election of an MCA shall be heard and determined by the Resident's Magistrates Court designated by the Chief Justice<sup>161</sup> and that of an MP shall be heard and determined by one High Court Judge.<sup>162</sup>

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<sup>157</sup> Section 28, County Governments Act (Act No. 17 of 2012).

<sup>158</sup> Section 29, County Governments Act (Act No. 17 of 2012).

<sup>159</sup> Part VII, Elections Act (Act No. 24 of 2011).

<sup>160</sup> Section 74, Elections Act (Act No. 24 of 2011).

<sup>161</sup> Section 76 (1A), Elections Act (Act No. 24 of 2011).

<sup>162</sup> Rule 6 (1) (a), The Elections (Parliamentary and County Elections) Petition Rules (2017).

## VI. Rationale for Kenya adopting the two-tier recall electoral system

The EA<sup>163</sup> and CGA<sup>164</sup> provide that after the IEBC confirms that the signature threshold has been met, the speaker of the relevant house of Parliament and county assembly is notified, a recall election and where the answer yes has the majority votes, then a by-election shall be held at a later date. The CoK as this study has noted in this chapter, provides that there are guidelines or rather ways in which a seat of parliament falls vacant and it is only after the seat has been declared vacant that a by-election can be occasioned.<sup>165</sup>

Additionally, the Constitution provides for specific rights that are instrumental in this regard. These rights include the right of an aggrieved person to approach the Court when their rights are threatened to be or have been violated.<sup>166</sup> This right is instrumental because at the signature collection stage, when someone thinks that the process was not fairly conducted, they can approach the Court to seek redress. Further, expounding on the right to approach the Court, the EA provides that a question as to the validity of an election of an MCA shall be heard and determined by the Resident Magistrate's Court<sup>167</sup> and that of an MP by the High Court of Kenya.<sup>168</sup>

Also, the political rights are enshrined in the Constitution more so with regard to the right to a free, fair and regular elections to all citizens.<sup>169</sup> Therefore, this study posits that the rationale for Kenya to adopt the two-tier recall election was in accordance with the CoK and to ensure that the rights guaranteed by the CoK— rights posited herein— are not infringed upon.

## VII. Does having a unified recall election outweigh the right to challenge a recall process in Court?

Inasmuch as there are countries like the United States of America— more so the State of California— has noted that the use of the unified recall election saves on its cost of election<sup>170</sup>, its constitutional dispensation is different from that of Kenya. Kenya might find it useful to adopt the unified recall model so as to save on the cost based on the CBA. This proves to be a

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<sup>163</sup> Section 47, Elections Act (Act No. 24 of 2011).

<sup>164</sup> Section 29, County Governments Act (Act No. 17 of 2012).

<sup>165</sup> Article 101, Constitution of Kenya (2010).

<sup>166</sup> Article 23, Constitution of Kenya (2010).

<sup>167</sup> Section 75 (1A), Elections Act (Act No. 24 Of 2011).

<sup>168</sup> Rule 6 (1) (a), The Elections (Parliamentary and County Elections) Petition Rules (2017).

<sup>169</sup> Article 38 (2), Constitution of Kenya (2010).

<sup>170</sup> Qvortrup M, 'Hasta la vista: A cooperative institutionalist analysis of the Recall' *47 Representation* 2, 2011, 165.

challenge as in Kenya the Constitution ranks higher to other legislations or law.<sup>171</sup> The right of an aggrieved person to approach the Court when his or her rights have been or are threatened to be infringed is reserved by the CoK.<sup>172</sup>

It is this study's position that inasmuch as the CBA is a good way of looking at whether the benefits of the unified recall model outweigh the costs, the same does not outweigh the right of an aggrieved person to move to Court to challenge the Recall process. This ties in with the legal rights theory as there are those rights that have been enshrined in the CoK and that the limitations of these rights can only be limited if they are in conformity with the CoK.<sup>173</sup>

Therefore, having a unified recall election model does not outweigh the right to challenge a recall process in Court.

#### VIII. The Katiba Institute Case and the effect it had on both the EA and CGA

Katiba Institute together with Transform Empowerment for Action Initiative filed a case against the Attorney General with regard to the contents of the two Acts— EA and CGA. The petitioners here sought a declaration of unconstitutionality for sections 45, 46, 47, and 48 of the EA, as well as sections 27, 28, and 29 of the CGA, a declaration that Parliament had been unsuccessful to legislate the Act required by Article 104 (2) and the Fifth Schedule of the Constitution, and a court order compelling Parliament to enact the legislation within 90 days of the date of the petition.<sup>174</sup>

The Court in its Judgment held that sections 45 (2)— grounds for recall, (3)— initiating a recall upon a high court judgment confirming the grounds and (6)— an unsuccessful contestant is ineligible to initiate a recall, of the EA, as well as sections 27 (2)— grounds for recall, (3)— initiating a recall upon a high court judgment confirming the grounds and (6)— an unsuccessful contestant is ineligible to initiate a recall and 28 (1) (b) (ii)— petition to recall signed by a petitioner who was a registered voter in the election that the recall is being sought and (c)— petition to recall to be supplemented by an order of the high court, of the CGA, is meaningless and redundant.<sup>175</sup>

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<sup>171</sup> Article 2, Constitution of Kenya (2010).

<sup>172</sup> Article 23, Constitution of Kenya (2010).

<sup>173</sup> Article 24, Constitution of Kenya (2010).

<sup>174</sup> *Katiba Institute & another v Attorney General & another* (2017) eKLR.

<sup>175</sup> *Katiba Institute & another v Attorney General & another* (2017) eKLR. Sections 45 (2), (3), and (6) address the grounds for recalling an MP, initiating a recall upon a High Court judgment or finding confirming these

Alternatively, they fail to meet the constitutional requirements outlined in Article 104 of the Constitution and are thus unconstitutional. In addition, sections 45 (1) (b) (ii) and 45 (6)— an unsuccessful contestant is ineligible to initiate a recall, of the EA, as well as sections 27 (6)— an unsuccessful contestant is ineligible to initiate a recall and 28 (1) (b) (ii)— petition to recall signed by a petitioner who was a registered voter in the election that the recall is being sought, of the CGA, are discriminatory and thus unconstitutional.<sup>176</sup>

## IX. Leadership and Integrity Act<sup>177</sup>

This legislation puts in place the procedures and mechanisms to ensure the proper realization of Chapter Six of the Constitution, as well as dealing with related issues. Further, the Act provides that a state officer must follow the values, principles, and requirements outlined in the Constitution<sup>178</sup>, which include— national values and principles outlined in Article 10 of the Constitution; rights and fundamental freedoms outlined in Chapter 4 of the Constitution; leadership responsibilities outlined in Article 73 of the Constitution; state officers' conduct principles outlined in Article 75 of the Constitution; educational, ethical, and moral criteria specified in Articles 99 (1) (b) and 193 (1) (b) of the Constitution<sup>179</sup>; in the case of County governments, the objectives of devolution as provided for in Article 174 of the Constitution; and the relevant principles and values of Public Service as described in Article 232 of the Constitution.

A State officer shall perform their duties efficiently, with honesty, in an open and accountable manner among other duties to the best of their ability.<sup>180</sup> Other integral integrity issues covered by the Act are— professionalism<sup>181</sup>, financial integrity<sup>182</sup> and conflict of interest.<sup>183</sup> Also, specific codes of leadership and integrity for state officers, will be specified by specific public

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grounds, and individuals who have unsuccessfully contested an election are barred from launching a petition. Section 27 (2) outlines the grounds for recalling an MCA. Sections 27 (3) and (6) and sections 28 (1) (b) (ii) and (c) have been deleted.

<sup>176</sup> *Katiba Institute & another v Attorney General & another* (2017) eKLR. Sections 45 (1) (b) (ii) and 27 (6) have been deleted, and sections 45 (6) (EA) and 28 (1) (b) (ii) (CGA) have been dealt with in the preceding footnote.

<sup>177</sup> Leadership and Integrity Act (Act No. 19 of 2012).

<sup>178</sup> Section 3, Leadership and Integrity Act (Act No. 19 of 2012).

<sup>179</sup> Section 13, Leadership and Integrity Act (Act No. 19 of 2012).

<sup>180</sup> Section 10, Leadership and Integrity Act (Act No. 19 of 2012).

<sup>181</sup> Section 11, Leadership and Integrity Act (Act No. 19 of 2012).

<sup>182</sup> Section 12, Leadership and Integrity Act (Act No. 19 of 2012).

<sup>183</sup> Section 16, Leadership and Integrity Act (Act No. 19 of 2012).

entities for the officers in that entity.<sup>184</sup> This Act is important as it supplements Chapter 6 of the Constitution which is one ground for an MP to be recalled.

## X. The issue

The two Acts provide that the recall election is carried out in two separate elections. This study has found that elections in Kenya are expensive and therefore, this study looks at whether it is feasible to conduct a unified recall election in Kenya as a solution to the high cost of elections.

## XI. Conclusion

This chapter has looked at the legal framework that underpins the right to recall in Kenya. Currently, as per the existing legislations, recall elections are conducted in two separate elections. Also, this chapter highlights the issue that this study is premised on.

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<sup>184</sup> Section 37, Leadership and Integrity Act (Act No. 19 of 2012).

## CHAPTER 4: COMPARATIVE STUDY WITH CALIFORNIA IN AMERICA AND RWANDA

### CALIFORNIA IN USA

#### I. Introduction

California conducts its recall election by combining the recall and replacement vote on the same ballot.<sup>185</sup> This is a unique way of conducting the recall election because a majority of the countries with recall provisions require that the recall election— the recall and replacement vote— be held on different ballots or rather in two separate elections.

This chapter examines California's distinct approach to recall elections, particularly the unified election of the recall and replacement vote on the same ballot. The historical context, the process of recalling both the state and local officers, the legal framework, and the cost-cutting analysis shed light on the complexities of the recall process in California. Furthermore, the chapter delves into the 2003 successful recall election and the 2021 unsuccessful recall election as case studies, the way recall elections can be challenged in California, and the funding mechanisms, emphasizing the state's involvement and the financial responsibilities that follow.

#### II. The historical context of recall in California

The recall was first introduced in 1911 when the former Governor of California, Hiram Johnson together with his legislative partners, suggested that voters embrace the recall, along with two additional mechanisms of direct democracy— the initiative and referendum. These initiatives were seen to empower the electorate with the ability to act as needed and give the people the tools they need to protect their interests.<sup>186</sup>

California has seen 179 attempts to recall state-elected officials since its inception. Where 11 recall initiatives successfully gathered enough signatures for ballot qualification, resulting in the removal of the elected official in six cases.<sup>187</sup>

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<sup>185</sup> Twomey A, 'The recall of members of parliament and citizens' initiated elections' 47.

<sup>186</sup> Farmer R, 'Power to the people: The progressive movement for the recall 1890S-1920' 57 *New England Journal of History* 2, 2001, 63.

<sup>187</sup> Weber S, 'Recall History in California (1913 to June 30, 2013)' California Secretary of State, 2023 <https://www.sos.ca.gov/elections/recalls/recall-history-california-1913-present> on 12 November 2023.

### III. The process for recalling both the State and Local officers

To initiate the process of recalling a state official, proponents for the recall must serve, file, and publicly announce or display their intent to circulate a recall petition.<sup>188</sup> The notice should include a statement of 200 words or less, explaining why the recall is being sought by the proponents. It must also include the names, signatures, and addresses of at least 10 people, or the number of signatures equivalent to submit the nomination papers for the official in question, or the higher of the two.<sup>189</sup> The notice ought to be filed with the office of the Secretary of State. The officer targeted for recall may submit a response of up to 200 words to the Secretary of State within a week of receiving the notice of intention.<sup>190</sup>

The proponents will then prepare the recall petition for circulation. The recall petition can be circulated by anyone over the age of 18. Registered voters who are eligible to vote for the targeted official's office can sign the petition.<sup>191</sup> A voter may withdraw their signature from the recall petition by submitting a written request to the county elections official prior to the filing of the section of the petition containing their signature.<sup>192</sup>

Signatures must be collected within 160 days. Election officials verify that the requisite number of signatures have been collected. The petition and its associated signatures are submitted to the Secretary of State and elections officials in each county where it was circulated before the 160<sup>th</sup> day.<sup>193</sup> If the requisite number of signatures are obtained, a vote is held to determine whether the official should be recalled and, if so, to elect a replacement.

Unless a recall election can be merged with a regular election within 180 days, the election should take place between 60 and 80 days after certification.<sup>194</sup> A simple majority of 50% plus one vote decides the outcome of a recall election.

The recall process for a local and state-wide official are similar but there are differences in some aspects. First, the signature threshold for state officers is 12% of the most recent election for the office in the form of signatures from registered voters. These signatures must come

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<sup>188</sup> Chapter 1, Article I, 11006, Elections Code.

<sup>189</sup> Section 11020, Elections Code (California).

<sup>190</sup> Section 11023 (a), Elections Code (California).

<sup>191</sup> Section 11045, Elections Code (California).

<sup>192</sup> Section 11303, Elections Code (California).

<sup>193</sup> Section 11103, Elections Code (California).

<sup>194</sup> Article II, Section 15 (a), The California State Constitution.

from at least five distinct counties and represent at least 1% of the latest election for the office in each of those five counties.<sup>195</sup> For local officers, the requirement is 20%.<sup>196</sup>

Second, under certain conditions, recall proceedings against local officials are prohibited. These include situations in which the official has served for less than 90 days in the current term, voters rejected a prior recall election against the official within the last 6 months, or the official's term expires in less than 6 months.<sup>197</sup>

Third, the deadlines for submitting local recall petitions vary depending on the size of the voting district and the number of voters registered. The deadlines are 40 days following the petition being approved for voting districts with less than 1,000 registered voters, 60 days for jurisdictions with less than 5,000 registered voters but at least 1,000, 90 days for jurisdictions with less than 10,000 registered voters but at least 5,000, 120 days for jurisdictions with less than 50,000 registered voters but at least 10,000 and 160 days for voting districts with more than 50,000 registered voters.<sup>198</sup>

Finally, the election shall be held within 88 nor more than 125 days after the order was issued. However, the election may be conducted within 180 days after the order was issued so that the election may be consolidated with a regularly scheduled election.<sup>199</sup>

#### IV. The Legal Framework for holding a unified recall election

Recalls are commenced by submitting a petition, which may include a stated reason, but this is optional because the sufficiency of the reason for a recall is not subject to review.<sup>200</sup> Proponents are those who are in charge of filing the recall petition and collecting signatures to meet the ballot qualification requirements. The recall petition must be qualified for the ballot within 160 days of it being filed. The submission of signatures amounting to 12% of the most recent vote for the office (for a state wide-elected officer) or 20% (for a district-elected official) is required to qualify for a recall against a local officer.<sup>201</sup> If a recall qualifies for the ballot, an election

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<sup>195</sup> Article II, Section 14 (b), The California State Constitution.

<sup>196</sup> Article II, Section 14 (b), The California State Constitution.

<sup>197</sup> Section 11007, Elections Code (California).

<sup>198</sup> Section 11220, Elections Code (California).

<sup>199</sup> Section 11242, Elections Code (California).

<sup>200</sup> Article II, Section 14 (a), The California State Constitution.

<sup>201</sup> Article II, Section 14 (b), The California State Constitution.

must be held within 60 to 80 days of the signature certification date. The official is ousted by a majority vote, and the candidate who receives the most votes is elected.<sup>202</sup>

California has recall provisions for two categories of elected persons and these are— state and local officials. For context, state officials' recalls are filed against the governor, lieutenant governor, secretary of state, treasurer, controller, attorney general, superintendent of public instruction, insurance commissioner, members of the State Board of Equalization, state legislators, and justices of the Court of Appeal and the California Supreme Court in California.<sup>203</sup> For local officials<sup>204</sup>, the recalls are filed against elected officials in a general law or charter city or county, various districts (such as schools, community colleges, or special districts), and judge of a trial court.

Notable, it is the recall of state officials that the recall vote and replacement vote are held on the same ballot— thus a unified election. The Californian Elections Code<sup>205</sup> provides that the first question on the ballot at every recall election shall be whether an official should be recalled where the words "Yes" and "No" will be written on distinct lines, each accompanied by an enclosed voting space to the right of each.

In addition to the requirements stated above, the second question on recall election ballots for state officers must include the names of candidates nominated to replace the targeted official. Each recall question should have these names listed beneath it. Following the candidate lists, the ballot must include a blank line followed by a voting space to the right.<sup>206</sup>

## V. Cost-saving Analysis in California's Unified Recall Election

The decision to combine the recall and replacement votes on a single ballot in California is a strategic move aimed at streamlining the voting process. The elimination of separate voting events reduces associated costs such as printing, distribution, polling station expenses, and staffing requirements. By holding both votes concurrently, the state reduces logistical complexities and administrative overhead, potentially resulting in significant cost savings.

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<sup>202</sup> Article II, Section 15, The California State Constitution.

<sup>203</sup> California Secretary of State, 'Procedures for recalling state and local officials' Office of The Secretary of State, 2023, 1 <https://elections.cdn.sos.ca.gov/recalls/recall-procedures-guide.pdf> on 24 November 2023.

<sup>204</sup> Section 11004, Elections Code (California).

<sup>205</sup> Section 11320, Elections Code (California).

<sup>206</sup> Section 11322, Elections Code (California).

California's 2003 recall election was held on short notice, with county election officials being notified only a few months before the election date. This suggests that there was insufficient time and resources to hold separate recall and replacement elections, making the single ballot option more cost-effective. Hill<sup>207</sup> finds that election costs in California counties generally follow a production model with economies of scale, which meant that as the number of voters increased, the cost per voter decreased.

Similarly, Qvortrup<sup>208</sup> posits that by eliminating the need for separate elections, the consolidated ballot reduces the financial burden on state and local governments. This promotes cost efficiency and optimal resource utilization, especially given the potential costs associated with organizing multiple elections. The cost savings from a unified process can be viewed as a wise use of public funds.<sup>209</sup>

Lawrence<sup>210</sup> states that the recall question and the replacement candidates' elections are held on the same ballot so that money is saved for future elections. Ellis<sup>211</sup> supports this notion of cost saving associated with running only one vote rather than two. Further, he asserts that holding the elections separately increases the monetary and logistical strain of the recall process and creates a time of doubt between the incumbent's recall and the election of a successor.<sup>212</sup>

## VI. Case studies: Outcomes of recall elections that succeeded and unsuccessful ones

### a. California's 2003 recall that was successful in ousting the incumbent governor

In 2003, the former Governor Gray Davis, was recalled and Arnold Schwarzenegger elected to replace him. 55.4% of voters voted "yes" while 44.6% voted "no" on the first question<sup>213</sup> whether Governor Davis was to be recalled and the winner Schwarzenegger received 48.6%

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<sup>207</sup> Hill A, 'Election administration finance in California counties' 42 *The American Review of Public Administration* 2, 2011, 613.

<sup>208</sup> Qvortrup M, 'Hasta la vista: A comparative institutionalist analysis of the recall' 47 *Representation* 2, 2011, 165.

<sup>209</sup> Cochran T, 'Recall elections waste public funds and cause chaos' US News, 10 May 2011 <https://www.usnews.com/opinion/articles/2011/05/10/recall-elections-waste-public-funds-and-cause-chaos> 24 November 2023.

<sup>210</sup> Lawrence D, 'California's crazy recall' Westmont Magazine, 2003 <https://www.westmont.edu/californias-crazy-recall> on 19 February 2023.

<sup>211</sup> Ellis A, 'The use and design of recall votes' 8.

<sup>212</sup> Ellis A, 'The use and design of recall votes' 8.

<sup>213</sup> Bowler S and Cain B, 'Introduction— Recalling the recall: Reflection on California's recent political adventure' 37 *Political Science and Politics* 1, 2004, 7.

on the second question<sup>214</sup> which had the list of candidates to replace the incumbent governor in the event he was recalled.

Some of the reasons that prompted Governor Davis to be recalled include— quadrupled power costs, a budget crisis, introduction of a car tax among other reasons.<sup>215</sup> On signature collection, the signatures required to qualify for the ballot were 897,158 and it is noted that the signature drive was largely underwhelming until a Republican legislator, Darrell Issa, chipped in US\$ 2 million to assist cover the costs for paid circulators.<sup>216</sup>

California had witnessed 177 attempts to recall state-wide officials and 31 of the attempts were aimed at recalling former governors. Also, in 1999, there was a recall attempt to recall Davis but this did not qualify for the ballot.<sup>217</sup> This recall election saw a high number of candidates— 135— vie to replace Davis in case he was recalled.<sup>218</sup> As Elizabeth Garrett<sup>219</sup> notes, the abundance of candidates was aided by poorly drafted legislation that lacked clear regulations for ballot entry. Furthermore, the Secretary of State's choice of rules, as the primary election officer, posed only minor impediments to those seeking to include "Gubernatorial Candidate" on their résumé.

Therefore, for one to qualify to be on the replacement ballot, (s)he needed to hand in 65 signatures from registered voters and make a payment of US\$ 3,500.<sup>220</sup>

#### b. California's 2021 unsuccessful recall

In 2021, there was a recall attempt in California to recall Governor Newsom. There were a number of reasons put forth as to why Newsom was being recalled. These include—

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<sup>214</sup> Ace project, 'United States: Total recall – the election of Schwarzenegger in California' The Electoral Knowledge Network, [https://aceproject.org/regions-en/countries-and-territories/US/case-studies/esy\\_us01](https://aceproject.org/regions-en/countries-and-territories/US/case-studies/esy_us01) on 6 December 2023.

<sup>215</sup> Haroun A, 'What happened during the 2003 California recall election – and why it's so different than 2021' Business Insider Africa, 14 September 2021 <https://africa.businessinsider.com/politics/what-happened-during-the-2003-california-recall-election-and-why-its-so-different/fgz4jch> on 8 December 2023.

<sup>216</sup> Wood D, 'Recall heard 'round the country?' The Christian Science Monitor, 15 July 2003 <https://www.csmonitor.com/2003/0715/p01s01-uspo.html> on 8 December 2023.

<sup>217</sup> Bowler S and Cain B, 'Introduction— Recalling the recall: Reflection on California's recent political adventure' 7.

<sup>218</sup> Lyman R, 'The California recall: The candidates; California voters wonder: Is anyone not running?' The New York Times, 16 August 2003 <https://www.nytimes.com/2003/08/16/us/california-recall-candidates-california-voters-wonder-anyone-not-running.html> on 6 December 2023.

<sup>219</sup> Garrett E, 'Democracy in the wake of the California recall' *153 University of Pennsylvania Law Review* 1, 2004, 254.

<sup>220</sup> Orlov R, 'California's recall: Field of 135 candidates made for political theater' Los Angeles Daily News, 7 October 2013 <https://www.dailynews.com/2013/10/07/californias-recall-field-of-135-candidates-made-for-political-theater/> on 6 December 2023.

dissatisfaction with Governor Newsom's handling of the pandemic, imposing business restrictions, exacerbating housing and homelessness issues, raising taxes, and raising the cost of living among other reasons.<sup>221</sup>

The proponents of this recall managed to collect more than 1.6 million signatures that were required to trigger the recall and qualify for the ballot.<sup>222</sup> A rather interesting fact about this recall is that the Sacramento County Superior Court extended the deadline for signature submission from November 2020 to March 2021<sup>223</sup> as a result of the COVID-19 pandemic.

As for the first question on whether Newsom should be recalled, the majority of the voters voted “no”— 61.9%— compared to the 38.1% voters who voted “yes”.<sup>224</sup> This ultimately meant that Governor Newsom was to retain his seat and the votes in the second question on who should replace him did not matter. In this election unlike the 2003 recall election that ousted Governor Gray Davis, the number of replacement candidates dropped significantly from 135 to 46 candidates.<sup>225</sup>

## VII. Challenging recall elections

The Election Code<sup>226</sup> of California provides that Any eligible voter in a county, city, or political subdivision may challenge an election result for a variety of reasons. These include allegations of precinct board misconduct, claims of the elected person's ineligibility at the time of the election, accusations of bribery or violations of the elective franchise, claims of illegal votes, complaints about eligible voters being wrongfully denied voting rights, claims that precinct board errors influenced the election outcome, and claims of errors in voting machines or ballot tallying.

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<sup>221</sup> Nixon N, ‘California Recall: What to know about the effort to remove Gavin Newsom’ Capital Public Radio, 22 July 2021 <https://www.capradio.org/articles/2021/07/22/signatures-are-in-what-you-need-to-know-about-the-gavin-newsom-recall-effort/> on 8 December 2023.

<sup>222</sup> Ronayne K, ‘California recall has enough signatures to make ballot’ AP News, 27 April 2021 <https://apnews.com/article/government-and-politics-california-9cdb7cd9ef3684f4a8a3dda471390cac> on 6 December 2023.

<sup>223</sup> *Orrin Heatlie v Alex Padilla* (2020), Superior Court of California.

<sup>224</sup> Barnes A et al, ‘California governor recall election: Voters reject recall of Gavin Newsom’ The Washington Post, 15 October 2021 <https://www.washingtonpost.com/elections/election-results/california/governor-recall/> on 6 December 2023.

<sup>225</sup> Cunningham M and Scanlan Q, ‘Gov. Newsom will not be removed in California recall election, ABC projects’ ABC News, 15 September 2021 <https://abcnews.go.com/Politics/gov-gavin-newsom-faces-potential-ousting-california-recall-2021/story?id=79520587> on 6 December 2023.

<sup>226</sup> Section 16100, Election Code (California).

The clerk of the superior court shall notify the superior court of the county of all statements filed within five days of the end of the time allowed for filing statements of contest. The presiding judge shall immediately designate the time and location of the hearing; which time shall not be less than 10 nor more than 20 days from the date of the order.<sup>227</sup> The court is required to provide factual findings and legal conclusions within 10 days of receiving and examining the evidence and arguments. Following that, the court will issue a decision, either confirming or invalidating the election. The judgment will be officially entered as soon as possible.<sup>228</sup>

As for appeals, any party dissatisfied with the court's decision may file an appeal with the court of appeal following standard procedures. Meanwhile, the person declared elected by the superior court retains the right to the office until a final decision is rendered, treating the situation as if no appeal had been filed.<sup>229</sup>

#### VIII. Funding of the recall election

In California the state governments appropriate funds from their general funds to cover election administration costs.<sup>230</sup> Additionally, the legislative analyst office<sup>231</sup> in its report notes that the state ought to pay for the associated cost of election-related requirements imposed on counties. Therefore, it would be right to say that the state government funds the recall election. As per California's laws, when the Secretary of State determines that the petition has the required number of valid signatures to begin a recall election, the Secretary of State must notify the Department of Finance of the results.<sup>232</sup>

After receiving notification from the Secretary of State that the petition has received the required number of valid signatures to trigger a recall, the Department of Finance is required to project the expenses associated with the recall election within 30 business days.<sup>233</sup> This estimate must then be presented to the Governor, Secretary of State, and Chairperson of the

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<sup>227</sup> Section 16500, Election Code (California).

<sup>228</sup> Section 16603, Election Code (California).

<sup>229</sup> Section 16900, Election Code (California).

<sup>230</sup> Legislative Analyst's Office Report, 'Considering the state's role in elections' Legislative Analyst's Office, 30 March 2017 [https://lao.ca.gov/publications/report/3634#State\\_Funding\\_of\\_County\\_Election\\_Activities](https://lao.ca.gov/publications/report/3634#State_Funding_of_County_Election_Activities) on 24 November 2023.

<sup>231</sup> Legislative Analyst's Office Report, 'Considering the state's role in elections' Legislative Analysts's Office, 30 March 2017.

<sup>232</sup> Section 11108 (c), Elections Code (California).

<sup>233</sup> Section 11108 (d), Elections Code (California).

Joint Legislative Budget Committee. The Joint Legislative Budget Committee has 30 days to assess and provide feedback on the estimate provided by the Department of Finance.<sup>234</sup>

Inasmuch as the state funds the recall election, this money comes from the taxpayers.<sup>235</sup> In Kenya, the money to fund elections comes from the taxpayers. Unlike Californian where the respective or affected county and ultimately the state bears the cost to fund for the recall election, in Kenya the funding is dependent on the National Treasury.<sup>236</sup>

## IX. Conclusion

Recall has been used in California since 1911 and it has been largely successful.<sup>237</sup> Inasmuch as in the Kenyan context recall is a novel feature in the Constitution of Kenya, it is bound to be used in the future.

## RWANDA

### I. Introduction

Rwanda a country in the East African region of Africa has made strides in making its elections cost-effective.<sup>238</sup> In this part, using Rwanda, this study looks into what makes the Rwandan election cost-effective and how this has been made possible over the years. In so doing, the study will look to borrow what has worked in Rwanda in order to reduce the cost of election in Kenya.

### II. Legal framework for elections in Rwanda

The Constitution of Rwanda (CoR)<sup>239</sup> is the foundational document that provides how the elections are to be conducted in Rwanda. The CoR provides that elections shall be through

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<sup>234</sup> Section 11108 (e), Elections Code (California).

<sup>235</sup> Hanson N and Lewis B, 'No, the losing party doesn't pay for the California recall election – taxpayers do' Verify, on 17 September 2021 <https://www.verifythis.com/article/news/verify/elections-verify/california-recall-election-pays-funding-taxpayers/536-b0a70e62-c2df-4ba5-aba6-056b627f16eb> on 24 November 2023.

<sup>236</sup> Independent Electoral and Boundaries Commission, 'An open letter to the people of Kenya' Amazon, 2 <https://s3-eu-west-1.amazonaws.com/s3.sourceafrica.net/documents/120833/IEBC.pdf> on 24 November 2023.

<sup>237</sup> Spivak J, Carrillo D, Kaliss N and Madnick J, 'California's recall is not overpowered' 483.

<sup>238</sup> Mwai C, 'We did our best to make elections cost effective, says NEC chief' The New Times, on 17 July 2017 <https://www.newtimes.co.rw/article/142395/News/we-did-our-best-to-make-elections-cost-effective-says-nec-chief> on 16 April, 2024.

<sup>239</sup> The Constitution of Rwanda.

universal suffrage which is equal for all Rwandans.<sup>240</sup> As such, the suffrage is either direct or indirect unless otherwise stated and that it shall be secret.<sup>241</sup> Additionally, it has been provided that Rwanda has a multi-party system<sup>242</sup> and that every Rwandan citizen has the right to either join or not join any political organisation of his or her choice.<sup>243</sup>

The National Electoral Commission (NEC), is the body charged with the mandate to conduct elections in Rwanda.<sup>244</sup> NEC is established under the CoR as a national commission among other commissions, specialised organs and councils.<sup>245</sup> This body, appoints electoral volunteers from the provincial and Kigali City level to the polling room level to ensure that the NEC discharges its functions.<sup>246</sup>

### III. Cost-saving aspect of Rwandan elections

The cost of Rwandan elections has been noted to be cost effective compared to Kenya and Uganda. As Musau notes, in the 2017 elections, Rwanda used Kshs. 761.7 million compared to the Kshs. 49.9 billion that Kenya spent in the 2017 general elections.<sup>247</sup> To compare the average cost per voter, Kenya's cost was at Kshs. 2,000 per voter, Uganda at Kshs. 1,400 per voter and Rwanda at Kshs. 112 per voter.<sup>248</sup>

In 2017, Rwanda saved significantly compared to the elections it held in 2010. In 2010, the cost of election in Rwanda was US\$ 8.7 million and that in 2017, the cost was US\$ 6.9.<sup>249</sup> Inasmuch as the number of registered voters went up from 5.2 million voters in 2010<sup>250</sup> to 6.6 million voters in 2017<sup>251</sup>, the cost was saved because the NEC was procuring fewer items in

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<sup>240</sup> Article 2, Constitution of Rwanda.

<sup>241</sup> Article 2, Constitution of Rwanda.

<sup>242</sup> Article 54, Constitution of Rwanda.

<sup>243</sup> Article 55, Constitution of Rwanda.

<sup>244</sup> Article 3, No. 001 of 2019 Organic Law Governing Elections of 29/07/2019 (Rwanda).

<sup>245</sup> Article 139, Constitution of Rwanda.

<sup>246</sup> Article 3, No. 001 of 2019 Organic Law Governing Elections of 29/07/2019 (Rwanda).

<sup>247</sup> Musau D, 'Kenya's August elections among the world's most expensive'.

<sup>248</sup> Musau D, 'Kenya's August elections among the world's most expensive'.

<sup>249</sup> The Independent, 'Rwanda to pay less for 2017 elections' The Independent, on 20 December 2016

<https://www.independent.co.ug/rwanda-pay-less-2017-elections/> on 16 April 2024.

<sup>250</sup> Amnesty International, 'Elections in Rwanda' Amnesty International, on 5 September 2017

<https://www.amnesty.org/en/latest/campaigns/2017/09/rwandas-repressive-tactics-silence-dissent-before-elections/> on 16 April 2024.

<sup>251</sup> Baddorf Z, 'Rwanda President's lopsided re-election is seen as a sign of oppression' The New York Times, on 6 August 2017 <https://www.nytimes.com/2017/08/06/world/africa/rwanda-elections-paul-kagame.html> on 16 April 2024.

2017 compared to 2010 and NEC was depending on the volunteers who would assist in the elections and didn't expect to be paid any wages.<sup>252</sup>

The system of volunteerism used in Rwanda has proved to be efficient as the volunteers who have been in place train in new volunteers who come in to assist in the election cycle.<sup>253</sup> The term electoral volunteer has been defined by the NEC as any Rwandan of at least 18 years old who approved by the NEC, willing and capable, not disqualified from voting, is dedicated to assisting the NEC in organizing, conducting, and overseeing elections, and does not expect compensation.<sup>254</sup>

The use of volunteers is not only used within the country but also in diaspora during voting. In addition to assisting in overseeing the elections, these volunteers also provide civic education on electoral procedures, working with the communities and handling disputes among other electioneering aspects.<sup>255</sup> It is noted that Rwanda has been holding the presidential and parliamentary elections separately. The elections of these two posts are held after a period of 7-years<sup>256</sup> and 5-years<sup>257</sup> respectively. The 2024 elections will deviate from this norm as the NEC announced that these two elections will be held jointly.<sup>258</sup> In this regard, the parliamentary elections have also been cost efficient in that in the 2013 parliamentary elections, the cost per voter was approximately reduced from US\$ 2.90 in 2008 to US\$ 1.20 in 2013.<sup>259</sup>

Inasmuch as it has been noted that the use of volunteers has reduced the cost of elections, the Senators in the Rwandan Senate would like that the reduction of cost be attributed in monetary terms to show how much the country would have spent without the assistance of the

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<sup>252</sup> The Independent, 'Rwanda to pay less for 2017 elections'.

<sup>253</sup> United Nations Development Program, 'Electoral volunteerism: Reducing costs and increasing national ownership of elections' United Nations Development Program, on 20 January 2022 <https://www.undp.org/rwanda/news/electoral-volunteerism-reducing-costs-and-increasing-national-ownership-elections> on 16 April 2024.

<sup>254</sup> National Electoral Commission, 'Instructions No. 01/2017 of 04/04/2-17 of the National Electoral Commission regulating 2017 presidential elections as modified and complemented to date' National Electoral Commission, 2 June 2017 [https://nec.gov.rw/uploads/media/instructions\\_on\\_2017\\_elections.pdf](https://nec.gov.rw/uploads/media/instructions_on_2017_elections.pdf) on 16 April 2017.

<sup>255</sup> National Electoral Commission, *The National Electoral Commission Strategic plan for the period 2022-2027*, May 2022, 13.

<sup>256</sup> Samset I and Dalby O, 'Rwanda: Presidential and parliamentary Elections 2023' NORDEM Report, No. 12 of 2003, 2003, 11 <https://www.cmi.no/publications/file/1770-rwanda-presidential-and-parliamentary-elections.pdf> on 16 April 2024.

<sup>257</sup> Samset I and Dalby O, 'Rwanda: Presidential and parliamentary Elections 2023'.

<sup>258</sup> Muhozi E, 'Unique aspects of Rwanda's upcoming general elections' IGIHE, 27 February 2024 <https://en.igihe.com/news/article/millions-will-vote-for-the-first-time-unique> on 17 April 2024.

<sup>259</sup> United Nations Development Program, 'Electoral volunteerism: Reducing costs and increasing national ownership of elections'.

volunteers.<sup>260</sup> Ordinarily, an increase in the number of the registered voters would push the cost of elections up. The NEC notes that the use of the volunteers and social media and the media to create public awareness and educate the public has reduced the cost of election as the number of registered voters increases. NEC spent more than RWf 7 billion in 2010 with the population of registered voters being 5.17 million and in 2017 the electoral body spent approximately RWf 6.2 billion as the registered voters increased to 6.8 million.<sup>261</sup>

The NEC also notes that another issue that makes their elections cost effective is the printing of ballot papers within the country rather than outside the country.<sup>262</sup> Printing these ballot papers locally has seen the cost of elections reduce from US\$ 3 per voter to US\$ 1 per voter in 2017.<sup>263</sup> The ballot papers in Rwanda do not contain any serial numbers or official marks on them which would make it hard for the election officials to verify the authenticity of the ballot papers.<sup>264</sup>

#### IV. Conclusion

Rwanda has been able to save on the cost of conducting its election by ensuring that the procurement of ballot papers is done within the country and that they use the volunteers to assist in managing its elections. Additionally, their ballot papers do not have the security features that the Kenyan ballot papers embody and thus, with this, Rwanda has been able to cut on the cost of conducting elections.

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<sup>260</sup> Kwibuka E, 'Senators want electoral volunteers' work valued in monetary terms' The New Times, on 4 December 2018 <https://www.newtimes.co.rw/article/161570/News/senators-want-electoral-volunteers-work-valued-in-monetary-terms/amp> on 16 April 2024.

<sup>261</sup> Mwai C, 'We did our best to make elections cost effective, says NEC chief'.

<sup>262</sup> African Union, 'African Union election observation mission to the 3-4 August 2017 presidential election in the Republic of Rwanda statement of preliminary findings and conclusions Kigali, 6 August 2017' African Union, on 7 August 2017 <https://au.int/en/pressreleases/20170807/african-union-election-observation-mission-3-4-august-2017-presidential> on 16 April 2024.

<sup>263</sup> African Union, 'African Union election observation mission to the 3-4 August 2017 presidential election in the Republic of Rwanda statement of preliminary findings and conclusions Kigali, 6 August 2017'.

<sup>264</sup> African Union, 'African Union election observation mission to the 3-4 August 2017 presidential election in the Republic of Rwanda statement of preliminary findings and conclusions Kigali, 6 August 2017'.

## CHAPTER 5: FINDINGS, RECOMMENDATIONS, AND CONCLUSION

### I. Introduction

This chapter will present the findings of this study where the same will be derived from the information discussed in the previous chapters. Additionally, the chapter will provide recommendations which will be drawn from the findings.

### II. Findings and Recommendations

This study discussed three research questions that were integral in assessing whether it would be possible for Kenya to hold a unified recall election. The first question looked into what makes the Kenyan election costly. This study finds that the bungling up of procurement procedures when acquiring various electoral materials, makes the cost of election high. Also, the additional security features that have been included on the ballot papers due to mistrust of the voters in the Commission end up inflating the cost of elections.

The high number of polling stations occasioned by the statutory capping of 700 voters per polling station by the EA, makes the Commission spend more in terms of election administration cost, security personnel, transportation cost, and ultimately in ensuring that all the polling stations have the necessary equipment to conduct the election.

Additionally, on what makes the election costly, it is this study's finding that some of the things like the capping of the maximum electorate per polling station have been enshrined in statute. This is the same case as the use of digital technologies required for the election. If a recall election is to be held, then all these factors would come into play and ultimately, the two tier recall election will be expensive.

The second question dealt with the legal framework that underpins the right to recall. This study finds that the CoK has provisions that are important with respect to the manner in which a seat of parliament falls vacant and a by-election may be occasioned. Further, the CoK is instrumental in ensuring access to court for persons whose rights have been violated and those whose rights are to be violated. Additionally, both the EA and CGA provide for the manner in which elections—including recall elections for both the MPs and MCAs respectively—ought to be conducted.

The final part of the study looks into the way the State of California conducts its recall election and what makes the Rwandan election cost effective to enable them save on costs related to

conduct elections. This study finds that California unlike Kenya, does not hold party primaries when nominating candidates to vie to be replacement candidates in the recall election.<sup>265</sup> On the seat falling vacant, there is no set requirement like in Kenya where the Speaker of the relevant House of Parliament or County Assembly has to declare a seat vacant. Further, the signature requirement for the recall to qualify for the ballot is 12% for the state-wide officers and 20% for the local officers whereas in Kenya the signature threshold is set at 30% for both the MPs and MCAs.

As for contesting the recall elections, there are strict measures that have been noted when it comes to the hearing and determination of these cases where the process of hearing and determination takes 10-20 days. The process of consolidating the recall vote and the replacement vote in California has also been seen to be cost-saving and thus, the State is able to save on costs related to future elections.

In comparing Rwanda with Kenya, this study finds that Rwanda has incorporated the use of volunteers who are not paid and the procurement of ballot papers is done in Rwanda rather than contracting other firms not in Rwanda to do the printing of these ballot papers. In addition to these, the ballot papers used, do not have the additional security features like the ones that the Kenyan ballot papers have.

This study also finds that the constitutional dispensation of Kenya and California are different and some of the things like having the recall election held simultaneously would create difficulties like how to amend the CoK to declare a seat vacant by the respective Speaker of the House of Parliament and County Assembly.<sup>266</sup>

Therefore, having a unified recall election as a solution to the high cost of election would not be ideal because this would go against some rights that have been reserved in the CoK—Articles 23 (authority of the courts to uphold and enforce the Bill of Rights), 24 (limitations of rights and fundamental freedoms), and 38 (political rights). Additionally, it is this study's finding that the in using the CBA, the conduct of a unified recall election would not outweigh the right to challenge a recall process in Court. Given this context, the following recommendations are proposed to deal with the issue of the high cost of elections—

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<sup>265</sup> Section 8000, Elections Code (California).

<sup>266</sup> Article 101, Constitution of Kenya (2010).

1. A thorough audit of election technologies to be conducted one year after general elections to assess their functionality and readiness for future use.
2. Contract printing firms in Kenya and procure ballot papers from these firms rather than procuring the same from firms outside Kenya.
3. Come up with a system of volunteerism where the general public— a person aged 18 years— would assist the IEBC conduct elections and educate the general public on electoral matters and processes.

### III. Conclusion

The right to recall is a novel feature of the Constitution of Kenya and thus, inasmuch as it has never been used, it is bound to be used in the future and some of the problems like the cost of the two elections— recall election and a by-election— are bound to come up. Recall has been posited to be a tool for accountability where the voters have the avenue to use this tool before the next election cycle to recall their elected representative.<sup>267</sup> Kenya ought to incorporate the recommendations above to ensure that the Kenyan election is cost-effective and that Kenya can save on the cost of election.

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<sup>267</sup> Vandamme P, 'Can the recall improve electoral representation?' *Frontiers Political Science*, 2020 [https://www.frontiersin.org/articles/10.3389/fpos.2020.00006/full?fbclid=IwAR1ThXCkK\\_8G6VB635bmuXvF6oR7sWaY6Mzey1PwzwzeiT3fSD41ZiVh2Go](https://www.frontiersin.org/articles/10.3389/fpos.2020.00006/full?fbclid=IwAR1ThXCkK_8G6VB635bmuXvF6oR7sWaY6Mzey1PwzwzeiT3fSD41ZiVh2Go) on 8 December 2023.

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