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THE IMPACT OF ELECTORAL JUSTICE ON THE PROMOTION OF DEMOCRACY AND HUMAN RIGHTS

THE CASE OF THE 2017 KENYAN PRESIDENTIAL ELECTIONS

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“To do good whenever one can, to love liberty above all else,
never to deny the truth”

“Bisogna fare tutto il bene possibile, amare la libertà sopra ogni cosa
e non tradire mai la verità”

Ludwig van Beethoven

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ACRONYMS

ACDEG	African Charter on Democracy, Elections and Governance
ACHR	American Convention on Human Rights
ACtHPR	African Court on Human and Peoples' Rights
AU	African Union
CKRA	Constitution of Kenya Review Act
CKRC	Constitution of Kenya Review Commission
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms – European Convention on Human Rights
ECtHR	European Court of Human Rights
EDR	Election Dispute Resolution
EDRB	Election Dispute Resolution Body
EDRS	Election Dispute Resolution System
EJS	Electoral Justice System
EOM	Electoral Observation Mission
ICCPR	International Covenant on Civil and Political Rights
IDEA	Institute for Democracy and Electoral Assistance
IDPs	Internally Displaced Persons
IEBC	Independent Electoral and Boundaries Commission
IFES	International Foundation for Electoral Systems
KIEMS	Kenya Integrated Election Management System
OAS	Organisation of American States
OAU	Organisation of African Unity
UDHR	Universal Declaration of Human Rights

INTRODUCTION

The aim of this thesis is to study the contribution of electoral justice to the promotion of human rights and democracy, proposing a specific case study on the 2017 Presidential Election in Kenya.

The decision to focus on this research topic comes from the author's interest in elections as a decisive moment in the democratic life of a country and effective methods to promote democratic governance and the respect for fundamental civil and political rights.

Media's communication strategies tend to drive the attention only on the election day, reducing elections to the mere act of casting a vote into the ballot box. Although management of polling stations, voting operations and the announcement of the results are crucial aspects, they do not alone determine the overall success of an election.

For this reason, it is necessary to abandon this conventional approach and embrace an innovative vision, highlighting how elections are processes rather than events.[1] According to this view, elections are made up of different salient moments and operations; many stakeholders, with different competencies and juridical status are involved. Therefore, electoral processes can be visualised as a cycle, composed of a pre-electoral, electoral and post-electoral period, a framework that makes an idea of the existing linkages between the different aspects and challenges of elections.[2]

Even though electoral justice mechanisms can be also activated to resolve disputes concerning aspects of the pre-electoral period (party nominations, financing of campaigns, eligibility of candidates etc.), it is in the post-electoral phase that its critical importance clearly emerges. This thesis precisely focuses on

[1] " Electoral Integrity: Elections are a Process," *Open Election Data Initiative,* https://openelectiondata.net/en/guide/electoral-integrity/elections-are-a-process/ (accessed 12 February 2020)

[2] The electoral cycle was developed conjunctly by the European Commission, the United Nations Development Programme (UNDP) and the International Institute for Democracy and Electoral Assistance (IDEA). "What is the Electoral Cycle," *ACE The Electoral Knowledge Network,* https://aceproject.org/electoral-advice/electoral-assistance/electoral-cycle#_ftn1 (accessed 12 February 2020)

post-electoral justice, or the resolution of the electoral disputes emerging after the proclamation of the results.

Traditionally, electoral justice institutions and dispute resolution mechanisms have never been popular topics of research, nor they have made up the core of electoral assistance efforts.[3] On the other hand, much has been written on electoral management, voting procedures, counting and electoral reforms – which are indeed the most visible aspects of the electoral cycle.

However, the frequent occurrence of irregularities and misconduct in elections, as well as the often violent contestation of electoral results – whose Kenya represents perhaps the most evident case – has raised awareness on the contribution that judicial resolution of electoral controversies can provide to stabilise weak democracies and enforce the protection of electoral rights.

The International Institute for Democracy and Electoral Assistance (IDEA), based in Stockholm, pioneered the studies on electoral justice, publishing *Electoral Justice: the International IDEA Handbook,*[4] the first comprehensive work on the concept of electoral justice and different mechanisms of electoral dispute resolution. The IDEA also contributed to spread the importance of electoral justice among the general public developing practical tools that everybody, from the scholar to the ordinary citizen, could use to assess their national electoral dispute resolution system (EDRS), highlighting available procedures, measures of redress and criticalities. These efforts were concentrated in the *Electoral Justice System Assessment Guide*[5] that we partly applied to assess the Kenyan EDRS.

Another important source that can help to clarify the concept of electoral justice, the kind of institutions involved in election dispute resolution (EDR) and the types of available remedies is the ACE *Electoral Knowledge Network,* an open-source online project providing an encyclopaedic work explaining every step of the electoral process, including electoral justice. For the extension of this

[3] Avery Davis-Roberts, "Electoral Dispute Resolution Discussion Paper for Experts Meeting," *Atlanta GA,* February 2009, p. 3
[4] Jesús Orozco-Henríquez et al., *Electoral Justice: The International IDEA Handbook* (Stockholm: International Institute for Democracy and Electoral Assistance, 2010)
[5] Oliver Joseph and Frank McLoughlin, *Electoral Justice System Assessment Guide* (Stockholm: International Institute for Democracy and Electoral Assistance, 2019)

work and the different topics covered, this resource can also invaluably help research in other election-related issues, including electoral management and electoral observation.

The works of generalist character on electoral justice are essentially those we have just mentioned; the current status of research on electoral justice is indicative of the need to further publish contributions helping to develop a theory of electoral justice or exploring specific aspects of it, for instance the different types of election dispute resolution bodies (EDRB).

EDR can be studied also by making reference to the international human rights instruments, both at the UN and regional levels; these conventions all provide for a right to free and fair elections. Among these instruments, the most important are certainly the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Many regional systems have also adopted their human rights treaties protecting, inter alia, popular representation and democratic governance; among these, the Organisation of American States (OAS) and the African Union (AU) were in the first line to adopt specific references to electoral justice.

Since electoral justice is administered at the national level, national legislations – including constitutions and electoral laws – and sentences or decisions adopted by the EDRBs all help the researcher to understand how electoral disputes are practically adjudicated.

Referring to all these sources, we have organised our work as follows: in the first chapter, we provided an introduction to electoral justice, defining this concept and the different models of EDRB; we also highlighted the many but often indirect connections between electoral dispute resolution and international human rights standards. Additionally, we tried to explain why electoral justice and the design of EDRS are issues that have not to be superficially ignored, as they invaluably contribute to the promotion of democracy and civil/political rights declined in their electoral dimension.

The second and third chapter constitute the core of our research, focusing specifically on Kenya, our case study. The second chapter is to be intended as an occasion to familiarise with Kenya and its recent electoral and political history.

Therefore, we first explained why this country represents an interesting case for the study of EDR, briefly recalling its constitutional history and the recurrent patterns of Kenyan elections: electoral violence and contestation of electoral results.

With the aim to demonstrate that the 2017 Kenya Supreme Court decision on the presidential election of that year was not a sudden and inexplicable event, we further deepened our contextualisation effort, focusing on a tragic event of recent Kenyan history: the 2007 post-electoral crisis. In fact, 2007 was the starting point of a profound process of reform which involved the adoption of a new constitution and the total re-thinking of the electoral architecture and the judiciary.

The 2017 Supreme Court's decision to annul the presidential election represented the culmination of these efforts, being the decision of a judicial body that was created with the 2010 Constitution to be the guardian of constitutionalism and the competent EDRB for presidential elections.

Having done these necessary premises, the third chapter introduces a detailed analysis on the 2017 annulment order; after having studied the content of the Supreme Court's sentence, we provided a sort of guide, helping the reader to focus on the most contentious aspects of the 2017 presidential election and the legal principles developed by the Court to justify the annulment of the election.

The fourth and last chapter attempts to find an answer to this thesis' research question: did, overall, the 2017 annulment order contribute to advance Kenyan democracy and the protection of citizens' civil and political rights?

We addressed this question from different perspectives. Moving from the assumption that widespread perceptions on institutional efficiency and reliability are aspects that have to be considered if we care for the stability of our democracies, we first tried to reconstruct the post-verdict atmosphere in Kenya to see whether the Supreme Court's decision was well-welcomed or rejected by the population.

We then tested the Kenyan EDRS activated in 2017 against commonly accepted guiding principles of electoral justice, as highlighted in the IDEA Electoral Justice System Assessment Guide.

After that, we moved back to the content of the 2017 nullification decision, underlining some aspects that, in our opinion, could be perceived as contentious issues connected to the Supreme Court's order.

Given the full commitment of the international community in the post-2007 pacification efforts and subsequent constitutional reform, the Kenyan case provided the opportunity to reason on the relations between national and international standards on elections and dispute resolution, claiming that the principal reference to national legal sources to justify the nullification of an election – as it was done in 2017 by the Kenyan Supreme Court – is not in contrast with the international protection of human rights, allowing, in certain cases, for the introduction of enhanced forms of safeguard.

1 CHAPTER I: AN INTRODUCTION TO ELECTORAL JUSTICE

1.1 What is Electoral Justice?

Electoral disputes and the subsequent activation of electoral justice mechanisms are more frequent than one could think. The 2000 US Presidential Election, opposing the Democratic candidate Al Gore and the Republican George W. Bush, was marked by an unprecedented electoral dispute in the recent history of American politics over recounting procedures in the state of Florida. After the official tally, it resulted that Bush led the race with a margin of just 537 votes; according to the Florida electoral law, this result automatically triggered a machine recounting procedure. After this first step, the margin between the two candidates narrowed to 317 votes, convincing Al Gore to request a manual recount in four counties.

Notwithstanding the ongoing recounting procedures, the Florida Secretary of State proclaimed George W. Bush the winner of the 25 electoral votes of the state; Gore immediately contested said proclamation and appealed the Florida Supreme Court, which ordered to continue the re-counting of the "undervote ballots".[1]

Having exhausted all the available remedies at the State level, Bush immediately brought the case to the US Supreme Court. The landmark sentence in *Bush v. Gore* determined that there was no legal ground to support the re-counting of the undervote ballots (7-2 majority); more contested (5-4 majority) was the decision concerning the remedies to put in place to settle the crisis: as no solution could be adopted within the pre-established deadline for the meeting of the Florida Electoral College, George W. Bush was assigned the 25 decisive electoral votes allowing him to be proclaimed the 43rd President of the United States of America.

[1] The *undervote ballots* were punch-card ballots that had been cast but not registered due to a problem known as "hanging chad" occurred in some Florida counties adopting this voting procedure. For an explanation of this issue and a detailed account of the Bush v. Gore case see the *National Constitution Center*, "On this day, Bush v. Gore settles 2000 presidential race," 12 December 2019, https://constitutioncenter.org/blog/on-this-day-bush-v-gore-anniversary (Accessed 17 December 2019)

A more recent example is provided by the Austrian Constitutional Court which annulled the second round of the 2016 Presidential Election after having ascertained irregularities affecting some 77,926 votes; the constitutional judges decided to call for a re-run of the second round, as the number of contested ballots could have decisively changed the results of the election.[2]

Moving to the African continent, in 2006 the opposition candidate to the Ugandan presidency Kizza Besigye denounced diffused irregularities and episodes of intimidation against his party. The subsequent electoral dispute was set by the Ugandan Supreme Court in favour of the incumbent president Yoweri Museveni.

Still in 2006, the Mexican General and Presidential Elections demonstrated how electoral crisis could degenerate in serious institutional paralysis. After the end of the official counting procedures, the two most voted candidates for the presidency, Felipe Calderón and Andrés Manuel López Obrador were separated only by a narrow margin of 0.6% in the popular vote. As a result, Manuel López Obrador decided to file a challenge before the Federal Electoral Tribunal asking for a total recount; Obrador's request was based on evidence which proved counting irregularities at several polling stations. After having ascertained that only a part of the contested ballot boxes had been tampered, the judges of the Federal Electoral Tribunal ordered a partial recount which ended up in the annulment of 237,736 ballots.

The abovementioned examples are instructive in several ways. First, they all show that elections are, by nature, contested events: even the most well-managed election cannot betray its competitive nature, which makes two or more candidates compete to be elected to public office. Secondly, although more frequent in post-conflict countries and States with limited institutional capacity, electoral disputes may arise also in consolidated democracies, as the cases of Austria and the United States clearly demonstrate. Thirdly, if electoral disputes are not properly dealt with, they can cause institutional paralysis and even

[2] Philip Oltermann, "Austrian presidential election result overturned and must be held again," *The Guardian,* 1 July 2016, https://www.theguardian.com/world/2016/jul/01/austrian-presidential-election-result-overturned-and-must-be-held-again-hofer-van-der-bellen (Accessed 17 December 2019)

protracted social unrest which irremediably puts under intolerable pressure the democratic institutions of a country.

For all these reasons, it can be argued that every democracy aiming at stability and viability needs to properly address the issue of electoral justice, designing specific institutions entrusted with the mandate to resolve electoral disputes.

The core of this research rests on two essential elements: electoral disputes, which are the problem and electoral justice, which is the solution.

Having contextualised electoral challenges, let us now provide a definition of electoral justice. Broadly speaking, electoral justice refers to all the mechanisms and institutions available in a country to ensure that any action and decision connected to the electoral process are consistent with the relevant laws and respect citizens' political rights.[3] The term Electoral Justice System (EJS) can be alternatively used to highlight that a network of institutions and electoral experts is put in place with the purpose to settle electoral challenges.

EJSs both perform corrective and preventive functions. The adjudication of electoral disputes is, of course, corrective, as the Election Dispute Resolution body (EDRB) intervenes after irregularities have occurred; however, an EJS is also created to anticipate problems and detect in advance shortcomings in the electoral management.

In conclusion, it can be said that an effective EJS is necessarily operative throughout the three phases of the electoral cycle – pre-electoral, electoral and post-electoral – and not just during elections as the common intuition may suggest.[4]

1.2 Why is Electoral Justice relevant for Democracy and its Enforcement?

As we have tried to explain in the previous paragraph, competition and adversarial dynamics are intrinsic characteristics of democracy and electoral processes. Therefore, electoral disputes should be considered as a natural occurrence in

[3] Jesús Orozco-Henríquez et al., *Electoral Justice: The International IDEA Handbook* (Stockholm: International Institute for Democracy and Electoral Assistance, 2010), p. 9
[4] Ibid., p. 18

democracies rather than the symptom of a deficient electoral management system.[5]

Certainly, a democracy where no electoral challenges are filed is indicative of perfect election management and widespread civic culture among candidates, political parties and citizens. Yet, such a situation resembles more an ideal situation rather than reality.

The study of EJSs can invaluably help the promotion of democracy and popular participation for four reasons. First of all, electoral disputes provide a stress-test function for democracies: they enable citizens, human rights' activists and researchers to assess the democratic system's ability to effectively overcome challenges and tensions that, if not properly addressed, risk damaging the stability of its institutions.[6]

Secondly, the evaluation of EDRBs' activities allows detecting weaknesses in the electoral management system, so that it is possible to better direct future reforms on those areas of intervention where change is needed the most.

Thirdly, an efficient electoral justice system contributes to the spread of a political culture where both candidates and voters understand that disputes have to be solved peacefully and timely, in accordance with the existent legal framework. In a consolidated democracy, this helps to perpetuate the democratic system, its rituals and institutions, while in the context of a democratic transition it spreads among people a sense of trust in the democracy's ability to maintain social peace and genuinely represent citizens' interests.

Finally, a responsive electoral justice system allows bridging the gap between the formal recognition of electoral rights at the level of the constitution or ordinary law and their effective application, which is one of the causes explaining current disaffection to democracy that is felt by many citizens.

Overall, we can conclude that if the EDRB complies with its mandate and proves its reliability, then it will not only contribute to the positive organisation of the electoral cycle but also, and more importantly, to the rooting of a culture of

[5] Ibid., p. 3
[6] Ibidem

legality which is ultimately necessary for the legitimisation of democratic governance.[7]

If a country does not have an independent and impartial institution with the mandate to broadly evaluate how the elections have been organised and eventually punish any misconduct or violation of the electoral code, then the election day would be transformed in nothing more than a void and meaningless ritual. The outcome of such a situation would be a plebiscitary or even illiberal democracy,[8] a type of regime where elections are regularly held but then electoral legitimacy is misused by the majority in power to illegally restrain rights and abolish constitutional limits on the executive in power. As Zakaria underlined, elections represent the essence of democracy because they allow people to express their opinion and select their leaders. However, a full-fledged democracy also needs a constitutional and liberal tradition able to protect individual rights and restrain the power of the majority.[9] Of course, it is much easier to organize elections than to instil a culture of constitutional liberalism: elections are fundamental, but they do not necessarily lead to liberal democracy.[10]

From our perspective, both democratisation and the spread of constitutional liberalism are necessary. There is no hierarchy between the two, as they are equally important at different stages. The organisation of free and fair elections and the efficient administration of electoral justice represent the first step towards the realisation of a full-fledged democracy. The subsequent adoption of a constitution and the dissemination of a culture of constitutionalism complete the process. The circle is usually closed with the final approval of the new constitution through a popular referendum.

Electoral justice is an aspect that cannot be disregarded if the aim is to promote successful democratisation. At one level, it reminds us that democratisation and constitutionalism cannot be separated: they are both essential for the creation of an accountable political regime, respectful of citizens' rights. At another level, electoral justice warns against the easy banalisation of elections

[7] Ibid., p. 2
[8] Fareed Zakaria, "The Rise of Illiberal Democray," *Foreign Affairs* 76, no. 6 (1997): 22–43
[9] Ibid., pp. 24-28
[10] Ibid., p. 40

coming especially from illiberal leaders, who aim at transforming elections in meaningless and useless ceremonies.

In a historical phase where liberal democracy is often threatened by a dangerous populist wave, electoral justice is necessary to mitigate the typical populist appeal to the popular will expressed through vote: elections are not the mere and disordered moment in which unrestrained popular sovereignty emerges but they have to be conducted according to specific limits established by the relevant legal framework. If we do really care for the people and their opinion, we have to fight against any banalisation and manipulation of elections.

Electoral justice may appear as a very specific form of justice, with limited impact out of the electoral context. This is not true, especially in post-conflict countries. The successful and satisfactory adjudication of electoral disputes by the EDRB invaluably helps to root the idea that every aspect of public life, starting from the election of representatives, is to be governed by the principle of the rule of law, the cornerstone of the democratic edifice.

In conclusion, we can affirm that the presence of a strong and effective EDRS on its own may not guarantee the effective protection of people's electoral rights and the holding of free, fair and democratic elections.[11] Yet, without such a system a country would not be able to address critical institutional and legal issues like the democratic choice of representatives, the protection of fundamental rights and the enforcement of the law.

1.3 Why is Electoral Justice relevant for Human Rights Protection?

Electoral Justice and the International Human Rights Instruments

As we have seen in the previous paragraphs, the establishment of an electoral justice system is one of the most critical choices that a country can make, either to reinforce its democratic institutions or to successfully achieve a transition from a dictatorial regime. Although there may be external influences, the decision to set up an electoral justice system is very much national, in the sense that specific

[11] Orozco-Henríquez, *Electoral Justice,* p. 3

national laws are adopted to establish the EDRB and define its competences. It may also occur that electoral justice is dealt with at the constitutional level; in this last instance, it is the constitution itself that defines the competent authorities and how electoral justice is to be delivered.

Nevertheless, the national character of electoral justice does not determine its complete detachment from international law and the international human rights framework. In fact, many connections can be established between the national EJSs' and international human rights treaties. These links are proved by both the fact that electoral rights are a subset of civil and political rights protected by international human rights law and the indirect references made to electoral rights in many international human rights instruments.

For what concerns the first point, electoral rights encompass both civil and political rights, whose protection the international community has committed to since the adoption of the Universal Declaration of Human Rights in 1948 (UDHR).[12] Hence, electoral rights can present both a civil – e.g. the right to political association, the right to join or not a political party and freedom of expression – and political dimension, this last represented essentially by the right to vote, to run for elective office and to participate in free, fair, genuine and periodic elections.[13]

The link between electoral justice and human rights protected at the international level is often indirect. In other words, the international human rights treaties protect rights that can have relevance during an electoral dispute. However, as things stand today, the international community has not adopted a binding international convention on the principles of electoral justice and dispute resolution yet.

International human rights law establishes several obligations in terms of dispute resolution, but they do not necessarily link them with the electoral process.[14] Therefore, the only way to find specific obligations concerning EDR

[12] UN General Assembly, *Universal Declaration of Human Rights,* 10 December 1948, 217 A (III)
[13] Orozco-Henríquez, *Electoral Justice,* p. 13
[14] Avery Davis Roberts, *Electoral Dispute Resolution Discussion Paper for Experts Meeting* (Atlanta GA: 2009), p. 2

and electoral rights in international law is to infer them from the general human rights protected by these instruments.

Despite its declaratory character, the UDHR was indicative of the signatory States' political will to create an international order based on fundamental values such as the pacific resolution of controversies and the respect for human dignity. The UDHR was essential to build momentum for the advancement of the human rights agenda and inspire the content of the forthcoming United Nations international human rights Covenants.

The UDHR's provision of reference for electoral rights is enshrined in art. 21, providing for a universal right of direct or indirect participation in the government of a country. Article 21 also mentions the will of the people as the legitimising criterion for the authority of any government. Specifically, the will of the people can be expressed only through « *periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures».*[15] The very same act of recognising the existence of a human right to free and fair election demands, at the national level, the creation of appropriate institutions in charge of electoral management and justice; moreover, art. 21 focuses on aspects which usually are at the core of electoral challenges before national EDRBs: universal and equal suffrage, the secrecy of the vote and popular participation.

Some eighteen years after the adoption of the UDHR, the United Nations General Assembly approved the text of the International Covenant on Civil and Political Rights (ICCPR),[16] a binding instrument of international law specifically drafted to protect this category of rights. Art. 2 of the same Covenant affirms the principle of non-discrimination in the recognition and enjoyment of the rights protected by the Covenant;[17] such principle is utterly important in terms of electoral justice, as many electoral disputes are advanced on the basis of unequal access to electoral rights like access to public offices, presentation of the list of candidates, right to freely campaign, voters registration and so on.

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[15] *Universal Declaration of Human Rights,* art. 21

[16] UN General Assembly, *International Covenant on Civil and Political Rights,* 19 December 1966, United Nations Treaty Series, vol. 999

[17] UN General Assembly, *International Covenant on Civil and Political Rights,* art. 2

Articles 19, 21 and 22 of the ICCPR protect fundamental civil liberties which are also relevant in electoral terms, respectively freedom of opinion and expression, right of peaceful assembly and freedom of association.[18] These rights – which are non-absolute in nature and therefore can be limited only by the law and if the limitations are necessary to protect some superior interest of a democratic society – are particularly relevant in the pre-electoral phase, when usually political parties present their candidates and electoral campaigns take place. Finally, art. 25 reaffirms what had already been stated in art. 21 of the UDHR, focusing on the characteristics of a democratic vote and the principles it should respect to be certified by the international community.

The protection of these human rights with electoral relevance can be ensured only if the States comply with specific international obligations concerning legal proceedings: the right to an effective remedy, non-discrimination and equality before the law, fair and public hearing and access to information.[19]

Additional guarantees of the same rights are provided by the regional human rights treaties.

The first of these regional systems of protection was the Council of Europe which adopted, in 1950, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[20] whose content is binding on all the State parties. The ECHR also established the European Court of Human Rights (ECtHR) as the judicial institution entrusted with the power to interpret the content of the convention and sanction the States responsible for its violation.

The ECHR is mainly focused on the protection of civil and political rights; hence, it mentions fundamental civil freedoms like the right to a fair trial (art. 6), that of expression (art. 10) and assembly/association (art. 11) which we have already highlighted as particularly meaningful in terms of electoral justice enforcement. Additionally, art.3 of Protocol No. 1 to the ECHR explicitly focuses

[18] Ibid., art. 19, 21, 22
[19] Ibid., art. 2(3), 14, 19
[20] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms,* 4 November 1950

on the right to free elections, whose protection the High Contracting Parties commit to through the periodic organisation of free elections by secret ballot.[21]

The European regional system of protection of human rights also inspired the creation of similar legal and institutional frameworks in other parts of the world. In 1969, the Organization of American States (OAS) adopted the American Convention on Human Rights (ACHR); since then 25 American States[22] have ratified this instrument which was created with the aim to *« Consolidate in [their] hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man»*.[23] The ACHR, other than recognising the usual human rights which are essential in a democracy and can be claimed before an EDRS,[24] it also provides at art. 23 for a specific *right to participate in government,* whose content is extensively developed and clearly recalls that of art. 25 of the ICCPR.

Moreover, the OAS went far beyond any other regional organisation in recognising the importance of democracy and its enforcement. In fact, it does not limit itself to the listing of specific human rights which are essential in a democratic society but, more importantly, it has defined in its founding document *«representative democracy* [as] *an indispensable condition for the stability, peace and development of the region»*;[25] consequently, in a system where the overall geopolitical stability of the region is linked to the presence and enforcement of representative democracy, EDRBs play a critical role in the quality of institutions ensuring that elections comply with the applicable national and international legal frameworks.

This indirect link between democracy intended as the source of regional stability and electoral justice was confirmed when the General Assembly of the

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[21] Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9

[22] Trinidad and Tobago and Venezuela have denounced the American Convention on Human Rights respectively in 1998 and 2012. At the moment of writing, 23 of the 35 members of the OAS are party to the American Convention

[23] Organization of American States, *American Convention on Human Rights, "Pact of San Jose",* Costa Rica*,* 22 November 1969*,* Preamble

[24] Freedom of Expression (art. 13), Right of Assembly (art.15) and Freedom of Association (art. 23)

[25] Organization of American States, *Charter of the Organization of the American States,* 30 April 1948, Preamble

OAS adopted the Inter-American Democratic Charter.[26] This legal document, binding on all the OAS member States, reaffirms in its Preamble that the system of regional cooperation between the American States and their internal political organisation has to be based on *the effective exercise of representative democracy;* the Preamble also acknowledges that the mission of the Organisation could not be limited to the promotion of democracy but it should also entail *« An effort to prevent and anticipate the very causes of the problems that affect the democratic system of government»*.[27] These two objectives are very much linked with those of electoral justice systems: in fact, not only does an EDRB oversees over the management of the electoral process, but it also accomplishes a preventive task, trying to anticipate possible problems and shortcomings, especially in the pre-electoral cycle, when the designated authorities are called to prepare the election day.

Finally, moving to the African continent, the African Charter on Human and People's Rights adopted by the former Organisation for African Unity (OAU) and later on by the African Union (AU) establishes electoral rights in art. 13, guaranteeing the right of every citizen to participate in the government of their own country.[28]

The dismantlement of the OAU and the creation of the African Union came with new commitments taken on by the Member States in terms of promotion of democracy and good governance. For this purpose, the African Union adopted in 2007 the African Charter on Democracy, Elections and Governance (ACDEG), a binding treaty which entered into force in 2012.[29]

Precisely because of its binding character, the ACDEG has marked a major step forward in the process of formalisation of African States' commitments to democracy promotion, regular holding of elections and good governance. The content of the ACDEG sums up that of previous declarations and soft law

[26] Organization of the American States, *Inter-American Democratic Charter,* Lima, 11 September 2001
[27] Ibid., Preamble
[28] The participation in government can be either direct or indirect through the election of freely chosen representatives. However, the African Charter does not mention periodic, free and fair elections as the other regional instruments do. See Organization of African Unity, *African Charter on Human and People's Rights (Banjul Charter),* 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)
[29] African Union, *African Charter on Democracy, Elections and Governance,* 30 January 2007

instruments adopted both by the OAU and the AU to tackle critical problems in the African continent, for instance, unconstitutional changes of government, election-related violence and military coups.[30] The passage from soft law to a regional treaty with binding force is certainly indicative of African States' willingness to enhance the regional promotion of democracy and rule of law.[31] Moreover, the ACDEG has been recognised by the African Court on Human and People's Rights (ACtHPR) as a human rights instrument, as it binds State parties and directly confers rights;[32] hence, it can be directly invoked before the ACtHPR.

For the purposes of our research, the ACDEG represents a fundamental document, because it recognises the importance of EJS in the reinforcement of democracy and protection of electoral rights. As evident in art. 2, where the objectives of the charter are outlined, the ACDEG enhances the adherence to the principle of the rule of law, promotes the independence of the judiciary, fosters citizens' participation and eases the sharing of *« Best practices in the management of elections for purposes of political stability».*[33]

By creating independent EDRBs, African States can better comply with the obligations they have assumed by ratifying the ACDEG.

Furthermore, the ACDEG provides for specific electoral justice obligations: art. 17(2) demands the establishment of *national mechanisms* (EDRBs) that redress election-related disputes, while art. 17(4) calls for the adoption, in each ratifying country, of a binding Code of Conduct compelling all the parties involved in the electoral process to accept electoral results or to challenge them only through the legal channels provided by the law.[34]

In conclusion, the ACDEG represents the regional instrument of international law where the role of electoral justice in promoting democracy and human rights emerges the most. Its adoption was based on the recognition that unfair electoral processes and lack of democratic practice had exacerbated many conflicts in Africa and that the creation of impartial EDRBs is essential to

[30] Micha Wiebusch et al., "The African Charter on Democracy, Election and Governance: Past, Present and Future," *Journal of African Law,* 63, S1 (2019): 10
[31] Ibid., p. 23
[32] Ben Kioko, "The African Charter on Democracy, Elections and Governance as a Justiciable Instrument," *Journal of African Law,* 63, S1 (2019): 57
[33] *African Charter on Democracy, Elections and Governance,* art. 2
[34] Ibid., art. 17(2) and 17(4)

effectively reduce their occurrence.[35] The African case clearly demonstrates how the adoption of a charter like the ACDEG can facilitate the *judicialisation of politics,* or the establishment of judicial oversight of electoral processes,[36] supplementing the efforts of national EDRBs with those of regional and international human rights courts like the ACtHPR.

From the targeted analysis of the most important international and regional human rights treaties, it results that electoral justice is most of the time indirectly connected to these legal instruments. The indirect link is due to the fact that, in general, human rights enshrined in international conventions do not address EDR in a direct way, but rather they protect rights like fair hearing, effective remedy and other civil and political liberties which can have relevance in electoral petitions.

The American and African regional human rights systems seem to distance from this general trend, as they have recognised the importance of democracy for the stability of their States and consequently adopted specific instruments entailing ad hoc references to EDR.

Electoral Justice in the Context of Democratisation promoted by the International Organisations

Albeit not mentioning it in the UN Charter, democracy can be considered *as a core value of the United Nations:*[37] democratic governance is more likely to protect human rights, whose global realisation is one of the main objectives the organisation was founded for.

However, as long as the bipolar confrontation between the Capitalist and the Communist blocs dominated and often paralysed the action of the organisation, the UN could do little to concretely promote democracy at the international level. The scenario changed completely with the collapse of the Soviet Union, a crucial historical event which meant the achievement of political independence for the

[35] Kioko, "The African Charter on Democracy Elections and Governance": 40
[36] Wiebusch et al., "The African Charter on Democracy, Election and Governance": 30
[37] United Nations, "Democracy", *United Nations,* https://www.un.org/en/sections/issues-depth/democracy/index.html (accessed December 18, 2019)

former Moscow's satellites, realised through the holding of the first democratic elections after decades of one-party ruling.

The end of the Cold War inaugurated a decade of democratisation, characterised by an increasing number of countries opening to more representative political regimes. In this historical context, elections represented at best the new democratic euphoria, a highly symbolical moment in which the transition finally accomplished.

International organisations, both at the global and regional level, became champion and active promoters of democratisation, allocating more and more financial resources and technical expertise to assist transitioning countries in the adoption of democratic institutions. As things stand today, there is no major international organisation excluding democratisation from its official mandate.

The United Nations immediately took advantage of the new geopolitical situation that had emerged after the end of the Cold War, becoming the global reference for democracy promotion and electoral assistance both at the normative and practical level.[38] With regard to the first dimension, since 1988 *« The General Assembly has adopted at least one resolution annually dealing with some aspect of democracy».*[39] In the field of technical assistance instead, the UN has extensively promoted democratisation through electoral processes, by providing short-term electoral observation, logistics and training.[40]

This new role of the organisation was promptly acknowledged by the Secretary-General Boutros Boutros-Ghali, who himself summed up in the 1996 *Agenda for Democratization*[41] the specific characteristic of the 1990s as a historical momentum for democracy promotion, as well as the new UN's specific role in supporting transitioning countries in building stable and effective democratic institutions.

The former Secretary-General underlined how the UN's effort for democratisation was a comprehensive one, not intended as the imposition of a

[38] According to the United Nations website, *« The UN has done more to support democracy than any other global organization»,* Ibidem
[39] Ibidem
[40] Ibidem
[41] Boutros Boutros-Gali, *An Agenda for Democratization* (New York: United Nations Department of Public Information, 1996)

specific model of democracy, but as a process of assistance to the States requesting it, encompassing different fields from electoral observation to institution building.[42] By promoting this holistic approach, the UN was also indirectly supporting the development and expansion of electoral justice systems. This happened in two ways: by advancing a culture of democracy, or a political culture based on non-violence, mediation and consensus[43] and secondly through institution-building and technical assistance, supporting transitioning countries *before, during and after the holding of elections.*[44] The establishment of ad hoc authorities competent for the resolution of electoral disputes pursues the same objectives. In fact, EDRBs invaluably contribute to the diffusion of a culture of democracy by recalling to all parties involved that irrespective of their gravity, electoral disputes have to be solved in a peaceful way, according to the procedures foreseen by the law. Moreover, EJSs are active throughout the electoral process.

The promotion of electoral justice at the national level is also compatible with the Sustainable Development Goals (SDGs) contained in the 2030 Agenda for Sustainable Development, adopted by the United Nations in 2015. In fact, Goal 16 – Peace, Justice and Strong Institutions – asserts that *peaceful and inclusive societies* can be realised only if full access to justice is guaranteed and strong, accountable institutions are built.[45] The creation of accountable, effective and open EDR mechanisms can in principle facilitate the attainment of Goal 16 by realising its objectives applied to the electoral field.

Therefore, in the light of what has just been explained, it is possible to affirm that the realisation of electoral justice as an institutional objective is compatible with the UN democratisation efforts.

Democracy promotion and electoral assistance is part of the mandate of many regional organisations too, flanking and supplementing the UN's global endeavours. Also in the case of regional organisations, it is possible to trace analogous connections between democracy promotion and an increased interest for electoral justice.

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[42] Ibid., pp. 2-4
[43] Ibid., p. 8
[44] Ibid., p. 16
[45] United Nations, "Sustainable Development Goal 16", *Sustainable Development Goals Knowledge Platform,* https://sustainabledevelopment.un.org/sdg16 (accessed December 18, 2019)

For instance, the Organisation for Security and Co-operation in Europe (OSCE) has consolidated a methodology to observe elections and, in particular, the handling of electoral disputes by competent national authorities.[46] This methodology tests the EDRS of an OSCE Member State against some principles which are fundamental for the correct delivery of electoral justice: availability of an effective remedy, right to a fair trial and a due process, freedom of expression, assembly and association.[47]

Other European regional organisations that are aware of the importance of electoral justice are the Council of Europe and the European Union. The former acts through a specialised body, the European Commission on Democracy through Law (Venice Commission), which in 2002 published a *Code of Good Practice in Electoral Matters,* including a part on electoral justice titled *An effective system of appeal.*[48] The Venice Commission specifies that a system of appeal should always be present and entrusted to either an electoral commission or a court; the EDRB's powers should be clearly regulated by law, and the procedure before it simple and effective. If the EDRB finds that the law has been broken and electoral rights not respected, it should also have the power to annul the results of the election.[49]

In the mentioned Code of Good Practice, the Venice Commission underlines how an EDRS is necessary to fill the gap between formal electoral law and its effective application in social reality; moreover, it is acknowledged that the EDRS' jurisdiction should cover not only the election day but also the decisions taken in the pre-electoral period concerning, *inter alia,* voters' registration, the right to vote, the validity of candidatures and the regulation of the electoral campaign.[50] The Venice Commission is so much concerned with electoral justice that it even focuses on aspects like the nature of the body entrusted with electoral justice competences – suggesting a preference for either an electoral commission or a judicial court – and the principles that should inspire the whole appeal

[46] Office for Democratic Institutions and Human Rights (ODIHR), *Handbook for the Observation of Election Dispute Resolution* (Warsaw: ODIHR, 2019), p. 5
[47] Ibid., p. 5 and pp. 12-23
[48] European Commission on Democracy through Law (Venice Commission), *Code of Good Practice in Electoral Matters,* opinion no. 190/2002 (Venice: Council of Europe, 2002)
[49] Ibid., p. 11
[50] Ibid., p. 27

procedure, like brevity, conciseness, extended standing for citizens wishing to contest electoral results and clearly delimited competences for the EDRB.[51]

The European Union mainly deals with electoral justice through the action of its election observation missions (EOMs). In fact, not only the EU deploys observers and experts to monitor the election day, but also to provide an overall and detailed assessment of the whole electoral process, including aspects like the legal framework and the available appeal procedure in case of electoral challenges.[52] The scope of such a comprehensive effort is to provide recommendations for possible reforms which can contribute to the reinforcement of democracy. In general, EU EOM's recommendations are not limited to electoral reforms, but they also include suggestions for the reinforcement of the electoral watchdogs, including an independent judiciary.[53]

The OAS is perhaps the regional organisation where the link between the organisation's mandate to promote democracy and electoral justice is most evident. Similarly to the EU, the OAS has mandated its EOMs to focus on every aspect of the electoral process, including electoral challenges. Thanks to the action of its EOMs, the OAS has succeeded in guiding many American countries through the path of successful democratic transition. As a consequence, many young American democracies are now characterised by more competitive political systems, where contestation of electoral results has become more and more common. This is why the OAS deeply feels the necessity to put in place efficient EDRS in its member states.[54]

Finally, the African Union adopted in 2007 the already mentioned ACDEG with the objective of strengthening democratic institutions, popular participation, rule of law and good governance in the member states. The Charter's provision underlining the necessity to create *national mechanisms that redress election-*

[51] Ibid., pp. 28-29
[52] European Union External Action, "EU and Election Observation", *European Union External Action,* https://eeas.europa.eu/headquarters/headQuarters-homepage/49661/eu-and-election- (Accessed 11 November 2019)
[53] Ibidem
[54] Organization of the American States, *Observing Electoral Justice Systems: a Manual for OAS Electoral Observation Missions* (Washington: Department of Electoral Cooperation and Observation of the Secretariat for Strengthening Democracy of the Organization of American States, 2019), Foreword

related disputes in a timely manner[55] is proof that the African Union too is well-aware of the importance of electoral justice in the reinforcement of democracy. Moreover, other indirect references to electoral justice can be found in the idea of democratic culture[56] or in the emphasis placed on constitutional, democratic and pacific transition of power,[57] all intrinsic objectives of a pacific resolution of electoral disputes.

This review of international human rights instruments and international organisations' mandates was necessary to demonstrate that electoral justice and the design of efficient EDRBs are crucial for the protection of human rights, especially civil and political rights. The centrality of electoral justice for the human rights discourse is demonstrated by the fact that there exist many connections, some more evident than others, between the content of international human rights instruments and the objectives and founding principles of electoral justice. The same is true for the international organisations' endeavours for democratisation, of whom electoral justice is nowadays seen as a fundamental aspect.

1.4 Different Models of Electoral Dispute Resolution Bodies

Having highlighted the importance of electoral justice systems for human rights protection, it is time to focus on the institutions that concretely intervene, at the national level, to adjudicate electoral disputes.

Electoral justice is administered by EDRBs that, depending on the historical and political context of each country, can be of different nature.[58]

According to the IDEA, the best way to classify the alternative EDR models is by looking at the nature of the body entrusted with the final decision on electoral challenges.[59] This methodological choice seems the most reasonable when it comes to studying in depth the EDRS of a country for two basic reasons: the first is that by focusing on last instance decisions it is possible to direct the

[55] *African Charter on Democracy, Elections and Governance,* art. 17(2)
[56] Ibid., Chapter 5, art. 11-12
[57] Ibidem
[58] Orozco-Henríquez, *Electoral Justice,* p. 57
[59] Ibid., p. 60

research only on those landmark sentences which really have an impact on the overall functioning of the democratic system. The second is that by looking at the nature of the EDRB, it is more likely to identify the differences among models, proceeding then to a general classification of existent EDRBs.

This classification differentiates EDRBs entrusted to legislative bodies, judicial bodies (either ordinary, constitutional, administrative or specialised electoral courts), electoral management bodies with judicial powers, and ad hoc bodies created through the intervention of the international organisations.[60] Historically, legislative EDRBs were the oldest form of EDRS.[61] However, starting from the early 20th century, a new trend known as judicialisation of electoral justice progressively affirmed: electoral challenges started to be adjudicated by judicial institutions which could be regular courts but also constitutional courts and specialised electoral tribunals. Nowadays, the trend towards judicialisation has become so pervasive that most of the representative democracies have adopted an EDRS entrusted to a judicial institution.[62]

Having briefly outlined the different typologies of electoral dispute resolution bodies, it is now time to go into the details of each model, analysing their comparative advantages and disadvantages.

EDRS Entrusted to the Legislative Branch

In the first modern representative democracies of late 18th and early 19th century, political parties were the absolute protagonists of the resolution of electoral disputes. Their involvement in EDR mechanisms as arbitrators was justified by the strict application of the principle of the separation of powers, which had very much inspired the birth of these democracies.[63]

Being electoral disputes considered an internal affair of parliaments, only the political parties there represented could perform EDR functions acting as the arbitrators of any controversy emerging from the electoral process.

[60] Ibidem
[61] Ibid., p. 62
[62] Ibidem
[63] Ibid., p. 64

The preservation of the principle of popular sovereignty was another concern that justified the adoption of a Legislative EDRS.[64] If the judiciary, whose members are generally selected according to criteria of competence and merit, had adjudicated electoral disputes, then the outcome of a popular election would have been irremediably influenced by a decision of an organ with no connection to a popular mandate.

From a judicial perspective, an EDRB entrusted to the legislative branch could also be welcomed as a form to preserve the independence of courts, avoiding their involvement in difficult and highly politicised cases.[65]

Nevertheless, a legislative EDRS implies many disadvantages; for instance, this system clearly contradicts the fundamental legal principle *nemo iudex in causa sua* according to whom nobody can judge a case in which they have an interest or are directly involved. Allowing the national Parliament to hear and solve electoral disputes would entail the breach of said principle, as the political majority represented in Parliament may have the temptation to use its position of force to alter the electoral results and favour its candidates.

Moreover, the involvement of the legislative branch in electoral justice administration risks reproducing the same adversarial logic of political elections in the immediate post-electoral phase: opposing parties quarrelling and trying to advance a solution responding more to their immediate interest rather than to the superior good of the democratic system. The perpetuation of this situation would inevitably undermine the democratic stability of a country, as political adversarial dynamics could not be channelled into pre-established legal procedures conceived to orderly resolve electoral disputes.

Finally, there is also a problem of competences. In fact, electoral disputes require detailed scrutiny of the contested facts and they involve issues of electoral and human rights protection which cannot be reasonably dealt with by political parties, lacking the necessary technical and legal knowledge to address such delicate issues.

In conclusion, EDR systems entrusted to internal Parliament/Congress' ad hoc commissions do not appear as a viable system to solve electoral disputes in

[64] Ibidem
[65] Ibidem

21st-century democracies; their involvement in EDR could be justified in the past, when political parties performed a very important role in the organisation of the electoral machine and overall supervision of electoral management. Now that this function is less relevant it seems unreasonable to entrust them with EDR competences. Additionally, historical experience has widely demonstrated that, even in the most consolidated democracies, this EDRB model is highly exposed to distortions and manipulations, as the majority will try to monopolise the dispute resolution system so as to advance its political interests, being in the position to do so.[66]

EDRS Entrusted to a Judicial Body

Nowadays, the majority of EDRS is entrusted to a judicial institution. Given the wide array of courts provided by national judicial systems, each with different mandates and powers, this EDR model is the one providing for the widest number of sub-categories.

When judicial EDRS started to be developed, the competence to hear and settle cases concerning elections was usually given to regular courts, in addition to their normal competences; electoral adjudication was therefore conferred to courts belonging to the judiciary, regular or even Supreme Courts, as in the case of Kenya and the United States.[67]

The main advantage of a judicial EDRS is that courts, in principle, are impartial institutions; therefore, they can adjudicate electoral disputes with a sufficient degree of objectivity and detachment from political confrontation. Moreover, even if electoral litigations are very specific and political in nature, they should not be considered differently from other cases; hence, courts are the natural forum where the parties involved can be heard and the facts adjudicated in the merit. Finally, and consistently with their mandate to guarantee the correct

[66] Owing to the abuses made by political majorities when certifying the electoral results, long-established democracies like the United Kingdom or France have progressively shifted towards an EDR system entrusted to judicial institutions, inaugurating that trend known as *judicialisation of electoral justice*. See Orozco-Henríquez, *Electoral Justice,* cit., p. 64

[67] In the countries adopting the Supreme Court model, these are considered the highest in rank courts, but still they are part of the judiciary

interpretation of the law, courts have the competence to settle electoral disputes according to the relevant legal framework, guaranteeing legal certainty, protection of electoral rights and, ultimately, the rule of law.[68]

Critics of judicial EDRS usually highlight the fact that courts are counter-majoritarian institutions: having no popular mandate they should not be authorised to adjudicate and even invalidate the results of an election. In addition, a major risk of judicial EDRS is that of undermining courts' impartiality, by involving them in very serious institutional and political crisis. Not only would this damage courts' reputation, but also it would overburden them with additional caseload, to the detriment of the judiciary's ability to deliver justice in an efficient and timely manner. Finally, and particularly for countries undergoing a democratic transition, the reliability of a judicial EDRS strictly depends on the people's perception of the independence, reliability and prestige of the judiciary branch of the country;[69] when these characteristics are missing, then the whole EDRS and its decisions are likely to be contested and disregarded.

Let us now introduce the different sub-categories of the judicial EDR model.

EDRSs where the Constitutional Court is the EDRB of reference represent a first variant of the judiciary model. This sub-category was very much influenced by the work of the Austrian jurist Hans Kelsen, whose work led to the foundation of the first specialised Constitutional Courts in Austria and Czechoslovakia in the aftermath of the First World War. Not only were these courts created as specialised bodies independent from the rest of the judiciary and entrusted with the competence to review ordinary legislation against the Constitution, but also they were designed as the bodies to whom electoral complaints had to be directed.[70]

The advantages of the Constitutional court model derive from the prestige and competence which is usually attributed to these institutions as courts guarantor of the constitutional system. However, as we have already seen for the case of regular courts, a judicial EDRS is not necessarily the most viable solution

[68] Ibid., p. 133
[69] Ibidem
[70] Ibid., p. 70

for transitioning countries;[71] in such a context, even a Constitutional Court may lack the necessary prestige and independence from the executive to act as an impartial arbiter of electoral controversies. Once again, the perceived independence and moral standing of the Constitutional Court determines its reliability as an EDRB.

In some judicial systems, electoral disputes can be compared to administrative challenges, opposing the citizen or a legal person to the public administration. In effect, electoral controversies can fit within this category, as most of them oppose a petitioner (citizens, candidates, representatives of political parties etc.) and the electoral management body (EMB), the State institution managing elections. Therefore, administrative electoral disputes have to be adjudicated by the competent administrative court, which can be part of the judiciary or independent from it.

Administrative courts, just as other judicial EDRBs, offer all the necessary guarantees in terms of competence and ability to treat electoral challenges according to the electoral law in force. Another advantage of this model, which is also true for the other judicial EDRBs we have already reviewed, is cost-related: conferring to already existent institutions the mandate to hear and settle electoral cases does not imply additional costs for the State coffers, as no extra public funds have to be allocated to create *ex novo* the EDRS.[72]

Nevertheless, some concern regarding administrative courts EDRBs may rise on the viability of the EDRS. In fact, administrative courts are usually those carrying the heaviest caseload and adding electoral disputes to their mandate would put them under serious pressure, impeding them to resolve electoral crisis efficiently and timely.[73]

The last type of judicial EDRS is that of specialised electoral tribunals, which are ad hoc courts with a specific mandate to adjudicate electoral cases. This model offers the highest level of specialisation, as the judges sitting in the electoral court are specifically trained to assess and adjudicate election-related disputes.

[71] Ibid., p. 133
[72] Ibid., p. 134
[73] Ibidem

Specialised electoral tribunals represent the Latin American contribution to electoral justice theory, as the first ad hoc electoral courts were created in Uruguay and Chile, respectively in 1924 and 1925.[74] Other countries in Latin America have progressively embraced the electoral tribunal model as a reaction against the abuses and shortcomings of legislative EDRS.[75] Hence, the experience of Latin America clearly demonstrates the advantages for democracy of a judicialisation of EDR systems.

Within the family of specialised electoral tribunals, there are both electoral courts which are part of the judiciary and others that are external to it. Other electoral tribunals can even be dependent from the executive.[76]

As we have already noted, the main strength of this model is in terms of competence, as electoral challenges would be addressed by a judicial body being competent exclusively on electoral law and offences to it.

On the other hand, the main concern linked to electoral tribunals is linked to the independence of its members; if the electoral court is dependent on the executive for appointment, then the EDRS may be subject to the same abuses committed by the political majority under the legislative model. In fact, the executive may be tempted to nominate those judges who are likely to support the ruling political party when it comes to successfully resist against electoral challenges filed by the opposition.[77] There is also some concern regarding the costs of a specialised electoral tribunal, as the State would have to allocate additional funds to create this institution and to properly train judges and personnel. Hence, the creation of an electoral tribunal EDRB may simply not be a viable solution for post-conflict countries, with limited governance capacity and public funds to invest in the EJS.

[74] ACE The Electoral Knowledge Network, *The ACE Encyclopedia,* 3rd edition 2012, "Specialized Electoral Tribunal Model", http://aceproject.org/ace-en/topics/lf/default (accessed 26 november 2019)
[75] Ibidem.
[76] Ibidem
[77] Orozco-Henríquez, *Electoral Justice,* cit., p. 134

EDRS Entrusted to the Electoral Management Body

EMBs are those institutions in charge of the organisation of elections and referendums, overseeing crucial activities like voters' and political parties registration, delimitation of electoral districts, nomination of polling stations' officers, conduction of the electoral day, counting of ballots and final proclamation of results.[78] Depending on the national electoral legislation, the EMB may also have additional electoral justice functions.

One positive aspect of an EDRS entrusted to an EMB is that it succeeds in isolating every aspect of the electoral process, from the organisation of the elections to the resolution of controversies, from other branches of power. However, it can be argued that EMBs working as EDRBs tend to concentrate too much power in their hands. The risk is that of replicating the same problems we have already discussed when reviewing legislative EDRBs, as the EMB would act both as a *judge and a challenged party.*[79]

EDRS Sponsored by International Organisations

In post-conflict contexts and in countries undergoing a democratic transition, international organisations have often promoted electoral justice by directly sponsoring and supporting ad hoc EDRBs.

The specific characteristic of these EDRSs is that they are based on EDRBs with temporary mandates, limited to one specific election. The rationale behind this EDRS consists of endowing a country with an EDRB which is supported and whose members are often selected by the sponsoring international organisation, whose task is that of addressing very specific issues emerging in a particular round of voting; once this mission is accomplished and the elections are over, then the temporary EDRB can be dissolved.[80]

[78] ACE The Electoral Knowledge Network, "What is an electoral management body", *The ACE Encyclopedia,* , http://aceproject.org/ace-en/topics/em/ema/ema01 (accessed 16 December 2019)
[79] Ibid., p. 77
[80] The ad hoc EDRB system was adopted in Cambodia, Bosnia and Herzegovina and Timor-Leste with the support of international organisations to help these countries achieve a successful post-conflict transition culminating in the holding of free and fair elections Ibid., p. 78

The most evident advantage of this EDRS resides in the financial, institutional and technical support provided by the sponsoring international organisation to the temporary EDRB. Electoral justice requires a solid institutional background to work properly, so the backing of a third-party organisation can be crucial for the successful resolution of electoral disputes.

On the other hand, a negative aspect of this system is the risk of perpetuating the transitional regime, especially if the country is not able to establish, after the elections, solid and independent EMB and EDRB.[81] Another difficulty linked to this EDRS is the possible contestation of the sponsoring international community in the name of the full "nationalisation" of the electoral process.[82] In such a case, the efficient administration of electoral justice would be undermined, as the sentences on the merit of electoral challenges would be contested as emanating from an EDRB considered to be dependent from the decisions of the international organisation supporting it.

1.5 EDRB's Guiding Principles

Having examined the full array of different EDRBs it is now possible to proceed with the study of their guiding principles, or the values that should ideally inspire the administration of electoral justice. As things stand today, no effort has been made to formalise these principles into a dedicated international treaty.

Nevertheless, it is possible to infer them from the existent international standards concerning elections and, on a country by country base, from national constitutions, statutes and ordinary laws concerning EMBs and EDRBs.

The lack of internationally agreed standards on the guiding principles for EDRBs also complicates the researcher's task when it comes to analyse and evaluate the EDRS of a country, as there is no point of reference to compare the country's electoral justice system. To overcome this obstacle, a good strategy is to first look at the existence of international standards concerning the principles of justice.

[81] Ibid., p. 134
[82] Ibidem

Since 2000 the Judicial Integrity Group, *an independent, not-for-profit, autonomous and voluntary organisation*[83] has resembled chief justices and superior courts judges from different countries in informal gatherings, with the aim to debate, exchange good practices and eventually come to a universally acceptable standardisation of the principles which should inspire the judiciary branch and the ethical conduct of the judges all over the world. This project finally resulted in the adoption of the *Bangalore Principles of Judicial Conduct* which were later on supported by the United Nations Economic and Social Council Resolution no. 2006/23 recommending to all member States to take into consideration the Bangalore Principles when adopting new rules or reforming their nationals codes of conduct for the members of the judiciary.[84]

The seven principles are: independence, impartiality, integrity, propriety, equality, competence and diligence.[85]

It is our contention that, being electoral justice a specific type of justice concerned with the resolution of litigations related to electoral processes, then the Bangalore Principles are also relevant for its correct administration, independently from the nature (judicial or not) of the EDRB.

Even though not all EDRBs are independent from other branches of power, we have seen that independence is an essential element to avoid abuses in the delivery of electoral justice by the EDRB. Moreover, given the political interests at stake in electoral disputes, it is essential that the EDRB maintains the necessary impartiality throughout the procedure. Additionally, effective electoral justice should be easily accessible, on conditions of equality, to all citizens who believe that their electoral rights were violated, without any discrimination. Competence is also relevant; in fact, the organ in charge of adjudicating electoral litigations should demonstrate extensive knowledge on every aspect of the electoral process, as it is not possible to entrust electoral justice competences to bodies with no

[83] Judicial Integrity Group, http://judicialintegritygroup.org/an-innovative-experiment (accessed 27 November 2019)
[84] Judicial Integrity Group, http://judicialintegritygroup.org/jig-principles (accessed 27 November 2019)
[85] UN Economic and Social Council (ECOSOC), UN Economic and Social Council Resolution 2006/23: *Strengthening Basic Principles of Judicial Conduct, 27 July 2006, E/RES/2006/23*, available at: https://judicialintegritygroup.org/images/resources/documents/ECOSOC_2006_23_Engl.pdf (accessed 1 December 2019)

familiarity with electoral issues. Finally, as previously underlined, the EDRB's reputation before the public opinion is fundamental to generate trust in the EDRS. For said reason, members of the EDRB have to carry out their functions with due diligence and irreproachably, in order to avoid eroding public trust and confidence in the institution they represent.

As it has emerged from this analysis, it is possible to establish connections between electoral justice principles and the Bangalore Principles. This is certainly true for judicial EDRBs. Yet, also non-judicial EDRBs cannot ignore the seven principles, because de facto they perform judicial functions when addressing the merit of cases concerning alleged violations of the electoral code.

In conclusion, the importance of the Bangalore Principles for electoral justice is so critical, that a system failing to comply with them could hardly be called an electoral justice system.

However, the reference alone to the Bangalore Principles' is not enough, as it denies electoral justice autonomy from other forms of justice. This is why the adoption of an international treaty specifically focused on electoral justice and its founding principles would enormously contribute to raising people's and States' awareness on the importance of creating efficient and reliable EDRBs.

A first important step in this direction was made with the drafting of the Accra Principles. It was 2011 when the Electoral Integrity Group[86] met in the capital of Ghana and drafted some important principles which go beyond those established in Bangalore, focusing more on electoral processes. The Accra Guiding Principles perfectly combine the classical moral principles of justice already drafted in Bangalore like integrity, independence and transparency with more specific principles that will be hereby named "electoral justice principles"; these are: participation, lawfulness, impartiality, timeliness and non-violence.

The Accra Declaration provides practical examples of application for each principle, so that it is easier to understand their relevance for an effective resolution of electoral disputes. For instance, the principle of participation requires that each stage of the electoral process should be as open as possible in terms of effective involvement of all social groups. In terms of lawfulness,

[86] The Electoral Integrity Group is an independent research team based at the University of Sydney and Harvard University, https://www.electoralintegrityproject.com/

electoral justice should be exercised on a case by case basis, trying to avoid fruitless focuses on technical aspects that, if strictly applied, risk undermining the enforcement of electoral rights through justice. Finally, timeliness and non-violence are among the Accra principles that best represent the essence of an electoral justice system which is fully committed to the promotion of democracy through the enforcement of political rights. Timeliness responds to the need to avoid unnecessary and dangerous protraction of electoral crisis, while non-violence is related to the electoral justice system's function of preserving the whole democratic system from uncontrolled social conflict which undermines institutional stability.[87]

In order to eventually come to the adoption of internationally accepted principles of electoral justice, it is necessary that initiatives such as the Accra Declaration are supported by international organisations, just as the UN Economic and Social Council has promoted within the member States adherence to the Bangalore Principles. Should this happen, electoral justice would not be underrated anymore as a factor reinforcing democracy and good electoral practices.

The IDEA has highlighted other specific principles of electoral justice. According to the institute based in Stockholm, formulating principles is not enough; it is also necessary to provide for structural guarantees, or *legal instruments* entrenching those values in the constitution and electoral law.[88]

The International IDEA Handbook on Electoral Justice clearly mentions independence as a core principle for an EDRS. Independence refers to the degree of autonomy of the EDRB as an institution, its members as well as its financial autonomy.[89] EDRB's financial autonomy is then linked to its sustainability, as the organ in charge of adjudicating electoral disputes should dispose of adequate human and financial resources (functional sustainability) and provide cost-effective procedures (financial sustainability).

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[87] Electoral Integrity Group, *Towards an International Statement of the Principles of Electoral Justice (The Accra Guiding Principles)* adopted on 15 September 2011, available at https://integrityaction.org/sites/default/files/publication/files/Accra%20Guiding%20Principles.pdf
[88] Orozco-Henríquez, *Electoral Justice,* p. 88
[89] Ibid., pp. 91-93

EDRBs should also be transparent and accountable. Transparency is indicative of easily accessible and clear procedures,[90] while accountability guarantees that the EDRB does not perform its functions totally free from any scrutiny and control.[91]

Finally, the principle of timeliness, requires that electoral rulings have to be delivered by the EDRB within rigid deadlines,[92] so as to avoid protracted electoral crisis which in turn generate institutional and political paralysis. Therefore, EDRBs have an obligation in terms of outcome: they are called to issue balanced and detailed decisions on electoral issues, as quickly as possible.

In conclusion, electoral justice principles stem from different sources, either national constitutions and statutes or international guidelines and declarations. Although many of these principles were not drafted having electoral justice in mind, it is possible to extend them to this field. Moreover, there's a high degree of consistency between the different sources, all quoting, with little exceptions, the same fundamental values. This means that a broad consensus on the importance of electoral justice is growing and that it could finally inspire the adoption of an international treaty concerning the standards of EDR.

1.6 Available Remedies before an EDRB

In the final part of this general introduction to electoral justice, we will look at the content of electoral disputes, focusing on the different types of available challenges, the right to bring an electoral action before the competent body (locus standi), the actions that can be concretely contested and, finally, the nature of the decisions that an EDRB can adopt.

This last theoretical endeavour will prove itself as necessary in the following chapters, when we will analyse in detail the EDRS of Kenya trying to evaluate its impact on the advancement of democracy in that country.

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[90] Examples of transparent electoral justice practices are the broadcasting of EDRB's sessions and online publishing of electoral rulings, which allow widespread publicity of mechanisms of electoral justice. Ibid., p. 110

[91] Ibid., p. 114

[92] Ibid., p. 125

Different Types of Available Challenges

The already mentioned criteria to distinguish different EDRB models – the nature of the body competent to adopt last resort decisions on electoral challenges – is useful also to understand which are the different types of challenges that can be brought before an EDRB. [93]

The major distinction is between administrative and judicial challenges. When the electoral justice system is based on an EMB which is not only competent to organise elections but also to hear and solve related disputes, then administrative challenges are available to petitioners. Administrative challenges can be also filed when the competent EDRB is an administrative court. On the other hand, judicial challenges are those which can be filed before a court, irrespective of its nature as an ad hoc or part of the judiciary body.[94]

Just as it can be done for other types of judicial proceedings, electoral disputes filed before a judicial EDRB can be considered in their merit during trials and appeal proceedings:[95] the trial is the classical form of judicial adjudication, opposing two conflicting parties (the petitioner and the respondent); in electoral disputes, classical petitioners are ordinary citizens, candidates and political parties' representatives, while the respondent is usually the EMB, called to justify its decisions adopted before, during and after elections. On the other hand, appeals consist of the re-evaluation by a higher court of a decision issued by a lower court.

Administrative and judicial challenges are the most diffused forms of electoral challenges; however, just as there exist legislative and international EDRBs, two additional channels for filing an electoral petition are available. However, these two last categories are not always mentioned: for instance, the ACE Encyclopaedia only refers to administrative and judicial challenges.

[93] Both the International Institute for Democracy and Electoral Assistance and the ACE Encyclopaedia use this criterion to distinguish the different typologies of electoral challenges
[94] Orozco-Henríquez, *Electoral Justice,* p. 137-138
[95] Ibid., pp. 139-140

Despite the differences among the electoral legislations of each country, it is possible to reconstruct a typology of the actors who are generally entitled to file an electoral complaint. Broadly speaking, all people and institutions involved in the different stages of the electoral process have an interest in the way this process is managed, being in principle authorised to file electoral challenges.

Citizens' electoral complaints usually target EMB's decisions adopted in the pre-electoral and electoral phase, because these can have an impact on their free exercise of the right to vote. Unsurprisingly, issues that are often at the core of citizens' electoral complaints concern the publishing and update of the electoral register, voters' identification on the election day and the right to freely access the polling station.

Additionally, in some cases the national electoral law allows for citizens' challenges of electoral results; where this option is available, it is indicative of the widest access to the electoral justice system – which is good in terms of protection of electoral rights – but at the same time it risks triggering a proliferation of electoral complaints endangering the whole system.[96] Citizens' electoral complaints are usually individual, but some countries of the Latin American region also allow for collective action against EMB's decisions: as in the case of individual complaints against electoral results, their proliferation may undermine the credibility of the EJS.[97]

Political parties and their representatives may also be involved in the electoral justice system as petitioners, by filing complaints against decisions adopted by the EMB in any phase of the electoral cycle, or respondents. Again, the requisite of the direct involvement is essential; following this principle political parties can challenge decisions concerning their registration for participation in the elections, the organisation of the election by the EMB, specific

[96] Ibid., p. 162
[97] ACE The Electoral Knowledge Network, *The ACE Encyclopedia,* "Who can file electoral appeals", http://aceproject.org/ace-en/topics/lf/lfb12/lfb12b/lfb12b00c, (accessed 11 December 2019)

episodes occurred during the election day and reported by their agents and, of course, electoral results.

Finally, candidates usually contest EMB's decisions concerning their eligibility and, naturally, the final outcome of an election.

Aspects of the Electoral Process that can be Challenged by the EDRB

The most advertised electoral challenges are those concerning the electoral phase and, in particular, the proclamation of the results. These disputes clearly attract the attention of the media and the public opinion, as their adjudication can directly affect the electoral results. Nonetheless, electoral justice is not necessarily limited to this aspect.

Although a significant part of filed electoral challenges concerns alleged EMB's misconduct in the management of the electoral process, it should be recalled that irregularities may come from different sources too, like ordinary citizens and political parties; it is common knowledge that voters may adopt behaviours that disturb the regular operations of the polling station: on these grounds, the polling station's presiding officer can disqualify the heckler from his or her right to vote. However, this decision can be challenged and adjudicated in the merit by the EDRB. Again, political parties' agents at the polling station may try to interfere with counting procedures or to unduly influence or even intimidate voters.

Other than considering the possible sources of irregularities in the electoral process, it is also useful to look at the moment when electoral challenges are brought before the competent EDRB.[98] Not only does this method allow to identify the aspects that can make the object of an electoral complaint, but also it is useful to remind that electoral irregularities may emerge at every phase of the electoral process.

The pre-electoral phase is a sort of preparation period in view of the election day; consequently, critical decisions have to be adopted by the EMB, potentially affecting the electoral rights of all the actors involved in the elections.

[98] Orozco-Henríquez, *Electoral Justice,* p. 148

Issues of concern for ordinary citizens are the update of the electoral register and the delimitation of electoral districts.[99] The former is far from being a mere technical issue, as the presence in the electoral register is the only tangible evidence proving that a person is entitled to the right to vote. To avoid challenges concerning this issue, it is good practice to regularly check the names in the register and compare them with data concerning deaths and changes of address coming from the competent local authorities. Moreover, it is important to allow for "last minute" updates, so as to be sure that the electoral register adequately reflects the demographic situation of the constituency when the elections take place.

The delimitation of electoral districts' borders, is also a crucial issue all EMBs should be aware of. In fact, the manipulation of this operation can potentially void of meaning the votes cast by citizens through fraudulent practices like gerrymandering and unbalanced representation between different districts.[100] The improper delimitation of electoral districts is less likely to raise electoral challenges, as it is a more technical aspect of elections not all citizens are aware of. However, especially if collective challenges are allowed, groups of active and informed citizens can decide to file an electoral complaint against the EMB if they feel that their electoral rights have been voided of meaning through fraudulent electoral geography.

Finally, there are decisions which are adopted in the pre-electoral phase by the EMB that are of interest for political parties. In fact, the national EMB is called to oversee the registration of political parties and candidates participating in the elections. On one hand, the exclusion of a political party from registration may be well justified if it either fails to comply with the applicable legal framework or is declared illegal by the competent judicial authority; on the other, the exclusion of the same political party from electoral competition automatically restricts political representation, as candidates who can be potentially voted and elected are excluded from the contest.

[99] Ibid., p. 148-150
[100] Ibid., p. 150-151

The electoral challenges that receive the most of attention are those concerning episodes occurred during the elections; this is due to the fact that the electoral phase is the moment when the public opinion is mostly mobilised.

Aspects that can be challenged during this phase concern the polling stations' officers conduct, their ability to well-manage voting procedures, especially the counting of ballots. As electoral results are proclaimed at the end of the electoral phase, many electoral challenges may concern this aspect. Depending on the model adopted by the country, the results of an election can be contested either before or after the official proclamation of the election results themselves.[101]

Finally, the post-electoral period generally involves challenges concerning political parties' expenditure for the electoral campaign and the final update of the electoral register.[102]

Which Decisions can be Adopted by the EDRB?

Once the procedures before the EDRB have been completed and irregularities have been ascertained, different options are available to restore electoral rights. These are the modification of the electoral results, if the irregularities concern only a part of the total received votes or specific polling stations, or the annulment of the election followed by a re-run. Finally, an elected candidate can be revoked his or her election if not meeting the eligibility requirements.[103]

Therefore, the outcome of an electoral challenge depends on the gravity of the irregularities which have occurred. Certainly, the most serious decision that an EDRB can adopt is that of annulling an election; this may be the only possible solution when irregularities and electoral misconduct are so widespread that they irremediably compromise the electoral results. Annulling an election is no easy decision; it may be difficult to justify to the eyes of the public opinion because it may be perceived as an undue intrusion into the basic democratic principle of popular sovereignty. Moreover, the annulment and subsequent call for fresh

[101] Ibid., p. 159
[102] Ibid., p. 160
[103] Ibid., p. 170

elections is a decision which has implications in terms of mobilisation of public resources, as new funds have to be allocated to organise the re-run. State capacity to manage electoral processes would also be put under strenuous pressure, as the EMB would be called to quickly react to the problems occurred during the previous election, restoring public trust in its mandate.

The decision to annul an entire election is usually dependent on the subsistence of specific conditions: the high number of ballots annulled at the level of the polling station, the ineligibility of a candidate or a slate of candidates or the lack of the necessary guarantees in terms of security and avoidance of corrupt electoral practices.[104] Therefore, the annulment of an entire election is not an EDRB's unrestrained decision: it is the result of independent analysis and evaluation of available evidence limited by the subsistence of specific and serious circumstances which do not guarantee the free, fair and genuine character of the election concerned.

Although the annulment of an election may seem the typical counter-majoritarian decision, it cannot be ignored that it is taken with the purpose to protect citizens' electoral rights and to ensure that the will of the people is effectively reflected in genuine elections whose results are reliable because deriving from good electoral management and certified by a competent EMB. Clearly, the EDRB deciding to annul an election should be fully aware of the consequences of this stance and be ready to provide convincing arguments, sufficiently explaining the reasons behind the order of annulment. Only in this way it is possible to avoid the perception that electoral justice is interfering with democracy.

Other elections may instead be characterised by limited irregularities which can be clearly led back to their sources, like a specific polling station or electoral district. When this is the case, the EDRB can order a modification of the electoral results, in the form of a total or partial recount, or the annulment of the contested votes. The annulment procedure can interest the single ballot paper – when the vote has not been expressed accordingly to the law or in an unequivocal way – or all the votes received from a specific polling station where irregularities have been

[104] Ibid., p. 178

denounced.[105] The rationale behind the two annulment procedures is different; single ballot papers are annulled to guarantee principles like the secrecy of the vote and its unequivocal character: the voter not complying with these basic principles is punished through the annulment of his or her vote. When all the votes coming from a specific polling station or a constituency are annulled, the EMB's aim is instead to avoid that ballot papers coming from locations where irregularities have occurred bias the overall results of the election.

1.7 Final Considerations

The objective of this first chapter was to provide an introduction to the concept of electoral justice, highlighting its importance for the stabilisation and reinforcement of democracy in the world and the protection of people's electoral rights intended as a specific category of human rights.

By looking at the most important international conventions for the protection of human rights, it was ascertained that there exists many (though indirect) connections between electoral justice and the international human rights regime; in effect, despite being established with national constitutions, statutes and electoral laws, mechanisms for the protection of electoral rights and the resolution of post-election controversies represent an invaluable tool not only to give meaningfulness to the expression of popular will at the internal level, but also for the States to comply with the international obligations they have accepted at the global and regional level.

In conclusion, it has been noticed that electoral justice, despite being based on few clear principles which represent the essence of the administration of justice and the core of international human rights instruments, still lacks any formalisation at the international level. Such a step will be critical for the promotion of sustainable democracy and will represent the formal seal on the endeavours made by many countries which have invested financial and technical resources in the creation or reforming of electoral justice systems.

[105] Ibid., p. 174

All these reasonings have sufficiently demonstrated that any human rights defender, from the ordinary citizen to the activist and civil servant, should be concerned with electoral justice as a way of enforcing democracy, developing people's trust in it and creating an institutional environment which is more sensitive to the protection of people's fundamental rights. Effective electoral justice is crucial in terms of human rights protection as it operates to give meaning and translate in practice political rights; each time that electoral irregularities are detected and punished and an electoral challenge is efficiently and timely resolved, the principle of the substantial implementation of human rights triumphs.

The effort to establish a connection between electoral justice and human rights protection would have been vain without a strong theoretical framework formally defining electoral justice, distinguishing its different models and institutions and explaining the available remedies in case of electoral irregularities. This theoretical part owes very much to the work of many researchers, scholars and election practitioners who have joined their forces to realise important contributions to electoral justice research, like the very much quoted International IDEA Handbook on Electoral Justice.

Having laid the foundations of our research, it is now time to go into detail of the chosen case study, the 2017 Kenyan Presidential Elections. The concepts exposed in this first chapter will be then used to evaluate the Kenyan system of electoral justice in terms of effective promotion and reinforcement of democracy in that country.

2 CHAPTER II – CONTEXTUALISING THE KENYAN CASE: FROM POST-ELECTORAL CONFLICT TO CONSTITUTIONAL AND ELECTORAL REFORMS

2.1 Outline of the Chapter

The general aim of this chapter is to provide the reader with a background of information concerning Kenya, its politics and recent changes in the constitutional and electoral law.

This contextualisation effort is necessary to understand that the historical 2017 Supreme Court's verdict nullifying the result of the August Presidential Election did not come out from a legal void. On the contrary, it was the precise result of a long and troubled process which has invested Kenyan politics, constitutional system and society, radically changing election management in the East African country and the possibility for the judiciary to intervene in the electoral process as the EDRB of reference.

Introducing the case of Kenya in a research focusing on the 2017 Supreme Court's decision to annul the Presidential Election and evaluating the impact of this decision on the promotion of democracy and human rights in the country means, first of all, explaining why Kenya is so important in the context of a study on electoral justice. After this necessary clarification, we will briefly recall the electoral history of Kenya from 1992, the year in which the first multiparty elections took place after two decades of one-party regime. Rather than recalling in detail every aspect of the elections that Kenya regularly organised since the beginning of the 1990s, we will try instead to underline the recurrent patterns of Kenyan electoral petitions; not only is this theoretical exercise more consistent with the research question of this thesis, but also it will prove helpful to underline the many changes that have characterised the Kenyan EDR system in the following years.

Having laid the foundations of our introduction to Kenya, we will turn then to the two key words inspiring this chapter: post-electoral conflict and

constitutional/electoral reforms; in effect, the long path that brought to the landmark 2017 judgment was very much rooted in an event that considerably disturbed the stability of Kenya and its chances to achieve a sustainable liberal democracy: the 2007 post-electoral Crisis.

The year 2007 represented the true turning point in the recent history of Kenya: following the contested declaration of Mwai Kibaki as the president-elect, uncontrolled and large-scale violence – fuelled by political divisions, ethnic grievances and social exclusion – broke-out, leading the country on the hedge of economical and institutional collapse.

For its consequences, both in terms of casualties and direct involvement of the international community in conflict-resolution through the Kofi Annan Mission, the 2007 and early 2008 facts deserve a special focus: in fact, they represent the starting point of a process which radically reformed the legal system of the country – leading to the adoption of a new constitution in 2010 – and through it the EDR system of the country.

Having briefly recalled the history of Kenyan electoral petitions since 1992 and the novelties introduced by the 2010 Constitution and related legislation in terms of electoral justice, we will also have laid the foundations to present coherently and systematically the content of the 2017 Supreme Court's decision, which cannot be really understood without making due reference to the reform process undergone by Kenya after the tragic 2007 events.

2.2 Why is Kenya Relevant for EDR and Electoral Justice?

The choice for Kenya as the main target of this research is not accidental, as the East African country represents one of the most interesting case-study in the field of electoral justice and resolution of electoral disputes.

First of all, since the restoration of multiparty politics in 1992, Kenya has been affected by a sort of "physiological contestation" of the electoral outcome, as the number of the electoral petitions filed before the competent EDRB clearly demonstrates. Of the six presidential elections which regularly took place since 1992, all but 2002 ended up in open rejection of the electoral results by the

defeated part, while 2007 represents a separate case, since the contestation of the electoral outcome ended up in a violent post-electoral crisis rather than in legal proceedings before a court. The legislative elections have equally generated a high number of electoral petitions; however, for space constraints, we will not deal with them here.[1] Therefore, from a simple quantitative perspective, Kenya offers extensive material to conduct research on electoral justice.

Secondly, the restoration of multiparty democracy has increased the occurrence of election-related conflicts at every stage of the electoral process.[2] Consequently, Kenya adds to the analysis of EDRSs a conflict perspective, demonstrating the importance of efficient and rapid delivery of electoral justice to prevent the outbreak or escalation of violence connected to the contestation of electoral results.

As the 2007 crisis extensively demonstrated, post-electoral violence in Kenya is generated by a mixture of ethnic motivations – as the political competition was transformed in ethnic confrontation for the political majority and, therefore, control over the lucrative natural resources – socio-economic factors, a diffused *« culture of violence»*[3] exacerbating adversarial dynamics in every aspect of social life, elections included, electoral mismanagement and a general distrust in the EDRB's capacity to address electoral petitions in an independent and satisfactory manner.

Thirdly, the Kenyan case is very much instructive in showing how electoral challenges are often focused on the role that key actors like the EMB (e.g. the Electoral Commission), candidates and political parties play during the elections. Electoral petitions are generally filed by the runner-up or losing party to challenge the results of a round of voting; however, the process leading to the final verdict is complex, involving detailed legal analysis applied to electoral illegalities, management and misconduct.

[1] In Kenya, general elections regularly take place every five year. General elections comprise for Presidential, Parliamentary and Local Elections

[2] Muema Wambua, "The ethnification of electoral conflicts in Kenya: options for positive peace," *African Journal on Conflict Resolution* 17.2 (2017), available at https://www.accord.org.za/ajcr-issues/ethnification-electoral-conflicts-kenya/

[3] Ibidem

Additionally, Kenya demonstrates how through constitution-making it is possible to widely address electoral issues and reform the EMB and EDRS of a country. The 2010 Constitution[4] is, in fact, the outcome of a process triggered with the intervention of an African Union-sponsored mediation mission led by the former UN Secretary-General Kofi Annan, deployed to the country to put an end to the 2007 post-electoral crisis. As we will see, Kofi Annan successfully mediated between the two parts, making them sign a historical National Accord of Reconciliation[5] eventually approved by the National Assembly, which committed the two opposing parties to power-sharing and an ambitious programme of reforms.

Not surprisingly, the new constitution that spurred from this process, devotes many provisions to the protection of electoral rights, the regulation of the EMB and its functions and the design of a brand-new EDRS, entrusting to the Supreme Court the task to resolve electoral petitions related to presidential elections. Of course, not every aspect of the electoral process could be regulated at the constitutional level; this is why the constitution-makers delegated the definition of many features of EDR and electoral management to subsequent ordinary laws adopted by the Parliament. These bills have not to be separated from the constitution: the two sources together make up the legal framework currently governing every aspect of elections in Kenya.

Finally, it is important to mention the contribution of Kenya to electoral justice advancement. Through its historical experience, Kenya has invaluably contributed to raising awareness on the importance of electoral justice for the promotion of democracy, civil and political rights. Kenya is the most evident example of how electoral mismanagement and unreliable EDRS, combined with diffused inequalities and ethnic grievances, can bring a country that had long been considered the *« Beacon of peace in Africa»* [6] on the edge of institutional and economic collapse. Due to election-connected conflict, Kenya experienced the

[4] *Constitution of Kenya,* 27 August 2010, available at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010

[5] National Assembly of Kenya, *National Accord and Reconciliation Act*, no. 4 of 2008, available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/NationalAccordandReconciliationAct_No4of2008.pdf

[6] Wambua, "The ethnification of electoral conflicts in Kenya"

worst two months of its recent history in the aftermath of the 2007 elections; it paid an unbearable death toll, without considering the thousands of internally displaced persons (IDPs) and the degree of social disruption caused by the uncontrolled violence.

The best service that a person can render to the cause of democracy and to the Kenyan people is that of accounting the efforts made by this country, through the law, to make sure that a similar post-electoral crisis could not affect the country anymore.

2.3 Recurrent Patterns of Kenyan Electoral History: 1992-2002

Since its independence from the United Kingdom in 1963, Kenya has regularly held general elections; however, this regularity was not indicative of the presence of a solid democratic regime in the country. In fact, for more than two decades, Kenyans have been ruled by a one-party regime that organised elections in which the registered voters could choose their preferred candidate from the only authorised list, that of the Kenya African National Union (KANU).

Jomo Kenyatta, the independence hero and first President of Kenya, laid the foundations of the one-party state but it was his successor, Daniel arap Moi to officially sanction this form of government by passing a constitutional amendment (the new Section 2A) in 1982 according to which *« There [should have been] in Kenya only one political party the Kenya African National Union* […] *every candidate for President shall be a member of the Kenya African National Union»*.[7]

During the 1980s, Moi enforced a particularly repressive regime responsible for widespread campaigns of intimidation of political opponents and gross human rights violations including detention in illegal conditions, torture and forced disappearances.[8] Moi also reinforced KANU's control over state institutions,

[7] *The Constitution of Kenya Amendment Act,* no. 7 of 1982, available at http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Constitution/HistoryoftheConstitutionofKenya/Acts/1982/ActNo.7of1982.pdf

[8] Amnesty International, *Amnesty International Report 1988* (London: Amnesty International Publications, 1988), p. 46-49

successfully subjecting the judiciary to the control of the executive and making judges' tenure dependent on their allegiance to the party.[9]

Towards the end of the 1980s, people's discontent with a corrupted and oppressive regime, combined with increasing pressure from the international community and major Kenya's donors, convinced the President to concede a new constitutional amendment suppressing Section 2A and restoring multiparty democracy. However, in the short term, the amendment of the constitution was not in itself enough to stop human rights violations, as persecution of opposition exponents was still practised and the release of political prisoners deliberately slow.[10]

The first multiparty elections held on the 29th of December 1992, confirmed Moi as President of Kenya with just 36.4 per cent of the votes; KANU also retained the absolute majority at the National Assembly.

The 1992 General Elections already highlighted some of the recurrent patterns in Kenyan elections. The first of these aspects concerned the electoral management; despite a relatively peaceful election day, many independent observers denounced several irregularities concerning the registration of voters, the nomination of candidates for the parliamentary elections and an overall lack of credibility by the Electoral Commission.[11]

The second recurrent pattern anticipated by the 1992 General Elections was election-related violence. In 1992 violence erupted in the pre-electoral phase and particularly affected the Rift Valley, where Kalenjin armed gangs – the ethnic group of the President – systematically attacked other groups. The Kalenjin Warriors' raids have to be read in the context of a KANU systematic design aimed

[9] Immigration and Refugee Board of Canada, *Restoration of Multiparty Government and Kenyans of Somali Origin,* March 1, 1992, par. 3.1 available at https://www.refworld.org/docid/3ae6a80a28.html

[10] Ibid., par. 1

[11] Commonwealth Observer Group, *The Presidential, Parliamentary and Civic Elections in Kenya, 29 December 1992: The Report of the Commonwealth Observer Group,* Commonwealth Election Reports (London: Commonwealth Secretariat, 1993), pp. vii-xi available at https://read.thecommonwealth-ilibrary.org/commonwealth/governance/the-presidential-parliamentary-and-civic-elections-in-kenya-29-december-1992_9781848595385-en#page8

at reinforcing its control over its electoral strongholds by forcing ethnic groups considered disloyal to the party out of the interested provinces.[12]

Subsequent investigations proved the existence of linkages between the Kalenjin Warriors and members of the government, thus reinforcing with evidence the idea that government's inaction in repressing violence was due more to connivance than incapacity.[13] This brings us to another recurrent element in recent Kenyan electoral history: the alleged or proved involvement of the ruling party in election-related violence.

For what concerns electoral justice, 1992 inaugurated the long list of petitions concerning presidential elections, which is one of the distinctive traits of Kenyan multi-party democracy.

Kenneth Matiba, the runner-up of the presidential election, filed his petition before the High Court of Kenya, which was the competent EDRB at that time. However, rather than personally signing the petition as required by law, he made his wife do it on his behalf, on grounds that he was physically impeded. Precisely for this reason, the High Court dismissed the petition;[14] the strict and literal interpretation of the law concerning electoral petitions prevented the High Court judges from hearing the petitioner's claims and adjudicate in the merit the case. In other words, an excessive legalism did not allow to ascertain the facts related to the conduct of the 1992 Presidential Election.

In 1997, Daniel arap Moi was re-elected as president of Kenya, defeating his challenger Mwai Kibaki with 40 per cent of the popular vote; KANU also retained the majority in the National Assembly.

Notwithstanding the fact that, overall, *« The results on the whole reflect[ed] the wishes of the Kenyan voters»*[15] the framework the presidential election took place within was not encouraging at all in terms of democratic progress. For

[12] Human Rights Watch, *Divide and Rule: State-sponsored ethnic violence in Kenya* (Human Rights Watch, 1993), p. 25

[13] National Assembly of Kenya, *Report of the Parliamentary Select Committee to investigate Ethnic Clashes in Western and Other Parts of Kenya,* 1992, cited in Human Rights Watch, *Divide and Rule,* p. 40

[14] High Court of Kenya, *Matiba v. Moi,* Civil Application no. NAI 241 of 1993*,* available at http://kenyalaw.org/caselaw/cases/view/73009

[15] National Democratic Institute, *NDI Statement on the December 29, 1997 Elections in Kenya,* p. 6, available at https://www.ndi.org/sites/default/files/1082_ke_1997elect_5.pdf

instance, not considering the years in office during the one-party era, Moi could run again for presidency, giving the impression that little had changed in term of state institutions' isolation from KANU pervasive control. Additionally, the President directly nominated the Chairperson of the Electoral Commission, suggesting a lack of independence of the supreme EMB from the executive.

Just as five years before, some concern was raised on pre-electoral management, especially regarding the overrepresentation of some electoral districts to the detriment of others. Moreover, despite an overall decrease with respect to 1992, episodes of violence had again disturbed the pre-electoral period, negatively affecting the opposition's electoral campaign.[16]

Confirming what it had already become a trend, the allegations of diffused irregularities and electoral mismanagement at several polling stations were enough to generate bipartisan reactions, with both KANU and the Democratic Party threatening to file electoral petitions had their candidate lost the presidential race.[17] Just as five years before, excessive legalism triumphed over the will to ascertain the facts, as the petition filed before the High Court in Nairobi was rejected on grounds of Kibaki's failure to serve it personally on the respondent as required by the Election Petition Rules.[18] The High Court judges' stance that *« Courts are under the duty to interpret and apply the law regardless of the consequences»*[19] was indicative of a not easily accessible electoral justice system, where allegations of electoral frauds and irregularities were not even investigated and adjudicated in the merit. The exacerbation of this attitude certainly did not contribute to disseminate trust in the EDRB's conduct, making regular electoral petitions a less and less attractive solution for those Kenyan citizens lamenting a violation of their electoral rights.

[16] Ibid., p. 2-5
[17] James C. McKinley Jr., "All Sides in Kenya Cry Fraud In Election," *New York Times,* December 31, 1997, https://www.nytimes.com/1997/12/31/world/all-sides-in-kenya-cry-fraud-in-election.html (accessed January 4, 2020)
[18] Election Petition No. 1 of 1998, *Kibaki v Moi & 2 Others (No 2),* available at http://kenyalawreports.or.ke/election_petitions/cases.php?pageNum_Recordset1=4&totalRows_Recordset1=192
[19] Ibid., p. 328 (35)

The 2002 Presidential Election arose false hopes concerning the definitive achievement of the democratisation process started ten years earlier; in fact, for the first time, the KANU candidate Uhuru Kenyatta – son of the first President and independence hero – was defeated by Mwai Kibaki, representing the main opposition parties united in the National Alliance Rainbow Coalition (NARC). This historical political event marked the first pacific transition of power in Kenya, as Kenyatta conceded victory to Kibaki; even though some minor electoral petitions had been filed, Kenyatta did not go to the High Court to contest the results of the election.

All the election observer groups invited to the country praised some aspects of the 2002 electoral process. For instance, the EU highlighted how the election had been overall well-managed by the Electoral Commission, up to the point that Kenya could be taken as a positive example to follow for the neighbouring countries on their way towards democratisation.[20] The Commonwealth Observer Group went far beyond by awarding the 2002 General Elections as the best ever organised by Kenya in its history as an independent country, witnessing a true commitment to democracy by all the parties involved and the Kenyan people.[21]

In conclusion, the 2002 Presidential Election gave the illusion to both the Kenyan people and the international community that the country had successfully completed its transition towards liberal and multiparty democracy. In effect, as election-connected violence and major mismanagements were almost totally absent, some of the trends that we highlighted for the 1992 and 1997 general elections seemed to have been definitively debunked. Some efforts still had to be made in order to make the electoral petition system more accessible and efficient, as the criteria to be met to successfully file an electoral petition were still perceived as too burdensome for the plaintiffs.[22] However, on the whole, it seemed that the future of Kenyan democracy was radiant. The following 2007

[20] European Union Election Observation Mission, *Kenya General Elections 27 December 2002: Final Report,* p. 4-5 available at http://aceproject.org/ero-en/regions/africa/KE/Kenya%20-%20EU%20rep02.pdf

[21] Commonwealth Observer Group, *Kenya General Election 27 December 2002* (London: Commonwealth Secretariat, 2006), p. 26 available at http://aceproject.org/ero-en/regions/africa/KE/kenya-final-report-general-elections-commonwealth/at_download/file

[22] Carter Center, *Observing the 2002 Kenya Elections* (Atlanta: The Carter Center Democracy Programme, May 2003), p. 47, available at https://www.cartercenter.org/documents/1355.pdf

General Elections and the terrible post-electoral crisis that they generated would leave little of the 2002 hopes, driving the country on the edge of institutional collapse and furious civil and ethnic war.

2.4 Back to Conflict: the 2007 General Elections and the Kenyan Crisis

Thanks to the successful organisation of the 2002 General Elections and the subsequent first pacific transition of power from KANU to the National Rainbow Coalition led by Mwai Kibaki, the general feeling was that Kenya had finally achieved its transition to full multiparty democracy, started with limited success in the 1990s.

Five years later, the presidential race between the incumbent Mwai Kibaki (Party of National Unity – PNU) and Raila Odinga (Orange Democratic Movement – ODM) appeared, in a first moment, proof of democratic maturity as the election day had passed without major disruptions and the polling stations had been generally well-managed. [23]

Tragically for the country, these early impressions were totally disregarded. In fact, when on the 30th of December 2007 the Chairman of the Electoral Commission of Kenya (ECK), Samuel Kivuitu, declared the incumbent Mwai Kibaki as the president-elect, people immediately took the streets, plunging the country in perhaps the worst post-electoral crisis in the history of democracy. The crisis would last two months, ravaging the country with an unprecedented wave of violence, fuelled by ethnic divisions and heightened by the political confrontation between the two parties.

Announcement of the Results and Violence Eruption

Violence initially erupted in the city of Kisumu – the third-largest city in Kenya and a stronghold of the ODM – one day before the proclamation of the results, as a form of protest against the delays in the announcement of the outcome of the

[23] International Crisis Group, *Kenya in Crisis,* Crisis Group Africa Report n° 137 (Nairobi/Brussels: International Crisis Group, February 21, 2008), p. 6

presidential race.[24] When the following day Kibaki was officially declared president-elect and a rapid swearing-in ceremony took place, disorders spread also to Nairobi and its slums and violence immediately took an ethnic connotation; Luo people, largely supporting Odinga started to attack Kikuyu, the ethnic group of the incumbent president. Subsequently, the conflict escalated as a result of a reactions and counter-reactions chain between the different ethnic groups involved and its geographical diffusion to the rest of the country.

The break-out of the crisis had little to do with the way the voting day had been managed; in fact, as we have already said, no major problem arose at the level of the polling stations, both during voting operations and counting procedures. Although the causes are multiple and complex, it can be affirmed beyond any reasonable doubt, that the announcement of the results was the trigger of violence. The combination of the 30th December declaration contradicting the first provisional results – which instead gave Odinga a wide margin over Kibaki – [25] the delay in the announcement of the results and the many denunciations coming from party agents present at the National Tallying Centre (NTC) about several irregularities committed during the final counting and tallying processes, all contributed to create an atmosphere of suspicion, fuelling allegations that the presidential election had been rigged.

Therefore, Odinga's supporters first took the streets pushed by the sensation of having been defrauded and deprived of their legitimate victory. However, available evidence shows that both sides were responsible for rigging and manipulation of electoral results.[26]

As Samuel Kivuitu later publicly admitted, he had been put under strenuous pressure to announce the results of the presidential election even if he could not be absolutely certain of them.[27]

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[24] Ibid., p. 9

[25] The discrepancy between the first provisional and the final results is due to the fact that ODM strongholds had been announced first, with the results of other constituencies accruing later on and reducing Odinga's advantage over Kibaki. See Nic Cheeseman, "The Kenyan elections of 2007: an introduction," *Journal of Eastern African Studies,* 2:2 (2008), p. 176

[26] Ibid., p. 177

[27] Ibidem

Kivuitu's admissions had blatantly unveiled how incompetently and superficially the ECK had managed the electoral process, failing to comply with its duty to guarantee the integrity of the election.

Although irrational, given the implication of both PNU and ODM in vote-rigging, and not justifiable, Odinga's supporters' reactions must be contextualised. If we analyse the immediate post-elections period in 2007, we will certainly notice that all the elements for a break-out of a violent post-electoral crisis were present: diffused irregularities in counting and tallying at both CTC and NTC, the manifest incompetence and superficiality of the ECK which abdicated its role as the supreme guarantor of the elections and, finally, the announcement of presidential results whose reliability was rather doubtful.[28]

Undoubtfully, the ECK bore primary responsibility in creating the conditions for the explosion of a violent post-electoral crisis. This is not only true for the atmosphere of suspicion that it fuelled concerning the operations at the NTC but also, and more importantly, for the fact that through its incompetent management of the elections, it completely eroded people's trust in its mandate and, by extension, in that of all the institutions involved in the electoral process. Operating in a country where presidential elections had always been highly competitive and politics dominated by ethnic divisions, the ECK should have been more attentive in operating in a transparent manner, fully complying with its mandate as the supreme guarantor of the elections. What it did instead, other than engaging in manifest irregularities, was to underestimate the risks connected to electoral mismanagement.

Having no residual faith in an institutional system they felt it had defrauded them and had a bad reputation in terms of independence and impartiality, many ODM supporters did not even consider the judicial solution of their electoral petitions. They preferred instead to take the street, engaging as their political opponents did, in murders, ethnic punitive expeditions, private property looting to have their "rights" restored. The result of all this was two months of chaos, one of

[28] For instance, at the NTC in Nairobi results coming from 44 constituencies had been officially tallied and proclaimed despite the lack of any legal document which could prove their reliability. International Crisis Group, *Kenya in Crisis,* p. 7-8

the most violent periods of Kenyan history, leading the country on the edge of civil conflict and institutional collapse.

Explaining the Kenyan Crisis: Elections and Failed Reforms

A post-electoral crisis causing thousands of deaths and internally displaced people (IDPs), economic disruption and institutional breakdown cannot be reduced to the mere reaction of Odinga's supporters to a fraudulent electoral outcome and Kibaki's groups counter-reactions. In fact, electoral factors and people's dissatisfaction with the ECK's conduct only partly explain the outbreak of the 2007 Kenyan Crisis.

Acknowledging the complexity underlying the Kenyan Crisis is an important step in a research focusing on electoral justice, as it shows how this theme is very much connected with other critical issues that every democracy needs to address for the sake of its stability: constitutional and institutional reforms, social justice, fight against corruption, civil society engagement in public life and the spread of a culture of transparency inspiring the public administration.

Much of the violence recrudescence in the tragic December 2007- February 2008 period has to do with the aberrant effects of exasperated ethnic politics combined with long-term grievances and accounts of ethnic favouritism or exclusion from privileges. In fact, the first Luo Odinga's supporters' raids were not only performed to react against electoral results perceived as unfair but also ethnically directed against Kikuyu people, considered the privileged group supported by the presidency. Likewise, Kikuyu and later on other groups like the Kalenjin in the Rift Valley[29] reacted to defend their ethnic group and not merely to advance political programmes through violence.

Although interesting and of primary importance in Kenyan politics, ethnic dynamics and their influence over the 2007 Crisis cannot be discussed here at length. Instead, it is more convenient to turn to the other two explicatory factors of the crisis: the failed institutional and constitutional reforms.

[29] As in 1992, the North Rift Valley was affected by the most extreme episodes of violence as a consequence of a revival of the Kalenjin Warriors Movement. Kalenjin gangs, largely supporting Odinga, systematically attacked Kikuyu people settled in the region. Ibid., p. 11

The failed institutional reforms refer to the never seriously addressed concerns regarding the independence and efficiency of the ECK, the electoral management body of Kenya, whose conduct had already been highlighted as problematic at several occasions. We have already seen that the electoral commission had major responsibilities in turning an overall well-managed polling day into a disaster in 2007; however, the quick references to the 1992 and 1997 General Elections that we provided in the previous paragraphs, were instructive in highlighting how the ECK's conduct on those occasions had not been free from public disapproval either. Since the restoration of multiparty democracy in 1992, domestic and international electoral observers had repeatedly urged Kenyan authorities to deal with ECK shortcomings and broadly reform its structure and mandate. The substantial failure to address these issues and the reiteration of major errors have undoubtedly contributed to diminishing people's trust in the EMB of the country.

Finally, the failed 2007 Presidential Election was indicative of the uncomplete transition of Kenya towards a liberal multiparty democracy, as witnessed by the fact that the country's legal system was still based on a constitution inherited from the one-party state, only limitedly amended to allow for other political parties than KANU in 1992. As it is easily understandable, this constitution did not offer adequate guarantees in terms of separation of powers.[30]

The lack of a constitutional system able to isolate key State institutions like the ECK for electoral management and the judiciary for the resolution of electoral challenges from undue presidential influences, sufficiently explains why the pacific resolution of electoral disputes before a court was not considered a feasible solution in 2007.

The 2007 Kenyan Crisis has enormous implications in terms of electoral justice; despite its complex nature and multiple explicatory factors, it should not be forgotten that elections acted like the trigger of violence. Hence, deaths and disruption could have been avoided if only a reliable EDRB had been put in place.

The Kenyan case clearly demonstrates how efficient, independent and reliable EDRBs can not only guarantee the meaningfulness of the whole electoral

[30] Cheeseman, "The Kenyan elections of 2007", p. 180

process but also act as a factor dramatically decreasing the likelihood of violent social conflict generated by contested elections. However, the realisation of this ideal system of electoral justice, cannot be achieved if the government and the parliament do not address in the proper way crucial matters like effective constitution-making, separation of powers and repeatedly frustrate people's legitimate expectations for institutional reforms and transparency.

In conclusion, the unfulfilled promises generated by the historical victory of the National Rainbow Coalition of 2002, the insane superficiality in electoral management and the political establishment's unavailability to repudiate once and forever the old constitution clearly put at risk the stability of Kenya, causing so much harm to its people. Only an unprecedented mediation effort by third parties could find a way out from the dangerous deadlock created by this political and social crisis.

Pacification Efforts: the Kofi Annan's Mission to Kenya

The potentially devastating effects of the Kenyan crisis on the geopolitical stability of East Africa, combined with the importance of Kenya as one of the most dynamic economies in Africa and major partner of Western countries in the area, attracted the attention of the international community on the ongoing violence in the country.

After the failure of the first pacification efforts, notwithstanding the involvement of preeminent African personalities,[31] the Chairperson of the African Union John Kufuor selected the former UN Secretary-General Kofi Annan to lead the mediation mission put in place by the regional African organisation.

The African Union's strategy for the successful pacification of Kenya was that of appointing a panel of mediators which could combine the unquestioned moral authority of African personalities like the former President of Tanzania Benjamin Mkapa and South African First Lady Graça Machel with the unrivalled

[31] Several African Heads of State and Government, including Benjamin Mkapa from Tanzania, Kenneth Kaunda from Zambia and Uganda's President Yoweri Museveni visited Kenya in January 2008. Even the well-known Nobel Prize for Peace Laureate Archbishop Desmond Tutu was chosen as the first mediator of the crisis

diplomatic and mediation skills of the former UN Secretary-General Kofi Annan.[32]

Annan immediately succeeded where his predecessors had failed: convincing Kibaki and Odinga to meet and start a dialogue which could stop violence and find a shared solution to the crisis. With the two parties finally sitting at the negotiating table, the Panel clarified since the beginning the objectives of the peace talks by providing a clear road map made up of four points: (1) Undertake immediate action to stop violence and restore human rights (2) Humanitarian crisis management and promotion of reconciliation (3) Overcome the political crisis and (4) Work on long term solutions and reforms addressing the root causes of violence.[33]

Compared to the early mediation attempts of early January 2008, the Annan's mission to Kenya had different strengths. First of all, it immediately clarified what the priorities of negotiations were; secondly, it always enjoyed the support of the United Nations and the international community in general, as the UN Secretary-General Ban Ki Moon's visit to Kenya demonstrated. Finally, Annan had the merit to successfully involve in the negotiations key stakeholders like the Kenya Red Cross Society (KRC) and the United Nations Development Programme (UNDP), which together highlighted the extent and the seriousness of the humanitarian crisis provoked by the post-electoral violence.[34] This decision proved to be crucial, as the two parties agreed that it was necessary to find immediate solutions which could alleviate the suffering of Kenyan people afflicted by the escalation of violence.

If almost immediate progress was achieved on the first two items of the road map, the resolution of the political crisis and the proposal of long-term solutions addressing the root causes of the crisis proved to be the most contentious issues, risking derailing the negotiations.

The resolution of the crisis passed necessarily from a complete ascertainment of the responsibilities concerning the allegations of vote-rigging

[32] Elisabeth Lindenmayer and Josie Lianna Kaye, *A Choiche for Peace? The story of forty-one days of mediation in Kenya* (New York: International Peace Institute, August 2009), p. 7
[33] Ibid., p. 10
[34] Ibid., p. 11

and electoral irregularities and the negotiation of a power-sharing agreement; the ultimate goal was the launch of a credible reform process which could address long-standing problems like widespread inequalities, land reform, ethnic favouritism and lack of transparency in the public administration, all issues that Kenya had inherited from the colonial administration and exacerbated under KANU one-party regime.[35]

Concerning the ascertainment of the facts related to the 2007 Presidential Election the parties agreed to establish an Independent Review Committee with a mandate *« To investigate all aspects of the 2007 presidential election and make recommendations to improve future electoral processes».*[36]

The two parties substantially disagreed on the modalities to achieve power-sharing. In fact, Kibaki and his advisers supported the thesis of the *non-fragmentation of power,*[37] claiming that the constitution had to be left unaltered, especially in the part concerning the president, who had to preserve his powers and position of primacy as Head of State and Government. This perspective was clearly not acceptable for Odinga and the ODM who, on the contrary, proposed major constitutional amendments and the introduction of the figure of the Prime Minister.

With the two political leaders worried to make concessions on so important issues, the negotiation talks risked running aground; however, Kofi Annan was able to accelerate the timing of the negotiations, urging the parties involved to find an acceptable agreement for the good of Kenya. This strategy proved successful and on the 28th of February 2008, two months after the initial eruption of the conflict, Kibaki and Odinga signed a historical *Agreement on the Principles of Partnership of the Coalition Government.* The two leaders also committed to a comprehensive programme of electoral, legal and judicial reforms and to the establishment of a Truth and Reconciliation Mission.[38]

Thanks to the complete and continuous commitment of the former Secretary-General Kofi Annan, it had been possible to find an agreement which

[35] Ibid., p. 10
[36] Ibid., p. 13
[37] Ibid., p. 18
[38] Ibid., p. 17

finally put an end to the worst election-related crisis in the history of independent Kenya. In just two months more than 1000 people had died and around 300,000 had become IDPs;[39] the unprecedented level of violence, combined with its diffusion all over the national territory had also paralysed the Kenyan economic system, risking leading the country to collapse.

The agreement signed by Kibaki and Odinga had preserved the country from open civil conflict, inaugurating a new period in Kenyan history, full of expectations for real change but also of uncertainties, as the two leaders that had so violently clashed during the 2007 elections were now forced to share power and transform the transitional government into a success.

The National Accord and Reconciliation Act

The Agreement on the Principles of Partnership of the Coalition Government was enacted through the adoption, by the National Assembly of Kenya, of the National Accord and Reconciliation Act (NARA).[40]

This bill formalised the engagements taken by the contending parties with the Panel led by Kofi Annan and inaugurated a transitional period of power-sharing characterised by a coalition government between PNU and ODM with a mandate to realise a comprehensive plan of reforms as agreed during the negotiation talks and lead the country to new General Elections in 2013.

The NARA specified the terms of power-sharing by instituting the post of Prime Minister appointed by the President; the fundamental requisite to become Prime Minister was to be an elected member of the National Assembly and to be the leader of the majoritarian force in parliament:[41] having the ODM won the parliamentary majority in the 2007 General Elections, the post of Prime Minister was automatically assigned to Odinga. The Prime Minister was given functions of overall supervision on the activities of the government, thus limiting the previous unrestrained power of the President in deciding the official line of the government. More importantly, the Prime Minister could not be unilaterally

[39] International Crisis Group, *Kenya in Crisis,* p. i
[40] National Assembly of Kenya, *National Accord and Reconciliation Act,* no. 4 of 2008
[41] Ibid., art. 3

removed by the President, as the office could become vacant only in case of death of the Prime Minister himself, resolution approved by the majority of the National Assembly withdrawing confidence or dissolution of the coalition.[42]

Overall, the adoption of the NARA marked a fundamental step in the process of implementation of the Agreement on the Principles of Partnership of the Coalition Government, giving it the force of law. Facing the impossibility of governing the country without the counterpart, both Kibaki and Odinga had agreed that the only viable solution for Kenya was a true commitment to power-sharing, the privileged tool to realise meaningful reforms in view of the 2013 General Elections.[43]

The NARA provided of course for a transitioning and temporary regime: the coalition government would have been dissolved at the end of the legislature. Power-sharing between the major political forces was not necessarily intended to be a permanent status, as the 2013 General Elections would establish new political balances.

However, power-sharing enacted through the limitation of presidential powers allowed, in the short term, to abandon the adversarial logic that had dominated the post-electoral phase, when Kibaki refused to negotiate with a person who could not advance any legal claim on the presidency and Odinga rejecting the validity of an electoral victory resulting from major frauds.

The immediate success of the Kofi Annan's mission was that of preserving Kenya from civil war and a higher death toll. However, in perspective, it had also successfully raised awareness on the root causes of the crisis, ultimately committing Kibaki and Odinga to an ambitious reform plan from whose success depended the credibility and stability of Kenya as a democratic nation.

[42] Ibid., art. 4
[43] *Agreement on the Principles of Partnership of the Coalition Government,* 28th of February 2008, Preamble

2.5 Unveiling the Truth about the 2007 Presidential Election: the Independent Review Commission's Findings

In compliance with what had been established in the Agreement on the Principles of Partnership, the new coalition government appointed an Independent Review Committee (IREC) with a mandate to broadly investigate and evaluate the organisation and conduct of the 2007 General Elections – notably the presidential election. Not only had the IREC a fact-finding task, but also a propositive function as, by highlighting the major shortcomings that had brought to the eruption of violence, it would have also suggested adequate reforms to improve different aspects of the electoral process.

The outcome of the IREC's work was the publishing of a report providing a detailed analysis of the pre, electoral and post-electoral phases of the 2007 General Elections, addressing in a comprehensive manner fundamental issues like the legal framework governing elections in Kenya, the role and independence of the electoral commission and the overall electoral management system.

From the analysis of the legislation which was in force when the 2007 presidential elections took place, the IREC pointed out that the pieces of legislation regulating elections were too many, 13 to be exact,[44] which practically made their coherent application impossible. Moreover, several shortcomings concerning the formal recognition of fundamental electoral rights – like the right to vote and stand for elections – were detected both at the constitutional and statutory level.

Assessing the conduct and every relevant episode related to the 2007 elections implied a focus on the role and responsibilities of the ECK as the body entrusted with the competence to perform and supervise every aspect of electoral management in Kenya. By reviewing the relevant constitutional provisions concerning the ECK, the IREC reminded that all the members of the commission were nominated by the president for a five years term and that the nomination of

[44] Dialogue Africa Foundation, *Kriegler and Waki reports: summarised version* (Nairobi: Dialogue Africa Foundation, 2009), p. 2, available at https://www.kas.de/c/document_library/get_file?uuid=d8aa1729-8a9e-7226-acee-8193fd67a21a&groupId=252038

the new ECK coincided with the years of General Election. This framework evidently raised some concern regarding the independence and autonomy of the ECK from the executive; in fact, as the analysis of presidential attitude demonstrated, the president of Kenya never showed any willingness to include other stakeholders like parliament, political parties or civil society organisations in the nomination of ECK's commissioners.[45] More worryingly, this attitude was even backed by the law, as nothing impeded the President to exercise his almost limitless influence over the ECK. In addition, the overall credibility of the ECK was weakened by a lack of professionalism – as the members of the electoral commission did not have to prove any particular competence or previous experience in electoral matters – and an insufficient formalisation of the administrative and internal procedures regulating the ECK's activities.

Not surprisingly, before assessing the ECK's specific responsibilities during the different stages of the 2007 elections, the IREC recommended to address the main areas of concern regarding the electoral commission's mandate by suggesting, *inter alia,* a parliamentary system of appointment of the ECK's members and a more careful definition of its administrative and internal procedures, in view of reducing arbitrariness and increase certainties about performances and accountability mechanisms.[46]

By scrutinising the specific circumstances under which the 2007 General Elections took place, the IREC was able to unveil specific criticalities concerning counting, tallying and transmission of results procedures. Retracing all the phases of these excessively complex procedures, the IREC was able to highlight that mismanagement and criticalities had verified both at the constituency and national tallying centre levels. Locally, the most evident problems had concerned the confusion between partial and definitive results, both communicated by the constituencies' returning officers to the national tallying centre in Nairobi by telephone.[47] The situation even worsened in Nairobi, as verification of the accruing results was badly performed, up to the point that the presidential results of 32 constituencies out of 210 differed from those reported on the polling

[45] Ibid., p. 5
[46] Ibid., p. 12
[47] Ibid., p. 33

stations' and constituencies' official forms.[48] Overall, the errors in counting and tallying derived from both excessively complex procedures and mismanagement at the level of the national tallying centre by ECK's officials; these aspects, far from being mere technicalities, undoubtedly contributed to spreading suspicion over the conduction of elections, ultimately causing the subsequent violence.

A consistent part of the IREC's report was devoted to electoral justice and post-election dispute settlement. The Commission was clear in highlighting the inadequacy of the Kenyan EDRS at that time and vigorously recommended a total reform of the system, whose ineffectiveness had significantly contributed to the outbreak of the post-electoral crisis.[49]

The major problem connected with the Kenyan EDRS was its generalist approach: at that time electoral petitions were handled by ordinary courts, on the assumption that they could deal with any kind of issue, irrespective of its nature.

On the contrary, the IREC was quite assertive in underlining that electoral petitions are no normal petitions: being very specific, they necessitate to be adjudicated by judges who are not generalists but instead are trained and familiar with electoral legislation and management.

This is why the recommendations concerning election dispute resolution advocated for a total reform of the EDRS, in view of replacing the system based on ordinary courts, and specifically the High Court for presidential petitions, with a specialised electoral tribunal *« With extensive power and exclusive jurisdiction in relation to the elections».*[50] The IREC recognised that the most evident problem linked with the specialised electoral tribunal model was its cost, as additional funds had to be allocated in order to create the ad hoc body. However, in their view, this drawback was outweighed by the guarantees offered in terms of specialised and rapid resolution of electoral disputes. Additionally, the most evident advantage of the suggested EDRS was its flexibility, allowing to resolve electoral disputes in a pragmatic way, as they arose, making the necessity to prevent political crisis prevail over excessive legalism.[51]

[48] Ibid., p. 34
[49] Ibid., p. 36
[50] Ibid., p. 38
[51] Ibid., p. 37

Following its mandate, the IREC also tried to establish the respective responsibilities of all the actors involved in the management and conduction of the 2007 General Elections. In its conclusions, the members of the committee affirmed that, due to the diffused irregularities, frauds and mismanagement reported by both domestic and international electoral observes, it had not been possible to establish true and reliable results of both the presidential and parliamentary elections.[52]

Undoubtedly, the ECK had major responsibilities, since the examined evidence demonstrated that it had badly complied with its supervisory function over the electoral process and final tallying in particular.

As irregularities and serious episodes like ballot stuffing, vote-buying and bribery had been ascertained in the strongholds of both major political parties, it had not been possible to attribute to any of them ultimate responsibility. Likewise, the IREC could not demonstrate any evident intention by the ECK to rig the entire electoral process and fraud the voters.[53] Serious and unacceptable as it was, incompetence and mismanagement could not be compared to explicit vote-rigging.

Overall, the IREC had accomplished with its mandate. The circumstances and episodes of the 27th of December 2007 had been reconstructed, the most concerning issues and shortcomings highlighted and reform proposals advanced. Moreover, the respective responsibilities of party agents, ECK and polling station staff had been highlighted, even though in terms of incompetence rather than conscious attempts to rig the elections to favour one candidate over the other.

Thanks to the undeniable commitment to its mandate, the IREC had succeeded in underlining how electoral mismanagement and lack of effective remedies in terms of electoral justice had brought the country on the edge of collapse, spreading uncontrolled violence which had caused casualties, injured people and immeasurable economic damages. It was then up to the transitioning PNU/ODM government to seriously take into consideration IREC's

[52] The Independent Review Commission, *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007,* p. 9, available at https://kenyastockholm.files.wordpress.com/2008/09/the_kriegler_report.pdf
[53] Dialogue Africa Foundation, *Kriegler and Waki reports,* p. 34

recommendations and embark in a process implying constitutional, electoral management and electoral justice reforms. A serious commitment to reforms represented the only way out from an *« electoral lawlessness»*[54] that had flourished for decades, permeating every aspect of Kenyan democracy.

2.6 An Introduction to Kenyan Constitutional History

Throughout its history as an independent country, Kenya adopted three constitutions. The first one was that of 1963 and it was negotiated with the British authorities to regulate the transition from the colonial regime to independence. It provided the country with both a national government led by a Prime Minister and at the local level regional executives; the legislative branch of power was represented by a bicameral parliament.

This first constitution was substantially changed one year later, when Kenya was officially proclaimed a republic, the post of Prime Minister abolished as the President also assumed executive functions and the regional governments abolished. Despite subsequent amendments – the most important of which officially transformed the country in a one-party State – the 1964 Constitution remained the supreme legal source in the country for decades, even after the reintroduction of multipartyism.

The substantial inadequacy of a constitution drafted in the immediate aftermath of independence, combined with diffused beliefs that it had failed to adequately protect rights, enforce the rule of law and support the harmonious social development of the country, were important factors that stimulated a process of total revision of the constitution, in view of the adoption of a new text.[55]

This process of constitution-making can be divided into two phases. The first concerns the early attempts made between the end of the 1990s and the first years of the new millennium, resulting in the 2005 referendum rejecting the

[54] The Independent Review Commission, *Report of the Independent Review Commission,* p. 10
[55] Daily Nation, "The review of the Constitution of Kenya under Constitution of Kenya (amendment) Act, 2008 and the Constitution of Kenya Review Act, 2008," *Daily Nation,* p. I, June 16, 2009, http://constitutionnet.org/sites/default/files/CoE_SupplimentFinal.pdf (accessed January 10, 2020)

constitutional draft proposed by the Constitution of Kenya Review Commission (CKRC); fundamentally, the process failed because of its increasing politicisation and the failure of the stakeholders involved by the CKRC to find shared solutions to the most contentious issues.[56]

The second phase of the process leading to the adoption of a new constitution immediately followed the 2007 Kenyan Crisis being a result of it; as it will be certainly remembered, the power-sharing agreement between Kibaki and Odinga negotiated by Kofi Annan also entailed a commitment by the transitioning government to substantial reforms, including a revision of the constitution in view of addressing the deep causes of the violence. Therefore, after the formation of the PNU/ODM coalition government, the National Assembly passed the Constitution of Kenya Review Act (CKRA), establishing the Committee of Experts (CoE) as the main body in charge of working on the text of the new constitution. The bill's guidelines framed an inclusive process of constitutional review and drafting, involving both institutional and civil society's stakeholders; essentially these were the CoE, the National Assembly, the Parliamentary Select Committee and, of course, the people of Kenya, who were called to ratify the new constitution through referendum at the end of the process.[57]

Undoubtedly, due to the expertise and high moral standing of its members, the CoE played an essential role in the whole process, both by giving content to the constitutional draft and by wisely involving the other mentioned stakeholders so as to make the process advance. According to the CKRA, the CoE was composed of nine members selected through a system involving both the National Assembly in the nomination and the President in the appointment procedures. To ensure diversity and multiple perspectives on the process, both Kenyan and non-Kenyan citizens could be selected, with a 2/3 proportion of Kenyan members.[58] Moreover, in view of ensuring the quality of the inputs proposed by the CoE, the selected people had to demonstrate competence and experience in different areas, including comparative constitutional law, human rights, electoral systems and

[56] *Constitutional history of Kenya: the 2000-2004 constitution review process,* http://constitutionnet.org/country/kenya-country-constitutional-profile (accessed January 10, 2020)
[57] Daily Nation, "The review of the Constitution of Kenya", p. I
[58] *Constitution of Kenya Review Act*, 2008, No. 9 of 2008, sec. 8.4

designs for democratic elections and land law.[59] The list of the different areas of expertise required to qualify as a member of the CoE is not only indicative of a desire to bring in the process different theoretical perspectives, but also of the acknowledgement that the new constitution had to deal with many unresolved issues of different nature, which had jointly caused the 2007 crisis and had to be set once and forever to guarantee the stability of Kenya.

The timing and schedule of the constitution review process were well-defined so that no major delays could stop the works of the CoE; in fact, by the end of November 2009, the experts released a first draft of the new constitution, submitting it to the review and amendments proposals of the other stakeholders and the general public. On the 2nd of April 2010, the National Assembly finally approved the *Proposed Constitution of Kenya* which was submitted to a constitutional referendum for approval on 4th August. A majority of 69 per cent[60] of the voters overwhelmingly approved the new Constitution which was solemnly promulgated by President Kibaki on the 27th of August.

For space constraints, we were forced to provide a succinct overview of the constitutional history of Kenya; much more would be important to analyse. However, we should not lose the focus of our research: electoral justice and EDRS in Kenya. Recalling the different stages of the process leading to the adoption of the 2010 Constitution was instrumental to underline how the new fundamental legal text was adopted in response to the tragic events of 2007, as part of a bigger reform process envisaged to avoid the future eruption of a new violent crisis. As we have already anticipated, the 2010 Constitution also addressed issues of electoral justice and management, substantially contributing in combination with other legal sources, to reform the way electoral petitions are dealt with in Kenya.

[59] Ibid., sec. 10.1

[60] Official results available at African Elections Database, *4 August 2010 Constitutional Referendum,* http://africanelections.tripod.com/ke.html#2010_Constitutional_Referendum (accessed January 10, 2020)

2.7 The Reformed Kenyan EDRS

An interesting feature of the Kenyan case is that an important part of the reform process of the national EDRS and EMB was accomplished through the adoption of the new 2010 Constitution. In fact, this fundamental charter contains unprecedented references to principles of electoral justice and regulations concerning the functioning and mandate of the bodies entrusted with the competence to settle electoral disputes and manage the electoral process.

That the Kenyan constitution-drafters decided to deal with issues of electoral justice at the level of the constitution comes as no surprise; this is the natural outcome of a constitution-making process that was undertaken to address those socio-political and electoral aspects that had caused the 2007 crisis, so as to make less likely the outbreak of dangerous post-electoral turmoil.

In other words, the parts of the 2010 Constitution concerning the election of the President, people's representatives sitting in the Parliament and the mandate of the EMB, are the fruit of an explicit acknowledgement, by the constitution-drafters, that elections had always been a contentious issue for Kenya, a necessary but delicate aspect of the democratic life of the country whose mismanagement, lack of punctual regulations and general distrust in the supervision bodies had caused considerable damage to the Kenyan people.

The Structure of the EDRS

The 2010 Constitution entails a mixed EDRS where both the judiciary and the EMB represented by the new Independent Electoral and Boundaries Commission (IEBC) intervene in the electoral dispute resolution process, with different competences and powers.

The constitution clearly distinguishes between disputes and petitions originating before and after the official publication of the results on the gazette. A further distinction is between electoral petitions arising from a presidential election and those filed to challenge the results of parliamentary, gubernatorial and local elections.

While the first parameter determines which petitions are to be addressed to the IEBC and which to the judiciary, the second further shares electoral challenges to the different courts.

According to art. 87(1), the Parliament is called to adopt legislation establishing an EDR mechanism able to timely resolve electoral petitions.[61] Hence, the legislative branch of power is under the constitutional obligation to address the issue of EDR, taking into consideration the fundamental requirement of the *timely resolution* of disputes when drafting these laws. Moreover, art. 87(1) allows us to understand that the constitution provides a general framework for the EDRS which is completed and enacted by statutory laws which have to comply with the constitution and the prescriptions and rights there defended.

Art. 87(1) can be considered as the general constitutional provision concerning EDR and in fact is contained in Chapter 7, on the Representation of the People. The first paragraph of art. 87 is supplemented by the following that introduces the IEBC as the first EDRB of the system but excluding it from the adjudication of electoral disputes concerning presidential elections.

Under the Kenyan Constitution, electoral petitions are subject to a rigid timeframe. The second paragraph of art. 87 sets it to twenty-eight days from the proclamation of the results for all electoral petitions with the exception of those concerning a presidential election which are subject to a different time frame.[62]

Finally, paragraph three contains a very important disposition concerning the service of the petition, which can be direct or indirect through an advertisement in a newspaper with national circulation; this requirement applies to all electoral petitions, including those arising from a presidential election.[63] The relevance of this part is due to the acknowledgement, by the constitution drafters, that one major obstacle to the effective access to the EDRB was the failure to comply with the direct service of the petition requirement; the reader will certainly recall that Mwai Kibaki's failure to personally and directly serve his petition on Daniel arap Moi was considered by the High Court of Kenya a

[61] *Constitution of Kenya,* 2010, art. 87(1)
[62] Ibid., art. 87(2)
[63] Ibid., art. 87(3); Supreme Court of Kenya, *The Supreme Court (Presidential Petition) Rules,* 2013

sufficient condition to dismiss the electoral petition in 1997. Therefore, the new constitutional framework provides, in principle, a less-burdensome requirement to file an electoral petition.

The requirements for electoral petitions set by art.87 should be supplemented by those contained in art. 88(4) which already pertains to the part of Chapter 7 concerning the Independent Electoral and Boundaries Commission. There, it is specified a further limit to the IEBC's EDR powers, as the Commission has no competence to deal with those disputes arising after the official proclamation of the results.[64]

In practice, this provision gives a primary role the IEBC to settle those disputes arising in the pre-electoral and electoral phase concerning its specific competences of supervision on processes like the nomination of party candidates, regulation of political campaigns and the registration of voters. The detailed regulation of election and referendum petitions before the IEBC is further contained in the Elections Act of 2011, a law adopted by the Parliament as prescribed by the constitution to establish a mechanism of EDR; for space constraints, we will not deal further with electoral petitions filed before the IEBC as, for the sake of this research, it is more convenient to deal with the Supreme Court's mandate to act as an EDRB.

The 2010 Constitution extensively revolutionised the Judiciary of Kenya by establishing the Supreme Court as one of the superior courts of the country together with the Court of Appeal and the High Court.[65] Art. 163(3) establishes the Supreme Court's competence to act as EDRB adjudicating petitions deriving from presidential elections; this jurisdiction is defined as *original and exclusive,*[66] meaning that only the Supreme Court can hear and evaluate presidential petitions which are original as they do not derive from any other previous proceedings.

Pertaining art. 163 to the part of Chapter 10 on the Judiciary specifically defining the structure and jurisdiction of Kenyan Superior Courts, it was not

[64] Ibid., art. 88(4). This means that electoral petitions concerning the results of parliamentary and local elections are not addressed by the IEBC. According to the Elections Act of 2011 sec. 75(1) and the Constitution of Kenya art. 105(1) electoral petitions concerning elections to the offices of County Governor, Senator and member of the National Assembly have to be filed before the High Court

[65] Ibid., art. 162(1)

[66] Ibid., art. 163(3)

possible to further deal with presidential petitions in this section of the constitution. Therefore, the constitution drafters correctly referred to art. 140 – under Chapter nine on the Executive – to provide further details on the available procedure to file electoral petitions concerning presidential elections. Consistently with the already recalled requirement of timely resolution of electoral disputes contained in art. 87, also in this case a strict time frame was imposed on the entire EDR mechanism: the petition must be filed within seven days from the declaration of the results and the Supreme Court disposes of fourteen days after the date of the filing to hear and adjudicate the case.[67] This double time frame, binding both the ordinary citizen as the petitioner and the Supreme Court as the adjudicator, was most likely set to avoid a dangerous and unnecessary lengthening of the dispute.

The decisions concerning electoral presidential petitions are not subject to appeal; this is a result of both the Supreme Court's position as the highest court of the judiciary and of its exclusive competence to adjudicate electoral challenges concerning presidential elections; in fact, could another court intervene, the exclusive jurisdiction would be *ipso facto* cancelled.

Should the Court uphold the petition, then the results of the presidential election would be considered invalid, null and void, with the justices calling the IEBC to organise fresh elections that have to take place within sixty days after the pronunciation of the sentence.[68]

In order to coherently fulfil its functions as the EDRB for presidential elections, the Supreme Court needs to rely on the cooperation of the IEBC, the institution that has major responsibility in organising and managing the elections. It follows that tangible evidence helping the justices to reconstruct the events connected to a presidential election can be provided only by the IEBC; for this reason, EMB's cooperation is more mandatory than voluntary, as the Supreme Court Act passed by the Parliament in 2011 compels the IEBC to provide the Supreme Court with certified copies of all the forms and documents used at

[67] Ibid., art. 140(1) and 140(2)
[68] Ibid., art. 140(2) and 140(3)

polling stations, constituency tallying centres (CTCs) and National Tallying Centre (NTC) to tabulate and declare the results of the presidential election.[69]

The procedure of electoral petitions challenging the results of a presidential election is further developed by the Supreme Court through the adoption of internal rules. These rules regulate aspects concerning the organization of the hearings before the court. To ensure the most accurate preparation of the trial, a pre-trial session is to be organised in order to frame the contested issues and consider the consolidation of multiple petitions.[70]

Finally, it is certainly true that an electoral petition is filed to challenge the outcome of a presidential election; however, the simple contestation of the results is not acceptable, as the petitioner must challenge specific aspects of the election including the validity of the election itself, the conduct of the presidential election, the qualifications of the president-elect, the validity of its nomination or the commission of specific electoral offences.[71]

Values and Principles inspiring the Kenyan EDRS

As we have seen in chapter one, a coherent and responsive EDRS not only requires a solid institutional framework resulting from the punctual definition of the procedures and EDRB's mandate to adjudicate electoral disputes, but also the respect, from these institutions, of fundamental principles of law, competence and morality. The administration of justice – and electoral justice is no different – is not all about procedures but also about principles that must be theorised and enforced.

The 2010 Kenyan Constitution is well-aware of this natural bond between principles and procedures; in fact, it established a new EDRS through both institutional and procedural architecture and affirmation of indisputable principles of electoral justice.

[69] Parliament of Kenya, *Supreme Court Act,* no. 7 of 2011, sec. 12
[70] Supreme Court of Kenya, *The Supreme Court (Presidential Petition) Rules,* 2013, available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/SupremeCourtPresidentialElectionPetitionRules.pdf
[71] Ibid., 12(1) and 12(2)

The first step that the constitution drafters took to affirm through the constitution an efficient and independent EDRS was to acknowledge in the preamble the legitimate aspirations of the Kenyan people for a government inspired by values such as democracy, freedom and human rights;[72] the ultimate goal of electoral justice is to guarantee that the procedures followed to form this government (in a presidential republic as Kenya through the direct election of the president as Head of State and Government) comply with the fundamental values entrenched in the constitution.

Other values that are entrenched in the Kenyan constitution as "national values" and have substantial relevance for electoral justice are those of accountability, integrity and transparency.[73] Applied to EDR, these principles demand that the EDRB's conduct has to be consistent with the constitutional and legal framework regulating EDR and that the procedures are clearly indicated so that everyone can, in principle, assess whether the authority entrusted with the task to adjudicate electoral disputes is really complying with its mandate.

Another necessary step in the design of an EDRS at the constitutional level is the prior entrenchment of electoral rights in the constitution. On this issue, the 2010 Kenyan Constitution has achieved remarkable progress if compared to the previous constitution. In fact, in the pre-2010 Bill of Rights, electoral rights were not mentioned at all, materialising the paradox of a democracy (formal but not very much substantial) without electoral rights! Hence, there is no point in setting an EDRS if there are no electoral rights to be enforced before the competent EDRB.

Taking into consideration the shortcomings of the 1964 Constitution and subsequent amendments, the members of the CKRC coherently decided to devote special attention to the draft of the Bill of Rights entrenching in the Constitution the fundamental rights belonging to the people of Kenya and being recognised by the State. Among these, we have the right of every citizen *to « Free, fair and regular elections based on universal suffrage and the free expression of the will of the elector».*[74] The Constitution goes further on by extensively developing the

[72] *Constitution of Kenya* (2010), Preamble
[73] Ibid., art. 10(2)
[74] Ibid., art 38(2)

meaning of *free and fair elections* at art. 81(e), which mentions the absence of violence and intimidation, neutrality and efficiency of the process and the supervision of an independent body as essential conditions for any election – local, gubernatorial, legislative, presidential or referendum – to be considered as *free and fair* under the law of Kenya.[75]

Notwithstanding the importance of finally entrenching in the constitution fundamental rights and values, their solemn proclamation would have meant little without the parallel creation of bodies with supervisory functions. That is the point of connection between the institutional framework and the principles, the constitutional matter whose failure to deal with would irremediably compromise the functioning of even the best designed EDRS.

Consequently, and in contrast with the previous constitution, the 2010 text affirmed the independence of both the IEBC and the Supreme Court from any other power of the state, so as to prevent any undue influence over the bodies that, each within its mandate, perform EDR functions in the Kenyan constitutional system.[76]

In conclusion, the 2010 Kenyan Constitution performs a decisive role in addressing issues of electoral justice, qualifying as the primary and most authoritative source defining the EDRBs mandates and inspiring principles. The reach of the EDRS reform process triggered after the 2008 crisis is so extended that it was not limited to targeted modifications of the existent system. On the contrary, what has been accomplished first by adopting the new constitution and later on with the relevant electoral legislation by the Parliament, is a brand new EDRS possessing the authoritativeness of the constitution as the supreme legal source of the country, all the necessary efficiency guarantees determined by a clear division of the electoral petition that each of the EDRB can hear and the moral force of the political and electoral rights, whose enforcement gives the entire EDRS its *raison d'être*.

As always in the history of human rights enforcement, the formal establishment of laws and rules does not necessarily correspond to their effective

[75] Ibid., art. 81(e)
[76] The independence of the judiciary is established at art. 160(1) while that of the IEBC, together with other independent commission and offices in chapter 15.

application. However, without a preliminary constituent phase when rules are defined and at least some of the most contentious social issues faced, no major advancement in terms of protection of fundamental rights can be realistically achieved.

This was exactly the case for the protection of electoral rights in Kenya through EDRS. In the East-African country, the devastating effects of the 2007 post-electoral crisis and their traumatic memory have convinced the parties involved in the conflict and the major stakeholders that a constitution-making phase within the framework of a transitional coalition government was the best way to satisfactorily address at least one of the triggering factors of the crisis, namely elections.

Concerned with the profound distrust that had always surrounded EDRS and electoral management in Kenya, often making people opt for violent alternatives to find answers to their disaffection, the constitution drafters decided to devote a significant part of the new constitution to electoral issues and their regulation. Just a few years after the accomplishment of these efforts, the new EDRS would be tested in the 2013 General Elections.

2.8 The First Stress-test for the EDRS: the 2013 Presidential Elections

Before getting to the substance of the case study on the 2017 Presidential Election, we have to make a last but necessary step which will prove to be useful in assessing the 2017 Supreme Court's rule: to briefly analyse the Kenyan EDRS's performance at the first stress-test of the 2013 Presidential Elections and the Supreme Court's reasoning behind its decision on the electoral petition filed by Raila Odinga. This concise but instructive analysis should distinguish the evaluation of the process from the content of the Supreme Court's decision.

On 4th March 2013, the National Union (TNA) candidate Uhuru Kenyatta defeated Raila Odinga of the ODM in the presidential elections, obtaining 50.51

per cent of the preferences, just above the necessary threshold of 50 per cent plus one.[77]

Overall, there was unanimous agreement on the fact that the 2013 elections represented a success, especially if compared to the disastrous previous elections whose consequences have already been extensively explained. Media accounts celebrated a redeemed country thanks to the commitment of all the parties involved in a peaceful and democratic election.[78] Unanimous was the praise of international observers that commented on the overall success of the 2013 elections that were relatively peaceful and well-organised.[79] Congratulations were extended to the presidential candidates and the Kenyan people for their commitment to the democratic process and acceptance of the results.[80]

For what concerns the EDRS and the available EDR mechanisms, all the observers acknowledged the ambitious efforts that Kenya had made to adopt a new constitution and overall reform its institutions, especially the judiciary. Thanks to the changes introduced the judiciary, which has the primary responsibility of settling electoral disputes, had accomplished the not easy task of restoring its reputation and public image as an independent and transparent institution, after decades of evident misconduct and corrupt practices.[81] Overall, the successful reform of the judiciary had substantially contributed to the pacific climate under which the elections took place, confirming the intuition that the EDRS' credibility invaluably contribute to excluding violence as an available alternative to challenge electoral results.[82]

Despite some concern regarding the prioritisation of electoral justice over everyday cases, especially at the High Court, and a too complex procedure

[77] Full results of the 2013 General Elections are available at "2013 Kenyan general election," https://en.wikipedia.org/wiki/2013_Kenyan_general_election (accessed January 14, 2020)
[78] Mwangi S. Kimeni, "Kenya: a country redeemed after a peaceful election," *Brookings,* April 2, 2013, https://www.brookings.edu/blog/up-front/2013/04/02/kenya-a-country-redeemed-after-a-peaceful-election/ (accessed January 14, 2020)
[79] European Union Election Observation Mission to Kenya, *General Elections 2013: Final Report,* p. 2, available at http://www.eods.eu/library/eu-eom-kenya-2013-final-report_en.pdf
[80] The Carter Center, *Observing Kenya's March 2013 National Elections: Final Report*, p. 68, available at https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-final-101613.pdf
[81] European Union Election Observation Mission, *General Elections,* p. 35
[82] The Carter Center, *Observing Kenya's March 2013 National Elections,* p. 61

involving different bodies with EDR competences,[83] both the international observers and the Kenyan people were satisfied with the new array of EDR mechanisms offered by the 2010 Constitution and related electoral acts.[84]

However, as we have affirmed at the beginning of the paragraph, the process is different from the principles and the content of judicial decisions settling electoral disputes. Notwithstanding the presence of legal experts informing the team on the legal framework governing elections in the observed country, electoral observation missions' reports do not usually go into the details of the verdicts delivered by the EDRS. Such a technical exercise would be out of the mandate of an EOM, as its task is to generally assess the electoral process which is made up of different aspects whose EDR is only a part.

For this reason, the complete assessment of the EDRS of a country should include both an evaluation of the process – a task that can be very much supported by the EOMS' reports – and a focus on the legal reasoning behind courts' decisions concerning electoral results, a subject-matter pertaining to the field of legal experts and scholars.

Following the official announcement of the presidential results by the IEBC, three electoral petitions were filed before the Supreme Court to challenge the election of Uhuru Kenyatta. Among the petitioners, the most famous was, of course, Raila Odinga, whose petition was filed on allegations of *« Massive tampering of the tallying process»*.[85] These petitions were eventually consolidated into one, which became the landmark case *Raila Odinga & 5 Others v IEBC & 3 Others.*[86]

The relevance of the *Raila Odinga v IEBC* case goes far beyond the attention it received due to the public broadcasting of the process with the Supreme Court complying with the transparency requirements imposed on it by the new legal framework concerning elections. Other than this, the 2013 Odinga's electoral petition was the first filed under the new constitutional system, activating

[83] Ibid., p. 61; European Union Election Observation Mission, p. 35

[85] Jason Patinkin, "Uhuru Kenyatta wins Kenyan election on a narrow margin," *The Guardian,* March 9, 2013, https://www.theguardian.com/world/2013/mar/09/kenyatta-declared-victor-in-kenyan-elections (accessed January 14, 2020)

[86] Supreme Court of Kenya, *Election petition no. 5 of 2013*

for the first time the procedure entailed by art. 140(1) of the new constitution. Additionally, it was practically the first case concerning the challenge of presidential electoral results that was heard and adjudicated in the merit by the EDRB without striking it out on mere technicalities.[87]

Three were the main issues that the Supreme Court had to deal with in order to determine whether Odinga's petition could be upheld: (1) Whether rejected votes had to be included in the final tally or not (2) If the IEBC had conducted the elections in a way consistent with the constitution and the 2011 Elections Act (3) If Uhuru Kenyatta had been legally declared as the president-elect.[88]

Given the importance of the 2013 *Odinga v IEBC* case, the Supreme Court's verdict generated many reactions among informed commentators, spanning from the more balanced to those openly criticising the reasoning behind the decision not to invalidate the presidential election and uphold Kenyatta's election. In particular, both sides focused on two aspects of the Supreme Court's rule: the definition of standards concerning elections and EDR and the evaluation of the IEBC's conduct.

The two aspects are very much connected, as the definition of a minimum standard the failure to comply with allows the EDRB to declare null and void the election necessary implies a subsequent evaluation of the EMB's performance as the constitutional body entrusted with the competence to organise and oversee elections.[89]

Concerning principles, the Supreme Court specified the standard of the proof in electoral disputes, establishing it at an intermediate level above the balance of probabilities required for civil causes but below the beyond reasonable doubt of criminal cases. The burden of the proof falls instead on the petitioner but, if he successfully discharges it, then it turns on the respondent. [90]

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[87] Kenya Law, *The Presidential Election Petition: The Mwananchi Friendly Version,* 25 April 2013, http://kenyalaw.org/kenyalawblog/the-presidential-election-petition-the-mwananchi-friendly-version-2/ (accessed January 14, 2020)

[88] Ibidem

[89] According to Francis Ang'Ila Aywa, the presence of these two aspects in a decision concerning an electoral petition is indicative of a balanced approach to electoral justice. See Francis Ang'Ila Aywa, "A critique of the Raila Odinga v IEBC decision in light of the legal standards for presidential elections in Kenya", in *Balancing the Scales of Electoral Justice,* ed. Collins Odote & Linda Musumba (Rome: International Development Law Organization IDLO, 2016), p. 60

[90] Kenya Law, *The Presidential Election Petition* (accessed January 14, 2020)

According to Wachira Maina, one of the most severe critics of the 2013 decision, the established standard of the proof was too onerous for the petitioner.[91]

The evaluation of the IEBC's conduct was one of the most criticised aspects of the whole decision, as it appeared to many that the Supreme Court had been too indulgent and tolerant[92] with the electoral commission's shortcomings in both electoral management and provision of statutory forms in the pre-trial procedure, key documents that could have enhanced Odinga's chances to better support his petition.[93]

Taking everything into account, it seems that the Kenyan EDRS applied to the 2013 presidential elections was very much praised for its processes and efficiency and less for the legal reasoning backing the decision to confirm Uhuru Kenyatta as the president-elect. In other words, nobody contested the fact that, for the first time, Kenyan voters could direct their claims towards an efficient and independent EDRB; in fact, people overall appreciated the reforms introduced by the constitution and trusted the Supreme Court as a credible arbiter rather than violently contesting the results.

Much less appreciated was the content of the electoral petition decision; no commentator dared to affirm that the Supreme Court had voluntarily excused some shortcomings by the IEBC; however, it seems that a much more courageous approach to the interpretation of the legal framework governing election was claimed in 2013.

[91] Wachira Maina, "Verdict on Kenya's presidential election petition: Five reasons the judgment fails the legal test," *The East African,* April 20, 2013, https://www.theeastafrican.co.ke/oped/comment/Five-reasons-Kenya-Supreme-Court-failed-poll-petition-test/434750-1753646-5dfpys/index.html (accessed January 14, 2020)
[92] Ibidem
[93] Francis Ang'Ila Aywa, "A critique of the Raila Odinga v IEBC", p. 76

3 CHAPTER III: THE 2017 PRESIDENTIAL ELECTION AND THE SUPREME COURT'S NULLIFICATION VERDICT

3.1 Outline of the Chapter

Before turning to the case study of this thesis, let us briefly recall the evolution of this research. In chapter one we have laid the theoretical foundations, introducing the concept of electoral justice, its relevance for the protection of human (electoral) rights and the different types of EDRB which are available to those people who claim that their electoral rights have been violated in the course of the electoral process.

After that, in chapter two we have provided a sort of prelude to our case study, introducing Kenya and its recent electoral and constitutional history. Contextualisation was necessary to highlight how Kenya reacted to the 2007 Crisis by, *inter alia,* completely reforming its EDRS. As we have seen, this was achieved through the adoption of a new Constitution which finally entrenched electoral rights and regulated different aspects of the elections, providing a mixed EDRS qualifying as EDRB both the new IEBC and the judiciary; the Supreme Court, in particular, was entrusted with the power to resolve electoral petitions arising from presidential elections.

Overall, since now we have laid down the theoretical foundations of our analysis and set the scenario of our case study. It is now time to turn to the proper case study object of this thesis by both focusing on the episodes related to the election and on the decision of the Supreme Court.

The 2017 Kenyan Presidential Election is, in reality, the tale of two elections: those held on the 8th of August and the re-run ordered by the Supreme Court which took place on the 26th of October, confirming Uhuru Kenyatta, the candidate of the Jubilee party, for a second mandate.

These elections are interesting both for political and judicial reasons. From a political point of view, they attracted so much attention because they represented the second act of the never-ending duel between the most influential families in

the history of Kenyan politics, with Raila Odinga attempting for the third consecutive time to be elected as president of the country and Uhuru Kenyatta seeking re-election after five years in office. Furthermore, due to the strategic importance of the country, Kenyan elections always capture the international community's attention.

From the juridical point of view, and especially in the context of research about electoral justice and EDRS, the 2017 presidential elections can be truly defined as historical, since for the first time in the long history of Kenyan electoral disputes the Supreme Court delivered an unprecedented verdict, declaring null and void the August presidential results. Consequently, the judges ordered the organisation of fresh elections on grounds that the first presidential round of voting *«[had] not been conducted in accordance with the Constitution and the applicable law».*[1]

The impact of such a decision is so far-reaching that it allows the researcher to analyse a number of issues that are important for the overall evaluation of the Kenyan EDRS in terms of democracy and human rights enforcement: the principles affirmed by the Supreme Court, the legal reasoning behind the decision to annul the election and the impact of a presidential re-run on Kenyan politics and society. However, all these subjects will be addressed in the last chapter, devoted to the evaluation of the Kenyan EDRS system. Conversely, in this chapter we will recall some aspects of both 2017 rounds of voting, turning afterwards to the analysis of the content of the verdict.

3.2 August and October Election Days: a Comparison

On the 8th of August 2017, around 80 per cent of the registered voters queued outside the many polling stations in the country to exercise their right to vote in the General Elections. Media and international electoral observers generally reported a very peaceful election day throughout the country; thanks to the polling

[1] Supreme Court of Kenya, *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & two others,* Election Petition no. 1 of 2017 [Determination of petition without reason], 1 September 2017

stations staff's commitment and professionalism, voting operations proceeded regularly without major disruptions.[2]

Just as five years before, Kenyan people's determination to exercise their constitutional rights had allayed the fears of the eve concerning possible violence and intimidation, transforming the election day in overall success.[3]

On the 11th of August, just after three days from the closure of the polls, the IEBC officially announced that Uhuru Kenyatta had won the presidential race with 54 per cent of the votes, outdistancing Raila Odinga of approximately ten percentage points.[4] As it would be ascertained later, these official results were based on aggregated data resulting from the constituencies forms;[5] however, on the 11th of August, the IEBC in Nairobi had not received all the polling stations forms yet.

Raila Odinga's and National Super Alliance (NASA) supporters' reactions to the results immediately fuelled concern that Kenya may precipitate in another violent post-electoral crisis. In fact, the runner-up had already bitterly criticised the first provisional results published by the IEBC, showing that Kenyatta was leading: according to the NASA candidate, the results had been hacked. After the announcement of the 8th of August, Odinga supplemented his early declarations by showing no willingness to bring his claims to the Supreme Court as he had correctly done in 2013. Meanwhile, NASA protests had already broken out, with Odinga doing nothing to calm down his supporters and channel opposition's discontent within the legal framework provided by the constitution.[6]

Fortunately for Kenya, Odinga did not follow up his early declarations and eventually filed, together with his running mate Kalonzo Musyoka, an electoral

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[2] EU Election Observation Mission Republic of Kenya, *Preliminary Statement,* 10 August 2017, p. 14; Carter Center, *Kenya 2017 General and Presidential Elections Final Report* (Atlanta: 2018), p. 4

[3] Bruno Meyerfeld, "Au Kenya, L'une des élections les plus réussies de notre histoire," *Le Monde, 8* August 2017, https://www.lemonde.fr/afrique/article/2017/08/08/au-kenya-l-une-des-elections-les-plus-reussies-de-notre-histoire_5170183_3212.html (accessed 15 January 2020)

[4] "2017 Kenyan general elections", https://en.wikipedia.org/wiki/2017_Kenyan_general_election (accessed 15 January 2020)

[5] The reader will become familiar with results forms provided for by the Kenyan election legislation. These are Form 34A, indicating the results of every single polling station and Forms 34B, aggregating polling stations results at the level of each constituency. We will deal extensively with this issue later on in the chapter

[6] Carter Center, *Kenya 2017 General and Presidential Elections,* p. 4-5

petition before the Supreme Court, demanding the annulment of the 11th August presidential race.

After a judicial procedure strictly complying with the time frame provided by the constitution, on the 1st of September 2017, the Supreme Court of Kenya surprisingly annulled the election for reasons that we will extensively analyse in the following paragraphs, calling the IEBC to organise fresh elections within sixty days. The reactions to the decision were of course polarised: Odinga's supporters welcomed it as the final triumph of justice and Kenyatta criticised it highlighting the anti-majoritarian character of the decision, though declaring that he would abide by it.[7]

The Supreme Court's ruling in the *Raila Amolo Odinga case* represented the true turning point of the 2017 electoral process; from September 1st onwards, the campaign leading to the October re-run was characterised by increased polarisation and pressure on institutional bodies and the judiciary. Animated, polarised and often violent campaigns were nothing new in Kenya so, in our opinion, it cannot be affirmed that it was the Supreme Court's decision to engender this situation. However, it is clear that such an important and unprecedented stance on the part of the Supreme Court could not pass without any reaction from the parties involved. In fact, both Kenyatta and Odinga consciously raised the level of the tensions and exerted increasing pressure on all the institutions involved in the electoral process. Luckily, protests and candidates' declarations never reached a point of no return as it had happened in 2007: episodes of violence and disorders connected to protests were limited both geographically (Nairobi slums and Nyanza region) and in the number of casualties and wounded people.[8]

This climate of tension and increasing insecurity was certainly fuelled by the widespread sensation, in both political parties, to be victim of injustice.[9] Kenyatta and the Jubilee Party were certainly not satisfied with the judicial outcome of the electoral petition; the incumbent president adopted an ambiguous

[7] Jason Burke, "Kenyan supreme court annuls Uhuru Kenyatta election victory," *The Guardian,* 1 September 2017, https://www.theguardian.com/world/2017/sep/01/kenyan-supreme-court-annuls-uhuru-kenyatta-election-victory (accessed 15 January 2020)
[8] Carter Center, *Kenya 2017 General and Presidential Elections,* p. 41
[9] EU Election Observation Mission Republic of Kenya, *Final Report,* January 2018, p. 31

attitude because, on one hand, he officially declared to respect the verdict, but on the other he systematically and vehemently attacked the judiciary, claiming that the Supreme Court had stolen his victory and betrayed people's will. He even alluded to possible retaliation against the judiciary after his re-confirmation at the presidency of Kenya.[10]

However, the NASA side was not completely satisfied either. Odinga clearly welcomed the Supreme Court's decision as the final triumph of justice after decades of a judiciary systematically siding with the incumbent president in electoral petitions. At the same time, the verdict had certified widespread electoral mismanagements and the total unreliability of the IEBC as the body mandated by the constitution to conduct elections. It was at this point that Odinga and NASA started to claim that it was not enough to have a re-run of the presidential election but that before it was necessary to extensively reform the IEBC and totally re-think Kenyan electoral management; additionally, they called for the prosecution of those responsible of electoral frauds.

Soon, the official NASA slogan became "no reforms no election", a promise that was actually honoured when Odinga retired from the presidential race and asked his supporters to boycott the October 26th re-run. As a result, Kenyatta ran uncontested and was confirmed for a second mandate with 98 per cent of the votes; the re-run had also seen an evident decrease in the voter's turnout.[11]

Due to limited popular participation and successful boycott of the fresh election by the second-largest party, both the EU and the Carter Center deployed a small number of observers which did not allow coverage of the election process as the one ensured in August. However, both teams recorded a general improvement in the management of the election by the IEBC, especially for what concerns the transmission and tallying of the results; furthermore, the election day was

[10] Kenyatta used the Swahili word "wakora" which can be translated in English as "crooks" to refer to the judges. Carter Center, *Kenya 2017 General and Presidential Elections,* p. 41

[11] "October 2017 Kenyan presidential election," https://en.wikipedia.org/wiki/October_2017_Kenyan_presidential_election (accessed 15 January 2020)

substantially peaceful and ordered, with episodes of violence occurring only in NASA strongholds, where people massively adhered to the boycott campaign.[12]

3.3 Shortcomings in the 2017 Presidential Election

In 2017 the main shortcomings and problems occurred during the immediate post-electoral phase, affecting key processes like the transmission of the results from polling stations to the constituency tallying centres (CTS) and from there to the National Tallying Centre in Nairobi (NTC), the verification of results and their final announcement. No major criticalities had occurred in the pre-electoral phase or during the election day, when voters identification and voting procedures were carried out in a manner generally consistent with the legal framework.

It follows that the very core of the 2017 *Raila Amolo Odinga case* was made up of accusations to the IEBC, the institution in charge of conducting the election in accordance with the constitution and electoral law and that, according to the petitioners, had substantially failed to guarantee a free and fair electoral process.

Thus, accusations of electoral mismanagements, illegalities and irregularities dominated the electoral petition. The predominance of these factors was due to important changes introduced to the electoral law – directly affecting the IEBC – and the primary role of technological systems used to govern specific aspects of the electoral process, both before and after the 8th of August.

For what concerns the elections law, major amendments to the 2011 Elections Act were introduced less than one year before the general elections concerning the use of technology in elections and recruitment of the IEBC commissioners, without the full involvement of the opposition in the process. Moreover, this time as a result of negotiation involving all the political parties, it was agreed to replace IEBC commissioners accused of corruption; this was a positive change but it also determined that the new commissioners entered in office just eight months before the elections, with evident problems in terms of electoral management.[13] Therefore, the doubts raised on the late reform of the

[12] EU Election Observation Mission Republic of Kenya, *Final Report,* p. 33-34 and Carter Center, *Kenya 2017 General and Presidential Elections,* p. 27-28
[13] EU Election Observation Mission Republic of Kenya, *Preliminary Statement,* p. 4

electoral law were both on procedural terms – as the opposition had not been sufficiently consulted in the early phase of the process – and on timing, as when important amendments are approved it is necessary to dispose of a transitionary period which is necessary to fully acknowledge in the pre-existent legal system the changes introduced.

Moving to the more "technical" aspects of the 2017 presidential election, technology was introduced to speed up some operations and to offer enhanced guarantees on the integrity of the electoral process. In particular, the "technological revolution" involved voter identification at the polling stations and transmission of results. Both processes were managed through the Kenya Integrated Election Management System (KIEMS); however, the biometric identification of voters through the KIEMS did not cause any major problem.[14]

More contentious, and later destined to be the core of the petitioners' arguments in supporting the allegations of a spoiled presidential election, the issue of the electronic transmission of official results forms from the polling stations to the constituency tallying centres and finally up to the National Tallying Centre in Nairobi.

Overall, according to the observers present on the field, the electronic system of transmission of the results proved unreliable, slowing down the national tallying in Nairobi and ultimately negatively affecting the official declaration of the presidential results.[15] According to the Kenyan legislation concerning elections, two forms are used to register the electoral results: Form 34A is filled in by each presiding officer with the results of his/her polling station. Later on, through the KIEMS and upon availability of 4G/3G networks, Forms 34A are transmitted to the Constituency Tallying Centre, where the constituency returning officers fills in Form 34B, aggregating the results of the entire constituency.

NASA party agents present at the National Tallying Centre denounced that, on the 11th of August, the IEBC had announced the victory of Kenyatta when still many Forms 34A had not been received; this was tantamount, according to Odinga, to having announced the winner of the presidential race without being sure of the results.

[14] Carter Center, *Kenya 2017 General and Presidential Elections,* p. 25
[15] Ibidem

The missing 34A forms and the rapid announcement of the results clearly fuelled NASA agents' suspicions that irregular procedures had substantially flawed the election. These feelings were further reinforced when, after the 11th of August, the NTC received all the missing Forms 34A and many discrepancies between them and Forms 34B used to announce the results emerged.

Certainly, had the IEBC took advantage of the seven days allowed by the law to count and finally announce the results, many problems concerning the tallying process could have been avoided.[16]

To summarise, rapid and late reform of the electoral law and technological problems negatively affecting the transmission and tallying process were the most critical aspects of the 2017 August Presidential Election. At the moment of the filing of the electoral petition before the Supreme Court, Odinga focused more on this second aspect which made up the true core of his arguments and Supreme Court's decision to annul the election. Resentment against the IEBC and continuous accusation of incompetence and corruption, as we have seen, would characterise also Odinga's protests in the aftermath of the Supreme Court's pronouncement, highlighting the degree of opposition's distrust towards the electoral management body.

3.4 The Supreme Court's Ruling in Raila Amolo Odinga (2017)[17]

Parties to the Case, Procedures Followed and Timing of the Petition

Despite his early declarations leaving little space for a judicial resolution of the electoral challenge, Raila Odinga decided to strictly adhere to the constitution and follow the available procedure to challenge the election of Uhuru Kenyatta.

Odinga and Musyoka's petition was filed before the Supreme Court on the 18th of August, just in time before the expiry of the seven-day period from the

[16] Ibid., p. 27

[17] The complete name of the case is *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & two others,* Election Petition no. 1 of 2017. From here on, we will refer to the case as *Raila Amolo Odinga (2017)* using the same shortened version adopted by the Court in the 2013 electoral petition

publication of the results provided for by the constitution to challenge the outcome of a presidential election.[18]

During the hearings, Odinga and Musyoka would be referred to as *the petitioners* or those persons going to the Court to denounce a situation and seeking remedies. The *respondents* in the case were the Independent Electoral and Boundaries Commission (IEBC) as the institution mandated by the constitution to conduct the elections in Kenya, the Chairperson of the IEBC as the person in charge to officially declare the results of the presidential election and Uhuru Muigai Kenyatta as the president-elect. Moreover, the Supreme Court nominated as *amici curiae* – interested but independent parties offering legal counsel and relevant information to the court so as to help it decide in the merit – the Attorney General and the Law Society of Kenya. In the Kenyan legal system, the Attorney General acts as the legal advisor of the Government and represents it in court in all cases in which it is involved, with the exception of criminal proceedings.[19] The Law Society of Kenya is instead the most important bar association of the country, whose membership is mandatory for all the practising lawyers of the country; it was established with an act of Parliament and it has an advisory role to the benefit of legal practitioners, the government but also the general public on issues concerning the administration of justice.[20]

Concerning the Supreme Court, its normal composition is of seven judges; however, the minimum legal number to operate and adopt decisions is five.[21] Odinga's electoral petition was received, heard and adjudicated in the merit by a coram of six judges including: D. K. Maraga as the Chief Justice, P. M. Mwilu as the Deputy Chief Justice, J. B. Ojwang, S. C. Wanjala, N.S. Ndung'u and I. Lenaola.

[18] *Constitution of Kenya* (2010), art. 140(1)
[19] "Mandate of the Attorney General and Department of Justice," *Office of the Attorney General and State Department of Justice,* https://www.statelaw.go.ke/about-office-of-the-attorney-general-and-department-of-justice/ (accessed 20 January 2020)
[20] "Introducing LSK," *The Law Society of Kenya,* https://lsk.or.ke/about-lsk/ (accessed 20 January 2020)
[21] *Constitution of Kenya* (2010), art. 163(2)

From the date of the filing of the petition, the Supreme Court took advantage of the full fourteen days period mandated by the Constitution to determine a case concerning a presidential petition.[22]

Issues to be determined and Verdict

On the 1st of September 2017, with a historical and unprecedented 4-2 majority decision, the Supreme Court delivered its verdict on the electoral petition filed by Raila Odinga. In accordance with the Presidential Petition Rules, on that occasion the judges only delivered a verdict, reserving the publishing of the merit for a subsequent date.[23]

Overall, the Supreme Court deliberated on four issues arising from the petition: (1) Whether the presidential election had been conducted in accordance with the constitution and the relevant law on elections (2) Whether irregularities and illegalities had been committed in the conduct of the presidential elections (3) If irregularities had occurred, what was their impact on the integrity of the election and finally, (4) the eventual measures to be adopted.[24]

Concerning these four points, following the hearing of the parties and on grounds of the evidence examined, the Supreme Court concluded that: (1) The IEBC had *« Failed, neglected or refused to conduct the presidential election in a manner consistent with the dictates of the constitution»,* (2) the IEBC had committed irregularities and illegalities, particularly in the transmission of the results; however, no misconduct could be imputed to Uhuru Kenyatta appearing as the 3rd respondent, (3) the irregularities had affected the integrity of the election.[25] Concerning the fourth point, about the remedies to be provided, it was established that the declaration of Uhuru Kenyatta as the president-elect was invalid, null and void; therefore, the judges ordered the IEBC to organise a re-run

[22] Ibid., art. 140(2)
[23] Supreme Court of Kenya, *The Supreme Court (Presidential Petition) Rules,* 2013, sec. 23(1)
[24] Supreme Court of Kenya, *Raila Amolo Odinga & Another v. Independent Electoral Commission & two others,* Election Petition no. 1 of 2017 [Determination of petition without reason], 1 September 2017, p. 1
[25] Ibid., p. 2

within sixty days from the delivery of the verdict, as mandated by the constitution.[26]

Dissenting Opinions

Contentious and highly divisive or politicised cases are rarely decided at unanimity; common law systems acknowledge this fact and allow supreme courts to adopt verdicts even though not all the judges agree with it. However, the dissenting judges have the right to publicly declare their motivations through the dissenting opinions which are attached to the final sentence of the court.

Due to its importance, impact on the democratic life of Kenya and the media coverage it enjoyed, the *Raila Amolo Odinga (2017)* case qualified as one of these contentious decisions. The presence of two dissenting opinions clearly demonstrates that the debate was intense and lively as it is intuitively expected from a panel of judges discussing the opportunity and consequences of the annulment of a presidential election.

Both dissenting judges Ojwang and Ndung'u invoked the petitioners' failure to produce sufficient material evidence as the main reason to refute their allegations and confirm the outcome of the 8th of August round of voting. In practice, according to the dissenting judges' opinion, Odinga and Musyoka had not successfully discharged their evidentiary burden and had failed to prove their allegations in accordance with the established standard of the proof.

Even so, the two judges differed in the content they gave to their dissenting opinions, focusing on different aspects of the elections that had to be taken into account to reach the final verdict. In fact, judge Ojwang noted how the petitioners had substantially built their case over the failures of the KIEMS in the transmission of the results and related forms. However, Ojwang recalled that the application of technology only partially affected the elections, since manual methods of transmission had also been put in place; consequently, claiming that the technological failures had prevented the presidential election to take place in

[26] *Constitution of Kenya* (2010), art. 140(3)

accordance with the constitution was a stretch and no demand of election annulment could be reasonably uphold.[27]

Instead, Judge Ndung'u built her dissenting opinion on the importance of respecting the popular will expressed through democratic elections. Seeing that all the international observers invited to Kenya had certified the 8th of August Presidential Election as *« free, fair, credible and peaceful»*[28] and having Uhuru Kenyatta largely reached the constitutional threshold required to be elected president, there were no *compelling reasons* to annul the presidential election in question.[29]

The parallel reading of the two dissenting opinions highlights how the two judges criticised Odinga's petition and their colleagues' decision to uphold it, both in its content and effects on the democratic life of Kenya. Both dissenting judges presumably started from one basic consideration: in principle, judicial decisions declaring null and void the results of an election interfere with the free expression of the popular will. As a consequence, annulment verdicts cannot be taken lightly and they must be supported by adequate material evidence spurring from a convincing exposition, by the petitioners, of their thesis. When these two elements are missing, any annulment verdict qualifies as undue interference with popular will and sovereignty, which are the very essence of democracy.

The Petitioners' Case

Even before the filing of the petition before the Supreme Court, Odinga's objective was clear: to seek for the annulment of the presidential election and its outcome that allegedly had been affected by several irregularities, especially in the transmission of the results and final announcement of the winner.

It is a cornerstone of the rule of law and proceedings before the courts that it is not sufficient to advance a claim and then have it adjudicated by the competent

[27] J.B. Ojwang, *Summarised Dissenting Opinion, Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission & two others,* Election Petition no. 1 of 2017 [Determination of petition without reason], 1 September 2017, [3]
[28] N.S. Ndung'u, *Summarised Dissenting Opinion, Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission & two others,* Election Petition no. 1 of 2017 [Determination of petition without reason], 1 September 2017, [1]
[29] Ibidem

judges; such a procedure would be equal to absence of justice as every allegation, irrespective of its validity, could in principle reach a court and be heard by judges. On the contrary, the petitioners have to respect precise procedural rules which demand them to clearly formulate their case, specify which legal provisions would have been violated and collect sufficient and convincing evidence proving the respondent's liability. Failing to do so, it is like no case exists at all.

With this general framework in mind, we will now see how the petitioners in *Raila Amolo Odinga (2017)* built their case, trying to convince the Supreme Court's Coram of the validity of their allegations. The information provided by the petitioners can be found in the text of the motivated sentence, which not only contains the verdict of the majority, but also recalls the facts and the affidavits of both the petitioners and respondents.

In 2017, Odinga and his running mate brought to the attention of the Supreme Court for ascertainment five aspects concerning the presidential election: (1) The substantial non-compliance of the 2017 Presidential Election with relevant constitutional and electoral law principles (2) Evident failures in the electronic system used to transmit the results (3) Intimidation and undue influence exerted by Uhuru Kenyatta on the voters in specific constituencies (4) The unprecedented number of rejected votes and their role in the final tallying process and, finally, (5) The necessity to review some principles set by the Supreme Court in 2013 concerning electoral petitions, namely the standard of the proof.

From the brief recall of these five points, it can be concluded that the petitioners adopted a wide strategy, involving in the case different aspects and actors connected to the electoral process. A significant part of the petitioners' case rested on the technological problems experienced in the phase of transmission of the results from the constituency tallying centres to the National Tallying Centre in Nairobi. As we have previously noted, putting the accent on technological failures was not only a way to drive the attention of the Court to problematic aspects of the election but also to bring into play the IEBC as the major responsible of the KIEMS shortcomings. According to the petitioners, being the IEBC the constitutionally-established EMB, it had the duty to oversee that the KIEMS worked well, satisfactorily transmitting the results along the three-step

polling stations – constituency tallying centres – National Tallying Centre chain. On that regard, it was argued that the IEBC had substantially lost control of the electoral process, inexorably compromising its outcome. All this was even more serious if the Court considered that the KIEMS and other technological devices had been introduced to guarantee the integrity of Kenyan elections, putting an end to an infamous and long-lasting history of electoral irregularities and malpractices.[30]

With reference to the IEBC's responsibilities, the petitioners claimed that, on the 11th of August, the IEBC Chairperson had declared the final results on the basis of partial data; in fact, at the moment of the announcement, the NTC still had not received from the concerned 10,000 polling stations the Forms 34A indicating the specific results, representing approximately five millions voters.[31] In addition, and confirming the negligent and wrongful conduct of the IEBC, the petitioners had received from their party agents present at the NTC credible evidence, witnessing that many Forms 34A and B did not comply with the integrity and security standards envisaged by the law lacking, *inter alia,* the IEBC stamp and the returning officer's and party agents' signatures.[32]

Therefore, considering that the KIEMS had been introduced to improve electoral practice in Kenya and the seriousness of the denounced episodes, it was Odinga's contention that the IEBC had substantially failed to comply with its constitutional mandate of overseeing and conducting elections. The petitioners concluded their case against the Kenyan EMB by declaring that the shortcomings and mismanagements were so diffused that the IEBC *«could not accurately and verifiably determine what results any of the candidates got»*.[33]

Involving the IEBC and highlighting the consequences of its incompetence was only a part of the petitioners' strategy. In fact, for Odinga, the annulment of the presidential election should necessarily pass from the judicial acknowledgement that Uhuru Kenyatta had violated his duties under the law as a

[30] Supreme Court of Kenya, *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & two others,* Election Petition no. 1 of 2017, [23]
[31] Ibid., [28]
[32] Ibid., [37]
[33] Ibid., [32]

candidate by intimidating voters in specific constituencies and using his position of power as the incumbent president to unduly influence the election.

Accusations of intimidation referred specifically to episodes that had taken place on the 2nd of August 2017, in Makueni County, when Kenyatta had allegedly threatened the local chiefs for not supporting him.[34] As to the undue influence, Odinga claimed that Kenyatta had contravened the Election Offences Act by diffusing and publishing materials during the electoral period; these materials were intended to unduly advertise the achievements of the outgoing government. Moreover, Kenyatta was also accused of vote-buying, having allegedly paid cheques to the IDPs from the 2007 Crisis.[35]

An additional element that the petitioners' brought to the attention of the court to support their thesis of a rigged presidential election was the unprecedented number of rejected votes, accounting for at least 2.6% of the total votes cast.[36] Even though all the rejected votes had been unduly excluded and had gone to Odinga, the result could not be overturned; instead, what the petitioners really sought was to highlight how these rejected votes could have substantially lowered Kenyatta's possibilities to overcome the constitutional threshold set by art. 138(4) to be elected as president: *« A candidate shall be declared elected as President if [he] receives – (a) more than half of all the votes cast in the election and (b) at least twenty-five per cent of the votes cast in each of more than half of the counties».*[37]

In substance, what Raila Odinga was asking to the judges of the Supreme Court was to take into account the relevant number of rejected votes and from there to reconsider its 2013 stance which had ruled that rejected votes must not be considered in the final tally of presidential elections.[38] Evidently, it was in the runner-up's interest to obtain a reconsideration of this position, as the inclusion of rejected votes in the final tally would have extensively reduced Kenyatta's probabilities to reach the constitutional threshold.

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[34] Ibid., [19]
[35] Ibid., [20]
[36] Ibid., [40]
[37] *Constitution of Kenya* (2010), art. 138(4)
[38] Supreme Court of Kenya, *Raila Amolo Odinga* (2017), [40]

In the 2013 electoral petition, the Supreme Court had correctly taken a stance on the issue of rejected votes not being the matter regulated by the constitution or the Elections Act. However, the request to move away from its precedent had major legal implications, belonging Kenya to a common law system. It is common knowledge that the *stare decisis* principle, binding judges to conform to the judicial precedent, is the cornerstone of the common law system; nevertheless, the Supreme Court is authorised to override its precedent decisions even though it has to be recalled that such a move is quite exceptional and full of implications for the legal system of a country. In common law countries, and we certainly have all clear in mind the United States case, when the Supreme Court decides to depart from its precedent jurisprudence, that decision is always considered as historical, determining major changes in the interpretation of the law by courts.

Since now, we have mainly focused on the episodes denounced by the petitioners as worth further ascertainment by the judges. However, an electoral petition without any reference to constitutional and legal principles allegedly violated in the context of the episodes denounced, would hardly be considered by any court. In other words, it is not enough to accuse the counterpart and spot the light on specific episodes: the petitioner has to indicate which principles and rules have been violated, at every level.

In the 2017 case, the two petitioners accomplished with these requirements by attempting to demonstrate that the IEBC's conduct had led to the violation of fundamental constitutional and legal principles concerning elections.

At the constitutional level, the petitioners quoted art. 38(2), establishing the right of every citizen to *free, fair and regular elections,*[39] and art. 81(v) concerning the IEBC obligation to administer elections in an *impartial, neutral, efficient and accountable manner.*[40] Moreover, art. 86(e) concerns the IEBC obligation to ensure an *accurate, verifiable, secure, accountable and transparent* voting method.[41]

[39] *Constitution of Kenya* (2010), art. 38(2)
[40] Ibid., art. 81(v)
[41] Ibid., art. 86(e)

These constitutional dispositions were supplemented by statutory rules, including the Election Offences Act, sanctioning different behaviours every candidate must refrain from during electoral periods, and Section 83 of the Elections Act:

> No election shall be declared to be void by reason of noncompliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election. (The Elections Act, no. 24 of 2011)

Taking everything into account, the core of 2017 Odinga's petition consisted in convincing the Supreme Court of the superficiality and carelessness of the IEBC in conducting the elections and how this discreditable conduct had led to the violation of fundamental constitutional and legal principles.[42]

The IEBC illegal conduct was reflected in the many technological shortcomings that had negatively affected the result transmission process, operations at the NTC and the final announcement of the results, based on partial or unverified data. According to Raila Odinga, the combined electoral malpractices and connected violations of the constitution and elections law, had *de facto* usurped people's sovereignty, extensively voiding of meaning the votes they had expressed on the 8th of August electoral round.

If this alarming framework had, in the end, brought the IEBC Chairperson to illegally declare Uhuru Kenyatta as the president-elect, the incumbent was no extraneous to illegal conduct either. In fact, the petitioners had accused him of voter intimidation and undue influence on voters and the electoral process.

Finally, the annulment of the August 2017 presidential elections should necessarily entail, according to the petitioners, an effort by the Supreme Court to review its early positions on the role of rejected votes and fundamental principles in electoral disputes like the standard of the proof, considered to be too burdensome on the petitioners.[43]

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[42] Supreme Court of Kenya, *Raila Amolo Odinga* (2017), [15]
[43] A detailed explaination of the set standard of the proof in electoral cases will follow. Ibid., [46]

The Respondents' Case

By deposing their affidavits, the respondents tried to answer back to the allegations that had been raised first by the petitioners, each responding to the charges concerning them directly.

Therefore, the IEBC task was mainly that to disprove the arguments according to which the August Presidential Election had not been conducted according to the constitutional and legal principles concerning elections. To support this thesis, the IEBC declared that the whole electoral cycle had been backed by *« an elaborate electoral management system»,*[44] suggesting that all the appropriate measures had been adopted to guarantee the maximum level of transparency and the overall compliance of the electoral process with the applicable legal framework. As an evidence of what it was affirming, the IEBC recalled the positive assessment given by practically all the international electoral observers[45] who, in general, had witnessed a pacific and well-managed election.

For what concerns the failures of the KIEMS in the transmission of the results along the three-levels chain, it appeared that the IEBC was much more at pain in discharging the petitioners' accusations. In fact, it was not totally possible for the IEBC to deny, through evidence, the contested shortcomings. Hence, the IEBC counsels adopted a strategy aiming at minimising the technological issues, showing that in no case they could be ascribed to the IEBC. Conversely, minor technological disruptions had to be imputed to external factors like the unavailability of 3G/4G networks – on which the KIEMS heavily relied on – or *« administrative and human errors»*[46] which were out of the IEBC control.

As denounced by the petitioners, the failures of the KIEMS had prevented the correct transfer of many forms 34A from the polling stations up to the following levels of the transmission chain. The IEBC strategy on this issue was that of contesting the extent of the problem, attacking the respondents on their failure to provide adequate evidence showing that the missing forms potentially

[44] Ibid., [52]
[45] Ibid., [53]
[46] Ibid., [58] and [98]

concerned 5 million votes.[47] Moreover, the IEBC denied that the discrepancies between the results announced on the basis of available Forms 34B and those indicated on the Forms 34A transmitted to the NTC after the 11th of August could have a distorting effect as claimed by Odinga; once more, errors and inconsistencies were limited and mainly imputable to human errors, factors that the IEBC could not reasonably control.

It was further contended that the share of rejected votes provided by the petitioners was exaggerated and voluntarily inflated; according to the IEBC rejected votes accounted for nothing more than a 0.54 per cent, very far from the NASA estimates of 2.6.[48] Hence, there was no unprecedented number of rejected votes as it was claimed by the counterpart.

The pretentious nature of the petitioners' arguments about rejected votes showed even more, according to Kenyatta and the IEBC, the necessity to strictly adhere to the judicial precedent set in 2013 on the weight of rejected votes in the final presidential tally; all the respondents agreed that the interpretation given on that occasion was a good one and should not be departed from: the rejected votes do not count and have to be excluded from the determination of the constitutional threshold.

On his part, the incumbent and declared president-elect Uhuru Kenyatta, had to respond to specific accusations concerning his person moved by his eternal rival Raila Odinga. Clearly, Kenyatta strenuously denied having engaged in the activities that were contested. Concerning the episodes in Makueni County, Kenyatta defended his conduct on the basis that it had been misinterpreted by Odinga: he had simply recalled the Chiefs their role as public servants and their consequent duty not to engage in political campaign for any party. In addition, accusations of having bought the IDPs' vote with cheques were totally unfounded: transfer of funds to the IDPs had occurred under the framework of a national programme in their favour and regularly approved by the Parliament.[49]

What it emerges from the analysis of the respondents' affidavits, is a strategy shaped to answer back, point by point, to the accusations advanced by

[47] Ibid., [74]
[48] Ibid., [78]
[49] Ibid., [74]

Raila Odinga and his team. This strategy was essentially deployed by downplaying all the errors and episodes of misconduct, imputing them to technical issues or non-voluntary human errors that the IEBC could do little to prevent.

A second key element was the attempt to discredit the evidence adduced by the counterpart, showing their implausibility and, therefore, the limited impact of minor shortcomings on the whole election.

Finally, from the strictly legal point of view, the respondents strenuously defended the *stare decisis doctrine,* with the aim to preserve what had been established in 2013 and considered favourable to their position from judicial revision. Accordingly, rejected votes should have not been considered in determining the constitutional threshold for election and the standard of the proof be left untouched.

The Principles set by the Court

Having heard both the petitioners' and respondents' submissions and analysed the evidence brought by both parties to support their thesis, the judges of the Supreme Court were finally called to determine the petition. Before doing that, the Court deemed wise to settle some fundamental legal principles in electoral cases. By completing this preliminary phase, the Court was not only preparing the ground for the final judgment but also addressing some matters raised by the petitioners and the respondents alike concerning the opportunity to depart from what it had been established in the 2013 *Odinga v Kenyatta* case.

The principles at stake in the case were: the burden of the proof, the standard of the proof, the role of rejected votes and the interpretation to be given to section 83 of the Elections Act.

The burden of the proof was defined as the duty of one party or the other in a case to prove his allegations both through dissuasion and production of evidence.[50] Citing the *Raila Odinga* case of 2013, the judges recalled that, concerning the burden of the proof, electoral cases resemble civil causes: it is the

[50] Ibid., [129]

petitioner who bears the responsibility to prove that a case really exist. Moreover, when it is brought to court, the public administration enjoys a sort of presumption of innocence, as it is presumed that « *All [its] acts have been done rightly and regularly».*[51] Although the plaintiff bears primary responsibility of proving his allegations, once he has successfully accomplished with his duty, then the burden of the proof shifts to the respondents.[52]

It can be said that the standard of the proof has to do with the quality of the proof, its content and the difficulty that derives to prove one's assertions. In general, the more serious the accuses, the higher the standard of the proof; this is why, in criminal proceedings, it is required to demonstrate one's allegations *beyond a reasonable doubt*, while in civil causes a less onerous *balance of probabilities* is set.

Where are electoral petitions positioned? Are they comparable to civil causes or do they resemble more criminal cases? Or again, could they be considered as a special category of petitions? The Supreme Court had already answered these questions in the 2013 case, setting the standard of the proof for electoral petitions in Kenya. On that occasion, it was recognised the special nature of electoral petitions which could not be compared to ordinary civil causes as they involved the entire electorate and not just two parties.[53]

Owing to the special nature of electoral petitions, in 2013 the Supreme Court of Kenya had established an intermediate standard of the proof, above the balance of probabilities required for civil matters but below the criminal standard of beyond reasonable doubt. The only departure from this principle was when, in electoral cases, allegations of criminal offences were made; on that case, the required standard of the proof was beyond a reasonable doubt.[54]

The petitioners had already criticised the elevation of the standard of the proof, since it imposed a superior burden on the plaintiffs; for this reason, in 2017 they demanded to the Court to depart from what it had established four years

[51] Ibid., [130]
[52] Ibid., [133]
[53] In 2013, the Kenyan Supreme Court engaged in a comparative exercise to determine the nature of electoral petitions. The acknowledgment of the special nature of electoral petitions was derived from an analysis of a 1970 Tanzanian High Court Decision in *Madundo v. Mweshemi & A-G Manza,* HCMC No. 10 0f 1970 quoted in *Raila Amolo Odinga* (2017), [150]
[54] *Raila Amolo Odinga* (2017), [146] [148]

before. Despite acknowledging opinions that had criticised the established standard of the proof in 2013, the Supreme Court confirmed that the special nature of electoral causes imposed not to depart from its earlier considerations: the correct standard of the proof was an intermediate one except from the case of criminal offences committed in the context of elections, where the *beyond reasonable doubt rule* applied.[55]

As we have seen in the paragraph concerning the petitioners' case, Odinga and Musyoka lamented an unprecedented number of rejected votes, accounting for 2.6 per cent of all the votes cast. Given the extent of Kenyatta's lead over Odinga after the 8th of August, these votes could not have completely overturned the presidential race; however, they could have influenced Kenyatta's ability to reach the constitutional threshold to be declared as president-elect. For this reason, referring again to the 2013 ruling, the petitioners asked a review of the principle that rejected votes could not be included in the votes cast and therefore they did not influence the candidate's attainment of the constitutional threshold. The rationale behind this reasoning was that rejected votes are assigned to no candidate because the voter does not clearly manifest his preference; therefore, *« It would be illogical to take them into account».*[56]

Once again, the Supreme Court did not depart from what it had established in 2013; to justify this stance, the judges engaged in another exercise of comparative jurisprudence, concluding that in a great majority of common law countries – including Australia, Canada, India, South Africa and the United Kingdom – rejected votes were not considered and therefore excluded from the final election tally.[57]

Finally, the court fully addressed the issue of interpretation of section 83 of the Elections Act, given that it had not done it in 2013[58] and that this provision was quite important in establishing the requirements to annul an election. Notwithstanding the Court's denial of having interpreted section 83 in 2013, it was the petitioners' contention that they actually did, giving a *« Conjunctive and*

[55] Ibid., [152]
[56] Ibid., [161]
[57] Ibid., [170]
[58] The Supreme Court specified that the interpretation of Section 83 was not at stake in the 2013 electoral petition; therefore, only limited references had been made to it. Ibid., [187] [201]

narrow interpretation […] [that] undermin[ed] the supremacy of the Constitution».[59] The expression "conjunctive interpretation" refers here to the meaning that has to be done to the two parts of section 83 of the Elections Act. The legal provision at stake commands that an election cannot be annulled if it has complied with the Constitution or non-compliance with it did not affect the outcome of the election itself. According to a conjunctive interpretation of the section – the one supported by Kenyatta and the IEBC – the non-compliance of the election with the constitution and the law alone is not enough to declare an election null and void: in fact, it is also necessary that the non-compliance affects the election.[60] It is easily understandable why, according to the petitioners, a conjunctive interpretation amounted to a violation of the supremacy of the constitution: in principle, an election not complying with the constitution may be still validated if violations did not affect the election itself!

On this issue, it appears that the Supreme Court adopted a defensive strategy, trying to discharge any allegation of dangerous legal interpretation not respecting the supremacy of the constitution. Hence, the judges denied having interpreted the provision at stake and in addition, they supported a disjunctive and literal interpretation.

Given the evident presence of a disjunctive conjunction "or" connecting the two limbs of the section, no interpretation would be acceptable but the disjunctive. As a result, a person seeking to obtain the annulment of an election shall be able to prove either that the conduct of the election did not comply with the constitution and other laws or that the bad conduct affected the results.[61]

From the analysis of the fundamental principles concerning electoral disputes commented by the Supreme Court, it can be noted that all these had already emerged in the 2013 presidential petition, witnessing their effective relevance in all legal cases concerning disputed elections. The petitioners' tried to obtain a re-interpretation of these principles in a way more favourable to their claims; however, this request implied a departure from the strict application of the *stare decisis,* potentially subverting the electoral jurisprudence of Kenya. The

[59] Ibid., [174]
[60] Ibid., [178]
[61] Ibid., [203]

Supreme Court recalled that it had the right to ignore its jurisprudential precedents, however recognising that an eventual departure from earlier decisions should be slow, so as to *« Ensure predictability, certainty, uniformity and stability».*[62]

The Supreme Court considered the enumeration and explanation of the principles a necessary preliminary phase to set the ground to determine the case presented before it. Considering that the interpretations given in 2013 were all confirmed, it can be concluded that the Court largely determined the Odinga's 2017 petition according to the precedents it had set.

The Court's Considerations

Following the establishment of the legal principles governing the electoral petition, the Court ascertained the facts with the aim to answer in the merit to the four issues raised by the case: whether the presidential election had been conducted in accordance with the constitution, whether illegalities and irregularities had taken place, their impact on the electoral process and the measures to be adopted.

The compliance of the 2017 presidential election with the constitution and the legal framework could only be demonstrated by showing that the denounced shortcomings in the transmission and tallying process had not taken place or, if they had, that they had not been systemic. Hence, on technical and electoral management aspects depended the constitutionality of the election, as widespread shortcomings in the conduction of the election were tantamount to a violation of the principles of accountability, efficiency and transparency entrenched in the supreme law.

To properly address the issue, the Supreme Court commenced by affirming that *« Elections are not only about numbers […] elections are processes».*[63] From this affirmation, it can be derived that, according to Court, the result of an election

[62] Ibid., [140]
[63] Ibid., [224]

is certainly important but, at the same time, it is necessary to evaluate the complete process from which these results have spurred.

The core of the petitioners' case was that problems in the transmission process, that had impeded the punctual digital transfer of Forms 34A to the NTC, had determined a premature announcement of the results, not sufficiently grounded on data coming from the polling stations. In effect, the depositions before the court had demonstrated that, upon request, IEBC agents at the NTC had not been able to provide ODM/NASA agents all the 34A and 34B forms;[64] moreover, all this happened after the declaration of the results. The unavailability of all the relevant forms and documents was protracted also during the hearings of the presidential petition: upon formal request of the Court, the IEBC had not been able to produce the requested documents.[65] Additionally, and in total default with respect to the Supreme Court's order of scrutiny, the IEBC had not granted access to its servers, leaving to the Court no choice but that of concluding that the data published on the IEBC webpage had been manipulated or were unreliable.[66] Impeded access to official forms and IT servers were considered as a symptom of lack of transparency of the IEBC.

In addition to all that, the Court was not persuaded by the respondents' strategy to downplay and minimise the shortcomings in the transmission process; in fact, the judges reasoned that from the very moment it had decided to introduce the KIEMS, and knowing its dependence on 3G/4G networks, the IEBC had been certainly aware of the fact that many polling stations located in remote areas could not access the server and timely transmit their results. During the debate, it had emerged that once the IEBC noticed the first technical problems, instructions were given to presiding officers of unreachable polling stations to move to areas where they could catch 4G, so as to regularly transmit the scan of their 34A form. However, they did not comply with these instructions.[67]

Overall, it is a fact that technical problems had occurred. The IEBC was well-aware that the KIEMS transmission system depended on the availability of

[64] Ibid., [251]
[65] Ibid., [267]
[66] Ibid., [280]
[67] Ibid., [270]

3G/4G and that many Kenyan polling stations could not be reached by this network. Where alternative methods of transmission had been put in place, IEBC instructions had been totally disregarded, preventing the transmission of Forms 34A. For all the reasons mentioned above, the Supreme Court did not trust the IEBC when it declared that technological shortcomings were imputable to minor errors and in any case beyond its control; instead, the KIEMS failures were equated to a *« Clear violation of the law».*[68]

With reference to the declaration of results, the IEBC had tried to demonstrate that the 11th of August announcement had been regularly done by making reference to the sole 34B Forms collecting the aggregated results for each constituency. In other words, the unavailability of all 34A forms did not affect in any way the reliability of the results.

In principle, 34A and B Forms provide the same data; they only show results in a different shape, as 34B Forms aggregate those of the whole constituency of reference and 34A provides an official tabulation of the results of every single polling station. However, the highlighted inconsistencies between the two forms, ascertained when finally all the 34A had reached the NTC in Nairobi, demonstrated that the two models do not necessarily coincide.

It can be reasonably said that the electoral law had introduced two separate forms to allow a double-check of the results. In effect, according to the Supreme Court, the act of declaring Uhuru Kenyatta the president-elect on the basis of Forms 34B only was indicative of the IEBC's failure to verify them, since a comparison with the disaggregated data coming from the single polling stations and registered in Forms 34A would have helped to check their reliability.[69]

In conclusion, the unavailability of counter-evidence able to disprove the petitioners' allegations, the effective declaration of results without the disposal of all the required forms and the IEBC's attitude aiming at downplaying violations of the Elections law as "technical issues", all persuaded the Court that the 2017 Presidential Election had not been conducted in compliance with the constitution. The Court acknowledged that minor disruptions could always happen, as *« No*

[68] Ibidem
[69] Ibid., [289] [290]

election is perfect»[70] however, the episodes concerning the 2017 presidential race could not certainly qualify as irrelevant and minor mistakes.

The ascertainment of illegalities and irregularities was the part of the petition directly calling into question President Uhuru Kenyatta, as the alleged responsible of undue influence and intimidation of voters. On both aspects, the Court dismissed Raila Odinga's allegations, on grounds of inadequate evidence not reaching the required standard.[71]

For what concerns the impact of the ascertained irregularities affecting the transmission and final tally process, the Supreme Court specified that their evaluation required to look both at the quantity of the problematic episodes and the quality of the violations. The quantity is relevant to establish the magnitude of the events: if they are limited *« The Court should not disturb the election»;*[72] the qualitative analysis is instead necessary to determine the seriousness of the ascertained irregularities.

Taking everything into account and particularly what had been found concerning the constitutional violations committed through careless electoral management, the Supreme Court declared that: *« The illegalities and irregularities committed by the 1st respondent [IEBC] were of such substantial nature that no Court, in good conscience, can declare that they do not count».*[73]

In sum, not only had it been ascertained that major problems had emerged in the transmission, tallying and declaration of the results, but also their impact had been so widespread that it could not be reasonably ignored or excused. As the Court had rightly noted, elections are processes, meaning that every single episode and activity throughout the electoral cycle is linked to the following. Therefore, even if irregularities are concentrated at a specific stage of the process, they can still affect the final outcome.

Applied to the Kenyan case, the multiple failures in the transmission system can be seen as trivial technical issues or major shortcomings that determined a chain of negative events: the unavailability of the results from many polling

[70] Ibid., [299]
[71] Ibid., [310] [322]
[72] Ibid., [378]
[73] Ibid., [379]

stations, the too rapid declaration of Kenyatta as the president-elect and the failure to adequately verify the data on which the official declaration was based.

All in all, the irregularities deriving from the IEBC careless conduct were more indicative of *« Systemic institutional problem»*[74] rather than of specific personal liabilities attributable to people consciously altering the electoral outcome; as a consequence of this, it was not possible to demonstrate beyond a reasonable doubt that the IEBC Chairman had engaged in criminal conduct, just as Kenyatta had not been considered responsible of the illegal actions imputed to him.

The Conclusions

In the final part of the sentence, out of the strict requirements of the legal proceedings, the Supreme Court explained in a clear and evocative language the rationale behind the decision to annul the presidential election. This is the most narrative and less legalistic part of the decision, although the law is never absent. The concluding remarks of the court are perhaps the most important of the decision, as they set the tone, substantiate the content and make understandable to everyone the critical importance of a sentence annulling the outcome of an election.

The leitmotiv of the conclusion, the North Star guiding the Court in its decision, was the simple principle of the supremacy of the constitution. Electoral rights are entrenched in the fundamental legal text of Kenya; their breach is per se sufficient to determine the annulment of an election. In fact, if an election is not substantially conducted in accordance with the constitution and relevant legal law and it does not convey to people the impression of being free and fair, then it is nothing more than a betrayal of the principle of people sovereignty.

In view of making the principles of supremacy of the constitution and popular will triumph, the Supreme Court can even overturn the results.[75] However, this power *« Is not forcefully taken but donated by the people of*

[74] Ibid., [386]
[75] Ibid., [389]

Kenya»[76] as the constitution was adopted for the people and approved by it. The constitution is the only guide and term of reference for the judges who, due to their special role, have first to abide by it.

The Supreme Court concluded its ruling, in a rather poetical way, by entrusting the future splendour of Kenya to the principle of the supremacy of the constitution: *« The greatness of a Nation lies in its fidelity to the Constitution and strict adherence to the rule of law»;*[77] this maxim is true for the conduction of elections as well as in every aspect of the public life of a country.

In conclusion, the 2017 Supreme Court ruling on the presidential petition filed by Raila Odinga can be considered historical for many reasons. The first, and most evident, is its outcome, as for the first time in the history of Kenya a presidential election was annulled on grounds of irregularities and illegalities affecting the process. Secondly, being the second electoral petition adjudicated in the merit after the introduction of the new constitution, it represented an occasion to affirm or reaffirm legal principles that are essential in the administration of electoral justice. Finally, it had reinforced, through electoral justice, the importance for every citizen and institution, from judges to political candidates and the EMB, to strictly adhere to the constitution while performing their tasks, so as not to betray the mandate conferred by the people. In the next chapter, we will address the goodness of this decision and its impact on the promotion of democracy and human rights in Kenya.

[76] Ibid., [399]
[77] Ibid., [394]

4 CHAPTER IV: ASSESSING THE IMPACT OF THE 2017 SUPREME COURT'S RULING

4.1 How to Evaluate the Kenyan EDRS?

Assessing a national EDRS is no easy task. Generally, it can be affirmed that a good EDRS consistently protects citizens' electoral rights, oversees the EMB's conduct and provides accessible, efficient and transparent procedures. Other additional factors that have to be taken into account are the widespread perceptions on the efficiency and reliability of the system, its performance in a concrete situation of electoral dispute, the principles it sets to advance electoral justice as well as the interactions of politicians and political parties with the system.

Our assessment of the overall impact of the 2017 Supreme Court's decision in *Raila Odinga* on the promotion of political (electoral) human rights and democratic governance in Kenya will be based on this broad approach.

Consequently, we will first look at public opinion's reactions to the announcement of the verdict, which are very much indicative of the atmosphere in the immediate aftermath of the 1st September 2017. We do not presume to assess the merit of the Kenyan EDRS by simply looking at the popular reactions to the annulment verdict; however, the study of Kenyan elections widely demonstrated that perceptions of transparency, efficiency and independence are crucial factors determining the stability of the democratic system and the pacific resolution of electoral disputes.

At a further level of the analysis, we will focus on the EDR procedures, answering critical questions like: is the Kenyan EDRS accessible? Does it provide for transparent procedures? Is it efficient in handling electoral disputes?

In performing this part of the analysis, we will be guided by the *Electoral Justice Assessment Guide*[1] edited by the International Institute for Democracy and Electoral Assistance which consists in a practical checklist that every interested

[1] Oliver Joseph and Frank McLoughlin, *Electoral Justice System Assessment Guide* (Stockholm: International Institute for Democracy and Electoral Assistance, 2019)

person, from the ordinary citizen to the researcher, can complete evaluating the EDRS of their country.

After having reviewed the available procedures we will turn to the content of the 2017 Supreme Court's sentence, considering some contentious issues that, in our opinion, emerged from the verdict. Was the decision of the Court based on solid legal reasoning? Did not the Court override too easily the principle of popular sovereignty by nullifying an election that had been evaluated as free and fair by all the major international observers? Did not the Court, in the end, void of meaning the supreme expression of democratic will by calling the IEBC to organise a re-run which was eventually deserted by the majority of the eligible voters? Does it make sense to organise a fresh election without major reforms to the EMB which could help to address the most problematic issues emerged during the first round of voting?

Clearly, a negative answer to all these questions would irremediably discredit the image of the Supreme Court as a valid EDRB and would inevitably lead us to the conclusion that the 2017 Supreme Court's decision did not, on the whole, contribute to advance Kenyan people's electoral rights and reinforce democratic institutions in the country.

However, we will support the opposite thesis, attempting to demonstrate that, through its decision, the Supreme Court enormously contributed to reinforce electoral justice in Kenya – by affirming the supremacy of the constitution – and democratic practice by casting a light on the importance of the quality of electoral processes over the mere numerical results.

We will conclude by affirming that the nullification of the 2017 Presidential Election represented a milestone in the process of affirmation of the independence of the Judiciary in Kenya and overall reinforcement of the Kenyan EDRS. A well-defined framework for electoral justice was already in place for the 2013 elections; however, it was only with the 2017 decision that the Supreme Court demonstrated that it was not only able but also willing to nullify elections and stand against the incumbent president if the conditions subsisted.

4.2 Reactions to the Supreme Court's Decision

In this section, we will use journalistic sources to reconstruct the atmosphere in Kenya in the immediate aftermath of the announcement of the landmark verdict in *Raila Odinga* (2017).

This exercise is important because in democracy, grasping the public opinion's mood is of the uttermost importance in view of understanding the degree of confidence people have in the public institutions. This is even more relevant in Kenya, where we have seen that the total disjunction between the people and key electoral stakeholders like the judiciary and the EMB generated an atmosphere of total distrust towards justice and electoral management which engendered, in turn, a spiral of violence which caused considerable harm to the Kenyan people. So, perceptions matter, even if they cannot be used as a parameter to test the content of a sentence, which can be done only through specific legal analysis.

Considering its impact on the Kenyan electoral process and the rareness of courts intervening in the electoral process to modify or annul its outcome, the Kenya Supreme Court decision clearly generated opposite and polarised reactions among Kenyatta's and Odinga's supporters. This is evident from the articles describing the fresh reactions to the announcement of the sentence in both leaders' strongholds: street celebrations, parades and jubilation in Kisumu, Kibera and Mombasa, traditionally NASA strongholds, and diffused disappointment in Jubilee Party's majority districts.[2]

As we have already accounted, polarization between the two parties further deepened in the intermediate phase between the Supreme Court's ruling and the re-run of the presidential election in October. This was part of a strategy conducted by both the Jubilee Party and the NASA alliance, systematically attacking the judiciary whenever it adopted a decision against their party.

[2] For detailed accounts see Lilian Kwamboka, " Celebrations in various counties after Supreme Court Decision," *Standard Digital Elections 2017,* https://www.standardmedia.co.ke/elections2017/article/2001253277/celebrations-in-various-counties-after-supreme-court-decision (accessed 29 January 2020) ; Rael Ombuor and Paul Schemm, " Kenya's Supreme Court annuls presidential election result for irregularities, orders new vote", *The Washington Post,* 1September 2017 (accessed 29 January 2020)

Despite his early declarations through which he committed to respecting the Supreme Court's decision, Uhuru Kenyatta and major exponents of his party started a harsh defamatory campaign, vehemently attacking the judiciary and questioning its authority to overturn the popular will. The incumbent president openly insulted the justices, calling them "crooks", subtly threatening Chief Justice Maraga and promising to resolve the problem with the judiciary once re-elected.[3]

These gratuitous and dangerous attacks shocked many Kenyan people, legal professional associations and informed commentators who denounced the seriousness of Kenyatta's assertions, their inappropriateness other than dangerousness, clearly calling Kenyan people to stand to defend the independence of the judiciary and its work to promote and protect the values of the constitution.[4]

If Kenyatta and Jubilee Party did not refrain from attacking the judiciary, overcoming any institutional custom, the opposition was not extraneous to attacks to the Supreme Court neither. Initially, Odinga clearly praised and supported the 4-2 majority decision to nullify the presidential election; the widespread mood was that justice had been finally done after years of an unresponsive and untrustworthy judiciary totally subdued to the president.

However, the winner in Court started to raise the level of tension when he eventually launched his campaign "no reforms no elections" finally deciding to withdraw from the October re-run. This strategy enormously increased the level of pressure on the judiciary and, indirectly, it criticised the Supreme Court for not having supported the annulment order with the prosecution of the IEBC managers responsible for the irregularities.

The level of the opposition's attacks on the judiciary was even increased when, after the 26th October by-election, the Supreme Court's dismissed an electoral petition filed to challenge Uhuru Kenyatta's re-election. NASA supporters declared that the Supreme Court's justices had not dared to annul again

[3] Nation Team, "Stop the insults, Judiciary tells President Kenyatta," *Daily Nation,* 3 September 2017, https://www.nation.co.ke/news/Stop-the-insults--Judiciary-tells-President-Kenyatta/1056-4080730-vgfawez/index.html (accessed 29 January 2020)
[4] Ibidem

the election because they had been threatened by Kenyatta himself and the Jubilee Party.[5]

For Karuti and Collins, the *politicisation of the judiciary,*[6] evident in the systematic attacks on the Supreme Court in particular after the delivery of its verdict on the August Presidential Election, was the distinctive character of the 2017 Kenyan electoral process.

Turning to newspapers' reactions, international correspondents and observers all highlighted the historical character of the sentence and its meaningfulness in terms of democracy reinforcement, in Kenya and Africa alike. Articles evidently recalled the unprecedented character of such a decision in the history of Kenyan electoral petitions and the consequent collocation of the Supreme Court among those few courts in the world that had intervened in the electoral process nullifying the results of the popular vote.[7]

Another aspect that was frequently recalled were the efforts made by the judiciary, since the introduction of the new constitution in 2010, to restore its image as a trustworthy and transparent institution. Therefore, the focus was often on the process of reform of the judiciary which had involved the epuration of corrupted magistrates, their replacement with competent and upstanding judges and the design of a more accessible system of justice.[8]

Thanks to the major changes it had undergone since the launching of the new constitutional system, the Kenyan judiciary had passed from being the most unreliable State institution to the most supported and trusted one;[9] in fact, only a competent and independent judiciary, widely supported by the people could have adopted such a *brave decision*,[10] unequivocally protecting the principle of the supremacy of the constitution, to whom elections have to comply with.

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[5] Kanyinga Karuti and Odote Collins, "Judicialisation of politics and Kenya's 2017 elections," *Journal of East African Studies,* 13:2 (2019), p. 236

[6] Ibidem

[7] Only in Austria, Maldives and Ukraine a court had annulled an election. Kenya became the 4th country in this category. See Njoki Wamai, " Kenya's Supreme Court ruling and what it means for the country," *The Conversation,* 7 September 2017, https://theconversation.com/kenyas-supreme-court-ruling-and-what-it-means-for-the-country-83549 (Accessed 29 January 2020)

[8] Yash Ghai, " Kenya's Judiciary: Agent of Justice under Difficult Circumstances," *Heinrich Böll Stiftung Cape Town,* 15 May 2018, https://za.boell.org/en/2018/05/15/kenyas-judiciary-agent-justice-under-difficult-circumstances (Accessed 29 January 2020)

[9] Ibidem

[10] Njoki Wamai, "Kenya's Supreme Court ruling"

The Supreme Court's verdict was also welcomed and promoted by the most important diplomatic missions accredited to Kenya, including the United States, Canada and the EU Delegation. Together, they issued a Joint Statement which considered the Supreme Court's decision as an *« Important moment for Kenya […] that has demonstrated Kenya's resilient democracy and commitment to the rule of law».*[11]

The electoral petition filed by Raila Odinga determined an extension of the electoral period. The Carter Center and the EU EOM also observed the post-electoral period, ensuring full coverage of the hearings before the Supreme Court; their observers reported that the whole procedure was open and transparent, providing to all the parties involved a fair hearing. The Court was praised for the way it handled the hearings and its final stance was considered a manifestation of the independence of the judiciary. [12]

The EU EOM to Kenya provided a wider analysis of the EDRS of Kenya; the higher number of electoral petitions filed before the judiciary at all levels compared to that of 2013 could be explained, according to the European experts, as a symptom of increased trust in the judiciary as a competent EDRB.[13] Of the 1st September decision, the EU Mission highlighted the importance of the rationale behind the nullification order: the process is more important than the outcome and it has to comply with the constitution; such a stance, according to the European observers, would have invaluably enhanced the integrity of the electoral process.[14]

In conclusion, from the newspapers and related sources that we cited in this section, it appears that the Supreme Court's ruling clearly had a polarising effect on the supporters of the two main parties: their progressively radical stances resulted in crossed attacks on the judges who had pronounced that sentence; while Kenyatta tried to make feel his authority openly threatening the judiciary of adverse consequences, Odinga diffused the idea that the sentence would serve no useful scope without a broad reform of the IEBC. Later on, he openly criticised

[11] *Joint Statement by Heads of Mission in Kenya,* Nairobi, 1 September 2017
[12] Carter Center, *Kenya 2017 General and presidential Elections,* p. 12
[13] EU Election Observation Mission Republic of Kenya, *Final Report,* p. 15
[14] Ibid., p. 16

the Supreme Court for not having upheld the electoral petition filed in the aftermath of the October presidential by-election.

If the reactions of the politicians and their most engaged supporters were harsh and critical, many voices raised to defend the Supreme Court's power to freely adjudicate, without undue interferences, presidential petitions and the judiciary from dangerous and unfair attacks. Those who sided with the Supreme Court were not only members of legal practitioners associations or university scholars and judges themselves, but also ordinary citizens standing for the courts that, in the precedent years, had been able to progressively affirm their independence, dismiss corrupt judges and restore their reputation as a competent and reliable institution.

Finally, foreign correspondents and international observers acknowledged the historical character of the Supreme Court's decision and praised the transparent and accessible procedures, guaranteeing a fair hearing to both the petitioners and the respondents; the outcome of such an excellent process could not result but in a ruling invaluably helping to promote the independence of the judiciary and the improvement of electoral practice in Kenya.

Had we to strike a balance between pro and against positions, we can conclude that the Supreme Court's nullification order was generally well-accepted: it fuelled civil society's manifestations of support to the judiciary and it was very much praised for the procedures adopted. Clearly, it had a major impact on the democratic life and consequently could not enjoy unanimous support, especially from the political forces directly involved in the hearings.

4.3 Testing the EDRS Procedures

The evaluation of the impact of the 2017 Supreme Court's sentence on the promotion of human (electoral) rights and democracy passes necessarily from a two-step process. The first one is carried out in this paragraph and it consists of a broad evaluation of the Kenyan EDRS. More precisely, our task here is to focus on the procedures available to qualified plaintiffs to denounce a violation of electoral rights, ascertain the facts and eventually have the violated rights restored.

Dealing this thesis with a nullification order affecting a presidential election, we will test the Kenyan system limitedly to the procedures available for the challenge of presidential results; this choice is coherent with the line of research that we set in the second chapter, when we decided to exclude from our analysis electoral challenges addressed to lower courts of the judiciary or the IEBC, in order not to excessively weigh down our treatise.

One way to assess the reliability of an EDRS is to test it against commonly accepted standards and principles of electoral justice. In Chapter I[15] we have seen that, as things stand today, there is no international binding convention defining these standards of electoral justice; however, these can be derived from commonly accepted principles of justice (drafted at the international level with the Bangalore Principles). Moreover, we can also make reference to the Accra Guiding Principles, developed by the Electoral Integrity Group. Despite their lack of authoritativeness, these commonly accepted principles of justice can help to clarify what is expected from an EDRS complying with human rights standards.

On the basis of this framework, the International Institute for Democracy and Electoral Assistance developed a methodology enabling every interested person to evaluate the EJS of every country.[16] Forty questions are provided, covering fairness, lawfulness, professionalism, transparency, accessibility, timeliness, independence, impartiality, education/awareness-raising, accountability, inclusivity and adaptability. The questions were framed to cover both the petitioner and EDRB perspectives.[17] For space constraints, we focused only on those questions which are particularly relevant for the Kenyan EDRS for presidential elections, testing it against the first eight abovementioned principles. This is certainly a selective application of the IDEA's methodology; however, it allows us to practically see whether the EDRS designed with the 2010 Constitution and subsequent elections law is consistent with those principles of electoral justice that are emerging at the international level, although not in an authoritative form yet.

[15] See par. 1.4
[16] Joseph and McLoughlin, *Electoral Justice Assessment Guide*
[17] Ibid., p. 16

Fairness

The principle of fairness has very much to do with the procedures available before the competent EDRB; some aspects that have to be considered are the treatment of the parties involved by the court, the access to information relevant for the proceedings and the perception that people have of the same proceedings.[18]

Overall, it seems that the Kenyan legal framework regulating electoral challenges in presidential elections complies with the principle of fairness. Both the petitioners and the respondents have different obligations but an equal position before the EDRB. For instance, the rules concerning the service of the petition provide the plaintiffs alternatives to the onerous direct service but, at the same time, the respondent is guaranteed maximum awareness of the procedures filed against him and a right to oppose them.[19]

Concerning the right to information, there is a constitutionally entrenched right of access to information, [20] which is necessary for the protection of any other fundamental right in the course of judicial proceedings: access to information is crucial to defend the right to free and fair elections provided by art. 38(2) of the Constitution.

Moreover, the procedure for electoral challenges before the Supreme Court entails a pre-trial procedure,[21] whose aim is precisely that of providing all the parties involved with all the necessary information concerning the trial, so as to enhance awareness and clarity.

Finally, the supreme guarantee of fairness is provided by the Kenyan constitution with art. 50(1), establishing the right to a fair and public hearing *before a court or another independent and impartial tribunal or body, to have any dispute settled.*[22] This provision is of the uttermost importance for electoral justice: the expression *« any dispute»* in fact, extends the application of the right to a fair hearing also to electoral petitions; in addition, the fact that art. 50(1) qualifies both courts and other bodies as competent forums means that both

[18] Ibid., p. 23
[19] See Supreme Court, *The Supreme Court (Presidential Petition) Rules,* 2013, sec. 7(1) and 8(1)
[20] *Constitution of Kenya* (2010), art. 35(1)
[21] Supreme Court, *The Supreme Court (Presidential Petition) Rules,* 2013, sec. 9 and 10
[22] Constitution of Kenya (2010), art. 50(1)

electoral petitions handled by the judiciary and those addressed by the IEBC or other bodies are covered by the guarantee entailed in the article.

Lawfulness

The criterion of lawfulness covers different dimensions like the adoption by Kenya of international legal instruments concerning electoral justice (mainly the ICCPR's articles which are also relevant for electoral justice and regional instruments), the acknowledgement by the national legal system of key rights related to electoral justice, the clear definition of the different EDRBs respective jurisdictions and the acceptance by the losing party of the sentence.[23]

For what concerns international obligations, Kenya is a State party to the ICCPR since 1972; several rights protected by the ICCPR having relevance for electoral justice have been transposed in the national legal system, enforced both though the constitution and ordinary laws. Among them we can cite the establishment of a competent forum,[24] the right to an effective remedy,[25] to public hearings[26] and to reasonable fees to file a complaint.[27]

Fundamental rights concerning the lawfulness of proceedings before the courts are extensively guaranteed in the Kenyan legal system; these include the right to notice of the petition, the right to counsel, the right to a legally reasoned judicial decision and non-discrimination in justice.[28]

The losing party's willingness to accept the Supreme Court's verdict in a presidential petition is still a contentious issue. If we look at the enforcement of the decisions in both 2013 and 2017 we can say that the Supreme Court's decisions were accepted, with the losing parties never attempting to challenge them through violence. Nevertheless, there is serious concern over the real

[23] Joseph and McLoughlin, *Electoral Justice Assessment Guide,* questions 2, 3, 6, 7
[24] UN General Assembly, *International Covenant on Civil and Political Rights,* art. 2.3; *Constitution of Kenya* (2010), art. 163(3) and 140
[25] ICCPR art. 2.3; *Constitution of Kenya* (2010), art. 50(1)
[26] ICCPR art. 14; art. 48
[27] ICCPR art. 26; Ibidem
[28] Notice of the petition: *Supreme Court (Presidential Petition) Rules,* sec. 7(1) and 16; Right to counsel: *Constitution of Kenya* (2010), art. 50(2) (g) (h); Right to a legally reasoned judicial decision: *Supreme Court (Presidential Petition) Rules,* sec. 23(1) (2); Right to non-discrimination in justice: *Constitution of Kenya* (2010), art. 159(2)

commitment of the losing party to the respect of the sentence: Kenyatta declarations and attacks on the judiciary in 2017 are the evidence of it.

Impartiality, Integrity and Professionalism

The 2010 Kenyan Constitution establishes precise requirements of professionalism for the judges; these are particularly strict for the magistrates of the superior courts, whose the Supreme Court is part of. Therefore, the justices adjudicating electoral petitions must meet strict criteria of competence and integrity. The first is achieved by combining a university education in law and extensive professional experience as a judge of a superior court, distinguished legal scholar or practitioner.[29] The second derives from an additional constitutional requirement, imposing the selection of the judges of the superior courts from persons whose high moral standing is undisputed, called to adjudicate their cases in an impartial manner.[30]

Transparency

Overall, the Kenyan law applicable to electoral petitions concerning a presidential election entails dispositions enhancing the transparency of the process. As we have already seen, under the Kenyan constitution a fair hearing must be public, which is per se a measure guaranteeing the transparency of the process. Moreover, the hearings before the Supreme Court are broadcasted on the web, potentially reaching every Kenyan citizen interested in verifying how the electoral petition is being handled by the Court. Finally, the pre-trial procedure also enhances transparency, as it is the moment when the Supreme Court informs the parties to the case on the procedures it will adopt to adjudicate the petition.

[29] *The Constitution of Kenya* (2010), art. 166
[30] *Constitution of Kenya* (2010), art. 166(2) (c)

Accessibility

Under the Kenyan law in force, every person can file an electoral petition before the Supreme Court; no specific categories of plaintiffs are mentioned, so the access to the court is, in principle, the broadest possible. However, the Supreme Court (Presidential Petition) Rules of 2013 command that, in order to successfully file a petition, it is necessary to pay the sum of one million Kenyan shillings as a form of security for the costs. The failure to comply with this requirement determines the dismissal of the petition.

Clearly, the obligation to deposit one million shillings may prevent the less wealthy citizens from filing an electoral petition.

Timeliness

As we have already pointed out, presidential petitions in Kenya are subject to strict timing and deadlines. These are mandated by the Constitution, binding the aspiring petitioner to file the petition within seven days from the proclamation of the results and the Supreme Court to adjudicate the case within fourteen days from the filing of the petition.[31] The timing set by the constitution is undoubtedly short, most likely to avoid an excessive protraction of the electoral challenge which would be dangerous as it could fuel uncertainty among the voters.

Independence

The independence of the EDRB is undoubtedly an essential aspect of the credibility of the EJS of a country. Being part of the judiciary, the Supreme Court of Kenya enjoys the independence bestowed by the constitution to the judiciary from other branches of power. Hence, the judiciary is only subject to the constitution and the law.[32]

[31] Ibid., art. 140(1) (2)
[32] Ibid., art. 160(1)

Another guarantee of the Supreme Court's independence as the EDRB for presidential elections is the system of appointment of the justices, always set at the level of the constitution. Although the justices are appointed by the President, the Head of State has not a totally unrestrained power, because he has to follow the recommendations of the National Assembly and the Judicial Service Commission. This last institution offers an additional guarantee of independence, as it was created as the body essentially composed by judges of the supreme and lower courts, autonomously regulating the judiciary and the removal of judges.[33]

Efficiency and Effectiveness

The availability of remedies against a violation of electoral rights is the best guarantee of the effectiveness of an EJS.[34] In other words, an EJS not disposing of the power to intervene in case of a violation of electoral rights and restore a situation of lawfulness, not only would it be useless but also dangerous, as it would generate distrust among the people, disillusioned by the lack of intervention and inability to effectively protect electoral rights.

The Supreme Court of Kenya has indeed a power of redress: once it ascertains that electoral rights have been violated or that the presidential election has not been conducted in a way consistent with the constitution or the electoral law, it disposes of a nullification power. This is precisely what it did in 2017, when the Court reasoned that the failure to conduct certain aspects of the presidential election in line with the constitution justified the annulment of the election itself.

Overall assessment

The IDEA *Electoral Justice Assessment Guide* provides us a methodology that we applied to our case study; we thus evaluated the compliance of the Kenyan EDRS for presidential elections with commonly accepted principles of justice. The main

[33] Ibid., art. 171(1)
[34] Joseph and McLoughlin, *Electoral Justice Assessment Guide,* p. 99

advantage of the IDEA methodology is that its clear and intuitive methodology aggregates all the existent principles of electoral justice reviewed in the first chapter.

Despite their lack of legal authoritativeness, these ideal standards recall fundamental principles and rights guaranteed both by national constitutions and international human rights instruments. They are therefore indicative of how a national EDRS should look like to be consistent with essential human rights principles protected both at the national and international level.

Due to their specificity and the limited space offered by this thesis, it was not possible to go through all the forty questions included in the IDEA Assessment Guide. Although the full treatise of the questions would have undoubtedly provided a complete assessment of the Kenyan EDRS, we preferred to focus only on those principles we considered particularly relevant for the Kenyan EDRS in presidential elections, namely their lawfulness and accessibility.

As we have explained, the actual system allowing every citizen to challenge the outcome of a presidential election was introduced with the 2010 Constitution and related electoral legislation. It was activated both in 2013 and 2017, calling the Supreme Court to adjudicate electoral petitions filed in both cases by the veteran opposition leader Raila Odinga.

This EDRS was left unaltered since 2010, so the standards set with that Constitution were applied also to the 2017 presidential petition.

Having said so, we can conclude that, overall, in 2017 Kenyan citizens disposed of a satisfactory EDRS handling petition arising from presidential elections. The review of the Kenyan legislation which is most relevant for presidential petitions, namely the Constitution and the 2013 Supreme Court (Presidential Petition) Rules offers a complex and well-defined system of guarantees which satisfactorily complies with the principles set in the IDEA Assessment Guide.

At the level of available remedies and procedures, in 2017 Kenyan citizens could count on a well-designed EDRS for presidential petitions. The competent EDRB was identified in the Supreme Court, which offered adequate standards of independence, impartiality and professionalism of the judges, mainly through the

constitution. The procedures for filing an electoral petition are clear, subject to a precise time frame which cannot be escaped; overall, the petitioners and the respondents are treated equally, in compliance with the constitutional right to a fair process and effective remedy, also set by international human rights instruments whose Kenya is part of.

The only areas of concern have to do mainly with accessibility, the timing of the procedures and ratification of regional instruments providing standards for electoral justice (lawfulness criteria). Accessibility to the Kenyan EDRS for presidential elections is wide: everybody can file a petition. However, the obligation to deposit the amount of one million Kenyan shillings to successfully file the petition may, in principle, prevent the less affluent citizens from denouncing violations of electoral rights during presidential elections. Moreover, even though the strict and short time frame provided for the hearing and resolution of presidential electoral disputes was set to preserve the stability of the Kenyan democracy by avoiding unnecessary and dangerous lengthy procedures, at the same time such a short schedule may not allow a detailed and careful analysis of the evidence by the Supreme Court before delivering the verdict.

Finally, even though Kenya generally complies with those civil and political rights defined at the international level and having an electoral relevance, the country has not ratified the African Union Charter on Democracy, Elections and Good Governance yet. This ratification is highly recommended, as the Charter represents one of the most detailed authoritative instruments of international law dealing with electoral standards and resolution of electoral controversies.

4.4 Assessing the verdict in *Raila Odinga* (2017)

Overall, Kenyan citizens dispose of an adequate EDRS to contest the results of a presidential election: a competent forum is established, the right to a fair hearing is guaranteed, procedures are transparent and forms of redress are available to protect citizens' electoral rights and ensure that elections comply with the constitution and applicable elections acts. Despite the minor problems that we

highlighted, formally the Kenyan EDRS for electoral challenges concerning presidential petitions worked well in 2017.

Nevertheless, the analysis is not complete; we still have to evaluate in practice this system, moving from the assumption that an EDRS and its effective contribution to the promotion of democracy and human rights cannot be evaluated by sticking only on the formal procedures. In fact, and upon availability of material evidence, it is important to analyse how the competent EDRB practically intervenes in the electoral process to ascertain irregularities and eventually restore rights.

The case of the 2017 Kenyan Presidential Election offers the occasion to perform this kind of exercise: not only was the EJS activated, but also the Supreme Court delivered an unprecedented verdict nullifying the election. Overall, what was the impact of this decision on the promotion of democracy and human rights in Kenya?

To answer this question we have, once again, to rely on the content of the 1st September 2017 decision, highlighting the most salient aspects and contentious issues that emerged from the verdict. We expect, at the end of the chapter, to find an answer on whether the Supreme Court, through its stance, contributed to reinforce the democratic architecture in Kenya or instead it weakened the system of protection of human (electoral) rights, perhaps unwisely ignoring the supreme expression of the Kenyan voters' will.

To do so, we will analyse the following issues: the coherence of the principles set by the Court with the judicial precedent in electoral cases and electoral rights as protected by the constitution, the anti-majoritarian character of a nullification order, the impact of the nullification order on the meaning of democracy in Kenya and, finally, the opportunity to call for fresh elections without adequate electoral reforms.

Coherence of the Principles set by the Supreme Court

We have seen in Chapter 3 that an important part of the proceedings before the Supreme Court in *Raila Odinga* (2017) was the definition of legal standards and

principles according to which the entire case had to be decided. Following the petitioners' request, the justices provided an interpretation of the burden and the standard of the proof in electoral cases. Additionally, the Court interpreted the meaning of section 83 of the Elections Act (2011) establishing the criteria for the nullification of an election.

A reasoning on the coherence of the principles established in 2017 shall necessarily pass from a consideration on the importance of the judicial precedent in common law systems like Kenya.

As we have already underlined, in the common law tradition the Supreme Court is the only tribunal which is authorised to depart from the judicial precedent, establishing in this way a new interpretation of the legislation to which the lower courts are bound.

At first sight, it can be said that in 2017 the Supreme Court of Kenya departed from its early jurisprudence set in 2013, when it first adjudicated a presidential petition upholding Uhuru Kenyatta's victory against Raila Odinga. Yet, this would be a superficial reading of the 2017 verdict, equalising the content of the legal reasoning with the outcome of the case.

Let us add another consideration: the coherent and consistent interpretation of electoral law, combined with a predictable conduct by the EDRB is indicative of its independence; therefore, a major departure from previous decisions can be considered as a symptom of political bias.[35]

Hence, following this line of reasoning, we will distinguish the content of the sentence from the outcome of the case. What emerged from our analysis is that the Supreme Court reached its final conclusions without departing from the principles it had set in 2013; in fact, the reader will certainly recall that the burden of the proof was confirmed to be the responsibility of the petitioner, while the standard of the proof was an intermediate one, above the balance of probabilities but below the beyond a reasonable doubt required in penal cases. Additionally, the Court confirmed that rejected votes should not be included in the final tally, thus not determining the possibility for a candidate to reach the constitutional threshold. Finally, the Supreme Court filled in an interpretative gap of Section 83

[35] Orozco-Henríquez, *Electoral Justice,* p. 131

of the Elections Act (2011), left open in the 2013 presidential petition. Hence, in 2017 the Court finally set the standard for the annulment of an election: violation of the constitution or irregularities affecting the results. It is enough to demonstrate the existence of one of these two conditions to have, in principle, an election nullified.

In practical terms, between 2013 and 2017 nothing had changed at the level of legal principles governing electoral disputes in Kenya. The line that had been set in the first presidential petition was confirmed five years later, showing a coherent attitude on the part of the Supreme Court with its electoral jurisprudence. Only the outcome of the petition was different.

In our opinion, the fact that the Supreme Court was able, on the basis of the principles that it had developed in 2013, to nullify the election of Uhuru Kenyatta in 2017, is indicative of its fidelity to the principle of predictability of its jurisprudence and independence from other branches of power. Claiming that by annulling the August 2017 election the Supreme Court failed to comply with the requirement of predictability is a stretch, an unfounded stance that finds no confirmation in the legal reasoning adopted by the Court.

By strictly adhering to the principles it had set in 2013, the apex Kenyan court accomplished the no easy task of upholding the petitioners' case by re-affirming legal standards that the same petitioners had found as too burdensome; moreover, in 2017 the Kenyan justices complied with their duty as the supreme EDRB to fill in any existent legal gap,[36] by clarifying the interpretation to be given to section 83 of the Elections Act.

Nobody more than the judges of the Supreme Court was aware in 2017 of the importance of the *stare decisis* in a common law system: by asserting their right to depart from their early jurisprudence, the justices recognised the necessity to do it wisely, providing adequate legal reasoning.[37] This is clearly not the attitude of an incoherent and irresponsible EDRB.

The merit of the Kenyan justices was to have the courage to intervene in the electoral process by remaining faithful to their doctrine and jurisprudence. Those accusing the court of incoherence confuse the outcome of an electoral petition

[36] Ibid., p. 132
[37] Supreme Court of Kenya, *Raila Amolo Odinga* (2017), [140]

with the legal reasoning behind it: adopting this erroneous approach would be tantamount to affirm that the Supreme Court is bound forever to the decision it adopted in 2013, the first time the electoral justice system for presidential elections was activated. Conversely, in 2017 the Supreme Court of Kenya demonstrated that elections are not untouchable events: their results can be annulled if the conditions subsist.

The Counter-majoritarian Character of the Nullification Order

The nullification of electoral results by a Supreme Court may be intuitively perceived as an unacceptable interference of a judicial institution with the free expression of the popular will. This is perhaps the most evident example of what Alexander M. Bickel theorised as the counter-majoritarian difficulty with reference to the power of constitutional review of the American Supreme Court: *« [W]hen the Supreme Court declares unconstitutional a legislative act […] it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it».*[38]

Although the counter-majoritarian dilemma was primarily applied to the power of constitutional review, its relevance emerges also in the context of Supreme Courts endowed with the power to annul the results of an election. Strictly speaking, the Supreme Court of Kenya ascertained the unconstitutionality of the 2017 Presidential Election, because the occurrence of major irregularities in the transmission and tallying processes had prevented it from being held in accordance with the constitutional precepts concerning elections and the representation of the people.

In the aftermath of the 2017 verdict, the counter-majoritarian argument was used by Uhuru Kenyatta to attack the Supreme Court justices and put into question their authority to annul the results of the election.[39] In effect, who authorises a typical counter-majoritarian institution, whose members are not

[38] Alexander M. Bickel, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics,* 2 ed. (Yale University Press, 1986), p. 16-17

[39] BBC News, "David Maraga: The brave judge who made Kenyan history," *BBC News,* 2 September 2017, https://www.bbc.com/news/world-africa-41123949 (accessed 5 February 2020)

directly elected by the people, to annul the results of an election, the supreme expression of the popular majority? If the Supreme Court nullifies an election, should not it at least adopt its decision at unanimity?

To sum up, from a counter-majoritarian perspective, the Supreme Court's nullification power is perceived as an abuse of power, the very same negation of the spirit of democracy. Nevertheless, a number of arguments can be introduced to refute this view.

The first answer that can be opposed to the counter-majoritarian dilemma is that the powers of the Supreme Court are not unlimited as they may seem; they are not self-attributed by the justices abusing their role but instead they derive from the constitution. The judiciary is not a superpower, exercising its authority in an unrestrained way, free from any kind of control: in the ideal application of the theory of the separation of powers the judiciary is independent from the other branches of power, not receiving instructions from them nor being subject to their undue influence. Still, the judiciary is bound to the law and the constitution, meaning that it must strictly adhere to the principles affirmed therein and make constitutionalism and the rule of law advance through its action.

Nobody more than the majority Kenyan justices in 2017 was aware of the implications of their power to annul a presidential election and of the possible concern that such a decision could generate. The Supreme Court immediately recognised that the popular view may suggest that an election cannot be overturned: they dismissed this view and asserted their power to adjudicate an electoral petition, however recalling that this is not an arbitrary power but it is conferred by the people of Kenya through the constitution.[40]

To this power of annulment, it is connected the great responsibility attributed to the supreme guardian of the constitution: ensure that every stage of an election complies with the principles set in the supreme law, as well as in the relevant electoral law. Should the Supreme Court ignore irregularities and constitutional violations, not only would it be validating an illegal and unreliable

[40] Supreme Court of Kenya, *Raila Amolo Odinga* (2017), [389] [399]

election, but also it would abdicate to its responsibilities towards the Kenyan people.[41]

It cannot be denied that counter-majoritarian arguments can have a strong appeal upon the general public. Concerns that a minority can strike down the decision of a majority are not totally unjustified; they should not be ignored but opposed with solid arguments and legal reasoning. In *Raila Odinga* (2017), the Supreme Court precisely did this: it provided the Kenyan people with crystal-clear motivations showing the lawfulness of its decision; when the people are offered convincing and reasoned motivations, they are more likely to abide by the decision of a court.

The constitution, and in particular articles 159 and 160 on the judicial authority and independence of the judiciary, provide the necessary link between the courts and the people: the judiciary is not a branch of power totally disconnected from the citizens; in interpreting the law the justices are abiding by it, administering justice in the name of the people. The Kenyan people, by ratifying through referendum the new constitution, voluntarily bestowed to the Supreme Court the power to nullify a presidential election upon the existence of specific conditions. To claim that the justices cannot apply this power on the basis of an alleged counter-majoritarian character of such a decision is a distorted and irresponsible interpretation of the facts, a mystification of reality which is even more dangerous if advanced by renowned politicians whose declarations are heard and followed by millions of citizens.

Even though they are not directly elected by the people, the Kenyan justices are not disconnected from it; they are appointed by the President – upon recommendation of other institutions – who is in turn directly elected by the people; they interpret the Constitution – which was approved by the people – and they are bound to it, imparting justice, again, in the name of the people. Contesting the intervention of the Supreme Court in the electoral process simply because, for the first time, it annulled the presidential election, is a denial of the very same idea of constitutionalism, the betrayal of a constitutional pact that

[41] Ibid., [399]

provided the Kenyan people with an EDRS that has the legal and moral duty to intervene if citizens' electoral rights are violated, offering adequate remedies.

In our opinion, it was the reaffirmation of its authority as the competent EDRB in presidential petitions and the convincing legal reasoning provided to justify its verdict, rather than the decision to annul the election itself the most valuable contribution offered by the Supreme Court to the cause of Kenyan democracy and protection of electoral rights.

The decision to nullify the election was in itself historical and indicative of the full Supreme Court's predisposition to take unprecedented stances if the circumstances required it; however, we are convinced that it is the true commitment to constitutionalism and the care devoted to the justification of the decision that are the best guarantees of an independent, efficient and responsive EDRS in Kenya.

The Impact of a Nullification Order on Democracy

It can be argued that the nullification of an election has an impact affecting different dimensions of democracy: electoral management, voters' turnout and allocation of state resources.

All these aspects emerged in the days following the Supreme Court's verdict; in fact, the justices called on the IEBC – recognised as the major responsible of the problems concerning the transmission process – to make sure that the presidential re-run and any forthcoming election would be conducted in accordance with the Constitution.[42] This solicitation clearly implied an enhanced effort by the IEBC to take into consideration what went wrong in August, so as to avoid engaging again in a discreditable conduct that had undermined people's trust in the democratic institutions of Kenya.

The re-organisation of the presidential election had also budgetary implications: 480 USD millions were spent to hold the August General Elections,

[42] Ibid., [391]

with an additional cost of 100 USD millions for the October re-run.[43] The elections costs implied an unprecedented concentration of public budget on elections, diverting funds from other important voices of expenditure.

Finally, if we look at the October turnout, we can see that the presidential re-run represented a substantial failure in terms of popular participation in the democratic process. While in August 79 per cent of the registered voters had exercised their right, in October the percentage dramatically decreased to 38 per cent.[44]

Had the nullification verdict a direct impact on the decrease in the quality of the Kenyan democracy? The answer is not easy as different factors intertwine. Certainly, we can say that the order to organise a presidential by-election has a direct impact on the public budget, as the State is obliged by a judicial decision to allocate additional funds for the re-organization of a new election. However, it can be argued that when the legislation allows for the annulment, then the EMB has to be ready for this possibility, earmarking a part of the budget to an eventual second round of voting. Moreover, the Supreme Court simply orders a re-run, but it has no voice on the allocation of public budget for elections; hence, the EMB and the government can notably reduce the increase in electoral costs by adopting optimal choices for election spending. Ultimately, wise budget policies would enormously contribute to making a re-run economically viable.

On the other hand, it seems to us that the Supreme Court cannot be blamed for the lower turnout in the October re-run. The uncontested character of the presidential by-election was due to the conscious decision of the opposition candidate not to run in absence of comprehensive reforms of the IEBC. This is a political decision, whose appropriateness will be discussed in the following sub-paragraph; instead, the objective of an EDRB is to consciously apply electoral law and solve electoral disputes in accordance, generating people's trust in the action of the judiciary. The reactions to the verdict of an EDRB depend instead on the

[43] Anthony Langat, " The Cost of Kenya's Repeat Election," *U.S. News,* 25th October 2017, https://www.usnews.com/news/best-countries/articles/2017-10-25/kenyas-repeat-election-comes-with-a-heavy-price-tag (accessed 7 February 2020)

[44] "2017 Kenyan general election" and "October 2017 Kenyan Presidential election," https://en.wikipedia.org/wiki/2017_Kenyan_general_election https://en.wikipedia.org/wiki/October_2017_Kenyan_presidential_election (accessed 7 February 2020)

institutional maturity of the parties involved and their ability to accept normal institutional dynamics in a democracy, restraining from dangerous behaviours which could hamper the stability of the democratic system. Perhaps, on this side, Kenyan politicians still have a lot to learn.

Fresh Elections and Electoral Reforms

In assessing the most contentious issues linked to the 2017 *Raila Odinga* case, we finally focus on the motivations provided by the opposition to justify the desertion of the presidential re-run: the absence of electoral reforms.

In the already quoted section 391 of the Supreme Court's sentence, we saw that the justices simply ordered the IEBC to organise the re-run in accordance with the constitutional framework and 2011 Elections Act, without asking for any reform of the electoral management system.

The nullification order was clearly grounded on the IEBC failure to conduct in an ordered and lawful manner the transmission process resulting, ultimately, in the announcement of final results whose reliability was certainly doubtful. This led the justices to conclude that the IEBC had failed to conduct the election in a manner consistent with the constitution and that the ascertained irregularities had affected the integrity of the election.

Backed by the Supreme Court's ruling, Raila Odinga and NASA supporters started a mediatic campaign against the IEBC, denouncing its faults and unreliability and calling for broad reform of Kenya's electoral management system. Just as Kenyatta with his vehement attacks on the Supreme Court, also Odinga was responsible for an instrumentalization of the sentence and politicisation of electoral justice: he exploited the lack of reforms for justifying his retirement from the October presidential race. Were his contentions substantiated? Should have the Supreme Court ordered a reform of the IEBC other than annulling the August Presidential Election?

In our opinion, this issue should be analysed by referring to both the Supreme Court's sentence and electoral management reform practices.

Two aspects emerged in the sentence concerning the liabilities of the IEBC and conduct of the elections: (1) the ascertained irregularities were the result of a *systemic institutional problem*[45] but it was not possible to demonstrate a criminal intent on the part of the IEBC nor to assign specific liabilities (2) the irregularities affected the transmission of the results, while other stages of the electoral process did not prove to be problematic.[46]

These two aspects lead us to the following remarks; the first is that, in absence of specific criminal liabilities, it could not be possible to justify any request for dismissal of IEBC staff and management: the IEBC had certainly failed to oversee the transmission process but the liabilities were generic, attributable to the whole institution.

The second remark is that the Supreme Court clearly circumscribed the irregularities to the transmission of results; being so, any change in election management procedures had to be limited to the improvement of results transmission, having other aspects of the electoral process proven not to be critical.

Electoral management reforms are delicate endeavours, involving technical and political choices, whose aim is to improve electoral processes, making them consistent with public desires and expectations.[47] Therefore, if electoral reform is to be undertaken, the aim must be that of improving the electoral process; if modifications of the electoral law are not well planned they can even worsen electoral practice and democracy overall.

Electoral assistance practitioners widely highlight two ingredients for the success of electoral management reforms: the adoption of the legislative changes sufficiently in advance with respect to the date of elections, so as to allow for a transitionary period, and the participation and full support to the action of the EMB by key stakeholders like the executive and the parliament.[48]

To us, it seems that all these conditions were not present in 2017. First of all, the rigid timeframe provided by the Kenyan constitution did not entail a

[45] Supreme Court of Kenya, *Raila Amolo Odinga* (2017), [386]
[46] Ibid., [301]
[47] Alan Wall et al., *Electoral management design: The international IDEA handbook,* revised edition (Stockholm: International Institute for Democracy and Electoral Assistance), p. 365
[48] Ibid., p. 372

sufficiently long period to adopt reasoned laws to reform the IEBC. Secondly, the necessary political support to the process was lacking: the NASA had framed IEBC reform as a non-negotiable point of its programme, while Jubilee party had the majority in both the Senate and National Assembly, making wide consultations and mediation towards a mutually shared reform process virtually impossible. One month and twenty-six days elapsed from the Supreme Court's verdict to the presidential re-run: it is evident that in such a short period of time a coherent electoral reform cannot even be outlined; had changes been introduced, due to the lack of a transitionary period, the IEBC would not have been able to internalise them, making the reform ineffective.

In practice, rushed reform of the IEBC would have reiterated the problems highlighted by the international electoral observers in the pre-electoral period, when the last-minute changes to the Elections Act were highly criticised because adopted close to the elections.[49]

A last aspect to be considered is related to the dangers of rushed reforms of electoral law.

In the immediate aftermath of the 1st September verdict, the Jubilee party majority drafted and passed in both houses of Parliament amendments to the 2011 Elections Act, allegedly to adapt the legislation in a way consistent with the Supreme Court's observations.[50] In compliance with the constitutional procedure for the adoption of laws, the Parliament sent the amendment bill to the President for final ratification. Uhuru Kenyatta did not sign the bill, on grounds that he believed it would have substantially favoured his party in the presidential re-run. However, he neither sent the bill back to the parliament, so the amendments were eventually introduced on the 3rd of November, when Kenyatta had already been confirmed president of Kenya for a second mandate.

The content of the amendment bill was highly contested by the opposition and many civil society organisations, on grounds that it made it more difficult for the Supreme Court to annul a presidential election: the annulment could have been ordered only if the irregularities affected the results. Additionally, it was claimed that the modifications to the Elections Act substantially reduced the independence

[49] See EU Election Observation Mission Republic of Kenya, *Preliminary Statement,* p. 4
[50] Carter Center, *Kenya 2017 General and Presidential Elections,* p. 16

and professionalism of the IEBC, allowing for an easy replacement of the commission's chairperson with less qualified candidates.[51]

Two civil society organisations – the Katiba Group and the Africa Center for Open Governance – supported by two other petitioners, challenged the constitutionality of these amendments, initiating procedures before the High Court of Kenya. The judges delivered their sentence on the 6th of April 2018, finding out that the Elections Law (Amendment Act) no. 34 of 2017 failed the constitutional test of validity; consequently, all the changes introduced to the mandate of the IEBC were struck down as unconstitutional.[52]

The case of the 2017 unconstitutional amendments to the Elections Act clearly demonstrates how the reform of the electoral management system of a country can be easily abused either by the political majority and the opposition, to reduce the independence of the EMB or to further politicise a judicial decision concerning electoral disputes. Had not it been for the Kenyan judiciary these amendments, adopted without the necessary broad consensus and adequate timing, would have irremediably compromised the Kenyan electoral management and democratic institutions.

In conclusion, the calls for broad reform of the IEBC were inconsistent with the spirit of the Supreme Court's sentence, which did not request the amendment of the legislation, but strict adherence to it.

4.5 National Electoral Justice and International Standards

From the analysis provided in chapter two, we could understand the major role that the international community, represented by the United Nations and the African Union, had in the pacification of Kenya after the 2007 elections and in the subsequent constitution-making process, successfully achieved with the 2010 referendum. The strategic importance of Kenya as a key partner of Western countries in the East African region, combined with the strong presence of international organisations – notably UN agencies – in the country explains the

[51] BBC News. "Kenya election law amendment takes effect," *BBC News,* 3 November 2017, https://www.bbc.com/news/world-africa-41859171 (accessed 8 February 2020)
[52] High Court of Kenya, *Constitutional Petition no. 548 of 2017,* 6 April 2018, [123]

close attention devoted by the international community to the resolution of the Kenyan crisis and the subsequent phase of reconstruction.[53]

Although the implementation of the 2010 Constitution and the creation of a new EDRS was very much a national process, it cannot be denied that the international community invested considerable resources in the stabilisation of the Kenyan democracy and pacific resolution of its electoral disputes. The wise cooperation between the international community and national actors resulted in the adoption of a new Constitution offering enhanced fundamental rights guarantees to the citizens and, overall, allowed Kenya to better adapt its national legal system to the international standards for the protection of human rights.

Nevertheless, in the 2017 annulment sentence, no evident reference to the international human rights regime was made: the justices reached their conclusions by exclusively referring to the Constitution and Kenya law. Is this choice compatible with the engagements taken by Kenya, through its constitution, to strictly comply with international law general rules and treaties?[54] Should have the Supreme Court made due reference to international human rights standards?

To answer these questions we have to identify which specific rights or standards protected at the international level are relevant in a judicial proceeding evaluating the nullification of a presidential election, focusing only on those which are applicable to Kenya. To make the exposition clear and coherent, it is also necessary to distinguish between international civil and political human rights potentially emerging in an electoral petition and eventual standards for the annulment of an election.

Civil and Political Rights in Electoral Petitions

In the first chapter, we saw how the link between electoral justice and international human rights standards is mainly indirect. In other words, international human rights conventions do not provide for specific rights of electoral justice (e.g. a right to judicial adjudication of electoral disputes or the

[53] International Crisis Group, *Kenya in Crisis,* p. 16
[54] *Constitution of Kenya* (2010), art. 2(5) (6)

obligation for State parties to establish EDR mechanisms) but they do protect many rights – civil and political – which can be relevant in proceedings before an EDRB or may emerge in electoral disputes.[55]

The only specific human right concerning elections is that to free and fair elections as the privileged form of expression of the popular will, initially affirmed by art. 21 of the UDHR, then inserted in the ICCPR (art. 25) and finally protected for specific categories of persons like women and disabled people. The only exception to the mainly indirect reference to electoral justice in international human rights treaties is provided by the African Charter on Democracy, Elections and Governance, commanding the state parties to establish independent EDRBs and to the parties competing in the elections to accept the results or challenge them through the channels provided by the law.

As things stand today, practically every human rights convention adopted at the UN and regional levels contain an article on free and fair elections, thus making up the core of international human rights standards relevant in electoral petitions.[56]

The main problem with this sources is that they do not really develop specific rights concerning electoral justice (inter alia the obligation to establish an EDRB), nor they inform us on the minimum requirements that procedures before the national EDRB should respect to comply with the international human rights regime.

Although non-binding, authoritative sources like the Human Rights Committee General Comments can help to elucidate the content of specific rights protected in the ICCPR.

In 1992, the UN Human Rights Committee – the treaty body of the ICCPR – released General Comment no. 25 on *the right to participate in public affairs, voting rights and the right of equal access to public service (art. 25).* Under art. 25 of the ICCPR every citizen has *« The right to vote and to be elected at genuine periodic elections [...]»;*[57] in General Comment no. 25 the Human Rights

[55] See, for instance the ICCPR artt. 19, 21, 22 and 25

[56] Directorate General for External Relations (European Commission), *Compendium of International Standards for Elections,* Fourth Edition (Luxembourg: Publication Office of the European Union, 2016), p. 3-10

[57] International Covenant on Civil and Political Rights, art. 25

Committee specified that, to comply with art. 25, States are under the obligation to regularly organise elections, taking place at intervals which are not unreasonably long.[58] Moreover, the right to vote must be established in the law and States are under the positive obligation to adopt *effective measures* to ensure that everybody can exercise this right.[59]

Eleven years later, the Human Rights Committee drafted another General Comment which can be useful to test the level of compliance of national EDRS with the international human rights regime: General Comment no. 32, Art. 14, on *the right to equality before courts and tribunals and to a fair trial.* In this document, the Committee specified that the objective of art. 14 is to guarantee the rule of law and the fair administration of justice. This is achieved by acknowledging that the right to a fair trial applies regardless of the nature of the proceedings before the court[60] thus, in principle, including electoral disputes. In addition, practices like the systematic denial of access to the courts, intimidation from any part and deliberately slow proceedings were considered as contrary to the scope of art. 14.[61]

Having highlighted the few indirect linkages between the international human rights regime and electoral justice we have now to consider which of these international human rights instruments establish legal obligations for Kenya.

From this list of treaties and conventions, we will deliberately exclude the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD); despite being quoted among the so-called international standards on elections,[62] they practically replicate ICCPR art. 25, stressing the duty of States to guarantee full participation in elections and public life of specific categories of people traditionally discriminated in their access to the public sphere.

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[58] UN Human Rights Committee, *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service,* 12 July 1996, CCPR/C/21/Rev.1/Add.7, [9]
[59] Ibid., [10] [11]
[60] UN Human Rights Committee, *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial,* 23 August 2007, CCPR/C/GC/32, [3]
[61] Ibid., [9] [25] [27]
[62] Directorate General for External Relations, *Compendium of International Standards for Elections,* p. 3-10

Thus, the international human rights instruments providing (limited) standards for elections applicable to Kenya are: the UDHR, the ICCPR and the African Charter on Human and People's Rights at the regional level. In particular, with this last instrument, Kenya committed to ensuring the participation of every citizen to the government of the country (art. 13) and to the protection of other relevant civil rights like that to receive information (art. 9) and to free association (art. 10).[63] In 2008 Kenya signed but never ratified the African Charter on Democracy, Elections and Governance, thus not being bound to the only legally-binding instrument specifically providing for obligations concerning electoral justice.

On the basis of these international sources of law, Kenya has to adopt national measures of different nature to ensure the protection of international human rights also at the national level.

The entry into force of the 2010 Constitution marked a landmark moment in the Kenyan endeavours to the recognition and effective protection of human rights. Since 2010, Kenya accomplished important steps to adapt its legal and judicial system to the international human rights obligations it had ratified. This does not mean that human rights are perfectly protected in Kenya; areas of concern still persist but undoubtedly, the new constitution and the legal reforms it engendered have substantially helped the East African country to improve its human rights record.

Moving to rights with an electoral relevance we can affirm that the right to vote has never been seriously put into question, as Kenyan authorities have organised general elections at regular intervals since the restoration of multiparty democracy in 1992. Considerable progress was achieved in the protection of civil and political rights; for instance, art. 38(2) of the new constitution acknowledges the rights to free and fair elections held at universal suffrage, and registration as a voter without unreasonable restrictions,[64] thus satisfying the requirements established by the Human Rights Committee in General Comment No. 25.

More difficult was the implementation of art 14 of the ICCPR on equality before the law and fair trial; the starting point was that of a corrupted judiciary,

[63] Ibid., p. 116
[64] *Constitution of Kenya* (2010), art. 38(2)

totally under the control of the executive, incapable and unwilling to fairly administer justice. Practices like intimidation, denial of access to justice and deliberately slow procedures – those highlighted by the Human Rights Committee as incompatible with the spirit of art 14 – were commonplace.

The reforms of the judiciary positively impacted the administration of electoral justice; since 2013, the practice of systemic dismissal of electoral petitions on mere technical grounds was abandoned. Consequently, the Supreme Court started to hear in the merit the petitions and develop a coherent electoral jurisprudence, whose founding principles were confirmed in the *Raila Odinga* (2017) case.

Finally, although it has not ratified the African Charter on Democracy, Elections and Governance yet, Kenya generally complies with its provisions concerning electoral justice: a competent EDRB was established and candidates generally address it to have their electoral petitions adjudicated in a lawful manner. However, in our opinion, Kenya should ratify the ACDEG so as to confirm its commitment to human rights principles.

International Standards for the Nullification of Elections

After having reviewed the core human rights with an electoral relevance, we shall consider whether States have agreed on international standards for the annulment of elections.

As things stand today, no international treaty or clear and prevailing practices have been adopted to outline the conditions under which it is possible to annul an election.

With mainly indirect linkages between the international human rights regime and electoral justice, the organisation of elections and the subsequent resolution of eventual disputes is still perceived as an issue pertaining very much to the sphere of sovereignty of each State. People are not entitled to a right to judicial resolution of electoral disputes, but rather to a right to fair trial and equality before the law (e.g. art. 14 ICCPR); as long as States ensure with their

national laws this right, the UN or other regional organisations are not in the position to dictate any standard concerning the resolution of electoral disputes.

States are free to choose their preferred model of EDRB, establish procedures for the filing of electoral petitions and legal standards for their resolution. All these aspects are regulated by national laws, and only a comparative analysis of the decisions adopted by different national EDRBs can help us to identify doctrines and trends in the nullification of elections.

Although it seems there is substantial agreement in jurisprudence on the need to carefully take the decision to annul an election, each State has adopted different standards.

Broadly speaking, it can be said that three approaches to the nullification of elections have affirmed. The first one is a prescriptive approach, which determines the annulment of an election only in presence of specific irregularities, the second is outcome-determinative – elections can be annulled only if the irregularities have substantially affected its outcome – and finally a mixed approach, according to which a round of voting can be nullified in presence of serious irregularities, irrespective of their impact on the results.[65]

According to the International Foundation for Electoral Systems (IFES), precisely because a clear trend has not affirmed yet, it is of the uttermost importance for the EDRB to clearly specify which approach and standards it will refer to eventually issue a nullification order.[66]

This is precisely what the Supreme Court of Kenya did in 2017 when it interpreted Section 83 of the Elections Act (2011); the justices recognised that a lack of an authoritative interpretation of the main legal rule concerning the annulment of elections in Kenya had created a legal gap which had to be filled to guarantee the complete protection of electoral rights.

The reader will certainly recall that the Supreme Court, by providing its authoritative interpretation of Section 83, stated that in order to have a presidential election nullified, it is necessary to demonstrate that either the election was not conducted in accordance with the constitution or that the irregularities affected the

[65] Chad Vickery et al., *When are elections good enough? Validating or annulling election results* (Arlington: International Foundation for Electoral Systems, 2018), p. 6
[66] Ibid., p. 24

results.[67] What it was called a *disjunctive interpretation* of Section 83, is a clear application of the mixed approach to the annulment of election: even if the irregularities in the transmission process were not, per se, enough to alter the outcome of the election, they were so serious that the reliability of the announced results could not be certified. Being so, the IEBC had failed to conduct the elections according to the constitution.

The outcome of the *Raila Odinga* (2017) case was undoubtedly determined by the interpretation given to Section 83. Commenting the annulment decision, the Carter Center noted that the Court went against *« Common international principles requiring that an annulment of elections only be declared when the irregularities are shown to affect the outcome of the election»;*[68] however, the measure was justified on grounds that the Court was interpreting Kenyan law (section 83) effectively suggesting a disjunctive interpretation.

In effect, the outcome-determinative approach is at the moment the most common, being consistently adopted in all the Council of Europe countries, United States, Canada and Australia.[69]

Nevertheless, it is our contention that the adoption of the mixed approach was legally justifiable and perfectly reasonable, creating an authoritative electoral jurisprudence, which invaluably contributed to the advancement of democracy and protection of electoral rights in Kenya.

First of all, the Supreme Court had the right to only refer to national legislation in adjudicating the 2017 *Raila Odinga case.* In fact, in absence of clear rules on electoral justice stemming from international law, the justices could do nothing but referring to Kenyan constitution and Elections Act, sufficiently regulating the topic of the nullification of elections.

Secondly, by interpreting Section 83 and opting for the mixed approach, the Supreme Court finally filled in a legal gap determined in 2013 when the Court did not interpret the provision at stake. In doing so, the supreme Kenyan EDRB strictly adhered to the text of the law, which does not leave any doubt on the

[67] See p. 103
[68] Carter Ceneter, *Kenya 2017 General and Presidential Elections,* p. 53
[69] Chad Vickery et al., *When are elections good enough?*, p. 4

righteousness of the disjunctive interpretation.[70] Moreover, even though the outcome-determinative approach is the most diffused, the mixed approach is widely adopted in the UK and other Commonwealth countries,[71] approaching Kenya to the electoral jurisprudence of those countries it shares a common legal system and history with.

Finally, by essentially referring to its national Constitution, in 2017 the Supreme Court set a higher standard of protection of electoral rights than that it would have derived from the adoption of the outcome-determinative approach.

The higher standard is determined by the fact that the quality of an electoral process is in itself more important than the quantitative outcome; therefore, the national EMB has the obligation to make sure that every aspect of the electoral process, from the early registration of voters to the final announcement of the results, complies with the constitution. In effect, what is the sense to hold elections if these disattend the supreme legal source of a country? What is the importance we attribute to people's vote if we validate a substantially unlawful electoral process?

Recent electoral history, in every corner of the world, provides plenty of examples of elections with a clear winner but substantially marred by irregularities and illegalities. The popular will cannot be ignored, but neither the conduct of elections.

Notwithstanding the merits of the mixed approach to the nullification of elections, we do are aware of its main problem: it potentially makes it easier to annul elections, even when it is not the case. Easy nullification could be fraudulently exploited by those people aiming at ignoring the popular will; however, a too strict application of the outcome-determinative approach makes it practically impossible to have elections annulled, even in the case of widespread violations. In fact, even the best legally substantiated electoral petition, supported with adequate evidence, would be hastily dismissed by the weight of the numerical outcome of the elections.

[70] The two limbs of Section 83 are connected by a disjunctive conjunction. Hence, a conjunctive interpretation would be legally and gramamrly impossible

[71] Chad Vickery et al., When are elections good enough?, p. 4

Perhaps, the most dangerous threat to democracy nowadays, are the attempts of those populist leaders continuously making reference to the demos, waiving the popular majority as the only determinant of political legitimacy. Kenya was ruled for decades by this kind of leaders, whose corrupt rule was confirmed at every election. Nobody really cared for the way elections were conducted, and electoral petitions were too easily dismissed because the consideration of the numerical outcome always prevailed.

Fears that easy nullification can be a way to ignore the popular will are somehow understandable and should not be underestimated. However, it seems to us that the most dangerous threat to the free expression of popular will is its banalisation to the mere act of casting a vote, ignoring the context which elections take place within. It is true that abuses in the administration of electoral justice can be committed however, they can be easily avoided by clearly establishing legal standards for nullification, based on an authoritative legal framework.

In conclusion to this part on the relationship between national electoral justice and international human rights standards, we would like to underline that the absence of any reference to human rights instruments in the 2017 Supreme Court sentence is not to be considered as a worrying aspect.

Up to the moment, international law has not developed specific human rights concerning electoral justice. In fact, international instruments generally protect the right to free and fair elections, or the right to a fair hearing as well as classical civil rights like the right to free association and freedom of speech, which make up fundamental aspects of public life and civic engagement, especially during election time.

What the international human rights conventions demand to the state parties is to adopt measures at the national level to make these rights effective; in the context of electoral justice, when a country offers to its citizens an EDRS competent to hear electoral disputes and remedies that can be activated to restore the violation of electoral rights, then this state is complying with its international human rights obligations. However, these obligations refer to general civil and political rights and not to specific electoral rights which are usually regulated in detail by national legislation.

This is why, in the 2017 Supreme Court sentence we do not find any reference to international human rights standards: specific norms concerning the organisation of elections, like those regulating voting procedures, counting, transmission and announcement of results, can be found in the Kenyan legislation – notably the Constitution and the Elections Act of 2011. It follows, that an electoral petition can be adjudicated only by testing the petitioners' assertions against these national standards.

Nevertheless, this does not mean that the Kenyan system of electoral justice is disjointed from the international human rights regime; quite the contrary, with the adoption of the 2010 Constitution – a process very much supported by the international community – Kenya accomplished major success in progressively adapting its national legislation to the international human rights obligations it ratified.

The very same establishment of a coherent national EJS, and the celebration of hearings before the competent EDRBs, is the demonstration that Kenya courts, by applying national laws, are administering electoral justice in a way consistent with the relevant international instruments protecting civil and political rights.

These arguments also apply to the specific decision to nullify the 2017 Presidential Election: as long as the States making up the international community will not decide to adopt an ad hoc convention, or will not coherently follow a specific repeated practice, elevating it to the rank of an international consuetudinary norm, national EDRBs will be free to adopt their preferred approach to the issue of nullification of democratic elections.

Being so, the Kenyan Supreme Court had certainly the right to adopt the so-called "mixed approach", which best reflects the spirit of its national election law constitution.

From our perspective, the decision of the Supreme Court of Kenya to annul the 2017 Presidential Election is to be welcomed as a sign of institutional maturity and progressive assertion of the independence of the judiciary. The fact that this decision was adopted following a legal reasoning essentially grounded in Kenyan law is not to be considered as a negative regression but as the conscious assertion

by the apex Kenyan court of its role as the guardian of the constitution and legality in elections.

As long as elections will be considered as a matter essentially pertaining to the sphere of sovereignty of each state, international law will not be able to impose any obligation, and resolution of electoral disputes through the application of national laws will continue to be the praxis.

In such a context, human rights defenders still have to be vigilant and monitor the level of compliance of each state with international human rights standards; at the same time, they have to clearly stand with those Courts asserting their authority in a coherent and reasoned way, compatible with the constitution and international human rights obligations.

The 2017 *Raila Odinga* case provides an important teaching: the assertion of the supremacy of the national constitution does not mean the denial of the relevance of the international human rights instruments. Specific matters like the resolution of electoral disputes cannot be regulated but by referring to national legislation; international law can, however, inspire the national legal systems, ensuring that the laws adopted by each State do comply with those principles that the international community has progressively developed to protect the basic value of human dignity.

Having said so, let us stand with the Kenyan justices; with their decision, they did not simply annul an election. They set a higher standard of protection of electoral rights compared to that of many countries, ensuring not the easy annulment of future elections, but their meaningfulness and the possibility, for each citizen, to fully demonstrate the occurrence of electoral irregularities, without impairing, for this reason, the guarantees recognised by the law to the respondents, like the presumption of innocence.[72]

Finally, through the unequivocal affirmation of the principle of the supremacy of the constitution, the Supreme Court accomplished that long process of complete reform of the Kenyan legal system, triggered by the intervention of

[72] In annulment cases, usually the petitioners are at pain in collecting sufficient and reliable evidence to prove their allegations. Through the affirmation of principles like that of the shifting burden of the proof, the Supreme Court enabled the petitioners to fully demonstrate their allegations, notwithstanding the IEBC unwillingness to provide them the necessary evidence.
See Chad Vickery et al., *When are elections good enough?* p. 18

the international community in the 2007 Crisis, whose ultimate aim was to endow Kenya with a solid system of protection of human and fundamental rights.

4.6 Concluding Remarks on the Chapter

In this chapter, we attempted to develop a reasoning enabling us to answer the question of whether the annulment of the 2017 Presidential Election contributed to reinforce the protection of human rights and democracy in Kenya.

From the evidence we collected, it seems to us that the question must be answered in the affirmative. First of all, the public opinion generally reacted positively to the annulment of the elections. While international observers mainly highlighted the historical character of the decision and the efforts accomplished by the Kenyan judiciary to become a truly independent institution, many Kenyan citizens mobilised in defence of the Supreme Court against Uhuru Kenyatta's vehement attacks and promises of retaliation.

We moved then to an assessment of the EDR procedures, finding out that, as things stand today, Kenyan citizen dispose of a system for filing electoral petitions concerning a presidential election which complies with generally accepted guiding principles of electoral justice. The 2010 Constitution, the Elections Act (2011) and the Supreme Court Rules on Presidential Petitions clearly define the competent EDRB, the conditions of access, a timeframe for the resolution of the dispute and available remedies in case of irregularities.

Afterwards, we focused on the verdict itself, considering some contentious issues which could be raised to criticise the Supreme Court's sentence. Overall, it seemed to us that the Supreme Court coherently justified and grounded in the constitution its decision to annul the election: predictability and legal clarity were the guarantees offered by the Kenyan justices against abuses of their nullification power. Undoubtedly, the October re-run was a failure in terms popular participation in the electoral process; however, this outcome is not to be attributed to the Supreme Court decision but rather to the conscious strategy of the opposition party, deliberately politicising the issue and deserting the October electoral appointment. Moreover, we extensively demonstrated that neither the

Supreme Court had called for broad reform of the electoral management system of the country, nor this process was feasible in the short period between the 1st September and 26th October; electoral management reform cannot be rapidly achieved: its success depends on the inclusion of all the key stakeholders and the availability of a transitionary period necessary to make the legislative changes effective. The absence of these two conditions risks transforming the reform of the EMB in an abusive process.

Finally, we considered the "national character" of the 2017 verdict, highlighting the absence of references to international standards concerning elections and dispute resolution. This is not necessarily a negative point if the national legislation complies with international human rights as the Kenyan Constitution does. Moreover, in the absence of a clear and predominant practice, the decision to annul an election remains a very national one, where international law has restricted margin for interference. The Supreme Court of Kenya, aligning itself with other Commonwealth countries, decided to provide a higher standard of protection of electoral rights, according to which an election can be annulled even if irregularities and non-compliance with the law did not affect the results.

The events of late 2017, demonstrate how the judiciary embodied in the Supreme Court enormously contributed to the advancement of the system of protection of electoral rights and reinforced democratic institutions in Kenya. This is not due to the decision to annul an election, but rather to the motivations behind it. By asserting the principle of the supremacy of the Constitution, it was clearly affirmed that it makes no sense to invest time and resources in conflict resolution and constitution-making if then it is possible to easily ignore constitutional standards in the conduct of elections. Adherence to the constitution and opposition against abusive, corrupted or simply irregular electoral practices is the privileged way to promote the rule of law, reinforce people trust in democratic institutions and ultimately comply with international human rights obligations.

CONCLUSIONS

The aim of this thesis was to demonstrate the critical importance that electoral justice can have in the promotion of human rights – civil and political – and reinforcement of democratic institutions. To do so, we proposed a case study on the 2017 Kenyan Presidential Election, annulled with a landmark decision by the Supreme Court of that country on grounds that the IEBC, the Kenyan EMB, had failed to conduct the election in a manner consistent with the constitution and applicable electoral law.

Although the conclusions of our research refer to the specific Kenyan case and, overall contribute to casting a light on the impact that the 2017 nullification decision had on this country's democracy, we believe that they can also be extended, in general, to other cases.

This is due to the fact that Kenya represents the archetype case for studies on EDR mechanisms, as the East African country resumes in its recent political history all the ingredients to test the effectiveness of electoral justice in the promotion of human rights and democratisation: highly contested elections, recurrent election-related violence, a process of constitution-making that substantially re-designed the EDRS of the country and the empirical material, the 2017 Supreme Court's decision in the *Raila Odinga case.* Being so, by demonstrating the positive impact of the Kenyan electoral justice system for presidential elections, we can contribute to raising the awareness on the importance of electoral justice as a key institutional choice that every country aiming at creating a stable and viable democracy should make.

Let us now go back to the research question of this thesis: did the intervention of the Kenyan Supreme Court in the 2017 presidential election and the subsequent annulment verdict contribute to reinforce the Kenyan democracy and its system of protection of human rights?

In light of our findings, by looking contemporarily at the procedures available in Kenya to contest the outcome of the presidential elections, the legal principles that the Court used to justify its decision and the standards of protection

for electoral rights set after 2017, this question should be answered in the affirmative.

The adoption of the 2010 Constitution represented a landmark moment in the history of Kenyan constitutionalism: for the first time in the history of the country it was adopted a constitution trying to put in place a system of check and balances able to limit the previously unrestrained executive power; in terms of electoral justice, the 2010 Constitution established a specific right to free and fair elections in the Bill of Rights, creating a mixed EDRS where both the judiciary and the electoral management body (IEBC) were called to act as EDRBs.

This system replaced the old one which did not offer adequate guarantees in terms of fair hearing and available remedies in case of violation of electoral rights. This situation was evident by both the lack of sanctions for electoral irregularities and misconduct and a systematic denial of justice, with electoral petitions easily dismissed on mere technicalities.

Therefore, Kenya passed from a situation of total absence of electoral justice to a complex system, offering specific procedures and remedies for plaintiffs. The new system was regularly activated in 2017: the petitioners could file their case, the respondents were regularly informed of the proceedings against them, while the procedures and schedule of the hearings duly communicated to the parties involved, in an atmosphere of full transparency. During the hearings, both Odinga and Kenyatta/IEBC had to comply with specific legal standards and provide evidence to support their claims on a basis of equality and non-discrimination before the Court.

The 2017 sentence in the *Raila Odinga case* did not reinforce Kenyan democracy simply because it annulled the election. Indeed, a verdict in an electoral petition can invaluably contribute to the cause of democracy and human rights independently of its outcome.

To us, what is more important is the content of the decision, the principles the EDRB affirms and the reasoning behind a verdict. The Kenyan Supreme Court showed real concern for these aspects, trying to make the content of the sentence understandable for all, even the ordinary citizen; as the decision had a clear impact on all Kenyan people, it was not one which could be taken easily.

An EDRB, independently of its status as a court or a political body, can invaluably contribute to the reinforcement of democracy by building people's trust in the institutions of the State. For this reason, the people called to adjudicate an electoral dispute have to demonstrate strict adherence to the law, rigidly complying with their mandate; moreover, they are called to show a true commitment to the enforcement of people's rights, satisfactorily demonstrating it through irreprehensible conduct and willingness to apply the law, independently of the consequences.

This is exactly what the Supreme Court of Kenya did in 2017. It did not simply limit itself to the adjudication of an electoral petition; conversely, it sufficiently demonstrated that, by fully complying with its mandate as the guardian of the constitution, it was adopting a decision not against the will of the people but in the name of the people, to protect its unalienable right to vote in free and fair elections, not marred by irregularities of any kind.

The Supreme Court did so because it was fully aware of the responsibilities connected to the adjudication of such a highly politicised electoral petition. It was, therefore, necessary to provide solid legal reasoning, one that could guarantee legal certainty and predictability but at the same time the right of the court to depart from earlier decisions and take the unprecedented step to call for a by-election.

Had the Court abused its powers, or given the slightest impression that it was acting outside the constitutionally-mandated limits of its jurisdiction, it would have irremediably compromised its image as the supreme arbiter of the Kenyan legal system, frustrating once more Kenyans' expectations for democracy and transparency.

The 2017 decision had clearly major consequences: in the immediate aftermath of the 1st September, the Supreme Court was vehemently attacked by the incumbent president Uhuru Kenyatta, being exposed to the risk of massive retaliation for having dared to annul the election; Raila Odinga did not save the Court from open criticism too, voluntarily raising the stake of the game, asking for electoral reforms that the Supreme Court could have never authorised, either for mere logistic reasons and for the sake of the overall stability of the democratic

architecture. Notwithstanding these attacks, the Kenyan justices were brave enough to stand with the people for their political rights, showing their independence from the majority in power but also their ability to adopt wise and feasible measures of redress.

In this thesis we also adopted an international human rights perspective; consequently, we highlighted how there are many connections between the resolution of electoral disputes by national EDRBs and the international human rights regime. In other words, protecting electoral rights means also protecting civil and political rights entrenched in the international conventions which have relevance during electoral periods.

Nevertheless, we also noticed how this connection between EDR and international human rights conventions is often indirect: international law sources do not oblige States party to adopt EDR mechanism or to ensure the possibility to file electoral petitions. However, those States like Kenya that have ratified treaties like the ICCPR or the African Charter on Human and People's Rights, have certainly committed to the periodic organisation of free and fair elections. Hence, the establishment of an accessible and efficient EDRS can certainly help the States to comply with the international obligations they have accepted for the protection of civil and political rights.

The relationship between the national and international level of protection of fundamental rights allowed us to make some reflections over the nature of the 2017 Supreme Court's decision to nullify that year presidential election. It appeared that the Kenyan Constitution and related elections laws were the only parameters adopted to take that decision.

As long as States will consider elections as an issue essentially pertaining to their sphere of exclusive sovereignty, we do not see how it will be possible for a national EDRB to adjudicate an electoral petition on the basis of international law. The fact that the connections between the administration of electoral justice at the national level with the international human rights are mainly indirect is the evidence that States are not ready to take additional commitments at the international level drafting, inter alia, a convention containing international principles to be followed in the adjudication of electoral disputes.

Being so, the national character of the 2017 Kenyan sentence should not worry those people, like the readers and the author, who do care for the protection of human rights and commit to the principles established by the members of the international community to affirm and protect the dignity of all human beings.

By affirming the supremacy of the Constitution and the necessity to have elections complying with the applicable law, the Supreme Court of Kenya was, in fact, setting a standard of protection of electoral rights which offers more guarantees than many others put in place in other countries, even stable and old democracies.

By declaring that elections can be annulled even if the irregularities do not affect the result, the Kenyan justices were renewing the promise that the constitution-makers had made in the immediate aftermath of the 2007 post-electoral crisis: endow Kenya with a new constitutional framework able to avoid the repetition of similar violence and allowing the country to fully comply with its international human rights obligations. Therefore, the 2017 annulment verdict is not disconnected from the international human rights regime, even if it does not mention it as a parameter. Hence, the Supreme Court's decision can be considered as the fruit of a national legal system that has achieved remarkable success in improving Kenya's performances in terms of rule of law, access to justice and constitutional guarantees offered to the citizens.

The objective of international human rights law is not to replace national laws; it is rather to ensure that, through the adoption of domestic measures, States comply with additional standards set at the international level to protect the dignity of all human beings. Only when States do nothing to harmonise their national systems with the international standards then international law can intervene (limitedly) to sanction these situations.

Kenya – like many other States, rich and poor alike – still has a long road ahead to fully comply with the international human rights obligations it voluntarily accepted by ratifying UN and regional conventions; however, it can be said that through its EDR mechanisms it currently provides its citizens with a system based on fundamental principles like non-discrimination and fair hearing

for the adjudication of electoral disputes, activating effective remedies in cases of violation of the constitution and laws in the electoral context.

Much more it could be said on the 2017 *Raila Odinga* case and EDR in Kenya; limited space does not allow us to focus on related issues that would deserve accurate study; however, having focused on electoral justice both at a general level and with a particular case, we think that our research can at least suggest two roads for future research on this topic.

On electoral justice in general, it is absolutely necessary to develop a complete and thorough theory of EDR, supplementing the efforts that have already been made by eminent actors in the field of electoral studies. For what concerns Kenya, it could be useful to fully assess this country's EDRS, focusing therefore on the other EDRBs entailed by the constitution (ordinary courts and the IEBC), to assess how well they handle the electoral petitions entrusted to them, especially in the pre-electoral period.

Finally, in 2022 Kenya will hold again General Elections; this democratic event will offer the occasion to see whether Uhuru Kenyatta, not being eligible for another mandate, will attempt to break the constitutional pact so as to reiterate his presidency. For the sake of democracy and protection of fundamental rights, but especially for the Kenyan people that so much have suffered under authoritarian leaders and so hard they have fought to improve their democratic system, we hope that the positive improvements highlighted in this thesis will be confirmed. Thanks to its full commitment to EDR, the Supreme Court of Kenya fuels our hopes, making them concrete.

REFERENCES

General Sources

Amnesty International. *Amnesty International Report 1988.* London: Amnesty International Publications, 1988

Ang'Ila, Aywa. "A critique of the Raila Odinga v IEBC decision in light of the legal standards for presidential elections in Kenya." in *Balancing the Scales of Electoral Justice,* ed. Collins Odote & Linda Musumba. Rome: International Development Law Organization, 2016

Bickel, Alexander M. *The Least Dangerous Branch: the Supreme Court at the Bar of Politics,* 2 ed. Yale University Press, 1986

Boutros-Gali, Boutros. *An Agenda for Democratization.* New York: United Nations Department of Public Information, 1996

Carter Center. *Kenya 2017 general and Presidential Elections Final Report.* Atlanta: 2018

Carter Center. *Observing Kenya's March 2013 National Elections: Final Report*. Available at https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-final-101613.pdf

Carter Center. *Observing the 2002 Kenya Elections*. Atlanta: The Carter Center Democracy Programme, May 2003. Available at https://www.cartercenter.org/documents/1355.pdf

Commonwealth Observer Group. *Kenya General Election 27 December 2002.* London: Commonwealth Secretariat, 2006. Available at http://aceproject.org/ero-en/regions/africa/KE/kenya-final-report-general-elections-commonwealth/at_download/file

Commonwealth Observer Group. *The Presidential, Parliamentary and Civic Elections in Kenya, 29 December 1992: The Report of the Commonwealth Observer Group,* Commonwealth Election Reports. London: Commonwealth Secretariat, 1993. Available at https://read.thecommonwealth-ilibrary.org/commonwealth/governance/the-presidential-parliamentary-

and-civic-elections-in-kenya-29-december-1992_9781848595385-en#page8

Davis-Roberts, Avery. *Electoral Dispute Resolution Discussion Paper for Experts Meeting*. Atlanta GA: February 2009

Dialogue Africa Foundation. *Kriegler and Waki reports: summarised version.* Nairobi: Dialogue Africa Foundation, 2009. Available at https://www.kas.de/c/document_library/get_file?uuid=d8aa1729-8a9e-7226-acee-8193fd67a21a&groupId=252038

Directorate General for External Relations (European Commission). *Compendium of International Standards for Elections,* Fourth Edition. Luxembourg: Publication Office of the European Union, 2016

Electoral Integrity Group. *Towards an International Statement of the Principles of Electoral Justice (The Accra Guiding Principles),* adopted on 15 September 2011

EU Election Observation Mission Republic of Kenya. *Final Report.* January 2018

EU Election Observation Mission Republic of Kenya. *Preliminary Statement.* 10 August 2017

European Union Election Observation Mission to Kenya. *General Elections 2013: Final Report.* Available at http://www.eods.eu/library/eu-eom-kenya-2013-final-report_en.pdf

European Union Election Observation Mission. *Kenya General Elections 27 December 2002: Final Report. A*vailable at http://aceproject.org/ero-en/regions/africa/KE/Kenya%20-%20EU%20rep02.pdf

Human Rights Watch. *Divide and Rule: State-sponsored ethnic violence in Kenya.* Human Rights Watch, 1993

Immigration and Refugee Board of Canada. *Restoration of Multiparty Government and Kenyans of Somali Origin,* 1 March 1992. Available at https://www.refworld.org/docid/3ae6a80a28.html

International Crisis Group. *Kenya in Crisis,* Crisis Group Africa Report n° 137. Nairobi/Brussels: International Crisis Group, 21 February 2008

Joseph, Oliver, and McLoughlin Frank. *Electoral Justice System Assessment Guide.* Stockholm: International Institute for Democracy and Electoral Assistance, 2019

Lindenmayer, Elisabeth, and Josie Lianna Kaye. *A Choice for Peace? The story of forty-one days of mediation in Kenya.* New York: International Peace Institute, August 2009

National Democratic Institute. *NDI Statement on the December 29, 1997 Elections in Kenya.* Available at https://www.ndi.org/sites/default/files/1082_ke_1997elect_5.pdf

Office for Democratic Institutions and Human Rights (ODIHR). *Handbook for the Observation of Election Dispute Resolution.* ODIHR, Warsaw, 2019

Organization of the American States. *Observing Electoral Justice Systems: a Manual for OAS Electoral Observation Missions.* Washington: Department of Electoral Cooperation and Observation of the Secretariat for Strengthening Democracy of the Organization of American States, 2019

Orozco-Henríquez, Jesús. *Electoral Justice: The International IDEA Handbook.* Stockholm: International Institute for Democracy and Electoral Assistance, 2010

The Independent Review Commission. *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007.* Available at https://kenyastockholm.files.wordpress.com/2008/09/the_kriegler_report.pdf

Vickery, Chad, et al. *When are elections good enough? Validating or annulling election results.* Arlington: International Foundation for Electoral Systems, 2018

Wall, Alan, et al. *Electoral management design: The international IDEA handbook,* revised edition. Stockholm: International Institute for Democracy and Electoral Assistance

Joint Statement by Heads of Mission in Kenya, Nairobi, 1 September 2017

Journal Articles

Cheeseman, Nic. "The Kenyan elections of 2007: an introduction." *Journal of Eastern African Studies,* 2:2 (2008): 166-184

Karuti, Kanyinga, and Odote Collins. "Judicialisation of politics and Kenya's 2017 elections." *Journal of East African Studies,* 13:2 (2019): 235-252

Kioko, Ben. "The African Charter on Democracy, Elections and Governance as a justiciable instrument." *Journal of African Law* 63, S1 (2019): 39-61

Wambua, Muema. "The ethnification of electoral conflicts in Kenya: options for positive peace." *African Journal on Conflict Resolution* 17.2 (2017): 9-40 available at https://www.accord.org.za/ajcr-issues/ethnification-electoral-conflicts-kenya/

Wiebusch, Micha, et al. "The African Charter on Democracy, Elections and Governance: past, present and future." *Journal of African Law* 63, S1 (2019): 9-38

Zakaria, Fareed. "The Rise of Illiberal Democracy." *Foreign Affairs* 76, no. 6 (1997): 22-43

International Law

Council of Europe. European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950

Council of Europe. *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9

Organization of African Unity. *African Charter on Human and People's Rights (Banjul Charter),* 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

Organization of the American States. *American Convention on Human Rights, "Pact of San Jose",* Costa Rica, 22 November 1969

Organization of the American States. *Charter of the Organization of the American States,* 30 April 1948, Preamble

UN Economic and Social Council (ECOSOC). *UN Economic and Social Council Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct,* 27 July 2006, E/RES/2006/23

UN General Assembly. *International Covenant on Civil and Political Rights,* 19 December 1966, United Nations Treaty Series, vol. 999

UN General Assembly. *Universal Declaration of Human Right,* 10 December 1948, 217 A (III)

UN Human Rights Committee. *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service,* 12 July 1996, CCPR/C/21/Rev.1/Add.7

UN Human Rights Committee. *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial,* 23 August 2007, CCPR/C/GC/32

Kenyan Law and Jurisprudence

High Court of Kenya. *Constitutional Petition no. 548 of 2017,* 6 April 2018

High Court of Kenya. Election Petition No. 1 of 1998, *Kibaki v Moi & 2 Others (No 2).* Available at http://kenyalawreports.or.ke/election_petitions/cases.php?pageNum_Recordset1=4&totalRows_Recordset1=192

High Court of Kenya. *Matiba v. Moi,* Civil Application no. NAI 241 of 1993. Available at http://kenyalaw.org/caselaw/cases/view/73009

National Assembly of Kenya. *National Accord and Reconciliation Act,* no. 4 of 2008

National Assembly of Kenya. *Report of the Parliamentary Select Committee to investigate Ethnic Clashes in Western and Other Parts of Kenya,* 1992. Cited in Human Rights Watch, *Divide and Rule,* 1993

Ndung'u, N.S. *Summarised Dissenting Opinion, Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission & two others,* Election Petition no. 1 of 2017 [Determination of petition without reason]. 1 September 2017

Ojwang, J.B. *Summarised Dissenting Opinion, Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission & two others,* Election

Petition no. 1 of 2017 [Determination of petition without reason]. 1 September 2017

Parliament of Kenya. *Constitution of Kenya Review Act*, 2008, No. 9 of 2008, sec. 8.4

Parliament of Kenya. *Supreme Court Act,* no. 7 of 2011

Supreme Court of Kenya. *Election petition no. 5 of 2013*

Supreme Court of Kenya. *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & two others,* Election Petition no. 1 of 2017 [Determination of petition without reason], 1 September 2017

Supreme Court of Kenya. *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & two others,* Election Petition no. 1 of 2017

Supreme Court of Kenya. *The Supreme Court (Presidential Petition) Rules,* 2013

Agreement on the Principles of Partnership of the Coalition Government, 28 February 2008

Constitution of Kenya, 27 August 2010

The Constitution of Kenya Amendment Act, no. 7 of 1982

Online Sources

ACE The Electoral Knowledge Network. "What is an Electoral Management Body?". *ACE Encyclopaedia.* http://aceproject.org/ace-en/topics/em/ema/ema01 (Accessed 16 December 2019)

ACE The Electoral Knowledge Network. "What is the Electoral Cycle". *ACE The Electoral Knowledge Network.* https://aceproject.org/electoral-advice/electoral-assistance/electoral-cycle#_ftn1 (Accessed 12 February 2012)

ACE The Electoral Knowledge Network. "Who can file electoral appeals". *ACE Encyclopaedia.* http://aceproject.org/ace-en/topics/lf/lfb12/lfb12b/lfb12b00c (Accessed 11 December 2019)

African Elections Database. *4 August 2010 Constitutional Referendum.* http://africanelections.tripod.com/ke.html#2010_Constitutional_Referendum (Accessed 10 January 2020)

European Union External Action. "EU and Election Observation". *European Union External Action.* https://eeas.europa.eu/headquarters/headQuarters-homepage/49661/eu-and-election- (Accessed 11 November 2019)

Judicial Integrity Group. http://judicialintegritygroup.org/an-innovative-experiment (Accessed 27 November 2019)

Judicial Integrity Group. http://judicialintegritygroup.org/jig-principles (Accessed 27 November 2019)

Kenya Law. *The Presidential Election Petition: The Mwananchi Friendly Version,* 25 April 2013. http://kenyalaw.org/kenyalawblog/the-presidential-election-petition-the-mwananchi-friendly-version-2/ (Accessed 14 January 2020)

Law Society of Kenya. "Introducing LSK." *The Law Society of Kenya.* https://lsk.or.ke/about-lsk/ (accessed 20 January 2020)

Office of the Attorney General and State Department of Justice. "Mandate of the Attorney General and Department of Justice." *Office of the Attorney General and State Department of Justice.* https://www.statelaw.go.ke/about-office-of-the-attorney-general-and-department-of-justice/ (accessed 20 January 2020)

Open Election Data Initiative. "Electoral Integrity: Elections are a Process". *Open Election Data Initiative.* https://openelectiondata.net/en/guide/electoral-integrity/elections-are-a-process/ (Accessed 12 February 2020)

United Nations. "Democracy." *United Nations.* https://www.un.org/en/sections/issues-depth/democracy/index.html (Accessed 18 December 2019)

United Nations. "Sustainable Development Goal 16." *Sustainable Development Goals Knowledge Platform.* https://sustainabledevelopment.un.org/sdg16 (Accessed 18 December 2019)

Wikipedia. "2013 Kenyan general election." *Wikipedia.* https://en.wikipedia.org/wiki/2013_Kenyan_general_election (Accessed 14 January 2020)

Wikipedia. "2017 Kenyan general elections." *Wikipedia.* https://en.wikipedia.org/wiki/2017_Kenyan_general_election (Accessed 15 January 2020)

Wikipedia. "October 2017 Kenyan presidential election." *Wikipedia.* https://en.wikipedia.org/wiki/October_2017_Kenyan_presidential_election (Accessed 15 January 2020)

Constitutional history of Kenya: the 2000-2004 constitution review process. http://constitutionnet.org/country/kenya-country-constitutional-profile (Accessed 10 January 2020)

Online Articles and Newspapers

BBC News. "David Maraga: The brave judge who made Kenyan history." *BBC News,* 2 September 2017, https://www.bbc.com/news/world-africa-41123949 (Accessed 5 February 2020)

BBC News. "Kenya election law amendment takes effect." *BBC News,* 3 November 2017, https://www.bbc.com/news/world-africa-41859171 (Accessed 8 February 2020)

Burke, Jason. "Kenyan supreme court annuls Uhuru Kenyatta election victory." *The Guardian,* 1 September 2017, https://www.theguardian.com/world/2017/sep/01/kenyan-supreme-court-annuls-uhuru-kenyatta-election-victory (Accessed 15 January 2020)

Daily Nation. "The review of the Constitution of Kenya under Constitution of Kenya (amendment) Act, 2008 and the Constitution of Kenya Review Act, 2008." *Daily Nation,* p. I, 16 June 2009, http://constitutionnet.org/sites/default/files/CoE_SupplimentFinal.pdf (Accessed 10 January 2020)

Ghai, Yash. " Kenya's Judiciary: Agent of Justice under Difficult Circumstances." *Heinrich Böll Stiftung Cape Town,* 15 May 2018, https://za.boell.org/en/2018/05/15/kenyas-judiciary-agent-justice-under-difficult-circumstances (Accessed 29 January 2020)

Kimeni, Mwangi S. "Kenya: a country redeemed after a peaceful election." *Brookings,* 2 April 2013, https://www.brookings.edu/blog/up-

front/2013/04/02/kenya-a-country-redeemed-after-a-peaceful-election/ (Accessed 14 January 14 2020)

Kwamboka, Lilian. "Celebrations in various counties after Supreme Court Decision." *Standard Digital Elections 2017,* https://www.standardmedia.co.ke/elections2017/article/2001253277/celebrations-in-various-counties-after-supreme-court-decision (Accessed 29 January 2020)

Langat, Anthony. " The Cost of Kenya's Repeat Election." *U.S. News,* 25 October 2017, https://www.usnews.com/news/best-countries/articles/2017-10-25/kenyas-repeat-election-comes-with-a-heavy-price-tag (Accessed 7 February 2020)

Maina, Wachira. "Verdict on Kenya's presidential election petition: Five reasons the judgment fails the legal test." *The East African,* 20 April 2013, https://www.theeastafrican.co.ke/oped/comment/Five-reasons-Kenya-Supreme-Court-failed-poll-petition-test/434750-1753646-5dfpys/index.html (Accessed January 14, 2020)

McKinley, James C. Jr. "All Sides in Kenya Cry Fraud In Election." *New York Times,* 31 December 1997, https://www.nytimes.com/1997/12/31/world/all-sides-in-kenya-cry-fraud-in-election.html (Accessed 4 January 2020)

Meyerfeld, Bruno. "Au Kenya, L'une des élections les plus réussies de notre histoire." *Le Monde,* 8 August 2017, https://www.lemonde.fr/afrique/article/2017/08/08/au-kenya-l-une-des-elections-les-plus-reussies-de-notre-histoire_5170183_3212.html (Accessed 15 January 2020)

Nation Team. "Stop the insults, Judiciary tells President Kenyatta." *Daily Nation,* 3 September 2017, https://www.nation.co.ke/news/Stop-the-insults--Judiciary-tells-President-Kenyatta/1056-4080730-vgfawez/index.html (Accessed 29 January 2020)

National Constitution Center. "On this day, Bush v. Gore settles 2000 presidential race." 12 December 2019, https://constitutioncenter.org/blog/on-this-day-bush-v-gore-anniversary (Accessed 17 December 2019)

Oltermann, Philip. "Austrian presidential election result overturned and must be held again." *The Guardian,* 1 July 2016, https://www.theguardian.com/world/2016/jul/01/austrian-presidential-election-result-overturned-and-must-be-held-again-hofer-van-der-bellen

Ombuor, Rael, and Paul Schemm. " Kenya's Supreme Court annuls presidential election result for irregularities, orders new vote." *The Washington Post,* 1 September 2017, https://www.washingtonpost.com/world/kenya-supreme-court-cancels-presidential-election-result-for-irregularities-orders-new-election/2017/09/01/ceee81d6-8ef4-11e7-84c0-02cc069f2c37_story.html (Accessed 29 January 2020)

Patinkin, Jason. "Uhuru Kenyatta wins Kenyan election on a narrow margin." *The Guardian,* 9 March 2013, https://www.theguardian.com/world/2013/mar/09/kenyatta-declared-victor-in-kenyan-elections (Accessed 14 January 2020)

Wamai, Njoki. " Kenya's Supreme Court ruling and what it means for the country." *The Conversation,* 7 September 2017, https://theconversation.com/kenyas-supreme-court-ruling-and-what-it-means-for-the-country-83549 (Accessed 29 January 2020)